SEVENTH BIENNIAL REPORT

OF THE

ATTORNEY-GENERAL

OF THE

STATE OF IOWA

H. W. BYERS
ATTORNEY-GENERAL

FOR TERM ENDING DECEMBER 31, 1908.

Printed by Authority of General Assembly.

DES MOINES
EMORY H. ENGLISH, STATE PRINTER
1909

REPORT OF ATTORNEY-GENERAL

STATE OF IOWA
ATTORNEY GENERAL'S OFFICE,
DES MOINES.

TO THE HONORABLE WARREN GARST,
Governor of Iowa:

In accordance with the provisions of law relative thereto, I have the honor to submit herewith my report of the business transacted in this office during the years 1907 and 1908.

The volume of business during the term just about to close far exceeds that of any former term, and will undoubtedly increase as the public business of the state develops and grows. Much of the increased labor in this department during the last two years was due to the passage by the Thirty-second General Assembly of numerous acts affecting the business and government of the state, and especially the primary election law; the several acts affecting corporations, and the changes in the law relating to the business and government of cities and towns of the state.

At the beginning of the term there were pending in this department, and on the docket of the several courts of the state, 105 cases, 58 of which were criminal, pending on appeal in the supreme court, and 47 were civil cases; of that number 58 criminal cases have been disposed of, and 12 civil cases, leaving undisposed at this time 35 of the civil cases.

Since the beginning of the term the criminal cases appealed to the supreme court, and including cases commenced originally by this department, number 121, and the civil cases commenced during the same period number 37, making a total of 158 cases entered on the docket in this office during the term, of which number 76 of the criminal cases, and 9 of the civil cases have been disposed of, leaving still pending at this time of the new cases 28 civil and 35 criminal, or a total of 63 cases, which together with the 35 civil cases begun prior to January 7, 1907, and which are still pending make a total of 98 cases pending on our docket, a complete list of which cases, as well as a list of all of the cases disposed of with a brief history of the questions involved in the more important ones will be attached to this report to be included in the printed volume under proper divisions.

During the term 120 official written opinions have been given in response to requests from members of the General Assembly, the governor, and the heads of the different state departments.

The time required in the preparation of these official opinions is inconsiderable, however, when compared with the time occupied with the various state officers, heads of departments, and commissions in the construction of statutes and discussion of questions which arise every day affecting their duties and departments.

In addition to the written opinions just referred to the department has furnished 771, what might be termed, letter opinions which were written in response to inquiries from city and county officers, and in some cases private persons; the letters, however, are not official in any sense, and the questions covered by them are treated in the most general way possible.

I doubt very much the wisdom of giving these letter opinions, but since it has been the practice of the office for a good many years I felt it my duty to continue the custom, at least, until the legislature takes some action upon the subject. These letter opinions represent but a small portion of the correspondence of the office. Thousands of letters have been received during the period covering almost every imaginable subject, and it has been the policy of the department to make some answer to every letter received.

I have received no money during the term from any source. The office, however, has been instrumental in closing up several matters in which payment to the state was made.

At the beginning of the term there were pending in the federal court at Council Bluffs, several so-called River Bed cases in which the state was a party, and in one of which, The Omaha Bridge & Terminal Railway Company as complainant, was seeking to have the title to a small tract of river bed land quieted as against the state and other defendants. The case was settled so far as the state is concerned by the payment by the Bridge Company to the state of five thousand dollars ($5,000.00), and the costs of the suit, and draft for this sum was delivered to the secretary of state.

There was also a case pending against Mr. Lafayette Young which was settled by the payment by Mr. Young to the state of the sum of fourteen hundred dollars ($1,400.00), and draft for this amount was handed over to the state treasurer.

The department also made claim of the Omaha and Council Bluffs Street Railway Company, for filing fees in the sum of $15,025.00. This claim was paid by the company with a draft to the secretary of state.

A more detailed report of these matters, and other claims for fees, will be included in the report of the several cases, and printed with this report.

For some time prior to the beginning of the present term of this office much was being said, not only by political speakers, but by the press, about the failure of many of the corporations doing business in this state to comply with the laws of the state requiring them to file copies of their articles of incorporation, and pay to the secretary of state certain filing fees; and about the beginning of the term the retiring secretary of state, Mr. W. B. Martin, and his efficient and hard working chief clerk, Mr. Henry T. Saberson, called my attention to many of such corporations.

Investigation of the records in the office of the secretary, together with other information gathered through correspondence with county attorneys, and others, who were in possession of the facts, convinced me that large sums of money was due the state from these corporations for unpaid filing fees and penalties, and a number of suits were instituted against the delinquents, the most important of which are the suits against the Western Union Telegraph Company and The Barber Asphalt Paving Company.

At the same time the work involved in the preparation of these cases was going on, plans were being perfected in the office for the better enforcement of the criminal laws of the state, and especially the statutes affecting the operation of saloons, gambling and bawdy houses. Investigation along these lines had disclosed a condition of affairs in the state that was not only a reflection upon every public officer, both state, county and municipal, who was in any degree responsible for the enforcement of these laws, but a matter of humiliation and shame to every good man and woman in the state; in other words, indifference to and defiance of the laws which are intended to keep clear and pure the stream of citizenship, and which make for the purity and happiness of the home had reached such a stage in some parts of the state that the very atmosphere was poisoned and polluted with disrespect and contempt for constituted authority, and many of such places were being jokingly referred to as the state of C...., or the state of B...., or the state of D....

In some of those cities the city authorities were in a sense in partnership with law breakers and criminals. Under an agreement, and by the payment of certain stipulated sums, saloonkeepers were granted privileges prohibited by the laws of the state. In some places they were allowed to operate their saloons on Sundays

and all night, to serve lunches and have wine rooms, and dance halls in connection with the saloons, all in violation of the laws of the state. Gambling houses were permitted to run openly in some places 24 hours out of every day, and by the payment of fixed sums into the city treasury were granted immunity from arrest or interference. The same practice prevailed with reference to houses of ill fame. The whole system amounting to nothing more nor less than the purchase, for a cash consideration, by the criminal law breakers of the city, of the honor and integrity, not only of the municipality as such, but of every man, woman and child in it; a system which if continued long would end in an absolute failure of government.

In consultation with the then governor of the state, it was decided that something ought to be done in the way of securing a better enforcement of all these laws in every part of the state, and some time in August Mr. George Cosson, one of the able assistants in this office was instructed to prepare and forward to each county attorney in the state a letter urging a more vigorous enforcement of the laws respecting intoxicating liquor, gambling and bawdy houses. Before Mr. Cosson found time, however, from other important work to write the letters, a storm of indignation that had been brewing for months broke over the state, and not only the ministerial associations and other law and order leagues throughout the state, but the press, almost without an exception, began a campaign for law enforcement. This wave of sentiment for better government was to some extent general throughout the country, but the storm, if I may term it such, had increased fury in this state, because of incidents which are still fresh in the minds of all good citizens.

But little more than a year ago one B. E. Jones, a respected citizen of the city of Burlington, was assaulted in broad daylight upon one of the principal streets of that city by a number of saloon men and their sympathizers, and cruelly and brutally beaten because he had instituted, as the law authorized him to do, a number of injunction proceedings against certain saloonkeepers of that city, the purpose of which proceedings was to enjoin these persons from continuing the illegal sale of intoxicating liquors therein. After repeated efforts to secure indictments against the guilty persons, Jones appealed to the governor and to this department to see if the law could not be vindicated, and with the consent of the governor, special counsel, Mr. George Cosson, was sent to investigate the case and to appear before the grand jury in co-operation

with the county attorney to secure, if possible, an indictment against the persons who committed the assault; but, notwithstanding the opinion of Mr. Cosson that there was ample evidence to warrant the finding of an indictment, the grand jury of that county refused to return or find an indictment against any of the parties, and though application was made for the calling of a special grand jury to investigate this case, the court denied the application, and the guilty parties are still unpunished, and to this extent it may justly be said that there was a failure of government in that city. At the very moment the members of this grand jury were standing with uplifted right hands before the court swearing that they would "diligently inquire and true presentment make of all public offenses against the people of this state, triable on indictment within this county, of which you have or can obtain legal evidence; you shall present no person through malice, hatred or ill will, nor leave any unpresented through fear, favor or affection, or for any reward, or the promise or hope thereof, but in all your presentments you shall present the truth, the whole truth and nothing but the truth, according to the best of your skill and understanding," scores of places were running wide open in which the keepers were violating practically every provision of the law regulating the sale of intoxicating liquors. Not to know this every day while this jury was in session its members would have had to be both blind and deaf, still it could find no evidence to indict these saloonkeepers; it had no trouble, however, to find time and evidence enough to indict a "drunk-made" burglar for breaking and entering one of those illegal places; and this kind of grand jury service is going on every term of court in many cities of the state, and yet there are good people who can still see some good in this worn out, expensive and now useless system.

During the month of October, 1907, T. H. Kemmerer, a respected resident and citizen of Davenport, and Captain C. W. Neal, a veteran of the grand army, also a resident of Davenport and a practicing attorney of that city, were assaulted on the streets of the city because of injunction proceedings brought under the law of the state against some 200 saloons for violating the liquor laws, in which cases Kemmerer appeared as plaintiff and Captain Neal as counsel. Kemmerer was struck with a cane; Captain Neal's life was threatened by a mob, and he was hanged in effigy in one of the parks of the city and later drummed out of town to the lasting disgrace of everybody, who had a part in the outrage, as well as

to the authorities who failed to give him the protection that every citizen is entitled to.

At about the same time in several cities of the state so-called compromise decrees were signed by certain judges of the district court in injunction suits, one of which decrees was later set aside by the supreme court and held to be invalid and not authorized by the law of the state.

Afterwards in one of these cities a great public demonstration and meeting was held attended by several thousand people, at which meeting the law of the state was denounced, the authorities defied, and the efforts of the people to enforce the law condemned. The mayor of this city, although previously having stated that the city department of police would have nothing to do with enforcing the provisions of the law regulating the sale of intoxicating liquors, did on the 4th day of December 1907, at the request of a number of saloonkeepers, sign a proclamation and give public orders to his chief of police directing him to see that the saloons complied with such regulations as the saloonkeepers themselves had previously agreed upon, a part of the conditions being that no saloon should remain open for the sale of liquor after 11 o'clock at night, and should not sell liquor on Sunday before 2 o'clock p. m.

In another city, under the protection of the city government, four of the most notorious gambling dens ever allowed to exist in the state were operating openly in buildings facing on the principal streets of the city. In these four dens men and boys of all classes and stations, including day laborers, were nightly squandering their money, and mothers and wives were appealing in vain to the authorities for relief.

At about this time the good people of the state were shocked and incensed by the murderous assault made upon Charles H. Morris at Enterprise. Mr. Morris was a mine owner, a citizen of Des Moines, and bore an enviable reputation. Because of his efforts to suppress boot-legging in the town of Enterprise, in the interest of the miners, he was cruelly shot on the 16th day of October, and as a result of the wound died on the 26th day of that month.

This was the culminating act in a long continued series of outrages against law and order, and against good government, and shortly thereafter Governor A. B. Cummins invited the members of the ministerial association of Des Moines to meet with him in the executive chamber on the 13th day of November, 1907, with a view of determining what course ought to be pursued, the attorney general being present on invitation at the meeting.

It may truthfully be said to the credit of the press of the state, and also of the ministers of all denominations, that their influence throughout this entire period was on the side of law and order.

We had endeavored for some time to induce county attorneys in counties in which the law was being violated to proceed by the injunction process in the name of the state against all persons who were violating the law, and it is but just to say that a large majority of them were doing the best they could with the means at hand, and out of the entire ninety-nine in the state there was but one who refused absolutely to act.

On the 20th day of November, 1907, an open letter was issued from this department to the Register and Leader, the Des Moines Capital, and other state papers, the contents of which will be remembered without being set out in this report.

Thereafter, the attorney general went in person to the city of Burlington to prosecute the suit against the county attorney of Des Moines county for wilfully refusing and neglecting to enforce the provisions of the law relating to the sale of intoxicating liquors.

He also went in person to Council Bluffs, where in a public meeting attention was called to the fact that the county attorney had appeared in open court as the attorney for some of the saloonkeepers who were charged with violating the law, and that one of the district judges in that district, on the motion of this same county attorney, had dismissed certain injunction suits which were then pending against some of these same saloonkeepers. As a result of this trip and meeting gambling was suppressed, the houses closed and the saloons of the county were brought under the provisions of the mulct law.

The assistant attorneys general, Mr. Charles W. Lyon, and Mr. George Cosson, were also sent to several of the cities in the state, and did conscientious and effective work in bringing about better conditions.

It was impossible for us, however, to do much along this line as no provision had been made by the legislature for funds, either to pay our expenses or the necessary and legitimate expense made by the county attorneys in their efforts to enforce the law. In fact, a large part of the cost of enforcing these laws in communities where they have been enforced has been paid by private citizens, and in some cases the county attorney has paid money out of his own pocket rather than have a prosecution fail.

What a commentation upon the state of the public mind. Did any one ever hear of a private citizen or the prosecuting officer

being compelled to pay the expense of enforcing the laws affecting property rights? Hardly—as to these laws the public is alive and awake, and the public officer is furnished with every means necessary to enforce them.

We spend every year for a force of oil inspectors from $15,000 to $16,000 to see that the laws regulating the sale of oil is enforced; and just now we are paying from $10,000 to $12,000 or more for a force of food inspectors to see that the pure food law is enforced. I do not question the wisdom of maintaining these forces, in fact they are necessary and are doing splendid work; I only urge that the state take the same interest in the enforcement of the laws affecting the morals of our boys and girls, and the peace and good order of our cities and towns. I urge this, because, in my jugdment, the harm to society and to property involved in all the violations of the laws regulating the sale of oil and foods in the last ten years is not to be compared to the harm done to society in a single year by the illegal saloon, the gambling house, and the house of ill fame. Why not combine these forces and organize them into a single effective force for ferreting out crime covering not only violations of law with respect to oil and food, but these other criminal laws which are so constantly broken.

Some improvement is noticeable in the conditions throughout the state within the year. So far as we are informed the Sunday and all night saloon has been banished. There are fewer gambling houses, and there has been some improvement with respect to bawdy houses. The improvement, of course, is not all due to the law enforcement campaign that has been going on, directed to some extent by this department, nor can it be said that the work has more than commenced.

We cannot resist at this point to call attention to improved conditions in Des Moines, the capital city, due to some extent to the campaign that has been going on now for over a year, but due largely to the change in the methods of governing the city. It is universally conceded by the citizens of the city that the criminal laws of the state are being better enforced throughout the city than ever before.

As an evidence of changed conditions here, a few Sundays ago the chief of police delivered an address from the pulpit of one of the churches of the city on the evils of drink and cigarette smoking. Such a thing would have been impossible under the old regime.

It is doubtful whether a more complete and perfect system for

enforcement of the criminal laws could be found any where than that in existence in this state. The legislature has provided an ample force of peace officers, magistrates, prosecuting officers, grand and petit juries, and courts. There is but one thing lacking and that is the power and the means to make that force effective. As the matter stands now this force, or machine for enforcing the criminal laws, may be likened to one of our modern Mogul engines with no steam on—there it stands perfect in all its parts, a great powerful machine, and yet without the motive power—steam, and an engineer to turn it on—not a wheel will move, and it is as useless as so much scrap-iron.

It is idle to say that the governor "shall take care that the laws are faithfully executed" without at the same time clothing him with the necessary power to perform this duty; this, however, is just our situation in this state so far as the governor is concerned. More than fifty years ago there was written into the constitution of Iowa as section 9 of Article IV, the following: "He (the governor) shall take care that the laws are faithfully executed"; and yet from that day to this not a single act has been written into our statutes giving the governor the slightest power to in any degree direct or control the action of the law-enforcing officers of the state.

To some extent the same situation exists with reference to county attorneys. They are required to see that certain laws of the state are enforced without being furnished with the necessary means and power to perform their duties; so that much of the criticism directed toward those officers for a failure to enforce the laws is unjust. The truth is, the trouble is not so much with the officers themselves as it is to the lack of a well organized department of justice. Beginning with the constable in the township and extending on up to the highest prosecuting officer of the state, this entire force of constables, sheriffs, marshals, policemen, inspectors, county attorneys and attorney general, should be organized into one harmonious working force for the enforcement of the laws affecting not only the moral side of our civilization, but the business and commercial side as well.

I have taken the pains and trouble to ascertain what amount of fines due the state is uncollected and standing upon the court docket of the several counties. I have no doubt it will be a surprise to the tax payers to know that at this moment there is due upon uncollected fines in round numbers $250,000.00. In addition

to this, as stated at the beginning of this report, our attention early in the term was directed to the foreign corporations doing business in the state without proper authority, and without having paid the filing fees required by law.

This proved to be a wonderfully fruitful field of inquiry and the situation disclosed was, to put it mildly, astonishing. We have only had time to scratch the surface in this work, but have uncovered thousands upon thousands of dollars that are undoubtedly due and owing to the state:

Here are a few of the delinquents with the amount of the filing fees, saying nothing about the penalties, that they owe and must pay, if we understand the law:

The Barber Asphalt Paving Company	$ 3,915.00
The Atchison, Topeka & Santa Fe Ry. Co	250,015.00
The Cudahy Packing Company	12,015.00
The Chicago Great Western Ry. Co	105,000.00
The Chicago, N. Y. & Boston Refrigerator Co	1,515.00
The Great Northern Railway Company	210,000.00
The Pullman Company	100,000.00
The Swift Refrigerator Company	5,015.00
The Western Union Telegraph Co	100,000.00
The Centerville Light & Traction Co	515.00

In addition to the above we have under investigation many more, and have no doubt that there are hundreds of others not yet brought to our attention.

If the fees above indicated are due to the state, as we have no doubt they are, they have been due for several years. In fact, two of the companies against which suits have been instituted are pleading the statute of limitations, and charging the state with laches in not sooner demanding payment.

Some weeks ago it was discovered by this department that one of the principal street railway companies doing business in the state was a foreign corporation, and had been operating its line for a period of about six years without complying with our statute with reference to filing fees, etc. The company had a capitalization of $15,000,000.00, making the filing fee it would owe the state $15,025.00. This amount has been due every minute since this corporation commenced operating its road in the state. It was paid to the secretary of state a day or two ago.

The condition disclosed with reference to uncollected fines, and filing fees from corporations as above referred to, emphasizes again the lack of a properly organized and effective department of justice, and indicates business methods which if applied to private enterprise would lead straight to bankruptcy.

In order that I may not be misunderstood I repeat here that no public officer is responsible for these conditions, nor am I trying to fix responsibility or blame upon any officer of the state. The trouble as before stated, is a legislative one and must be remedied by the legislature. For instance: In the matter of corporations, there is at this time no possible way in which any public officer, or any citizen for that matter, can determine from the records of the state just what foreign corporations are doing business in Iowa; and the same may be said of domestic corporations.

This is due to the fact that we have no statute requiring corporations to report to the secretary of state. In a great many of the other states in the Union the law requires an anuual report to be filed by every corporation doing business in the state with the secretary in order that that officer may know at all times just what corporations are operating within the state.

Another thing that is worthy of consideration in the matter of a well organized department of justice is the question of appeals in criminal cases. Under our present arrangement the county attorney prosecutes all criminal cases in the lower courts, and when appeal is taken his connection with the case ends, and it is the duty of the attorney general to prepare and present the case for the state to the supreme court. The trial is conducted in the lower court absolutely independent of the attorney general's department, so that neither that officer nor any of his assistants have any information of any kind about the case until after the appeal is taken, nor is there any provision in the law authorizing the county attorney to follow the case even on the request of the attorney general, nor allowing him his expenses in going to the seat of government to advise with the attorney general with respect to cases pending in the supreme court from his county. The result is, that many times in important criminal cases where the record is large and the facts complicated, reversals follow simply because the attorney general has been deprived of the assistance of the county attorney in making up the record; and I know of no work that could be engaged in by the legislature that would result in greater profit or saving than a revision of our criminal law and procedure. When the bulk of our criminal procedure was written the central idea in all criminal prosecutions was punishment with reformation as a mere incident, if it was considered at all, while today, the central idea in criminal

prosecutions is reformation with punishment as a mere incident. As proof of this attention is called to the fact that within a month the warden of one of our penitentiaries made an address, or read a paper in which good clothes, outdoor sports, flowers and music were mentioned as a necessary part of modern prison life.

In the former days punishment was so severe and the disgrace of being convicted of a crime so great that every possible safeguard was thrown around the citizen charged with crime. Every technicality known to the law was indulged in his favor, and every possible advantage given to him as against the state. No man could be tried for a crime above certain minor offenses without first being indicted by a grand jury, a slow process at best; then as a rule, the case would drag along for a term or two of court before called for trial, then if it were found that the county attorney had failed to meet the technical requirements in the indictment it was set aside and the person charged held to the next grand jury. If another indictment was found and the case was finally tried and the defendant found guilty, he had several months in which to have a motion for new trial disposed of, then he had a year in which to appeal and several months more to prepare and present his case to the supreme court. If the judgment was affirmed there then he had sixty days in which to file a petition for rehearing, and several more months in which to present it, and finally the judgment below might be reversed because of some trifling error in the court below, and the case go back to the lower court to go through the same long weary course or be dismissed.

I have in mind now a case that came under my own observation Two young men forged and uttered a check. The county attorney of the county was a bright young fellow just out of school. He presented the case to the grand jury, an indictment was voted and returned in court; two terms later the case came on in district court, demurrer to the indictment was filed in which it was urged that the indictment failed to charge that the boys *knew* the check was a forged instrument. The demurrer was sustained, the indictment set aside, and the boys held over to the next grand jury at which another indictment was found and returned into court, and a term or two later the case came on again for trial. A jury was impanelled, a witness sworn, and when the first question was put to the witness defendants' counsel objected and urged as a reason for his objection that the second indictment failed to charge that the boys *knew* the check was a forged instrument, and sure enough, the

county attorney in drawing his indictment had simply charged that the boys *knowingly* uttered the forged instrument. The court sustained the objection, the jury was discharged, the indictment set aside and the boys held over again until the next grand jury. A third indictment was returned, and after two or three terms of court the case came on again for trial when defendants' counsel objected to further proceedings urging that one trial had already been had, and that they could not be twice tried for the same offense. This objection was sustained by the court and the boys were discharged, although their guilt was without question almost from the beginning, and the county had been put to hundreds of dollars of expense.

Just such things as this are going on in our criminal courts every day, and court expenses are steadily increasing. Excuse for tolerating such a system up to this time may be found in the fact that we have been busy with other important matters, but justification for its continuance can only be urged upon the theory that swift and certain punishment is no longer necessary for the prevention of crime, and that the interest of the tax payer is no longer a matter of concern to the legislature.

These considerations lead me to suggest the following amendments and additions to our laws:

First: Make it possible for the governor "to take care that the laws are faithfully executed" by giving him the power, upon proper complaint, to remove peace officers, mayors and prosecuting attorneys.

Second: A complete reorganization of the attorney general's department along substantially the same lines as the department of justice in the national government is organized; establishing a closer relation between the county attorney and the attorney general; requiring the county attorney to report to the attorney general promptly all matters of importance pending in his office in which the state is interested, and giving to the attorney general power to take charge, either himself or by assistants appointed by him for the purpose, of any case pending in the district court in which the state is interested, and to appear before the grand jury in any county in any matters pending before that body of sufficient importance to justify, in his judgment, such appearance.

Third: Enlarging the powers and duties of oil and food inspectors requiring them to assist prosecuting attorneys and the attorney general in securing evidence in all prosecutions in which the state

is interested whether it be a violation of the criminal laws of the state, or for the collection of fees and fines due the state.

Fourth: Give the county attorney authority to follow appeals to the supreme court when requested by the attorney general, with ample provision for his compensation and expenses.

Fifth: Give to the attorney general's department sufficient force to properly transact the business of the office with salaries high enough to secure the best possible service.

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

The only excuse for the length of this report is the importance of the questions covered and the desire I have to see some of the changes indicated made, coupled with the hope that you may deem them of sufficient importance to cover all, or some of them, in your recommendations to the legislature.

Acknowledging with gratitude the uniform courtesy and kindness of all the officers and employes about the Capitol building, and expressing my appreciation of the splendid work of Mr. Chas. W. Lyon, who has had sole charge of the appeals in criminal cases; of the careful and painstaking services of Mr. George Cosson in looking after the civil business of the office; of the faithful and efficient manner in which Miss Hobbs and Miss Gilpin have performed their duties, I am,

Respectfully,

H. W. BYERS,
Attorney General.

Schedule A is a complete list of all appeals in criminal cases, submitted to the supreme court during the years 1907 and 1908, 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, 1909.

Schedule C is a list of civil cases which were pending in the state and federal courts January 1, 1907, and have since been disposed of.

Schedule D is a list of civil cases which have been commenced and disposed of since January 1, 1907.

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

Schedule F contains some miscellaneous matters which will, no doubt, be of interest to the public.

Schedule G is the official written opinions given by this office during the years 1907 and 1908.

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

SCHEDULE "A"

The following is a list of criminal cases submitted to the Supreme Court, and also rehearings asked during the years 1907 and 1908 and the final disposition of the cases:

Title of Case	County	Decisions	Offense
State v. Anderson, Wm. C., appellee..	Allamakee.....	Reversed Dec. 15, 1908....	Adultery.
State v. Arthur, James, appellant....	Pottawattamie.	Petition for rehearing overruled June 10, 1907....	Breaking and entering.
State v. Athey, James M., appellant..	Poweshiek	Petition for rehearing overruled Feb. 14, 1907.....	Adultery.
State v. Blades, Jack et al., appellants	Polk	Affirmed May 17, 1907.....	Keeping a gambling house.
State v. Bricker, L. J., appellant.....	Lee	Affirmed July 3, 1907.....	Rape.
State v. Brown, W. E., appellee......	Buena Vista...	Dismissed May 10, 1907..	Receiving and accepting a deposit when and while insolvent.
State v. Brown, W. E., appellee......	Buena Vista...	Dismissed May 10, 1907..	Receiving and accepting a deposit when and while insolvent.
State v. Brown, W. E., appellee......	Buena Vista...	Dismissed May 10, 1907..	Receiving and accepting a deposit when and while insolvent.
State v. Brown, W. E., appellee......	Buena Vista...	Dismissed May 10, 1907..	Receiving and accepting a deposit when and while insolvent.
State v. Brown, W. E., appellee......	Buena Vista...	Dismissed May 10, 1907..	Receiving and accepting a deposit when and while insolvent.
State v. Bresee, Emily W., appellant..	Pottawattamie.	Affirmed Dec. 17, 1907.... (Petition for rehearing overruled March 17, 1908.)	Practicing medicine without lawful authority.
State v. Blee, James, appellant.......	Marion	Reversed March 13, 1907..	Murder.
State v. Blydenburgh, E. S., appellant (rehearing)	Hardin	Reversed July 3, 1907....	Murder.

Title of Case	County	Decisions	Offense
State v. Bennet, Burton, appellant....	Bremer........	Affirmed Jan. 8, 1907...... (Petition for rehearing overruled Feb. 18, 1908.)	Seduction.
State v. Blackburn, Nick, appellant..	Marshall......	Affirmed Jan. 17, 1907....	Rape.
State v. Blackburn, Nick, appellant.. (rehearing)........................	Marshall......	Reversed Jan. 14, 1908....	Rape.
State v. Baldes, Mathias, appellant....	Sioux.........	Affirmed Feb. 5, 1907......	Murder.
State v. Brown, L. W., appellant.....	Harrison......	Petition for rehearing overruled June 10, 1907.....	Liquor nuisance.
State v. Caine, D. F., appellant (rehearing)	Woodbury.....	Reversed April 12, 1907...	Conspiracy.
State v. Conroy, Michael, appellant....	Scott..........	Affirmed Feb. 6, 1907......	Burglary.
State v. Crofford, J. W., appellant...	Clarke........	Affirmed March 5, 1907....	Murder.
State v. Cothron, C. W., et al., appellants	Monroe........	Reversed April 11, 1908..	Larceny.
State v. Cohn, Meyer, appellant.......	Page..........	A..irmed Nov. 18, 1908....	Illegal sale of intoxicating liquors.
State v. Cooper, C. S., appellee......	Monroe.......	Contention of State sustaine^ June 4, 1908.....	Libel.
State v. Crayton, Fred, appellant....	Monroe........	Affirmed June 4, 1908....	Murder.
State v. Davis, Jack, appellant......	Harrison......	Stricken Nov. 23, 1908.....	Enticing for the purpose of prostitution.
State v. Des Moines Union Ry. Co., appellant	Polk..........	Affirmed March 10, 1908...	Leasing a house for the purpose of prostitution.
State v. Donnelly, F. P., appellant...	Polk..........	Stricken Dec. 18, 1908....	Larceny by embezzlement.
State v. Dodwen, Vernon, appellant..	Fayette.......	Affirmed March 10, 1908...	Larceny.
State v. Dvoracek, Frank J., appellee.	Story.........	Contention of State sustained Nov. 21, 1908....	Desertion.
State v. Evans, Albert, et al., appellants	Monroe........	Reversed May 13, 1908....	Larceny.
State v. Ezecheck, John, appellant....	Johnson.......	Dismissed Sept. 17, 1907...	Murder.
State v Fielding, Marshall, appellant..	Mahaska......	Affirmed July 3, 1907......	Murder.
State v. Foster, Lucy, appellant......	Kossuth.......	Affirmed Dec. 12, 1907....	Assault with intent to commit murder.
State v. Fishel, Norman, appellant...	Page..........	Affirmed Dec. 15, 1908....	Assault with intent to commit rape.
State v. Gilbert, Chas. F., et al., appellees	Iowa..........	Affirmed May 5, 1908.....	Exposing a child.
State v. Goodsell, W. R., appellant....	Butler.........	Reversed Nov. 20, 1907...	Appeal from order district court.

SCHEDULE "A"—CONTINUED.

Title of Case	County	Decisions	Offense
State v. Green, Roy, appellant	Pottawattamie	Stricken March 17, 1908	Larceny from a building.
State v. Gage, Chas. B., et al., appellants	Poweshiek	Affirmed June 4, 1908. (Petition for rehearing overruled Sept. 29, 1908.)	Sodomy.
State v. Goodsell, Warren, appellant	Butler	Affirmed June 4, 1908	Incest.
State v. Hanley, Thomas, appellant	Monroe	Affirmed March 5, 1907	Possession of burglar's tools with intent to commit burglary.
State v. Hanlin, J. M., appellant	Lucas	Affirmed Jan. 9, 1907. (Petition for rehearing overruled May 20, 1907.)	Making false entries as deputy clerk.
State v. Hoover, Carl, appellant	Audubon	Reversed April 3, 1907	Assault with intent to commit rape.
State v. Hall, L. G., appellant	Linn	Affirmed Jan. 16, 1908	Liquor nuisance.
State v. Harmann, Peter, appellant	Dubuque	Reversed July 3, 1907	Adultery.
State v. Hooker, Robert, appellant	Delaware	Affirmed Oct. 23, 1907	Larceny.
State v. Henderson, A. M., appellee	Iowa	Affirmed Oct. 15, 1907	Making false entries and reports with intent to deceive.
State v. Hobson, Mrs. Ralph, et al., appellants	Monroe	Affirmed May 17, 1907	Prostitution.
State v. Hart, Chas., appellant	Polk	Affirmed Dec. 15, 1908	Uttering a forged instrument.
State v. Hoffman, George C., appellant	Lee	Affirmed June 4, 1907. (Petition for rehearing overruled Sept. 27, 1907.)	Embezzlement.
State v. Henderson, A. M., appellee	Iowa	Dismissed Jan. 15, 1908	Making false entries and reports with intent to deceive.
State v. Hubbell, F. M., et al., appellants	Polk	Affirmed March 10, 1908	Leasing a house for the purpose of prostitution.
State v. Hubbell, F. M., et al., appellants	Polk	Affirmed March 10, 1908	Leasing a house for the purpose of prostitution.
State v. Hubbell, F. M., et al., appellants	Polk	Affirmed March 10, 1908	Leasing a house for the purpose of prostitution.
State v. Hubbell, F. M., et al., appellants	Polk	Affirmed March 10, 1908	Leasing a house for the purpose of prostitution.
State v. Hubbell, F. M., et al., appellants	Polk	Affirmed March 10, 1908	Leasing a house for the purpose of prostitution.
State v. Jackson, W. P., appellant	Pottawattamie	Stricken Nov. 24, 1908	Breaking and entering.
State v. Johnson, Lee, appellant	Benton	Affirmed Jan. 8, 1907	Assault with intent to commit rape.
State v. Johnson, Chas. M., appellant	Black Hawk	Affirmed Nov. 18, 1907	Assisting a prisoner in jail escape.
State v. Johnson, T. W., appellant	Linn	Affirmed May 7, 1907. (Petition for rehearing overruled Dec. 16, 1907.)	Liquor nuisance.
State v. Johns, W. D., appellant	Mitchell	Affirmed Nov. 17, 1908	Nuisance.
State v. Kehr, W. N., appellant	Linn	Reversed Jan. 8, 1907	Burglary.
State v. Kendig, A. J., appellant	Madison	Affirmed Feb. 5, 1907. (Petition for rehearing overruled April 11, 1907.)	Practicing medicine without a license.
State v. Kehr, W. N., appellant	Linn	Affirmed January 17, 1908	Appeal from an order of district court.
State v. Kehr, W. N., appellant	Linn	Affirmed April 10, 1908	Burglary.
State v. Krug, Fred et al., appellants	Boone	Affirmed Nov. 18, 1907. (Petition for rehearing stricken Feb. 12, 1908.)	Assault with intent to do great bodily injury.
State v. Leslie, Joseph, appellant	Pottawattamie	Reversed April 7, 1908	Burning wood timber of another.
State v. Leonard, George, appellant	Marshall	Affirmed July 3, 1907	Burglary.
State v. Lewis, Ed, appellant	Polk	Affirmed June 6, 1908. (Petition for rehearing overruled Sept. 29, 1908.)	Murder.

SCHEDULE "A"—CONTINUED.

Title of Case	County	Decisions	Offense
State v. Leasman, Jesse, appellant	Madison	Affirmed Feb. 12, 1908	Throwing at a train.
State v. Mathews, Neal, appellant	Polk	Petition for rehearing overruled Feb. —, 1907	Murder.
State v. Manchester, Wm., appellant	Woodbury	Affirmed Jan. 17, 1907	Burglary.
State v. McGovern, Bernard, appellant	Clinton	Stricken Jan. 17, 1907	Larceny.
State v. Martin, Johnson T., appellant	Keokuk	Affirmed Jan. 16, 1908. (Petition for rehearing overruled April 11, 1908.)	Murder.
State v. Maher, Matt, appellant	Johnson	Dismissed May 8, 1907	Murder.
State v. McDonald, L. A., appellant	Pottawattamie	Affirmed Jan. 14, 1908	Incest.
State v. Meyer, Fritz, appellant	O'Brien	Affirmed Oct. 15, 1907	Assault with intent to commit rape.
State v. Mitchell, L., appellant	Hamilton	Affirmed June 11, 1908. (Petition for rehearing overruled Sept. 29, 1908.)	Assault with intent to do great bodily injury.
State v. Miller, B. F., appellant	Black Hawk	Affirmed March 19, 1908	Practicing medicine without a license.
State v. McCausland, Wm., appellant	Wright	Affirmed Nov. 20, 1907. (Petition for rehearing overruled Feb. 17, 1908.)	Rape.
State v. Mason, L. B., appellant	Allamakee	Reversed Dec. 13, 1907	Obtaining money under false pretenses.
State v. McDermet, F., appellant	Marshall	Affirmed April 7, 1908	Larceny in and from a building.
State v. McDavitt, Rector, appellant	Polk	Reversed Nov. 24 1908	Resorting to hotel for the purpose of lewdness.
State v. Nowell, Elmer, appellant	Pottawattamie	Petition for rehearing overruled June 10, 1907	Murder.
State v. Norman, C. J., appellant	Decatur	Affirmed Oct. 15, 1907	Larceny of domestic fowls in the night time.
State v. Nugent, Thos. J., appellant	Greene	Reversed May 8, 1907	Seduction.
State v. O'Brien, Pat et al., appellants	Polk	Affirmed Nov. 12, 1907	Robbery.

State v. Ozias, Chas., appellant	Buchanan	Affirmed Nov. 13, 1907	Receiving stolen property.
State v. O'Malley, J. E., appellant	Dallas	(Petition for rehearing overruled Jan. 8, 1907.)	Nuisance.
State v. Partipilo, Nicola, appellant	Fayette	Affirmed July 7, 1908. (Petition for rehearing overruled Sept. 29, 1908.)	Assault with intent to commit murder.
State v. Pitkin, F. O. et al., appellants	Linn	Affirmed Jan. 15, 1908	Liquor nuisance.
State v. Pillow, Ed, appellant	Polk	Dismissed Nov. 20, 1907	Conspiracy.
State v. Quinn, Dan, appellant	Polk	Dismissed by appellant Sept. 22, 1908	Manslaughter.
State v. Rocker, Chas., appellant	Osceola	Affirmed June 9, 1908	Murder.
State v. Rosborough, Chas. A., appellant	Dallas	Dismissed Sept. 24, 1907	Obstructing a public ditch.
State v. Reiff, Geo. E., appellee	Harrison	Dismissed Nov. 16, 1907	Larceny.
State v. Rutledge, Homer, appellant	Appanoose	Reversed Oct. 21, 1907	Murder.
State v. Richardson, Homer, appellant	Mitchell	Affirmed March 10, 1908	Incest.
State v. Rowe, Ed, appellant	Dickinson	Affirmed June 4, 1908	Malicious killing of domestic animals.
State v. Ralston, Frank, appellant	Monroe	Affirmed July 7, 1908	Rape.
State v. Roche, Marion W., appellant	Union	Affirmed Feb. 17, 1908	Perjury.
State v. Richmond, John, appellant	Clayton	Affirmed June 4, 1908	Breaking and entering.
State v. Shaffer, Wesley, appellant	Linn	Affirmed Jan. 17, 1908	Appeal from an order of district court.
State v. Shaffer, Wesley, appellant	Linn	Affirmed April 10, 1908	Murder.
State v. Smith, Andrew, appellant	Monroe	Affirmed Jan. 14, 1908	Murder.
State v. Sparegrove, James K., appellant	Iowa	Affirmed June 4, 1907. (Petition for rehearing overruled Sept. 27, 1907.)	Exposing a child.
State v. Steward, Mrs. C. F., appellee	Story	Affirmed June 6, 1908	Violating the pharmacy law.
State v. Scott, E. W., appellant	Polk	Affirmed Nov. 12, 1907. (Petition for rehearing overruled Jan. 20, 1908.)	Receiving stolen property.
State v. Smith, David, appellant	Plymouth	Reversed Oct. 15, 1907	Aiding in the unlawful delivery and distribution of intoxicating liquors.
State v. Sandy, Alexander, appellant	Clay	Affirmed June 8, 1908	Uttering a forged instrument.
State v. Symens, Peter, appellant	Scott	Affirmed April 8, 1908	Rape.
State v. Snyder, Joseph, appellant	Cerro Gordo	Reversed March 10, 1908	Burglary.

SCHEDULE "A"—CONTINUED.

Title of Case	County	Decisions	Offense
State v. Steidley, A. M., appellant...	Lee.....	Affirmed Jan. 8, 1907.....	Appeal from an order of district court.
State v. Steidley, A. M., appellant...	Lee.....	Affirmed Oct. 15, 1907....	Burglary.
State v. Stevens, Tom, appellant.....	Polk.....	Affirmed March 13, 1907... (Petition for rehearing overruled May 20, 1907.)	Rape.
State v. Stout, John Ernest, appellant	Cedar.....	Reversed Oct. 20, 1908....	Desertion.
State v. Smith, Thomas, appellant...	Monroe.....	(Petition for rehearing dismissed Jan. 8, 1907.)	Murder.
State v. Stevens, Roy W., appellant..	Pottawattamie.	Stricken Dec. 18, 1908....	Assault with intent to commit rape.
State v. Thompson, Andrew P., appellant	Harrison.....	Reversed April 2, 1907...	Adultery.
State v. Thomas, Chas., appellant....	Polk.....	Petition for rehearing overruled Oct. 24, 1907.....	Murder.
State v. Taylor, Harry L., appellant..	Wapello.....	Reversed Dec. 15, 1908....	Robbery.
State v. Taylor, W. L., appellant....	Polk.....	Affirmed Nov. 17, 1908....	Practicing medicine without a license.
State v. Usher, Joseph, appellant....	Linn.....	Affirmed May 7, 1907..... (Petition for rehearing overruled Dec. 16, 1907.)	Murder.
State v. Von Kutzelben, Erich, appellant	Iowa.....	Reversed Oct. 24, 1907....	Murder.
State v. Walker, John, appellant.....	Polk.....	Affirmed March 5, 1907.... (Petition for rehearing overruled May 20, 1907..	Murder.
State v. Waterbury, Frank, appellant..	Linn.....	Reversed Jan. 18, 1907....	Uttering a forged instrument.
State v. Woodard, Chas., appellant...	Decatur.....	Petition for rehearing overruled Jan. 18, 1907.....	Murder.
State v. Westerman, Louis, Appellant	Polk.....	Affirmed May 9, 1907.....	Perjury.
State v. Wurtsbaugh, J. D., appellant	Pocahontas....	Dismissed May 6, 1908....	Bigamy.
State v. Wolf, J., et al., appellants...	Linn.....	Affirmed June 6, 1908.....	Keeping a nuisance.
State v. Whimpey, Lem, appellant....	Polk.....	Modified and affirmed Nov. 19, 1908.....	Rape.
State v. Young, James, appellant....	Mahaska.....	Modified and affirmed Oct. 16, 1907.....	Rape.
State v. York, A. P., appellee.....	Dallas.....	Reversed Oct. 15, 1907....	Receiving money as township trustee under contract with road supervisor.
State v. Young, Josie, appellant.....	Polk.....	Affirmed Oct. 23, 1908....	Prostitution.

SCHEDULE "B"

The following is a list of criminal cases pending in the supreme court of Iowa on January 1, 1909:

Title of Case	County	Crime
State v. Blodgett, D. T., appellant	Polk	Forgery.
State v. Bennett, Lulu, appellant	Scott	Murder.
State v. Baker, George, appellant	Montgomery	Murder.
State v. Carter, S. E. and Geo. H. Marts, appellants	Polk	Conspiracy.
State v. Carter, W. L., appellant	Polk	Larceny in a building.
State v. Carlson, August, appellant	Pottawattamie	Uttering a forged instrument.
State v. Chapman, Isaac, appellant	Appanoose	Nuisance.
State v. Chamberlain, L. C., appellant	Polk	Obtaining signature by false pretenses.
State v. Clark, W. G., appellant	Jefferson	Obtaining money under false pretenses.
State v. Clark, John, appellant	Jefferson	Larceny.
State v. Duff, Nelson, appellant	Winneshiek	Aiding a prisoner to escape.
State v. Delahoyde, Charles et al., appellees	Marshall	Nuisance.
State v. Fuller, John E., appellant	Webster	Desertion.
State v. Gibbons, Martha, appellee	Fayette	Murder in the second degree.
State v. Hardin, Eli, et al., appellants	Polk	Conspiracy.
State v. Hedgpeth, Marion, appellant	Pottawattamie	Breaking and entering a building.
State v. Herriman, Sam, appellant	Fayette	Lewdness.
State v. Hetland, John, appellant	Wright	Assault with intent to commit rape.
State v. Hogan, George A., appellant	Jones	Rape.
State v. Hogan, Oscar, appellant	Wapello	Rape.
State v. Jones, William, appellant	Polk	Keeping a house of ill fame.
State v. Latham, Albert, appellant	Polk	Breaking and entering.
State v. Loose, B. F., appellant	Polk	Perjury.
State v. Matheson, George, appellant	Pottawattamie	Assault with intent to commit murder.
State v. Porter, C. C., appellant	Polk	Keeping a house of ill fame.
State v. Perkins, George, appellant	Bremer	Adultery.
State v. Pell, Bert, appellant	Marshall	Murder.
State v. Rome, Roy, appellant	Polk	Larceny in building.
State v. Rohn, Fred, appellant	Jones	Rape.
State v. Roberts, Doug, appellant	Appanoose	Nuisance.
State v. Tolliver, Chas., appellant	Polk	Robbery.
State v. Thornton, Joe, appellant	Henry	Assault with intent to commit murder.

SCHEDULE "C."

Cases pending January 7, 1907, have since been disposed of:

11—*Mrs. F. M. Randolph vs. Cottage Hospital, State of Iowa, et al.*
26—*State of Iowa vs. Lafayette Young.*
31—*State of Iowa vs. Ole Thompson.*
57—*Omaha Bridge & Terminal Ry. Co. vs. Hannan, et al.*
59—*Silas Wilson vs. La. Purchase Exposition Com., et al.*
84—*State of Iowa vs. A. J. Fuhrmeister, et al.*
101—*W. A. Montgomery, et al. vs. G. S. Gilbertson.*
103—*City of Marshalltown vs. George LaPlant.*
107—*H. A. Merrill, et al., vs. Board of Supervisors of Cerro Gordo County.*
108—*G. S. Gilbertson vs. T. H. Kenefick.*
119—*Carrie C. Catt vs. Mary Catt, et al.*
120—*State of Iowa vs. Addie Scott, et al.*

SCHEDULE "D."

The following is a list of civil cases which have been commenced and disposed of since January 7, 1907.

Sarah Lynch Griffin vs. Patrick Lynch, et al.
In re estate of John R. Lamb vs. W. W. Morrow.
State of Iowa vs. C., R. I. & P. Ry. Co., and Ill. Cen. Ry. Co.
In the matter of Drainage District No. 70 Calhoun County.
S. O. Thomas vs. J. C. Anderson & Co., et al.
J. S. Baughman vs. E. T. Burns, et al.
S. O. Thomas vs. Henry Geng, et al.
B. E. Jones vs. John Goble, et al.
B. E. Jones vs. Joseph Koch, et al.
S. O. Thomas vs. Charles LaFranz.
J. S. Baughman vs. Joseph McCabe, et al.
J. S. Baughman vs. John Niewoehner, et al.
S. O. Thomas vs. Frank Ober, et al.
B. E. Jones vs. Earnest Williams, et al.
David K. Clever, et al, vs. The State of Iowa, et al.
In the matter of the estate of S. J. Fisher, decd., vs. W. W. Morrow, Treas.

SCHEDULE "E."

Cases pending in the district, federal and supreme courts.

CASES PENDING BEFORE INTERSTATE COMMERCE COMMISSION.

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

DISTRICT COURT.

State of Iowa, ex rel, Chas. W. Mullan, Attorney-General, vs. German Mutual Insurance Company of Council Bluffs, B. F. Loose, et al.
Western Union Telegraph Company vs. B. F. Carroll, Auditor of State.
State of Iowa vs. Suel J. Spaulding.
In the matter of the estate of Richard Wilde, deceased.
Edward H. Farley vs. Northwestern Life & Savings Company, B. F. Carroll, et al.
Sioux City Gas and Electric Company vs. Wm. B. Martin and G. S. Gilbertson.
Western Union Telegraph Company vs. B. F. Carroll, Auditor of State.
State of Iowa, ex rel B. F. Carroll, Auditor of State vs. New Liberty Savings Bank.
Frank L. McCoy, et al., vs. James L. Paxton, et al.
Isaac Hall vs. Butler County, et al.
J. W. Murphy vs. Louisiana Purchase Exposition Com., et al.
State of Iowa, ex rel Chas. W. Mullan, Attorney-General, vs. The Fraternal Accident Society of Cedar Rapids, Iowa.
L. W. Nichols, et al., vs. The National Masonic Accident Assn., et al.
City of Council Bluffs, et al., vs. W. B. Martin, Secretary of State, et al.
Rose Ann Carravan, et al., vs. Martin Harkins, et al.
Freemont Benjamine, et al., vs. B. F. Huff, et al.

Geo. C. Clark, et al., vs. J. W. McIntosh, et al.
Chas. R. Hannan, vs. W. B. Martin, et al.
Dumbarton Realty Company vs. W. B. Martin, et al.
Dumbarton Realty Company vs. F. M. Mollyneaux, et al.
Dumbarton Realty Company vs. Paul King, et al.
Dumbarton Realty Company vs. Chas. Newton, et al.
A. White vs. Board of Medical Examiners, et al.
C. L. Dunlap vs. C. M. Kellar, et al.
Louis Busse vs. Marquis Barr, et al.
City of Ottumwa vs. Calvin Manning.
State of Iowa vs. Centerville Light & Traction Company.
State of Iowa vs. National Protective Legion of Waverly, N. Y., Mrs. M. E. Rush.
State of Iowa vs. Iowa Business Men's Building & Loan Association.
State of Iowa vs. The Pioneer Life Association of America, of Davenport, Iowa.
State of Iowa vs. Iowa Farmers Protective Mutual Hail Insurance Association of Des Moines.
In Re Estate of Grace R. Spangler.
W. W. Morrow, Treasurer, vs. Carrie Durant, Executrix.
William Shallenberger vs. A. M. Linn, et al.
W. A. Guild vs. City of Des Moines, et al.
State of Iowa vs. Iowa German Mutual Insurance Association.
State of Iowa vs. Western Union Telegraph Company.
State of Iowa vs. Barber Asphalt Paving Company.
Nina Hamilton vs. Ella Hamilton, et al.
L. P. Boyle vs. Nicholas Cronin.
Talcott Bros. vs. Williams Drug Company, et al.
A. E. Noble vs. Henry Taylor, et al.
A. E. Noble vs. G. J. Curtis, et al.
Theron W. Prindle vs. Unknown Claimants and Orphans' Home, et al.
Samuel Todd vs. Unknown Claimants and Orphans' Home, et al.

CASES PENDING IN FEDERAL COURT.

Robert C. Rice, et al., vs. Northwestern Life & Savings Company, B. F. Carroll, Auditor, et al.
Samuel Carr, et al., vs. Chas. R. Hannan, et al.
John A. Creighton, et al., vs. Chas. R. Hannan, et al.
John I. Redick vs. Chas. R. Hannan, et al.

The Whitney Realty Company vs. Chas. R. Hannan, et al.
James Barr, et al., vs. Chas. R. Hannan, et al.
George Baxter, et al., vs. Chas. R. Hannan, et al.
Henry Poor vs. The Iowa Central Railway Company, et al.
William Shillaber vs. Minneapolis & St. Louis Railway Company, et al.
Standard Stock Food Company vs. H. R. Wright, St. Food & Dairy Com.
American Linseed Company vs. H. R. Wright, St. Food and Dairy Com.

CASES PENDING IN SUPREME COURT.

Wm. H. Semonies, et al., vs. Chas. W. Needles, et al.
State of Iowa vs. Syndicate Land Company.
Dumbarton Realty Company vs. E. Erickson, et al.
State of Iowa vs. J. N. Jones, et al.
In the matter of the estate of Wm. Clement Putnam.
In Re Estate of George Wells, deceased.
H. F. Schulte vs. C. J. Parker.
E. R. Lacey vs. W. W. Morrow, Treasurer of State.
C. L. Tennant vs. H. F. Kuhlemeier.
State of Iowa, ex rel Geo. M. Pratt, vs. W. C. Hayward, Secretary of State.
In Re Estate of A. Culver, W. W. Morrow, Treasurer, vs. Melissa Gould, Administratrix.

SCHEDULE "F."

Des Moines, Iowa, November 20, 1907.

TO THE EDITOR: In your editorial of recent date relative to the enforcement of the liquor law in Iowa you call attention to the late decision of the supreme court of Minnesota, wherein the attorney-general prosecuted an action in the name of the state to remove one Robinson from the office of mayor of the city of St. Cloud, and also to recover the penalty provided by section 1561 of the revised laws of Minnesota. You insist that the attorney-general of Iowa has equal authority with the attorney-general of Minnesota.

Section 1561, revised laws of 1905 of Minnesota, makes it the duty of the mayor of every municipality of that state, or other public officers named therein, to make complaint to the proper magistrate of any known violation of the laws of the state on the subject of the sale of intoxicating liquors; and section 1562 declares a neglect of that duty malfeasance in office, subjecting the guilty officer to removal and a penalty of not less than one hundred dollars, and not more than five hundred dollars.

Section 4545 of the Minnesota code provides among other things, that when any public officer does or suffers an act, which by law causes a forfeiture of his office, the attorney-general may, when he has reason to believe that a cause of action can be proved, bring an action in the name of the state, upon his own information or upon the complaint of a private person against the person offending.

It is therefore erroneous to assume that the Minnesota decision sustaining the attorney-general's right to prosecute an action for the removal of an officer for malfeasance or non-feasance in office is based upon the common law powers of the attorney-general.

The principal point decided in the case was that the attorney-general had authority by virtue of his office to maintain an action to recover the penalty prescribed by section 1562, revised laws of Minnesota, notwithstanding that section 1561 made it the duty of the county attorney to collect such penalty. The court based its decision partly upon the common law powers which it said inhered

in the office of the attorney-general, but also found that it was the evident purpose of the legislature in passing the present liquor laws to re-establish the supreme authority of the state with reference to the control and regulation of the sale of intoxicating liquors.

The mulct law in Iowa, which does not repeal but only suspends under certain conditions the prohibitory law, contains a method for its inforcement, but the responsibility of enforcement rests almost wholly with local officers. Judges are enjoined with the duty of instructing the grand jury with reference to violations of the liquor laws, and section 2406 provides, that actions to abate liquor nuisances may be brought in the name of the state by the county attorney, or any citizen of the county may institute and maintain such a proceeding in his name.

Section 2428 provides, that peace officers shall see that all provisions of the chapter relating to intoxicating liquors are faithfully executed within their respective jurisdictions, and when informed, or they have reason to believe that the law has been violated, they shall file an information to that effect against the offending party before a magistrate, and further provides that the county attorney shall appear for the state and prosecute such cases, and that any peace officer shall, upon conviction, pay a fine of not less than ten nor more than fifty dollars and forfeit his office.

Section 5099 designates peace officers to be, (1) sheriffs and their deputies; (2) constables; (3) marshals and policemen of cities and towns.

It is to be observed that the provisions of said section do not include county attorneys, and also that the section is criminal in its nature, and that the peace officer who fails to comply with the provisions of said act may be proceeded against only by information in the regular way.

Section 2446 of the code, which is currently supposed to give the judges of the various districts authority to summarily suspend or remove from office any county attorney who neglects or refuses to enforce the general provisions of the mulct law, merely provides that it shall be the duty of the county attorney of each county to see that the provisions of the chapter relating to the *mulct tax* are enforced, and for a failure in this regard, the district court or judge thereof shall suspend or remove from office any county attorney.

It is contended by some that this section only authorizes the court or judge to suspend or remove county attorneys for a failure

or refusal to enforce the provision of the chapter relating to the *mulct tax*, and cite in support of this contention the fact that as the law as originally enacted was more general in its provisions and authorized the district court, or any judge thereof, to remove any county attorney for failure to perform any of the duties enjoined upon him under the provisions of the mulct law; but whether this contention is sound or not, there is ample authority for removing county attorneys or other officers from office for neglect or failure to enforce the general provisions of the mulct law found in chapter 8, title 6 of the Code, the provisions of which are general in their nature and apply to all county, township, city and town officers. In addition to the other grounds specified therein, said chapter provides that officers may be removed for habitual or wilful neglect of duty, for corruption, and for wilful misconduct or maladministration in office.

Section 1252 of the code provides, that any resident of the county, city or town of which the person to be charged is an officer may make complaint by a petition in the district court. It further provides, that the county attorney shall file such petition whenever he believes there is just cause therefor, and may be required to do so by the court or judge thereof.

Section 1253 provides for notice to the accused; section 1254 provides that the action shall be tried as a law action, and that all the proceedings shall, as near as may be, conform to the rules governing the trial of such action.

It is perfectly apparent that there is a material difference between the procedure in the Iowa law and the Minnesota law, and that the attorney-general of Minnesota is given a great deal more power and authority by statute than is conferred upon the attorney-general of Iowa.

In this state, however, the attorney-general unquestionably has the authority to appear in any case in which the state is a party, or in which it has an interest. No one, I think though, would contend that as this department is now organized with a contingent fund of only six hundred dollars per annum over and above an amount sufficient to pay the regular help, it would be physically possible, or that it is his duty to appear for the state before committing magistrates in the prosecution of persons charged with indictable offenses, nor even to assist in the prosecution of such persons in the district court after an indictment unless the case was of unusual public interest, and then only when requested to do so by the governor, executive council, or general assembly, and in

this connection it is proper to say, that at the beginning of the term of the present attorney-general the governor called attention to the necessity of a better enforcement of the laws of the state, and requested and authorized the department to take such action as was deemed best in all matters with respect to law enforcement.

Without extending this statement further, it is my judgment, in which the governor concurs, that there is sufficient authority under our statute to authorize the attorney-general to appear and prosecute any action brought in the name of the state for the removal of any county attorney, or other officers when the county attorney refuses to prosecute for malfeasance or non-feasance in office; and this department stands ready to prosecute in all such cases upon proper complaint by any responsible resident of the county or city of which the person charged is an officer.

Respectfully,
H. W. Byers.

Opinion Given to Legislative Committee on Proposed Primary Plan.

It is proposed by the so-called Dolliver-Smith plan to provide for a primary election for the republican candidate for United States senator by having the names of the several candidates for senator printed on the official ballot used at the general election in November; the names to appear either at the top or the bottom of the republican ticket, with the further provision that the vote for United States senator shall be limited to persons who vote for each candidate on the republican national, congressional, state and legislative ticket.

Is such a plan lawful, and if adopted would the vote for the republican candidate for United States senator be confined to members of the republican party?

No one will contend that it would be lawful in this state to grant the right to vote for a candidate for United States senator on the republican ticket to some republicans, and deny the same right upon the same terms to others; that is to say, it would be at once conceded that a primary election law which discriminated between members of the same party would be invalid.

It may also be safely stated that any method for determining whether persons proposing to vote at the proposed primary for United States senator possessed the required qualifications, which in any manner impaired the right of the voter to cast his ballot

for the person of his choice for office, or that in any way restrained or interfered with his freedom of choice would be invalid.

It is the settled public policy of this state that every man who is entitled to vote at all, has the right to vote at all elections; that his vote shall be by secret ballot; that he shall be allowed to cast his vote free from unlawful and improper influence; that there shall be absolute freedom of choice.

This policy and these rules will be found declared in the constitution of our state, in the statutes and in the decisions of our courts. The proposed plan if enacted into law would in its operation violate most, if not all, of these sacred rights, and would be opposed to the "express terms of our fundamental law" as well as the "genius and spirit of our institutions."

The purpose of the plan, it is claimed, is to give the republicans of the state an opportunity to vote their preference for a republican United States senator, and yet every republican who voted for one candidate on either of the other party tickets above the county ticket, and every republican who, for any reason, failed to mark his ballot for every candidate on the republican ticket down to the county ticket, would be disfranchised in so far as the primary election on the United States senator is concerned.

If the legislature has the power to say that unless the voter marks his ballot for the republican candidate for congress his vote on the same ticket for the republican candidate for United States senator shall not be counted, then it follows that that body has the power to say that unless the voter marks his ballot for the republican candidate for governor his vote on the same ticket for the republican candidate for secretary of state shall not be counted; a proposition that would be laughed to scorn by every high school boy in the state.

It is no answer to this argument to say that because the vote on United States senator is only advisory and a mere instruction to the members of the general assembly, that therefore the ordinary rules that govern elections do not apply, because if the names of the candidates for United States senator are printed upon the official ballot and the voters given a right to vote their choice for that office, it is just as much of an election as is the vote on State auditor or governor. In the one case, if a sufficient number of votes are cast for the candidate for governor, he is elected to the office of governor; in the other case, if the requisite number of votes are cast for one person for United States senator, he is elected to the office of republican nominee for United States senator. In both cases the elector has simply expressed his choice of candidates for office. The fact that the legislature may not make the choice of the people effective by responding to the moral obligation thus placed upon it does not affect the question in the least.

Again, the plan, if adopted, would impair the voter's right to freedom of choice between candidates for office, and would amount to an interference and restraint upon the right of suffrage, and for that reason ought not to be adopted, and if adopted would be void.

To illustrate: At the republican primary in June candidates for congressional, state, legislative and county offices were nominated by the republicans. Now suppose that since the nominations were made it has become quite generally known that one of the nominees for Congress is unworthy and unfit for the place. He refuses to withdraw. A republican voter on election day goes to his polling place and upon examining his ballot finds upon it the name of the objectionable candidate, and he is just about to either omit to make a cross in the square opposite his name, or to vote for the candidate on the democratic ticket when he remembers that he has the right to vote for a republican candidate for United States senator, but that to enjoy that right or privilege he must vote for the objectionable candidate for congress, and at once there is in his mind a conflict of desire and choice, and if his desire to vote for the candidate for United States senator outweighs his objection to voting for an unworthy and unfit candidate for congress, he will put the cross in the square opposite the name of the congressman, and then proceed down the ticket and mark his ballot for senator.

On the other hand, if his sense of public duty and his desire to save his district from the humiliation of being represented by an unworthy man outweighs his desire to help select the republican candidate for United States senator, he will refuse to vote for the candidate for congress, and lose his vote for United States senator.

Must a man be learned in the law to know that such legislative act would be contrary to the whole public policy of this state?

Our Constitution provides that:

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

In considering this constitutional provision in the case of *Edmonds v. Danbury,* 28 Iowa, 271, our supreme court, speaking through Judge Dillon, says:

> "It is admitted that these qualifications confer a right. The right thus conferred is the right to vote. This right is held by a constitutional and not by a legislative tenure. It cannot be destroyed or impaired by the legislature."

In the doctrine thus stated by Judge Dillon is found a complete answer to the suggestion that because in the end the United States senator must be elected by the legislature, therefore the voter who is deprived of the right to vote for a candidate for senator has lost nothing. He has been disfranchised just as completely as though he had been deprived of his right to vote for the candidate for governor, because, just the moment the legislature provides for an election at which the electors of the state may vote their preference for United States senator, just that moment the constitutional provision above quoted is called into operation, and every person who comes within its provisions has the right to vote at that election.

Again, in the same case, Judge Dillon says:

> "Those whom the constitution declares to be electors cannot be disfranchised; and not one jot or tittle can lawfully be added to or taken from the qualifications which the constitution prescribes."

In *Monroe v. Collins,* 17 Ohio State, 666, it is said:

> "What the legislature cannot do directly it cannot do by indirection. If it has no power expressly to deny or take away the right, it has none to define it away, or unreasonably to abridge or impede its enjoyment by laws professing to be merely remedial. The power of the Legislature in such case is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise, and by preventing its abuse."

In *Daggett v. Hudson,* 43 Ohio State, 548, Judge Atherton speaking for the court, says:

> "The legislature has full power to regulate the right to vote, but no constitutional power to restrain or abridge the right, or unnecessarily to impede its free exercise. Under the pretense of regulation the right of suffrage must be left untrammeled by any provision or even rules of evidence that may injuriously or necessarily impair it."

Mr. Mecham, in an article in the 3d Mich. Law Review, page 367, asserts a doctrine that is coming to be recognized by our courts more and more every day, when he says:

> "Now, the constitutional right to vote involves, not merely the right to vote for or against a suggested individual or measure—it involves also the right to propose men or measures, at least so far as the voter's own action is concerned. It is not merely a right to vote for or against the person or plan of some other person's choice, but it involves the right in the voter to take the initiative and to vote for the man and measures of his own choice. It is therefore true, and has often been pointed out, that the right to vote necessarily involves the right to nominate, and that the right to nominate is an essential and inseparable part of the right to vote. The right to nominate, therefore, becomes a constitutional right, and any law which denies to the voter the right to determine for whom he shall vote must be void."

Judge McCrary, in his work on elections, 4th Ed., Sec. 700, among other things, says:

> "The statutes of most of the states expressly permit the voter to cast his ballot for the person of his choice for office, whether the name of the person he desires to vote for appears upon the printed ballot or not. Statutes which deny the voter this privilege are in conflict with the constitutional provision guaranteeing the right of suffrage to every citizen possessing the requisite qualifications and are void."

In *State ex rel. Cook et al. v. Houser,* a decision of the supreme court of Wisconsin in 100 N. W. R., 964, it is said:

> "Whatever privileges are within the power of the legislature to grant, may be granted upon such conditions and subject to such regulations as it in its wisdom may see fit to impose. That is elementary. In dealing with this subject care should be exercised to distinguish between common law rights, which are within the protection of constitutional restraints upon legislative authority, and mere legislative creations. A failure in that regard would be quite likely to lead one astray. The right to vote and to secrecy in respect to the elector's opinion thus expressed cannot be impaired, but the enjoyment of those rights which are within constitutional protection, may have every legislative aid, which the wisdom of

the lawmaking power may see fit to afford. The power of regulation to that end is limited only by what is reasonable. Any attempt to regulate passing that barrier, is destructive of the right involved, not an aid to its enjoyment, and hence is not legitimate."

Whatever the law may be, however, in other jurisdictions, it seems to be settled in this state by the decisions of our own supreme court.

In *McMillan et al. v. Lee County et al.*, 3 Iowa, 311, a case decided in 1856, three separate and independent propositions were submitted to a vote of the people in such a way that the elector's vote on each of the propositions depended upon how he voted on the other, or in other words, that unless his vote was the same on each proposition it would not count. In passing upon the question the court among other things, says:

"We cannot regard this in any other view, than as an attempt to impose a condition upon the taking effect of the vote of the people adopting a proposition submitted to them, wholly unauthorized by the law. * * * To make the success of any one proposition depend upon the adoption of all, was to take from the expression of the will of a majority of the people, that essential validity intended by the law to be imparted to it, where it declares that the question adopted by them shall have the force and effect of an act of the general assembly."

And again:

"The force and effect thus imparted to their will, is intended to be given to that will *freely* expressed. * * * The evils which might be permitted to grow up under such a system, are so obvious and apparent, that any extended discussion of the question by us, would be superfluous. It may be sufficient to suggest, that if it were allowed, measures in themselves odious and oppressive, might by means of it, become fastened upon a county, which in no other way could have obtained the number of votes requisite to insure their adoption, but by being connected with some other proposition, which commended itself to the favor and suffrage of the people, by its inherent merits and popularity. They must be adopted or rejected together. After the same manner, a measure desirable and necessary to a people of a county, may when offered for their adoption, be rejected by their votes and fail to become a law, by reason of its connection with some other measure or measures unpopular or uncalled for. In either case, there is an evil. An unpopular measure may be forced upon an unwilling people, or a necessary and desirable one may be denied them, in despite of their wishes. It is sufficient for us to say, that the law, in our opinion, intended to provide for no such system of contradictions. A measure wise and salutary in itself, needs no adventitious assistance to recommend it to the suffrages of the people, or to insure its adoption by them. It may demand that its enactment into a law, shall be made to depend upon their sanction alone. A pernicious measure is not entitled to such assistance, and should be permitted to stand or fall by its own inherent merits or defects."

The doctrine of this McMillan case is reasserted in *Gray v. Mount*, 45 Iowa, 591, where the court says, in passing upon the validity of submitting two distinct propositions on the same ballot where the vote upon one depended upon the vote on the other:

"If they are submitted together, it is very clear that the voter cannot vote for one and against the other. He must vote against both, whereby he may defeat one, the success of which he desires, or he must vote for both, whereby he may cause the success of one which he desires to be defeated. If he fails to vote he may thus aid in causing the defeat of his favorite measure, and the adoption of the one he opposes. He has thus no liberty of choice. The plan of submitting the questions, for there are two, resembles more the common device of an auctioneer in disposing of worthless goods, whereby a good article is mingled with them and made to draw bids, or the cunning tricks of gamesters to induce wagers of the unwary, rather than the open, direct and fair manner that always should prevail in elections by the people. The very letter as well as the spirit of our election laws condemns this plan. It has never been heard of that electors were, by any plan, denied the right of choosing one, and rejecting another candidate for office, to be voted for at the same election."

Could anything be more directly in point upon the questions involved in the so-called Dolliver-Smith plan? It would seem that this decision would convince even the authors of the plan that it could have no standing in the courts of this enlightened state.

See also, *Brown v. Carl*, 111 Iowa, 608.

Hours might be spent, yes even days, in quoting from authorities in this country holding similar views to the foregoing, but it seems that what has already been said is sufficient to satisfy any unprejudiced mind that the proposed amendment to the primary law would be void; first, because in its operation it discriminates between republicans; and second, because it impairs the voter's right to cast his ballot for the person of his choice.

H. W. Byers.

September 6, 1908.

Settlement of Case of State of Iowa vs. Lafayette Young.

Gentlemen: On the 20th day of March, 1902, an action was commenced in the district court of Polk County, Iowa, entitled *State of Iowa v. Lafayette Young*. The petition in the case was in two counts.

In the first count the State's claim in substance was, that Mr. Young, as state binder, had received from the state for binding certain pamphlet reports the sum of $2,260.74, when he should have received only the sum of $519.85; it being claimed by the State that payment was made for covered pamphlets when in truth and in fact the pamphlets, or documents as they are sometimes termed, were all bound without covers, the over-payment amounting to $1,740.89.

In the second count the state's claim in substance was, that Mr. Young, as state binder, had received from the state for binding cetrain reports, books and documents the sum of $4,988.58, when he should have received only the sum of $2,091.74, the state alleging that payment was made under subdivision 4 of section 141 of the code providing for sewing and binding in paper covers the journals of the two houses, when payment should have been made under subdivision 3 of said section which provides for stitching and binding in paper covers, reports, books and documents other than house and senate journals. The over-payment under this count as claimed by the state being $2,896.84.

Mr. Young answered the state's petition alleging in substance:

First. That the pamphlets, documents and leaflets referred to in the first count of the petition were in fact covered within the meaning of the term "cover" as used in section 141 of the code.

Second. That the reports, books and documents referred to in the second count of the petition were sewed and bound in paper covers; that all of said reports, books and documents were submitted to the then secretary of state, passed upon by him and the amount found due for the work duly certified by said secretary. That the finding of the secretary of state that the work was done in accordance with the provisions of chapter 5 of title 2 of the code, and the amount so certified by that officer was an adjudication and settlement of the amount due Mr. Young, and was binding and conclusive upon the plaintiff, and he denied that there was anything due the State upon either count of its petition.

The case went to trial in the district court and at the conclusion of the testimony on the part of the state, the district court, on motion of Mr. Young's counsel, withdrew from the jury the issue as to the second count in the petition, submitted to the jury the issue on the first count, but refused to allow the jury to take with them to their jury room certain sample pamphlets which were exhibits in the case, the exhibits being introduced and received in evidence for the purpose of aiding the jury in determining as to whether or not the pamphlets and leaflets in question were in fact bound with covers. A verdict was returned by the jury on the count submitted to it, in favor of Mr. Young, and against the state.

The state appealed, and on the 17th day of January, 1907, the supreme court handed down a decision deciding:

First. That the court below erred in withdrawing from the jury the issues made on the second count of the petition.

Second. That the court below erred in refusing to send the exhibits referred to to the jury, and the judgment below was reversed.

Thereafter, and on or about the 8th day of March, 1907, the defendant filed his petition for a rehearing of the case in the supreme court, and on the 20th day of May, 1907, the same was denied. The cause then went back to the district court on *procedendo*, and is still pending in that court.

A careful reading of the decision of the supreme court in connection with the record made upon the trial in the court below convinced me that there was really nothing left in the case to try; the decision of the court when applied to the admitted facts in the case settled the question made on the first count against the state, and upon the second count against Mr. Young.

At this point it was suggested by counsel for the state to defendant's counsel that the case ought to be settled without a re-trial, and negotiations were begun with that end in view.

It will be remembered that at no time was the claim made by the state in the trial of the case in either court, that either fraud or collusion was involved in the transaction anywhere: on the other hand, it has been claimed by the defendant from the beginning that the payments made under the first count were not only honestly made, but were in conformity with the long established custom, and that as to the second count, the reports, books, and documents were sewed instead of stitched at the request of the then secretary of state, and the heads of the several other departments of state, and this claim of the defendant is supported by the testimony taken on the trial below. It is even claimed by the defendant that the question as to whether the reports, books, and documents covered by the second count of the petition should be stitched or sewed was taken up some time prior to 1902, and during the defendant's term as state binder, with the executive council and that that body directed the secretary of state to notify the defendant to sew the books in question rather than to stitch them.

I have been unable to find any record evidence of any such action upon the part of the council, but however that may be, it is admitted on all hands that sewing made a far better and more durable book than stitching; that it cost the state binder more in material and labor to furnish the sewed book than it did the stitched one.

In view of these facts the defendant, through his counsel, contends that it would be a gross injustice to him for the state to take advantage of the technical rule of law laid down by the supreme court, and exact of him a return of the difference between the amount he would have been entitled to for the stitching, and the amount paid for the sewed documents.

My own judgment is that the state can justly ask but for two things out of this controversy:

First. To have the law with reference to the legal questions involved in the trial settled definitely for the benefit of the public officers whose duty it is to audit and certify bills and accounts against the state for work of this character, and this result has been accomplished by the decision of the court.

Second. To be made whole for any amount paid to Mr. Young over and above the actual value of the work as performed by him, that is to say, to have returned to it by the defendant the difference between the reasonable cost of the work to the defendant of the binding of the reports, books and documents as they were bound and delivered to the state, and the amount received by him.

I have made diligent effort to ascertain this difference, and while I do not pretend to have ascertained the amount with exactness or perfect accuracy, I am reasonably safe in saying that the difference between the cost to Mr. Young of the work on the volumes covered by the second count of the petition, and the amount paid him by the state was somewhere between nine hundred and a thousand dollars. That in addition the state has been to some expense in the trial of this case that cannot be included in the items of court costs, as well as being deprived of the use of the money for some seven years, and for which it would be entitled to interest. These items would amount to from four to five hundred dollars, making the total amount necessary, in my judgment, to make the State whole the sum of fourteen hundred dollars, and this amount the defendant, through his counsel, has offered to pay, together with all of the costs in both courts; and since no official corruption is involved in the controversy, and believing, as I do, that whatever might be the rule as between individuals, the state, through a mere technical but honest misinterpretation of the law by one of its officers, cannot afford to profit at the expense or to the hurt of one of her citizens, who with respect to the matter in question was acting in perfect good faith, I submit the matter to you with the recommendation that the offer of Mr. Young be accepted.

Respectfully,
H. W. BEYERS,
Attorney-General of Iowa.

November 24, 1908.
TO THE HONORABLE EXECUTIVE COUNCIL
OF THE STATE OF IOWA.

SCHEDULE "G.."

LOCAL BOARD OF HEALTH—DESTRUCTION OF PROPERTY BY—State not liable for property ordered destroyed by local board of health, even though the order to destroy was made by authority of the state board, under its quarantine powers.

Des Moines, Iowa, January 9, 1907.

DR. A. M. LINN,
Des Moines, Iowa.

DEAR SIR.—I beg to acknowledge receipt of your letter of the 8th instant, requesting my opinion as to whether the State is liable for the value of property destroyed by order of the State Board of Health. In reply I beg to say, the local Boards of Health throughout the State are without power to bind the State for the payment of property destroyed under their order, even though the order to destroy the property was made by the authority of the State Board of Health while in the exercise of its quarantine powers.

It is therefore my opinion that the State is not liable for property thus destroyed, and the bill referred to in your letter should be returned without the approval of the Board.

Respectfully submitted,
H. W. BYERS,
Attorney-General.

BOARD OF EDUCATION.—Power to employ one not a member of the Board to prepare outlines of professional study—amount of help to be employed limited. Board of Education has not the power to employ assistance to prepare outlines of professional study. Superintendent of Public Instruction authorized to certify to the executive council only expenditure authorized by Chapter 122, Acts Thirty-first General Assembly, as to readers and additional clerical help required.

SIR—I have your communication of the 9th instant in which you ask my opinion upon the following question:

May the educational board of examiners employ one not a member of the board to prepare the outlines of professional study required, such service to be paid for under the provision of section 15 of chapter 122, laws of the thirty-first general assembly.

Section 15 of the acts referred to provides:

> "All expenditures authorized by this act shall be certified by the Superintendent of Public Instruction to the executive council, who shall cause the Auditor of State to draw warrants therefor upon the Treasurer of State, but not to exceed the fees paid into the treasury under the provisions of this act."

This section limits the Superintendent of Public Instruction to the certification only to the executive council of expenditures *authorized* by chapter 122, acts of the thirty-first general assembly. It is therefore important to determine what expenditures are authorized by the act.

I find no provision any where for the employment of help other than what is contained in section 14. That section limits the help to readers and such additional clerical help as may be required. The limitation thus placed upon the board in the employment of help leads me to the conclusion that it was the intent of the legislature that the board itself should prepare and forward with each certificate the outlines referred to in your communication. Your question must therefore be answered in the negative. I have the honor to be,

Very respectfully,
H. W. BYERS,
Attorney-General of Iowa.

January 15, 1907.
HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

STATE OFFICERS—CONSTRUCTION OF TERM "EACH STATE OFFICE." The term "state officers" should be construed to include members of various permanent boards and commissions already created or hereafter created. That the term "each state office" should be construed to include the offices occupied by the various permanent state boards and commissions and state officers.

SIR.—I have your letter of January 16th requesting my opinion as to whether or not,

First, the state officers referred to in line 7, section 16, page 4, of the prefix to the code of Iowa, include the members of the various state boards and commissions already created by statute and those which may hereafter be created.

Second, as to whether or not the term "each state office," as used in section 42 of the code, includes the offices occupied by the various state boards and commissions and each subsidiary department of the executive department, department of state, the department of the auditor of state and the other state departments which occupy more than one room.

To carry out the evident intent of the legislature in enacting these provisions a liberal construction should be placed upon them.

It is therefore my opinion,

First, that the term "state officers," as used in line 7, section 16, page 4 of the prefix to the code of Iowa, should be construed by you in acting thereunder to include each member of the various permanent state boards and commissions already created by statute and those which may hereafter be created.

Second, that the term "each state office," as used in section 42 of the code, should be construed by you to include the offices occupied by the various permanent state boards and commissions and each subsidiary department of the executive department, department of state, the department of the auditor of state and the other state departments which occupy more than one room.

Respectfully submitted,

H. W. BYERS,
Attorney-General of Iowa.

January 17, 1907.

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

CORPORATIONS—INCREASE OF CAPITAL STOCK—USE OF TERM "AUTHORIZED CAPITAL" BY STOCK LIFE INSURANCE COMPANY—TERM USED IN ARTICLES.—When amendment proposed for the increase of capital stock, it must be paid up and secured same as original capital stock. The law relating to organization of stock life companies permits use of term "authorized capital" in their articles of incorporation. When term is used in articles it is not required that capital so authorized shall be subscribed and paid for either in cash or by duly certified notes.

SIR.—I have the honor to acknowledge your communication of January 11th, with its enclosure, in which you submit to me the following questions, and request my opinion thereon:

"*First.* When a stock company wishes to increase its capital stock, and to that end proposes an amendment to its articles of incorporation, does not the law contemplate that such increase in its capital stock must be paid in and secured in the same manner as the original capital is paid in and secured?

"*Second.* Does the law relating to the organization of stock life insurance companies permit or contemplate that such companies may use the term 'authorized capital' in their articles of incorporation, and if such term is permitted or authorized does not the law contemplate that the capital so authorized shall at the time of such authorization be subscribed and paid for, either in cash or cash and duly certified notes?"

Section 1769 of the code provides:

"Stock companies organized under the laws of this state shall have not less than one hundred thousand dollars of capital subscribed, twenty-five per cent of which shall be paid up and invested in bonds of the United States or this state, or in bonds and mortgages upon unincumbered real estate in the state, worth, exclusive of improvements, at least double the sum loaned thereon, which securities shall be deposited with the auditor of state, and upon such deposit, and evidence by affidavit or otherwise satisfactory to the auditor that the capital is all subscribed in good faith, and that the company is the actual and unqualified owner of the securities representing the paid-up capital, he shall issue to such company the certificate hereinafter provided for, but no part of the twenty-five per cent aforesaid shall be loaned to any stockholder or officer of the company. The remainder of such capital shall be paid within such time as the directors or trustees of the company may order, and until paid it shall be secured by the notes of the stockholders of the company."

Under this section no life insurance company organized on the stock plan shall be authorized to do business in this state until it has not less than one hundred thousand dollars of capital subscribed, twenty-five per cent of which, at least, must be paid up, and the remainder secured by the notes of the stockholders of the company.

The obvious intent of the legislature in enacting this section was to give to life insurance companies organized under this plan stability and permanency, but it does not seem to me that there is anything in the section that prohibits life insurance companies organized under the stock plan from using the term "authorized capital"; nor that increased capital authorized by amendment to the articles of incorporation must at the time of such authorization be subscribed and paid for in cash, or cash and duly certified notes.

A reading of sections 1607, 1609, 1610 and 1613 of chapter 1, title IX of the Code, confirms me in this judgment.

Section 1607 provides:

"Any number of persons may become incorporated for the transaction of any lawful business, but such incorporation confers no power or privileges not possessed by natural persons, except as hereinafter provided."

Section 1609 provides:

"Among the powers of such corporations are the following:

"1. To have perpetual succession;

"2 To sue and be sued by its corporate name;

"3. To have a common seal, which it may alter at pleasure;

"4. To render the interest of the stockholders transferable;

"5. To exempt the private property of its members from liability for corporate debts, except as otherwise declared;

"6. To make contracts, acquire and transfer property, possessing the same powers in such respects as natural persons;

"7. To establish by-laws, and make all rules and regulations necessary for the management of its affairs."

Section 1610 provides, among other things:

"Before commencing any business except their own organization, they must adopt articles of incorporation, which must be signed and acknowledged by the incorporators, * * * Such corporation shall pay to the Secretary of State, before a certificate of incorporation is issued, a fee of twenty-five dollars, and, for all authorized stock in excess of ten thousand dollars, an additional fee of one dollar per thousand. * * *"

Section 1613 provides:

"A notice must be published for four weeks in succession in some newspaper as convenient as practical to the principal place of business, which must contain:

"1. * * *

"2. * * *

"3. The amount of capital stock *authorized*, and the times and conditions on which it is to be paid in."

All life insurance companies in this state organized under the stock plan must comply with the provisions of sections 1610 and 1613, and it will be noticed that in section 1610 the term "authorized stock" is used by the legislature, and in section 1613 requiring notice to be published, and providing what the notice shall contain the term "capital stock authorized" is used.

It is therefore my opinion.

First. That the law relating to the organization of stock life insurance companies permit such companies to use the term "authorized capital" in their articles of incorporation.

Second. That when a stock company with one hundred thousand dollars paid up capital wishes to increase its capital stock, and to that end proposes an amendment to its articles of incorporation, the law contemplates that such increase in its capital stock when issued must be paid in and secured in the same manner as the original capital is paid in and secured.

Third. That when the term "authorized capital" is used in the articles of incorporation it is not required that the capital so authorized shall at the time of such authorization be subscribed and paid for either in cash, or cash and duly certified notes.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

January 17, 1907.

HON. B. F. CARROLL,
Auditor of State.

INCREASE OF TAX LEVY—THE RIGHTS OF ANY CITIZEN TO VOTE—SHALL NOT BE ABRIDGED ON ACCOUNT OF SEX.—Where at a special election to establish a library "to be supported by a municipal tax as provided by statute," women would have the right to vote.

MADAM.—I beg to acknowledge the receipt of your communication of the 17th instant in which you ask my opinion upon the question, "Where at a special election in Iowa the question submitted is: 'Shall a free public library be established in Humboldt to be supported by a municipal tax as provided by statute,' have women the right to vote."

Section 1131 provides among other things:

> "The right of any citizen to vote at any city, town or school election, on the question of issuing any bonds for municipal or school purposes, and for the purpose of borrowing money, or on the question of increasing the tax levy, shall not be denied or abridged on account of sex."

It is evident that if the proposition stated above received a majority of the votes cast and the library established the tax levy of Humboldt would be increased.

It is therefore my opinion that your question must be answered in the affirmative.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

January 18, 1907.
MISS ALICE S. TYLER,
Secretary Library Commission.

TOWNSHIP CLERKS—COMPENSATION.—Township clerks to receive five per cent on all money coming into his hands by virtue of his office except money received from his predecessor in office.

SIR.—I beg to acknowledge the receipt of your communication requesting my opinion as to whether or not the township clerk is entitled to receive five per cent upon money coming into his hands by virtue of his office.

Section 591 of the code provides among other things:

> "1. * * *
>
> "2. For all money coming into his hands by virtue of his office, except money received from his predecessor in office, unless otherwise provided by law, five per cent."

Section 1538 of the code so far as it affects the township clerk, provides:

> "And the township clerk shall receive two per cent of all the money thus coming into his hands, and by him paid out for road purposes."

If there were no other or different provisions than the above the township clerk would be entitled to receive five per cent upon all money coming into his hands by virtue of his office, except money received from his predecessor in office, and except money

received by him and paid out for road purposes. The thirty-first general assembly, however, by chapter 59, struck out all that part of section 1538 referring to the township clerk, thus leaving his compensation to rest entirely upon section 591 of the code.

It is therefore my opinion that the township clerk is entitled to receive under the law as it now exists, five per cent for all money coming into his hands by virtue of his office, except money received from his predecessor in office.

Respectfully submitted,
H. W. BYERS,
Attorney-General of Iowa.

January 19, 1907.
HON. W. C. KIMMEL,
Senate Chamber.

CITY SCALES—CITY OR TOWN NOT REQUIRED TO ESTABLISH.—Whatever power is given the city council with reference to establishing and providing a standard for correct weights and measures is discretionary.

SIR:—I have the honor to acknowledge your communication of January 21st, with enclosure from Lewis A. Megow, vice-president Oelwein Trades and Labor Assembly, in which you submit to me the following question, and request my opinion thereon.

> "Is there any way to compel a city to establish city scales, and does the state have anything to do in the matter?"

Section 3023 of the Code provides:

> "A sealer of weights and measures may be appointed in any city or town by the council thereof, who shall hold his office during its pleasure, and it may obtain from the sealer the weights and measures of the proper county such standards of weights and measures as may be necessary; in case the board of supervisors of the county in which any city or town is situated has not obtained such standards, then its council may do so. Each sealer in cities and towns shall take charge of and provide for the safe keeping of the town or city standards, and see that the weights, measures, and all apparatus used for determining the quantity of commodities used throughout the town or city, which shall be brought to him for that purpose, agree with the standards in his possession."

Section 3019 of the Code provides for the appointment by the governor of a superintendent of weights and measures for the state.

Section 3022 authorizes the board of supervisors of any county at any regular meeting to obtain from the state superintendent of weights and measures such standards of weights and measures as may be necessary for its county, and provides for the appointment of a county sealer of weights and measures, and makes it the duty of the county sealer upon his appointment to provide cities and towns with such standard weights and measures.

Section 3026 of the code provides:

> "If any person shall hereafter use any weights, measures, beams or other apparatus for determining quantity of commodities, which shall not be conformable to the standards of this state, in any counties whose standards have been obtained by the board of supervisors, or in any city or town after such standards have been obtained therein, whereby any person shall be injured or defrauded, he shall pay five dollars for each offense, to be collected by the county, city or town sealer, and shall be liable to the person defrauded in treble damages and costs. Every person keeping any store, grocery or other place for the sale or purchase of such commodities as are usually sold by weight or measure shall, once in each year, procure the weights and measures used by him to be compared with the standard herein provided, and be subject to a penalty of five dollars for every neglect to comply with this provision, to be recovered by anyone who shall prosecute therefor."

Section 3027 of the code defines a public scale to be one for the use of which a charge is made, and that all persons keeping public scales and acting as weigh masters shall be sworn before entering upon their duties to keep their scales correctly balanced, make true weights, and render correct account to the person having weighing done.

Section 2029 makes a violation of any of the provisions of the two preceding sections a misdemeanor, with punishment by fine, and a liability to the person injured for all damages sustained.

Under these several sections the question submitted must be determined, and a consideration of them leads me to the conclusion that whatever power is given to the city council with reference to establishing and providing a standard for correct weights and measures is discretionary.

It is therefore my opinion, that there is no way to compel a city or town to establish city scales.

Respectfully,
H. W. Byers,
Attorney-General of Iowa.

January 22, 1907.
Hon. Albert B. Cummins,
Governor of Iowa.

Salaries of State Officers.—Where one state officer overdraws his salary account the auditor of state would have no right to deduct the amount from salary account of his successor in office. It would be the duty of the auditor to draw warrants for the full time of their term.

Sir:—I have the honor to acknowledge receipt of your communication of the 7th instant with accompanying statement showing the salary account of former Attorney-General Milton Remley for the six years ending January 7, 1901, the salary account of Hon. George L. Dobson, secretary of state, for the four years ending the first Monday in January, 1901, salary account of George L. Dobson as a member of the executive council for the same period, salary account of Hon. John Herriott, treasurer of state, for the six years ending January 7, 1901, salary account of John Herriott as a member of the executive council for the same period, and the corresponding accounts of Attorney-General Mullan, Hon. W. B. Martin, secretary of state, W. B. Martin, as member of executive council for same period, Hon. G. S. Gilbertson, treasurer of state, and G. S. Gilbertson as member of the executive council for the same period, and requesting my opinion as to whether or not the auditor of state has the authority to draw warrants in payment of balance due upon the salary of Chas. W. Mullan, attorney-general; W. B. Martin, secretary of state, and member of the executive council; G. S. Gilbertson, treasurer of state, and member of the executive council.

Upon an examination of the statement furnished me I find:

First. That Attorney-General Milton Remley drew $83.28 more than he was entitled to draw as salary.

Second. That George L. Dobson drew $41.39 more than he was entitled to draw as salary for the term served as secretary of state, and $9.42 more than he was entitled to draw as a member of the executive council for the same period.

Third. That John Herriott drew $41.36 more than he was entitled to draw as treasurer of state for the time served by him, and $9.42 more than he was entitled to draw as a member of the executive council for the same period.

The fact that these several officers drew the sums stated above more than they were entitled to draw would not justify the auditor in refusing to draw warrants for the payment of the balance of the salary due to each of the several officers named in your communication. Your statement shows:

First: That Attorney-General Mullan served six years as attorney-general at a salary of $4,000.00 per year, and had drawn but $23,916.70, leaving balance due him of $83.30.

Second: That W. B. Martin served as secretary of state for six years at a salary of $2,200.00 per year, and that he had drawn but $13,158.63, leaving a balance due him as secretary of state of $41.37. That as a member of the executive council for the same period Mr. Martin was entitled to draw $3,825.00, and had drawn but $3,815.58, leaving a balance due him as member of the executive council of $9.42.

Third: That G. S. Gilbertson served as treasurer of state for six years at a salary of $2,200.00 per year, and had drawn but $13,158.63, leaving a balance of $41.37 due him on his salary as treasurer of state. That for the same period Mr. Gilbertson was entitled to draw as a member of the executive council the sum of $3,825.00, and had drawn but $3,815.58, leaving a balance due him of $9.42.

It is therefore my opinion that the auditor of state is authorized, and it is his duty to draw warrants in favor of Chas. W. Mullan, attorney-general, for $83.28; W. B. Martin, secretary of state, $41.37; W. B. Martin as member of executive council for $9.42; G. S. Gilbertson, treasurer of state, for $41.37; G. S. Gilbertson as member of executive council for $9.42.

Respectfully,
H. W. Byers,
Attorney-General of Iowa.

January 26, 1907.
Hon. B. F. Carroll,
Auditor of State.

Salaries of State Officials—Overdrafts—Provisions Concerning.

Sir:—I have the honor to acknowledge receipt of your communication of the 21st instant referring again to the salary of outgoing state officers, and in which you request my opinion:

First. As to whether or not there is an overdraft in the salary account of the present attorney-general, secretary of state, and as member of the executive council, and treasurer of state, and member of executive council, in the accounts overdrawn by Attorney-General Milton Remley, Hon. George L. Dobson, secretary of state, and member of executive council, and Hon. John Herriott, treasurer of state, and member of executive council.

Second. As to whether or not the auditor of state should deduct the amount so overdrawn from the salaries of the present state officers for the month of January, 1907.

As stated in my former opinion covering another phase of this salary question, the overdrafts, or over payment if that be a better term, occurred upon the retirement of the several state officers referred to six years ago, and cannot in any way affect the right of the present state officers to draw the full amount due them for the month of January, 1907. The deficiency in the salary fund should be covered by the present legislature.

It is therefore my opinion:

First: That there is no overdraft in the salary account of the present attorney-general, secretary of state as such, or as member of the executive council, treasurer of state as such, or as member of the executive council.

Second: That no deductions should be made from the salaries of these several officers for the month of January, 1907, on account of overdrafts in the salary account of former state officers.

Respectfully,
H. W. Byers,
Attorney-General of Iowa.

January 26, 1907.
Hon. B. F. Carroll,
Auditor of State.

Local Board of Health.—Fumigation—Expense of—Power of Board of Supervisors to Increase or Reduce Fees for.—It is the duty of the local board of health to attend to fumigation through its proper officers. Expense of fumigation and quar-

antine to be paid by public. The county to pay in first instance and to be reimbursed one-third by tax upon locality from which expense was certified. Board of supervisors has power to increase or reduce fees allowed in quarantinable diseases.

SIR:—I have the honor to acknowledge receipt of your communication of the 28th instant in which you request my opinion:

First. As to whose duty it is to fumigate after quarantine.

Second. As to who pays for fumigation.

Third. As to whether or not the county supervisors have the authority to reduce the fees allowed for services rendered in quarantinable diseases when properly certified by township trustees.

Under the quarantine laws of the state in force prior to the adoption of chapter one hundred eleven (111) acts of the thirty-first general assembly, all expenses for the care, nursing, medical assistance and supplies furnished a patient under quarantine was chargeable to the patient, all other expenses incurred in establishing, maintaining or raising a quarantine, including fumigation, was chargeable to the public.

Section 2570-a of the supplement to the code among other things provided:

> "When one or more persons shall be confined in a house, or pest house, or detention or other hospital, the local board of health shall ascertain the total amount of expense incurred for the care of such persons, which amount shall be equitably apportioned by the local board of health between the several persons cared for, and when so apportioned the president and clerk of said board shall certify to the county auditor the name of such person or persons and their proportionate share, and the county shall recover the same in any court of competent jurisdiction within the state, and the certificate of the president and clerk of said board shall be *prima facie* evidence of the amount furnished such person or persons. In case of the inability of any person or persons, or those liable for their support, to pay for the expenses incurred as provided in this section, such expense shall be paid by the county. * * * In the event that any of the expenses made as aforesaid shall be collected from private individuals after said tax has been levied on the property of the city, town or township, said city, town, or township shall have credited to them one-third of the amount so collected."

These provisions divding the expense of quarantine between the public and the persons quarantined lead to great confusion, and in many counties in the state to expensive litigation. This, together with the fact that a large number of the people of the state believed that the quarantine was for the benefit of the public, and that all its expenses should be paid by the public, created a strong sentiment for a change in the quarantine laws of the state. In response to this sentiment the legislature adopted chapter one hundred eleven (111) acts of the thirty-first general assembly. By this act all provisions in the then existing quarantine laws requiring the quarantined patient or patients to pay for care, nursing, medical assistance, supplies, etc., was repealed, and all of the expenses of quarantine made chargeable to the public.

Section 2571 of the code provided among other things:

> "All expenses incurred in the enforcement of the provisions of this chapter, when not otherwise provided, shall be paid by the town, city, or township; in either case all claims to be presented and audited as other demands. In the case of townships the trustee shall certify the amount required to pay such expenses to the board of supervisors of the county, and it shall advance the same, and, at the time it levies the general taxes, shall levy on the property of such township a sufficient tax to reimburse the county, which, when collected, shall be paid to and belong to the county."

Under this provision it was held, that the board of supervisors had no authority to revise the fees of a physician employed by a local board of health; that the action of the local board in fixing the fees and certifying them up to the board was binding on the county in all cases where the fees were payable by the county.

Chapter 111, however, above referred to, provides:

> "The local board of health shall allow an amount on such bills as shall be reasonable, and the certificate of the local board of health shall be *prima facie* evidence of the correctness of said bills, but the board of supervisors may revise the amount so allowed and fix the same."

Under this provision the board of supervisors is given the absolute power to revise all bills for expenses incurred in quarantine cases, they have the right to either increase or reduce the amount of the bills.

It is therefore my opinion:

First: That it is the duty of the local board of health, through its proper officer, to see that proper fumigation is had in all cases of quarantine.

Second: That the expense of fumigation, as well as all other expenses of the quarantine, is to be paid for by the public, the county to pay the bill in the first instance, and it to be reimbursed to the extent of one-third of the amount so paid by tax upon the property of the city, town or township from which such expenses were certified.

Third: That the board of supervisors have the authority to increase or reduce the fees allowed for services rendered in quarantinable diseases, even though the amount of the fees are fixed and properly certified by township trustees or other local boards of health.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

January 30, 1907.
F. W. POWERS, M. D.,
Waterloo, Iowa.

GAME WARDEN—DEPUTY—RIGHT UNDER LAW TO SEIZE PACKAGE SUPPOSED TO CONTAIN GAME.—Section 2539 of the code supplement provides for seizure of packages supposed to contain fish, birds or animals, neither warden or deputy would have right to seize same without warrant. If absolutely certain package for shipment contains such game not necessary to have warrant.

SIR:—I beg to acknowledge receipt of your communication of the 1st instant in which you request my opinion upon the question as to whether or not the game warden, or his deputy, have a right under the law without a warrant to seize and open packages believed to contain game birds being shipped out of the state contrary to law.

Section 2539 of the supplement to the code among other things provides:

> "It shall be the duty of the fish and game warden, sheriffs, constables, and police officers of this state to seize and take possession of any fish, birds, or animals which have been caught, taken, or killed at a time, in a manner, or for a purpose, or had in possession or under control, or have been shipped contrary to the provisions of this chapter. Such seizure may be made without a warrant."

Under this provision it is the duty of all officers who are required by the laws of this state to enforce the game laws to seize on sight any fish, birds, or animals which have been caught, taken, killed, had in possession or under control, or shipped contrary to law, and such seizure may be made without any warrant or process.

This section also provides:

> "Any court having jurisdiction of the offense, upon receiving proof of probable cause for believing in the concealment of any fish, birds, or animals, caught, taken, killed, had in possession, under control, or shipped contrary to any of the provisions of this chapter, shall issue a search warrant and cause a search to be made in any place therefor."

It is evident from the adoption of the last provision that it was contemplated by the legislature that there would be cases in which it would not be proper to permit the officer to act without a search warrant, and a careful reading of the two provisions leads to the conclusion that the first one was intended to cover all cases in which the fish, birds, or animals were in sight, and the unlawful possession evident; while the second was intended to cover all cases in which the fish, birds, or animals were concealed or secreted, and it is my opinion that neither the warden, nor his deputies, have the right under this section to seize and open packages believed to contain game birds being shipped out of the state contrary to law. I do not, however, wish to be understood as holding that if the game warden, or one of his deputies, knew that in a particular package about to be shipped, there was concealed game birds to be shipped contrary to law, that he would be bound to first secure a warrant before he could seize the package and take possession of the game. What I do hold is, that for his own protection in all cases of concealment where the warden, or his deputy, is not absolutely certain that the package, or packages, contain fish, birds, or animals the possession of which would be unlawful no action should be taken without a search warrant.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

February 6, 1907.
HON. GEO. A. LINCOLN,
Game Warden.

INTOXICATING LIQUORS—VALIDITY OF CERTAIN PROVISIONS OF SENATE FILE NO. 52 OF THIRTY-SECOND GENERAL ASSEMBLY.

SIR: Some days ago you requested my opinion as to the validity of the following provisions contained in senate file No. 52:

First. The provision prohibiting the removal of intoxicating liquor shipped under certain circumstances more than one hundred feet from the point at which such liquor is delivered by the carrier company.

Second. The provision making it unlawful for any person receiving such liquor from the express company, or common carrier, to give the same or any part thereof to any other person.

Third. The provision prohibiting the delivery of such liquor to any one except the consignee.

Fourth. The provision fixing the title to the liquor in the person receiving it from the express company.

I have examined these several provisions with as much care as was possible under the circumstances, and have no doubt whatever as to the validity of the first, second and fourth provisions.

The third provision in so far as it is intended to apply to interstate shipments would, in my judgment, be in violation of section eight (8) article one (1) of the constitution of the United States.

It is therefore my opinion:

First. That the first, second and fourth provisions above referred to if enacted into law would be valid.

Second. That the third provision would be valid as to all shipments made between points wholly within the state, and invalid as to all interstate shipments.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

February 11, 1907.

SENATOR JAMISON,
Senate Chamber.

REQUISITION—GRANTED ONLY IN CASES OF TREASON OR FELONY.—The term "or other crime" used in federal constitution and statutes, left out of Iowa statute. Not the duty of the governor nor has he the authority to grant requisition for misdemeanor.

SIR: I beg to acknowledge receipt of your communication of the 15th instant in which you request my opinion upon the following question:

"Have I the authority or is it my duty, upon proper application, to issue a requisition for the return of a fugitive charged with a misdemeanor?"

Section two (2) of article (4) of the constitution of the United States among other things provides:

"A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

Section 5278 of the revised statutes of the United States provides, that:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty," etc.

Under the foregoing provisions it has been held that:

"The word 'crime' of itself includes every offense from the highest to the lowest,—'misdemeanors' as well as treason and felony."

Kentucky v. Dennison, 24 How., 66.
Ex Parte Reggel, 114 U. S., 642.

Section nine (9) of article four (4) of the constitution of Iowa provides, that:

"He (the governor) shall take care that the laws are faithfully executed."

If there were no statutory limitations upon the power of the governor to act under the foregoing provisions he would undoubtedly have the authority to issue, upon proper application a requisition for the return of a fugitive charged with a misdemeanor, but as to whether or not it is his duty to do so depends entirely upon what the legislature has authorized him to do in the way of enforcing the laws of the state by procuring the return of criminals who have fled to another jurisdiction. Without some act of the legislature the governor, as such, would be powerless to

enforce his demand upon a sister state under the authority given in the section of the revised statutes of the United States above referred to, for the reason that the governor of a state has only such powers as are given him by the constitution and laws of the state. True, the constitution of Iowa requires the governor to see to it that the laws are faithfully executed, but the manner and method of enforcement is left entirely to the legislature, and the provision which controls in respect to the question submitted is found in section 5169 of the code, which provides:

> "The governor, in any case authorized by the constitution and laws of the United States, may appoint agents to demand of the executive authority of another state or territory, or from the executive authority of a foreign government, any fugitive from justice charged with treason or felony."

It will be noticed that the term "or other crime" as used in both the federal constitution and section 5278 of the revised statues quoted above is omitted from this section, and the governor's power to act thereunder is limited to the charge of treason or felony. The plain intent, it seems to me, of the legislature being to avoid the expense and annoyance incident to the return of fugitives whose offense is not greater than a misdemeanor.

It is therefore my opinion, that you do not have the authority nor is it your duty, to issue a requisition for the return of a fugitive charged only with a misdemeanor.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

February 18, 1907.
HON. ALBERT B. CUMMINS,
Governor of Iowa.

TEACHERS' CERTIFICATE—LEGAL LICENSE IN AND FOR COUNTY IN WHICH ISSUED.—A teacher's certificate issued under Section 2737 of the code which was repealed by chapter 122 acts of thirty-first general assembly, is not cancelled by repeal of statute, can only be revoked for cause.

SIR: I beg leave to acknowledge receipt of your communication of the 13th instant in which you request my opinion as to whether or not, a certificate issued prior to October 1, 1906, under authority of section 2737 of the code, and which has not expired by limitation, is a legal license in and for the county within which such certificate is issued.

Section 2737 of the code provides for the issuance of a certificate upon proper showing, and for its revocation under certain circumstances.

A teacher holding a certificate under this section is authorized to contract to teach school in the county where the certificate was issued for the full time stated therein, unless by some later act of the legislature the certificate has been cancelled or annulled.

Chapter 122 laws of the thirty-first general assembly repeal section 2737, and provides that the act shall take effect and be in force on and after October 1, 1906, but there is nothing in it that in any manner cancels or annuls certificates issued under said section, and which are still in force when the act becomes effective, in fact, no reference whatever is made to them, so that the whole question turns upon the proposition as to whether or not the repeal of the section under which the certificates in question were issued amounted to a revocation or cancellation of them.

Paragraph one (1) of section forty-eight (48) of the code provides, that:

> "The repeal of a statute does not revive the statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the staute repealed."

The certificates in question gave to the holders the absolute right, subject only to revocation for cause, to teach school for the full period covered by their terms, and this right vested at once upon the issuance and delivery of the certificates and could not be taken away by the mere repeal of the section under which they were granted or issued; in fact, the rights of the holders when once the certificates became operative stood independently of the statute and could not be changed by subsequent legislation, but even if this were not true, consideration of public policy would forbid any other construction upon the force and effect of chapter 122 laws of the thirty-first general assembly.

I do not hesitate therefore, to answer your question in the affirmative.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

February 18, 1907.
HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

STATE COLLEGE OF AGRICULTURE AND MECHANIC ARTS—ACTING AS TRUSTEE—FUND OBTAINED FROM HOLDER OF BURIAL LOTS.—Chapter 144 acts of thirty-first general assembly permits colleges to act as trustee of fund received from holders of burial lots and expend income from such funds in keeping up grounds of cemetery.

SIR: I beg to acknowledge receipt of your letter of the 15th instant requesting my opinion upon the following question:

> "Can the college act as trustee of funds deposited by holders of burial lots upon lands belonging to the college, but formerly set aside for this purpose for the benefit of the professors and their families, the income upon such funds to be used in keeping up the cemetery lots and grounds."

Until the session of the thirty-first general assembly no provision had been made by the legislature of this state authorizing state institutions either to accept gifts, or act as trustees. That body enacted chapter 144 laws of the thirty-first general assembly which provides:

> "Gifts, devises or bequests of property, real or personal, made to any state institution for purposes not inconsistent with the objects of such institution, may be accepted by its governing board, and such board may exercise such powers with reference to the management, sale, disposition, investment or control of property so given, devised or bequeathed, as may be deemed essential to its preservation and the purposes for which the gift, devise or bequest was made."

This provision, in my opinion, is broad enough to cover the question submitted. Your question therefore is answered in the affirmative.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

February 20, 1907.
VINCENT SMUNT, ESQ.
Member Board of Trustees of the Iowa State College, Ames, Iowa.

PUBLIC SCHOOLS—NO TUITION CHARGE TO ACTUAL RESIDENTS OF DISTRICT.—The only limitations section 2773 of the code places on children attending public school free of tuition, are age and actual residence in school district.

SIR: Some days ago you submitted to me some correspondence between yourself and the school officers of the Stanton independent school district, and also some correspondence with the state superintendent, and requested my opinion as to whether or not the children in the Swedish Evangelical Lutheran Orphans Home of Iowa, located, as I understand it, within the independent school district of Stanton, have the right to attend the public school in that district over the objection of the school officers, and without payment of tuition.

Section 2773 of the code among other things provides:

> "Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years."

It will be noticed that under this provision the only limitation, aside from that of age, of the pupils' right to attend the public school is that of actual residence. Your question then turns entirely upon the point as to whether or not these children are actual residents of the independent school district of Stanton, and basing my opinion upon the information contained in the papers you left with me, I would say they are such residents.

I am therefore of the opinion that your question will have to be answered in the affirmative.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

February 20, 1907.
HON. F. F. JONES,
House Chamber.

STATE BANK—EXTENT OF INDEBTEDNESS ALLOWED—SECTION 1611 OF THE CODE CONSTRUED.

SIR: Referring to your recent request for my opinion as to whether or not the limit of indebtedness referred to in section 1611 of the code applies to state banks, I have to say, that that section in so far as it is material to the inquiry provides as follows:

> "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, except risks of insurance companies and liabilities of banks not in excess of their available assets, not including their capital, shall exceed two-thirds of its capital stock."

It will be noticed that the exception, in so far as it refers to banks, limits the indebtedness of the bank over and above its avail-

able assets, not including capital, to two-thirds of its capital stock, to illustrate:

A bank with sixty thousand dollars capital, two hundred thousand dollars in liabilities, including deposits, and with bills receivable and other available assets to the amount of two hundred thousand dollars, would under this section be permitted to borrow forty thousand dollars; on the other hand, a bank with sixty thousand dollars capital, two hundred thousand dollars liabilities including deposits, total bills receivable and other available assets one hundred fifty thousand dollars, would be ten thousand dollars above the limit.

I am of the opinion therefore, that the exception clause in this section exempts banks from the two-thirds rule only to the extent of their available assets, beyond that they are subject to the rule the same as other corporations.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

February 25, 1907.
HON. JOSEPH H. ALLEN,
Senate Chamber.

COMPULSORY EDUCATION—AGE LIMIT—DUTY OF PARTY HAVING CONTROL OF CHILD.—Under the provisions of section 2823-a code supplement a person having control of child would be required to send it to school the required time during its fourteenth year.

SIR: Replying to your recent request for my opinion as to the proper interpretation of section 2823-a of the supplement to the code, I have to say, that that section so far as it is material to the inquiry provides as follows:

> "Any person having control of any child of the age of seven to fourteen years inclusive, in proper physical and mental condition to attend school, shall cause such child to attend, etc."

It is my opinion that under this provision the person in control of the child would be bound to send it to school for the time required in the section during its fourteenth year.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

February 25, 1907.
HON. J. L. WILSON,
Senate Chamber.

APPROPRIATIONS—VOTE REQUIRED FOR MAKING.

SIR: I beg to acknowledge receipt of your communication of the 26th instant in which you call my attention to Senate File No. 158, and in which you request my opinion as to how many affirmative votes are necessary to the passage of the bill. In response to such request I submit the following opinion:

The bill is as follows:

A BILL

"FOR AN ACT making an additional appropriation to pay the remainder of the expenses of the members of the Iowa Shiloh Battle Field Monument Commission, the Iowa Lookout Mountain and Missionary Ridge Monument Commission, the Iowa Vicksburg Park Monument Commission, and the Iowa Andersonville Prison Monument Commission, upon their joint visit to dedicate the monuments erected by the state of Iowa upon southern battlefields and at Andersonville.

"*Be It Enacted by the General Assembly of the State of Iowa:*

"Section 1. There is hereby appropriated out of any moneys in the state treasury, not otherwise appropriated, the sum of one thousand dollars ($1,000.00), or so much thereof as may be necessary to pay the remainder of the expenses of the members of the Iowa Shiloh Battlefield Monument Commission, the Iowa Lookout Mountain and Missionary Ridge Monument Commission, the Iowa Vicksburg Park Monument Commission, and the Iowa Andersonville Prison Monument Commission incurred upon their joint visit to dedicate monuments erected by the state of Iowa upon southern battlefields and at Andersonville. Before the said payment is made the executive council shall approve the accounts for said expenses, and when approved the auditor shall draw his warrants therefor.

"Sec. 2. This act being deemed of immediate importance shall take effect from and after its passage and publication in the Register and Leader and Des Moines Daily News, newspapers published at Des Moines, Iowa."

Section 17 of article 3 of the constitution 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 final passage shall be taken immediately upon its last reading and the ayes and nays entered on the journal."

Section 31 of the same article of the constitution provides:

"No extra compensation shall be made to any officer, public agent or contractor after the service shall have been rendered or the contract entered into; nor shall any money be paid on any claim the subject matter of which shall not have been provided for by preexisting laws, and no public money or property shall be appropriated for local or private purposes unless such appropriation, compensation or claim be allowed by two-thirds of the members elected to each branch of the general assembly."

If the passage of the bill in question is controlled by the provisions of section 17 above, then its passage would require a bare majority, if, however, it comes within the provisions of section 31 article 3 of the constitution, its passage would require an affirmative vote of two-thirds of the members elected to each branch of the general assembly, so that it becomes important to determine what relation, if any, the bill in question has to this section.

The section may properly be divided into three parts or divisions:

First. To allow extra compensation to any officer, public agent or contractor after the service shall have been rendered or the contract entered into, would require a two-thirds vote.

Second. To appropriate money to pay on any claim the subject matter of which shall not have been provided for by preexisting laws requires a two-thirds vote.

Third. To appropriate money for local or private purposes requires a two-thirds vote.

The bill in question is taken out of the first part or division of the section, for the reason that it no where provides for compensation to any officer, public agent or contractor.

It is not controlled by the second division for two reasons: first, because it is not such a claim as is contemplated by the section; and, second, the subject matter has been provided for by preexisting laws.

The third division is in no way applicable, for the reason that the bill does not in any sense contemplate an appropriation for local or private purposes.

I am therefore of the opinion that but fifty-five affirmative votes are necessary to the passage of the bill in the house.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

February 26, 1907.
HON. N. E. KENDALL,
Speaker of the House.

FACTORIES—SUPERINTENDENTS OF.—Chapter 149 of acts of twenty-ninth general assembly creates liability, where machinery is used and safety appliances required, on the part of the owner, agent, superintendent or person having charge of the machinery. Under this provision a manager of a factory, after being notified to put in the appliances and neglecting to do the same, would be liable to the penalty provided.

SIR: I beg to acknowledge receipt of your communication of the 1st instant in which you say, "On March 15, 1906, a written notice was served on Mr. Hugh Davey, as manager of Davey Manufacturing Company of Mason City, to guard certain machinery as follows: 'Place guard on jointer, also on one rip saw, place guard on band saw, protect projecting set screws on shafting, guard gears on two small drill presses, and provide guard railing to elevator shaft.' On June 1st the Davey Manufacturing Company sold out to the Weir Wardrobe Company, Mr. Davey being retained as foreman of the factory. Factory was closed until about September 1st, was then started with Mr. Davey in charge, but orders of inspector requiring protection of machinery was disregarded with exception of some of the minor details. On February 27, 1907, other machines were still unguarded, in the meantime one man was badly injured. Mr. Davey left the employment of the Weir Wardrobe Company January 1, 1907, and is now in Des Moines in employment of another company"; and in which you request my opinion as to whether or not you can hold the said Hugh Davey for violation of the law in failing to guard machinery in question under the circumstances mentioned.

In response thereto I submit the following opinion:

Section two (2) of chapter 149 laws of the twenty-ninth general assembly among other things 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 and supply or cause to be furnished and supplied therein, belt shifters or other safe mechanical contrivance for the purpose of throwing belts on and off pulleys; and, wherever possible, machinery therein shall be provided with loose pulleys; *all saws, planers, cogs, gearing, belting, shafting, setscrews, and machinery of every description therein shall be properly guarded.*"

Section four (4) of the same chapter in so far as it is material to the inquiry here provides:

"It shall be the duty of the commissioner of the bureau of labor statistics of the state to enforce the provisions of the foregoing sections. * * * * * * * Any person, whether acting for himself or for another, or for a co-partnership, joint stock company, or corporation, having charge or management of any manufacturing establishment, workshop or hotel, who shall fail to comply with the provisions of said section within ninety days after being notified in writing to do so, by any one of said officers whose duty it may be to enforce the provisions of said section, shall be punished by fine not exceeding one hundred dollars or by imprisonment in the county jail not exceeding thirty days."

Under these provisions, if the facts are as stated in your communication, Mr. Davey has undoubtedly laid himself liable to the penalty provided in section four (4).

Your question is therefore answered in the affirmative.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

March 1, 1907.
ALFRED SHEPHERD, ESQ.,
Deputy Commissioner.

STATE INSTITUTIONS—INMATES DYING INTESTATE—DISPOSAL OF MONEY OR CREDITS THEY MAY HAVE.—1st. The heads of the state institutions in case an inmate dies intestate, has the right to endorse and collect certificate of deposit, drafts and checks, deposited with him or found among the intestate's effects.

2d. The money cannot be used by the head of the institution where an inmate dies, in defraying funeral expenses.

3d. The money thus collected must be transmitted to the treasurer of state at the end of one year.

SIR: I beg to acknowledge receipt of your communication of the 7th instant in which you state:

"It sometimes happens that inmates of state institutions under our control die intestate, without leaving surviving spouse or heirs so far as known to us, and having in their possession bank certificates of deposit, drafts or checks payable to their order. This paper may be deposited with the head of the institution, but is more apt to be found among the effects of the decedent after his death. The sums represented by such paper are usually too small to justify the expense of administration. Several cases of this kind are now before us."

And in which you ask:

"Is there authority under chapter 112, acts of the thirtieth general assembly or other provisions of law for the endorsement and collection of such paper by the heads of institutions of which the inmates were members or other officer, without formal administration to use it in paying funeral expenses or to remit it to the treasurer of state, if not, does the law of escheat apply?"

In response thereto I submit the following opinion:

Section 1 of chapter 112 provides:

"That when an inmate of any state institution under the control of the board of control of state institutions dies intestate, leaving money on deposit with the chief executive or other officer of the institution, and administration of the estate of such intestate is not granted and no surviving spouse or heirs are known to the officers of the institution or are ascertained although diligent search for them be made, the money so left shall be transmitted to the treasurer of state at the end of one year from the death of the intestate and shall be credited to the support fund of the institution from which it was sent. A complete permanent record of the money so sent, showing by whom and with whom it was left, its amount, the date of the death of the owner, his reputed place of residence before he became an inmate of the institution, the date on which it was sent to the state treasurer and any other facts which may tend to identify the intestate and explain the case shall be kept by

the chief executive officer of the institution and a transcript thereof shall be sent to and kept by the treasurer of state."

Section two provides a method by which the money may be secured by any person who may be entitled to the same at any time within ten years from the death of the intestate.

The purpose of this act is two-fold:

First. To designate a depository in which money left under the circumstances stated in section one may be preserved for the persons entitled thereto if called for within ten years from the death of the intestate; and,

Second. If not so called for to vest the title to the money in the state absolutely.

The legislature in passing this act undoubtedly had in mind just such cases as you suggest in your letter, and while the act does not in so many words cover certificates of deposit, drafts and checks, nor the endorsement and collection thereof by the head of the several institutions, it is my judgment that the language used is broad enough to authorize these officers to do whatever may be necessary to secure the money and deposit it with the state treasurer. To say that the language, "leaving money on deposit with the chief executive or other officer of the institution," limited the authority of the chief executive or other officer of the institution to cash actually in the possession and on deposit with such officer, would be a narrow construction and one not at all in harmony with the purpose and intent of the legislature.

I am therefore of the opinion:

First. That the heads of the several institutions referred to have the authority under chapter 112, acts of the Thirtieth General Assembly, to endorse and collect bank certificates of deposit, drafts or checks either on deposit with such officers or found among the effects of the inmate after his death.

Second. That money in the form of bank certificates of deposit, drafts and checks left under the circumstances stated in your communication cannot be used by the heads of the several institutions in paying funeral expenses.

Third. That all money so collected must at the end of one year from the death of the intestate be transmitted to the treasurer of state.

Respectfully,

H. W. BYERS,

Attorney-General of Iowa.

March 8, 1907.

HON. G. S. ROBINSON,

Board of Control.

SEAL OF THE STATE OF IOWA. AUTHORITY OR DUTY OF GOVERNOR TO USE SAME.—All grants and commissions issued in the name of the state and by the authority of the people shall be sealed with the state seal and signed by the governor and countersigned by secretary of state. Governor would have no more authority to attach the seal to an instrument of the character requiring it that had been issued under a former administration than he would have to sign the name of the governor who issued the document.

SIR: I beg to acknowledge receipt of your communication in which you request my opinion as to whether or not you have the authority to attach the seal of the State of Iowa to a patent issued in 1854.

In response thereto I submit the following:

Section twenty (20) of article four (4) of the constitution of Iowa provides:

"There shall be a seal of this state, which shall be kept by the governor, and used by him officially, and shall be called the great seal of the State of Iowa."

Section twenty-one (21) of the same article is as follows:

"All grants and commissions shall be in the name and by the authority of the people of the State of Iowa, sealed with the great seal of the state, signed by the governor and countersigned by the secretary of state."

Under these provisions of the constitution it was the duty of the then governor to affix the great seal of the State of Iowa to the patent in question.

An examination of the records in the land office show that the patent when recorded in the records of that office did have the seal attached, and a careful and close inspection of the patent itself shows that a seal was at one time affixed, traces of the impression of the same are still discernible, in fact, the circle and some of the cross lines of the seal can be seen with the naked eye, and by using a glass the letters "ea" of the word "seal" can be easily seen; so that in my judgment nothing further is needed on this patent in the way of a seal, but however that may be, it is my opinion that you would have no more authority to attach the seal of the State of Iowa to this paper if the seal had been omitted originally than you would have to sign the then governor's name to the patent if his signature had been omitted.

The enclosures referred to in your letter are herein returned to you.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

March 8, 1907.

HON. ALBERT B. CUMMINS,
Governor of Iowa.

STATE BOARD OF MEDICAL EXAMINERS—GRADUATES OF OSTEOPATHIC SCHOOLS MEETING REQUIREMENT FOR EXAMINATION. A substantial compliance with section 2583-a code supplement all that required.

SIR: I beg to acknowledge receipt of your communication of the 18th instant accompanied by certain affidavits and certificates of the president of the Still College of Osteopathy located at Des Moines, Iowa, and in which you say:

"I herewith submit an affidavit received from the secretary of the Still College of Osteopathy, Des Moines, Iowa. From this, you will see that only certain members of the class graduated by this institution in January 1907, have complied with the requirements of the state board of medical examiners, relative to anatomy and dissection.

Will you kindly give me your opinion upon the following points:

1st. In view of the facts set forth in the accompanying affidavits, is the above mentioned college entitled to recognition as being in good standing with the state board of medical examiners upon and after graduation of the class of January 1907?

2d. As secretary of the state board of medical examiners, have I authority to admit to examination graduates of the class of January 1907, of the above mentioned college, who according to the affidavit on file, have complied with the requirements of this board, and to exclude those of the same graduating class, who according to the affidavit, have failed to fulfill all the requirements as to dissection, etc., required by the state board of medical examiners.

3d. If, in your opinion, the above mentioned college is not now in good standing according to the requirements of this board, is it necessary that the board should pass upon the present standing of said college before any of its graduates are admitted to examination?

An early reply will greatly oblige."

In response thereto I submit the following opinion:

Section 2583-a of the supplement to the code in so far as it is material to the inquiry here provides:

> "Any person holding a diploma from a legally incorporated school of osteopathy, recognized as of good standing by the Iowa Osteopathic association, and wherein the course of study comprises a term of at least twenty (20) months, or four (4) terms of five (5) months each, in actual attendance at such school, and which shall include instruction in the following branches, to-wit: Anatomy including dissection of a full lateral half of the cadaver, physiology, chemistry, histology, pathology, gynecology, obstetrics, and theory of osteopathy and two full terms of practice of osteopathy, shall, upon the presentation of such diploma to the state board of medical examiners and satisfying such board that he is the legal holder thereof, be granted by such board an examination on the branches herein named, (except upon the theory and practice of osteopathy until such time as there may be appointed an osteopathic physician on the state board of health and of medical examiners). The fee for said examination, which shall accompany the application, shall be ten dollars ($10.00) and the examination shall be conducted in the same manner, and at the same place and on the same date that physicians are examined as prescribed by section twenty-five hundred and seventy-six (2576) of the code. The same general average shall be required as in cases of physicians; provided that osteopaths who are graduates of legally incorporated schools of osteopathy as above recognized, and who are at the time of the passage of this act engaged in the practice of osteopathy in Iowa, shall be entitled to receive a certificate upon the payment of the prescribed fee without such examination. Upon passing a satisfactory examination as above prescribed the said board of medical examiners shall issue a certificate to the applicant therefor, signed by the president and secretary of said board, which certificate shall authorize the holder thereof to practice osteopathy in the state of Iowa."

Under this section a substantial compliance with its terms is necessary in order to entitle a graduate of a college of osteopathy to demand the examination provided for.

An examination of the affidavit accompanying your communication shows that every requirement of the section referred to was strictly complied with, except the provision requiring dissection of a full lateral half of a cadaver. Failure to comply with this provision is claimed to be due to the scarcity of dissecting material. It is a matter of common knowledge that such material is not always at hand, and I am inclined to the opinion that under all the circumstances of this case it is shown that the law has been substantially complied with.

I am therefore of the opinion:

First. That the college mentioned in your communication is entitled to recognition as in good standing after graduation of the class of January, 1907, in so far as any matter shown in the affidavit above referred to affects the standing of said college.

Second. That as secretary of the state board of medical examiners you would not have the authority to exclude from examination any of the graduates referred to in the affidavits.

I return you herewith affidavit and certificate.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

March 18, 1907.

DR. LOUIS A. THOMAS,
Secretary State Board of Medical Examiners.

INSANE PERSON—DOMICILE OF.—A years residence in any county without notice or warning to quit will acquire a settlement for a person who is a county charge. Such person cannot lose his residence in one place until settlement is acquired in another. The losing of a legal settlement does not depend so much upon the intent of such a person as upon the actual fact of residence.

SIR: I beg to acknowledge receipt of your favor of the 11th instant in which you say;

"A person now insane and in the custody of officials in Chicago, was born and raised in Iowa county, in this state, and resided therein continuously until about July 15, 1905. She then went from that county to Davenport where she remained until April or May, 1906. She then stored her goods in Davenport and went to Chicago where she has since resided. The intent as to residence with which she went to Davenport and from there to Chicago does not appear certainly, although some evidence tends to show she intended to abandon permanently her settlement in Iowa county. The Chicago authorities deny that she has acquired a legal settlement in the state of Illinois, and demand that she be received in this state. Iowa county claims that she has lost her legal settlement therein and denies liability for her support. Scott county denies liability on the ground that she never acquired a legal settlement therein.

"Similar cases are frequently presented to us for determination. We desire your opinion in regard to the following:

"1. Has the person referred to lost her legal settlement in this state, and if she has not, which county is liable for her support?

"2. Does a person having a legal settlement in this state who leaves his place of settlement and moves to another county of the state or another state, lose that legal settlement under the laws relating to the poor before acquiring a legal settlement elsewhere?

"3. To what extent does the losing of a legal settlement once established and the acquiring of another depend upon the intent as to a place of residence with which the change is made?

"4. What length of time is required under the law relating to the poor to lose a legal settlement once established in this state; to acquire a new legal settlement?"

In response thereto I submit the following:

The questions submitted are controlled by the provisions of chapter 1, title 12, of the code relating to settlement and support of the poor.

Section 2224 of that chapter in so far as it is material to the inquiry here provides:

"A legal settlement once acquired continues until lost by acquiring a new one, and may be acquired as follows:

"1. Any person having attained majority, and residing in this state one year without being warned as hereinafter provided, gains a settlement in the county of his residence;

"2. A married woman follows and has the settlement of her husband, if he have any within the state, and if she had a

settlement at the time of the marriage it is not lost by the marriage;

"3. A married woman abandoned by her husband may acquire a settlement as if she were unmarried."

It has been held that the provisions of this section are applicable to the case of an insane person who becomes a county charge.

Scott County vs. Polk County, 61 Iowa, 616.

Therefore, under this section and the holding of the supreme court in the Scott county case above cited at the time the person in question removed from Iowa county to Scott county her legal settlement was in Iowa county, and would remain there until she gained a legal settlement in some other county.

Section 2226 of the code provides:

"Persons coming into the state, or going from one county to another, who are county charges or are likely to become such, may be prevented from acquiring a settlement by the authorities of the county, township or city in which such persons are found warning them to depart therefrom. After such warning, such persons cannot acquire a settlement except by the requisite residence of one year without further warning."

Section 2227 of the code is as follows:

"Such warning shall be in writing, and may be served upon the order of the trustees of the township, or of the board of supervisors, by any person; and such person shall make a return of his doings thereon to the board of supervisors, which, if not made by a sworn officer, must be verified by affidavit."

Assuming that no steps were taken by Scott county as provided in sections 2226 and 2227 above quoted to prevent the person in question from acquiring a legal settlement in that county, the question as to whether or not she gained a legal settlement then in Scott county would depend upon the condition of her mind when she removed from Scott county to Chicago, that is to say, if she was sane when she left Davenport for Chicago not having resided in Scott county a full year her legal settlement was still in Iowa county, if, however, she was insane when she left Scott county for Chicago, then her legal settlement would be in Scott county, assuming of course, that she was sane when she left Iowa county.

This identical question has been settled by the courts of this state and it is uniformly held that, when a person once acquires a

domicile in a county and before acquiring a legal settlement becomes insane the insanity will not prevent the person acquiring a settlement.

Washington County vs. Mahaska County, 47 Iowa, 57.
Fayette County vs. Bremer County, 56 Iowa, 516.
Scott County vs. Polk County, supra.

"The residence in a county necessary to establish a settlement therein must be personal presence in a fixed and permanent abode, or of a character indicating permanency of occupation as distinct from lodging, boarding or temporary occupation."

County of Cerro Gordo vs. County of Wright, 50 Iowa, 439.

My conclusions upon the facts as stated by you, and the law as I find it, are;

First. That the person referred to has not lost her legal settlement in this state, and,

(a) If she was insane when she left Davenport she has acquired a legal settlement there, and that county would be liable for her support.

(b) If she was sane when she left Davenport then her legal settlement is still in Iowa county, and that county would be liable for her support.

Second. That a person having a legal settlement in this state who leaves his place of settlement and moves to another county of the state, or to another state, does not lose that legal settlement under the laws relating to the poor before acquiring a legal settlement elsewhere.

Third. That the losing of a legal settlement does not depend so much upon the intent as to a place of residence as it does the actual fact of residence or personal presence in a fixed place of abode.

Fourth. Under the laws of this state relating to the poor a person who has attained majority gains a legal settlement in a county where he resides a full year without warning to leave, and loses that legal settlement by moving to another county and remaining there a full year without the warning referred to in section 2226 of the code.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

March 19, 1907.
HON. G. S. ROBINSON,
Member Board of Control State Institutions.

PAY OF SOLDIERS RAISED BY THE STATE FOR THE UNITED STATES.—Construction placed on chapter 81, acts of the tenth general assembly, holding same still in force.

SIR: I beg leave to acknowledge receipt of your communication in which you say;

> "I have the honor to submit for your opinion chapter 81, an act of the tenth general assembly, 'to provide for the payment of the just claims of certain officers and soldiers of Iowa regiments for military services.' Is this act still in force, and would a claim made in compliance with this act be a lawful claim against the state, and would payment be authorized under its provisions."

In response thereto I have to say, that in my opinion the act is still in force. This being true it follows that your other questions must be answered in the affirmative.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

March 25, 1907.
HON. W. H. THRIFT,
Adjutant-General of Iowa.

PARDONS—POWER OF GOVERNOR TO GRANT—LEGISLATIVE LIMITATION.—The governor has power to grant reprieves, commutations and pardons for all offenses except treason and impeachment; and in cases of murder in the first degree he shall grant no pardon until he has presented the matter to the general assembly and received their advice thereon. The legislature advises, in such cases, a pardon be granted and the governor fixes the terms of the pardon.

SIR: I beg to acknowledge receipt of your communication of the 27th instant in which you say:

> "I hand you a copy of the resolution of the general assembly, under which a conditional pardon was issued to Otto Otten. Application is now made for an absolute pardon. Have I the power, under the law and this resolution, to grant, without further action of the legislature, an absolute pardon?"

In response thereto I submit the following opinion:

Section 16 of article IV of the constitution, in so far as it affects the question submitted, provides:

> "The governor shall have the power to grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law."

Under this constitutional provision it has been held that the governor has the absolute power to grant pardons upon such terms and conditions as he may deem proper, and the only regulation or limitation upon that power provided by law in this state is found in section 5626 of the code, wherein it is provided:

> "After conviction of murder in the first degree, no pardon shall be granted by the governor until he shall have presented the matter to and obtained the advice of the general assembly thereon."

Under the law then, as I read it, where the applicant for pardon has been convicted of murder in the first degree the legislature in the first instance decides whether a pardon should be granted or not. If the decision is favorable to the pardon, then the power to dictate the terms and conditions is lodged in the governor, and he may either grant an absolute or conditional pardon as to him seems proper.

True, in this case the resolution passed by the twenty-ninth general assembly recommended a *conditional* pardon. It is perfectly evident, however, that in using the term "conditional pardon" it was not the intent of the legislature to limit in any way the power of the governor to fix the terms and conditions of the pardon. This is put beyond question by the last clause in the resolution which reads; "upon such terms and conditions as the governor may prescribe," and a fair construction of the resolution is to say that the legislature intended to do only that which the law authorized it to do, that is, advise the governor to grant the pardon, leaving the terms and conditions to be fixed by him.

I am therefore of the opinion that you have the power to grant the said Otto Otten an absolute pardon without further action of the legislature.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

March 28, 1907.
HON. ALBERT B. CUMMINS,
Governor of Iowa.

EXECUTIVE COUNCIL—APPOINTMENT OF COMMISSIONER IN LAKE DRAINAGE CASES—PAYMENT OF EXPENSE CREATED BY SUCH COMMISSIONER.—Chapter 186, acts of the 30th general assembly gives the executive council power to appoint commissioners to take evidence in lake drainage cases, and that the expense shall be audited by the executive council and certified to the auditor and paid out of general fund.

SIR: I beg to acknowledge receipt of your communication of March 30th in which you say:

"On the 20th day of May, 1905, the executive council issued a commission to William Hazlett, Pocahontas county, authorizing him to conduct a hearing, under the provisions of chapter 186, acts of the thirtieth general assembly, in the matter of the petition for the drainage of Swan Lake at Laurens, Iowa.

"In that commission said Hazlett was, by the executive council, authorized to do all things that a commissioner appointed as required by law would be authorized to do in the premises and that 'said William Hazlett is hereby commissioned to grant hearings to such persons as shall make application, under the provisions of a notice given, and to continue such hearings until the completion of same.' From the facts presented to the executive council the commissioner appointed one F. M. Ely, a shorthand reporter, to take down the testimony and agreed that he should receive a compensation of ten ($10.00) dollars per day with compensation for extending his notes, as per bill filed by said Ely with the executive council. The executive council paid said Ely six ($6.00) dollars per day for the time claimed and for extending the notes the rate named in the statute for court reporters, amounting in the aggregate in the neighborhood of one hundred and fifty ($150.00) dollars, as stated in the attached letter of Mr. Ely. His claim aggregated something like two hundred and eighty-five ($285.00) dollars.

"The executive council requests your opinion as to the limit under the law to which the executive council would be authorized to make payment upon this claim. Mr. Ely is insisting that he should be paid the full amount claimed, under the agreement of the commissioner to pay upon the basis of his charge. The executive council desires to pay a further amount if authorized to do so by law."

Chapter 186, acts of the thirtieth general assembly authorizes the executive council, in effect;

First. To determine what lakes shall be maintained as the property of the state, and what lakes, if any, shall be drained and sold.

Second. Through the governor to appoint an engineer to make a survey and plat when proper petition is filed with the executive council as provided in section 2.

Third. To take evidence itself upon any and all questions involved in the determination to either maintain or sell such lake or lakes, or to appoint a commissioner to take such evidence.

Fourth. To sell such lake beds as they may determine under the evidence and showing ought to be sold.

Fifth. Such sale to be made only after proper appraisement.

The act further provides that all expenses made in carrying out its provisions shall be audited by the executive council, certified by it to the auditor of state, and paid out of the general fund of the state treasury upon his warrant.

There is nothing in the act in any manner limiting the compensation or fees that may be allowed by the executive council to the persons who are selected by it to perform the services required to be done in carrying out its provisions, nor is there any general statute limiting the amount that may be paid or allowed for such services.

In this situation the council is bound only by the general rule of reasonable compensation under all the circumstances. It is true that the compensation of shorthand reporters when engaged in the business of reporting court proceedings in this state is limited to six ($6.00) dollars a day, and for transcripts to six (6) cents per one hundred words. This, however, is compensation for what may be said to be permanent employment, and could not be used as a fixed rule for measuring the value of services performed under the circumstances stated in your letter. In addition to this there is a question of good faith and fair dealing involved in this controversy. The commissioner was authorized by the executive council to grant hearings to persons making application therefor and such hearings necessarily involved the taking of testimony and having the same put in form to be reported to the council. If the commissioner acted in good faith, as I have no doubt he did, in making his contract with Mr. Ely, the obligation should be promptly met by the state.

In my opinion, under the act in question if the executive council in auditing the bill finds that the services have been performed as claimed by Mr. Ely it should certify the same to the auditor of state for payment in full.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

April 1, 1907.
A. H. DAVISON, ESQ.,
Secretary of Executive Council.

CITIES AND TOWNS—FAILURE OF TO ADOPT UNIFORM SYSTEM OF BOOKS—PENALTY.—Failure on the part of the city officials to provide a uniform system of books and blanks as provided by chapter 34 acts of thirty-first general assembly would be a misdemeanor and subject to punishment or fine as provided in section 4906 of the code.

SIR: I beg to acknowledge receipt of your letter of the 4th instant in which you say:

> "Will you please give me your official opinion as to what penalty attaches where the officials of a city or town fail to adopt and use the uniform system of books and blanks provided for in Chapter 34, acts of the thirty-first general assembly?
>
> "Are officials who fail to comply with the provisions of section 4 of said chapter subject to the penalty provided for in section 1 thereof?"

In response thereto I submit the following opinion:

Section one (1) of the act referred to provides:

> "It shall be the duty of the chief accounting and warrant issuing officer of each city and town, namely auditor or clerk as the case may be, to prepare and publish the annual report of the financial condition and transactions of the city or town now or hereafter required by law, and all accounting officers of all boards or commission departments and offices whatsoever within the corporate area receiving or disbursing public funds shall file with the auditor or clerk, within thirty days from the expiration of their fiscal year, a report in writing of official transactions in the form and manner required by law. *In case of refusal or gross neglect to comply with the law and provisions herein governing the method of accounting for and reporting municipal transactions herein referred to, the official so delinquent shall be deemed guilty of a misdemeanor.* The auditor or clerk aforesaid is hereby authorized to institute legal proceedings to enforce the provisions herein requiring report to him."

It will be noted that by this section a refusal or gross neglect to comply with this chapter governing the method of accounting and reporting municipal transactions makes the official so delinquent guilty of a misdemeanor.

Section 4906 of the code provides:

> "Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars ($500.00), or by both such fine and imprisonment."

Reading this section into the chapter under consideration, as it must be in order to determine the penalty attaching to a violation of its provisions, any officer of a city or town, whose duty it is to put in operation and enforce the provisions of this chapter, guilty of a refusal to perform such duties or guilty of gross neglect in the performance of the same may be imprisoned in the county jail not more than one year or fined not exceeding five hundred dollars ($500.00), or may be both fined and imprisoned, and this penalty would attach to a wilful violation of any of the provisions of the chapter including section 4.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

April 5, 1907.
HON. B. F. CARROLL,
Auditor of State.

STATE BOARD OF MEDICAL EXAMINERS—ITINERANT PHYSICIAN—REFUSAL OF BOARD TO GRANT LICENSE TO.—State board of medical examiners must find an applicant for such license fit and proper to practice as an itinerant and such applicant must pay to the treasurer of state $250.00. The power placed

with the board to grant or refuse such license is discretionary.

SIR: I beg to acknowledge receipt of your letter of the 17th instant in which you ask:

> "Will you kindly inform me if, under the statutes of Iowa, the state board of medical examiners is compelled to issue an itinerant's license, or whether the board may exercise its discretion in so doing."

In response thereto I submit the following:

Section 2581 of the code among other things in substance provides:

First. That every physician practicing his profession, and professing to cure or heal the sick by any medicine, appliance or method, and who by himself, agent or employee goes from place to place, or from house to house, or by circulars, letters or advertisements solicits persons to meet him for professional treatment at places other than his office at the place of his residence, shall be considered an itinerant physician.

Second. That such physician in addition to the certificate provided for in section 2576 of the code as amended by chapter 114, thirty-first general assembly, shall procure from the state board of medical examiners a license as an itinerant.

Third. That for such license he shall pay to the treasurer of state, for the use of the state of Iowa, the sum of two hundred and fifty dollars per annum.

Fourth. When such payment is so made the secretary (of the board) shall issue to the applicant therefor a license to practice within the state as an itinerant physician for one year.

Fifth. The board may for satisfactory reasons refuse to issue such license upon satisfactory evidence of incompetency or gross immorality.

Sixth. Practicing medicine as an itinerant physician without such license is made a misdemeanor punishable by a fine of not less than three nor more than five hundred dollars and costs, and providing for commitment to jail until such fine is paid.

These provisions, as well as others of like character found in the same chapter, were not enacted by the legislature simply for the purpose of increasing the revenues of the state, but rather to protect the people from the ignorance and incapacity of the quack doctor who is without permanent location, but roves from place to place, leaving behind him a trail of deception and fraud.

The obvious intent in placing the license fee so high was to limit in so far as possible the number of itinerant physicians.

Two things, as I read the section, must be done before the secretary of the board has authority to issue the certificate:

First. The state board of medical examiners must find the applicant for the license a fit and proper person to practice as an itinerant physician.

Second. Upon such finding the applicant must pay to the treasurer of state for the use of the state the sum of two hundred and fifty dollars.

Upon the happenings of these two events it becomes the duty of the secretary of the board to issue to the applicant a license. The board, however, may refuse to order the issuance of the license for satisfactory reasons, that is to say, if the board finds upon investigation that the applicant is neither fit nor competent to practice as an itinerant physician, then it would be their duty to refuse to order the issuance of the license, and in my judgment, the board would fail in its obligations to the public if it did not in every case satisfy itself by the most complete and searching investigation, of the character, skill and ability of every person making application for a license under the section.

The discretionary power thus placed in the board to grant or refuse the license must, of course, be exercised in a just and reasonable manner, keeping in mind always the interests involved, and in every case where there is conflict between the rights and claims of the individual and the health and general welfare of the people, the individual must yield.

The board in all cases have the right to take such time in making the necessary examination as to them seem proper under all circumstances.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

April 27, 1907.

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

SUPERINTENDENT OF PUBLIC INSTRUCTION—STATE CERTIFICATES AND DIPLOMAS—COUNTY CERTIFICATES—ISSUANCE OF.

SIR: I beg to acknowledge receipt of your recent communication in which you ask:

First. Are state certificates and diplomas issued under the provisions of section 2629 to 2631 inclusive, prior to October 1, 1906, subject to the provisions of section 17, chapter 122 laws of the thirty-first general assembly?

Second. Are county certificates issued under the provisions of sections 2735 to 2737 inclusive, and section 2777, prior to October 1, 1906, subject to the provisions of section 17, chapter 122 laws of the thirty-first general assembly?

In response thereto I submit the following opinion:

Section 2629 of the supplement to the code provides for meetings of the board of educational examiners, and for the examination of applicants for state certificates, and state diplomas, and authorizes the board to issue such certificates and diplomas to persons who successfully meet the tests prescribed.

Section 2630-b of the supplement to the code authorizes the board to issue special certificates to teachers of music, drawing, penmanship or other special branches, and to primary teachers.

Section 2631 of the code fixes the life of the state certificates and diplomas issued under section 2629 of the supplement to the code, provides for revocation of the same, and fixes the fees to be charged therefor.

Section 2735 of the code among other things authorizes the county superintendent to examine applicants for teachers' county certificates.

Section 2736 of the supplement to the code names the subjects that shall be covered by the examination for county certificates, and provides for the keeping of a record of the examinations, etc.

Section 2737 of the supplement to the code authorizes the county superintendent to issue a certificate for a term not to exceed one year, and upon the applicant passing an examination in certain additional branches the certificate may be for two years, also provides for revocation of the certificate.

Section 2777 of the code provides for the establishment of kindergarten departments in the common schools, and requires teachers therein to hold a certificate from the county superintendent.

There is nothing in any of these sections requiring the registration of any of the certificates or diplomas therein referred to.

Section 17 of chapter 122 laws of the thirty-first general assembly, in so far as it is material to the inquiry here provides:

> "No person shall teach in any public school in this state whose certificate has not been registered with the county superintendent of the county in which such school is located."

Under this provision every person holding either a state certificate, a state diploma, a county certificate, special certificate or a certificate to teach in kindergarten, who desires to teach in any of the public schools of this state must cause the certificate to be registered with the county superintendent of the county in which they desire to teach, no matter when their certificate was issued, whether before or since October 1, 1906.

Both of your questions, therefore, must be answered in the affirmative.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

May 1, 1907.

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

DENTISTS—REGISTRATION OF CERTIFICATES BY—WHEN REQUIRED.—Construction of section 2600-I of the code.

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

> "The dental board wishes to ask your opinion on a case of one Gustavus North of Cedar Rapids. He was in practice at the time the original dental law was passed in 1882. He took out a registration certificate as required by that law, for men that were in the practice of dentistry at that time. He did not register his certificate with the county clerk. The board set up the claim that he is not a legal practitioner because of failure to register his license or rather certificate. He takes the position that he being a registered dentist, did not have to register his certfiicate with the county clerk and is now a legal practitioner. He cites as his authority the clause marked in section 2600-I in enclosed folder. I think I have these sections designated as they appear in the code.
>
> "He also makes the claim that section 2600-I does not cover his case. Will you advise the dental board who is correct in this matter?"

In response thereto I have to say, that in my opinion the doctor is not required to comply with the provisions of section 2600-I.

Very truly yours,

H. W. BYERS,

Attorney-General of Iowa.

May 1, 1907.

E. D. BROWER, D. D. S.,

Member board of Dental Examiners,

LeMars, Iowa.

STATE BOARD OF MEDICAL EXAMINERS.—WHO MAY TAKE EXAMINATION.—Blind persons having complied with requirements should be permitted to take examination.

SIR: I beg to acknowledge receipt of your recent communication in which you ask for an opinion as to whether or not the board of medical examiners have the authority to allow persons who are blind, but otherwise qualified, to take the examination to practice osteopathy in this state, the inquiry arising on the application of one J. R. Shike of Madison county.

In response thereto I submit the following:

This same question was submitted to my predecessor, the Honorable Chas. W. Mullan, and on the 16th day of June, 1905, he handed down an opinion in which he held, in effect, that the board was without power or authority to permit a person who is blind to take the examination required for the practice of medicine or osteopathy.

I have so much confidence in the judgment and legal ability of General Mullan that in most cases I am inclined to follow his opinion without question; this case, however, is of so much importance to all concerned, and especially to the applicant, and his side of the case has appealed to me so strongly that I have given to the question involved great care, and have examined it from every side, and while I agree in the main with General Mullan in his reasoning, his conclusion if adopted by the board, would result in such hardship and injustice, not only to this applicant, but to all others afflicted as he is, that I will not follow him unless a fair and reasonable construction of the law covering the question involved forces me to the same conclusion.

The naked question as here presented is, whether a person otherwise qualified may be refused an examination by the board of medical examiners for the sole reason that he is blind; in other

words, I am asked to justify the board in the adoption of a universal and arbitrary rule which would bar every blind person in this state from entering one of the greatest and most attractive professions open to our citizens. No matter how strong his mental powers may be; no matter how much he knows about anatomy, physiology, chemistry, pathology, and all the other branches taught in our schools of osteopathy; no matter what special skill he might have for the treatment and cure of diseases; no matter how vigorous his body and active all his other senses except sight; if he is blind he must suffer not only this affliction, but the additional one of being deprived of the pleasure and profit that is found in adding to the sum of human happiness by making the weak strong, by softening pain, by making the sick well. This ought not to be, and cannot be sound law.

The whole question is controlled by a right construction of sections 2576 and 2583-a of the supplement to the code.

Reading the two sections together as we must do to reach a correct conclusion, it is provided:

First. That any person holding a diploma from a legally incorporated school of osteopathy recognized as such, who has complied fully with the law in securing said diploma, and having satisfied the board that he is a legal holder thereof, shall be granted an examination.

Second. The examination shall be held at the same time and place as that fixed for the examination of physicians, and the examination shall be conducted in the same manner.

Third. All examinations shall be in writing.

Fourth. A fee of ten dollars shall be paid by the applicant for the examination.

Fifth. Each applicant shall receive from the secretary a confidential number which he shall place upon his work so that the board shall not know by whom the work was prepared.

Sixth. All matters connected with the examination shall be filed with the secretary, preserved as part of the records for five years, and during that time shall be open to public inspection.

Seventh. If the applicant passes a satisfactory examination, the board shall issue a certificate signed by the president and secretary, which shall authorize the holder to practice osteopathy in the state of Iowa.

If there is anything in any of the above provisions that would bar a blind man from taking the examination provided for it must be the requirement that the examination shall be in writing,

and it is claimed that this provision is mandatory; and so it is, that is to say the questions and answers must be written. It does not, however, follow that because the statute says the examination shall be in writing, therefore, the questions must be written by the hand of some member of the board, or by its secretary, and the answers written by the hand of the applicant. All that is required is that when the examination is completed the record of it, both the questions and answers, must be in writing, filed with the board and preserved for the inspection of any one interested for a period of five years. If the law required the answers of the applicant to be set down in his own hand writing, or if the ability to write, or the character of the writing was a part of the test of the examination, or if none but persons who had their eyesight unimpaired could successfully or safely practice the profession of osteopathy, then there would be some basis for holding that a blind man was barred.

The law requires the opinion of the supreme court in most cases to be in writing, filed with the clerk and recorded, and yet it is a matter of common knowledge that the members of the court dictate their opinions to a secretary who writes them upon a typewriter.

The law requires the instructions given upon the trial of cases in the district court of this state to be in writing, and yet in these days of advanced and improved methods of recording the thoughts and words of men there is probably not one judge out of twenty-five that writes his instructions with his own hand. They are dictated to his reporter, and by him written on the typewriter.

Twenty-seven years ago in *Harvey vs. Tama County*, reported in 53 Iowa at page 228, one of the then strongest legal firms in this state sought to prevent consideration by the supreme court of certain instructions on the ground that these instructions, or some of them, were in lead pencil. That court held that while the law required the instructions to be in writing, the statute did not provide that the writing shall be in ink.

Four years later in *State vs. Fooks*, two of the instructions were in print, and this was urged as a ground for complaint. The supreme court, Judge Beck writing the opinion, held, that while the statute required instructions to be in writing, presenting them in print was a sufficient compliance with the law. Thus for the first time giving legal endorsement to the use of the typewriter in recording court proceedings.

The law also requires the attorney-general in certain cases to give his opinion in writing, but he does not write them with his hand, he dictates them to a stenographer who writes them upon a typewriter, and will shortly be writing them with his voice by speaking into the tube of an Edison business phonograph, the machine recording the opinion on its cylinder and later speaking it to the operator who will write it on the typewriter.

In all these cases the provision that the thing shall be done in writing is mandatory, but the character of the writing, the instrument with which it is done, and who actually manipulates the machine that places the word or sign upon the record, is left to the discretion and the judgment of the individual or body who is required to make the record.

The legislature in the adoption of the provisions of the two sections above referred to had two things in mind so far as the sections cover the practice of osteopathy.

First. To test the competency of the applicant to practice that profession.

Second. To preserve for the benefit of the general public a record showing such competency.

When the board with any given applicant has accomplished these two things it has complied with the law.

If the rule contended for by some had been enforced in this country thirty years ago, the legal profession, and the medical profession would have been deprived of some of its brightest and clearest minds, in fact, I have in mind now men in both professions who are blind, and yet whose services are sought above those of others who are in possession of all of their faculties.

Without extending this opinion further, I am led irresistibly to the conclusion, that there is nothing in the law that would justify the Board of Medical Examiners in refusing to permit a blind man, who is otherwise qualified, to take the examination for the practice of osteopathy, and that the written questions of the Board may be read to him by the Secretary, or by some person named by the Board on request of the applicant, and his answers written by himself on the typewriter, or dictated by him to a stenographer, and by the stenographer written on the typewriter, or dictated by him to an Edison Business Phonograph, his answers recorded by the machine and transcribed from the cylinder by a typewriter;

and an examination conducted in this way would, in my opinion, be a compliance with the sections under consideration.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

May 3, 1907.

DR. LOUIS A. THOMAS,
Secretary of board of Medical Examiners,

BACTERIOLOGICAL LABORATORY—EXPENSE OF DIRECTOR IN ATTENDING MEETINGS OF STATE BOARD OF HEALTH.—Bacteriological laboratory permanent part of the medical department of the university. This department is required to make tests for the state board of health and report the results thereof to the board. Expense of director attending meetings of board to make reports necessary expense. Not contemplated that director should attend all the meetings of board.

SIR: I beg to acknowledge receipt of your communication of the 25th ultimo in which you say:

> "Will you please advise me as to the construction to be placed upon section 3, chapter 101, acts of the thirtieth general assembly, relative to the use of the appropriations provided for the bacteriological laboratory.
>
> "Dr. Henry Albert, the director, is required by the state board of health to attend the regular meetings held in the city of Des Moines, in order to make his quarterly report and consult relative to the work of the laboratory, and advise upon any matters pertaining to bacteriology, etc., that may be laid before the board.
>
> "Upon all occasions previous to last month, Doctor Albert's traveling expenses necessarily incurred on account of attending the meetings were allowed by the executive council and paid from the funds of the bacteriological laboratory; but upon presenting Dr. Albert's bill for the month of March, I was informed by the secretary of the executive council that the law made no provision for the payment of such expense, and the bill was consequently rejected.
>
> "Kindly inform me if the section above referred to under the term 'contingent and miscellaneous expenses' should be understood to apply to Doctor Albert's case."

In response thereto I submit the following:

Section 1, of chapter 101, laws of the thirtieth general assembly, in so far as it is material here, makes the bacteriological laboratory of the medical department of the state university at Iowa City a permanent part of the medical department of the university work, requires it in addition to its regular work to make such tests and investigations as the state board of health may require, and to report to the board the results thereof under rules and regulations adopted by the board.

Section 2, of the same act, makes the professor of bacteriology of the medical department of the university the director of the laboratory, and requires him to make tests and investigations when required by the state board of health, and to give preference in point of time to the call of the board, and to report to it the result of all tests and investigations under such rules as it may adopt.

Section 3 of the same chapter makes an appropriation for the payment of the salary of the director, the assistants, the expenses of the laboratory, including postage and stationery, and then makes this provision: "and other contingent and miscellaneous expenses which may be incurred in the maintaining of said laboratory, *and perform the duties required therein by the provisions of this act.*"

A fair construction of these provisions gives the board of health the authority to require the director of the laboratory to perform certain duties in the laboratory at Iowa City, and in cases where tests and scientific investigations are necessary for the information of the board in the prosecution of its duties as the health officers of this state, and the test or investigation is of such a character that it cannot be made in the laboratory at Iowa City, then the board has the authority to require the director to go to any point in the state for the purpose of making such test and investigation, and in addition to this the board has the authority if it be necessary for its instruction and information to require the director to appear before it at its meetings in the city of Des Moines, and when the director is required by the state board of health to make his tests and investigations at some other point in the state than at Iowa City, and when in proper cases the director is required by the board to appear at its meetings in Des Moines, the traveling expenses necessarily incurred by said director on such trips is a proper and lawful charge, and should be paid out of the appropria-

tion made in section 3, of the chapter under discussion; but it is not contemplated by this chapter that the director should be required to attend all the regular meetings of the board held in the city of Des Moines, and a rule of the board making such demand upon the director would be beyond the scope of its authority.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

May 3, 1907.
DR. LOUIS A. THOMAS,
Secretary State Board of Health,

CLAIMS OF FIRST IOWA CAVALRY.—Chapter 120 of the acts of the twelfth general assembly still in force and claims properly proven in compliance with the act should be paid.

SIR: I beg to acknowledge receipt of your communication asking my opinion as to whether or not chapter 120, acts of the twelfth general assembly is still in force, and, as to whether or not a claim made in compliance with such act is a lawful claim against the state, and, as to whether or not payment is still authorized under its provisions.

In response thereto I have to say, that in my opinion the act is still in force, and that claims properly proven and made in compliance with the act should be paid.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

May 13, 1907.
HON. B. F. CARROLL,
Auditor of State.

DISCRIMINATION IN RATES—CONTRACTS—CARRIERS MAKING DISCRIMINATION IN RATES TO NEW INDUSTRY.—A contract between a common carrier and a new industry to assist such new company in transporting its materials and goods by granting reduced rates is legal under section 2146 of the code. The board of railway commissioners has authority to approve such a contract.

GENTLEMEN: In response to your request for an opinion as to the legality of the contract between the Iowa Portland Cement Company and the Chicago, Rock Island & Pacific Railway Company, executed on the 20th day of May, 1907, and as to the authority of your commission to approve the same, I submit the following opinion:

Section 2146 of the code, after prohibiting common carriers from making discriminating rates or charges for the transportation of freight, provides as follows:

> "But for the protection and development of any new industry within the state, such railway company may grant concessions or special rates for any agreed number of car loads, which rates shall first be approved by the board of commissioners, and a copy thereof filed in its office."

The manifest intent of the legislature in tacking on this exception clause was to encourage the building of new industries in the state, thus adding to its growth and development. It was not only its purpose to permit transportation companies to assist in this worthy purpose by the granting of reduced rates for transporting material, but it is evident from the use of the term "protection" that it intended to permit the concession and special rates to continue so long as the prosperity and growth of the particular industry depended upon such reduced rates.

Three of the necessary and most important factors in the development of industries are labor, fuel, and raw material. These three things are not always to be secured in the same locality, and to bring them as close together as possible for manufacturing purposes by reducing the cost of transportation was undoubtedly in the mind of the author of the provision in question.

I therefore conclude:

First. That the contract is a legal one in every respect.

Second. That your board have authority to approve the same.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

May 22, 1907.
BOARD OF RAILROAD COMMISSIONERS.

STATE BOARD OF HEALTH—EXPENSE.

SIR: In response to your communication of the 25th ultimo requesting my opinion as to whether or not the board of health have authority to charge part of the expense of publishing matters pertaining to the several departments under its jurisdiction to each of said departments, I have to say, that in my opinion, the board has such authority.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

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

INSURANCE COMPANIES—STANDARD FIRE POLICY.—Held that an additional provision might be added to the standard fire policy by complying with the method pointed out in this opinion.

SIR: In the matter of the application of the North British and Mercantile Insurance Company of London and Edinburgh for permission to insert in the standard fire policy to be used by it in this state the following provision:

> "This policy is issued subject to the following stipulation, namely:
>
> *First.* That the amount of any loss (not exceeding the sum within mentioned) is payable out of the accumulated funds of the fire department of the company as defined by the North British and Mercantile Insurance Company's act 1870, and all other the capital stock and funds of the company except the funds from time to time belonging to the life department of the company, as defined by the act.
>
> *Second.* That no member of the company shall be liable to any demands against the company for more than the unpaid portion of his share or shares of the capital of the company."

I have to say, that after carefully considering the terms of House File 49 as finally enacted into law, providing for a uniform policy to be used by all fire insurance companies doing business in the state of Iowa, and after hearing the argument of the representatives of the company, I am of the opinion that there is no legal objection to the insertion of the proposed clause. In view, however, of the fact that the act referred to requires the conditions of the policy to be printed in double column form with numbered lines, and further provides that provisions required by law to be inserted in the policy shall be printed apart from the other conditions and agreements and under a separate title, I would suggest that the applicant be required to insert the proposed provision, if inserted at all, just below the nineteenth condition or agreement on the face of the policy, and under the following title printed in larger type than the other conditions of the policy, "provisions required by law to be stated in the policy of insurance."

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

May 29, 1907.
HON. B. F. CARROLL,
Auditor of State.

STATE BOARD OF EDUCATION—TEACHERS' EXAMINATION.—Held that it is admissible to permit applicants for teachers' certificates to take the examination in a county other than that of their residence by complying with certain prescribed regulations.

SIR: I have the honor to acknowledge receipt of your communication requesting my opinion upon the question, as to whether or not it would be admissible under the law to permit applicants for teachers' certificates to take the examination in a county other than that of their residence by paying the examination fee to the county superintendent of their residence with proposed regulations governing such examinations, from which it appears that the plan proposed to be adopted is for the convenience of teachers who are necessarily absent from their home county during the months in which examinations are required to be held.

In response thereto I submit the following:

Section 3 of the act providing for uniform county certificates, in so far as it is material to the inquiry here, provides in substance:

First. That the county superintendents shall on the last Friday and Wednesday and Thursday preceding in the months of January, June, July and October, examine all applicants for teachers' certificates.

Second. That such examinations shall be held at the county seat.

Third. That the county superintendent at his discretion may cause to be held under certain circumstances an additional examination at some other place in the county.

Fourth. That the questions used in such examinations shall be printed and furnished by the educational board of examiners.

Fifth. That the examinations shall be conducted strictly under rules prescribed by the board.

Section 6 of the same act provides:

> "A record shall be kept by the county superintendent of all examinations taken within his county, with the name, age and residence of each applicant, and the date of the examination."

The other provisions of the act refer to the subjects to be covered by the examination, the kind of certificates to be issued, when and under what circumstances they may be renewed, the manner and the circumstances under which they may be revoked, and other provisions of like character.

I find nothing in either of these sections quoted that would make it illegal to permit an applicant for a teachers' certificate, who is otherwise qualified as required by the act in question, to take the examination under the plan proposed in the paper accompanying your request and entitled, "Regulations by which examinees may pay the examination fee in the county of their residence, and write the examination in another county."

In the passage of the law under discussion the legislature had in mind not only a method of securing efficient and competent teachers for the schools of the state, but to make it as convenient as possible as to time and place for such persons to establish their qualifications.

All of the provisions of the act covering the qualifications of the applicant, and as to the provisions affecting or rather applying to the efficiency and competency of the applicant as a teacher are mandatory, and should be strictly complied with; on the other hand, the provisions of the act fixing the time and the place that the examination shall be held, and all other matters of mere convenience, and which do not in any way affect the question of competency are not mandatory, but are left largely to the discretion and judgment of the educational board of examiners, the state superintendent and the county superintendents.

True, section 3 fixes a time and place for the holding of examinations, but the same section also provides, that such examinations shall be conducted strictly under rules prescribed by the board, thus authorizing the board to so arrange the details of the examination including the time and place in such a way as will best serve the convenience of all concerned.

It is suggested that to permit teachers to take the examination as proposed would be an evasion or violation of section 6 of the act. I am forced to disagree with this suggestion. It can only have support upon the theory that the law requires the examination to take place within the county, but does it? I take it that the examination includes not only writing the answers to the questions propounded, but the preparation of the questions at the beginning, and later the marking and grading of the papers. If I am right in this, then necessarily under the provisions requiring the board to have the questions printed, and later to read and pass upon the examination papers, at least as to part of the subjects, the examination takes place partly in Polk county and partly in the county of the applicant's residence, and it would be just as reasonable to say that the applicant is actually examined where the questions are prepared, or where the papers are read and graded, as it is to say that the examination takes place where the answers are written, and to permit an applicant to write in a county other than his residence the answers to questions furnished as the law provides, such questions and answers to be returned and passed upon by the county superintendent and the board as required, would in my judgment be a substantial compliance with the law.

I therefore conclude, that it would be entirely legal and proper to permit examinations of applicants for teacher's certificates to be taken as proposed under the rules set out in the paper prepared by the state superintendent under the title, "Regulations by which examinees may pay the examination fee in the county of their residence, and write the examination in another county," and in all such cases the county superintendent in the county of the applicant's residence should make the record required by section 6 the same as if the answers to the examination questions were written in such county.

Respectfully,
H. W. Byers,
Attorney-General of Iowa.

June 4, 1907.

Hon. John F. Riggs,
Superintendent of Public Instruction.

CITY AND TOWN COUNCILS—VACANCIES.—When all of the members of the town council except one resign, it was held that the governor had no jurisdiction in the premises and that the vacancies must be filled by the remaining council.

SIR: Complying with your request of the 28th instant for an opinion as to the course to pursue in case five of the six members of a town council resign at the same time, I submit the following:

It has been the law of this state since July 4, 1858, until February 29, 1904, that vacancies in the town council should be filled by a special election.

Chapter 157, Seventh General Assembly;
Revision of 1860, section 1101;
Code of 1873, section 530;
Code of 1897, section 1272.

By the act of the thirtieth general assembly, chapter 41, the provision for calling a special election in case of a vacancy in the city council, was repealed, and it was provided in general language that in case a vacancy should occur in the office of councilman or mayor, the council should appoint any qualified elector to fill such vacancy, who should hold such office until his successor should be elected at the first regular municipal election.

There would be no question, I think, but that under this chapter the legislature intended that in case of vacancies of councilmen in any city or town, the vacancies should be filled by the remaining councilmen, regardless of whether or not there was still a quorum, were it not for the provision of subdivision 9, section 568, which provides that in selecting persons to fill vacancies, the person elected to fill such vacancy shall receive a majority of the votes of the whole number of members of the council; and subdivision 2 of section 668 which provides that "in all cities or towns a majority of the whole number of members to which such corporation is entitled, including the mayor, shall be necessary to constitute a quorum."

Subdivision 9 of section 668, however, does not require a majority of the total number of members to which the municipality is entitled, but only a majority of the whole number legally qualified to act; so that the only bar to the remaining members of the council filling a vacancy is that found in subdivision 2 of section 668, providing the number which shall constitute a quorum.

It is claimed that the provision with reference to a quorum is absolutely operative for all purposes, and that the provision in section 1272 as amended by the Thirtieth General Assembly, is limited by

subdivision 2 of section 668 of the code, and that it devolves upon the governor, under the provision of article 4, section 10, of the Constitution, to fill such vacancies by appointment.

Section 10 of article 4, however, provides that the governor shall have power to fill such vacancy only in case no mode is provided by the Constitution and laws for filling such vacancy.

In my opinion, however, the legislature has provided a manner for the filling of vacancies in city and town councils; and as before stated, this provision from 1858 until 1904, was by special election, and since 1904, such vacancies are to be filled by the council.

It was provided in the code of 1873, in McClain's code of 1888 and until the adoption of the code of 1897 that five councilmen, or trustees as they were formerly called, were necessary to constitute a quorum. It was also therein provided that in case of a vacancy in the council, the council should call a special election; but if the position is taken that the provision with reference to the quorum is absolute for all purposes, then if vacancies had occurred reducing the number of the council to four, it would have devolved upon the governor to appoint even though there had remained four duly qualified members of the body, for the reason that in such situation, the remaining councilmen not constituting a quorum, could not call a special election; and as by the thirty-second general assembly, the mayor is deprived of a vote in both cities and towns, except in case of a tie, and as in such case he may not be considered in making up a quorum, (*Somerset vs. Smith*, 49 S. W. R., 456) then at the present time and until the council in towns is reduced to five by the acts of the thirty-second general assembly, if there should remain the mayor and three qualified members of the council, it would still, under the opposite view, be necessary for the governor to appoint because of a lack of a quorum.

This position, it seems to me, is manifestly untenable and contrary to the legislative intent which is and ought to be the guiding principle in the construction of all statutes. It is also a cardinal principle of statutory construction that the intent is to be gleaned from the whole statute, and not from any particular part, and that the object to be attained is to be considered.

In section 1272, as amended by the thirtieth general assembly, which provides for the filling of vacancies in the office of councilmen by the council, there is also a provision for the filling of vacancies in various state offices by the governor and various county offices by the board of supervisors, and all township offices includ-

ing trustees by the trustees, but where the offices of the three trustees are vacant, the county auditor shall appoint.

It was evidently the intent of the legislature in the case of a vacancy in the township trustees where there was one remaining trustee that he should fill the vacancy, notwithstanding that two are necessary for a quorum, although this intent is not directly expressed; and I conclude that when the legislature abolished the provisions for a special election to fill vacancies in the office of councilmen, that it intended thereby that the remaining councilmen, regardless of their number, should be authorized to fill such vacancies, and that the provision of subdivision 2 of section 668 should be qualified or repealed by implication to that extent.

When the reason for a rule fails, the rule itself ought to fail. The primary object of fixing a required number in order to constitute a quorum was to afford the municipality the benefit of the thought and acts of at least a sufficient number of its councilmen to prevent hasty, ill-advised or improper action in the transaction of its business; but I perceive no salutary reason why it ought to operate as a bar to prevent the remaining councilmen from taking the preliminary steps necessary to organization so that the business of the municipality may be transacted.

I confess, however, that the question is not free from doubt, but considering that it has never been the legislative policy of this state for the governor to fill vacancies in county or municipal offices, or in any offices below state and district offices, and that the legislature has, in the same section in which provision is made for filling vacancies in the council, provided that one trustee or a less number than a quorum may fill a vacancy in the office of township trustees, and that the remaining councilman of a town is much better acquainted with the qualified electors of the town and the needs of the municipality, than the governor, I think it more in consonance with the spirit of local self government to resolve the doubt in favor of the remaining councilman making the appointment, than to have the governor issue a commission.

I therefore conclude that you have no authority or jurisdiction in the premises.

I herewith return the communication of Mr. Simmons.

Respectfully submitted,

H. W. BYERS,
Attorney-General of Iowa.

June 29, 1907.

HON. A. B. CUMMINS,
Governor of Iowa.

STATE MILITIA—USE OF THE APPROPRIATION FOR SUPPORT FUND TO PAY FOR THE TRANSPORTATION OF TROOPS AND OFFICERS OF THE UNITED STATES ARMY.—Held that the term "support of the guard" as used in the statute includes the necessary education and instruction of the guard in field maneuvers and other exercises for the purpose of discipline, and that it would be lawful to pay the traveling expenses of the necessary officers and troops of the United States army participating in field maneuvers and other exercises.

SIR: In response to your request for an opinion as to whether or not, under the law covering the organization and support of the state militia, it would be legal to use of the appropriation for support fund a sufficient amount to pay for the transportation of certain troops and officers of the United States army who have been detailed to participate in certain field maneuvers and other exercises for instruction of the state militia, I have to say, I have carefully examined the provisions of the law involved in the question suggested and have no doubt whatever as to the authority of the governor as commander-in-chief to order the proposed field maneuvers, and to request the participation in said maneuvers of troops of the United States army, the only question is as to the right to use any part of the appropriation for support of the guard to pay the traveling expenses of these troops.

I take it that the term "support of the guard" as used in the statute means more than simply feeding and clothing the guard when on duty, and furnishing it arms, camp grounds, etc., but that the term includes the necessary education and instruction of the guard in field maneuvers and other exercises necessary to make the guard efficient for the purposes for which it is organized and maintained.

In this view of the matter I am of the opinion that it would be entirely proper and lawful to pay the traveling expenses of the necessary officers and troops of the United States army participating in the field maneuvers and other exercises referred to above, and that upon the certificate of the adjutant general approved by the governor, the auditor would be warranted in drawing his warrant upon the state treasurer for the payment of such expenses out of the support fund.

Respectfully,

H. W. BYERS,
Attorney-General of Iowa.

July 11, 1907.

HON. ALBERT B. CUMMINS,
Governor of Iowa.

SAVINGS AND STATE BANKS—AUTHORITY TO OWN AND OPERATE BRANCH BANKS.—State and savings banks have no authority to establish and operate a branch banking business in any other place than that designated in their articles of incorporation.

SIR: I have your communication referring to the operation of certain savings and state banks in this state in which you say:

"Will you kindly give me your opinion on the following question:

"May a savings or state bank, owning and operating in one city or town, send their cashier to an adjoining town, renting a room and taking supplies each day,—accepting deposits and issuing drafts; said cashier returning to his home bank in the evening and writing up the books for the day's business?

"We have several cases in Iowa at the present time, of this character. Do you consider this side business, a branch?"

In response thereto I have to say:

The manner in which you say these banks are operating is, in my judgment, carrying on a branch business, and as there is no provision in the laws of this state authorizing savings and state banks to establish and carry on a branch business, or to conduct their business in any other place than that designated in their articles of incorporation, the practice is unauthorized and unlawful and should be discontinued.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

July 11, 1907.
HON. B. F. CARROLL,
Auditor of State.

STATE BOARD OF DENTAL EXAMINERS—SPECIAL EXAMINATION.—Held that the state board may hold a special examination for one applicant, said applicant paying the expenses thereof.

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

"The dental board wish to ask your opinion in the matter of holding an examination for a University of Michigan student, a resident of this state. Commencement in that school was held at a later date than our June examination. Our next

regular meeting will be in December. He wishes to commence practice in this state but does not wish to violate the law and his father has asked the privilege of paying the expenses of a special examination. The finance of the Board would not permit us to hold a special examination unless there were sufficient applicants to pay the expenses, neither would it be advisable in our opinion.

"We wish to ask you if it would be permissible to examine that man and accept the expense money from him."

In response thereto I have to say:

Upon a careful examination of the provisions of the law governing the organization and duties of your board, I am of the opinion that it would be permissible and proper for the board to hold a special meeting for the purpose of examining the applicant referred to, and to accept from the applicant payment of the necessary expense of such examination.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

July 15, 1907.
DR. E. D. BROWER,
LeMars, Iowa.

CORPORATIONS—CHANGE IN ARTICLES—RIGHT TO SERVE AS ADMINISTRATOR, EXECUTOR AND TRUSTEE—TERM OF OFFICE.—Held: (1) A corporation may change its name or make any other change in its articles which is germane to the business as stated in the original articles. (2) If a change in location is made, the original articles and amendments must be recorded in the office of the recorder of deeds in the county to which such change is made. (3) a. In the absence of statute, a corporation may not act as administrator, guardian or executor. b. If the articles so provide, a corporation may act as a trustee. c. A corporation may also organize so as to act as trustee in bankruptcy. d. In order for a corporation to act in the capacity of a surety and guaranty company, it must be incorporated under chapter 4, title IX. of the code, relative to insurance companies. (4) A provision in the articles providing for ten-year term of office is contrary to public policy.

SIR: I have your communication of the 3d instant in which you request my opinion upon the following questions:

1. Can a corporation by amendment change the nature, character and location of its business?

2. If the changes referred to in the first query are permissible, particularly as to change in location, should the amendments to articles be recorded in the county in which change is made, as well as in the county where the company has been previously located?

3. Can this gas company by amendment assume to itself the right to serve as administrator, executor, trustee, trustee in bankruptcy, and guarantee the fidelity of persons or secure bonds? If so, will the company be subject to examination and supervision by the auditor of state?

4. Can a company legally provide for a ten year term of office as in amendments Nos. 3 and 4?

In reply to the first question there can be no doubt but that the legislature contemplated changes could be made by amendment in articles of incorporation. Section 1615 of the code provides:

> "Changes in any of the provisions of the articles may be made at any annual meeting of the stockholders, or special meeting called for that purpose, and they shall be valid only when recorded, approved and published as the original articles are required to be. Such changes, however, need only be signed and acknowledged by such officers of the corporation as may be designated to perform such act by the stockholders."

In general, a corporation may change its name or make any other change in its articles which is germane to the business, as stated in the original articles, at least so far as the state is concerned.

Clark & Marshall Private Corporation, Vol. 1, page 393; Vol. 2, page 976.

Union Ag'l Ass'n vs. Neill, 31 Iowa, 95.

Under certain circumstances the state may, however, object to the change in the location of a corporation which is of a quasi public nature, such as schools and hospitals. While a corporation may make any change in the articles incident to the original business which is not of a fundamental or radical nature, it may not under the guise of amendment, substantially change the original purpose for which such corporation is organized.

10 Cyc., pages 233-234-j;

In re Penn B. Co., 6 Pa. Dist., 530;

31 Iowa, 95, Supra.

Snook vs. Ga. Imp. Co., 83 Ga., 61.

Such legerdemain in order to avoid the incorporation fee as provided by law, will not be sanctioned by this department.

Second. If a change in location is made, the original articles together with the amendments, must be recorded in the office of the recorder of deeds in the county to which such change is made.

Section 1615 of the code and section 1610 of the code supplement.

Third. As to whether or not a corporation, in the absence of express statutory authority, may act as an executor or administrator, is a question as to which the authorities are in direct conflict.

On the 6th day of September, 1905, my predecessor in office, Mr. Chas. W. Mullan, gave an official opinion to Mr. B. F. Carroll, auditor of state, in which he stated that there is no statute or principle of public policy in this state which forbids a corporation acting as trustee, receiver, executor or guardian, and he cited a number of authorities to sustain this position.

No discrimination is made between a corporation acting as a trustee and as guardian, executor or adminstrator. A number of authorities cited by Mr. Mullan and by the text writers in general upon this subject, do not support the point at issue, for the reason that in some of the cases there was an express statutory provision authorizing the corporation to act in that capacity, and the question turned upon the constitutionality of the law; while in some of the other cases the only question involved was the right of a corporation to act as a trustee.

While I freely grant that there is authority to support the proposition, and while I have high regard for the opinion of my predecessor Mr. Mullan, I am nevertheless impelled in this case to take an opposite view of the matter, believing that the better reasoning and the greater weight of the authority is to the effect that a corporation may not act as guardian, executor or administrator, unless expressly authorized by statute so to do.

There have been repeated attempts during the past few years to get a bill through the legislature authorizing loan and trust companies to act in the capacity of guardian, executor or adminstrator, and each effort has been unsuccessful. This is conclusive as to the legislative intent upon the subject.

Section 1607 of the code provides that any number of persons may become incorporated for the transaction of any lawful business. To my mind it is doubtful whether the word "business" is broad enough to include anything in the nature of a quasi public office, such as the duties of a guardian, executor or administrator.

Moreover, the work is of a personal character and an oath is required.

As sustaining the proposition that in the absence of express statute, a corporation may not act as administrator, guardian or executor, see the dictum of Deemer, Justice, in *State vs. Higby Co.*, 130 Iowa, pages 69-72; Cook on Corporation, 5th Ed., Vol. 2, Sec. 679.

The case of *State vs. Higby Co., supra,* definitely settles the law in Iowa that a corporation may, if the articles of incorporation so provide, act as a trustee.

A corporation may also organize as to act as a trustee in bankruptcy.

Collier on Bankruptcy, 5th Ed., page 360;

Section 45, Bankruptcy Act, 1898.

In order for a corporation to act in the capacity of a surety and guaranty company, it must be incorporated under chapter 4, title IX of the code and amendments thereto relative to insurance companies.

Subdivision 2 of section 1709 of the code provides that any company organized under this chapter or authorized to do business in this state, may insure the fidelity of persons holding places of private or public trust, or execute as surety any bond or other obligation required or permitted by law to be made, given or filed, except bonds required in criminal cases. None but stock companies shall engage in fidelity and surety business.

If a corporation is organized under chapter 4, title IX of the code and amendments thereto, it follows that it would be subject to examination and supervision by the auditor of state.

Fourth. While there is no statutory provision limiting the length of time a corporation may by its articles fix the term of its various officers, yet a provision in the atricles providing for a ten year term of office, is, in my opinion, contrary to public policy and ought not to be approved. Articles of incorporation and by-laws in order to be valid must not be unreasonable or oppressive.

10 Cyc., page 357; 24 N. J. L., 435.

Respectfully submitted,

H. W. BYERS,

Attorney-General of Iowa.

July 16, 1907.

HON. W. C. HAYWARD,

Secretary of State.

BOARD OF EDUCATIONAL EXAMINERS—VALIDITY OF DIPLOMA OF GRADUATION FROM STATE INSTITUTIONS OF HIGHER LEARNING.—Held: That a diploma of graduation from the regular and collegiate courses in the State University, and from other institutions of higher learning within the state whose curriculum is the equivalent of that specified in section 2629 of the code supplement, is sufficient to authorize the state board of educational examiners to issue state certificates to applicants holding such diplomas.

SIR: Your communication of the 12th instant received in which you ask for an opinion as to the construction to be placed upon the following language from section 2, chapter 148, laws of the thirty-second general assembly:

> "Where such graduation shows the extent and quality of scholarship that is required by section 2629 of the supplement to the code."

That is to say, is this language to be construed to require each of the subjects named in section 2629 of the supplement to the code to be indicated as having been pursued, or whether the diploma of graduation alone shall not be construed as showing the extent and quality of scholarship required by section 2629.

Section 2629 of the code supplement as amended by the thirty-second general assembly, provides among other things that the board of educational examiners shall meet for the transaction of business at such times and places as the president may direct, and shall annually hold at least two public examinations of teachers, to be conducted by a member or the secretary of the board or by such qualified person or persons as the board may select.

It may issue state certificates and state diplomas to such teachers as are found upon examination to possess a good moral character, thorough scholarship and knowledge of didactics with successful experience in teaching, or with such other training and qualifications as the board may require. The examination for certificates and diplomas shall cover orthography, reading, writing, arithmetic, geography, English grammar, bookkeeping, physiology, history of the United States, algebra, botany, natural philosophy, drawing, civil government, constitution and laws of the state, and didactics; those for diplomas, in addition to the foregoing, geometry, trigonometry, chemistry, zoology, geology, astronomy, political economy, rhetoric, English literature, general history, and such other studies as the board may require.

Chapter 148 of the thirty-second general assembly provides as follows:

"Section 1. That the state educational board of examiners may accept graduation from the regular and collegiate courses in the state university, state normal schools, and the state college of agriculture and mechanic arts, and from other institutions of higher learning in the state having regular and collegiate courses of equal rank, as evidence that a teacher possesses the scholarship and professional fitness for a state certificate.

"Section 2. That in all cases where such graduation shows the extent and quality of scholarship that is required by section twenty-six hundred and twenty-nine (2629) of the supplement to the code, and when the teacher possesses a good moral character and satisfies the board of being professionally qualified, there shall be granted by the said board of examiners a state certificate valid for five years to teach any public school in the state."

The act is entitled "An act to empower the state educational board of examiners to issue state certificates to graduates of higher institutions of learning", which indicates that it was the evident purpose of the legislature to obviate the necessity of applicants for state certificates to take an examination in each and every one of the branches specified in section 2629 of the code supplement, provided such applicant is a graduate from the regular and collegiate courses of the state university or other institution of higher learning, assuming of course that the studies pursued in the regular collegiate courses of such institutions were the equivalent to that specified in section 2629 of the code supplement.

If such was the purpose of the legislature, and there could be no other, it would be rendered nugatory if section 2 of chapter 148 was construed to mean that the diploma of graduation should show a passing grade in the identical subjects specified in section 2629 of the supplement to the code. This is a necessary corollary for the reason that it is a matter of common knowledge that neither the state university nor any other institution of higher learning, includes in its regular curriculum a number of the minor subjects specified in section 2629.

If further evidence be desired as to the legislative intent it is found in the fact that prior to the passage of chapter 148 above referred to, known as Senate File 207, the same legislature passed

Senate File 98, chapter 149, acts of the thirty-second general assembly, which provides in express language that the state educational board of examiners is empowered to accept certificates issued by state departments of other states where such certificates are issued upon evidence of scholarship and experience equivalent to that required for like certificates under the laws of this state.

It would be unreasonable to suppose that when the legislature passed chapter 148 it thereby intended to discriminate against our own state university and other institutions of higher learning, by denying the right of the state board of educational examiners to accept a diploma of graduation from such institutions of higher learning within this state, unless it showed that the curriculum of such institutions embraced all of the identical subjects specified in section 2629 of the supplement to the code, while at the same time the board was authorized to accept certificates issued by state departments of other states where such certificates were issued upon evidence of scholarship and experience the equivalent of that required in section 2629 of the supplement to the code. However, there is nothing in the language used which would warrant such a strained and narrow construction.

Section 1 of chapter 148 would authorize the state board of educational examiners in accepting a diploma of graduation from the regular and collegiate courses in the state university and other institutions of higher learning, as being evidence in itself of the requisite qualifications, and the only limitation that is placed upon section 1 by section 2 of the act, is that the state board of educational examiners must be satisfied that the regular and collegiate courses in such institutions of higher learning are equal in extent and quality of scholarship which is required by section 2629 of the code supplement.

The word "extent" is defined by Webster and the Century Dictionary to be the space or degree to which a thing is or may be extended; length; compass; size. The word "quality" is defined to be the degree of excellence, grade or rank. Both words have an abstract meaning and coupled together as used in section 2 chapter 148, mean nothing more nor less than the word "equivalent" and ought not to be tortured into meaning the same as the word "identical."

I am of the opinion that the general purpose of the act, the legislative intent as evidenced by the title of chapter 148 and the provisions of chapter 149 heretofore referred to, and the correct and literal interpretation of the language used in section 2 of

chapter 148, all lead to the same conclusion, namely: that chapter 148 acts of the thirty-second general assembly requires only a diploma of graduation from the regular and collegiate courses in the state university, state normal schools and the state college of agriculture and mechanic arts, or from other institutions of higher learning within the state, the curriculum to be the equivalent; that is to say, equal in character and equally as comprehensive, but not necessarily identical with that specified in section 2629 of the supplement to the code, in order to authorize the state board of educational examiners to issue state certificates as therein specified to such applicants.

Respectfully submitted,
H. W. BYERS,
Attorney-General of Iowa.

July 16, 1907.

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

UNIFORM SYSTEM BOOKS—DUTIES OF COMMISSION.—It is the duty of the commission appointed under chapter 24, acts of the thirty-second general assembly, to prepare all books, blanks, etc., including the "transfer book" used in the office of county auditors and such legal forms as are in general use in the office of the county clerk. Held, further, that the expense of the commission for a period of thirty days which is necessary in order to obtain the required information, must be paid by the state.

SIR: Your communication of the 23d instant received in which you ask for an official opinion relating to the duties of the commission appointed under chapter 24, acts of the thirty-second general assembly, to provide a uniform system of books, blanks, etc., to be used by county officers, and specifically upon the following points:

First. Is it the intention of the law to include among the books to be prepared by the commission, the book known as the "Transfer Book" used in the office of the county auditor?

Second. Does the law providing for a uniform system of books and blanks contemplate the preparation and installation of books and blanks pertaining simply to the accounts of the various offices named, or does it intend to include all books and blanks kept in the various offices, especially the legal forms used in the office of the clerk of the district court?

Third. Could the members of the commission include in their expense accounts to be paid by the state, traveling and other expenses made in visiting counties of the state for the purpose of inspecting the records and informing themselves as to the methods employed, as well as for the purpose of meeting with the officials of the counties in consultation?

For the sake of brevity I shall group the questions together and reply generally.

It is my opinion that the law contemplates the preparation of all books, records, vouchers, receipts, blanks. etc., including the "Transfer Book" used in the office of the county auditor, together with such legal forms as are necessarily in general use in the office of the clerk of the district court, provided said forms are to be used in connection with such duties as are incumbent upon the clerk to perform.

It follows as of course that the forms prepared by the commission must be in conformity with the law, and such forms as the statute now specifically prescribes.

Nothing herein stated, however, shall be construed to imply that the commission is empowered to prepare legal forms of a technical nature for the mere convenience of lawyers.

As to the item of expense, the act simply states that the necessary traveling, hotel and other expenses of the commission, shall be paid by the state for a period of not to exceed thirty days. I take it that the proper construction to be placed on this statement is that all expense for the period of thirty days, which is necessary in order to obtain the required information, whether it shall be in visiting counties for the inspecting of records or meeting with the various county officials, must be paid by the state.

Respectfully submitted,
H. W. BYERS,
Attorney-General of Iowa.

July 25, 1907.

HON. B. F. CARROLL,
Auditor of State.

CHILD LABOR—EMPLOYMENT OF CHILDREN—WHEN PROHIBITED.—Held; (1) a: That the employment of children under fourteen years of age is prohibited in any mine, manufacturing establishment, factory, mill, shop, laundry, slaughter house or packing house. b. In the operation of any freight or passenger elevator. c. In any store or mercantile establishment where more than eight persons are employed. (2) Children under

fourteen years of age may work in husking sheds connected with canning factories in which no machinery is operated.

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

"There seems to be some difference of opinion regarding the meaning of sections one and three of chapter 103 of the acts of the thirty-first general assembly, therefore, we respectfully request an opinion on the following questions for the information and guidance of this bureau;

"In section 1 do the words 'where more than eight persons are employed' apply only to stores and mercantile establishments or do they apply to all branches of industry mentioned in that section?

"Can children under fourteen years of age be lawfully employed in canning factories or in husking sheds connected with same?

"Does the exemption specified in section 3 apply to hours of labor, or does it exempt the canning industry from all the provisions of this act?"

In response thereto I have to say:

First. That section 1 of the act referred to prohibits the employment of any person under fourteen years of age;

(a) In any mine, manufacturing establishment, factory, mill, shop, laundry, slaughter house, or packing house.

(b) In the operation of any freight or passenger elevator.

(c) In any store or mercantile establishment where more than eight persons are employed.

The limitations as to the number of persons apply only to stores and mercantile establishments.

Second. Reading sections one and three together, as they must be in order to arrive at the correct interpretation of their provisions, I am of the opinion that children under fourteen years of age may be lawfully employed in husking sheds and other places connected with canning factories in which no machinery is operated.

Third. The exemption specified in section 3 does not, in my judgment, exempt the canning industry from all the provisions of the chapter referred to, but simply permits the employment of children under fourteen years of age in husking sheds and other

places connected with canning factories, but in which no machinery is operated.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

August 7, 1907.
HON. EDWARD D. BRIGHAM,
Labor Commissioner.

STANDARD FIRE INSURANCE POLICY.—Held; (1) That if a standard fire insurance policy is issued without filling in the blank space following the $ sign, no agreement is contained in the policy covering additional insurance, and leaving such space blank should be construed as a refusal to permit the taking of additional insurance. (2) An unlimited amount of additional insurance may be authorized by writing in the blank following the $ sign the word "other" or the words "an unlimited amount of". (3) Additional insurance may be prohibited by writing in the words "no" or "no other". (4) Companies may waive the provision in the policy limiting the taking of additional insurance to authorized companies, and consent to the taking of insurance in unauthorized companies. (5) The whole clause cannot be waived and another substituted. (6) a-If the parties agree that additional insurance may be obtained in unauthorized companies this agreement must be in the form of a rider attached to the policy. b-The blank following the $ sign in the policy can only be used to fill in the amount of additional insurance in unauthorized companies that the parties have agreed upon or to indicate that no additional insurance is to be obtained.

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

"Subdivision 1 of section 2, chapter 76, acts of the thirty-second general assembly, the same being one of the provisions of the standard fire insurance policy, reads as follows:

"'It is hereby agreed that the insured may obtain $——— additional insurance in companies authorized to do business in the state of Iowa.'

"Will you please favor me with your official opinion on the following points:

"1st. If a company issues a policy without placing any amount in the blank space following the $ sign, should such

act be construed as a refusal to permit the taking of other or additional insurance, or as permitting the taking of an unlimited amount of other insurance?

"2d. If it is held that such an act as is designated in question No. 1 should be construed as declining to permit the taking of other or additional insurance, (a) In what manner, if at all, can companies permit the taking of an indefinite or unlimited amount of additional insurance? (b) Could the word 'other' be written in the blank space following the $ sign, and would that be held as permitting the taking an indefinite or unlimited amount of other insurance?

"3d. If it is held that such an act as is designated in question No. 1, viz., leaving the space following the $ sign blank, should be construed as permitting an unlimited amount of additional insurance to be taken, what should be placed in the blank space following the $ sign where it is not intended that any additional insurance shall be taken?

"4th. (a) Would it be permissible to write the word or words "no" or "no other" in the blank space following the $ sign? (b) If permissible to insert the words "no" or "no other" what would be the effect as to unauthorized insurance? As the clause would then provide that no other insurance could be taken in authorized companies, would it also mean that no other insurance could be taken in either authorized or unauthorized companies?

"5th. Can companies waive the provision of the clause limiting the taking of additional insurance to 'companies authorized to do business in the state of Iowa', so as to permit the taking of insurance in unauthorized as well as authorized companies?

"6th. If question No. 5 is answered in the affirmative, in what manner should the waiver be made?

"7th. Can companies waive the entire provisions of the clause quoted in the introduction to this request and substitute the following or a similar clause 'other insurance permitted'?

"8th. Can companies fill in an amount in the space following the $ sign and then insert a clause 'other insurance permitted', and if so, could other insurance in unauthorized companies be taken, or only insurance in authorized companies?

"9th. Can companies leave the space following the $ sign blank and insert a clause 'other insurance permitted' and, if so, could other insurance in unauthorized companies be taken, or only insurance in authorized companies?"

In response thereto I submit the following:

First. The blank space following the $ sign in subdivision 1 of section 2, chapter 76, acts of the thirty-second general assembly, is to be filled by the parties making the contract of insurance with their agreement, whatever it may be, as to additional insurance; if, therefore, a policy is issued without filling in the blank space, following the $ sign, no agreement is contained in the policy covering additional insurance, and leaving such space blank should be construed as a refusal to permit the taking of other or additional insurance.

Second. The company can authorize the taking of an indefinite or unlimited amount of additional insurance by simply writing in the blank following the $ sign the word "other", or the words "an unlimited amount of".

Third. If it is the intention of the parties to the insurance contract to prohibit the taking of any additional insurance, then the blank should be filled by writing in the word or words "no" or "no other".

Fourth. Companies may waive the provision of the clause referred to limiting the taking of additional insurance to "companies authorized to do business in the state of Iowa", and consent to the taking of insurance in unauthorized as well as authorized companies. This waiver may be accomplished by attaching to the policy a rider containing the agreement of waiver, and I would suggest the following form: "At the request of the insured the clause in this policy limiting additional insurance to companies authorized to do business in the state of Iowa is hereby waived."

Fifth. The entire provisions of the clause referred to cannot be waived by the insurance company and another or different one substituted. If in order to fully state the contract of the parties with reference to additional insurance it be necessary to add to or take from the clause referred to, it must be done by rider.

Sixth. The blank following the $ sign in the policy can only be used to fill in the amount of additional insurance in authorized companies that the parties have agreed upon, or to indicate by appropriate words that no additional insurance is to be obtained by the insured. If, as stated above, the parties agree that additional

insurance may be obtained in unauthorized companies this agreement must be in the form of a rider attached to the policy.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

August 9, 1907.
HON. B. F. CARROLL,
Auditor of State.

FEES COLLECTED BY STATE BOARD OF DENTAL EXAMINERS—SHOULD BE COVERED INTO THE GENERAL REVENUE OF THE STATE AT THE CLOSE OF EACH PERIOD.—It is held that the fees collected by the state dental board during the year are subject only to expenses and bills contracted during that year, and that any sum of money remaining unexpended at the close of each period should be covered into the general revenue of the state.

SIR: I have your communication of the 11th instant in which you refer to section 2600-h of the code supplement, and chapter 7 acts of the thirtieth general assembly, which in so far as they are material to your inquiry provide as follows:

"Section 1. That all boards, commissions, departments, and officers of state, elective or appointive, shall turn into the state treasury on or before the 15th day of each month all fees, commissions, or moneys collected or received during the preceding calendar month, with an itemized statement of sources from which received.

"Sec. 2. * * * * *

"Sec. 3. That the executive council shall examine all statements referred to in section two (2) (expenses and per diem of boards and commissions) of this act that shall have been filed with the secretary of the council, and for all items of per diem and expenses approved and amounts allowed by a majority of said council the auditor of state shall draw warrants payable by the treasurer of state out of such funds as are now or may hereafter be provided by law. The treasurer of state and auditor of state shall each keep an account of the moneys paid in under the provisions of this act and where the law now provides, or may hereafter provide, that the amounts allowed for per diem and expenses shall be limited to or paid from fees collected, the auditor's warrant shall be drawn against the funds realized from such fees and shall not exceed the amount thereof."

Section 4 repeals all acts in conflict with this act.

Chapter 7 above referred to went into effect July 4, 1904, and you ask for an opinion as to whether or not the board of dental examiners under section 2600-h of the code supplement as modified by chapter 7, has the right to draw upon the funds collected in one year to pay bills which were contracted during a subsequent year, or in other words, should the unexpended fees for any period be allowed to accumulate and remain to the credit of the board to be used by the board at any time in the future, or should the amount remaining unexpended at the close of each period be covered into the general revenue of the state.

The question is not free from difficulties, but as I view the matter under section 2600-h of the code supplement, the board audited its own bills and at the end of each annual period which closed, according to said section, on the first day of May of each year any sum of money remaining after the payment of the compensation and expenses of the members of the board, and the salary of the secretary and treasurer, was paid by the treasurer of said board to the state treasurer and covered into the general revenue of the state, and that chapter 7 above referred to was passed in order to hold all boards and commissions to a more strict accountability of the funds collected by them by providing that such boards and commissions should turn into the state treasury on or before the fifteenth day of each month all fees, commissions, or moneys collected or received during the preceding calender month, and that the bills of all boards and commissions should be audited by the executive council.

It is clear that it was the intention of the legislature in passing chapter 7 to decrease and not increase the latitude of the various boards, commissions, and departments of state in the collection and distribution of the fees coming into their several departments, and while the time of paying the money into the state treasury, and the method of auditing the bills are changed, there was no intention to repeal that part of 2600-h of the code supplement which provided that the amount of money remaining after the payment of expenses as therein stated should be covered into the general revenue of the state on or before the first day of May of each year. Only such parts of section 2600-h of the code supplement are repealed by chapter 7, acts of the thirtieth general assembly as are in necessary conflict with the provisions of that chapter.

My conclusion is, therefore, that the fees collected by the dental board during the year are subject only to expenses involved and bills contracted during that year.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

August 9, 1907.
HON. W. W. MORROW,
Treasurer of State.

INDEBTEDNESS TO MUNICIPAL CORPORATIONS—WHAT CONSTITUTES.—Money raised by a city in anticipation of taxes as provided for in section 912 of the code which were payable only from a school fund, and in which it was provided that the amount so raised should not create a liability against the municipality nor the general revenues thereof is not to be included in the indebtedness of the city.

SIR: I have before me certain papers and communications referring to the indebtedness of the city of Burlington, Iowa, together with your letter requesting my opinion as to what obligations shall constitute an indebtedness of political or municipal corporations, as the term is used in the constitution of Iowa.

Section 3 of article XI of the constitution provides as follows:

"No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation—to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness."

In the determination of this question it is well to keep in mind that the word "indebtedness" as used in the constitution has received judicial interpretation, and is not to be construed in its most comprehensive sense.

As said by our supreme court in *Swanson vs. The City of Ottumwa*, 118 Iowa, 161-189, "Were we to give the word the broad significance that some of the authorities would justify, we should destroy the corporate life and efficiency of every municipality which reaches the allowed limit of indebtedness."

And from this case and the other decisions of our supreme court, I think the following rule or principle is to be deduced:

That whenever a municipality has the means or funds in its treasury to meet its indebtedness, the issuance of warrants in excess of the five per cent limit is not a violation of the constitutional prohibition; and that even if there be no money in the treasury yet current expenses incurred in anticipation of the taxes duly levied would not constitute an indebtedness. So also where money is to be raised by special assessments laid upon certain specific property or districts, or where the same is to be raised by special taxes authorized by statute, and according to the provisions thereof the bonds or certificates sold in anticipation of the special taxes are payable only out of certain and specific funds therein designated, and no general liability is incurred against the municipality or its regular and general revenues, then and in that event the money raised, or to be raised is not an indebtedness in the sense that the word is used in the constitution; provided, of course, that the bonds, certificates or contracts of the municipalities made in pursuance of such statute are in conformity with its provisions.

Applying the above principles to the instant case it follows that the money raised by the city of Burlington in anticipation of taxes as provided for in section 912 of the code, which were payable only from a special fund, and in which it was provided that the amount so raised should not create a liability against the municipality nor the general revenues thereof is not to be included in the indebtedness of the city. Hence the city in raising such revenue did not exceed its authority or violate the constitutional provisions above referred to.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

August 16, 1907.
HON. B. F. CARROLL,
Auditor of State.

VESTED RIGHTS—EXCHANGE OF TRANSPORTATION FOR SERVICES RENDERED.—Held; That contracts entered into in good faith prior to the passage of chapter 112, acts of the thirty-second general assembly, would not be invalidated by reason of said act, and the issuance of passes pursuant to the terms of said contract would not subject the parties to said contract to the penalty prescribed therein.

SIR: I have before me your communication of the 13th ultimo, with contracts between the Hawkeye Telephone Company and

the Des Moines Interurban Railway Company, the Chicago, Milwaukee & St. Paul Railway Company, and the Chicago, Rock Island & Pacific Railway Company, all covering the exchange of transportation for telephone service, and requesting my opinion as to the legality of passes issued under said contracts.

In response thereto I have to say, that a decision of the question you submit involves, at least to some extent, the validity of the contracts referred to, and the rights and obligations of the parties thereunder as between themselves, questions which I do not feel like passing upon at this time.

Assuming, however, that prior to the passage of chapter 112, acts of the thirty-second general assembly, the provision in the contracts covering telephone service could have been enforced against the Hawkeye Telephone Company, then in my opinion, the issuance now of passes as provided in the contracts, and the use of the same by the persons to whom they were to be issued would not subject any of the parties to the penalty provided for in section 4 of said chapter 112; in other words, if the contracts in question were legal and enforcible as between the parties prior to the passage of the so called anti-pass act, and neither party has since abrogated them, then passes issued since January 1st, and since the passage of the act above referred to would, in my judgment, be legal.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

September 12, 1907.
HON. ALBERT B. CUMMINS,
Governor of Iowa.

STATE REGISTRAR—VITAL STATISTICS—COMPENSATION ALLOWED.—The secretary of the state board of health is made state registrar of vital statistics. Held; (1) That the state registrar is justified in charging a fee of ten cents for each one hundred words for certified copies of records. (2) That no such fee could be lawfully retained by the state registrar as compensation, but should be turned into the state treasury.

SIR: Referring to your communication of the 13th ultimo, enclosing letter of the secretary of the board of health, and requesting my opinion as to whether or not a fee for certified copies of the records in the office of the state registrar could properly be charged and received by the state registrar, and the fee retained

by him as compensation for the duties required of him as head of that department, I submit the following:

Section 1 of chapter 109, acts of the thirty-first general assembly, creates the office of state registrar of vital statistics, and makes the secretary of the state board of health state registrar of vital statistics.

Section 7 of the same act appropriates the sum of twenty-five hundred dollars for the payment of the expenses of the department in which expense was to be included twenty-five dollars a month to the state registrar in addition to his salary as otherwise authorized.

The thirty-second general assembly by chapter 136 repealed the salary clause in section 7 of chapter 109, acts of the thirty-first general assembly, and reduced the appropriation for expenses from twenty-five hundred to two thousand dollars, thus showing clearly that it was the intention of the legislature to require the secretary of the state board of health to perform the duties of state registrar without other compensation than the salary provided for him as secretary of the state board of health.

Section 1291 of the code provides among other things, that for making out a transcript of any public papers or records under his control for the use of a private person or a corporation an officer may charge and receive for each one hundred words ten cents.

Under these several provisions it is my opinion:

First. That the state registrar would be justified in charging a fee for certified copies of the records of ten cents for each one hundred words.

Second. None of such fees could be lawfully retained by the state registrar as compensation, but should be turned in to the state treasurer.

I return you herewith Dr. Thomas' letter.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

September 13, 1907.
HON. ALBERT B. CUMMINS,
Governor of Iowa.

INSURANCE COMPANIES—RESERVE FUND.—Held; That section 9, chapter 80, acts of the thirty-second general assembly, contemplates the collection and maintenance of a re-insurance reserve by state mutual fire insurance associations on all such association's business including tornado insurance.

SIR: I have before me your recent favor in which you ask my opinion as to whether or not section 9, chapter 80, acts of the thirty-second general assembly, providing for the collection and maintenance of a re-insurance reserve by state mutual fire insurance associations, contemplates the collection and maintenance of such a reserve on all the association's business; including tornado business; or simply a reserve on the association's fire insurance business, the association, under the law and its articles of incorporation, having the right to assume both fire and tornado risks.

In response I have to say, that after a careful examination of the section and chapter referred to, and with such information as I have been able to get with reference to the intention of the legislature in the enactment of the act in question, I am of the opinion that the law contemplates the collection and maintenance of a reinsurance reserve by state mutual fire insurance associations on all such association's business, including tornado business.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

September 13, 1907.
HON. B. F. CARROLL,
Auditor of State.

RAILWAY COMPANIES—HOURS OF SERVICE OF EMPLOYEES.—When the schedule of a run from Des Moines to Sioux City is less than sixteen hours, the train crew may complete the run even though the trip requires over sixteen hours, provided the delay is due to unavoidable and unforeseen causes. The good faith, safety of the public and the condition and health of employes to be considered.

DEAR SIR: I beg to acknowledge receipt of your letter of the 15th inst., asking for an opinion as to the proper construction of chapter 103, acts of the thirty-second general assembly, when applied to the situation stated in your letter.

Replying I have to say, that in the case you refer to, if the run from Des Moines to Sioux City begins and ends in Des Moines, and the schedule time of the trip is as you say, a trifle less than sixteen hours, then I would say;

First. That the fact that the train is delayed, waiting for connections at connecting points, or is unavoidably delayed for any other reason, would not prevent the crew from completing their trip as scheduled.

Second. That if, for some unavoidable and unforeseen cause, a train is delayed on its way from Des Moines to Sioux City so that it is evident when the train leaves Sioux City for the return trip, more than sixteen hours will be consumed in making the round trip, to permit the crew to return their train to Des Moines, would not be a violation of the act. In other words, upon the facts as stated in your letter, I concur in the construction you put upon the act.

The very nature of the business and the interests involved, it seems to me, make it necessary to give to the act a broad and liberal construction, a construction that will effectuate the purpose of the legislature in its passage. It was not the intention of the legislature, in the passage of the law, to reduce the earning capacity of railroad employes, nor to deprive them of any reasonable and proper opportunity to increase their income by putting in all of the time that their physical condition and the safety of the general public would justify; nor was it the intention of the legislature to make it unnecessarily inconvenient and expensive for the railroad company to operate its trains. In fact, its intention was to conserve the interests of all concerned in the business of railroading, and if the superintendents, train-masters, train-dispatchers, yard-masters, and other officials of the railroads in this state, whose duty it is to manage and operate trains, will exercise their good judgment in each particular case, keeping in mind always that two things are involved in their decision—the safety of the traveling public and the health, convenience and comfort of the men doing the work—the penalty clause in this act will never need to be enforced.

You will understand, of course, that this is not an official opinion, but simply my personal views given out of courtesy to you and the employes of your road.

Very truly yours,
H. W. BYERS,
Attorney-General of Iowa.

October 17, 1907.
JAS. C. DAVIS,
Des Moines, Iowa.

BOARD OF EDUCATIONAL EXAMINERS.—It is discretionary with the board whether they accept the manuscript of a county super-

intendent who writes the examination while giving it, he having had possession of the questions.

SIR: In compliance with your request for an opinion upon the following question:

> "Is it mandatory upon the educational board of examiners to accept the manuscript of a candidate for teacher's certificate written in an examination in which such candidate, or assistants appointed by him, conducts the examination, and previous to which said candidate as county superintendent has received and had in his posession the questions used in said examination, and who had charge of the answer papers after it; it further being his duty to grade or have graded the answer papers in one subject (didactics)?"

I submit the following:

The law governing the examination and certification of teacher's is embodied in chapter 122, acts of the thirty-first general assembly.

Section 2 of said chapter provides:

> "A county superintendent, who may be of either sex, shall be the holder of a first grade certificate as provided for in this act, or of a state certificate or a life diploma, and shall, during his term, be ineligible to the office of school director or member of the board of supervisors. If for any cause he is unable to attend to his official duties he may appoint a deputy who may act in his stead, except in visiting schools and trying appeals."

From a reading of the section above quoted it is clearly apparent that such a situation as your question suggests was not contemplated by the legislature, and were the provisions of said section complied with, no such question could possibly arise.

Section 3 provides:

> "On the last Friday and Wednesday and Thursday preceding in the months of January, June, July and October, the county superintendent shall meet and with such assistants as may be necessary, examine all applicants for a teacher's certificate. * * * The questions used in such examinations shall be furnished by the educational board of examiners, who shall cause the same to be printed and the examinations shall be conducted strictly under the rules prescribed by the board."

Section 13 provides:

> "As soon as the examination is completed the county superintendent shall forward to the superintendent of public instruction, a list of all applicants examined, with the standings of each in didactics and oral reading, and his estimate of each applicant's personality and general fitness, other than scholarship, for the work of teaching. He shall at the same time forward to the superintendent of public instruction the answer papers written, with the exception of those in didactics. Under the supervision of the educational board of examiners, the papers shall be graded and the scholastic qualifications determined. The result of such examination of persons who pass the same shall be entered upon a certificate provided by such board, and shall be transmitted to the county superintendent of the county in which the person entitled thereto resides."

There is, however, an important duty devolving upon the county superintendent before the examination is given as above provided. This duty is set out in section 12 of said chapter, which is as follows:

> "Before admitting anyone to the examination, the county superintendent must be satisfied that the person seeking a certificate is of good moral character, of which fact he may require proof, and is in all respects other than in scholarship possessed of the necessary qualifications as an instructor."

I infer from your question that it is the practice and rule of the educational board of examiners to forward the questions to be used in the examination to the county superintendent prior to the time of the giving of the examination.

In view of the provisions above quoted, to our mind, the duties of a county superintendent in relation to the examination of applicants for a teacher's certificate, taking into consideration the fact that the county superintendent may appoint an assistant or assistants to aid in the conducting of the examination, are incompatible with his also being an applicant and writing at such examination. It is therefore my opinion that it is not mandatory upon the educational board of examiners to accept the manuscripts of a candidate for a teacher's certificate written under the conditions stated in your letter.

Respectfully submitted,
CHARLES W. LYON,
Assistant Attorney-General.

October 19, 1907.
HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

SHOT EXAMINER—EMPLOYMENT AND DISMISSAL OF.—Held; (1) That a mine operator may lawfully agree with the miners to let them hire the shot examiners, limiting them to properly certified persons in the employ of the operator. (2) That where two shot examiners are certified for the same mine and only one is needed, the employer may select one and reject the other.

SIR: I have before me your communication of recent date in which you ask for an official opinion regarding the law of shot examiners, and in which you ask:

First. Does the operator comply with the law by agreeing with the miners to let them hire the shot examiners?

Second. If so, can the miners employ a man as shot examiner that is not in the employ of the operator?

Third. Can the employer discharge a shot examiner—that is where there are two for the same mine and only one needed? Can he discharge the one and employ the other?

In response thereto I submit the following:

Section 2495-b of the supplement to the code, in so far as it affects the questions covered in your inquiry, provides as follows:

> "In all mines, where the coal is blasted from the solid, competent persons shall be employed to examine all shots, before they are charged. * * * Before entering upon the discharge of their duties, said examiners shall give proof of their competency to the state mine inspector of the district in which the mine where they are employed is located, and said inspector shall certify to the operator of each mine the persons who have given proof of their competency to act in the capacity of shot examiners. The state mine inspector to have the power to refuse to give permission to any person to act as shot examiner who, in his judgment, is not sufficiently competent; or he may revoke the permission granted, should it appear that a shot examiner is negligent or careless in the performance of his work."

Under the foregoing provisions it is the duty of the operator to employ as shot examiners such persons only whose competency has been certified to by the inspector of the district in which the mine is located. There is, however, nothing in the section that would prohibit the operator from agreeing with the miners to let them select or hire the shot examiners, but the responsibility for the manner in which the examiner performed his duty would rest with

the operator in whose mine the examiner was employed, and if the selection and hiring was done by the miners under an agreement with the operator, in making the selection the miners would be bound to make their selection from persons certified as above stated; nor is there anything in the section prohibiting the discharge of a shot examiner when his services are no longer needed.

I would therefore say:

First. That the operator may lawfully agree with the miners to let them hire the shot examiners, limiting them, however, to properly certified persons.

Second. That under such an agreement the miners would be limited in the employment of a shot examiner to persons in the employ of the operator.

Third. That where two shot examiners are certified for the same mine, and only one is needed, the employer may employ one and reject the other.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

October 24, 1907.
HON. RHYS T. RHYS,
State Mine Inspector,
Ottumwa, Iowa.

LIFE INSURANCE COMPANIES—INVESTMENTS—MEANING OF WORD "STATE" AND THE TERM "GROSS TAX CERTIFICATE."—Held; (1) That the word "State" as used in subdivision 4 of section 1806 of the code, and subdivision 3 of section 1, chapter 77, acts of the thirty-first general assembly, should be construed as including a territory. (2) That the instrument called "gross tax certificate" is not such an evidence of municipal indebtedness as to bring it within the class of investments in which a life insurance company may put its funds.

SIR: I have before me your communication of the 1st instant in which you say:

> "The executive council would like your opinion upon two questions arising upon the enclosed papers.
>
> "*First.* Is the word 'state' in section 1806, subdivision 4, to be construed as including a territory?
>
> "*Second.* Is the instrument called 'gross tax certificate' an evidence of municipal indebtedness, so as to bring it within

the class of investments in which a life insurance company may put its funds?"

In response thereto I submit the following:

Paragraph 15 of section 48 of the code is as follows:

> "The word 'state' when applied to the different parts of the United States, includes the District of Columbia and the territories, and the words 'United States' may include the said district and territories."

Subdivision 3 of chapter 77, acts of the thirty-first general assembly, amending section 1806 of the supplement to the code, provides as follows:

> "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 used by authority of and according to law and bearing interest, and are approved by the executive council."

It will be noticed that the legislature in enacting the above subdivision recognized a distinction between evidences of indebtedness of a county, city, town or school district, and improvement certificates issued by municipal corporations, and the investment of funds by insurance companies or associations in improvement certificates is limited to those issued by municipal corporations of this state, and such as are a first lien upon real estate within the corporate limits of the municipality.

The language used by the legislature in this subdivision indicates quite clearly to me that the "other evidences of indebtedness" referred to in the first line of said subdivision is limited to indebtedness of the county, city, town, or school district resting upon all of the property of the county, city, town, or school district; in other words, an indebtedness for which the credit of the municipality is pledged for its payment as distinguished from the indebtedness resting upon the property of a district, and for the payment of which the property only of the district is liable.

I conclude therefore:

First. That the word "state" as used in subdivision 4, of section 1806 of the code, and subdivision 3 of section 1 of chapter 77, laws of the thirty-first general assembly, should be construed as including a territory.

Second. That the instrument called "gross tax certificate" is not such an evidence of municipal indebtedness as to bring it within the class of investments in which a life insurance company may put its funds. I return you herein papers.

Respectfully submitted,
H. W. BYERS,
Attorney-General of Iowa.

October 25, 1907.
HON. A. B. CUMMINS,
Governor of Iowa.

ACADEMY OF SCIENCE—AUTHORITY OF GOVERNOR TO REVISE REPORT.—The governor has power to revise the report of the academy of sciences.

SIR: I have before me your communication of the 25th instant referring to section 124 of the code, and requesting an opinion as to whether or not the report of the academy of sciences is covered by this section, and subject to your revision in the way of determining what shall, and what shall not be printed.

In response thereto I have to say, a careful examination of the statute convinces me that you have the same power to revise the report of the academy of sciences that you have with reference to the reports of the several state departments.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

October 30, 1907.
HON. ALBERT B. CUMMINS,
Governor of Iowa.

STATE BOARD OF MEDICAL EXAMINERS—FEES DEPOSITED MAY BE RETURNED WHEN.—It is held, that a practitioner in Illinois who makes application for admission to practice medicine in Iowa under reciprocity with the state of Illinois files his application and fee of $50.00, that said fee may be returned to said applicant provided that no certificate has yet been granted, and the fee has not been covered into the state treasury, even though the board of medical examiners have passed upon

the application and authorized the secretary to issue a certificate.

SIR: I beg to acknowledge receipt of your communication of the 1st instant, in which you say:

"An applicant for admission to practice medicine under reciprocity with the state of Illinois, files his application and fee of $50.00 (fifty dollars). At the first meeting the board of medical examiners passes upon the application and instructs the secretary to issue a certificate to the said applicant. The fee of $50.00 then becomes the property of the state of Iowa, but has not yet been turned over to the treasurer of state.

"The enclosed letter from Dr. Louis H. Freedman requests the return of his fee, stating that having decided to make other arranements he no longer requires the Iowa certificate. This letter was not received until two days after the board had passed favorably upon his application. Will you kindly inform me if under the circumstances cited in Dr. Freedman's letter, I would be justified in withholding the certificate and returning the fee of the applicant."

In response thereto I have to say, that under the circumstances stated in your letter, it would be legal and proper for you to return the fifty dollar ($50.00) fee to Dr. Freedman.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

November 9, 1907.
DR. LOUIS A. THOMAS,
Secretary State Board of Health.

STATE BOARD OF MEDICAL EXAMINERS—AUTHORITY TO ADMIT STUDENTS TO EXAMINATION.—It was held that under the facts set forth in the opinion, two students of Drake University were entitled to take the examination before the state board of medical examiners.

SIR: I beg to acknowledge receipt of your communication of the 1st instant, in which you say:

"Two students were admitted to the junior class of the medical department of Drake University, one of whom was a graduate veterinarian, and the other a graduate in osteopathy. Upon these qualifications the faculty of Drake University

examined them as to their proficiency in the various branches taught in the said university during the freshman and sophomore years. Both applicants passed a creditable examination. At that time the state board of medical examiners required that all applicants for examination should show four years of actual medical study pursued in a medical college of recognized standing with the board; two years later upon their graduation from Drake University these students applied for examination before this board, but as their applications showed only two years of actual medical study in a college as prescribed by the state board of medical examiners, they were admitted to examination upon the understanding that if the board should decide that the faculty of Drake University had acted contrary to the requirements of the board, they would not be entitled to receive a rating.

"For your further information I will state that Dr. Fairchild, dean of the medical department of Drake University, stated that both students were admitted to the college in good faith; that he had consulted with the secretary of the board concerning the matter and had been given to understand that if the two students passed a satisfactory examination in the branches taught during the first two years of the course, there would be no objection to the college allowing them the two years credit for work done and graduating them in the regular order.

"The board instructed me to lay these facts before you and request your opinion as to the authority of the board to admit the two students in question, to examination."

In response thereto I have to say, that I have examined the provisions of the statute applicable to the inquiry here made, and, upon the facts stated in your letter, I am of the opinion that the board has ample authority to admit these two students to examination. It seems to me a refusal to admit them under the circumstances stated above, would be a gross injustice.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

November 9, 1907.
DR. LOUIS A. THOMAS,
Secretary State Board of Health,

STATE BOARD OF HEALTH—FEES FOR ISSUANCE OF DUPLICATE CERTIFICATE.—The state board of health may charge a reasonable fee for the issuance of duplicate certificates to physicians and osteopaths, such fees to be accounted for and turned into the state treasury.

SIR: I beg to acknowledge receipt of your November 1st, in which you say:

> "Will you kindly inform me as to whether this board would have authority to charge a reasonable fee for the issuance of a duplicate certificate to physicians and osteopaths. As far as I am informed, the law seems to be silent on this point, and in conversation with Mr. Cosson a short time ago he informed me that he was of the opinion that the board would have the legal right to charge a reasonable fee.
>
> "As this is a matter of considerable importance and questions may occasionally arise, I should be obliged if you will kindly furnish me a written opinion governing this point."

In response thereto I have to say, that it would be entirely legal and proper for you to charge a reasonable fee for the issuance of duplicate certificates to physicians and osteopaths, such fee to be accounted for and turned into the state treasury the same as other fees are required to be.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

November 9, 1907.
DR. LOUIS A. THOMAS,
Secretary of State Board of Health.

DESTRUCTION OF DISEASED CATTLE—AUTHORITY OF EXECUTIVE COUNCIL TO MAKE PAYMENT THEREFOR.—When cattle had been bitten by a dog affected with hydrophobia and killed by the owner upon the advice of a local veterinary surgeon, the state veterinarian or his deputy not being present and giving no directions that the same be killed, the executive council has no jurisdiction or authority to authorize payment therefor.

SIRS: I am in receipt of a communication from Mr. A. H. Davison requesting an opinion as to the authority of the executive council to make payment to Mr. John Broderick, a farmer residing in Dubuque county, Iowa, for four head of cattle killed upon the advice of a local veterinary surgeon because said cattle had been bitten by a dog affected with hydrophobia.

Mr. Davison in his request for an opinion enclosed a letter from Mr. John A. Cunningham in which it appears that previous to the killing of said cattle, the state deputy veterinary surgeon was notified over the long distance telephone as to the condition of said cattle, but that said deputy failed to appear until after the cattle had been killed; and therefore, neither the state veterinarian nor his deputy had anything whatever to do with the killing of said cattle or ordering the same to be killed.

The authority of the executive council in this matter is wholly statutory and is found in section 2534 of the code as amended, which provides as follows:

> "Whenever in the opinion of the state veterinary surgeon the public safety demands the destruction of any stock, the same may be destroyed upon the written order of such surgeon, with the consent of the owner, or upon approval of the governor, and by virtue of such order such surgeon, his deputy or assistant, or any peace officer, may destroy such diseased stock, and the owner thereof shall be entitled to receive its actual value in its condition when condemned, to be ascertained and fixed by the state veterinary surgeon and the nearest justice of the peace, who, if unable to agree, shall call upon the nearest or other justice of the peace upon whom they agree as umpire, and their judgment shall be final when the value of the stock, if not diseased, would not exceed twenty-five dollars; but in all other cases, either party shall have the right of appeal to the district court, but such appeal shall not delay the destruction of the diseased animals. The veterinary surgeon shall at once file with the executive council his written report thereof, who shall, if found correct, indorse their finding thereon, whereupon the auditor of state shall issue his warrant therefor upon the treasurer of state, who shall pay the same out of any moneys at his disposal under the provisions of this act, but no compensation shall be allowed for stock destroyed while in transit through or across the state, and the word 'stock' as herein used, shall be held to mean cattle, horses, mules and asses."

These provisions are not merely directory but mandatory and must be complied with in order to give the council jurisdiction. It is clear from the facts stated in Mr. Cunningham's letter that

there has not been a substantial compliance with the provisions of the above named section. It is therefore my opinion that the executive council has no jurisdiction or authority in the premises.

Respectfully,
CHARLES W. LYON,
Assistant Attorney-General of Iowa.

November 13, 1907.
TO THE HONORABLE EXECUTIVE COUNCIL OF THE STATE OF IOWA.

TEACHER'S CERTIFICATE—COUNTY SUPERINTENDENT'S AUTHORITY IN THE REGISTRATION THEREOF.—Held: (1) A teacher's certificate issued by the state board of educational examiners is prima facie evidence of its validity. (2) When a teacher has presented her certificate to the county superintendent to be registered, and has tendered the registration fee provided, she has done all that is required of her, and it is then the duty of the county superintendent to register such certificate, and in the event of his refusal so to do the teacher may legally enter upon her duties as such within the county, even though the county superintendent arbitrarily refuses to register such certificate.

SIR: I am in receipt of your favor of the 27th instant in which you request an opinion upon the following questions:

"1. Is a teacher's certificate issued by the state board of educational examiners prima facie evidence of its validity?

"2. May a county superintendent, except as provided in section 2734-r, School Laws of 1907, refuse to register such a certificate when presented for that purpose, and the registration fee of one dollar tendered?

"3. In case a county superintendent refuses to register a certificate when so presented, and the fee tendered, may the holder of the certificate legally enter upon her duties as a teacher within the county?"

These questions will be answered in the order stated.

First. A teacher's certificate issued by the state board of educational examiners is unquestionably prima facie evidence of its validity.

Second. Section 17 of chapter 122 of the acts of the thirty-first general assembly provides:

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

Section 18 of said chapter (denominated in your letter as section 2734-r, school laws of 1907), provides:

"In case a sufficient number of life diplomas, state certificates, first grade certificates, special certificates and second grade certificates are held in any county to supply the schools thereof, it shall not be incumbent on the county superintendent to register third grade certificates."

Clearly, when a teacher has presented her certificate to the county superintendent for the purpose of having same registered, and has tendered the registration fee provided, she has done all that is required of her and all in her power to comply with section 17 above quoted, and it is then the duty of the county superintendent to register such certificate. That it was the legislative intent to make it the duty of the county superintendent to register such certificate when presented in the manner set out in your second question, becomes at once apparent when the language of section 18 above quoted is considered. In said section it is provided that under certain conditions "it shall not be incumbent on the county superintendent to register third grade certificates," clearly indicating the legislative intent to make it incumbent upon the county superintendent to register all certificates, excepting third grade certificates under certain conditions, when properly presented.

Third. When a teacher has presented her certificate to the county superintendent for registration, together with the registration fee required as provided in section 17 above set out, she has done all that is required of her under the law, and it is my opinion that she may then legally enter upon her duties as teacher within the county, even though the county superintendent may arbitrarily refuse to register such certificate.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

November 29, 1907.
HON. JOHN F. RIGGS,
Superintendent Public Instruction.

EXPENSE—WHAT ITEMS OF EXPENSE MUST BE REPORTED BY THE COUNTY AUDITOR AND CLERK.—Opinion enumerates in detail the expenses of the county for criminal prosecutions which the auditor must report to the clerk of the district court pursuant to provisions of section 475 of the code; and holds that the clerk of the district court shall make substantially the same report to the secretary of state pursuant to the provisions of section 293 of the code.

SIR: I have before me your communication in which you ask for an opinion as to what items of expense the county auditor should report to the clerk of the district court under section 475 of the code, and which the clerk should report to the secretary of state under section 293 of the code.

In response thereto I submit the following:

Section 475 of the code provides in substance that the county auditor shall report to the clerk of the district court before a day fixed, the expenses of the county for criminal prosecution.

Section 293 of the code provides that the clerk of the district court shall make substantially the same report to the secretary of state.

Under these provisions the following items of expense should, in my judgment, be included in such reports:

Jurors' fees in all criminal cases; jurors' meals served while in the trial of criminal cases; all bailiffs' fees for service while in attendance upon the court or jury during the trial of criminal cases; printing and postage used in connection with criminal cases; all expense in taking convicted persons to prison; attorneys' fees allowed in the defense of criminals; all fees paid to the court reporter for reporting in the trial of criminal cases; all the fees of grand juries; all fees paid to witnesses appearing before the grand juries; all fees paid to the clerk of the grand jury; the compensation of the bailiff for attendance upon the grand jury; all fees of the sheriff and other officers paid by the county for services in connection with the work of the grand jury; all expenses made in connection with the jail; all jurors' fees, jurors' meals, witnesses' fees, constables and justices' fees paid by the county in all criminal cases before justices of the peace and police courts; the compensation of the county attorney and his assistants.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

November 30, 1907.
HON. W. C. HAYWARD,
Secretary of State.

STATE BANKS—CERTIFICATES OF DEPOSIT—NOTICE OF WITHDRAWAL OF DEPOSITS.—Held: (1) A state bank may legally issue certificates of deposit containing a stipulation that the issuing bank might require of the certificate holder sixty days' notice before the deposit can be withdrawn. (2) a. That savings banks are authorized to require sixty days' written notice of the withdrawal of savings deposits without reference to the form of certificate. b. But this provision of the laws has no application to state banks operating a savings department.

SIR: I have before me your letter enclosing letter from Mr. C. J. Weiser, president of the Winneshiek County State Bank, and asking for an opinion as to whether or not state banks by a provision in the certificates of deposit, or by entry in or upon their pass books covering funds deposited in the savings department of such banks can require of their depositors sixty days' notice upon withdrawal of savings deposits.

In response thereto I submit the following:

I know of no provision in the statute limiting the power of a state bank in its agreements with depositors in their savings department as to time of withdrawal of deposits, and I see no reason why such banks could not legally and properly issue certificates of deposit containing an agreement that the issuing bank might require of the certificate holder a sixty days' notice before the deposit could be withdrawn. Such an agreement, in my judgment, would be binding upon the certificate holder.

As to savings banks the law as written in section 1848 of the supplement to the code gives such banks the right to require sixty days' written notice of the withdrawal of savings deposits without reference to whether the certificate is a demand or time certificate, but this provision has no application to state banks operating a savings department, and all such banks in the absence of an agreement with the depositor to the contrary must pay their certificates when due.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

December 5, 1907.
HON. B. F. CARROLL,
Auditor of State.

STATE BOARD OF MEDICAL EXAMINERS—A DAY'S WORK—WHAT SHALL CONSTITUTE.—The state board of medical examiners have the power to fix and determine their office hours, and the right to decide what shall constitute a day's work in examining and rating papers.

SIR: I beg to acknowledge receipt of your communication of December 3d in which you ask:

> "*First.* If a member leaves home in the afternoon to attend the meetings of the board, and arrives in Des Moines that evening is he entitled to receive pay for a whole day or for only the fractional part thereof occupied in traveling.
>
> "*Second.* Some time ago the board adopted a schedule of work for rating examination papers and decided that the work of rating answers to eighty questions should constitute a day's work. Is such an arrangement legal?
>
> "*Third.* At a recent trial the board convened at 9:00 A. M., and remained in session until after midnight; repeating this on the second day in order that parties attending the trial from a distance might not be required to be away from their home and business any longer than necessary. Under such circumstances would the members of the board be entitled to receive pay for two or for four days' work?"

In response thereto I have to say:

First. That as to your first and third inquiries I have at this time under consideration a request from the executive council for an opinion covering the same questions, and will forward you copy of the same when rendered.

Second. The state board of medical examiners undoubtedly have the right to adopt all reasonable rules regulating and covering the work of their department. They have the power to fix and determine their office hours, and in my judgment, they have the right to settle and decide just what shall constitute a day's work in examining and rating papers and answers.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

December 5, 1907.

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

EMBALMER'S LICENSE—RENEWAL.—Under section 4, chapter 140, acts of the thirty-second general assembly, in order that an embalmer's license might be renewed without examination application for such renewal should have been made within thirty days after the 30th day of June following the date of the issuance of said license.

SIR: I beg to acknowledge receipt of your letter of the 3d instant asking for an interpretation of section 4, chapter 140, acts of the thirty-second general assembly.

In response thereto I submit the following:

Section 4 of the act referred to, in so far as it is material to your inquiry, provides:

> "Any person now holding an unexpired license from the state board of health as an embalmer, shall be held to be licensed as an embalmer under the terms of this act, but all licenses now in force, or hereafter issued, shall expire on the 30th day of June following the date of issuance of said license. Licenses shall be renewed without examination annually by the state board of health within thirty (30) days after expiration, provided, etc."

Under this provision in order that a license might be renewed without examination application for such renewal would have to be made within thirty days after the 30th day of June this year.

It has been suggested that since the act was without a publication clause when passed by the legislature, and hence did not become effective until after the 4th day of July, the provision that "all licenses now in force, or hereafter issued, shall expire on the 30th day of June following the date of issuance of said license" is without force.

I cannot, however, agree with this contention; it is perfectly evident from a reading of the act in question that it was the intention of the legislature to fix a date at which all licenses for the practice of this profession should expire, and the fact that the date fixed happens to be a few days before the law goes into effect is, in my judgment, unimportant in so far as it affects the question of renewing licenses without examination. The most, I think, that could be claimed would be that embalmers would have thirty days

from and after the taking effect of the act in which to apply for renewal of their licenses.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

December 7, 1907.
DR. LOUIS A. THOMAS,
Secretary State Board of Health.

OLD SOLDIERS PREFERENCE LAW—DISCHARGE OF AN APPOINTEE FOR INCOMPETENCY OR MISCONDUCT.—In order to discharge an old soldier because of incompetency or misconduct written charges should be preferred against him stating the grounds for removal, and a copy of such charges with notice of time and place of hearing should be served upon the accused.

SIR: I am in receipt of your request for an opinion as to the procedure to follow in case you find it necessary to remove or discharge any member of your force for incompetency or misconduct who is an honorably discharged soldier of the civil war.

Written charges should be made stating the grounds for the removal, and a copy of such charges, together with notice of the time and place of hearing, should be served upon the accused, and at such time and place the person sought to be removed should have an opportunity to be heard and refute such charges and show why he ought not to be discharged.

Upon hearing if the charges are not sustained by a preponderance of the evidence the person should be exonerated, but if a preponderance of the evidence shows incompetency or misconduct the person should be removed from his position or discharged from employment.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

December 13, 1907.
HON. T. E. MCCURDY,
Custodian of State House.

IOWA NATIONAL GUARD—EXPENSE OF COURT MARTIAL—HOW PAID.—The expense of a court martial incurred in the trial of an officer of the Iowa national guard when in active service, should be taxed by the president of the court martial, and upon his certificate the auditor should issue to the judge advocate his warrant for such expenses, the same to be paid by the state treasurer out of the general fund.

SIR: I beg to acknowledge receipt of your letter of the 19th instant in which you ask:

> "An officer of the Iowa national guard, when in active service, if arrested and tried by a general court martial, for disobedience of orders when in said active service, how are the expenses of the court martial paid and from what funds, and who audits the voucher?"

In reply I have to say, that the expenses of the court martial, organized under the circumstances as stated in your letter, should be audited and paid as provided in section 2196 of the code, that is to say, the expenses shall be taxed up by the president of the court martial, and upon his certificate showing the character and the amount of the expenses, the auditor should issue to the judge advocate his warrant for such expenses, and the same should be paid by the state treasurer out of the general fund.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

December 19, 1907.
ADJUTANT GENERAL THRIFT,
State House.

DISINFECTION OF PUBLIC SCHOOL BUILDINGS—EXPENSE—HOW PAID.—The material used in disinfecting a school building should be furnished by the school board; the cost thereof paid from the funds of the school district, and the work of disinfection and supervision thereof should be done by the local board of health.

SIR: I beg to acknowledge receipt of your communication of some weeks ago asking for an opinion as to whether the expense of disinfecting public school buildings should be paid from the funds of the school district or by the local board of health.

In response thereto I have to say that since the rules of the state board of health require the disinfection to be under the personal supervision of the health officer, and since by the same rules, school boards are required to keep the school buildings and premises in a sanitary condition, it is my opinion that the disinfecting material should be furnished by the school board, and the

cost thereof paid from the funds of the school district, and that the work of disinfection and supervision thereof should be done by the local board of health.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

January 13, 1908.
HON. LOUIS A. THOMAS,
Secretary State Board of Health.

PRINTING OF ABSTRACT IN A STATE CASE—EXECUTIVE COUNCIL NO AUTHORITY TO ALLOW THE CLAIM.—In the case entitled *State of Iowa vs. Amana Society*, the expense of printing the abstract should be paid by the state, but, held; That a special act of the legislature is necessary to authorize payment.

SIR: Replying further to your communication of November 16, referring to the bill of Iowa county against the State of Iowa for money expended for printing an abstract in the case of the State of Iowa vs. Amana Society, I have to say that the bill for printing the abstract referred to should be paid by the state; but the executive council is without authority to audit the bill and order it paid from the state treasury.

It is my opinion that the only way the bill can be properly disposed of is by an act of the legislature. I return papers herewith.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

January 13, 1908.
A. H. DAVISON,
Secretary Executive Council.

PARDON OR PAROLE OF FEDERAL PRISONERS BY THE GOVERNOR.—The governor has no authority to pardon or parole a federal prisoner confined in one of the penitentiaries of this state. This power is invested exclusively in the President.

SIR: Referring again to your communication of some months ago asking for my opinion as to whether or not the governor has the power to pardon or parole a federal prisoner confined in one of the penitentiaries of this state, I beg to say that I have examined this question with great care, and without setting out at length any

of the reasons for my conclusion, it is my opinion that this power can be exercised only by the president of the United States.

I return herewith communication from Mr. F. E. Watkins and a brief furnished by Messrs. Milchrist & Scott of Sioux City, Iowa.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

January 13, 1908.
HON. ALBERT B. CUMMINS,
Governor of Iowa.

PRIMARY ELECTION LAWS—COMPENSATION OF SPECIAL POLICE OFFICERS AND CHALLENGERS—NOMINATION PAPERS—WHEN NECESSARY TO BE FILED.—Held: (1) Peace officers appointed to attend voting places for the purpose of preserving order pursuant to the provisions of section 1125 of the code are entitled to compensation, but that there is no authority for paying challengers for their services. (2) The board of supervisors should be paid for services rendered in canvassing returns of the primary election in the usual way and not charged to the primary election account. (3) Candidates for members of the board of supervisors in counties divided in superior districts need not file nomination papers.

SIR: I beg to acknowledge the receipt of your letter of January 16th in which you ask:

"*First.* Under the provisions of the primary election law for the payment of expenses of said primary election, should the police officers and challengers at said primary election be allowed pay for their services?"

"*Second.* Can the board of supervisors charge for their services in canvassing the returns of said primary election to the primary election account, provided they do not charge the county for the same time and services?

"*Third.* Does the provision in the primary law that the candidates for office in a smaller subdivision than a county need not file nomination papers also apply to candidates for members of the board of supervisors in counties that have been divided into supervisor districts?"

In response thereto I submit the following:

First. Section 1 of chapter 51, acts of the thirty-second general assembly, providing for primary elections makes the provisions of

chapters 3 and 4 of title 6 of the code, in so far as applicable, apply to such elections.

Section 1125 of chapter 3, title 6 of the code, makes provision for the appointment of special police officers to attend the voting places for the purpose of preserving order, and in my judgment, under these provisions such police officers are entitled to pay for their services, but I do not think it was the intention of the legislature to authorize payment for the services of the challengers provided for in section 9 of the primary act.

Second. The compensation of the board of supervisors for services in canvassing the returns of the primary election and in performing such other services as are required by the act under consideration, should be paid in the usual way and not charged to the primary election account.

Third. Candidates for members of the board of supervisors in counties that have been divided into supervisor districts are not required to file nomination papers.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

January 17, 1908.
HON. B. F. CARROLL,
Auditor of State.

FRATERNAL BENEFICIARY ASSOCIATIONS—PERMIT TO TRANSACT INSURANCE BUSINESS IN IOWA.—Held: That a fraternal beneficiary association organized and doing business under the laws of the State of Illinois which was authorized to transact insurance business in Iowa prior but not subsequent to April 1, 1904, may now lawfully transact buisness in Iowa without meeting the requirements of chapter 86, acts of the thirty-second general assembly, provided said association is in all other respects within the law governing such associations.

SIR: I am in receipt of your communication of some days ago referring to a certain fraternal beneficiary association organized and doing business under the laws of the State of Illinois, and asking my opinion as to whether or not under chapter 86, acts of the thirty-second general assembly, a fraternal beneficiary association which at one time was authorized to transact an insurance business in Iowa, but had not been so authorized since April 1, 1904, could

properly be refused authority to do business in this state until it was able to meet the requirements of chapter 86.

In response thereto I submit the following: Section one of the chapter referred to, in so far as it is material to your inquiry, provides as follows:

No fraternal beneficiary society not admitted to transact business within this state prior to the passage of this act, shall be incorporated or given a permit or certificate of authority to transact business within this state, unless it shall first show that the mortuary assessment rates provided for in whatever plan of business it has adopted, are not lower than is indicated as necessary by the following mortality table."

It seems to me that the language used in this section indicates clearly that it was the intention of the legislature to fix a time after which no society of the kind covered by the act which had not at some prior time been authorized to do business in this state, should be given a permit or authority to transact business within the state without first meeting with the requirements of this chapter. That is to say it was the evident intent of the legislature to exempt from the provisions of this act all such societies which had prior to its passage, under proper authority, acquired members in this state; and I think this exemption would apply even though the society in question for some reason or other was without a permit or certificate of authority at the time the chapter in question went into effect.

I am, therefore, of the opinion that the association in question may legally and properly be authorized to do business in this state without meeting the requirements of chapter 86, laws of the thirty-second general assembly, if such association is in all other respects within the law governing the granting of such authority.

Respectfully,
H. W. BYERS.
Attorney-General of Iowa.

January 30, 1908.
HON. BERYL F. CARROLL,
Auditor of State.

PRIMARY LAW—INTERPRETATION AND CONSTRUCTION OF THE ENTIRE ACT.

SIR: I beg to acknowledge receipt of your communication calling my attention to the importance of a full understanding upon the part of candidates for office, of the scope of the primary law

enacted by the thirty-second general assembly, and especially sections 32 and 33 of the act in question, and chapter 73, laws of the thirty-second general assembly, prohibiting political contributions by corporations, and requesting an opinion upon these sections and chapters.

In response thereto I have thought it wise, in view of the numerous inquiries now before this department for opinions upon the several sections of the act in question, to cover the entire act in a single opinion, and submit the following:

First. Sections 1, 2, 3, and 4 are entirely clear and need no construction or interpretation.

Second. Section 5, among other things, provides that the expenses of the primary election should be paid, one-half by the county in which the election is held, one-half by the state, and directs the board of supervisors to audit the entire expense and certify the same to the executive council; upon such certification the executive council is required to order a warrant for one-half the amount to be delivered to the county, and the county is then to pay the entire bill.

(a) Under this section the compensation of special police officers appointed to attend the voting places for the purpose of preserving order as provided in section 1125 of chapter 3, title 6 of the code, should be included in and charged to the primary election account. The challengers provided for in section 9 of the act are not entitled to any compensation.

(b) The compensation of the board of supervisors for such services as are required by the act under consideration should be paid in the usual way, and not charged to the primary election account.

Third. Section 6 fixes the time when the polls open and close, makes provision for the use of the Australian ballot system, indicates the manner in which the voter shall cast his ballot, how it shall be counted in case names are written upon his ticket, and in case a candidate is nominated on more than one ticket, requires from him a declaration indicating the party under which his name is to be printed on the official ballot.

Under this section two questions have been raised:

(1) As to whether or not chapter 2 of title 6 covering registration in certain cities applies to primary elections held under this act in such cities.

(2) Whether the elector voting at the city primary on February 24, 1908, is bound by his declaration of party affiliation when he

calls for his ballot at the primary election to be held in June this year.

It will be noted section 1 makes the provisions of chapters 3 and 4, title 6 and chapter 8, title 24 of the code apply, so far as applicable, to all primary elections, but nowhere in the act is anything said about chapter 2 of title 6 covering registration.

The original primary election law, found in chapter 40, laws of the thirtieth general assembly, provided for a complete scheme of registration of voters in cities with a population exceeding 3,500.

Chapter 51 under consideration repeals chapter 40, acts of the thirtieth general assembly, and makes no provision whatever for registration.

Section 7 of the act under consideration, among other things, provides:

> "At the primary election to be held in June this year, any person shall be entitled to participate therein who is a qualified elector in such precinct at the time of said primary election, and when the voter seeks to pass the guard-rail, he shall indicate the party ballot he desires."

It is further provided in the same section, that:

> "The voter's selection shall constitute his declaration of party affiliation," etc.

I therefore conclude upon the questions raised under section 6:

(1) That no registration is required prior to the primary to be held in cities of the first class, and cities acting under a special charter having a population of over 15,000, on February 24th, and that no registration is required in such cities after the city election in March and prior to the primary election in June of this year.

(2) That the declaration of party affiliation made at the primary in such cities on the 24th of February this year, will not be binding upon the voter at the general primary, it being the evident intent of the legislature to fix the status of the voter as to party for the first time at the June primary in 1908.

Fourth. Section 7 covers the declaration of party affiliation and provides a method of preserving a record of such declaration and for furnishing lists and poll-books to the primary election.

Under this section the question has been raised as to whether or not the lists and books used at the primary election in cities referred to in the last preceding division of this opinion are to be used at the primary in June. It seems to me to be very clear that this question should be answered in the negative.

Fifth. Sections 8 and 9 seem to be entirely clear, at any rate, no requests of any kind have been made for interpretation or construction of these sections.

Sixth. Section 10 covers nomination papers, affidavits of candidates and affidavits of qualified electors as to the signatures on nomination papers.

Under this section the following questions have been raised:

(1) Does the provision in the primary law that the candidates for office in a smaller subdivision than a county need not file nomination papers, apply to candidates for members of the board of supervisors in counties that have been divided into supervisor districts?

(2) If it does apply to such persons, how do they get their names printed upon the official primary ballot?

(3) When more than one sheet of paper is used and forms one nomination paper, does the law require a separate affidavit of a qualified elector to each separate sheet of paper; or may one affidavit of a qualified elector cover all of the several sheets of paper which together form one nomination paper?

(4) If the same person should sign more than one nomination sheet or sheets for the same candidate for the same office, would such duplicate signature invalidate the nomination paper or papers?

(5) Where several sheets are fastened together and used as a single nomination paper, must each sheet have the form set out in section 10 written or printed at the top?

Answering the above questions in their order:

(1) Candidates for members of the board of supervisors in counties divided into supervisor districts, and where members of the board are elected by district, do not need to file nomination papers.

(2) Candidates for office to be filled by the voters of a subdivision of a county may have their names printed upon the official primary ballot by filing with the county auditor at least thirty days prior to the primary election, the affidavit set out in this section.

(3) One affidavit will be sufficient to cover all of the several sheets used as a single nomination paper, provided, of course, the person making the affidavit has the required information with respect to the signers.

(4) If the same person should sign more than one nomination paper for the same candidate for the same office, his name could be counted but once in ascertaining whether the nomination paper contained the requisite number of signers. If by counting the name but once the nomination paper contained the number of signatures required by law, then the duplication would not in any manner affect the validity of said nomination papers.

(5) Each sheet of nomination paper, where more than one is fastened together and used as a single paper, should have printed at the top the form set out in this section, and signatures upon sheets without such form at the top cannot legally be counted.

Seventh. Section 11 provides for printing and furnishing to candidates for public office, the nomination paper blanks covered by the act under discussion. An opinion has been asked as to whether or not the secretary of state and the county auditor should furnish these blanks to candidates in unlimited numbers. It is my opinion that since the legislature fixed the required number of signers to be procured by each candidate, that these officers cannot legally furnish to candidates more than a sufficient number of blanks to contain the signatures required for the particular office. If the candidate desires to secure a larger number of signers, then he must furnish his own blanks.

Eighth. Sections 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 are self-explanatory and need no interpretation.

Ninth. Section 24 provides the method by which nomination shall be made for any office where the vote at the primary was a tie, and authorizes the party committee for the county, district or state, as the case may be, to fill vacancies occurring after the primary election. Under this section it is only vacancies which occur *after* the holding of the primary election that may be filled by the party committee. Vacancies which exist because no candidate for the particular office was voted for at the primary, are filled by the county convention as provided in section 25 of the act in question.

Tenth. Section 25 provides:

1st. That a county convention of each political party shall be held in each year in which a general election is to be held.

2d. The convention is to be composed of delegates elected at the primary election.

3d. The number of delegates from each voting precinct is to be determined by the respective county central committees, and a statement from such party committee designating the number each voting precinct is entitled to, must be filed in the office of the county auditor at least thirty days before the primary election. Upon a failure of the committee to so file, the auditor fixes the number.

4th. The voter expresses his choice for delegates to the county convention from his precinct by writing in the names on the blank lines left for that purpose and making a cross in the square opposite the name, or by pasting on the blank lines uniform white pasters with the name of the delegate written or printed thereon and by making a cross opposite each name.

5th. One member of the county central committee for each party from each precinct is to be elected in the same manner that the above delegates are selected, for a term of two years beginning on the day of and immediately following the adjournment of the county convention.

6th. Makes provisions for returns by the judges of election and for certifying the same to the auditor, and requires the auditor in turn to notify delegates and members of the county central committee of their election, the time and place of holding the county convention, and to deliver to the chairmen of the respective central committees a certified list of the delegates and committeemen elected.

7th. Provides the manner in which the county convention shall be called to order and temporarily organized, and the method of filling vacancies in precinct delegations, and prohibits the use of proxies.

8th. The county convention thus required to be held is authorized to nominate candidates for every office to be filled by the voters of the county, when no candidate for such office has for any reason not received a nomination at the preceding primary election. It is also authorized to nominate candidates for the office of judge of the district court in counties comprising one judicial district of the state, and to select delegates to the state and district conventions, as well as to elect members of the party central committee for senatorial and congressional districts.

Inquiry has been made under this section as to whether or not the county convention would have the right to nominate a person for a county office who had not been a candidate before the primaries; in other words, the question is if the names of three persons appeared upon the primary ballot for county auditor, and no one of the three receives the necessary thirty-five per cent, would the convention have the right to nominate for county auditor some person other than one of the three voted for at the primary. It seems to me there can be but one answer to this question. The county convention is given the power to make nominations for all county offices for which no nomination was made at the primary.

This would include not only the offices for which candidates were voted for at the primary, but also offices, if there should be any such, for which no candidate appeared on the primary ballot; the evident intent of the legislature being to leave the convention free to fill such places without limiting it to the persons who were voted for at the primary.

Eleventh. Section 26 provides for holding district conventions and is clear and definite in all its provisions.

Twelfth. Section 27 provides for the holding of a state convention for each political party, fixing the time such convention shall be held; prohibits the use of proxies and authorizes the convention when organized to make nominations for a state office, when for any reason no candidate for such office has been nominated at the preceding primary. It also authorizes the convention to nominate candidates for the office of judge of the supreme court, and to elect a state central committee consisting of not less than one member from each congressional district.

Suggestion has been made that under this section the state convention is authorized to name the chairman of the state central committee. The language of the section, however, does not justify such construction. It will be noted that nothing is said in the section about the selection of the chairman of the state central committee. On the contrary, the section provides that the committee may organize at their pleasure. This language indicates that it was the intention of the legislature to permit the committee to complete its organization by the election of a chairman and such other officers as it deemed necessary to properly carry on its work.

Thirteenth. Sections 28, 29, 30, and 31 are easily understood and need no interpretation.

Fourteenth. Section 32 prohibits persons from giving or receiving compensation for political services and attaches severe penalties for its violation, the object of the section and the intent of the legislature being to secure the unbiased expression of the voter at the primary election.

It is of vital importance to the state that only persons who are competent and fit should be selected to act as public servants, and it is the duty of every citizen to assist, in so far as his situation and condition will permit, in making such selection, and his choice should be uninfluenced by any other reward than the reward that comes to all alike from the faithful discharge of public duty. To this end, the legislature in the adoption of this section makes it a crime in Iowa for any person to perform political service for

pay, or to accept pay for such service, or to pay, offer or give for such service in the interest of a candidate for office.

It was not the intent of the legislature to prevent persons from accepting pay for performing service for a candidate which is in no sense political; that is to say, a candidate for office may legally and properly employ clerks and stenographers to take his dictation, write his letters, copy his speeches, take clippings from newspapers, mail his letters, and send out his speeches, clippings and announcements to persons whose names are furnished by the candidate, and perform all other services which come within their legitimate occupation or calling. He may legally and properly rent headquarters, pay for halls in which to make speeches, pay the printer for putting his speeches in type for distribution, hire liverymen to drive him from place to place, and pay the railway company for his transportation. Such services are innocent and the candidate, or his friends for him, may properly pay for the same, and the persons who perform such services may legally and properly receive pay therefor.

On the other hand, it would be unlawful to pay a stenographer or clerk, or any other person, for writing letters to his friends soliciting their support for a candidate for office; or to pay for managing a campaign, a person for making speeches, interviewing voters, soliciting votes, getting voters to the polls, and other like services.

It would be unlawful for a newspaper to accept pay for an advertisement for a candidate urging reasons for his nomination, etc.; nor can a newspaper lawfully publish for pay matter disparaging a candidate. Nor can a candidate, or any one for him, lawfully cause newspapers containing matter favorable to his candidacy, to be sent by the publishers to persons who are not regular subscribers, and pay for same; and publishers who accept pay for papers so sent would be subject to prosecution under this section.

The thought running through the whole section seems to be that the citizen may not make a commodity of his duty to the public. To illustrate: John Brown is an expert stenographer and a popular man in his county and state. A candidate for office says to Mr. Brown: "I want help with my correspondence and I will pay you $500 for the next two months if you will come to my headquarters take my dictation, copy my speeches and mail them out to a list of names which I will furnish you." Mr. Brown accepts the employment. The transaction is legitimate and proper and not prohibited by the section under discussion. If, however, the candidate

should say to Mr. Brown: "You have a wide acquaintance and a great many influential friends. I am a candidate for office. If you will come to my headquarters and write letters to your friends throughout the state urging them to support me, and in other ways use your personal influence to get votes for me, I will pay you $500 for two months for such work." The transaction is illegal and both the candidate and Brown would be guilty of a violation of section 32 of the act in question.

In the first part of the illustration, no duty to the public is involved in the contract between the candidate and Brown; in the second, it is Brown's public duty as a citizen of the state to support the candidacy of the person most competent and fit for the position sought, and to give such support without pay or offer of pay.

The section authorizes contracts in good faith for the announcement of a candidacy in the newspapers and for securing the names of voters required to file preliminary nomination papers, and the payment of any reasonable compensation for such services. Under this exception or proviso, a candidate could legally and properly pay for having the announcement of his candidacy printed in the newspapers, and he would not be limited to any particular number of papers, but could legally have such announcement printed in as many newspapers as he saw fit, and let the same stand as long as the newspaper cares to carry it, the charge, however, to be limited to a reasonable sum for the space.

As to the securing of names of voters on preliminary nomination papers, the act fixes the minimum number of signers, and it is my opinion that a candidate is not permitted to pay for securing more than such number of names, with such reasonable number in addition as may be necessary to cover duplications or other errors. The act, however, does not prohibit the friends of the candidate from securing additional names; nor does it prohibit persons from rendering any proper service to a candidate, or in the interest of a candidate for office, when no pay is received or expected; and nomination papers may be circulated and names secured in an unlimited number but it must be done without compensation.

Fifteenth. Section 33 covering bribery and illegal voting and fixing the penalty therefor is clear and self-explanatory.

Sixteenth. Section 34 is the repealing section.

Seventeenth. Section 35 makes the provisions of the primary act, as far as applicable, govern nominations of candidates by politi-

cal parties in cities of the first class, and cities acting under special charter having a population of over fifteen thousand.

Under this section inquiry has been made as to whether or not posters may be used for candidates for ward aldermen, city precinct committeemen and delegates to the city convention as provided in section 26, as to delegates to the county convention; and as to whether or not it is necessary to put a cross in the square opposite the name of such candidate; and as to how a vote should be counted in case the name of a republican candidate was written upon a democratic ballot.

In response to these inquiries, it is my opinion, (1st), that posters may be used; (2d), That a cross must be placed in the square opposite the name; and (3d), That the vote for the republican candidate on the democratic ticket would be counted as one vote for the person named as a democratic candidate and would not be added to the total of the republican candidate's vote on his own party ticket.

Eighteenth. Chapter 73 applies exclusively to corporations, their officers, agents, and representatives. Section 1 of the chapter, among other things, makes it unlawful for the corporation or any of its officers, agents or representatives acting in behalf of such corporation, "to give or contribute any money, property, labor or thing of value, directly or indirectly, to any member of any political committee, political party or employee or representative thereof, or to any candidate for any public office, or candidate for nomination to any public office, or to the representative of such candidate, for campaign expenses or for any political purpose whatever, or to any person, partnership, or corporation for the purpose of influencing or causing such person, partnership, or corporation to influence any elector of the state to vote for or against any candidate for public office or for nomination for public office, or to any public officer for the purpose of influencing his official action, but nothing in this act shall be construed to restrain or abridge the liberty of the press or prohibit the consideration and discussion therein of candidacies, nominations, public officers or political questions."

Section 2 makes it unlawful to solicit money for campaign purposes from corporations.

Section 3 provides immunity from prosecution for giving testimony in relation to the matter covered by the chapter.

Section 4 is a penalty section, and fixes the punishment for violation of the provisions of the act at imprisonment in the county jail for not less than six months or more than a year, and by fine not to exceed $1,000.

The intent of the legislature in the adoption of this chapter was to make it impossible for the corporation, as such, to exert any improper influence in politics in the state. It can no longer use its money, its transportation, its property, or the influence of its officers, agents and representatives in advancing the interests of any candidate for office, or in opposition to any candidate; nor can it use any of these agencies for the purpose of improperly influencing the official action of any public officer.

There is, however, nothing in the act that in any manner prevents any of its officers, agents, representatives, or employes from exercising their individual right to support such candidates for office as they may wish, or from using their personal influence in political matters. The officer, agent, representative or employee of a corporation is subject to prosecution under this chapter, only when he acts for and on behalf of the corporation in respect to the things which are prohibited in sections 1 and 2.

To illustrate: A conductor on a street railway has the same right to take part in political campaigns, help his friends who are candidates, and exercise his influence in exactly the same way that other citizens may. This same conductor and the company, however, would be liable to prosecution under this chapter, if at the request of the corporation through a superior officer, he should take a lay-off on full pay for ten days for the purpose of using his influence in soliciting votes for the candidates the corporation desired to have succeed at the election.

This opinion is necessarily a long one but it should be remembered that the two chapters covered contain a complete plan for a primary election, and in the very nature of things contain much that is mere detail. I am confident, however that if the voter will take the pamphlet containing the law sent out by the secretary of state, and give an hour each evening for two or three evenings to a careful reading of the act, he will have no difficulty in understanding its every provision.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

January 30, 1908.
HON. A. B. CUMMINS,
Governor of Iowa.

BOARD OF LIBRARY TRUSTEES—APPOINTMENT MAY BE MADE WHEN.—Where the question of establishing a free public library was carried at the spring election of 1907, and no board of library trustees was appointed—Held: That the mayor had authority to appoint said board in the year 1908 the term of office of the members to begin on July 1, 1908.

MADAM: I beg to acknowledge receipt of your letter of January 30th in which you request an opinion as to whether or not the mayor of a city in which at the spring election of 1907 an affirmative vote was had upon the question, "Shall a free public library be established?" and no board of library trustees has as yet been appointed and ratified by the city council, may appoint such board during the present year.

In response thereto I have to say that it would be entirely legal and proper for the mayor of such cities to appoint a board of library trustees as provided in section 728 of the code at this time, and the term of office of the members of such board would begin on July 1st this year.

Respectfully submitted,
H. W. BYERS,
Attorney-General of Iowa.

January 31, 1908.
ALICE S. TYLER,
Secretary Iowa Library Commission.

PARDON OR PAROLE OF PRISONER. POWER OF GOVERNOR.—Power of governor to pardon or parole a prisoner serving a life sentence for murder in the first degree, the legislature having refused to recommend such pardon or parole.

SIR: Some months ago you submitted to me the question of your power to pardon or parole a prisoner convicted of murder in the first degree and committed to the penitentiary for life, and requested an opinion as to whether or not you could properly exercise this power and pardon or parole a prisoner even though the legislature had, upon the matter being presented to it, refused to recommend such action upon your part. Since that time I have given the question many hours of thought and investigation, and nowhere have I been able to find the slightest foundation or encouragement for holding that the legislature, by refusing to act upon an application for pardon when properly submitted to it, or by unfavorable action, could thus prevent the granting of the pardon or parole by the governor.

It will be conceded, I think, by every one who has given the subject thought that the chief executive would not be bound to grant the pardon simply because the legislature recommended it, and it is difficult to understand why or upon what authority it can be claimed that its action should control in the one case and not in the other.

In my examination of the authorities touching this question, I found many cases supporting the contention that the power to pardon under constitutional provisions similar to ours, can in no manner be controlled by the legislature; but no good purpose will be served by citing them here.

The question is an important one and I have delayed responding to your communication until I could fully and abidingly satisfy myself what my decision ought to be.

I do not overlook the fact that some years ago the then attorney-general passed upon this question and held that the governor was bound by the action of the legislature. I do not know exactly how the question came to him, but as I said in the beginning of this opinion, I have been unable to find any support for that view, and my conclusion is that when the governor has complied with the regulations prescribed by the legislature, and that body has acted upon the application, either favorably or adversely, that then it is the duty of the governor to consider the case upon its merits, giving such weight to the action of the legislature as the circumstances of the case justify, and no more, and render such decision in the matter as to him seems just and right.

I return herewith papers in the Weems and other cases.

Respectfully submitted,
H. W. BYERS,
Attorney-General of Iowa.

February 13, 1908.
HON. A. B. CUMMINS,
Governor of Iowa.

JUDGE SUPREME COURT. INCREASE IN SALARY. TERM EXTENDED. HOW CONSIDERED.

SIR:—I have your communication of recent date in which you say:

'The Hon. S. M. Weaver, judge of the supreme court, by the adoption of the constitutional amendment, his term of

office was extended from January 1, 1908, to January 1, 1909, one year. See Joint Resolution No. 1, thirtieth general assembly.

"His honor claims the increase of salary for this extended year of his term of office as per chapter 12, twenty-ninth general assembly.

"Will you please give this department your written opinion whether Judge Weaver is entitled to the increase of salary on the grounds of the extended term of office."

In response thereto I submit the following:

Your inquiry involves a construction of article 5, section 9 of the constitution; chapter 12, acts of the twenty-ninth general assembly; and joint resolution No. 1, acts of the thirtieth general assembly.

Section 9, article 5 of the constitution provides among other things that the compensation of the judges of the supreme court shall not be increased or diminished during the term for which they shall have been elected.

Section 5 of chapter 12, acts of the twenty-ninth general assembly, which became effective January 1, 1904, provides: "Each judge of the supreme court hereafter elected shall receive a salary of six thousand dollars per year."

Section 6 of the same act repeals all acts or parts of acts in conflict with the chapter.

Joint resolution No. 1, among other things, provides: "The terms of office of the judges of the supreme court, which would otherwise expire on December 31st in odd numbered years, * * * * are hereby extended one year, and until their successors are elected and qualified."

Under these several provisions, if it can be said that his Honor Judge Weaver is still serving upon the term for which he was elected in 1901, then, under the constitutional provision above quoted, he would not be entitled to the increase in salary provided for by the twenty-ninth general assembly. But is he thus serving? At the time of his election in 1901, the term of a judge of the supreme court was six years; that term expired on the 31st day of December, 1907, and had it not been for the adoption of the joint resolution above referred to the judge or some one in his stead, would be serving on a new six year term. The above resolution amending the constitution, however, provided that the judges whose terms expired on the 31st day of December, 1907, should serve an additional year. This question was submitted to the people and received an affirmative vote. By such vote it is my opinion that Judge Weaver was elected to serve an additional term of one year as judge of the supreme court and is therefore entitled to the increase in salary.

Respectfully submitted,
H. W. BYERS.
Attorney-General of Iowa.

February 14, 1908.
HON. B. F. CARROLL,
Auditor of State.

INTOXICATING LIQUORS—CORPORATIONS NOT AUTHORIZED TO SELL AT RETAIL. There is no provision in the mulct law expressly giving a corporation the right to sell intoxicating liquor at retail.

GENTLEMEN: I am in receipt of your communication of the 31st ultimo requesting an opinion as to whether or not a corporation may legally engage in the business of selling intoxicating liquors at retail in this state.

There is no express provision in our law relating to this question. The question, however, is not whether there is any provision in the mulct law prohibiting a corporation from engaging in the business of selling liquor at retail, but whether or not there is any provision in the mulct law authorizing a corporation as such to engage in the business of selling intoxicating liquors at retail.

Unless it is authorized expressly or by implication, the privilege does not exist, for the reason that prohibition is still the law in Iowa, and the sale of liquor under the mulct law becomes lawful only upon the full compliance of the provisions under said act, which operate as a bar to the penalties prescribed in the prohibitory liquor law.

There is not only an absence of express authority to be found in the mulct law authorizing a corporation to sell intoxicating liquors at retail, but every provision of said act seems to be based upon the idea that the privilege and responsibility of selling intoxicating liquors at retail is a personal one. While the term "person" may include corporations, yet this does not follow where the act taken as a whole, wherein the term is used, negatives the idea. The term "person" as used in the mulct law seems to denote a specific person, and is used as the antecedent of such personal pronouns as him and himself.

The mulct law provides for the signing and the filing of a bond by the principal. The punishment prescribed may be both fine and imprisonment. This is true not only for maintaining a liquor nuisance, but also in contempt proceedings. It is clear that a corporation of course, could not be imprisoned.

If a corporation may engage in the sale of intoxicating liquors at retail, the element of personal responsibility would be almost entirely eliminated. To my mind this was not the intent of the legislature, and the sale of intoxicating liquors at retail by a corporation is not authorized.

Respectfully submitted,

H. W. BYERS.

February 15, 1908. *Attorney-General of Iowa.*

TO THE HONORABLE EXECUTIVE COUNCIL
of the State of Iowa.

LONG AND SHORT HAUL. APPLIES TO EXPRESS COMPANIES. Section 2126 of the Code Construed.

SIR: I am in receipt of your communication of the 19th instant in which you say:

> "The Railroad Commission of Iowa desires your opinion upon the following propositions:
>
> "*First.* Does section 2126 of the Code, generally alluded to as the long and short haul clause, apply to chapter 9 of title 10 as amended by chapter 116 of the laws of the thirty-second general assembly?
>
> "*Second.* Do sections 2145 and 2146 of the Code, being the discriminatory statutes, apply to express companies as provided by the statutes above named?
>
> "This commission has a hearing upon the subject of express rates on tomorrow and an early opinion is greatly desired."

In response thereto I submit the following:

Sections 2126, 2145, and 2146 of the Code are all found in chapter 7, title 10 of the Code of 1897. The first section of that chapter, in so far as it affects your inquiry, reads as follows:

> "The provisions of this chapter shall apply to the transportation of passengers and property, and to the receiving, delivering, storing and handling of property wholly within this state, *and shall apply to all railroad corporations, express companies,* * * * and to any common carrier engaged in this state in the transportation of passengers or property by railroad therein * * * and the term 'transportation' shall include all instrumentalities of shipment or carriages; and the term 'railway corporation' shall mean all corporations, companies or individuals owning or operating any railroad in whole or in part in this state; and the provisions of this chapter shall apply to all persons, firms and companies and to all associations of persons, whether incorporated or otherwise, that shall do business as common carriers upon any of the lines of railway in this state, street railways excepted, the same as to railroad corporations herein mentioned."

Chapter 9 of title 10, which was repealed by chapter 116, laws of the Thirty-second General Assembly, in so far as material, provided as follows:

> "All express companies operating and doing business in this state are hereby declared to be common carriers, and all laws, so far as applicable, now in force or hereafter enacted, regulating the transportation of property by railroad companies, shall apply with equal force and effect to express companies."

Chapter 116, laws of the Thirty-second General Assembly, among other things, after declaring all express companies to be common carriers, provides:

> "And all laws so far as applicable, now in force or hereafter enacted, regulating the transportation of property by railroad companies, shall apply with equal force and effect to express companies."

In these several provisions, we have:

First. An express declaration of the legislature that express companies operating in the state are common carriers.

Second. That all of the provisions of chapter 7 shall apply to not only express companies, but to all common carriers.

Third. The declaration that the provisions of chapter 7 shall apply to all persons, firms, companies or associations of persons, whether incorporated or otherwise, doing business as common carriers, upon any of the lines of railway in the state.

Fourth. The declaration that all laws, so far as applicable, now in force or hereafter enacted, regulating the transportation of property by railroad companies, shall apply with equal force and effect to express companies.

In the light of these legislative declarations, it is difficult to arrive at any other conclusion than that it was the intention of the legislature to make the so-called long and short haul clause and the discriminatory sections, in so far as they affect the transportation of property, apply to express companies.

It is therefore my opinion that sections 2126, 2145 and 2146 of the code, in so far as they involve the transportation of property, apply to express companies.

Respectfully submitted,

H. W. Byers.

Attorney-General of Iowa.

February 19, 1908.

Hon. W. L. Eaton, Chairman,

Board of Railroad Commissioners.

Tax Sale is of no Validity Against the State.—It is held that there is no liability upon the part of the state to pay the taxes for which the sale was made under the facts stated in the opinion.

Gentlemen: I am in receipt of your communication of the 31st ultimo advising that about the 23d day of May, 1903, the state acquired title to the west one-half of lots 15 and 16, Sage's subdivision of the town of Mitchellville by condemnation proceedings and by quit claim deed from the owner, dated April 25, 1903, but not delivered until May 23; that thereafter and on the 5th day of December, 1904, the land in question was sold for the taxes of 1903; and you request an opinion upon the following questions:

"1st. Is the tax sale specified of any validity as against the state?

"2d. Is there any liability on the part of the state to pay the taxes for which the sale was made, and if there is what penalty or interest if any, should be paid in addition to the principal sum?"

The sale of any land for taxes owned by the state and used for public purposes shall not affect or prejudice the rights or interests of the state therein, and no assessment or taxation of such lands, nor the payment of any such tax by any person, nor the sale or conveyance for taxes of any such lands shall in any manner affect the right or title of the public therein, or confer upon the purchaser or person who pays such taxes any right or interest in such land.

I conclude therefore:

1st. That the tax sale specified is of no validity against the state. Section 1435 of the Code, District of Oakland vs. Hewitt, 105 Iowa, 663.

2d. There is no liability on the part of the state to pay the taxes for which the sale was made under the facts above stated.

It may be conceded that a church or some private corporation existing for religious or eleemosynary purposes and exempt from general taxation is liable to the tax assessed against the property purchased by it where the assessment was made prior to the time of the purchase and the execution and delivery of the deeds, or prior to the completion of the condemnation proceedings as the case may be, even though the levy was not made until afterwards, for our supreme court has so held—First Congregational Church of Cedar Rapids vs. Lynn County, 70 Iowa, 396,—and it may be true that this rule would apply to a school district even though collection could not be made by execution. District of Oakland vs. Hewitt, supra.

But a distinction is to be drawn between the liability for taxes of the state itself, and such institutions as churches, public libraries, cemeteries, and even political subdivisions of the state, all of which are exempt from general taxation. See E. and W. Construction Co., vs. Jasper County, 117 Iowa, 365-382; Polk County Savings Bank vs. State of Iowa, 69 Iowa, 24.

Respectfully submitted,

H. W. Byers.

Attorney-General of Iowa.

February 20, 1908.

Honorable Board of Control of State Institutions.

Diseased Animals—Destruction of and Compensation Therefor.—Evidence examined and found to justify the action of the executive council in refusing to approve a claim for $140.00 for the destruction of diseased animal.

Sir: I have before me your communication of March 4th with accompanying papers in the matter of the claim of W. G. Robertson for the sum of $140, the alleged value of a certain horse which was found to be suffering with the disease known as glanders and condemned and killed.

I have gone carefully over the papers and find that the only horse reported by the state veterinary surgeon as having been con-

demned and killed, was killed on or about the 26th day of December, 1907, and attached to the report of the state veterinary surgeon, or rather his assistant, is an agreement by the owner to destroy the animal at his own expense and a waiver of all claims for damages.

On the 8th day of March, 1908, and after these papers were received at this office, a letter was received from J. F. & W. R. Lacey, attorneys for Mr. Robertson, saying that there were two horses killed and that the waiver was only as to one. Upon the receipt of this letter I again examined the files and attached thereto I found an appraisement dated January 7, 1908, upon which is noted the fact that a certain bay filly was found affected with glanders and destroyed. If this is not the animal covered by the several certificates or report of the assistant state veterinary surgeon, then there is no report whatever from him as to this animal.

Section 2534, Code Supplement, 1907, provides among other things:

> "Whenever in the opinion of the state veterinary surgeon the public safety demands the destruction of any stock, the same may be destroyed upon the written order of such surgeon, with the consent of the owner, or upon approval of the governor, and by virtue of such order such surgeon, his deputy or assistant, * * * may destroy such diseased stock, and the owner thereof shall be entitled to receive its actual value in its condition when condemned," etc.

The section then provides for appraisement and makes it the duty of the surgeon to at once file with the executive council his written report setting forth the order for the destruction of the animal, either with the consent of the owner or upon the approval of the governor, and stating the appraised value of the animal; or in other words, the amount of the compensation that the owner is entitled to as shown by the appraisement.

I find among these papers no such report, no order of any kind for the destruction of the bay filly referred to in the appraisement, but as stated above, the only report on file is the one covering the horse which the owner himself agreed to destroy and waived his claim for damages.

Under this record the executive council was entirely right in refusing to approve Mr. Robertson's claim for $140.

I am returning you herewith the papers in the case.

Respectfully submitted,

H. W. Byers.

Attorney-General of Iowa.

April 7, 1908.

Hon. A. H. Davison,

Secretary Executive Council.

Iowa National Guard—Compensation of Officers During Attendance upon Court-Martial Proceedings.—An officer of the Iowa National Guard cited to appear before a court-martial is entitled to pay for the days in attendance upon the trial.

Sir: I have before me at this moment for disposition the question of compensation due Col. William T. Chantland of Fort Dodge, Iowa, as set forth in certain correspondence and papers delivered to me by your secretary.

If I understand the questions involved, they are (1st) the number of days for which compensation should be allowed; and (2d) as to whether the compensation or pay should be that of the rank of major or colonel.

Briefly stated, the record shows that Col. William T. Chantland was elected colonel of the 56th Infantry, Iowa National Guard, on the 28th day of October, 1907. November 30, 1907, commission issued to Wm. T. Chantland with rank of colonel 56th Infantry to date from October 28, 1907. Examined November 29, 1907, and placed on duty as colonel December 20, 1907.

It seems to be conceded that on or about the 30th day of November, 1907, certain charges having been preferred against Colonel Chantland by Major Parker, the governor ordered the colonel to appear before a court-martial which had already been ordered to convene on December 10th; that he did appear at that time and was in attendance upon the court up to and including the 17th day of December, a period of eight days. In addition to this service, the colonel claims that he put in five full days in making preparation for his trial upon the charges preferred by Major Parker, and he makes claim for thirteen days' pay as colonel.

The adjutant general, as I understand it, concedes that the colonel was in attendance upon the court five days; that he is entitled to pay for that period, but that the pay should be of the rank of major and not colonel.

I have given the question careful consideration and without taking the time necessary to set out in this opinion in detail the facts and the law upon which I base my conclusion, I am of the opinion that the questions in dispute should be settled by allowing Colonel Chantland eight days' pay of the rank of colonel.

Herewith I return you the files in the case.

Respectfully submitted,

H. W. BYERS.

Attorney-General of Iowa.

April 18, 1908.

HON. ALBERT B. CUMMINS,

Governor of Iowa.

SCHOOL HOUSES—COUNTY SUPERINTENDENT'S DUTY IN OPENING ROADS THERETO.—The Board of Directors are given authority to procure such roads as may be necessary for proper access to a schoolhouse, hence when request is made upon the county superintendent to appoint appraisers by said board it is mandatory upon the superintendent to act. Held further, that the duty of the county superintendent to appoint appraisers is not conditioned upon the approval of the proposed road by the board of supervisors.

SIR: I submit the following in response to your communication of the 16th instant in which you say:

"1. Section 2749 empowers the electors to authorize the school board to obtain at the expense of the corporation roads for proper access to its schoolhouses. This section and the one following also empower them to vote schoolhouse taxes to defray such expenses. Under these provisions, do the electors have power to authorize a school board to procure a road to a school site when such site may be reached from other directions than that of the proposed new highway?"

"2. Section 2815, in providing for the acquiring of road sites, provides that when the owner of the real estate refuses or neglects to convey the same, or is unknown, or cannot be found, either party in interest may request the county superintendent to appoint appraisers. When the county superintendent is so requested, (a) is it mandatory upon him to appoint the appraisers as requested; (b) may he refuse to do so until the proposed road has been approved by the board of supervisors of the county?"

In passing upon section 2749 of the code our supreme court in *Bogaard et al. vs. Independent Dist. of Plain View et al.*, 64 N. W., page 859, says:

"The purpose of the law is to provide means of access by public highways to the schoolhouses of the state, and not to leave pupils dependent upon the consent of some landowner for the opportunity of attending school. This case, as shown in the petition, furnishes an apt illustration of the necessity for such a law. The right to obtain highways at the expense of the district is not limited to cases where the schoolhouse is not upon a road, nor to cases where a private right to pupils to pass is refused."

It would seem from this that the board would have the right to procure a road to a schoolhouse site even though the site might be reached by roads leading from other directions. That is to say, the board is given the authority to procure such roads as may be necessary for proper access to a schoolhouse, and your first question should be answered in the affirmative.

Under Section 2815, I am of the opinion that when in a proper case request is made to the county superintendent for the appointment of referees, he should make the appointment without reference to whether the board of supervisors have approved the proposed road or not.

Respectfully submitted,

H. W. BYERS.

Attorney-General of Iowa.

April 19, 1908.

HON. JOHN F. RIGGS,

Supt. Public Instruction.

NOMINATION PAPERS—LAST DAY MAY BE LEGALLY FILED.

SIR: In response to your oral request for an opinion as to the last day upon which nomination papers can legally be filed in your office for the primary to be held on the 2d day of June, I have to say that in my opinion the 23d instant is the last day upon which such filings should be received by you.

Respectfully,

H. W. BYERS.

Attorney-General of Iowa.

April 20, 1908.

HON. W. C. HAYWARD,

Secretary of State.

LOCAL BOARDS OF HEALTH—COMPENSATION—Members of city and town councils and township trustees are not entitled to receive compensation while sitting as local boards of health.

SIR: I am in receipt of your communication of the 15th instant, with letter from George S. Tuttle, township clerk of Postville, Iowa, in which you ask for an opinion as to whether or not the city council and board of trustees may draw fees for attending meetings of the local board of health in addition to the compensation received as members of the city council or board of township trustees.

In response thereto I have to say that while the matter inquired about is not properly within the jurisdiction of this department, I will out of courtesy to you and Mr. Tuttle say that township trustees and members of the city council are entitled to the compensation provided by statute for serving as such trustees and council and to no other; that is to say, there is no provision authorizing these boards to receive compensation while sitting as local boards of health.

Very respectfully,
H. W. BYERS.
Attorney-General of Iowa.

April 22, 1908.
DR. LOUIS A. THOMAS,
Secretary State Board of Health.

CORPORATIONS—MAY NOT SELL INTOXICATING LIQUORS AT RETAIL.—It is held that corporations may not engage in the business of selling intoxicating liquors at retail in this state.

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

> "Herewith I am sending you application made by the Co-operative Company of Sioux City, Iowa, for authority under the provisions of chapter 71, acts of the thirty-second general assembly, to issue stock. The executive council has authorized certificates to be made to said company, after referring the said application to the attorney-general for his opinion as to whether the business proposed is business authorized by the laws of the state to be conducted. Please examine the same and report in writing at your earliest convenience, as the company are anxious for immediate authority."

In response thereto I submit the following:

Section 1607 of the code, in so far as it is material to the inquiry here, provides:

> "Any number of persons may become incorporated for the transaction of any *lawful* business."

Section 2382 of the code makes it unlawful for any person, except a permit holder, by himself, clerk, servant, employe or agent, to sell or keep for sale in this state, alcohol, ale, wine, beer, spirituous, vinous and malt liquor.

Section 2447 of the code is as follows:

> "Nothing contained in this chapter so far as it relates to the mulct tax shall be in any way construed to mean that the business of the sale of intoxicating liquors is in any way legalized, nor as a license, nor shall the assessment or payment of any tax for the sale of liquors as aforesaid protect the wrongdoer from any penalty now provided by law, except as provided in the next section."

The section referred to is what is known as the bar section, and provides among other things that when the necessary steps have been taken to put in operation the so-called mulct law, no proceeding shall be maintained against any person who has paid the quarterly assessment of mulct tax, and who has complied with the several conditions set out in the section.

Article 2 of the articles of incorporation of the co-operative company of Sioux City provides as follows:

> "The general purpose of said corporation shall be to buy, sell and deal in beer, wine and liquors for pecuniary profit, and its object and purpose is to buy, sell and deal in beer, wine and liquors either at wholesale or retail, to buy, lease or own, and maintain suitable buildings and grounds for the purposes of the company, and to do such other business as may be necessary or incidental to the main purpose and object of this corporation. * * *"

Until within a very short time the applicant was operating under the corporate name of the Co-operative Beer Company. A few days ago it filed with the secretary of state an amendment to its articles of incorporation, the amendment, however, making but a single change and that in the name, striking out the word "Beer." We have then a corporation organized for the sole and only pur-

pose of buying, selling and dealing in intoxicating liquor, and the questions involved in your inquiry are, (1st) Is the business of buying and selling intoxicating liquor in Iowa, by persons other than registered pharmacists, a lawful business; and (2d) if lawful because of the so-called mulct statute, does that act, when considered with the general statute prohibiting the sale of intoxicating liquor, authorize corporations to engage in that business.

It seems to me both questions must be answered in the negative. It is true that under the mulct law, persons complying with its provisions and conditions may not be prosecuted for making sales of liquor, but the same act provides, as stated above in section 2447, that the business of selling intoxicating liquors is in no way legalized by the adoption of the mulct tax law. If this declaration of the legislature is to be given force and effect, then buying and selling and dealing in intoxicating liquors in Iowa is not a lawful business.

I do not overlook the fact that in *McKeever vs. Beacon,* 101 Iowa, 173, in a controversy between the landlord and his tenant as to the validity of a lease for a building to be used for saloon purposes, our supreme court in an opinion written by Chief Justice Kinne held that sales of intoxicating liquor by a person who complies in all respects with the mulct law are not unlawful sales, and further that "The manifest purpose and intent of the act was to so far legalize the sale of intoxicating liquors as to remove the penalties for such sale as to those complying with all of its provisions."

There is in my opinion nothing in this decision warranting the claim that the business of buying and selling intoxicating liquor as a beverage is a lawful business within the term lawful as used in section 1607 of the code. All that can be claimed for it is that sales made under certain restrictions and conditions are lawful to the extent that the person making them is exempt from the penalties of the general prohibitory statute, and that contracts made in good faith for the use of premises in which to operate a saloon under the mulct law may be enforced.

In any event it is clear that the legislature in the adoption of the mulct statute never intended that corporations should operate saloons, or engage in the business of buying and selling intoxicating liquor under its provisions.

This question was fully covered by a former opinion of this department given to the Honorable Executive Council on February 15, 1908.

I herewith return the application.

Respectfully submitted,
H. W. BYERS,
Attorney-General of Iowa.

April 23, 1908.

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

IOWA NATIONAL GUARD—QUALIFICATION FOR SERGEANT OF HOSPITAL DETACHMENT.—Held: That sergeant of a hospital detachment should be a registered pharmacist.

SIR: I am in receipt of your communication of the 17th instant in which you request an opinion as to whether or not a sergeant of a hospital detachment should be a registered pharmacist. In response thereto I submit the following:

Section 2588 of the code, in so far as it touches the question you submit, provides:

> "No person not a registered pharmacist shall conduct the business of selling at retail, compounding or dispensing drugs, medicines or poisons, or chemicals for medicinal use, or compounding or dispensing physicians' prescriptions as a pharmacist, nor allow any one who is not a registered pharmacist to so sell, compound or dispense such drugs, medicines, poisons or chemicals or physicians' prescriptions, except such as are assistants to and under the supervision of one who is a registered pharmacist and physicians who dispense their own prescriptions only."

These provisions, in my opinion, would make it necessary that a sergeant of a hospital detachment, a part of whose duty it is to dispense drugs, be a registered pharmacist.

I am returning letter of E. L. Martindale.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

April 24, 1908.

F. J. WILL, *Surgeon General.*

MINES—SHOT EXAMINER.—The shot examiner and not the mine foreman has the authority to determine the question of safety of the firing of shot.

SIR: I have before me your letter of the 21st instant in which you say:

"Inasmuch as there is a dispute between the mine operators and the miners of this state relative to the powers of a shot examiner, would you kindly submit to this office an opinion to cover the following question:

"Has the mine foreman of a mine the right to condemn or prohibit the firing of a shot that the regularly certified shoot examiner has passed upon as being safe and practical shot to be fired?"

In response thereto I submit the following:

Section 2495-b of the supplement to the code provides among other things as follows:

"In all mines, where the coal is blasted from the solid, competent persons shall be employed to examine all shots, before they are charged. Said examiners to have the power to prohibit the charging and firing of any shot which, in their judgment, is unsafe."

I find no provision anywhere in the statute authorizing or empowering the mine foreman to exercise any judgment or discretion with reference to the safety of shots; on the other hand, the above provision lodges with the shot examiner the power to absolutely control shot firing in so far as the question of safety is involved.

I am therefore of the opinion that when the shot examiner has determined the question of safety of a particular shot the mine foreman is without power to condemn or prohibit the firing of the shot on the ground that it is unsafe.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

April 30, 1908.

HON. EDWARD SWEENEY,
Mine Inspector, State House.

PRIMARY LAW—CONSTRUCTION AND INTERPRETATION AS TO FORM OF BALLOT, FILING OF AFFIDAVITS, GIVING OF NOTICE BY THE AUDITOR, THE MANNER OF MAKING NOMINATIONS AND DUTY OF AUDITOR IN FURNISHING SAMPLE BALLOTS.—Held: (1) The county auditor in all counties having townships which include an incorporated town "or part thereof, together with territory outside the limits of such town" to furnish to the election board a separate ballot to be voted by the electors residing outside the limits of such town. (2) Candidates for delegates to county conventions and precinct committeemen need not file affidavits. (3) There is no authority for the auditor to have printed upon the primary ballot the names of candidates for delegates to county conventions or precinct committeemen. The names of such candidates must be written or pasted with uniform white pasters on the blank lines upon the ballot by the voter while in the booth. (4) The notice to be published by the auditor should include the names and addresses of all persons who have filed proper affidavits as candidates. (5) The ballots for all parties should be of the same size and contain squares and blank spaces for all offices to be voted for at the primary. (6) Voters at the primary may make nominations by writing in the names of the candidates of their choice and placing a cross in the square to the left thereof. (7) It is the duty of the county auditor to mail a sample ballot to all candidates for township offices, who have on file in his office an affidavit.

SIR: Referring to the letter of Mr. Frank Leedham, auditor of Clinton county, I have to say, that in addition to the question raised by Mr. Leedham with reference to the nomination of assessors at the approaching primary election several other questions all involving the primary ballot have been raised by other auditors of the state, and I have thought it advisable to cover all such points in this opinion.

The questions are:

First. What form of ballot should be used in townships in which there is an incorporated town, and the nomination of the assessor is to be made by the electors residing in the township outside of the incorporated town?

Second. Does the primary law contemplate the filing of affidavits with the auditor by candidates for delegates to the county convention, and precinct committeemen?

Third. If such affidavits are filed should the names of such candidates be printed on the official primary ballot?

Fourth. Is it necessary to include in the notice required by section 1087-a12 of the primary law, the names and addresses of candidates for offices to be filled by the voters of a subdivision

of the county, such as township officers, and members of the board of supervisors in counties where these officers are selected under the district plan?

Fifth. Should the ballots for all parties be of the same size?

Sixth. Where no candidate is proposed by the filing of nomination papers or affidavit with the auditor for some of the offices for which nominations are to be made at the primary, and the ballot is prepared with blank spaces as shown in the form of ballot set out in section 1087-a14 of the supplement to the code, may the voters affiliated with the party whose ballot is so made up write in the name of the person of their choice, put a cross in the square opposite the name so written, and in that manner make nominations?

Seventh. Must the county auditor furnish sample ballots to candidates for township offices?

Considering these questions in the order stated:

First: It is provided by section 565 of the code that:

> "In each even numbered year, there shall be elected in each township, a part of which is included within the corporate limits of any city or town, by the voters of such township residing without the corporate limits of such city or town, one assessor, in the same manner as provided by law for the election of township assessor."

Section 1130 of the 1907 supplement to the code of Iowa provides as follows:

> "The board of supervisors shall provide for each precinct in the county, for the purpose of elections, one box, with lock and key. When any township precinct includes a town or part thereof, together with territory outside the limits of such town, the township trustees shall prepare a separate ballot box to receive the votes for township assessor, which shall be on separate ballots, and only the ballots of persons living outside of the limits of such town shall be placed in said ballot box. The judges of election shall place each ballot in its proper ballot box. The judges of election shall have the right to administer an oath to any voter and to examine him under oath as to the assessor for whom such elector is entitled to vote."

Section 1087-a16 of the same supplement, in so far as it is material to the question involved here, provides:

> "All necessary election supplies, including poll books as provided by law, for the general election, together with a sufficient number of official primary ballots of each party, shall be furnished for the primary election board for each precinct by the county auditor."

Section 1087-a1, 1907 supplement to the code, provides among other things, that chapters 3 and 4, title 6, of the code shall apply so far as applicable to all primary elections the same as general elections.

Under these several provisions it is the duty of the auditor in all counties having townships which include an incorporated town "or part thereof together with territory outside the limits of such town" to have prepared and furnished to the election board a separate ballot to be voted by the electors residing outside the limits of such town, and upon which ballot shall be printed the names of all the candidates who are entitled to have their names printed on the ballot including those who have filed affidavits for nomination as assessor if any such have so filed, if not, then the ballot should contain the necessary blank space for writing in the name of a candidate for assessor, and separate ballot boxes should be provided as required by section 1130 quoted above.

Second: Section 1087-a13 of the supplement to the code provides that:

> "The names of candidates of each political party for nomination for the several offices *and blank spaces for delegates to the county convention and for party committeemen* shall be printed in black ink on separate sheets of paper uniform in color, quality, texture and size, with the name of the political party printed at the head of said ballots, which ballots shall be prepared by the county auditor in the same manner as for a general election. The names of candidates on all primary election ballots shall be arranged alphabetically according to surnames for each office."

Section 1087-a25, in so far as it affects this question, provides:

> "The requisite number of names of candidates of his choice for delegates to the county convention to which each precinct is entitled shall be written, or pasted with uniform white pasters, on the blank lines upon the ballot by the voter while in the booth, or by some one designated by the voter unable to write, after the ballots are received and before they are deposited,

> and the requisite number of persons from each precinct who receive the highest number of votes shall be the delegates from the precinct to the county convention. One member of the county central committee for each political party from each precinct shall be elected in the same manner in which delegates are selected."

It is evident from these provisions that it was not intended by the legislature that candidates for delegates to county conventions, and for precinct committeemen, should file affidavits as provided in section 1087-a10 of the primary law. In fact, this section makes it clear that it is only candidates for elective offices who are required to file such affidavits.

Third: There is no provision in the primary law authorizing the auditor to have printed upon the primary ballot the names of candidates for either delegates to county conventions or precinct committeemen; in fact, the law as above stated specifically provides that the names of the candidates for such positions must be "written, or pasted with uniform white pasters, on the blank lines upon the ballot by the voter while in the booth, etc."

Fourth: The provision with reference to notice is that:

> "At least thirty days before any such primary election, the secretary of state shall transmit to each county auditor a certified list containing the name and postoffice address of each person for whom a nomination paper has been filed in his office, in accordance with the provision of section ten of this act and entitled to be voted for at such primary election by the voters of such county, together with a designation of the office for which he is a candidate, and the party from which he seeks a nomination. Such auditor shall forthwith upon receipt thereof, publish, under the proper party designation, the title of each office to be filled, the names and addresess of all persons for whom proper nomination papers have been duly filed, both in his own office and in the office of the secretary of state, giving the name and address of each, the date of the primary, the hours during which the polls will be open, and that the primary will be held in the regular polling place in each precinct. It shall be the duty of the said auditor to publish said notice once each week for two consecutive weeks prior to the said primary election."

The use by the legislature in this section of the words "for whom proper nomination papers have been duly filed" has led to some confusion and is interpreted by some of the county auditors to limit the notice to such candidates only as have filed both nomination papers and a candidate's affidavit. I do not think this was the intention of the legislature. It is just as important that the voters be informed as to the candidates for township offices and members of the board of supervisors in counties where they are elected by districts as it is that they know who the candidates for the county offices are. The notice to be published by the auditor should therefore, include the names and addresses of all persons who have filed proper affidavits as candidates for township offices or members of the board of supervisors in counties divided into supervisor districts.

Fifth. Section 1087-a13, above quoted, provides that the ballots shall be made up of "separate sheets of paper uniform in color, quality and *size.*" To fully meet this provision of the law my judgment is, that the ballots for all parties should be of the same size, and that in preparing them the auditor should have printed on each ballot squares and blank spaces for all offices to be voted for at the primary for which no nomination papers or affidavits have been filed.

Sixth: Section 1087-a6 of the primary act, among other things, provides, that the Australian ballot system shall be used at the primary election, and makes certain provisions with reference to the manner in which votes for persons whose name is written upon the ballot by the voter shall be counted. Section 1119 of chapter 3, title 6, of the code, which by the primary act is made applicable to primary elections provides among other things that "the voter may also insert in writing in the proper place the name of any person for whom he desires to vote, making a cross opposite thereto."

These provisions put it beyond doubt that the voters at the primary may write in the names of the candidates of their choice, and make nominations in that way.

Seventh: Section 1087-a15 of the act in question provides among other things that:

> "The county auditor of each county shall, at least fifteen days preceding the primary election, cause to be printed sample ballots of each political party and the words 'sample ballot' shall be printed near the top of each of such ballots in large capital letters, and immediately thereafter shall mail one of such sample ballots to each candidate who is entitled to have

his name printed on the official primary ballot of any party in any precinct in his county to the postoffice address of such candidate as given in his nomination paper, or affidavit, as the case may be," etc.

Under this provision it is the duty of the county auditor to mail a sample copy to all candidates for township offices who have on file in his office an affidavit.

Respectfully,
H. W. BYERS,
Attoney-General of Iowa.

May 6, 1908.
HON. W. C. HAYWARD,
Secretary of State,

CORPORATIONS—EXCHANGE OF STOCK.—An issue of stock by one corporation for the stock of another corporation is illegal.

GENTLEMEN: I beg to acknowledge receipt of your secretary's communication of the 4th instant with application of the Farmers Lumber Company of Manson, Iowa, for authority to issue stock in exchange for stock in another company, and requesting an opinion as to whether or not such an exchange of stock would be lawful.

In response thereto, I have to say, that the same question was submitted to my predecessor by the present auditor of state on the 2d day of November, 1905, and in a very extended and well considered opinion the conclusion was reached that it would be against public policy to permit one corporation to purchase and own the stock of another.

General Mullan's conclusion is in harmony with the great weight of authority, and even if the applicant lumber company was authorized by its articles of incorporation to deal in the stock of other corporations, which I take it it is not from the statement in the application as to the purpose for which the corporation was formed, I would be inclined to hold that the exchange of stock as proposed in the application referred to would be without authority in law.

General Mullan's opinion will be found in the report of the attorney general for 1906 on page 292. I am returning you herewith the application of the lumber company.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

May 9, 1908.
TO THE HONORABLE EXECUTIVE COUNCIL OF THE STATE OF IOWA.

STATE BANK—THE LEGALITY OF FORM OF AMENDMENT TO ARTICLES.

SIR: Referring again to the proposed amendments to the articles of incorporation of the Iowa State Bank, and in response to your request for an opinion as to whether or not the proposed amendments are in proper form, I have to say that objection might be urged against that part of the amendment to article three of said articles of incorporation which authorizes the corporation to act as executor, administrator, guardian, etc. "Whenever thereunto authorized by law." The objection, however, I do not think is one that would justify you under the law in refusing to file the proposed amendments.

Respectfully submitted,
H. W. BYERS,
Attorney-General of Iowa.

May 19, 1908.
W. C. HAYWARD,
Secretary of State.

SAVINGS BANKS—FORM OF CERTIFICATE—FEE REQUIRED TO BE PAID.—In general, changes in articles of incorporation shall be valid only when recorded, approved, and published as required in case of original articles. Savings banks must pay the fee required by section 1615 of the code. Method of issuing and exchanging stock prescribed by section 1641-b of the code supplement.

SIR: I am in receipt of your communication of the 21st instant with a copy of certificate increasing the capital stock of the Citizens Savings Bank of Washington, Iowa, and asking for an opinion:

First. As to whether or not the certificate is in proper form.

Second. As to whether or not the fee required by section 1610 of the 1907 supplement to the code must be paid by this corporation, and,

Third. As to whether or not this bank can issue $25,000 of the increased capital stock in exchange for its surplus fund without proceeding as required by chapter 71 of the acts of the thirty-second general assembly.

In response thereto I submit the following:

First. Section 1615 of the code authorizes changes in the articles of incorporation and in substance provides, that such changes shall be valid only when recorded, approved, and published as required

in case of original articles, with the exception that amendments may be signed and acknowledged by such officers of the corporation as may be designated by the stockholders.

This section is general in its nature and applies to all corporations seeking to amend and change their articles, except corporations created under the several chapters of title 9, and for which some other or different provision has been made with reference to changing their articles or increasing their capital stock.

Section 1856 of the code makes special provision for increasing the capital stock of savings banks, and covers the entire procedure; and in view of the provisions of this section, I am of the opinion that your first question must be answered in the affirmative. To hold otherwise would make it necessary for this corporation to proceed under both section 1615 and section 1856, requiring it to go to the expense and trouble of duplicating the record of its action in increasing its capital stock, and the only difference there would be after both records had been made up would be that in the one case the action of the corporation in making the change in its capital stock would be verified by the affidavit of the chairman and secretary of the meeting at which the change was made and certified to by a majority of the board of directors, while in the other, the instrument showing the action of the corporation would be signed and acknowledged by the persons designated by the stockholders.

Second. Section 1610 of the 1907 supplement to the code, like section 1615 is general in its nature, and applies to all corporations organized and doing business in the State of Iowa, and unless there is some provision in the chapter covering the organization of savings banks exempting such corporations from the payment of the fee, the bank in question must pay the fee required by this section. I am unable to find any such exemption, and therefore answer your second question in the affirmative.

Third. As to your third question, if this corporation desires to issue and exchange its stock for anything other than money it must proceed under section 1641-b of the 1907 supplement to the code.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

May 22, 1908.
HON. W. C. HAYWARD,
Secretary of State.

INSURANCE COMPANY—AMENDMENT TO ARTICLES.—The statement "a two-thirds vote of the policy-holders cast at the annual meeting" found in article IX, construed and held to mean two-thirds of the policy-holders voting at such meeting.

SIR: Referring again to the proposed amendments to the articles of incorporation of the Guaranty Mutual Life Insurance Company, and the proper construction to be placed upon article IX thereof, I have to say, that after a careful examination of the brief furnished by Mr. A. A. McLaughlin, counsel for the company, I am inclined to take a different view from that stated to you orally at the time the question was first before me.

It was my thought then that the language in this article, "a two-thirds vote of the policy-holders cast at any annual meeting, etc.," meant two-thirds of all of the policy-holders of the association.

Mr. McLaughlin's argument on the question, and the authorities presented by him have forced me to the conclusion that the language above quoted means two-thirds of the policy-holders voting at such a meeting.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

June 11, 1908.
HON. B. F. CARROLL,
Auditor of State.

POWER OF EDUCATIONAL BOARD OF EXAMINERS TO PUBLISH PAMPHLETS. Held: That under the provisions of chapter 6, acts of the thirty-second general assembly, the board of examiners have authority to determine in the first instance what pamphlets and other printed matter are necessary for use in their department; but held that the general authority to pass upon bills for printing and the reasonable necessity therefor rests with the executive council, and hence orders by said board for such printing should be made through the executive council or have the approval of that body.

SIR: I have before me your communication in which you say:

"Your official opinion is desired upon the following questions concerning the power of the educational board of examiners to publish pamphlets and outlines on educational subjects relating to their duties under chapter 6, laws of the

thirty-second general assembly. In whom is authority vested to determine (a) the necessity for publishing such pamphlets or outlines; (b) the number of copies to be issued, and (c) the form in which they shall be issued."

In response thereto I submit the following:

Section 5 of the act referred to is as follows:

"This act shall be construed as giving legal authority to the educational board of examiners to obtain all the necessary printing for the performance of their duties, as required by law, in the same manner as the printing is provided for state officers."

Under this provision the educational board of examiners in the first instance have the authority to determine what pamphlets and other printed matter are necessary for use in their department, as well as the number and the form in which they shall be issued. The general authority, however, to pass upon bills for printing, etc., and the reasonable necessity of the particular book or pamphlet rests with the executive council, and orders by the educational board of examiners for such printing should either be made through the council or have the approval of that body.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

June 12, 1908.
HON. JOHN F. RIGGS,
Superintendent Public Instruction.

TAXATION OF TELEGRAPH AND TELEPHONE COMPANIES—MEANING OF WORD "LINE."—Held: That the word "line" as used in section 3, chapter 42, acts of the twenty-eighth general assembly, means the wires and polls over which the telegraph or telephone company operates its business, but that the same company need not necessarily own both wires and polls in order to come within the term "operating a line in this state."

GENTLEMEN: I have before me the communication of your secretary asking for an opinion as to the proper meaning of the word "line" as used in section 3, chapter 42, acts of the twenty-eighth general assembly.

In response thereto I have to say: That in my opinion the word "line" as used in this section and chapter means the wires and poles over which the telegraph or telephone company, as the case may be, operates its business. It does not follow, however, that the same company must own both wires and poles in order to come within the term "operating a line in this state." To illustrate: The Bell Telephone Company might own and operate a telephone line from Des Moines to Ames, owning both poles and wires; the Mutual Telephone Company might operate a telephone line between the same points owning only its wires, and having them strung on the poles owned by the Bell Telephone Company, and for the purposes of the section in question the length of the line of both companies would be exactly the same.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

June 13, 1908.
TO THE HONORABLE EXECUTIVE COUNCIL OF THE STATE OF IOWA.

EXPENSES OF STATE VETERINARIAN.—Held: That the term "actual expenses" as used in section 2538 of the 1907 supplement to the code would cover hotel bills paid by the state veterinary surgeon while away from his home in the discharge of his official duties.

GENTLEMEN: Referring to the communication of your secretary some days ago containing a claim made by P. O. Koto, state veterinary surgeon, for expense, and asking for an opinion as to whether or not under section 2538 of the 1907 supplement to the code the state veterinary surgeon is entitled to charge for living expenses while in the city of Des Moines, I have to say, that I have examined the section referred to and have considered it in connection with the original section in the code, and am of the opinion that the term "actual expenses" as used in the section above referred to would cover hotel bills paid by the state veterinary surgeon while away from his home in the discharge of his official duties.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

June 13, 1908.
TO THE HONORABLE EXECUTIVE COUNCIL OF THE STATE OF IOWA.

STATE BOARD OF CANVASSERS TO DETERMINE TIE VOTE.—Held: That in case of a tie vote between candidates for the office of state senator it is the duty of the state board of canvassers to determine by lot the tie vote as between such candidates.

GENTLEMEN: In response to the oral request of your chairman for an opinion as to whether or not it is the duty of your body acting as a board of canvassers to determine the tie vote in the twenty-fifth senatorial district, which resulted in no nomination of democratic candidate for senator for that district, I submit the following:

Section 1087-a-22 of the supplement to the code provides among other things:

> "On the second Monday after the June primary election, the executive council shall meet as a canvassing board, and open and canvass the abstract returns received from each county in the state. * * * Such canvass and certificates shall be final as to all candidates named therein; * * * * and (the board) shall also forthwith prepare a certificate as to each office, separately, for which no candidate was nominated, together with the names of the several candidates for each of such offices voted for at the primary election and the number of votes received by each of such candidates and send such certificates to the chairman of the party central committee for the state, in case of offices to be filled by the voters of the entire state, and to the chairman of the party central committee for a district of the state, if known, in case of offices to be filled by the voters of any such district of the state composed of more than one county, and to the county auditor of each county in any such district, and to the county auditor and chairman of the party central committee for the county, in case any such district is composed of one county."

Section 1087-a-24, in so far as it relates to the determination of tie votes, provides:

> "In case of a tie vote resulting in no nomination for any office, or election of delegates or party committeeman, the tie shall forthwith be determined by lot by the board of canvassers, or judges of election, as the case may be."

It is my opinion that under these provisions it is clearly the duty of your board to determine by lot the tie vote as between the democratic candidates for senator in said district.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

June 19, 1908.
TO THE HONORABLE EXECUTIVE COUNCIL OF THE STATE OF IOWA.

PER DIEM OF MEMBERS OF THE BOARD OF MEDICAL EXAMINERS.—Held: That a member of the board of medical examiners while en route to and from his home by the nearest practical way to the place where an examination is held, is engaged in the discharge of his official duties, and is therefore entitled to a per diem for the time thus necessarily spent.

SIR: I am in receipt of your communication requesting an opinion as to whether the members of the board of medical examiners are entitled to a per diem for the time necessarily spent en route to and from their homes to the place where the examination is held.

Section 2583 of the code supplement of 1907 provides in part that "each member of the board of examiners shall receive out of the fund created by the payment of fees by applicants for examination or certificates, the sum of eight dollars for each day and necessary traveling expenses for the time he is actually engaged in the discharge of his duties as a member of the board."

It is my opinion that a member of the board while en route to and from his home by the nearest practical route to the place where the examination is held, is enaged in the discharge of his official duties and he is therefore entitled to a per diem for the time thus necessarily spent.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

July 8, 1908.
HON. A. B. CUMMINS,
Governor of Iowa.

PER DIEM OF REGENTS OF STATE UNIVERSITIES.—Held: That regents and trustees of the state university while traveling to and from their homes to the state university by the nearest practical route for the purpose of holding official meetings, are engaged in the performance of official duties, and are therefore entitled to a per diem for the time thus necessarily spent.

SIR: I am in receipt of your communication of the 12th ultimo requesting to be advised as to whether or not regents of the state university are entitled to per diem for only the time actually spent in board and committee meetings, or whether they are entitled to a per diem for the time necessarily spent enroute to and from their homes to the state university for the purpose of discharging their official duties as regents of the university.

Section 2617 of the code provides:

> "Regents and trustees shall be allowed four dollars for each day actually and necessarily engaged in the performance of official duties, not exceeding thirty days in any one year, and mileage at the same rate as is allowed members of the general assembly. The limitation of thirty days shall not apply to building committees, which shall not consist of more than three members, but such committees shall not charge for or receive compensation for more than sixty days in any one year."

It is my opinion that regents and trustees of the university while traveling to and from their homes to the state university by the nearest practical route for the purpose of holding official meetings are engaged in the performance of official duties, and are therefore entitled to a per diem for the time thus necessarily spent.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

July 8, 1908.
HON. B. F. CARROLL,
Auditor of State.

SOLDIERS' HOME AT MARSHALLTOWN—CONDITIONS OF ADMISSION.—Held: That the previous interpretation placed upon chapter 20, title XII of the code, relating to the admission of soldiers to the Soldiers' Home at Marshalltown, should still prevail and that the home should continue to receive all dependent soldiers honorably discharged from the army of the United States who served in Iowa regiments or batteries, or were accredited to the state of Iowa, or who have been residents of this state for three years next preceding the date of application.

GENTLEMEN: I am in receipt of your communication of the 30th ultimo advising that it has been the custom to receive as members in the Soldiers' Home at Marshalltown, Iowa, dependent soldiers who have been honorably discharged from the army of the United States, regardless of the time of service; that the report of the commandant shows that there have been received into the home soldiers of the Civil, Spanish-American, Mexican and Indian wars, and you ask for an opinion as to whether or not the practice of thus receiving all dependent soldiers honorably discharged from the army of the United States, is legal and should be continued, or whether admission should be limited to soldiers who served in the civil war.

It is my opinion that in view of the interpretation which has been heretofore placed upon chapter 20, title XII of the code, relating to the admission of soldiers to the said home at Marshalltown, that said act should not now receive a narrow construction and be interpreted so as to limit admission to soldiers who served in the civil war, but that the previous interpretation placed upon said act should still prevail and the home should continue to receive all dependent soldiers honorably discharged from the army of the United States who served in Iowa regiments or batteries or were accredited to the state of Iowa, or who have been residents of this state for three years next preceeding the date of application.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

July 22, 1908.
HONORABLE BOARD OF CONTROL.

STATE BOARD OF CANVASSERS—TIME IN WHICH CANVASS MUST BE MADE AND RESULT DECLARED.—Held: That is was the duty of the executive council sitting as a board of canvassers to compel the canvass and declare the result of the primary election in the seventh congressional district not later than the last day upon which a congressional canvass could be held under the primary law in such district, and at which convention a nomination for congress could legally be made if none had

been made at the preceding primary. As to whether the action of the state board of canvassers would be legal in the event that said board failed to make the canvass and declare the results within the time specified? *Quaere.*

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

"S. F. Prouty, a candidate at the recent primary for representative in congress from the seventh congressional district, has filed with the executive council a written demand that the council canvass the returns and declare the result as to said office prior to the time fixed in the law for holding the congressional convention.

"The question upon which the council desires your opinion is as follows: Is it the duty of the council to make the canvass and declare the result prior to the time mentioned, it further appearing that the board of supervisors of Dallas county has made no returns of said primary election to the secretary of state or to the executive council?"

Section 1087-a-4 of the supplement to the code among other things provides: That the primary election shall be held on the first Tuesday after the first Monday in June in the year 1908, and biennially thereafter. This year the day fixed fell on the 2d day of June.

Section 1087-a-12, in so far as it is material to your inquiry, requires the secretary of state to transmit to each county auditor at least thirty days before the day for holding the primary election, a certified list containing the name and postoffice address of each person for whom a nomination paper has been filed in his office.

The same section requires the auditor to forthwith, upon receipt of such list, publish the same giving the date of the primary, the hours during which the polls will be open, and designating the polling place. It is required that this notice or list shall be published once a week for two consecutive weeks prior to the primary election.

Section 1087-a-13 makes provision for printing the official ballot, and makes it the duty of the county auditor to prepare the same in the same manner as for general election.

Section 1087-a-15, in so far as it is material now, requires the auditor to, at least fifteen days preceding the primary election, prepare, have printed and distribute to the candidates sample ballots.

Section 1087-a-16 in substance makes it the duty of the county auditor to procure and furnish to the election officers all of the necessary supplies for holding the primary, including poll books.

Up to this point all of the several steps required to be taken by the provisions referred to must be taken, or in other words, the duties enjoined upon the several officers must be performd prior to the day fixed for holding the primary election.

Section 1087-a-19 makes it the duty of the board of supervisors to meet on the first Tuesday following the primary election, and canvass the returns from each voting precinct, to make abstracts of their returns to sign and certify thereto and file the same with the county auditor. It also makes it the duty of the board to prepare and certify a list of the candidates nominated separately, and deliver a copy of the same to the chairman of each county central committee, and to prepare, certify and deliver to such chairman a list of the offices to be filled for which no candidate of his party was nominated.

Section 1087-a-20 among other things, requires the county board of supervisors to make a separate abstract of the canvass as to United States senator, electors of the president and vice-president of the United States, all state officers, representative in congress, and senators and representatives in the general assembly.

Section 1087-a-22 provides in substance, that the executive council shall meet as a canvassing board on the second Monday after the June primary election, and shall open and canvass the abstract returns *received from each county in the state.*

It further provides that if returns are not received from all the counties the secretary of state shall immediately send a messenger after the missing returns, and the board is authorized to adjourn from day to day until they are received.

The board is required to make an abstract of its canvass, and sign and certify thereto. It is then provided that such canvass and certificates shall be final as to all candidates named therein, and that the candidates for each political party for each office having received the highest number of votes in the state or district, as the case may be, provided he received not less than thirty-five per centum of all the votes cast by the party for the office, shall be the nominee of his party, and entitled to have his name go on the official ballot at the general election without other certificate.

The board is also required to prepare and certify a list of the candidates of each party so nominated separately, and deliver to the chairman of each party central committee for the state a copy

of such list, and to forthwith prepare a certificate as to each office, separately, for which no candidate was nominated, together with the names of the several candidates for each of such offices voted for at the primary election and the number of votes received by each candidate and send such certificates to the chairmen of the several party committees in case of offices to be filled by the voters of the entire state, and to the chairman of the party central committee for a district of the state, if known, in case of offices to be filled by the voters of such district of the state composed of more than one county.

Section 1087-a-23 provides for filing with the secretary of state the original abstract returns when the canvass is completed, and also provides for certifying vacancy nominations.

Section 1087-a-26 provides as follows:

> "In any senatorial, judicial, or congressional district composed of more than one county, in any year in which a senator in the general assembly, a judge of the district court, or a representative in congress of the United States is to be elected, a senatorial or congressional convention may be held, and a judicial convention shall be held by each political party participating in the primary election of that year. Not less than ten days and not more than sixty days before the day fixed for holding the county convention a call for such senatorial, judicial and congressional convention to be held shall be issued by the party central committee for any such district and published in at least one newspaper of general circulation of each county composing any such district and which call shall state among other things the number of delegates each county of the district shall be entitled to and the time and place of holding the convention. Any such call shall be signed by the chairman of the party central committee for any such district, and be filed by him with the county auditor not less than five days before the county convention and the county auditor shall attach a true copy thereof to the certified list of delegates required to be delivered by him to the chairman of the respective county central committees. In case no nomiantion was made in the primary election for the office of senator in the general assembly in any district composed of more than one county, or for the office of representative in congress of the United States, as shown by the certificate issued by the state board of canvassers provided for in this act, then in any such district the chairman of the party central committee therefor shall forthwith issue such call for a convention in such district and deliver the same to the county auditor of each county in the district and in such case said call need not be published. No such district convention shall be held earlier than the first Thursday or later than the fifth Thursday following the county convention. The convention when organized shall make nominations of candidates for the party for any such district office when no candidate for such office has been nominated at the preceding primary election as shown by the canvass of the votes provided for in section twenty-two hereof. The organization of and procedure in any such district convention shall be the same as in the state convention. Such district conventions may adopt party platforms and transact such other business as may properly be brought before them."

The question is, is there anything in the provisions last above referred to from which it can be said that the time is fixed in which the executive council is required to canvass the returns of the primary election and declare the result?

It will be noted that the congressional convention is only authorized to nominate a candidate for representative in congress when no nomination was made at the primary election, and the warrant or authority upon which such nomination may be made by the congressional convention is the certificate from the state canvassing board setting forth the fact that no nomination for representative in congress was made at the primary election; and the time in which such district convention may be held is limited to a date not earlier than the first Thursday or later than the fifth Thursday following the county convention.

It is contended on the one hand that since the primary act authorizes the executive council, while sitting as a canvassing board, to adjourn from day to day until all of the returns are received, the time in which they must complete their canvass is indefinite, and that the adjournment from day to day may continue at least until the last day upon which the secretary of state must make up and certify out the ballot, which under the act is fifteen days before the general election.

On the other hand, it is urged that the board must complete its canvass and certify the result not later than the last day upon which a legal congressional convention can be held, and the nomination of a candidate for congress made.

I am inclined to agree with the latter view. I confess, however, that the question is not entirely free from doubt, and regret that so important a question must be determined without time enough to give to it that deliberate and careful consideration it deserves. I have, however, made an earnest effort to reach a right conclusion having in mind the great importance of the interests involved.

The legislature in the passage of the primary law intended to furnish an orderly system or method of making nominations and making up an official ballot. To make the system workable it was necessary to begin with the precinct and move up step by step to the final making up of the ballot by the secretary of state, and to enjoin upon numerous public officers certain duties with reference to each step in the system. If the county auditor failed to perform the duties enjoined upon him in the preparation of the ballot preceding the date of the primary, no primary could be held; in other words, the faithful performance of the duties enjoined upon each succeeding officer, board, or convention depends upon the diligent and faithful performance of the duties enjoined upon the preceding officer, board, or convention, and unless these duties are performed or steps taken, at least by the time the next officer, board, or convention is required to act, confusion results and the whole system fails.

It may be true, as claimed by counsel, that the provisions of the act under discussion fixing the time in which certain duties are to be performed are not mandatory in the sense that the exact minute, hour, or day is fixed in which action must be taken, but they are mandatory in the sense that the duty must be performed in the manner required, and in time to save the rights and privileges of all parties interested, and to make the system workable in all its parts.

Under the system for nomination provided by the act under discussion a successful candidate at the primary election acquires a two-fold right or privilege, if I may put it that way:

First. The right to all the time the legislature intended to give him in which to present to the voters his claims for election to the office for which he has been nominated, and,

Second. The right to have his name go on the official election ballot.

The theory advanced by the able counsel that the state board of canvassers would have the right to delay its canvass and the declaration of the result thereof until fifteen days before election

would deprive the successful candidate of the first right suggested and make barren the second.

The very purpose of the law making body in fixing the date of the primary several months before the election was to make it not only possible for the successful candidate to properly present his claim, but for the people to have time and opportunity to inform themselves as to the fitness of the candidates; and when the legislature provided that district conventions should not be held earlier than the first Thursday or later than the fifth Thursday following the county convention, it was undoubtedly the thought of that body that ample time was being given the board of state canvassers to fully perform every duty enjoined upon it with reference to the canvass of the returns, and certifying or declaring the result, and it was the evident intention of the legislature in the adoption of this provision to require the executive council, sitting as a canvassing board, to complete its canvass, declare and certify the result at least by the fifth Thursday following the county convention.

Having reached this conclusion the further question is suggested by the situation confronting the council as to whether or not the failure of the board of supervisors of Dallas county to certify up the returns of that county will operate to extend the time in which the council must complete its canvass and declare the results.

It is earnestly urged on one side that the council is bound to delay its canvass until returns are received from every county in the state. If this be true then a situation might arise, and such a situation may now exist with reference to the Dallas county returns, that would make it impossible for the executive council to canvass the returns of the June primary and declare the result before the November election, thus not only depriving the successful candidate for congress in the seventh district of his right to make a campaign, and to have his name on the official election ballot, but in addition depriving every candidate for the other state offices of the same right, and in effect nullifying the whole primary election.

The reason given for this startling proposition is that to canvass the returns and declare the result without the returns from Dallas county would disfranchise several thousand voters in that county, but it seems to me a complete answer to this argument is found in the fact that to follow it to a logical conclusion would make it possible for the action of a canvassing board in a single county to disfranchise the voters in all the counties of the state, and nullify the entire primary election.

This may be the law of some jurisdictions, but it has never been so held in this state and I think I am safe in the belief that it never will be.

Assuming therefore, that your body has performed its full duty with reference to securing the returns from Dallas county, it is my opinion that it is the duty of your board to complete the canvass and declare the result of the primary election in the seventh congressional district not later than the last day upon which a congressional convention can be held under the primary law in such district, and at which convention a nomination for congress can legally be made if none has been made at the preceding primary. I do not, however, wish to be understood as passing upon the legal effect of your boards failure to act by the time stated. I am simply declaring what I firmly believe to be the correct interpretation of the primary act with respect to the time within which it is made the duty of your board to canvass the returns and declare the result, and while I have before me no official information as to just why the returns from Dallas county are delayed, nor as to just who is responsible for such delay, at the risk of committing an impropriety I venture the suggestion that it is the duty of all parties interested to make an earnest and honest effort to have the returns from that county filed with the executive council before the expiration of the time in which it is required to complete its work in order that it may perform the duties enjoined upon it by the law of the state, thus protectng the rights of all of the interested candidates as well as giving force and effect to the expressed will of all the people at the primary election.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

July 22, 1908.
GOVERNOR A. B. CUMMINS,
Chairman Executive Council.

DRAINAGE DITCH MATTERS—PAYMENT OF COST.—Held: That where a drainage ditch petition was withdrawn the costs already incurred should be paid and a new petition and new bond filed before another commissioner is appointed.

SIR: In response to your verbal request for an opinion as to whether or not in the drainage matter referred to you by F. G. Dunahugh, auditor of Story county, Iowa, and in which the

counties of Story and Marshall are both interested, and about which this department has already had some correspondence with Mr. Dunahugh, I have to say, that it is my opinion that the costs already made should be paid up, a new petition and new bond filed before another commissioner is appointed.

I return you herewith enclosures.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

July 23, 1908.
HON. B. F. CARROLL,
Auditor of State.

VACANCY IN OFFICE OF SUPREME COURT—METHOD OF MAKING NOMINATION TO FILL SAID VACANCY.—Held: That under the general statute covering elections and the primary act of the thirty-second general assembly, that it is the duty of the party committees of the several political parties of this state to call a state convention to make a nomination to fill the vacancy in the office of judges of the superme court, and that the several county conventions in the state should be composed of the delegates selected at the recent primary election.

SIR: I have before me your communication of the 16th instant in which you say:

> "Hon, Chas. A. Bishop one of the justices of the supreme court of Iowa died on the 9th inst. Will you kindly give me your opinion upon the following questions:
>
> "*First.* Is the vacancy thus caused one which should be filled by the voters at the general election in November, 1908, and should I include this office in the proclamation for such election."
>
> "*Second.* If you answer the above question in the affirmative, what is the procedure for political parties in making and certifying nominations, and how can such nominations as well as those made by petition, be lawfully placed upon the official ballot?"

In response thereto I submit the following:

The constitution provides for filling judicial offices by election, and that,

"When any office shall, from any cause, become vacant, and no method is provided by the constitution and laws for filling such vacancy, the governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the general assembly, or at the next election by the people." Section 10, article 4.

"In all cases of elections to fill vacancies in office occurring before the expiration of a full term, the person so elected shall hold for the residue of the unexpired term; and all persons appointed to fill vacancies in office, shall hold until the next general election, and until their successors are elected and qualified." Section 6, article 11.

"The judges of the supreme court shall be elected by the qualified electors of the state, * * *." Section 3, article 5.

It will thus be seen that in this state the judiciary are elected. The exception made to meet possible contingencies and necessities is by appointment to fill vacancies, and such appointments are expressly limited by the above provisions and must expire at the next general election, thus indicating clearly that it was the intention to make the election of judges of our courts the rule, and appointment the exception.

The same intention is apparent when the statute covering the filling of vacancies of this character is considered.

Section 1272 of the supplement to the code among other things provides, that vacancies in the offices of judges of the courts of record shall be filled by the governor.

Section 1276 of the code, in so far as it has important bearing upon the question here, is as follows:

"An officer filling a vacancy in an office which is filled by election of the people shall continue to hold until the next regular election at which such vacancy can be filled, and until a successor is elected and qualified."

Thus carrying into the statute and giving additional force and effect to the rule or principle established by the constitution, that judges of our courts are to hold their commissions from the people, and that in contingencies arising from the certainty of death, and the uncertainty of resignation, appointments are to be made to continue only until the next convenient opportunity the people have to fill the vacancy under our system or method of selecting such officers.

It is claimed that the language in section 1276, "the next regular election at which such vacancy can be filled," means the election held at the proper time for filling the next regular term of the particular office vacant.

There is support for this contention in the decisions of several courts of our sister states. In one of them with constitutional provisions identical with ours, the court holds: That the terms "next general election" and "next regular election" as used in the constitution and statute means the next election at which the particular office would be filled in the usual and ordinary way.

Such a construction, it seems to me, is contrary not only to the plain language of our statute, but to the constitutional provisions hereinbefore quoted; at any rate, our supreme court has put an end to the controversy by its decision in *Dyer vs. Bagley*, 54 Iowa, 487, and under the rule announced in that case the vacancy caused by the death of the Hon. Charles A. Bishop is one which should be filled at the general election in November, 1908, and should be so stated in your proclamation for such election.

I have had more difficulty with your second question. So far as I have been able to find it is the first time in the history of the state that just such a problem has been presented for solution.

Until the adoption of the primary law there was no legal and orderly system of making nominations for public offices in this state. It was simply provided that political parties which "at the general election next preceding polled at least two per cent of the entire vote cast in the state" was entitled to make one nomination of a candidate for any state, district, or municipal office. The method of making the nomination whether by primary, caucus, or convention, was left entirely to the party organizations. The usual method was the precinct caucus at which delegates were selected to the county convention, and in turn the county convention selected delegates to the state convention at which nominations were made for all state offices, and the secretary of state in making up the official ballot for state offices was guided by the certificate of the presiding officers of such convention.

The thirty-second general assembly, in the passage of the primary act, undertook to furnish a complete system under which the candidates of all political parties for all offices which under the law are to be filled by direct vote of the voters of the state, except judges of the supreme, district, and superior courts, should be nominated at a primary election; and there can be no doubt that as to all of the offices which fall within its provisions the sys-

tem thus provided supersedes and takes the place of all preexisting methods of making nominations, so that if the nomination of judges of the supreme court is in any sense covered by the general provisions of the primary law, then at this time the nomination to fill the vacancy in question could only be made by petition as provided in section 1100 of the code, hence the question is: Does the primary act furnish a complete method or system under which nominations for judges of the supreme, district, and superior courts are to be controlled and made?

The question is an important one, not only because it involves one of the most important positions in all the list of state offices, but because there is a vital governmental principle at stake.

If it is true, as some contend, that the selection of candidates for supreme, district and superior judges is in no manner controlled by the provisions of the primary law, then the law in that respect is defective and should be amended. A careful consideration of the act, however, shows that this contention is not sound. While it is true that judges are not nominated by a direct primary vote, the act does provide that all the county conventions shall be made up of delegates selected at the primary election by the direct vote of the voters of each precinct; fixes the time at which judicial and state conventions shall be held, and provides that these conventions shall be composed of delegates named at the several county conventions.

It is true that these several provisions, as well as the provisions authorizing the party committee to fill vacancies occurring after the primary, apply only to offices the terms of which expire in January following the primary election, but they all indicate the general purpose of the law making body to establish a legal primary election at which delegates to all county conventions at least shall be selected by direct vote of the people.

The delegates so selected to the county conventions are, in my judgment, quasi public officers, and since the statute does not fix their term of office they would hold until their successors are elected, which would be at the succeeding primary election.

For these reasons, and many others that might be urged, I am inclined to hold that under the general statute covering elections, and the primary act of the thirty-second general assembly, the party central committees of the several political parties in this state have the power, and it is their duty, to call a state convention to make a nomination for the office made vacant by the death of Hon. Charles A. Bishop, and that the several county conventions in the state be composed of the delegates selected at the recent primary election.

I do not, however, wish to be understood as holding that a nomination made by a convention made up under the old caucus system would be illegal or invalid, but simply suggest that the method pointed out above would be more in harmony with the spirit and purpose of the primary law.

Respectfully,
H. W. Byers,
Attorney-General of Iowa.

July 25, 1908.
Hon. Albert B. Cummins,
Governor of Iowa.

Collateral Inheritance Tax—Payment by the State of Costs and Interest in Case of Refund.—In an action brought for a refund of collateral inheritance tax which has been erroneously paid into the state treasury the court is authorized to tax the costs against either party to the suit. Held, however, that there is no provision in the statute authorizing the state of Iowa to pay interest upon judgments of this nature.

Gentlemen: I am in receipt of your communication of the 29th ultimo enclosing papers in the case of *R. F. Clarke, trustee, vs. W. W. Morrow, treasurer of state.* The case was brought by the said trustee to recover a sum of money which was paid to the treasurer of state as collateral inheritance tax, but which in fact was in excess of the correct amount due the treasurer of state. The said Clarke as trustee recovered a judgment against the treasurer of state in the sum of $417.05, together with the costs of the action amounting to $23.50. The said Clarke as trustee now demands that the state of Iowa pay the amount of judgment recovered and costs of suit, together with interest from the date of the rendition of said judgment at six per cent. You ask for an opinion as to whether the state is required to pay costs and interest in said action.

Section 1475-a code supplement provides:

> "That when a court of competent jurisdiction has or may hereafter determine that property, upon which a collateral inheritance tax has been paid, is not subject to or liable for the payment of such tax, so much of such tax which has been overpaid to the treasurer of state, shall be returned or refunded

to the executor or administrator of such estate, or to those entitled thereto, when a certified copy of the record of such court showing the fact of non-liability of such property to the payment of such tax has been filed with the executive council of the state, the executive council shall issue an order to the auditor of state directing him to issue a warrant upon the treasurer of state to refund such tax."

There is nothing therein contained authorizing the executive council or any state officer to issue a warrant upon the treasurer of state to pay interest on the judgment recovered against the treasurer of state for a refund of tax paid in excess of the correct amount due, and I think I am safe in saying that there is no provision in the statute authorizing the state of Iowa to pay interest upon a judgment of this nature.

As to the question of costs, however, I believe that whenever it is necessary for the state to bring an action to enforce collection of the inheritance tax, and the state succeeds in obtaining a judgment in any sum, the costs should be taxed to the property and the defendants in said suit; but when the state is a party defendant in an action brought by an executor or administrator to recover a sum of money which the state has collected in excess of the correct amount of tax due upon property subject to tax, it is within the power of the district court to assess the costs to the state.

Rule 9 of the rules and regulation relating to the assessments and collection of the collateral inheritance tax provides that in all cases where the property is found to be liable to taxation under the inheritance tax law, all costs of the proceedings had for the assessment of such tax shall be chargeable to such property, but to discharge the lien upon such property all costs as well as the taxes must be paid. In all other cases the costs are to be paid as ordered by the court.

The last statement of said rule would, in my opinion, authorize the court to tax the costs, in an action brought for a refund of the tax, against either party to said suit, the court presumably beinging governed by equitable considerations in such taxation.

My conclusions are, therefore, that the state should pay the costs of this suit, but is not authorized to pay interest on the judgment.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

July 25, 1908.
HON. EXECUTIVE COUNCIL OF IOWA.

RE-WEIGHING COAL—AMOUNT WHICH MAY BE CHARGED.—Held: That chapter 113, acts of the thirty-second general assembly, limits the amount that may be charged by railroad companies operating within this state for weighing coal, and that said act applies to both interstate and intrastate shipments.

GENTLEMEN: I am returning you the papers in *Edmonds-Freeman Company vs. Illinois Central Railroad Company*, covering the question of the railroad company's right to charge for re-weighing coal in this state an amount in excess of that fixed by chapter 113 of the laws of the thirty-second general assembly.

It is my opinion that that chapter limits the amount that may be charged by railroad companies operating within this state for weighing coal; that this limitation applies to both interstate and intrastate shipments, as indicated by your chairman in his letter to the traffic manager of the Illinois Central Railroad Company of February 18th.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

July 29, 1908.
TO THE HONORABLE BOARD OF RAILROAD COMMISSIONERS.

BANKS—ARTICLES OF INCORPORATION—LEGAL FEES FOR FILING ARTICLES.—Held: That the articles of incorporation of the Marion Savings Bank, the Security Savings Bank, and the Ottumwa Savings Bank should be accepted and filed by the secretary of state upon the payment of the fee required by the statute in force at the time of the filing.

SIR: I am returning to you papers as follows:

First. Copy of articles of incorporation of Marion Savings Bank of Marion, Iowa.

Second. Certified copy of articles of incorporation of Security Savings Bank of Cedar Rapids, Iowa.

Third. Certified copy of articles of incorporation of Ottumwa Savings Bank of Ottumwa, Iowa.

These papers were forwarded to me several days ago from your office with a request for an opinion as to whether or not these banks were properly incorporated, and, as to whether or not the secretary of state ought to accept for filing the enclosed articles, and if so, what fee should be charged?

I have gone over the questions involved with considerable care and have reached the conclusion that the secretary should accept and file the articles as offered by the parties interested upon the payment of the fee required by the statute in force at this time.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

July 29, 1908.
HON. W. C. HAYWARD,
Secretary of State.

CERTIFICATE OF DEPOSIT.—Held: That the form of certificate as set out in the opinion below is a demand certificate, is negotiable, and nothing in the law prohibits the issuing of certificates of deposit running for a period of thirty years; that certificates of the kind referred to should be treated as ordinary deposits unless the depositor knows that such certificates represent money borrowed by the bank, rather than deposits made in the usual way.

SIR: I beg to acknowledge receipt of your favor of the 27th instant in which you say:

"Will you please favor this department with your opinion as to whether or not the following is a permissible form of certificate of deposit for use by savings banks of this state and whether or not it is in conflict with any of the provisions of the statutes of this state with realtion to banks and banking:

GOLD CERTIFICATE OF DEPOSIT.

Series A.
Number ——.
Des Moines Iowa, ..., 19..
THE MARQUARDT SAVINGS BANK.

"THIS IS TO CERTIFY THAT the Missouri Mining, Manufacturing and Mercantile Company of Unionville, Missouri, has deposited in The Marquardt Savings Bank ..... dollars, payable in Gold, or its equivalent in current funds of the United States of America, upon the surrender of this certificate.

This deposit shall draw interest at the rate of four per cent (4%) per annum from the date of this certificate until paid. The said interest is to be credited annually for not to exceed thirty (30) annual installments.

"This series of certificates is authorized by a resolution of the board of directors of the Marquardt Savings Bank adopted July ...., 1908.

.....
Cashier.

Countersigned by.....
President.

(Seal.)

"Some points in particular which suggest themselves to me and upon which I desire your opinion are the following:

"*First.* As to whether or not it is entirely clear that the certificate above referred to is a *demand certificate.*

"*Second.* Whether or not it is negotiable.

"*Third.* Whether or not a savings bank can issue a certificate of deposit running for a period of thirty years.

"*Fourth.* Whether or not it can issue a demand certificate running for a period of thirty years.

"*Fifth.* If you hold that a bank may be permitted to issue a certificate in the form set forth above, whether it should be treated as an ordinary deposit or as bills payable."

In response thereto I have to say: That in my opinion the certificate set out in your communication is a demand certificate; is negotiable; that there is nothing in the law governing savings banks which would prohibit them from issuing certificates of deposit running for a period of thirty years; that certificates such as referred to in your letter should be treated as ordinary deposits, unless the department knows that such certificates represent money borrowed by the bank rather than deposits made in the usual and ordinary way.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

July 29, 1908.
HON. B. F. CARROLL,
Auditor of State.

STATE BOARD OF HEALTH—AUTHORITY TO PASS LAWS AND REGULATIONS.—Held: That the state board of health had full authority to pass its said laws and regulations, and that the action of the board of supervisors in rejecting a bill upon the ground

that the state board of health exceeded its authority in passing its said laws and regulations was erroneous.

SIR: I am in receipt of your communication of the 22d instant, advising that the local board of health of the town of Eldon, Iowa, authorized its health officer to attend and disinfect certain cases of measles. That thereafter the health officer filed his bill for services with the local board of health and the local board of health duly approved the same and certified said bill to the board of supervisors for payment. That the said board of supervisors refused to pay said bill upon the ground that the state board of health exceeded its authority when it adopted its rules and regulations under which local boards of health are now governed.

You request an opinion as to whether the action of said board of supervisors in rejecting said bill for the reason stated is legal.

It is my opinion that the state board of health had full authority to pass its said rules and regulations, and that the action of the board of supervisors in rejecting the aforesaid bill for the reason heretofore stated is erroneous.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

July 30, 1908.
HON. LOUIS A. THOMAS,
Secretary State Board of Health.

INTERNAL IMPROVEMENT—WHAT CONSTITUTES.—Held: That the draining of a meandered lake so that the lake bed may be used for general purposes would be an internal improvement in the sense in which the term is used in section 2900-a-25 of the code supplement.

GENTLEMEN: I am in receipt of your communication of the 31st ultimo requesting to be advised as to whether the draining of Bass Lake in Webster county, so that the same may be used for agricultural and other purposes, would be considered an internal improvement as the term is used in section 2900-a-25 of the code supplement, 1907.

It is my opinion that the draining of a meandered lake so that the lake bed may be used for general purposes would be an internal improvement in the sense in which the term is used in section 2900-a-25 of the code supplement. See—

Chase vs. City of Sioux City, 86 Iowa, 603;

Township of Burlington vs. Beasley, 94 U. S., 310-314;
Rippey vs. Becker, 57 N. W., (Minn.) 331;
Words & Phrases, Vol. 4, 3717-3718-3719.

I further believe from the facts disclosed by your letter and the papers enclosed therewith, that Webster county is entitled to a conveyance of the land within the meander lines of Bass lake lying within said county.

I return enclosures herewith.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

August 20, 1908.
TO THE HONORABLE EXECUTIVE COUNCIL OF THE STATE OF IOWA.

NOMINATIONS UNDER PRIMARY ACT—COMMITTEE MAY NOT MAKE AN ORIGINAL NOMINATION—TIME OF FILING CERTIFICATE.—Held: (1) That the secretary of state is not authorized to accept and file a certificate of nomination of a candidate for state senator when the convention nominating said candidate was held later than July 23d. (2) The affidavit of the chairman and secretary of the convention would be sufficient evidence of the regularity of the convention proceedings in the absence of objections. (3) The district central committee is without authority to make an original nomination to fill a vacancy in the office of state senator on the party ticket.

SIR: I am in receipt of your communication of the 15th instant asking for an interpretation of certain sections of the primary act passed by the thirty-second general assembly, and in which among other things you say:

"What I desire is your opinion as to whether any construction of the primary and general election laws will justify me in accepting and filing the certificate of nomination of a candidate for state senator where the convention nominating said candidate was held later than July 23d.

"Also, must I, before filing said certificate of nomination, require evidence as to proper issuance of call of convention and filing of same with the county auditor within the time required, together with all other steps in detail, or may I accept the affidavit of chairman and secretary of the convention as prima facie evidence of the regularity of all the proceedings?

"Also, where there was no nomination of a district candidate at the primary election, and no convention held, or convention held and no nomination made, has the district central committee authority to nominate a candidate to fill the vacancy on the party ticket?"

In response thereto I have to say:

First. That there is nothing in the primary or general election laws of this state which would justify you in accepting and filing the certificate of nomination of a candidate for state senator where the convention nominating said candidate was held later than July 23d.

Second. The affidavit of the chairman and secretary of the convention, in the absence of objection or counter showing, would be sufficient evidence of the regularity of the convention proceedings.

Third. Where there is a failure to nominate a district candidate at the primary election, or at a convention regularly called and held within the time provided by law, the district central committee is without authority to name a candidate to fill the vacancy on the party ticket. Under section 1087-a-24 of the supplement to the code, the district central committee is only authorized to act when a vacancy occurs after the place has been once filled either by nomination at the primary or by convention regularly called and held within the time fixed by law.

For a more extended discussion of the questions raised in your first and third inquiries see opinions given to his excellency, the governor, on July 22d and 25th, copies of which are herewith enclosed.

I also return to you the correspondence referred to in your letter.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

September 25, 1908.
HON. W. C. HAYWARD,
Secretary of State.

CLOSING A PRIMARY DEPARTMENT OF A SCHOOL—CONSENT OF COUNTY SUPERINTENDENT NOT NEEDED.—Held: That the school board of an independent school district is not required to first secure the consent of the county superintendent in order to discontinue a department of a school where the interests of the pupils are otherwise provided for in said school.

SIR: I am in receipt of your communication of the 23d inst., requesting an opinion as to whether or not it is necessary for the board of directors of an independent school district to obtain the consent of the county superintendent in order to close, temporarily or for the school year, a primary department of the school which is attended only by a few pupils who will be cared for in other departments of said school.

It is my opinion that the school board of an independent school district is not required to first secure the consent of the county superintendent in order to discontinue a department of a school where the interests of the pupils are otherwise provided for in said school.

That is to say, section 2773 of the code supplement of 1907 does not give the county superintendent jurisdiction or authority over the number of departments to be established in independent school districts, or the assignment of pupils to their respective classes in said schools, nor is it necessary, under the provisions of said section to secure the consent of the county superintendent in order to rearrange or readjust the classes or the departments in said school.

Yours very truly,
H. W. BYERS,
Attorney-General of Iowa.

Sept. 29, 1908.
HON. JNO. F. RIGGS,
Superintendent of Public Instruction.

SENATORIAL BALLOTS—VALIDITY OF REQUEST STATEMENT.—Held: That an elector who is eligible to vote for a United States senator in a senatorial primary is not required to use the request statement furnished by the judges of election.

SIR: I beg to acknowledge receipt of your communication of October 5th in which you say:

"I have been asked whether a republican elector, who desires to express his choice of candidate for the United States senate at the polls in November, under the provisions of the recent amendment to the primary law, must sign a request statement furnished by the judges of election, or whether he may sign and present to the judges a similar statement pre-

pared by himself or others. In other words, is it the duty of the judges of election to furnish primary ballots to those republican electors *only* who sign request statements furnished by said judges, or are said judges required by the law to furnish primary ballots to all voters who present properly signed request statements, in the form required by law, without regard to where they obtained them?

"Will you kindly favor me with your opinion in this matter and greatly oblige?"

In response thereto I have to say, that the voter is not required to use the request statement furnished by the judges of election, but may present a request statement either written by himself or printed for him, and if the request is in form as required by the recent amendment to the primary law, and properly signed by the voter, it is the duty of the judges of election to furnish him a primary ballot.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

October 5, 1908.
HON. W. C. HAYWARD,
Secretary of State.

FREE TRANSPORTATION OF STATE PROPERTY USED FOR EDUCATIONAL PURPOSES.—Common carriers have the right to transport free the property of the Iowa State College which is to be used wholly for educational purposes.

SIR: I am in receipt of your communication of the 19th instant enclosing letter from Professor Holden of Ames, Iowa, in which the professor says: "The Iowa state college would like to fit up two cars, one with live stock from the college, the other with exhibits, to be used in connection with the various short courses to be held in different parts of the state. Two of the leading railroads have informed me that their companies will be glad to furnish the cars and transport them free over their lines, providing it can be done legally. I have been asked by the roads for an opinion in regard to the matter. The stock and material will be used solely for educational purposes." And in which you request an opinion upon Mr. Holden's inquiry.

In response thereto I have to say, that under a fair and reasonable construction of our statutes regulating the transportation of property by common carriers it is my opinion that the railroads mentioned in Mr. Holden's letter could furnish the cars and transport the property referred to, under the circumstances, and for the purposes stated in the letter, without violating any law of this state.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

October 24, 1908.
HON. ALBERT B. CUMMINS,
Governor of Iowa.

AGRICULTURAL SOCIETIES—WHEN GAMBLING PERMITTED NOT ENTITLED TO COMPENSATION FROM STATE—DUTY OF STATE AUDITOR.—It is held that it is not mandatory upon the auditor of state to draw warrant in favor of a county fair association upon the filing with the state auditor the affidavits of the president, secretary and treasurer, provided that reliable evidence is presented to the state auditor to the effect that gambling was permitted by the officers of the county fair association during the time said fair was being held.

SIR: I am in receipt of your communication of September 19th requesting an opinion as to whether two affidavits are sufficient for the auditor of state to refuse to draw a warrant, in accordance with code section 1661, for a county fair association, when said association presents a voucher subscribed and sworn to by the president, secretary and treasurer that no gambling was allowed upon the grounds during the time the fair was being held.

Section 1661-a of the code supplement 1907, provides in part:

"Any county or district agricultural society, upon filing with the auditor of state affidavits of its president, secretary, and treasurer, showing what sum has actually been paid out during the current year for premiums, not including races, or money paid to secure games or other amusements, and that no gambling devices or other violations of law were permitted, together with a certificate from the secretary of the state society showing that it has reported according to law, shall be entitled to receive from the state treasury a sum equal to forty per cent of the amount so paid in premiums, but in no case

shall the amount paid to any society exceed the sum of two hundred dollars."

This taken by itself would seem to make it mandatory upon the auditor of state to draw a warrant for the sum due the county fair association, not to exceed two hundred dollars, upon the filing with the auditor of the affidavits of the president, secretary and treasurer in the form and manner prescribed in said section, together with a certificate from the secretary of the state agricultural society showing that the county fair association has reported according to law. Nothing however in said section repeals either expressly or by implication section 92 of the code which provides:

> "Every claim against the state shall be presented to the auditor for settlement within two years after it accrues, and, if thereafter presented, the same shall not be audited. When a claim is presented, the auditor is authorized to examine the claimant and any other persons, under oath, touching such claim, or cause them to verify the same by affidavit or deposition."

Under this section the auditor is authorized to require such evidence as will satisfy him of the validity and legality of any claim presented to him for payment.

It is my opinion that if you are in doubt as to whether the said county fair association is entitled to the claim presented considering that affidavits have been presented to you alleging that gambling was permitted by the officers of the county fair association during the time said fair was being held, that you are authorized to withhold payment of said claim until satisfactory evidence is presented to you that said fair association is lawfully entitled to receive the amount of the claim presented.

Yours very truly,
H. W. BYERS,
Attorney-General of Iowa.

November 12, 1908.
HON. B. F. CARROLL,
Auditor of State.

COUNTY SUPERINTENDENT—AUTHORITY TO FILE INFORMATION AGAINST PARENT WHO PERMITS CHILD TO ABSENT HIMSELF FROM SCHOOL.—It is held that the president and officers specified in section 2823-f code supplement, 1907, have not the exclusive right to institute proceedings to enforce the law relating to compulsory attendance at school, and that the county superintendent has the right to file information against any parent in the county violating the provisions of section 2823-a of the code supplement.

SIR: I am in receipt of your communication of the 16th instant submitting the following question:

> "Does that part of section 2740 of the code, which says that the county superintendent shall see that all provisions of the school law, so far as it relates to school and school officers, are observed and enforced, give the county superintendent authority or the right to file an information before a justice of the peace against a parent who keeps his children out of school in violation of law; or does the mere fact that section 2823-f makes it the duty of the director or president to enforce the law, prevent the county superintendent from proceeding directly against the parent who violates the law?"

Section 2823-a code supplement 1907 makes it a misdemeanor and prescribes a punishment for any parent or guardian of any child of the age of seven to fourteen years inclusive, who fails or neglects to cause such child to attend some public, private or parochial school where the common school branches are taught, or to attend upon equivalent instruction by a competent teacher elsewhere than school for at least sixteen consecutive school weeks in each school year.

Section 2823-f of the code supplement 1907, makes it the duty of the director or president of any board of directors, or any truant officer appointed by such board of directors, to enforce the provisions of chapter 14-a of the code supplement relating to compulsory education and prescribes the penalty for the failure of such officers to enforce the provisions of said act.

Without determining the specific duties enjoined upon the county superintendent by section 2740 of the code, suffice it to say that nothing contained in section 2823-f of the code supplement gives the officers therein named the exclusive right to institute proceedings for a violation of section 2823-a of the code supplement. The county superintendent undoubtedly has the right to file information against any parent in the county violating the provisions of said section 2823-a.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

November 25, 1908.
HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

STATE BOARD OF CONTROL.—DEFINITE DUTIES PRESCRIBED.—WHEN DEEMED OF IMMEDIATE IMPORTANCE.—EXPENSE.

The state board of control when its duties are prescribed by the legislature and it is necessary to take definite and immediate action upon the happening of certain events it is not necessary to obtain a resolution of the board approved by the governor before they act. In such case the expense to be paid by the state.

GENTLEMEN: I am in receipt of your communication of the 5th instant, calling my attention to section 2725-a5 code supplement of 1907, which provides:

> "No expenditure for traveling expenses to other states shall be made by the board, or by any officer or agent thereof, or by any officer, employe or agent of any state institution subject to this board unless the authority to make such trip is granted at a meeting of the board of control upon a written resolution, adopted by the board, which shall state the purpose of such trip, and the reason the same is deemed necessary. Said resolution, if adopted, shall then be submitted to the governor for his written approval, and if he does not approve the same such trip shall not be made at the expense of the state."

Also directing my attention to section 2287 of the code supplement which makes it incumbent upon the superintendent of any state hospital for the insane to cause immediate search to be made for any patient who shall escape from said hospital; and section 2727-a28-a which authorizes the board of control to forthwith return any insane patient, who is a non-resident of this state, to the place of his legal settlement; and likewise directing my attention to other sections of the code and code supplement which enjoin certain specific duties upon the board of control. You request an opinion as to the necessity of a resolution adopted by the board of control and approved by the governor in each case as a condition precedent to making the state liable for costs or other expenses in the following cases:

> "1. The employment of officers or other persons in other states to take into custody inmates who have escaped from the Soldiers' Orphans' Home, Industrial School and Institution for Feeble-minded Children.

> "2. The sending of officers or others into other states to secure the return to this state of escapes from the institutions last named.
>
> "3. The visits of state agents or other persons to other states to procure homes or employment for inmates of the Soldiers' Orphans' Home and Industrial School, and to visit such inmates after they are placed for purposes of inspection and supervision.
>
> "4. The employment of officers or other persons in other states to take into custody patients who have escaped from state hospitals.
>
> "5. The sending of officers or others into other states to secure the return to the state of patients who have escaped from state hospitals.
>
> "6. The sending of non-resident patients to their places of legal settlement."

For the sake of brevity I shall not reply to your questions separately, but will endeavor to announce a rule of law which will be applicable to all matters of this nature.

It is my opinion that wherever the legislature has prescribed definite duties to be performed, either by or under the direction of the board of control, and the legislature has provided that said duties be performed immediately upon the happening of certain events, or the very nature of the duties themselves demands an immediate performance, then, and in that event, expenses may be incurred without waiting to first obtain a resolution of the board with the approval of the governor.

I am, however, of the opinion that the visits of state agents or other persons to other states to procure homes or employment for inmates of the Soldiers' Orphans' Home and Industrial School, and to visit such inmates after they are placed, for the purpose of inspection and supervision, are not of such a nature as to require immediate performance and that therefore a resolution adopted by the board and approved by the governor should be had as a condition precedent to the incurring of expenses for such purposes.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

December 8, 1908.
HONORABLE BOARD OF CONTROL OF STATE INSTITUTIONS.

COUNTY FAIRS.—STATE AID.—GAMBLING DEVICE.—Warrant should not be issued to county fair associations where gambling is permitted. A "jingling board" is a gambling device.

SIR: I am in receipt of your communication of the 17th instant requesting an opinion as to whether or not what is termed a "jingling board" is a gambling device; and if so, whether or not a warrant should be drawn in behalf of a county fair where it is admitted that such boards were permitted to operate as a privilege for which a fee was charged, the officers claiming that they were under the belief that it was not a gambling device.

On the 18th day of October, 1899, Milton Remley, then attorney-general of Iowa, gave an official opinion to Hon. Frank F. Merriam, auditor of state, in which he defined gambling and gambling devices.

See attorney-general's report, page 208, 1899.

I adhere to this opinion, believing that it is a clear exposition of the law covering this question.

It is clear from Attorney-General Remley's opinion and the decisions of our supreme court that what is known as a "jingling board" is a gambling device.

With reference to your authority in the premises I refer you to my former opinion given under date of November 12, 1908.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

December 24, 1908.
HON. B. F. CARROLL,
Auditor of State.

DELINQUENT STATE TAXES AND PENALTIES.—It is the duty of the counties to pay into the state treasury penalties and interest on delinquent state taxes. Method of procedure in case of failure of county treasurer to pay such interest and penalties into the state treasury.

SIR: I am in receipt of your communication of the 23d instant requesting an opinion as to whether or not counties of the state should account to the state and pay into its treasury, interest or penalty collected by the county treasurers on delinquent state taxes; and if so, what course should the auditor of state pursue to secure such payment in case the county treasurer fails to pay over the money to the state as the law requires.

The duty of the various counties of the state to account to the state and pay into its treasury, interest and penalty collected by

the county treasurers on delinquent state taxes is clearly defined in an opinion given by former Attorney-General Mullan to the auditor of state under date of August 29, 1906. I adhere to this opinion.

In the event that the county treasurer fails to pay over to the state taxes due the state, or interest or penalty thereon, you are authorized to proceed in the manner pointed out in sections 91, 93 and 94 of the Code.

I suggest that if any officer or county treasurer neglects to render an account to your department within the time prescribed by law, or if no time is so prescribed, then within twenty days after being required so to do by you, that you enter an account against him from the books in your office charging ten per cent damages on the whole sum appearing due and interest at the rate of six per cent per annum on the aggregate from the time when the account should have been rendered.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

Des Moines, December 28, 1908.
HON. B. F. CARROLL,
Auditor of State.

INDETERMINATE SENTENCE LAW.—Prisoner sentenced in accordance with should be given good time.

SIR: I am in receipt of your communication of the 1st instant requesting to be advised as to whether a prisoner sentenced to the reformatory at Anamosa pursuant to the provisions of section 9, chapter 192 acts of the thirty-second general assembly, is entitled to the benefit of "good time" granted pursuant to the provisions of section 5703 of the code.

It is my opinion that chapter 192 acts of the thirty-second general assembly does not repeal either expressly or by implication the provisions of section 5703 of the code. It follows therefore that a person sentenced to the reformatory at Anamosa under the indeterminate sentence law should be given "good time earned" pursuant to the provisions of section 5703 of the code, even though the board of parole refuses to pardon said convict.

Respectfully,
H. W. BYERS,
Attorney-General of Iowa.

December 30, 1908.
MR. MARQUIS BARR,
Anamosa, Iowa.

SCHEDULE "H."

LETTER OPINIONS.

TOWNSHIP CLERKS—COMPENSATION.

Des Moines, January 10, 1907.

WILLARD H. PALMER, ESQ.,
County Attorney,
Maquoketa, Iowa.

MY DEAR SIR: I have your letter of the 7th instant referring to the compensation of township clerks, and requesting my opinion as to their compensation. In reply I beg to say, that while it is not incumbent upon me as attorney-general to furnish opinions to county attorneys, and other county officers, as a matter of courtesy to you, and the board of supervisors, I will give you my views upon the question suggested in your letter.

Prior to the amendment of section 1538 made by the thirty-first general assembly, striking out all of that section pertaining to the township clerk, these officers were entitled to receive five per cent upon all money coming into their hands by virtue of their office, except upon money received from their predecessors in office; and except upon money coming into their hands and paid out for road purposes, upon which latter they were entitled to receive two per cent. Since the enactment of chapter 59, thirty-first general assembly, these officers are entitled to receive five per cent upon all money coming into their hands by virtue of their office, except what is turned over to them by their predecessors in office.

Very respectfully yours,
H. W. BYERS.

TOWNSHIP TRUSTEES.—COMPENSATION FROM COUNTY FUND.

Des Moines, January 10, 1907.

W. C. RATCLIFF, ESQ.,
County Attorney,
Red Oak, Iowa.

MY DEAR SIR: I have your letter of the 8th instant referring to the compensation of trustees, and requesting my opinion as to whether under sections 1538 and 590 of the code the trustees' compensation should be paid out of the county fund, or township fund. In reply I beg to say, that while it is not incumbent upon me as attorney-general to furnish opinions to county attorneys or other county officers, as a matter of courtesy to you and the board of supervisors I will give you my views upon the question suggested in your letter.

Upon a careful reading of the sections of the code referred to by you, and the several sections covering the collection and expenditure of road taxes, I reach the conclusion that the compensation of township trustees must be paid out of the county fund.

Very respectfully yours,
H. W. BYERS.

COUNTY OFFICERS.—TERM OF OFFICE.—COMPENSATION.

Des Moines, January 10, 1907.

J. A. HUGLIN, ESQ.,
County Attorney,
Fairfield, Iowa.

MY DEAR SIR: I have your letter of the 9th instant, referring to the salary of county officers. In reply I beg to say, that while it is not incumbent upon me as attorney-general to furnish opinions to county attorneys, or other county officers, as a matter of courtesy to you, I will give you my views upon the question suggested in your letter.

First. The term of all the officers named in your letter commenced on the first Monday in January following their election, and ended at the beginning of the first Monday in January following the election of their successors.

Second. Each of the officers named are compensated by the year. The auditor's salary under section 479 is $1,200.00 per annum; if your auditor has served two terms he would be entitled to

draw four times $1,200.00, and no more, and the same rule would apply to all the other officers named.

It follows therefore that the outgoing officers referred to by you have served no extra time but simply completed their terms, and are not entitled to any extra compensation.

Very respectfully yours,
H. W. BYERS.

COUNTY CLERK.—In case of failure of county clerk to qualify, the outgoing clerk would hold over.

Des Moines, Iowa, January 11, 1907.

GEORGE E. PATTERSON, ESQ.,
Estherville, Iowa.

DEAR SIR: I have your favor of the 8th instant, referring to the office of county clerk in your county. In reply I beg to say, that while it is not incumbent upon me as attorney-general to furnish opinions to county attorneys, or other county officers, as a matter of courtesy to you and the board of supervisors I will give you my views upon the questions suggested in your letter.

Section 1265 of the code provides:

"Except when otherwise provided every officer elected or appointed for a fixed term shall hold office until his successor is elected and qualified, unless he resigns, or is removed, or suspended as provided by law."

Sction 1266 provides:

"Every civil office shall be vacant upon the happening of either of the following events:

"1. * * * * *

"2. A failure of the incumbent, or hold over officer to qualify within the time prescribed by law.

"3. * * * * *."

Under these sections if, as you say, the county clerk elect in your county fails to qualify within the time required the present incumbent has the right to hold the office until the next general election by re-qualifying and giving a new bond.

The board of supervisors under the facts stated in your letter would have no authority to declare the office vacant and appoint a clerk.

Very respectfully,
H. W. BYERS.

CITY MARSHAL.—DUTY IN SUPERIOR COURT.—FEES.

Des Moines, January 15, 1907.

HON. M. D. PORTER,
Judge Superior Court,
Oelwein, Iowa.

MY DEAR SIR: Relpying to your January 14th I beg to say, that while under the law it is not incumbent upon me as attorney-general to give opinions to public officers outside of the several state departments, I will, however, out of courtesy to you, give you my views upon the question submitted in your letter.

Section 266 makes the city marshal's duties and authority in your court in executing process correspond with those of the sheriff of the county in the district court.

Section 280 provides, that he shall have the same fees and compensation as the sheriff receives for like services.

Section 511 entitles the sheriff to charge and receive for each warrant served $2.00.

Under these provisions it is my judgment that the marshal would be entitled to charge $2.00 for serving warrants issued from your court.

The last clause, section 267, I do not think has any reference to the fees the marshal is entitled to charge.

Very truly yours,
H. W. BYERS.

BOARD OF SUPERVISORS.—AMOUNT OF COMPENSATION PER SESSION.

Des Moines, January 18, 1907.

F. F. HUNTER, ESQ.,
County Attorney,
Rockwell City Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your favor of recent date in which you ask for my opinion with reference to the amount the supervisors are entitled to draw for session service under section 469 of the Code of 1897. Replying I have to say, that while it is not incumbent upon me as attorney-general to give opinions to officers outside of the state departments, I will, as a courtesy to you and the board of supervisors, give my views upon the matter.

I have examined this section carefully and regret to say that I find nothing in it that would warrant the board in drawing for more

than the thirty-five days. I have no doubt whatever that in counties such as yours where the drainage act has increased the work of the board of supervisors they ought to have a larger compensation, but I see no way in which it can be done except by an amendment to this section.

Very truly yours,
H. W. BYERS.

TOWNSHIP CLERK.—COMPENSATION.

Des Moines, Iowa, January 18, 1907.

LLOYD THURSTON, ESQ.,
County Attorney,
Osceola, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your letter of the 14th instant, referring to the compensation of township clerks. Replying I have to say, that I cannot give you an official opinion upon the question submitted, for the reason that requests for such opinions must come from some of the state departments. I will, however, out of courtesy to you and the county auditor, give you my views upon the question you state.

While section 1538 was in force the township clerks were entitled to receive $2.00 per day for each day of eight hours necessarily engaged in official business, and for all money coming into their hands by virtue of their office, except money received from their predecessors, and except money received from the road fund, five per cent, and upon all money received and paid out for road purposes, two per cent. After the amendment of section 1538, which was in effect a repeal of the two per cent clause of that section, the law with reference to the compensation of clerks was all contained in section 591; in other words, the township clerks are now entitled to $2.00 a day as provided in paragraph one of 591, and five per cent upon all money coming into their hands by virtue of their office, except money received from their predecessors, as provided in paragraph two of said section.

Very respectfully,
H. W. BYERS.

MORTGAGES.—MARGINAL ASSIGNMENT OF ON RECORDS.

Des Moines, Iowa, January 19, 1907.

GEO. S. BEVER, ESQ.,
Centerville, Iowa.

DEAR SIR: I beg to acknowledge receipt of your favor of the 18th instant, referring to the duties of county recorder. I cannot give you an official opinion upon the questions you submit as requests for such opinions must come through some of the state departments; I will, however, out of courtesy to you, give my views upon the several matters you inquire about.

First. There is no provision in the code covering marginal assignments of mortgages similar to the one relating to cancellation.

Second. A marginal assignment on the record, if properly executed and indexed, would be valid, and be notice to all persons dealing with the property upon which the mortgage was an incumbrance.

The better practice, however, is to have the assignment by separate instrument duly acknowledged and filed for record.

Very truly yours,
H. W. BYERS.

COUNTY RECORDER.—SALARY.

Des Moines, Iowa, January 19, 1907.

G. W. LAIRD, ESQ.,
Mount Pleasant, Iowa.

DEAR SIR: I beg to acknowledge receipt of your letter of the 17th instant, referring to your salary as county recorder. I cannot give you an official opinion upon the question submitted, for the reason that requests for such opinions must come from some department here. I will, however, out of courtesy to you, give you my views on the question stated.

If the fees of your office for each of the four years served by you exceeded $1,200.00 per year, then you were entitled to retain out of the fees for the four years four times $1,200.00 and no more, and it would make no difference just when you took possession of the office, nor upon what particular day in January this year you turned the office over to your successor. If the fees of the last year, however, did not amount to $1,200.00, then you would be entitled to have the fees collected by you up to the 7th day of January, 1907.

Very respectfully,
H. W. BYERS.

JUSTICES OF THE PEACE.—COMPENSATION AND FEES.—HOW ALLOWED.

Des Moines, January 21, 1907.

L. B. BARTHOLOMEW, ESQ.,
County Attorney,
Chariton, Iowa.

DEAR SIR: I beg to acknowledge receipt of your letter of the 19th instant, in which you ask my opinion upon several questions involving the allowance of fees to justices of the peace, constables, witnesses, and others. I cannot give you an official opinion upon the several questions submitted, for the reason that requests for such an opinion must come from some of the state departments; I will, however, out of courtesy to you and the board of supervisors of your county, give you my views upon the matters inquired about.

First. The board of supervisors cannot legally allow fees to justices of the peace, constables, witnesses, and others merely upon the certificate of such justices. All claims of that character are controlled by section 1300 of the code, and a particular account for said fees must be made out and filed in the auditor's office, verified by the affidavit of the party claiming the fees, and if the fees are for services under section 4661, then the claim, or account for such fees so filed with the auditor, must in addition to being verified by the claimant, be certified to by the clerk or justice as provided in said section.

Second. A justice of the peace is entitled under section 4597 for the trial in all actions, civil or criminal, for each six hours, or fraction thereof, one dollar. Under this section, if there is a hearing on the preliminary examination the justice is entitled to a fee as provided in paragraph twenty-one of this section; if examination is waived he is not entitled to a trial fee.

Third. Under paragraph one, section 4597, justices of the peace are entitled to fifty cents for docketing each case in any action. Under this provision justices are entitled to this fee for docketing a case on preliminary examination.

Fourth. Paragraphs five, six and seven of section 4597 do not refer to the judgment entered in preliminary examinations.

Very respectfully yours,
H. W. BYERS.

COUNTY OFFICERS.—SALARY.—WHEN TERM ENDS.

Des Moines, January 23, 1907.

J. V. GRAY,
County Attorney,
Mount Pleasant, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your favor of yesterday, requesting my opinion as to whether or not county officers are entitled to pay for the six days intervening January 1st and January 7th. Replying, I have to say that I cannot give you an official opinion upon the question submitted for the reason that requests for such opinions must come from some of the departments here. I will, however, out of courtesy to you, give you my views upon the matters inquired about.

All of your county officers are entitled to receive for their last year the annual salary provided by law, and no more. Their term begins on the first Monday in January and ends at the beginning of the first Monday in January after their successor has been elected and qualified.

Your holding, therefore, is entirely correct.

Very truly yours,
H. W. BYERS.

DRAINAGE LAW.— POWER OF BOARD OF SUPERVISORS TO EMPLOY HELP.

Des Moines, January 24, 1907.

C. J. CEDERQUIST, ESQ.,
County Attorney,
Boone, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your recent favor, referring to the employment of help under the new drainage law. Replying I have to say that I cannot give you an official opinion for the reason that requests for such opinions must come from some of the state departments; I will, however, out of courtesy to you, give my views upon the matter.

Under chapter 68, thirtieth general assembly, and amendments thereto, the board of supervisors undoubtedly have the power to employ such help as may be necessary to carry out the provisions of the act, either as assistants to themselves or the engineer appointed by them, but in the exercise of this power the board of supervisors should determine who should be employed, and what their compensation should be. Their contract with the engineer

should cover his services alone. This course is necessary in order that when the final statement of costs and expenses is made up by the board it may be ascertained therefrom just who was employed, and what he was paid for his services. The course suggested by the engineer would lead to confusion, and if adopted by the board would subject them to just criticism.

Very truly yours,
H. W. BYERS.

SOLDIERS' EXEMPTION LAW.—AMOUNT OF EXEMTION.

Des Moines, February 6, 1907.

J. E. COE,
Township Clerk,
Muscatine, Iowa.

DEAR SIR: I beg to acknowledge receipt of your favor of the 2d instant, in which you request an opinion as to the soldiers' exemption law. I cannot give you an official opinion upon the question submitted for the reason that requests for such opinions must come from some of the departments of state. I will, however, out of courtesy to you, give you my views.

Under paragraph seven of section 1304 of the supplement to the code, all old soldiers are entitled to a reduction of eight hundred dollars from their assessment, provided they do not own property of the actual value of five thousand dollars. For instance, if the actual value of the old soldiers' property in a given case is $4,900, then his assessment should be upon a valuation of $4,100, that is to say, he should have an $800 reduction from the actual value. On the other hand, if he owns property of the actual value of $5,000, then he is not entitled to any reduction.

Trusting these suggestions will cover what you want, I am,
Yours very truly,
H. W. BYERS.

IOWA SHILOH COMMISSION.—AUTHORITY TO PUBLISH REPORT.

Des Moines, February 12, 1907.

HON. WM. B. BELL,
Washington, Iowa.

DEAR SIR: I beg to acknowledge receipt of your letter of the 9th instant in which you request my opinion as to whether or not the Iowa commission appointed for the erection of monuments on the battlefield of Shiloh has the power under the act creating the

commission to publish their report in book form, and pay for the same out of the funds set aside for expenses.

Chapter 167 laws of the twenty-eighth general assembly, after providing in section 1 for an appropriation of fifty thousand dollars, and in section 2 for the commission and its duties, contains this provision:

> "Section 3. That for the services of said commissioners required to be performed under section 2 of this act there shall be no compensation, but said commissioners shall receive the actual expenses incurred by them in an amount not exceeding in the aggregate the sum of two thousand dollars, to be paid out of the appropriation hereby made."

By this provision the commissioners were given the power to use, of the appropriation made, the sum of two thousand dollars for actual expenses; nothing however, is said, either in this section or the act, as to what expenses are intended to be covered, and a fair construction of the entire act forces the conclusion that it was the intention to authorize the commissioners to do whatever was necessary and proper to carry out the patriotic purpose the legislature had in view in the passage of the act; the only limitation being as to the amount expended, and while it is nowhere provided that the commission should make and file a report of its doings, to hold that it was not intended that a record of a work so important, and of such public interest, should be preserved, not only by having a report of the commission filed with the governor to be preserved as a part of the public records, but that such report should be put in convenient form for distribution, at least to the public libraries of the state, would be a narrow and unreasonable construction, and out of all harmony with the evident purpose of the legislature.

Taking this view of the question it only remains to determine whether any of the later acts of the legislature referring to this subject has repealed or limited the provisions of section 3 of this act.

The twenty-ninth general assembly amended the act by adding the following section 4:

> "Any portion of the amount in this act appropriated not required to pay expenses of commissioners as herein limited, and to pay for the monuments and markers contracted for, erected and delivered pursuant to this act, may be used and expended by the commissioners appointed and acting under the provisions of this act, in preparing for and holding suitable,

appropriate dedicatory ceremonies, at Pittsburg Landing, Tennessee, and paying the expenses of the committee of the commissioners composed of not more than two persons in supervising the construction of said monuments and markers. Said expenses to be paid out upon warrants drawn in like manner, upon proper vouchers and similarly drawn."

Section 3 of chapter 190, laws of the thirty-first general assembly, an act providing for a joint dedication of the several monuments erected by the state provided as follows:

"All unexpended appropriations for the construction of the monuments under the supervision of the said several commissioners, and all sums in said appropriation which have been set apart by law for the payment of expenses of dedication shall be returned to the general fund of the state, it being the intent that the sum hereby appropriated shall cover all the expenses of said dedications, except the expense of the governor and his staff, which shall be paid out of the appropriations for the governor's office."

These last two provisions do not repeal or limit the provisions of section 3 of the act under consideration, nor is there anything in them inconsistent with said section, and while a strict construction of the several acts referred to when all read together might deny the commissioners the power to use any part of the fund referred to in section 3 of the first act for the purpose of publishing and distributing its report, I am constrained to adopt the more liberal construction, and the one which in my judgment comes nearer harmonizing with the purpose and intent of the legislature in making the appropriation in the first instance.

It is therefore my opinion, that it is the duty of the Shiloh commission to prepare and file with the governor a full and complete report of their doings as such commissioners, and that they have the right to publish such report in book form and pay for the same out of the funds set aside for expenses in section 3 of chapter 167.

Respectfully,
H. W. Byers.

Mortgages.—Taxation of.

Des Moines, February 19, 1907.

E. B. Cook, Esq.,
Cambridge, Ill.

Dear Sir: Replying to your recent favor referring to taxes upon your mortgage, I have to say, that moneys and credits, which would include notes and mortgages securing them, are assessable in this state the same as other property, and it makes no difference how they are acquired whether as security for unpaid purchase price of land, or for the loan of money. It is not likely, however, that if you are a resident of Illinois your mortgage would be assessed in this state, as we have no law up to this time taxing mortgages under the circumstances of your case. There are several bills pending just now in the legislature with that end in view.

Very truly yours,
H. W. Byers.

Foreign Corporations.—Must Comply with Law Before Doing Business in this State.

Des Moines, February 22, 1907.

Oscar J. Johnson, Esq.,
Oyens, Iowa.

My Dear Sir: I beg to acknowledge receipt of your favor of the 19th instant, referring to foreign corporations doing business in this state. Replying I have to say, that before foreign corporations can transact any business in this state they must comply with section 1637 of the code, that is to say, they must file certified copy of their articles of incorporation with the secretary of state, pay the filing fee and secure from the secretary a permit.

Before advising about prosecution, I would like to know something more definite about the particular case you have in mind.

Please let me hear from you again.

Very truly yours,
H. W. Byers.

Clerk of the District Court.—Fees of Office.—How Disposed of.

Des Moines, February 28, 1907.

E. W. Clark, Esq.,
Clerk District Court,
Mason City, Iowa.

My Dear Sir: I beg to acknowledge receipt of your favor of the 27th instant, referring to naturalization fees. Replying I have to say, that I am not permitted to give you an official opinion upon the question, as requests for such opinions must come from some of the departments of state. I will, however, out of courtesy

to you, say that all fees collected by the clerk of the district court should be reported and turned into the county treasury.

Very truly yours,

H. W. BYERS.

RECORDING OF PATENTS TO LAND.—Where to complete chain of title—Not necessary to submit it to auditor for taxation.

Des Moines, February 28, 1907.

E. E. BOSS, ESQ.,
Charles City, Iowa.

DEAR SIR: I beg to acknowledge receipt of your letter of some days ago, referring to the recording of patents. Replying I have to say, that I am not permitted to give you an official opinion upon the question submitted, as requests for such opinions must come from some of the departments here; I will say, however, out of courtesy to you, that where the recording of the patent is simply to perfect the chain of title, and is not in fact a transfer, it is not necessary to submit it to the auditor to be entered for taxation, etc.

Very truly yours,

H. W. BYERS.

CHAPTER 106 of the Thirty-first General Assembly.—Unlawful to sell kerosene in red cans.

Des Moines, March 1. 1907.

H. C. UNBEHAUN, ESQ.,
Winthrop, Iowa.

DEAR SIR: Replying to your recent favor I have to say that under chapter 106, laws of the thirty-first general assembly, it is unlawful to sell kerosene in red casks, cans or measures. You did right in refusing to make such sale. The law provides that gasoline shall be sold in cans painted red, and that no kerosene shall be so sold.

Very truly yours,

H. W. BYERS.

MULCT LAW.—Hard cider when intoxicating comes within the law.

Des Moines, March 8, 1907.

C. A. FOSSELMAN, ESQ.,
Waverly, Iowa.

DEAR SIR: I beg to acknowledge receipt of your letter of yesterday asking if it is contrary to the laws of Iowa to sell hard cider

without paying the mulct tax. Replying I have to say, that I am not permitted to give you an official opinion upon the question submitted for the reason that requests for such opinions must come from some of the departments of state. I would suggest, however, that it has been held by the supreme court that the sale of hard cider when intoxicating is forbidden, and is subject to exactly the same rules and regulations as is the sale of whiskey or beer.

Very truly yours,

H. W. BYERS.

KEROSENE OIL.—Discrimination in sale of by retail merchant.

Des Moines, March 8, 1907.

BURGESS & SMITH,
Akron, Iowa.

GENTLEMEN: I beg to acknowledge receipt of your recent favor referring to the sale of kerosene oil. Replying I have to say, that the act of the thirty-first general assembly covering unfair commercial discrimination in petroleum products has no application whatever to the sale of kerosene oil by the retail merchants throughout the state, and there is nothing in the act that would prohibit the retailer from selling five gallons for ninety cents, even though he was charging twenty cents for a single gallon. You will understand, of course, that this is simply my personal view of the matter, and not an official opinion, as requests for such opinions must come from some of the state departments. You will, however, be entirely safe in relying on what is said above.

Very truly yours,

H. W. BYERS.

MORTGAGE NOTE.—Must be acknowledged and recorded to bind third parties.

Des Moines, March 9, 1907.

W. S. & A. V. BLACKFORD,
Bonaparte, Iowa.

GENTLEMEN: Replying to your recent favor I have to say, that I see nothing in the provisions of the sample note which would make it either illegal or void, as between the parties it would be perfectly good, but provisions in the note as to title, ownership and right of possession would be of no force whatever as against persons purchasing the property from the maker of the note without notice, that is to say, in order to bind third parties you would

have to have an acknowledgment on the note and file it for record the same as a mortgage. You will understand, of course, that I am simply giving you my personal views, and not an official opinion, as I am not permitted to give such opinions except upon request from some of the state departments.

Very truly yours,
H. W. BYERS.

PENSION MONEY.—Not subject to taxation.

Des Moines, March 9, 1907.

J. C. FARVER, ESQ.,
Wapello, Iowa.

MY DEAR SIR: Replying to your letter of a day or two ago I have to say, that pension money is not subject to taxation. See section 1309 of the code, page 460. You will understand, of course, that I am simply giving you my personal views as I am not permitted to give official opinions except upon request of some of the state departments.

Very truly yours,
H. W. BYERS.

LIBRARY TAX.—Right of women to vote.

Des Moines, March 11, 1907.

J. S. JACKSON, ESQ.,
Villisca, Iowa.

MY DEAR SIR: Replying to your favor of Friday, referring to library tax, I have to say, that as you state the question, women undoubtedly have the right to vote, but they must have the same qualifications as men, that is to say, they must be residents and twenty-one years of age, etc. Of course, you will understand that I am simply giving you my personal views and not an official opinion, for the reason that requests for such opinions must come from some of the departments here.

Very truly yours,
H. W. BYERS.

CONSTRUCTION OF SECTIONS 602 of the code supplement and 603 of the code.

Des Moines, March 11, 1907.

MR. F. R. FORD,
Tiffin, Iowa.

DEAR SIR: I have your letter of March 9th in which you inquire concerning the election of town officers. In reply will say that section 602 of the code supplement and section 603 of the code provide that in the organization of an incorporated town, there shall be elected a council, mayor, clerk and treasurer, who shall hold their offices until the first regular election thereafter.

Under your statement of facts the officers elected in December, 1906, for the town of Tiffin would hold their offices until the first regular election thereafter, which should be held on the 25th day of March, 1907, at which time it will be necessary for you to elect a new council, mayor, clerk, treasurer and assessor. The assessor, however, will not begin his term of office until January 1, 1908, as provided by section 650 of the code.

Trusting this will make the matter sufficiently clear, I am,

Yours very truly,
H. W. BYERS.

TOWNSHIP TRUSTEES.—Where one trustee still in office, he shall appoint other two.

Des Moines, March 20, 1907.

H. G. SCOTT, ESQ.,
Leon, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your March 16th, referring to the appointment of township trustees. Replying I have to say, that I cannot give you an official opinion upon the question submitted for the reason that requests for such opinions must come from some of the state departments. I will, however, out of courtesy to you, give you my personal views in the matter.

Section 1272 of the code, providing for filling vacancies, so far as it is material to the inquiry, provides:

> "In all other township offices, including trustees, by the trustees, but where the offices of the three trustees are all vacant, the county auditor shall appoint."

Under this provision it is undoubtedly the duty of the trustee whose term has not yet expired, to appoint the other two trustees.

You will notice that the auditor makes the appointment only "where the office of the three trustees are all vacant."

Very truly yours,
H. W. BYERS.

SHERIFF'S FEES.

Des Moines, March 20, 1907.

J. H. KEENAN, ESQ.,
Osceola, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your letter of the 14th instant, referring to sheriff's fees. Replying I have to say, that I cannot give you an official opinion upon the question

submitted for the reason that such opinions can only be given upon request of some of the state departments. I will, however, out of courtesy to you, give my personal views upon the matter referred to.

Paragraph 9 of section 511 of the Code provides:

"For making and executing a certificate or deed for lands sold on execution or a bill of sale for personal property sold one dollar."

Under this provision the sheriff is entitled to charge and receive one dollar for the certificate of purchase issued when the sale is made, and one dollar for making the sheriff's deed, if the property is not redeemed and a deed is demanded.

Very truly yours,
H. W. BYERS.

NOTARY PUBLIC.—A notary public who is a stockholder in a bank cannot take acknowledgment of mortgage executed in favor of bank.

Des Moines, March 20, 1907.

D. B. ALLEN, ESQ.,
Arlington, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your letter of recent date, referring to notaries public. Replying I have to say, that I cannot give you an official opinion upon the question submitted for the reason that requests for such opinions must come from some of the state departments. I will, however, out of courtesy to you, suggest that if you are a stockholder in the bank, as I assume you are, you cannot as notary public take and certify an acknowledgment of mortgages executed in favor of the bank. This whole question is covered by decisions of our supreme court which can be found in the 113 Iowa, 216, the 87 N. W. R., 655.

I suggest that some day when you are where you can have access to these books you read these decisions.

Very truly yours,
H. W. BYERS,

DIVORCE LAWS OF IOWA.—When a wife or husband may obtain a divorce.

Des Moines, March 21, 1907.

CHESTER M. BURNSIDE, ESQ.,
Fayette, Iowa.

DEAR SIR: I beg to acknowledge receipt of your letter of recent date, referring to the divorce laws. Replying I have to say, that

the following are the grounds for divorce in this state if the wife makes the application:

1. When he has committed adultery subsequent to the marriage.
2. When he wilfully deserts his wife and absents himself without a reasonable cause for the space of two years.
3. When he is convicted of a felony after the marriage.
4. When after marriage he becomes addicted to habitual drunkenness.
5. When he is guilty of such inhuman treatment as to endanger the life of his wife.

The husband may obtain a divorce from the wife for like cause, and also when the wife at the time of the marriage was pregnant by another than the husband of which he had no knowledge, unless he had an illegitimate child or children then living, which at the time of the marriage was unknown to the wife.

The courts construe the provisions of the code for divorce strictly, and an applicant to be successful must come clearly within some of the grounds above stated.

In the first divorce enactment in this state there were in addition to the above grounds three others, as follows:

When a defendant at the time of his marriage was impotent.

When he had a lawful wife then living.

When it shall be made fully apparent that the parties cannot live in peace and happiness together, and that their welfare required a separation.

You will find the first enactment in the code of 1851, on page 223, under the title divorce and alimony. The present law covering divorce and alimony is contained in chapter 3 title XVI of the code of 1897, beginning on page 1135.

Very truly yours,
H. W. BYERS,

SHADE TREES OR HEDGE ALONG PUBLIC ROAD.—BRUSH GROWING IN ROAD.

Des Moines, March 22, 1907.

J. A. MATLAND, ESQ.,
New Sharon, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your favor of recent date, referring to hedges. Replying I have to say, that while I am not permitted to give an official opinion upon the question submitted for the reason that requests for such opinions must

come from some of the departments here, I will, out of courtesy to you and the board of trustees suggest:

1. That if the hedges referred to in your letter are along the public road, the trustees would have the right to proceed as provided in section 1570.

2. As to how close the hedge may be left standing for posts or shade trees is largely a matter of judgment, and if the hedge trees are far enough apart so that they are used only for posts or shade trees they should not be disturbed.

3. The trustees would have no right to cut shade trees on the fence line, unless the trees in some manner obstructed the public highway.

4. The road supervisor has jurisdiction over the public roads in his district, the adjoining land owner is under no obligation to cut brush growing in the highways.

Respectfully yours,
H. W. BYERS,

VACCINATION. WHEN MAY BE REQUIRED OF PUBLIC SCHOOL CHILDREN.—Homoepathic method not recognized.

Des Moines, Iowa, March 22, 1907.

O. E. MEDILL, M. D.
Persia, Iowa.

MY DEAR SIR: Replying to your recent favor referring to smallpox cases at Persia, Iowa, I have to say, that I cannot give you an official opinion upon the questions submitted for the reason that requests for such opinions must come from some of the departments here, I will, however out of courtesy to you suggest, that the local board of health would have no right to require scholars to be vaccinated before being admitted to the public school, except in cases of an epidemic. Under such circumstances they would have a right to exclude from the schools all persons who refused to comply with the order of the local board.

As to the so-called "oral or Homoeopathic vaccination" I have to say, that the state board of health has always refused to recognize such vaccination.

I enclose you copy of rules and regulations called circular No. 3 and call your attention to a decision of Judge Macy found on page 5, and an opinion of attorney-general Remley on page 8, covering substantially the points inquired about in your letter.

Very truly yours,
H. W. BYERS.

COUNTY TREASURER—SALARY.

Des Moines, March 26, 1907.

F. P. WRIGHT,
Chariton, Iowa.

DEAR SIR: Your two letters referring to the salary of the county treasurers were duly received, delay in responding thereto was due to the fact that both letters were received at a time when the entire force in this department was occupied with other accumulated business and your letters were laid aside and my attention has just now been called to them.

You, of course, understand that I cannot give you an official opinion upon the questions submitted, for the reason that requests for such opinions must come from or through some of the state departments; I will, however, out of courtesy to you state my views upon the matters inquired about.

I have read General Mullan's letter of February 25, 1905, to Mr. C. B. Ellis of Onawa, Iowa, and to which you refer, and have also read Mr. Ellis' letter asking for an interpretation of section 490. General Mullan's letter evidently proceeds upon the theory that the taxes collected by the county treasurer, other than that covered by paragraph one of the same section, are to be used simply as a basis upon which to determine the amount due the treasurer at the end of each quarter or at the end of the year, as the case may be, and that while paragraph five provides that the excess over and above the fifteen hundred dollars allowed the treasurer for salary shall be paid into the county treasury, as a matter of fact the treasurer will have nothing to pay in, that is to say, his idea seems to be that the clause, "the excess shall be paid to the county treasurer" refers to the original payment by the tax payer and that the excess so paid will be credited up to the several funds provided for in section 1303 of the code, and not alone to the general fund provided for in paragraph two of that section. In arriving at this conclusion I think the general must have overlooked section 492.

My own judgment is that when section 490 and 492 are considered together, as they must be, that it is contemplated that the treasurer shall report quarterly all moneys received by him for services, and that a warrant should be drawn in his favor for the three per cent covered by paragraph two on the general fund, so that at the end of the quarter the treasurer will have received all of the fees earned by him up to that time, including the three

per cent provided for in paragraph two of section 490, and at the end of the year if the total amount received by the treasurer exceeds fifteen hundred dollars the excess is turned into the treasury, and credited to the general fund.

It is only fair for me to say to you that Mr. Ellis confined his inquiry to General Mullan to section 490.

Very truly yours,
H. W. BYERS.

MALT TONIC.—Druggist as permit holder not authorized to sell malt tonic.

Des Moines, Iowa, March 27, 1907.

HARR & GIBBS CO.,
Center Junction, Iowa.

GENTLEMEN: I beg to acknowledge receipt of your favor of the 23d instant referring to the sale of malt tonic, and in which you say:

> "I would like to be informed if druggists have the right to sell malt tonic preparations that are on the market if sold in good faith as medicine, and not as a beverage. Please let me know at your earliest convenience."

Replying I have to say, that I cannot give you an official opinion upon the question submitted for the reason that requests for such opinions must come from or through some state department; I will, however, out of courtesy to you give you my views touching the sale of malt tonic.

Section 2385 of the code provides:

> "Persons holding permits may sell and dispense intoxicating liquors, not including malt liquors for pharmaceutical and medical purposes, and to permit holders for use and resale by them, only for the purposes, authorized in this chapter; they may also sell and dispense alcohol for specified chemical purposes, and wine for sacramental uses. Registered pharmacists, physicians holding certificates from the state board of medical examiners and manufacturers of proprietary medicines may buy from permit holders intoxicating liquors (not including malt) for the purpose of compounding medicines, tinctures and extracts that cannot be used as a beverage, but nothing herein contained shall be construed to authorize the manufacture or sale of any preparation or compound, under any name, form or device, which may be used as a beverage, and which is intoxicating in its character."

It is obvious from the provisions of this section if the malt tonic referred to in your letter comes within the term "malt liquors" as here used that your question must be answered in the negative. This section prohibits permit holders from selling or dispensing malt liquors and registered pharmacists from buying malt liquors for the purpose of compounding medicine, tinctures, etc. The evident intent of the legislature in the enactment of this section being to prohibit the sale of malt by the persons referred to for any purpose.

Yours very truly,
H. W. BYERS.

SOLDIERS' WIDOWS—RIGHT TO EXEMPTION.

Des Moines, April 1, 1907.

W. H. DOWNING, ESQ.,
Primghar, Iowa.

DEAR SIR: I beg to acknowledge receipt of your letter of the 30th ultimo referring to exemptions to soldiers' widows under section 1304 of the code. Replying I have to say, that under the facts stated in your letter the widow would be entitled to the eight hundred dollar exemption provided by paragraph seven of said section 1304 of the supplement to the code. Of course, you will understand that this is not an official opinion, but simply my personal views given out of courtesy to you. Official opinions, as you know, can only be given upon request from some of the state departments.

Very truly yours,
H. W. BYERS.

MAYOR—JUSTICE OF THE PEACE.—A citizen may hold both offices at same time.

Des Moines, April 1, 1907.

J. G. THAYER, ESQ.,
Blakesburg, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your recent favor in which you ask whether a citizen of an incorporated town can legally hold both the office of justice of the peace and mayor. Replying thereto I have to say, I know of nothing in the laws of this state that would prevent a person from being both justice of the peace and mayor at the same time.

Very truly yours,
H. W. BYERS.

TAX FOR RELIEF OF INDIGENT SOLDIERS—HOW DISTRIBUTED.

Des Moines, April 1, 1907.

WILLIAM LOGAN, ESQ.,
Fort Dodge, Kansas.

DEAR SIR: Replying to your favor I have to say, that section 430 of the code of 1897 authorizes the board of supervisors to levy a tax of one-half mill upon all the taxable property within the county to create a fund for the relief and to pay funeral expenses of indigent union soldiers, and their wives, widows or minor children having a legal residence in the county. The fund is distributed by a commission called the Soldiers' Relief Commission. They are appointed by the board of supervisors; the commission meets at stated periods and reports their doings to the board.

Trusting this information is what you want, I am,

Yours very truly,
H. W. BYERS.

GASOLINE—SALE OF.

Des Moines, Iowa, April 1, 1907.

HARRY BILLUPS, ESQ.,
Maquoketa, Iowa.

DEAR SIR: I beg to acknowledge receipt of your letter of the 29th ultimo referring to the sale of gasoline in which you ask whether the package must be painted red where sales of a quart or less are made. Replying I have to say, that section 1 of chapter 106, laws of the thirty-first general assembly in so far as it is material to your inquiry provides:

> "Every person dealing at retail in gasoline in this state shall after the first day of January, 1907, deliver the same to the purchaser in quantities of more than one quart and less than six gallons only in barrels, casks, packages, cans or measures painted vermillion red, and having the word gasoline plainly stenciled or marked thereon."

It will be noted that this provision requiring the package to be painted red, etc., only applies to sales of more than one quart and less than six gallons. It was evidently the intention of the legislature to permit the delivery to persons of a quart or less in a bottle or other package without being marked as required when the sale is of an amount greater than a quart and less than six

gallons. It is therefore my opinion that dealers may deliver gasoline in a bottle or can not painted or marked as required in section 1, chapter 106, laws of the thirty-first general assembly, where the amount delivered is one quart or less. You will, of course, understand that this is not an official opinion, but simply my personal views given out of courtesy to you. Official opinions can only be given upon request from some of the state departments.

Very truly yours,
H. W. BYERS.

ASSIGNMENT OR RELEASE OF MORTGAGE ON MARGIN OF RECORD.

Des Moines, April 1, 1907.

L. J. FLEMING, ESQ.,
Centerville, Iowa.

DEAR SIR: Replying to your recent favor I have to say that the law requiring the county recorder to witness the signature of the party releasing or satisfying a mortgage went into effect March 28, 1894. There is nothing in the statute requiring the recorder to witness the signature when an assignment of the mortgage is made, and the failure of the recorder to witness such signature would have no effect on the assignment whatever.

Very truly yours,
H. W. BYERS.

CONSTRUCTION OF SECTIONS 12 AND 13, CHAPTER 11 OF THE THIRTIETH GENERAL ASSEMBLY.

Des Moines, April 4, 1907.

GOVERNOR A. B. CUMMINS,
Des Moines, Iowa.

MY DEAR GOVERNOR: Referring to the letter of Mr. Wells Rupert, which I return to you herein, I have to say, that I see no real difficulty in ascertaining the legislative intent in adopting sections 12 and 13 of chapter 11, laws of the thirtieth general assembly. It would have been better perhaps if the legislature had used the term "seventeenth year" instead of "seventeenth birthday"; the latter term in view of the difference of opinion as to when you begin to count birthdays leaves section 12 open to two different constructions, that is, one magistrate might hold that the section applied to children having reached their seventeenth year, while another might hold that it applied to children who had

reached their sixteenth year, and as Mr. Rupert says in his letter both decisions would have support in Websters definition of birthday.

There is nothing, however, in the section that exempts boys over sixteen and under seventeen from punishment for the commission of crime. All that is sought to be done by the section is to prevent the commitment or confinement of any child under seventeen years of age in a place where they will be exposed to the influence of adult convicts.

I have already had some correspondence with the county attorney of Dubuque county about the same matter.

Very truly yours,
H. W. Byers.

Board of Equalization—Right to Adjourn for Investigation.

Des Moines, April 5, 1907.

R. E. Barr, Esq.,
Box 44, Wapello, Iowa.

My Dear Sir: I beg to acknowledge receipt of your letter of yesterday referring to the proceedings of your board of equalization. Replying I have to say that I doubt very much the propriety of my expressing an opinion upon the questions submitted, and would suggest that it is the duty of the city and county attorney to advise about such controversies; I will, however, out of courtesy to you say, that I see nothing illegal in the proceedings of the board of equalization as stated by you. It is entirely proper to adjourn the board of equalization for the purpose of ascertaining such facts as may be necessary to fix the taxable value of property within their jurisdiction.

As to the other matter of assessing the property of the concern you refer to, a right conclusion depends so much on full and complete information as to the business of the tax payer in question, that I will not undertake to say more than to call your attention to the case of *McConn vs. Roberts*, found in the 25 Iowa at page 152, and *Jewel vs. Board of Trustees* of Sumner township, Buchanan county, found in 113 Iowa, page 47. You will undoubtedly find both of these cases in the library of some lawyer in your town.

Respectfully yours,
H. W. Byers.

City Council—Compensation.

Des Moines, April 5, 1907.

George W. Bowen, Esq.,
Carroll, Iowa.

Dear Sir: I beg to acknowledge receipt of your letter of a day or two ago addressed to my predecessor, Hon. Charles W. Mullan, referring to the compensation of members of the city council. Replying I have to say, that while I very much doubt the propriety of my expressing an opinion upon the question submitted, I will however, out of courtesy to you suggest that if the meeting is a regular council meeting, or a called meeting of the council, the members present would be entitled to one dollar for that meeting without reference to the character of the business transacted at the meeting, that is to say, they would be limited in their compensation to a dollar for that meeting even though after getting together they organized as a board of health. There is no provision in the statute entitling them to compensation while acting simply as a board of health.

Very truly yours,
H. W. Byers.

Applications for the Purchase of Liquor—What Must Contain.

Des Moines, April 6, 1907.

Brunt & Parnum,
Decorah, Iowa.

Gentlemen: I beg to acknowledge receipt of your letter of a day or two ago referring to blank applications for the purchase of liquor. Replying I have to say, that while I doubt very much the propriety of my expressing an opinion upon the sufficiency of the blanks, copy of which are enclosed in your letter, I will, however, out of courtesy to you suggest that the exact requirements of the statute are as follows:

First. The blank requests must be signed by the applicant in his true name.

Second. It must be truly dated.

Third. It must contain the statement that the applicant is not a minor.

Fourth. It must give the residence of the purchaser if he is purchasing for himself, if for another, then both the residence of the purchaser and that for whom the liquor is requested must be given.

Fifth. It must state for whom and whose use the liquor is required.

Sixth. Must give his true name and residence, and if the streets are numbered must give the number and street.

Seventh. It must state the actual purpose for which the request is made, and for what use desired.

Eighth. That neither the applicant nor the person for whose use requested, habitually uses intoxicating liquors as a beverage.

Ninth. The application must be attested by the permit holder who receives and files the request.

I find nothing in the statute preventing the sale to an adult for the use of a minor for legitimate purposes. For your further information I call your attention to the decisions of our supreme court found in the 82 N. W. R., pages 335 and 439. You can find these books in any of the law offices in your city and it might be worth your while to read these cases.

Very truly yours,
H. W. BYERS.

MUNICIPAL REPORTS—MADE ANNUALLY—WHAT TO CONTAIN.

Des Moines, April 8, 1907.

W. M. HAMILTON, ESQ.,
Lake View, Iowa.

DEAR SIR: I beg to acknowledge receipt of your letter of the 3d instant referring to the annual report of cities and towns. Replying I have to say, that section 741-c of the code supplement requires each municipality to make an annual public report containing an accurate statement in summarized form.

First. Of all collections made or receipts of such municipality from all sources.

Second. All accounts due the public but not collected.

Third. All expenditures for every purpose.

Fourth. A statement in detail of the cost, operation and income of each public utility operated or owned by the municipality.

Fifth. A statement in detail of the entire public debt.

Sixth. The amount of debt which the municipality may under the law contract for the year for which the report is made.

The report must be published annually at the close of the fiscal year in two newspapers in said city or town, or in one such paper if there be but one, and if none then by posting a copy in three public places in said city or town.

A report containing anything less than the several items above mentioned would not be a full compliance with the law.

Very truly yours,
H. W. BYERS.

MULCT TAX—FAILURE TO ASSESS—LIABILITY FOR BACK TAX.

Des Moines, April 8, 1907.

L. A. PINE, ESQ.,
Toledo, Iowa.

DEAR SIR: I beg to acknowledge receipt of your letter of the 4th instant referring to collection of mulct tax. Replying I have to say, that if I understand your letter the authorities in collecting the mulct tax are not confined to the quarter in which the report is made by the assessor, that is to say, if an individual has been keeping and running a place where intoxicating liquors have been sold for say nine months prior to the time he was first reported by the assessor, there would be three quarterly installments of the mulct tax due from him. The fact that the assessor has failed to include such person in his list of persons filed with the auditor, if any such has been filed, would not relieve the individual from the payment of the tax, nor prevent the same from being a lien upon the real estate wherein or whereon the business is carried on.

Very truly yours,
H. W. BYERS.

DRAINAGE LAW—TRUSTEES MAY PETITION FOR DRAINAGE DISTRICT—COST OF DRAIN.

Des Moines, April 8, 1907.

H. S. SPEER, ESQ.,
Webb, Iowa.

DEAR SIR: I beg to acknowledge receipt of your letter of the 5th instant referring to the drainage law. Replying thereto I have to say:

First. That your trustees have the right to petition for the establishment of a drainage district covering and including the highway referred to in your letter.

See section 44, chapter 68, laws of the thirtieth general assembly as amended by section 5, chapter 84, laws of the thirty-first general assembly.

Second. The cost of such drain is to be paid from the road fund of the township, or townships if the district extends into more

than one township, or from the county road fund, or partly from each of said funds as the board of supervisors may direct.

Very truly yours,
H. W. BYERS.

CONSTRUCTION OF SENATE FILE No. 215, passed by thirty-second general assembly.

Des Moines, April 9, 1907.

H. L. TINLEY, ESQ.,
Council Bluffs, Iowa.

MY DEAR MR. TINLEY: I beg to acknowledge receipt of your letter of the 6th instant in which you say:

> "The fire and police board recently appointed composed of Messrs. B. M. Sargent, L. Zuramel, Sr., and myself, wish to ask if you would kindly furnish at an early date as convenient, your opinion relative to the appointment of a successor to the chief of the fire department. The present chief was elected by the city council in March, 1906, for the term of one year ending March 31, 1907, and not re-elected by the council. Kindly say as to the intent of the law in regard to the standing of the present chief. We have been advised that copies of the law will be sent us soon.
>
> "Kindly say from what fund will be expected to supply books and stationery and who authorizes such expenditure."

In response thereto I submit the following:

Section 1 of senate file No. 215, the bill just recently passed by the general assembly and which became operative as a law on the 4th day of this month, makes the law covering the board of police and fire commissioners in certain cities apply to all cities with a population of 25,000 and over.

Section 2 of the bill takes from the city council the right to elect the chief of the fire department.

Section 3 gives the power to appoint a chief of the fire department to the board of police and fire commissioners.

Section 4 includes the chief of the fire department in the list of officers who may be removed by the board for misconduct or failure to perform his duty, in other words, puts the office of chief of the fire department under civil service rules.

Section 5 continues the present chief of the fire department and the members of the police and fire department of all cities affected by the act, other than the chief of police, in their present positions without further appointment or examination.

Section 6 is the publication clause.

It will be noted that there is no provision whatever in the bill covering necessary supplies, books and stationary for the board.

I am of the opinion therefore:

First. That under the facts stated in your letter, there is a vacancy in the office of the chief of the fire department of your city.

Second. That the board of police and fire commissioners have the authority to fill such vacancy by the appointment of the chief of the fire department.

Third. That such supplies, books, and stationary as may be needed by the board for the purpose of organizing and conducting its department should be furnished and paid for in the same way that supplies for other departments of the city government are furnished and paid for.

Very truly yours,
H. W. BYERS.

CITIES OF SECOND CLASS—WHAT OFFICERS MAYOR APPOINTS.

Des Moines, April 10, 1907.

B. R. BRYSON, ESQ.,
Iowa Falls, Iowa.

DEAR SIR: I beg to acknowledge receipt of your favor of the 5th instant referring to the appointment of city officers. Replying I have to say, that under the law enacted by the recent general assembly in cities of the second class the mayor is authorized to appoint a street commissioner, marshal, deputy marshal, and such other officers as may be provided for by ordinance.

Very truly yours,
H. W. BYERS.

PUBLIC CEMETERY—WHEN TRUSTEES MAY LEVY TAX FOR SUPPORT OF.

Des Moines, April 16, 1907.

LEO C. PERCIVAL, ESQ.,
Winterset, Iowa.

DEAR SIR: I beg to acknowledge receipt of your recent favor referring to cemetery tax. Replying I have to say, that the facts

stated in your letter are not sufficient upon which to base an opinion as to whether or not the tax referred to is properly levied.

You say, "the township trustees levied a cemetery tax on the property within the limits of a town in the township for a cemetery within the limits of that town," but you do not say who owns and controls the cemetery, nor the amount of the levy.

Under the statute the township trustees have the power to levy a tax to pay for lands purchased for cemetery purposes or for the necessary improvement and maintenance of cemeteries in their township, or in an adjoining township whenever they deem such action advisable.

In addition to this they have the power to levy a tax of not to exceed one mill to improve and maintain any cemetery not owned by the township provided the same is devoted to general public use. This last power is given to them by chapter 23, acts of the thirtieth general assembly.

If the cemetery referred to in your letter is owned and controlled and maintained by the city or town referred to, and not devoted to general public use, then the trustees would have no power to make the levy and the tax would be invalid; but as I said before, it is impossible for me to give you an intelligent opinion without a more definite statement of the situation.

Very truly yours,

H. W. BYERS.

ASSESSOR—DUTY TO ADMINISTER OATH TO TAXPAYER.

April 16, 1907.

S. C. JUDY, ESQ.,
Jefferson, Iowa.

DEAR SIR: Replying to your recent favor I have to say:

First. That it is the duty of the assessor to administer the oath as provided by the statute.

Second. If the taxpayer signs the oath he would not be heard to say he was not sworn.

Third. The assessor has no right to sign the taxpayer's name to the oath.

Fourth. If the assessor should sign the taxpayer's name to the oath his liability would depend entirely upon the circumstances under which he signed it.

Very truly yours,

H. W. BYERS.

PROPERTY OWNED BY EDUCATIONAL INSTITUTION—EXEMPT FROM TAXATION.

April 16, 1907.

J. P. PETERSON, ESQ.,
Humboldt, Iowa.

DEAR SIR: I beg to acknowledge receipt of your recent favor referring to taxation of the Humboldt college property. Replying I have to say, that while I very much doubt the propriety of my expressing an opinion upon the question submitted, I will out of courtesy to you suggest, that if the property referred to is *owned* by the Humboldt College, and *used* for educational purposes solely, and no part of the property leased or otherwise used with a view to pecuniary profit it is exempt under section 1304 of the code; if however, the property is owned by yourself the use of it by the college even though it was without charge would not bring it within the exemption clause of that section. I assume, however, from your letter that while the title to the property is in your name, it is in fact owned by the college.

I would suggest that you examine *Griswold College vs. The State*, 46 Iowa, 275, and *Laurent vs. The City of Muscatine*, 59 Iowa, 404.

Very truly yours,

H. W. BYERS.

COUNTY RECORDER—DEPUTY—SALARY—FEES.

April 17, 1907.

MINNIE E. ALLEN,
County Recorder,
Marshalltown, Iowa.

DEAR MADAM: I beg to acknowledge receipt of your recent favor referring to salary of the county recorder and deputy. Replying I have to say, that while I very much doubt the propriety of my expressing even a personal opinion upon the question stated in your letter, I will out of courtesy to you, and for your information alone say:

First. That in my judgment the salary of the county recorder and deputy is payable monthly as provided in section 1289 of the code.

Second. That the board of supervisors is without authority to prevent the payment of the monthly installments due these officers.

Third. That under section 495 of the Code as amended by chapter 21 laws of the thirtieth general assembly, the recorder is required to report quarterly to the board of supervisors all fees collected by him, and to make an annual settlement with the board on the first Monday in January of each year and pay into the county treasury all fees collected.

Fourth. That under said section as amended the recorder has no right to retain any part of the fees as payment of salary, but must pay all money collected as fees into the county treasury and draw salary the same as other county officers under section 1289 of the code.

It was undoubtedly the intention of the legislature in adopting chapter 21, laws of the thirtieth general assembly to put the recorder's office strictly upon a salary basis, and to require this officer to quarterly pay all money received by him in the way of fees into the county treasury; chapter 21, however, is so drawn that when read into section 495 of the code does not change the time when the fees are to be paid into the county treasury. I think, however, it would be better for all concerned for these officers to pay over the fees to the county treasurer quarterly instead of standing on a strict construction of the statute.

Very truly yours,

H. W. BYERS.

RURAL MAIL CARRIERS—EXEMPTION OF EQUIPMENT FROM TAXATION.

April 18, 1907.

CLARENCE L. SPURING, ESQ.,
Thompson, Iowa.

DEAR SIR: I beg to acknowledge receipt of your letter of April 16th, referring to the exemption of rural mail carrier's teams. Replying I have to say, that while I very much doubt the propriety of my giving you even my personal opinion upon the question submitted, I will, out of courtesy to you and for your information alone, say that in my judgment the team, harness and vehicle used by the mail carrier in carrying and delivering mail and thus making his living comes clearly within the exemptions found in paragraph 5 of section 1304 of the supplement to the code.

Very truly yours,

H. W. BYERS.

LOCAL BOARD OF HEALTH—ESTABLISHMENT OF QUARANTINE—EXPENSE.

Des Moines, April 19, 1907.

DR. W. H. HELLER,
Remsen, Iowa.

MY DEAR SIR: I have your favor of April 13th in which you submit several questions pertaining to the powers and duties of the local board of health, also in regard to who pays the expense for the care, nursing, medical assistance and supplies furnished a patient under quarantine.

In your first question you ask as to whether it is necessary for an entire board to meet to declare a quarantine. In answer will say that section 2568 of the code, among other things, provides:

> "The quarantine authorized by this section in case of infectious or contagious diseases may be declared or terminated by the mayor of any city or town, or the township clerk outside of such city or town, in cases required by regulations of the state board of health, upon written notice given by any practicing physician of the existence of such disease or termination of the cause for quarantine, as the case may be."

It is apparent from the above that it is not necessary that all the board of health meet in order that a quarantine be established.

The 2d, 3d, 4th, 5th, and 6th questions submitted by you all pertain to the question of expense. Chapter 111 acts of the 31st general assembly provides:

"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 the same have been filed with the clerk and shall certify the amount allowed by it thereon to the county auditor, and the board of county supervisors shall act upon said bills as thus certified at its first regular meeting thereafter. The local board of health shall allow an amount on such bills as shall be reasonable and the certificate of the local board of health shall be prima facie evidence of the correctness of said bill, but the board of supervisors may revise the amounts so allowed and fix the same."

By this act all of the expenses of quarantine, etc., are made chargeable to the public regardless of the financial condition of the patient.

Your seventh inquiry is as follows:

> "A pauper has a contagious disease; Dr. A. is county physician and the pauper wants Dr. B. to care for him. Can Dr. B. collect his fees from the county?"

Referring again to chapter 111, acts of the 31st general assembly, we find the following:

> "It is further provided that nothing herein contained shall be construed to prevent any person quarantined as herein provided from employing *at his own expense* the physician or nurse of his choice."

It is clearly apparent that Dr. B. could not collect fees for his services from the county; neither could he collect his fees from the county if called in by the patient to treat other than a contagious disease. A physician in order to collect his fees from the county must have been regularly appointed by the board of health acting as a body, before the services are performed.

Young vs. The County of Black Hawk, 66 Iowa, 460.

Enclosed I am sending you several leaflets containing a copy of the law as it appears in chapter 111 acts of the 31st general assembly.

The delay in answering your letter is due to the absence of the attorney-general from the city and the letter has just reached me.

Respectfully

CHAS. W. LYON.

Assistant Attorney-General.

SHERIFF—EXPENSE OF BOARDING PRISONERS.

Des Moines, Iowa, April 20, 1907.

MR. EARDLEY BELL, JR.,
Washington, Iowa.

DEAR SIR: Replying to your favor of recent date referring to sheriff's fees, I have to say that in my judgment the amount paid to the sheriff for boarding prisoners is to be treated the same as "expenses necessarily incurred and actually paid while engaged in the performance of official duties," as provided in section 510 of the supplement to the code. In other words, the amount paid for boarding prisoners is not to be charged against the sheriff in making up his salary as fees collected.

Very truly yours,

H. W. BYERS.

CITIES AND TOWNS.—Power to condemn land for park purposes.

Des Moines, Iowa, April 20, 1907.

J. B. PAXTON, ESQ.,
Sac City, Iowa.

MY DEAR SIR: Replying to your recent favor I have to say, that cities and towns have the power to condemn any land within or without the limits of such city or town for park purposes. Under this power it would have the right to condemn land owned by an agricultural fair association.

Very truly yours,

H. W. BYERS.

DUTIES AND RESPONSIBILITIES OF CITY OFFICERS.

Des Moines, Iowa, April 20, 1907.

MISS ANNA DONOVAN,
Emmetsburg, Iowa.

DEAR MADAM: I beg to acknowledge the receipt of your favor of April 18th referring to the duties and responsibilities of city officers. Replying I have to say that it would be entirely improper for me to give you an official opinion upon the questions submitted and I very much doubt the propriety of giving you even a personal opinion. I will, however, out of courtesy to you and for your information alone, say that your first question is fully answered by our supreme court in a recent case entitled *Bay et al vs. Davidson, et al*, reported in the 111 N. W. R. at page 25 (Pamphlet No. 1, April 9, 1907). This Reporter you will find in any of the law offices there in your city.

As to your second question, I am of the opinion that a report made for the last year under section 741, if complete, would be all that would be required of the present council.

Third. City councilmen are not entitled to compensation for committee services.

Fourth. A councilman would have no right to employ any person outside of the council to do his work and of course would have no authority to pay for such services out of the city funds.

Very truly yours,

H. W. BYERS.

BOUNTY ON WOLVES.

Des Moines, Iowa, April 25, 1907.

O. A. GARRETSON, ESQ.,
Salem, Iowa.

DEAR SIR: I beg to acknowledge receipt of your April 22d referring to bounty on wolves. Replying I have to say, that section 2348 and section 422 of the code must be read together to determine the power of the board of supervisors with reference to granting the bounty for the destruction of wolves, and when so read it is evident that five dollars is the maximum amount that can be recovered from the county for a wolf skin.

Very truly yours,
H. W. BYERS.

PROPERTY OWNED BY RELIGIOUS INSTITUTION EXEMPT FROM TAXATION.

Des Moines, Iowa, April 29, 1907.

H. W. HECHLER, ESQ.,
Hedrick, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your recent favor referring to exemptions allowed under section 1304 of the code. Replying I have to say, that under the facts as stated in your letter the building referred to would not be exempt from taxation. The whole question turns on the ownership of the property; if owned by a religious institution and devoted solely to the appropriate objects of that institution the property is exempt. If owned by an individual the property is taxable even though it is devoted solely to the use of a religious congregation and without charge.

Very truly yours,
H. W. BYERS.

BOARD OF SUPERVISORS.—Record in drainage matters.

Des Moines, Iowa, April 29, 1907.

B. O. CLARK, ESQ.,
Jefferson, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your letter of recent date in which you ask as to whether the proceedings of board of supervisors in drainage matters must be recorded in the minute book. Replying thereto I have to say, that section 442 of the code requires the board of supervisors to keep a book known as the minute book, and to have recorded therein all orders and decisions made by it except those relating to highways.

Section 14, chapter 68, laws of the thirtieth general assembly, in so far as it is material to the inquiry here, provides:

> "The board shall provide a book to be known as the drainage record, and the county auditor shall keep a full and complete record therein of all proceedings in each case."

In the absence of the provision just above quoted all of the board's proceedings with reference to drainage matters would have to be recorded in the minute book.

The legislature, however, undoubtedly intended that the record of drainage matters should be kept separate and apart from the other business of the county, hence provided for a separate book, and required the proceedings with reference to all drainage matters to be set out therein in full. To set out the same proceedings in the minute book would be an unnecessary and expensive duplication, and there would be no more reason for it than there would be to set out in the minute book a record of the proceedings and adjudications relating to highways.

Very truly yours,
H. W. BYERS.

CONSTRUCTION OF SECTION 2448 OF THE CODE.

Des Moines, Iowa, April 29, 1907.

W. H. HOOVER, ESQ.,
Gowrie, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your letter of recent date referring to section 2448 of the code. Answering your questions in the order stated, I have to say:

First. That saloons if located at all must be upon a laid out public street.

Second. A railroad right of way is not a street.

Third. A saloon cannot be operated on a back lot without an opening upon a *public business street.*

Very truly yours,
H. W. BYERS.

COUNTY SUPERINTENDENT—EXPENSES.

Des Moines, Iowa, April 29, 1907.

R. J. O'BRIEN, ESQ.,
Independence, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your recent favor referring to the expenses of county superintendents under chapter 122, acts of the thirty-first general assembly. Replying I have to say, that you were entirely right in your advice to the board of supervisors. It is true the act requires the county superintendent to file an itemized and verified monthly statement of his traveling expenses, but there is no provision for its payment except upon the approval and order of the county supervisors.

Very truly yours,
H. W. BYERS.

BOARD OF SUPERVISORS—DUTY TO SECURE DRAINAGE RECORD.

Des Moines, Iowa, April 30, 1907.

SIM R. STEDMAN, ESQ.,
Emmetsburg, Iowa.

MY DEAR SIR: I beg to acknowledge your favor of recent date referring to drainage records in your county. Replying I have to say, that I have grave doubts as to whether the use of a loose leaf book for recording the proceedings in drainage matters is a compliance with section 14 of chapter 68, laws of the thirtieth general assembly. That section requires the board to provide a book to be known as the drainage record, and makes it the duty of the auditor to keep a full and complete record therein of all drainage proceedings. There is, of course, nothing in the section fixing the size nor character of the book beyond the fact that it shall be a book, and known as the drainage record; still I am of the opinion that the only safe thing for your board to do would be to procure a bound book something after the style and make-up of your minute book. As I said before, I very much doubt whether records of drainage proceedings kept on loose leaves would be such a compliance with section 14 as to authorize their admission as evidence of the board's action if the question was ever raised.

Very truly yours,
H. W. BYERS.

ANTI PASS LAW.

Des Moines, Iowa, May 1, 1907.

JOHN R. BELL, ESQ.,
Sheffield, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your recent favor referring to the anti pass bill. Replying I have to say, that the anti pass law passed by the thirty-second general assembly provides among other things:

> "That no common carrier of passengers shall directly or indirectly issue, furnish or give any free ticket, free pass, or free transportation for the carriage or passage of any person within this state."

There are, of course, some exceptions such as officers, agents, etc. The act further provides:

> "The words free ticket, free pass, free transportation, as used in this act shall include any ticket, pass, contract, permit or transportation, used furnished or given to any person by any common carrier of passengers for carriage or passage for any other consideration than money paid in the usual way at the rate, fare or charge open to all who desire to purchase."

It is evident from these provisions that after the fourth day of July railroad transportation will have to be paid for in money.

The act, however, will in my judgment, not affect contracts made prior to its passage.

Very truly yours,
H. W. BYERS.

DRAINAGE LAW.—COMPENSATION OF BOARD.

Des Moines, Iowa, May 1, 1907.

TOM C. SMITH, ESQ.,
Logan, Iowa.

MY DEAR TOM: Replying to your letter of a day or two ago, I have to say, that in looking up the additional drainage legislation I have been unable to find any bill affecting the service of the county attorney.

One bill was passed fixing the pay of members of the board of supervisors at $4.00 a day for time actually in session, $3.00 a day exclusive of mileage for committee service, and five cents a mile going to and from regular, special and adjourned sessions

at the place of committee service. The time they can put in in drainage work in addition to the time allowed for other work shall not exceed fifty days in any one year.

The other bill refers to the drainage districts, and petitions, etc., and limits the amount any officer may receive for serving notices to five cents a mile for distance actually traveled, and not exceeding $5.00 per day of eight hours for making service.

A copy of the county attorney's salary bill is enclosed.

With very best wishes, I am,

Yours very truly,

H. W. BYERS.

HUCKSTER WAGON.—Local merchants may run same.

Des Moines, May 3, 1907.

IRA B. THOMAS, ESQ.,
Des Moines, Iowa.

DEAR SIR: I beg to acknowledge receipt of your communication in which you say:

> "If not presuming too much I will ask that you hand me your opinion of the meaning of the following words in the enclosed bill, passed at the recent session: 'Nor to persons running a huckster wagon.' The meaning of the words 'huckster wagon' is not quite clear and fully understood throughout the state."

In response thereto I have to say, that the exception clause, "nor persons running a huckster wagon" used in the bill passed by the thirty-second general assembly, repealing chapter 48, acts of the Thirtieth General Assembly, in my opinion, refers to persons who run a wagon through the country exchanging small articles of merchandise for farm produce, and retailing small articles for household use. In many towns in Iowa the local merchant sends wagons into the country with small articles of merchandise for sale or exchange for farm produce. All these, in my judgment, come under this clause.

Very truly yours,

H. W. BYERS.

REGENT OF STATE UNIVERSITY—REMOVAL FROM DISTRICT—VACANCY.—A regent of the State University changing his residence from one district to another creates a vacancy in the office.

Des Moines, May 11, 1907.

HON. T. B. HANLEY,
Des Moines, Iowa.

DEAR SIR: I beg to acknowledge receipt of your communication of recent date in which you say:

> "While I was residing at Tipton in the fifth congressional district of Iowa, I was by the legislature elected regent of the State University for a term which has not yet expired. April 25, 1907, I removed from Tipton to Des Moines, Iowa, of which latter city I am now a resident.
>
> "I wish you would kindly give me your opinion in writing as to whether my said removal from the fifth congressional district *ipso facto* created a vacancy in the office of regent to which I was elected as above stated."

In response thereto I submit the following opinion:

Section 2609 of the code in so far as it relates to the question submitted provides:

> "The general assembly shall elect the following regents and trustees of the state institutions, all of whom on any one board shall not be of the same political party:
>
> "1. For the University one regent from each congressional district, who shall hold office for one year.
>
> "2. * * * * * * *"

Sections 179 and 2612 requires each regent to take the oath of office required of civil officers in the chapter upon qualifications for office, and also the oath as set out in said section 179.

Section 2617 fixes the compensation and mileage allowed to regents.

Section 2635 defines their powers and duties, and makes the board of regents the governing body of the State University.

Section 1266 of the code, in so far as it is material here, provides:

> "1. * * * * *
>
> "2. * * * * *
>
> "Every civil office shall be vacant upon the happening of either of the following events:

"3. The incumbent ceasing to be a resident of the state, district, county, township, city, town, or ward by or from which he was elected or appointed, or in which the duties of his office are to be exercised."

The foregoing is all of the statutory provisions necessary to be considered upon the inquiry made, and the whole question turns on whether or not a regent is a "civil officer" within the meaning of this term as used in the statute. If so, then your question must be answered in the affirmative; if not then in the negative.

To begin with it must be conceded that every "public officer" not engaged in military or naval service is a "civil officer" within the meaning of these words as used by the legislature, and to determine what the law constitutes a "public officer" or a "public office" recourse must be had to the definition of these terms as given by recognized authorities.

"A public officer is said to be an officer under the government as distinguished from an officer of a corporation, or from a private person holding what is sometimes called an office, such as executor or guardian."

Abbott Law Dict., Tit. "Public Office."

"Offices consist of a right, and correspondent duty, to execute a public or private trust, and to take the emoluments belonging to it."

3 Kent. Comm., 454.

"A right to exercise a public function or employment, and to take the fees or emoluments belonging to it."

Bouviers' Law Dict.

"A special duty, trust, charge or position conferred by authority, and for a public purpose; a position of trust or authority, as an executive or judicial office, or a municipal office.

Webster's Dict., Tit. "Office."

"A public office is the right, authority, and duty, created and conferred by law, by which, for a given period, either fixed by law, or enduring at the pleasure of the creating power, an individual is invested with some portion of sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer."

Meechem Pub. Off., Sec. 1.

"A public office is an agency for the state and the person whose duty it is to perform the agency is a public officer."

19 Am. & Eng. Enc. of Law, 382.

"A civil office is a grant and possession of the sovereign power, and the exercise of such power within the limits prescribed by the law which creates the office constitutes the discharge of the duties of the office; and it is distinguished in this respect from a mere employment as a contractor or agent under some public office."

3 Mo., 481.
Samson v. Sutherland, 13 Vt., 309.
County of Yalabusha v. Carbry, 3 Smed. & Mar., 550.

"The idea of an officer clearly embraces the idea of tenure, duration, fees, or emoluments, rights and powers, as well as that of duty; a public station of employment confirmed by appointment of government."

Burrell Law Dict., Tit. "Office."

"An office in a municipal corporation is a public function established by law."

Kennedy v. Independent School District, 48 Iowa, 191.

In *State ex rel. Att'y Gen'l v. Valle*, 41 Mo., 31, in passing upon the question whether the officers of a municipal corporation are civil officers within the meaning of that term as used in the constitution of Missouri, the supreme court of that state say:

"In a certain popular acceptation, the words civil office under this state might possibly be interpreted to mean state officers in the sense of participating directly in the administration of the state government as such; but they are none the less civil officers under this state because their functions are confined to the local administration. The offices are created and the officers are appointed, and their powers given, and their duties defined, and their salaries fixed, directly by act of the legislature. They exercise a share of the powers of civil government, and their authority comes directly from the

state. They are to be considered as much civil officers under this state as the judge of a court, or the mayor of a city."

In the *People of North Carolina ex rel, John Nichols, et al., v. Wm. H. McKee, et al.*, 68 N. Car., 429, it is held:

"That directors of the insane asylum, deaf and dumb asylum and penitentiaries are public officers."

The same court in *People of North Carolina ex rel., Welker et al., v. Bledsol, et al.*, at page 457, in the same report, held:

"That the trustees of the university are public officers."

The same court in *State Prison North Carolina et al., v. W. H. Day*, 124 N. Car., 362, held:

"That the superintendent of the state prison is a public officer."

The supreme court of Ohio, in the *State of Ohio ex rel., the Att'y Gen'l v. Chas. L. Wilson*, reported in the 29th Ohio, page 347, held:

"That the medical superintendent of a hospital for the insane is a public officer."

Justice McClain, in the first volume of his Criminal Law, section 646, says:

"If the office is one involving the taking of an oath and the filing of a bond by the occupant whether he be elective or not, such occupant is a public officer."

In the case before us the office of regent is created by the statute, the position is named in the act as "office." They have fixed and definite terms; one must be named from each congressional district; they are allowed compensation for their services while, as the statute says, *"engaged in the performance of official duties;"* their powers and duties are defined and prescribed by statute; they are required to take the same oath that all other public officers are required to take, and must give bond for the faithful performance of their duties.

In performing these duties and exercising the powers thus conferred upon them they are taking part in the administration of the civil government of this state.

From these considerations, and in the light of the statutes and authorities quoted above it follows:

First. That the office of regent of the State University of Iowa is a "civil office" within the meaning of that term as used in section 1266.

Second. That the board of regents, aside from the governor and superintendent of public instruction, who are members by virtue of their office, must be made up of one regent from each congressional district.

Third. That the permanent removal of a regent from the district for which he was elected creates a vacancy in the office.

Your question must, therefore, be answered in the affirmative.

Respectfully,

H. W. BYERS.

HORTICULTURAL AND AGRICULTURAL LANDS WITHIN CORPORATE LIMITS OF CITIES AND TOWNS.—When subject to taxation.

Des Moines, May 13, 1907.

J. M. FORBES, ESQ.,
Jefferson, Iowa.

DEAR SIR: I beg to acknowledge receipt of your favor of recent date referring to the taxation of horticultural and agricultural lands lying within the corporate limits of cities and towns. Replying I have to say, while I doubt the propriety of my expressing even a personal opinion upon the question referred to in your letter, I will, out of courtesy to you, suggest that the whole question turns on the benefits derived from the expenditure of the tax question, that is to say, in all cases of tracts of land of ten acres or more in good faith occupied and used for agricultural or horticultural purposes and deriving no benefits from the proposed municipal tax, the tract is exempt. On the other hand, even though the land is occupied and used in good faith for agricultural and horticultural purposes only, if benefits are derived from the levying of the proposed tax, the tract is not exempt and this benefit need not be to the land alone, if the owner or the occupant of the land has an equal right and an equal opportunity with all of the other citizens of the city or town in question to use and enjoy the improvements or public place, as the case may be, the land would be subject to the tax for such improvement or place.

Under this rule it is my judgment that all horticultural and agricultural lands within the corporate limits of cities and towns in this state not expressly exempted from such tax, whether platted or not, are subject to park and library taxes.

Very truly yours,

H. W. BYERS.

OLD SOLDIERS' EXEMPTION.—How value of property is determined.

Des Moines, May 13, 1907.

J. J. PARKS, ESQ.,.
Fredericksburg, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your favor of recent date, referring to paragraph 7 of section 1304 of the supplement to the code. Replying I have to say, the term "actual value" as used in line 13 of paragraph 7, section 1304, means just what it says, that is to say, the actual value of the old soldier's property is to be determined in exactly the same way you would determine the value of the property of any other citizen. If a controversy arises as to what the actual value of the soldier's property is, it would be determined by showing the reasonable market value of the property at the time of the assessment, and in the place where the property is situated.

Very truly yours,
H. W. BYERS.

FOREST TREE PRESERVATION.—When same is exempt from taxation.

Des Moines, May 13, 1907.

C. E. CHANDLER, ESQ.,
Marengo, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your recent favor, referring to forest tree reservation. Replying I have to say, that if the Amana Society's timber land contains not less than two hundred forest trees to the acre, or if less and they plant, cultivate and otherwise properly care for the number of forest trees necessary to bring the total number of growing trees up to not less than two hundred on each acre, and in all other respects comply with the provisions of chapter 52, then in my judgment, the entire tract referred to in your letter would be taxable as provided in section 10 of said chapter. The assessor, however, in this district should make it his business to see that every provision of the act was strictly complied with before reporting this land as a forest reservation.

Very truly yours,
H. W. BYERS.

DRAINAGE LAW.—Construction of Section 441 of the Code.

Des Moines, May 13, 1907.

HON. PAUL E. STILLMAN,
Jefferson, Iowa.

MY DEAR MR. STILLMAN: I beg to acknowledge receipt of your recent favor referring to the duty of the board of supervisors with reference to drainage matters under section 441 of the code.

Replying I have to say, that section 14 of chapter 68, laws of the Thirtieth General Assembly, requires the board of supervisors to provide, and have kept by the county auditor, a book to be known as the drainage record, in which all proceedings with reference to drainage matters should be recorded.

Section 441 requires the board to have published "all the proceedings of the county board of supervisors."

Considering these two sections together, as they must be in order to arrive at a correct conclusion upon the question submitted, it seems to me entirely clear that if the board failed to have published *all of their proceedings*, which would include proceedings had with reference to drainage matters, they would not be complying with section 441.

The purpose of the legislature in enacting section 441 was to give publicity to the proceedings of the board of supervisors in order that the people of the county might know what their county government was costing them, and how their business was being conducted. To give force and effect to this purpose and intention of the legislature, all of the proceedings of the board pertaining to receipts and expenditures, bills allowed, bonds issued and sold, and all other important matters of a public nature must be published as provided in this section.

Very sincerely yours,
H. W. BYERS.

DELINQUENT TAXES.—PENALTY.

Des Moines, May 16, 1907.

J. S. SHEARER, ESQ.,
County Treasurer,
Washington, Iowa.

DEAR SIR: I beg to acknowledge receipt of your letter of the 15th instant referring to the collection of delinquent taxes.

Replying I have to say, that the board of supervisors are without authority to make the contract suggested by you. The matter of collecting delinquent taxes is entirely under your jurisdiction, and the appointment of collectors of delinquent taxes, and their compensation, is controlled by section 1407 of the code.

As to your second question, if the first installment of taxes be not paid by April 1st, then the penalty of one per cent per month attaches as of the 1st day of March, in other words, if the party fails to pay the first installment by the 1st of April, when he does pay you should figure interest at one per cent per month from the 1st day of March to the date of payment.

Very truly yours,

H. W. BYERS.

COUNTY AUDITOR.—FEES.

Des Moines, May 17, 1907.

JOHN BOEYINK, ESQ.,
Orange City, Iowa.

MY DEAR SIR: Replying to your recent favor, referring to the $2.00 fee covered by section 2850 of the code of Iowa, I have to say, that this fee is to be dealt with in exactly the same way as are the fees covered by section 478 of the code. I am sorry that it is necessary to decide the question submitted this way, because my experience with that office has convinced me that the salary of county auditors is far below what it ought to be, but this is a matter that will have to be remedied by the legislature. Under the statute as it has made it you are not entitled to the fee over and above your salary. Very truly yours,

H. W. BYERS.

ESTABLISHMENT OF MUNICIPAL LIGHT PLANT.

Des Moines, Iowa, May 21, 1907.

ROY GODSEY, ESQ.,
Mystic, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your letter of the 20th instant, referring to the erection of a municipal light plant. In reply I have to say, that the statute does not require both the question of the establishment of a light plant and the issuance of bonds to pay for the same to be submitted to the people, that is to say, under section 720 of the supplement to the code, the question to be submitted to the people is the establishment of the plant. If an affirmative vote is had upon this question no further vote of the people is necessary upon the question of issuing bonds.

I am, of course, not giving you the exact form that the question should be submitted in. In this connection, however, I call your attention to the case of *Brown vs. Carl*, reported in the 111 Iowa, at page 608.

If I can assist you further by other suggestions, I will gladly do so.

Very truly yours,

H. W. BYERS.

USE OF PUBLIC WATERS.—Right of persons owning lots bordering on public lake to build piers and wharfs.

Des Moines, May 22, 1907.

D. W. HAMSTREET, ESQ.,
Clear Lake, Iowa.

MY DEAR SIR: Your letter of some days ago to Governor Cummins, referring to Clear Lake, was referred to me by the governor.

Replying I have to say, that people owning lots bordering on the lake have a right to build wharfs or piers, and use them so long as such wharfs, piers, and their use do not interfere with the use by the general public of the lake for boating and fishing, in other words, the general public have the right to the use and enjoyment of the waters of Clear Lake for every legitimate purpose, and this right, of course, includes the right to the use of the beach for landing purposes.

Very truly yours,

H. W. BYERS.

FARMERS' ELEVATOR COMPANIES.—Right to operate under "protection clause."

Des Moines, May 23, 1907.

C. G. MESSEROLE, ESQ.,
Gowrie, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your favor of recent date requesting my opinion as to whether the provisions of the Stillman anti-trust grain law passed by the thirty-second general assembly will prevent the Farmers' Elevator Companies from operating under article VII of the by-laws enclosed in your

letter, or, in other words, whether the so called "protection clause" in the by-laws of such companies is contrary to the provisions of said act.

In response thereto I have to say, that I have carefully examined both the by-laws under which the Farmers' Elevator Companies operate and the Stillman act, and have been unable to find anything in the so called "protection clause" that is out of harmony with or contrary to the spirit and purpose of said act.

The "protection clause" or "penalty clause" as it is termed by some, amounts to no more than an agreement by the members to contribute their share toward the expense of managing and operating the business. The fact that each member's contribution is measured by the amount of his sales, not only through the companies' agent but to other dealers, does not affect the validity of the arrangement in the least.

The purpose of the Stillman act is to make it unlawful in Iowa for any person, company, partnership, association or corporation dealing in grain to enter into any agreement, contract, trust or pool for the purpose of fixing the price to be paid for grain, or to in any manner prevent competition in the buying and selling of grain.

As I read the articles and by-laws of the Farmers' Elevator Companies, the very purpose of their organization is to protect their members from the operation of the so called "grain combine" in Iowa, and to furnish them facilities for getting their grain into the open market at the least possible expense. There is absolutely nothing in the plan that even squints at fixing the price of grain, or in any manner preventing the freest competition among the buyers and sellers of grain.

I therefore conclude:

First. That the agreement upon the part of the members of cooperative grain companies to pay a certain per cent upon sales of grain made to other dealers is a legal and binding agreement.

Second. That there is nothing in the Stillman anti-trust grain law passed by the thirty-second general assembly that will make it unlawful for co-operative grain companies to continue to operate under the so called "protection" or "penalty clause."

Very truly yours,

H. W. BYERS.

DRAINAGE DISTRICT.—SERVICE OF NOTICES.—SHERIFF'S FEES.

Des Moines, May 25, 1907.

GEO. E. HANNUM, ESQ.,
Boone, Iowa.

MY DEAR SIR: Replying to your favor of yesterday referring to Senate File No. 8, I have to say, that under this act the officer serving the notice is entitled to charge and receive five cents per mile for the distance actually traveled, and in addition thereto the sum of five dollars per day of eight hours; that is to say, if for instance the sheriff is given the notices to serve in a drainage district he is entitled to charge and receive as mileage five cents per mile for the distance actually traveled, and not to exceed five dollars a day of eight hours, no matter how many notices he serves during the trip; to illustrate again, if the sheriff is given ten notices and travels one hundred miles in serving the ten persons and puts in twenty-four hours, he would be entitled to charge for that work five dollars mileage and fifteen dollars for making the service, and the same rule would apply if he had but one notice directed to ten different persons. These fees when collected by the sheriff are to be accounted for and turned into the county the same as other fees.

Trusting that I have made myself clear, I am,

Very truly yours,

H. W. BYERS.

COMMITTING MAGISTRATE.—A committing magistrate has no authority to suspend sentence.

Des Moines, May 28, 1907.

DR. F. P. CLARY,
Clearfield, Iowa.

MY DEAR DOCTOR: I am in receipt of your letter of yesterday, referring to suspension of sentence, etc. Replying I have to say, that strictly speaking you are without authority to suspend sentence, but since you have the power and authority to issue the mittimus you can delay issuing it during good behavior which to some extent amounts to the same thing as suspending the sentence, and then at any time when it seems proper to you, you can issue the mittimus and send the party to jail. In all such cases the committing magistrate should exercise discretion and judgment, having in view always the peace and good order of the community.

What I have said above is not to be considered an official opinion, but simply my personal views given out of courtesy to you, and for your information and guidance alone. Official opinions can only be given upon request of some of the state departments.

Very truly yours,

H. W. BYERS.

ITINERANT PHYSICIAN—WHO DEEMED SUCH.

Des Moines, June 4, 1907.

CLARK & FISHER,
Onawa, Iowa.

GENTLEMEN: Your letter of recent date addressed to the attorney general duly received. Your inquiry should properly have been addressed to the county attorney, as there is no provision of the law for the attorney general giving an official opinion to private individuals.

It is my opinion, however, that the answer to your inquiry is found in code, section 2581, which applies to regular physicians, and code supplement 2583-e, which applies to osteopaths.

The statute, in defining an itinerant physician, seems to imply that any one practicing either as a regular physician or as an osteopath, who solicits business at a place other than his office or at the place of his residence, is held to be an itinerant, and before entitled to practice at such additional place, is required to procure from the state board of medical examiners a license as an itinerant for which he shall pay to the treasurer of state the sum of two hundred and fifty dollars.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

SIDEWALKS.—Right of council of city or town to construct sidewalks.

Des Moines, June 10, 1907.

J. L. MATTHEWS, *Mayor*,
Conway, Iowa.

DEAR SIR: Your favor of the 3d instant addressed to the attorney-general in which you submit the question as to whether or not your town council can construct a sidewalk after notice given, and charge more than forty cents a lineal foot; also, whether or

not in case where there is no grade established you have the right to order brick or cement walks, has been received.

The law governing this case will be found in section 777 and section 779 code supplement of Iowa. It is clear that where no grade is established you will only have the right to order or construct temporary walks, and if the walks are constructed by the town you will not be entitled in any event to charge an amount in excess of that provided by the statute, to-wit: Forty cents a lineal foot. The supreme court has also held that a town cannot require the construction of a temporary walk above the natural surface of the land.

If walks are to be repaired or constructed, if you will follow carefully the law as stated in section 777 and section 779 of the code supplement, and the annotations thereunder, and also your own ordinances upon the subject you will have no difficulty in collecting for the cost of repairs or temporary walk.

The law does not authorize the attorney-general to give official opinions except to state officers, and this reply is made to you as a personal courtesy.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

ROAD LAW.—Who exempt from road tax.

Des Moines, June 15, 1907.

D. M. APPLEGATE, ESQ.,
Winterset, Iowa.

DEAR SIR: Your communication of the 31st ultimo received, in which you ask an opinion upon the construction of the road law, as follows:

1. Who is the judge of a resident being able bodied?
2. When must he be twenty-one in order to make him subject to the road tax?
3. May the road supervisor demand labor, or will the payment of money satisfy the requirements of the statute?

The attorney general is not authorized to give official opinions except to the various state officers, but as a favor to you I submit herewith my personal opinion.

First. The road supervisor is the judge in the first instance as to who is able bodied in the sense that he is subject to the road

tax. If a person called upon to perform labor upon the roads, claims that he is not able bodied, his remedy is to refuse to work and upon suit being brought against him to recover for the road tax, set up as a defense his personal condition, and the matter will then be determined in the regular way by the court.

Second. In answer to your second question, my opinion is that if a resident is twenty-one years of age at the time he is called upon by the road supervisor to perform labor, during any time between April 1st and October 1st, he comes under the provisions of the law and is subject to the road tax.

Third. The statute contemplates that a person shall perform labor or send a satisfactory substitute, and in case of his failure so to do, under section 1552 of the code, he is liable for three dollars a day for each day which he is subject to work; so that if a person does not wish to perform labor personally or send a substitute, the payment by him of the three dollars per day will satisfy the requirements of the statute.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

CITY AND TOWN COUNCILS.—VACANCY.—HOW FILLED.

Des Moines, June 15, 1907.

CITY ATTORNEY M. C. CREIGHTON,
Madrid, Iowa.

DEAR SIR: Your communication of the 8th instant received, in which you state that all of the councilmen of your town, except one, have resigned. You ask the opinion of the attorney general as to whether the remaining councilman has the authority to fill the vacancies.

There are no supreme court decisions covering this point that I have been able to find, but I think the question must be governed by section 1272 and the amendment thereto, chapter 41 thirtieth general assembly, and section 1279, and that as there is no provision for a special election in a case of this nature, the council man has the right to appoint. I would suggest that the one councilman appoint an additional councilman and let him qualify, and the two appoint the third; and after the third member properly qualifies, the three appoint the fourth, and so on until all the vacancies are filled. If this is done the citizens would be less likely to object to the appointments, alleging that it was a one-man rule.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

COUNTY TREASURER.—SALARY.

Des Moines, June 15, 1907.

COUNTY ATTORNEY H. E. BOYD,
Malcom, Iowa.

DEAR SIR: Your communication of the 29th ultimo, in which you ask for the construction to be placed upon sections 490 and 492, relative to the compensation of county treasurers, is received.

The attorney general is not authorized to give official opinions except to the various state officers, but I submit this reply as a personal courtesy to you.

There are no supreme court decisions directly in point that I have been able to find, but there is a case in 117 Iowa, page 83, which has some bearing on the question.

My opinion is that the legislature never intended that a county treasurer should be permitted to draw nearly a year's salary in advance. Under such a construction county treasurers serving their last terms might resign their office as soon as they received their last year's salary, and there would be no provision for compensation for a successor. This certainly ought not to be the law.

When a county treasurer makes his settlement with the board of supervisors, as provided in section 492 of the code, all money in his hands in excess of his salary then earned should be paid into the county treasury.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

DRAINAGE DISTRICTS—ESTABLISHMENT OF—JURISDICTION OF BOARD OF SUPERVISORS.

Des Moines, June 15, 1907.

COUNTY ATTORNEY THOMAS A. KINGLAND,
Forest City, Iowa.

DEAR SIR: Your communication of the 8th instant received, in which you ask the opinion of the attorney general as to whether

a board of supervisors loses jurisdiction of a petition for the establishment of a drainage district in case of irregularities mentioned by you.

There are no supreme court decisions as yet covering the question at issue, but it was evidently the intention of the thirtieth general assembly in section 47, chapter 68 and Senate File No. 8 of the thirty-second general assembly, which reads as follows:

> "Whenever any petition has heretofore been filed and any action thereon has been taken by the board of supervisors that is not final, it shall not be necessary that a new petition shall be filed in order to obtain the benefits of this act, but the board of supervisors are hereby empowered to proceed with the improvement from the point at which legal proceedings thereon were stopped."

Senate File No. 8 contained a publication clause so that the law is now in effect. The question is not free from doubt but the provisions made for appeal are such that the rights of the parties interested are fully protected.

Of course I assume that all persons interested have the proper notice of the final hearing and the final decision of the board so that they can take the necessary steps to protect their own rights.

The attorney general is not authorized to give official opinions except to the various state officers, but as a personal courtesy to you I have submitted my personal opinion which is based entirely on the facts as set forth in your letter.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

COUNTY ATTORNEY.—DUTIES AS TO BOARD OF SUPERVISORS IN SUIT.

Des Moines, June 15, 1907.

COUNTY ATTORNEY I. S. PEPPER,
Muscatine, Iowa.

DEAR SIR: Your communication of the 10th instant received, in which you submit the question as to whether or not it is incumbent upon the county attorney to appear in his official capacity to defend a road supervisor or township trustee in case a private suit is brought against them.

It is my opinion that there is no duty upon the county attorney to appear in an official capacity in cases of the nature you suggest.

Very truly yours,
GEORGE COSSON,
Assistant Attorney General.

INTOXICATING LIQUORS.—Licensing persons to solicit orders for.

Des Moines, June 15, 1907.

L. A. BROWN, ESQ.,
Davis City, Iowa.

DEAR SIR: Your favor of the 16th ult., enclosing ordinance relating to the licensing of persons soliciting orders for intoxicating liquors was duly received.

You request an opinion as to the legality and constitutionality of such an ordinance.

The attorney general is not authorized to give official opinions except to the various state officers, but owing to the importance of the question and as a personal favor to you, I submit the following:

Our supreme court has held that the provisions in section 680 of the code, upon which the ordinance in question seems to be based, does not authorize a city or town to regulate a saloon or control the liquor traffic.

In *Iowa City vs. McInnerny*, 114 Iowa, 590, the court, speaking through Deemer, justice, said:

"Where the mulct law is not in operation, municipal corporations have no power under the general welfare, section 680, to regulate the closing of saloons. It is only in cities which have complied with the provisions of the mulct law that councils have power to pass laws and ordinances regulating saloons."

As a general proposition municipalities have only such powers as are expressly given them by statute, or such as are necessarily implied from the nature of their business, or in carrying out those expressly given.

My opinion is that if there is any power at all for a city to require solicitors of intoxicating liquors to first secure a license, it would be found under the authority of section 700 of the code and amendments thereto; but under the holdings of our supreme court it is very doubtful if this section is broad enough to include persons soliciting orders for future deliveries.

You are doubtless aware that the thirty-second general assembly passed a law which is in common parlance termed the "C. O. D.

Package Law," which makes all firms, persons or corporations who keep in store liquors in which the purchase price is to be collected from the consignee, subject to the mulct tax, the evident intent being to curtail as far as possible these interstate shipments of liquor.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

PURE FOOD LAW.—Adulteration of commercial feeding stuffs and agricultural seeds.

Des Moines, June 20, 1907.

NEW PRAGUE FLOURING MILL COMPANY,
New Prague, Minn.

GENTLEMEN: Your letter of the 15th instant relative to the law relating to concentrated commercial feeding stuffs and agricultural seeds, which provides for labeling and inspection tax, received.

You ask if the law assesses a tax of ten cents per ton on all feed shipped into the state of Iowa. The law does not make such a general provision but refers to certain articles specified in the bill.

I have this date requested our state dairy commissioner, Mr. Wright, to send you a copy of this bill in pamphlet form and trust that the same will reach you in due time.

You ask an opinion as to whether or not the law is in violation of the interstate commerce clause of the federal constitution. The law seeks only to impose an inspection tax.

In *Schollenberger vs. Pennsylvania*, 171 U. S., page 1, at 24, and in a more recent case by the United States supreme court it was held that a law which provided for an inspection tax to prevent adulterations was a proper police regulation. There is nothing in the provision of this law which I have discovered upon a cursory examination, which would warrant this department in making a ruling that the law was in violation of the interstate commerce clause of the constitution.

The attorney-general is not authorized to give official opinions except to state officers, but I submit my personal opinion to you based entirely upon the facts as set forth in your letter for your own guidance.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

TAXATION.—As to taxation of public property.

Des Moines, June 22, 1907.

MR. C. W. BAKER,
Trunan, Minn.

DEAR SIR: Your communication of the 5th instant in which you request an opinion concerning taxations of lands in Iowa used for highway purposes, received.

The attorney-general is not authorized to give official opinions except to the officers of state, but out of courtesy to you, I submit the following:

The property of the state and its various governmental subdivisions is not subject to taxation when the same is devoted entirely to public use and not held for pecuniary profit. The property of cities and counties, while it is not subject to general taxation may, under certain circumstances, be subject to special taxes levied as special assessments.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

INSURANCE.—Attaching application to policy of insurance.

Des Moines, June 27, 1907.

HON. B. F. CARROLL,
Auditor of State.

DEAR SIR: In response to your inquiry as to whether or not, under section 1741 of the code, it is necessary to have attached to all policies of insurance a copy of the application, I have to say that the purpose of the legislature in the enactment of this section was to cause all parts of the contract of insurance to appear in or upon the policy, so that when a policy of insurance was delivered to the assured, he would have before him all of the binding provisions of the contract; and so that in case of controversy, the rights and liabilities of the parties could be measured by the terms of the policy itself without recourse to the application or any representations or statements preliminary to the execution of the contract of insurance.

The effect of the act is to confine the company strictly to the terms and conditions appearing in or upon the policy. In this view of the matter, when an insurance company issues or renews a policy which contains on its face the representations and appli-

cations of the assured, if any such were made, upon which it relied in making the contract of insurance, it has complied with section 1741 of the code, and is not required to attach to the policy or endorse thereon a copy of the application.

In other words, as is said by our supreme court in *MacKinnon Company vs. Mutual Fire Insurance Company,* 89 Iowa, page 173:

> "It is only applications and representations of the assured that are made a part of the contract, and which may affect its validity, and that do not appear therein, that are required to be endorsed upon or attached to the policy."

Very truly yours,

H. W. BYERS.

RIPARIAN OWNERS.—Along navigable streams.

Des Moines, June 28, 1907.

H. R. BAKER, ESQ.,
Eldon, Iowa.

DEAR SIR: Your communication of the 29th ultimo received in which you ask for an opinion as to the extent of the ownership of riparian land owners along the Des Moines river. In our state riparian owners take to the high water mark on all navigable rivers. While the act of congress of 1846 which declared the Des Moines river to be navigable to the Raccoon Forks, was repealed in 1870, nevertheless it has been held that the rights of the owners remain the same as though the river was still navigable.

Board of Park Commissioners vs. Taylor, 108 N. W., 927.

As was said in a recent case, the point as to where the high water mark is, is not determined by human records, but by the record made by the river itself.

It would be impossible for me to state without viewing the premises, and even then I would find difficulty in locating the exact point of high water mark. Being familiar with the river and seeing it during the high water and low water, you are quite as capable of determining the fact as to where the high water mark extends as I am.

The land within high water mark, including the river bed, belongs to the state. The strip of land, however, between high and low water mark may, under certain circumstances, be conveyed.

Board of Park Commissioners vs. Taylor, Ibid;

Chapter 212, acts of the thirty-first general assembly.

The secretary of the state land department could probably advise you as to whether or not any disposition has been made of the land between high and low water mark.

Very truly yours,

GEORGE COSSON,
Assistant Attorney-General.

CEMETERIES—AUTHORITY OF TRUSTEES TO IMPROVE.

July 1, 1907.

ROBERT DAVIS, ESQ.,
Defiance, Iowa.

MY DEAR ROBERT: Replying to your favor of several days ago referring to the sale of lots in the Union township cemetery, I have to say, that the trustees are given by law the authority to make all necessary and proper rules and regulations with reference to cemeteries. They have the right to enclose, improve and adorn the grounds, erect buildings, and prescribe rules for the erection of monuments or other memorials. Under this power they have the right to sell lots in the cemetery the proceeds of the sales to be used for the improvement and adornment of the cemetery. Persons, however, who are too poor to buy a lot could not be prevented from having a place in the cemetery for the burial of their dead.

Very truly yours,

H. W. BYERS.

OFFICERS' SALARIES.—When may be changed during term of office. Governed by constitution.

Des Moines, July 2, 1907.

SAMUEL HOLMES, ESQ.,
Missouri Valley, Iowa.

DEAR SIR: I have your communication of the 26th ultimo in which you ask for an opinion as to whether the compensation of township clerks may be changed during the term of the incumbent. I note that you say the lawyers there advise you that the salaries or compensation of officers can neither be increased nor decreased during their term of office. This applies only in case there is a state constitutional provision to that effect. The legislative power of a state, except so far as restrained by its own constitution, is at

all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, shorten or lengthen their terms of service and it may increase or diminish the salaries or change the mode of compensation.

Butler vs. Penn., 10 How. 402;
Newton vs. Commissioners, 100 U. S., 548-559;
Bryan vs. Cattell, 15 Iowa, 538.

The right to compensation exists, if at all, as the creation of law and therefore may be increased or diminished.

Cent. Dig., Vol. 37, Sec. 152, Col. 1953;
Section 857, Mechem on Public Officers.

Section 9 of article 5 of our state constitution prohibits a change in the salaries of the district and supreme judges, and there is also some statutory prohibition against increasing or diminishing the salary of officers of cities and towns, but there is no constitutional provision preventing the increase or decrease of township clerks. They will, therefore, be governed by the law in force at the time they are holding office.

The new law goes into effect July 4th.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

INSURANCE—STANDARD FIRE POLICY—ADDITIONAL INSURANCE.

Harlan, Iowa, July 3, 1907.

HON. C. L. ROOT,
Clinton, Iowa.

MY DEAR MR. ROOT: Your recent favor referring to the Iowa Standard Fire Insurance Policy was forwarded to me here.

Replying I have to say, that I had some difficulty in arriving at a satisfactory conclusion myself as to what rule should be followed with reference to the blank providing for additional insurance; but after going over the matter fully with the auditor, I concluded that the safer and better way would be to require these blanks to be filled either by limiting the amount of additional insurance authorized to a named sum, or by writing in the blank permission to the assured to procure additional insurance in any amount desired. The blank was undoubtedly placed there by the legislature for the very purpose of having the exact arrangement as to additional insurance appear on the face of the policy, thus

putting that question beyond dispute in case of loss; and I am quite sure that if the blank remained unfilled, and a controversy arose over the question of additional insurance, the courts would hold that under the policy there was no additional insurance authorized.

I, of course, may be entirely wrong about the view the court would take, but, however that may be, it seems to me, as I said before, that the safer and better rule for all concerned would be to put into the blank the agreement of the parties as to additional insurance, whatever it may be.

Very truly yours,
H. W. BYERS.

CONSTRUCTION OF CHAPTER 74, ACTS OF THIRTY-FIRST GENERAL ASSEMBLY.—Relative to policies for personal accident, health and employer's liability.

Des Moines, July 10, 1907.

HON. LAWRENCE DEGRAFF,
Des Moines, Iowa.

DEAR SIR: I have yours of the 15th ultimo in which, after referring to the acts of the thirty-first general assembly, chapter 74, authorizing life insurance companies to issue what are known as personal accident, health and employers' liability policies, you submit the following question:

> "Can such life insurance companies issue either accident or employers' liability policies which, while insuring against general accidents to persons and insuring employers against loss by reason of accidents or casualties to persons occuring in or connected with their trade or business, also cover such cases as may arise or grow out of explosions or ruptures of steam boilers?"

It is my personal opinion, and I think this is the view taken by the insurance department in the state auditor's office, that while the company could not provide in a general accident policy for injuries occurring as a result of explosions or ruptures of steam boilers, that nevertheless if a general accident policy were issued and the assured was injured as a result of the explosion or rupture of the steam boiler, that he could recover on the policy.

Very truly yours,
H. W. BYERS.

SECRETARY OF STATE—AUTHORITY TO MAKE CHANGES IN LEGISLATIVE ACTS.

Harlan, Iowa, July 15, 1907.

HON. ERNEST R. MOORE,
Cedar Rapids, Iowa.

MY DEAR SIR: Replying to your recent favor referring to the correction of errors in the acts of the thirty-second general assembly as made by the secretary of state I have to say, that that officer is without power to make any changes in the acts of the legislature either by adding to or taking from them, it, however, is made his duty under subdivision 6 of chapter 1, laws of the thirtieth general assembly, if reference to the section or act amended or repealed is omitted from the title to supply the omission.

Very truly yours,
H. W. BYERS.

CONSTRUCTION OF CHAPTER 136, acts of the thirty-first general assembly as to organization of rural school corporations.

Des Moines, July 17, 1907.

CHAS. A. WALHOF, ESQ.,
Rock Valley, Iowa.

DEAR SIR: Your communication of the 9th instant received in which you request an opinion as to the date of the organization of the rural school corporation. I think perhaps you have not noticed chapter 136 of the thirty-first general assembly. That in express terms repeals chapter 2757 of the code and provides among other things that "The board of directors of all independent city, town and village corporations shall organize on the third Monday in March, and those of all other school corporations on the first day of July, unless that date falls on Sunday, in which case on the day following."

It goes without saying that rural school corporations are embraced in the phrase "and those of all other school corporations on the first day of July."

You are quite right in saying section 2758 as amended by chapter 137, acts of the thirty-first general assembly, provides that each director shall qualify on or before the date for the organization of the board. Of course if he fails to qualify within that time, a

hold over director may qualify at any time within ten days thereafter.

State ex rel Rick vs. Cahill, 105 N. W., 691;
Section 1275 of code.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

SCHOOL DISTRICTS—ACTION ON BONDS.—Corporations act through their board of directors.

Des Moines, July 17, 1907.

GUS LAGE, ESQ.,
Hubbard, Iowa.

DEAR SIR: I have your communication of the 11th instant and I note you say that your school board duly organized on July 1st, elected a new secretary and treasurer and that you later called a meeting of the board to have said bonds approved and that no quorum appeared at said meeting. You ask for an opinion as to whether or not it would be legal for the board to accept the bonds in the absence of a regular meeting of the school board on the written consent of the majority of the individual members.

The attorney-general is not authorized to give official opinions except to the various state officers, but as a personal courtesy to you I submit the following:

It is a general rule that corporations act through their board of directors and that no corporate act can be done by the individual members of the board, unless authorized by law or by the charter of the corporation. The determination of the members individually is not the determination of the board. The concurrence of a majority of the board, when duly assembled, is requisite to constitute a valid act.

Harrington vs. Dist. Twp. of Liston, 47 Iowa, 11;
Ind. School Dist. of Cedar Twp. vs. Witner, 85 Iowa, 387.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

PATIENT ESCAPED FROM STATE HOSPITAL.—Expense properly chargeable to the state.

July, 18, 1907..

MR. H. E. BOYD,
County Attorney,
Malcom, Iowa.

DEAR SIR: Your communication of the 11th instant received, and I note that you say a patient escaped from the hospital prior to the taking effect of chapter 80, section 25, laws of the thirtieth general assembly, which provides that in case of the escape of any patient from the hospital, all necessary expense incurred in the recapture and recommitment of such patient shall be paid by the state, but that said patient was not recaptured and recommitted until some time after the taking effect of the above act, and you ask for an opinion as to whether, under such circumstances, the expense of recapture and recommitment is properly chargeable to the state. As the statute provides, without any limitations, that all necessary expense incurred in the recapture and recommitment of such patients shall be paid by the state, and as the recapture and recommitment occurred subsequently to the taking effect of the act, and as no expense was incurred until after the taking effect of the act, it is my opinion, therefore, that such expense is properly chargeable to the state.

Of course, you understand that this department is not authorized to give official opinions except to the various state officers, and that this is simply a personal opinion for your own guidance.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

STATE SAVINGS BANKS. CODE SECTION 1850 AS IT RELATES TO INVESTMENTS OF THE BANKS.

July 19, 1907.

HON. B. F. CARROLL, ESQ.,
Auditor of State,
Des Moines, Iowa.

DEAR SIR: I have your communication of recent date, with enclosures of O. F. Myers, cashier of the State Savings Bank, Hampton, Iowa, in which you request an opinion from this department upon the questions submitted by Mr. Myers.

In the case of a town property loan of $250.00, the value of the lot is $200.00, and the improvements $600.00, making a total of $800.00; assuming the above to be true, he asks:

1. a. Is it legal for a savings bank of Iowa to make the above loan?

b. If so, under what part of the code is the investment described?

2. a. Is it legal for a savings bank to purchase the above mortgage from a holder of said mortgage and carry it as a permanent asset of the bank?

b. Or carry it for a short time if the bank has a ready market and sell it to make a commission.

3. Is it illegal for an officer or employe of the bank to take mortgages in such individual's name, at the same time executing a legal assignment of both note and mortgage to the bank?

4. Is it legal for Iowa savings banks to take a second mortgage on property—mortgage running one to five years?

5. Is it legal to buy investments described at number 4 of the third party?

6. a. Is it legal for a savings bank to loan on first mortgages up to one-half the value of the land in Iowa?

b. In Minnesota?

7. Is it legal for a savings bank to purchase a first mortgage secured on Minnesota farms? a. For permanent investment; b. for the sake of selling when the bank has a ready market for same?

Is a state bank in Iowa in a different position on any of these investments?

Sec. 1850 of the code provides in part as follows:

> "Each savings bank shall invest its funds, or capital, all money deposited therein, and all its gains and profits *only* as follows: Subdivision 4. In notes and bonds, secured by mortgage or deed of trust upon *unincumbered* real estate in this state, worth at least twice the amount loaned thereon.

"Subdivision 6. In all cases of loans upon real estate, all the expenses of searches, examination and certificates of title, or the inspection of property, appraisals of value, and of drawings, perfecting and recording papers, shall be paid by such borrowers; if buildings are included in the valuation on real estate, upon which a loan shall be made, they shall be insured by the mortgagor for

at least two thirds of their value in some solvent company, and the loss, if any, under the policy of the insurance, shall be made payable to the bank or its assigns, as its interests may appear. When the mortgagor neglects to procure the insurance as above provided, the mortgagee may procure the same in the mortgagor's name, for its benefit and the premium so paid therefor shall be added to the mortgage debt."

It follows from the provisions of subdivision 4, that all of question 1 and question 2, and subdivision a of question 6 must be answered in the affirmative, provided the conditions specified in subdivision 6 of Sec. 1850 are fully complied with. It also follows that questions 4 and 5 and subdivision b of question 6 and all of question 7 must be answered in the negative. As to the third question, while the statute has no express provision covering it, the provision in Sec. 1869 of the code, which is now repealed and is reenacted in chapter 91, of the 32 G. A., provides that no officer or employe of the bank shall in any manner, directly or indirectly, use its funds or deposits, or any part thereof, except for the regular business transactions of the bank, and no loan shall be made by it to any of them, except upon the express order of the board of directors.

I think that the spirit of this provision, and public policy, prohibits any officer of the bank transacting business for the bank in a private capacity. At all events, I can see no reason why an officer of a bank, acting wholly in his official capacity, should desire to transact business in a private capacity.

As to the rules governing savings and other banks in Iowa, I understand it to be the policy pursued by the state auditor, acting upon the advice of former Attorney-General Mullan, to be the same, with reference to savings and other banks. I know of no reason why this plan should be interfered with.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

ANTI-PASS LAW.—Contracts for transportation made before the anti-pass law went into effect would be valid.

Des Moines, Iowa, July 25, 1907.

N. T. GUERNSEY, ESQ.,
Des Moines, Iowa.

MY DEAR SIR: I have before me your letter of July 24th referring to contracts of the Iowa Telephone Company with the

several railroads of this state for transportation in exchange for services, and suggesting that I had given an opinion as to the effect of the anti-pass law upon such contracts.

Replying I have to say that I have given no official opinion such as you suggest. I have, however, in a general way and to several parties stated and written that it would be the policy of this department to recognize as valid all contracts in which transportation is given as part consideration and made prior to the passage of the anti-pass law, and which were legal and enforcible as between the parties at the time they were made.

In other words, I am of the opinion that such contracts made in good faith and before the passage of the act referred to, and especially in all cases where there has been a part performance, are not affected by the anti-pass law.

Very truly yours,
H. W. BYERS.

TOWNSHIP TRUSTEES.—Authority to grant license to operate a saloon.

Des Moines, Iowa, July 27, 1907.

GEORGE H. WOODSON, ESQ.,
Oskaloosa, Iowa.

DEAR SIR: Your communication of the 24th instant received in which you submit the following question:

> "Do you know of any provision of the law in this state whereby the trustees of a township, acting under the authority of the board of supervisors, or under any other authority now recognized by law, could authorize the operation of a saloon?"

Of course, you understand that this department is not authorized to give official opinions except to the various officers of the state, but as a courtesy to you I submit my personal opinion.

Prohibition is still the law in Iowa. Provisions of the mulct law are found in title 12, chapter 6 of the code. After providing for the payment of the mulct tax, we find this provision in section 2447:

> "Nothing contained in this chapter so far as it relates to the mulct tax shall be in any way construed to mean that the business of the sale of intoxicating liquors is in any way legalized, nor as a license, nor shall the assessment or payment

of any tax for the sale of liquors as aforesaid protect the wrongdoer from any penalty now provided by law, except as provided in the next section."

Then follows the provisions of section 2448, code supplement, which operate as a bar in any city, including cities acting under special charters of five thousand or more inhabitants; and in the section following, which is 2449 of the code, provides certain conditions by which cities or towns or cities acting under special charter of less than five thousand inhabitants, may come within the provisions of the preceding section. But no provisions are made which operate as a bar to the enforcement of the prohibitory liquor law relating to townships as such or granting township trustees the right to authorize the operation of a saloon, and unless the power is especially given, inasmuch as prohibition is still the law in Iowa, it would be illegal for them to exercise it.

I do not know how the blanks you speak of came to be sent out but they were never submitted to this department.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

RAILROADS—WHEN MAY GRANT PASSES.

Harlan, Iowa, July 29, 1907.

HON. W. L. KENYON,
Law Dept. Ill. Cen. Ry. Co.,
I Park Row, Chicago, Ill.

MY DEAR JUDGE: Replying to your recent favor referring to exception J under section 2 of chapter 112 of the anti-pass law, I have to say, I am quite sure it was the intention of the legislature to permit the granting of passes in proper cases to the widows of superannuated and pensioned employes, rather than to the widows of members of their families, but in view of the way this exception reads in the law as finally passed, I think it would be entirely proper to construe the clause to authorize the granting of passes to superannuated and pensioned employes, their widows and members of their families, and widows of such members. Any other construction would, as you say, work an injury to a certain class of people, and in my judgment would be out of harmony with the spirit and purpose of the legislature in the passage of the act.

It will, of course, be the policy of this department to prosecute vigorously any violation of this act, keeping in mind, however, always the evil the legislature sought to reach in its enactment.

Taking this view of the matter I am quite sure there will be no prosecutions, at least so far as this office is concerned, for the granting of passes to the widows of superannuated and pensioned employes.

Very truly yours,
H. W. BYERS.

CONSTRUCTION OF CHAPTER 59, ACTS OF THE THIRTY-SECOND GENERAL ASSEMBLY.—As to right of cities and towns to license peddlers outside of cities and towns.

Des Moines, Iowa, July 31, 1907.

C. W. WOOTON, ESQ.,
Akron, Iowa.

DEAR SIR: Your communication received some time ago and I note that you say your council has passed an ordinance in conformity with chapter 59, acts of the thirty-second general assembly relating to peddlers outside of cities and towns. You ask for an opinion as to whether or not your town may by ordinance require opticians and book agents to take out a license. I think that your rights in this regard are to be determined by section 700 of the code supplement and amendments thereto, and that chapter 59 of the thirty-second general assembly will be of no avail to you.

In the case of the *City of Waukon vs. Fisk*, 124 Iowa, 464, the supreme court held that an itinerant optician who prescribes and collects for eye glasses is not properly classed as a merchant, and that the city has no right by ordinance to classify him as an itinerant merchant.

Of course there would be a distinction where one prescribed glasses, gave the orders and collected the pay as in the case cited, and where he purchased the glasses himself and sold them at retail as he went around from house to house.

As to your right to require a book agent to take out a license, I do not believe that one who is merely taking orders for books could be properly classed either as a peddler or as an itinerant merchant.

The supreme court in the case of *State vs. Nelson*, 128 Iowa, 740, said:

"While the cases are not all agreed as to what constitutes a transient merchant or peddler, still it is clear that one engaged simply in soliciting orders or making delivery of goods on behalf of another, is not a merchant. He is a medium through which a merchant communicates with his customers. What is accomplished is no more than as if the merchant had made use of the mail or telephone to solicit orders and of an express or transfer company to make deliveries. If, therefore, the ordinance in question could be said to include by intention—what it does not by words—agents in its definition of transient merchants, it cannot be upheld. Code section 700 gives to cities and towns power to define by ordinance who shall be considered transient merchants—that is, what merchants shall be considered as transient; but it cannot be construed as a grant of power to declare those persons to be merchants who by universal acceptance in the business world are not such."

It was held in *Emmons vs. Lewiston*, (Ill.) 8 L. R. A., 328, that a canvasser for books or book agent is not a peddler.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

BANKS.—Right to receive sight draft with bill of lading attached for shipments of liquor.

Des Moines, Iowa, August 1, 1907.

MR. O. L. FRAZIER,
Davis City, Iowa.

DEAR SIR: Your communication of the 26th instant received in which you ask for an opinion as to whether your bank may lawfully make collections for liquor where the same is shipped by freight, sight draft with bill of lading attached being sent to the bank, the consignee receiving bill of lading from you upon payment of the sight draft.

This is somewhat similar to the C. O. D. business which was carried on formerly so extensively by the express companies. Our supreme court held that this C. O. D. business rendered the express company liable, but the decision was reversed by the United States supreme court.

During the last legislature a bill was introduced by Senator Gillilland for the express purpose of stopping the C. O. D. business by making any individual, firm or corporation liable for the mulct tax which kept liquor in store and made the collection for the same. Of course this practice now in shipping the same by freight, drawing sight draft against the consignee and sending bill of lading to the bank is simply to evade the purpose of this act above referred to. However, it is my opinion that under the rulings of the recent decisions of the United States supreme court that on interstate shipments you would not be technically guilty of the violation of any law, but as intrastate shipments of liquors where the same are to be used as a beverage, and in all cases except to permit holders and others who are authorized by law to sell the same under certain conditions, are absolutely prohibited by our state law, and as such shipments from points wholly within the state are not affected by the United States supreme court cases, I should not want to be a party in aiding any one either directly or indirectly in violating this law.

The attorney-general is not authorized to give official opinions except to the various state officers and in matters of this nature we prefer very much not to give a personal opinion, for the reason that it tends to foreclose judicial interpretation of the questions in the courts and interferes with the prosecution of cases by the county attorneys. The county attorney is really the proper person to advise on such matters as he is the one to initiate proceedings; however, as a personal courtesy to you I have submitted the above personal opinion which is to be used by you solely for your own guidance.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

TOWN COUNCILS.—Right to lay sidewalks along public grounds and assess tax to abutting property owner, even when such property owner is the public.

Des Moines, Iowa, August 3, 1907.

R. G. MAY, ESQ.,
New Albin, Iowa.

DEAR SIR: Your communication of the 19th ultimo received in which you ask for an opinion as to whether the town council may lawfully construct a sidewalk on a street adjoining public school

grounds and pay for same from city funds. You advise that the school district extends beyond the city limits.

Section 779 of the code supplement gives the city the power to provide for the construction, re-construction and repair of permanent sidewalks upon any street, highway, avenue, public ground, wharf, landing or market place within the limits of such city or town under certain conditions therein specified.

This gives you the power to construct the sidewalk and assess the taxes to the abutting property owner, which in this case is the school district; but your power is co-extensive only with the corporate limits of the town. As a general proposition municipalities have only such powers as are expressly granted them and such as are necessarily implied in order to carry out those powers expressly given. Since the statute no where gives to cities and towns the authority to construct sidewalks and donate them to school districts it follows from the principles before stated that it would be improper for them to do this. School districts, however, while exempted from taxation for general purposes are nevertheless subject to special assessments for such improvements as sidewalks, and while the property of the district may not be subject to execution, the special tax may nevertheless be enforced by mandamus.

See *City of Sioux City vs. Ind. School Dist. of Sioux City*, 55 Iowa, 150;
E. & W. Con. Co. vs. Jasper County, 117 Iowa, 365.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

TOWN CLERK—EMPLOYE OF RAILROAD.—An employe of a railroad who is town clerk would not be prevented from accepting a pass.

Des Moines, Iowa, August 7, 1907.

F. K. ORVIS, ESQ.,
St. Olaf, Iowa.

DEAR SIR: Replying to your recent favor I have to say, that I know of no law of this state that would prevent you as town clerk of the incorporated town of St. Olaf from accepting and using a pass issued to you as stated in your letter, if your chief and principal occupation is to render service to common carriers of passengers, that is to say, if you are employed continuously by the

railroad company as agent, the fact that at the same time you are holding the office of town clerk would not make it unlawful for you to use a pass.

Very truly yours,
H. W. BYERS.

CONSTRUCTION OF CODE SECTION 3191 AND AMENDMENT THERETO.—Relating to divorced persons remarrying within one year.

Des Moines, Iowa, August 7, 1907.

BRONSON, CARR & SONS,
Manchester, Iowa.

GENTLEMEN: Replying to your recent favor referring to the amendment to code section 3181, I have to say, there seems to be considerable difference of opinion among the lawyers and court officers of the state as to just how this act should be construed, some of them holding that the act applies only to divorces decreed since the fourth day of July, others that it applies to divorces procured before as well as after that date.

I have no doubt whatever that it was the intention of the legislature to prohibit divorced parties from marrying again within a year from the filing of the decree of divorce whether the filing was before or after the taking effect of the act. The language used, however, in the act does not express this intent as clearly and definitely as it should; still if I were called upon to act under the chapter, either as clerk of the district court on an application for license to marry, or as a court in the trial of a person charged with the violation of the act, I should hold that the law applied to divorces decreed before as well as after the fourth day of July.

There is also a difference of opinion as to your second question. Several lawyers, and at least one or two judges, have been quoted in the press as stating that a person divorced here now might cross the line into an adjoining state, marry and return to Iowa without subjecting himself to the penalty provided in the amendment.

I have no doubt that a marriage under such circumstances would be legal, that is to say, the parties would be legally married; but I am quite sure that if I was a district judge and the party was brought before me for trial under an indictment charging a violation of this statute, and the only defense was that the

marriage took place in another state, I would give him an opportunity to take that defense to the supreme court.

Very truly yours,

H. W. BYERS.

PUBLIC PRINTING—COMPENSATION FOR.

Des Moines, Iowa, August 12, 1907.

W. F. CRAIG, ESQ.,
Creston, Iowa.

MY DEAR SIR: Replying to your favor of the 8th instant referring to compensation allowed for public printing, I have to say, that under section 441 of the code supplement publishers are entitled to charge 33 1-3 cents for each ten lines of brevier type, or its equivalent. There is, however, nothing said in this section about the width of the columns. Section 1293 of the code, referring to publication of legal notices, provides that the columns shall be not less than 2 1-6 inches in width, and I think this may be taken as the established width where no other is fixed by law, so that in publishing proceedings of the board of supervisors, the schedule of bills allowed, the reports of the county treasurer, the publishers of the official newspapers are entitled to charge and receive 33 1-3 cents for each ten lines of brevier type, or its equivalent in a column not less than 2 1-6 inches in width.

Very truly yours,

H. W. BYERS.

BOARD OF SUPERVISORS.—Authority of board of supervisors to appoint registrars, and compensate them and the county auditor from the gopher bounty for their duties in regard to same.

Des Moines, August 13, 1907.

B. I. AGAN, ESQ.,
Glenwood, Iowa.

DEAR SIR: I have before me your letter of the 12th instant referring to the appointment by your board of supervisors of registrars to count and destroy gopher feet, and providing in the resolution of appointment that the registrar should receive ten per cent and the auditor twenty per cent of the bounty paid, and requesting my opinion as to the legality of such action.

In response thereto I have to say that chapter 121, acts of the thirty-second general assembly, makes no provision whatever for the payment to the auditor for his services in receiving proofs of the destruction of pocket gophers, nor does it authorize the board of supervisors to fix the compensation of registrars.

In the absence of some such provision the board is, in my judgment, without authority to provide for compensation for either the auditor or the registrars. The original bill when it was introduced at the recent session of the legislature had in it a provision for compensation to the auditor, upon the passage of the bill this provision was stricken out, indicating clearly that it was not the intention of the legislature to allow the auditor any additional compensation for the work made necessary by the operation of the act in question. The act provides for the appointment by the board of registrars, or other officers, in other parts of the county to receive gopher claws and other proofs of killing. This provision is for the purpose of making it convenient for the people living at a distance from the county seat to make their proofs, and while the act does not provide for compensation for the services of these officers, I am of the opinion that they would be entitled to receive reasonable compensation for services performed, bills for the same to be presented and audited by the board of supervisors, and disposed of as are all other claims against the county.

Very truly yours,

H. W. BYERS.

LEGAL RESIDENCE OF PERSON—GOVERNED BY INTENTION.

Des Moines, August 15, 1907.

MR. E. F. TEST,
Care World Herald,
Omaha, Neb.

DEAR SIR: Your communication of the 6th instant received in which you request an opinion as to your legal residence or your right to vote in Iowa. As a general rule a legal residence once acquired continues until the acts and the intention of the person concur in order to change the same. If your legal residence was formerly Council Bluffs, Iowa, and you have never at any time had the intention to abandon this residence, and your acts and conduct have been such that an abandonment could not be implied, it is my opinion that you are still entitled to vote at Council Bluffs, and

that as a matter of law, you are still a legal resident there. One who is temporarily absent from his legal residence without any intention of abandoning the same, does not, simply by such temporary absence, lose his residence. Of course where one quits a residence and his conduct is such that it is reasonable to suppose that he has abandoned the same, he thereby loses his former residence.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

LOCAL MUTUAL INSURANCE COMPANIES.—Cannot insure property unless owned by a member of the company.

Des Moines, August 20, 1907.

JOHN BOEYINK, ESQ.,
Orange City, Iowa.

DEAR SIR: Your communication of the 13th instant received, and I note you say the board of supervisors of your county has insured the buildings on the county poor farm in a local mutual insurance company, and has paid the regular assessments due on such insurance.

You ask whether or not in case of fire the county could collect insurance for the loss.

Section 1759 of the code supplement prohibits a local mutual insurance company from insuring any property not owned by one of their own number, except such school or church property within the territory in which they do business, and the re-insurance of risks of similar associations.

As the county is not a member of this local mutual insurance company, such company would, under the provisions of the above section, be prohibited from insuring the property of the county, and in case of loss the county could not recover the value thereof.

See, In re Assignment Mutual G. F. Ins. Co., 107 Iowa, 143;
Fidelity Iowa Insurance Company vs. Bank, 127 Iowa, 599.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

CARRYING CONCEALED WEAPONS—PERSON ARRESTED FOR SAME AND RELIEVED OF WEAPONS.—On his release and payment of fine the weapons should be returned to him.

Des Moines, August 21, 1907.

W. R. WOODS, ESQ.,
Ollie, Iowa.

DEAR SIR: I am in receipt of your communication of the 19th instant in which you ask for an opinion as to what disposition should be made of weapons which are taken from a person arrested and charged with the crime of carrying concealed weapons;

In the absence of an express statute declaring such weapons to be forfeited. I am of the opinion that upon the release of the person arrested, either after the payment of his fine or the service of the term of his commitment, the weapons should be returned to him.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

CITIES AND TOWNS—PUBLISHING OF COUNCIL PROCEEDINGS.

Des Moines, August 22, 1907.

L. B. WHEELOCK, ESQ.,
Hudson, Iowa.

DEAR SIR: I am in receipt of your communication of the 14th instant in which you ask to be advised as to whether it is necessary for towns to publish their regular council proceedings.

Replying thereto I have to say, that I know of no law which makes it incumbent upon the council to publish their regular proceedings. The statute says that they must be open to the public. A number of cities and towns, however, publish their proceedings. Of course, I do not include in the regular council proceedings ordinances and matters of that nature. Ordinances must be published in order to be valid.

But see 741-c code supplement.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

SUBPOENA—POWER OUTSIDE OF STATE.

Des Moines, August 23, 1907.

S. J. MORROW, ESQ.,
Fillbeck Hotel, Terre Haute, Ind.

DEAR SIR: Your communication of the 19th instant received in which you ask for an opinion as to whether or not a subpoena issued from a district court in Iowa could compel the attendance of a witness outside the state.

Replying thereto, I have to say, that subpoenas both in civil and criminal matters issued out of our state courts have no coercive power outside of the state of Iowa. A subpoena in a criminal case is effective anywhere within the state.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

MINORS—LIABILITY FOR CRIMES.

Des Moines, September 3, 1907.

W. E. WILSON, ESQ.,
Koszta, Iowa.

DEAR SIR: I am in receipt of your communication of the 27th ultimo in which you ask for an opinion as to the liability of minors for violating the fish and game laws.

Replying thereto I have to say, that minors who are old enough to understand the nature of their acts are responsible for their crimes the same as adults, but all persons under sixteen years of age must be prosecuted for their crimes under the juvenile court law, except where a minor may be charged with the commission of an offense punishable under the laws of the state with life imprisonment or with the penalty of death.

If the game laws are being violated and you are unable yourself to secure the proper evidence, I would suggest that you communicate with George Lincoln, game warden at Cedar Rapids.

Where a parent encourages and directs his child to commit a crime he is equally liable with the child who actually performs the deed.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

POLICE AND TRUANT OFFICER—MAY ACCEPT TRANSPORTATION ON STREET RAILWAY.

Des Moines, September 9, 1907.

J. J. MCCONNELL, ESQ.,
Superintendent City Schools,
Cedar Rapids, Iowa.

DEAR SIR: I beg to acknowledge receipt of your recent favor inquiring as to the right of a street car company to give free transportation to a member of the police force while acting as truant officer.

Replying I have to say, that while I am not permitted to give an official opinion upon the question submitted, I will, out of courtesy to you, suggest my personal views about the matter.

Chapter 112, laws of the thirty-second general assembly, known as the anti-pass act, permits common carriers to issue free transportation to policemen and firemen of any city wearing the insignia of their office within the limits of such city. The right to issue this transportation is in no manner dependent upon the question of compensation, that is to say, it is not important whether the officer is paid by the city or not if he is in fact a policeman and wears the insignia of that office. The fact that this particular policeman also acts as truant officer for the schools and receives compensation from the school district for such service would not change his relation to the city in any respect; he would still be a policeman, if, as you say, he was properly sworn in as a member of the police force. There is nothing in the statute to prevent a person from serving as a policeman without compensation.

Taking this view of the matter I am quite sure that the person you refer to as a police and truant officer comes clearly within the exception covered by subdivision L in section 2 of the chapter above referred to.

Very truly yours,
H. W. BYERS.

CONSTRUCTION OF CHAPTER 103 ACTS OF THIRTY-SECOND GENERAL ASSEMBLY.—As to the "sixteen hour law."

Des Moines, September 9, 1907.

GEO. B. ALDEN, ESQ.,
Clarion, Iowa.

DEAR SIR: I have before me your recent favor referring to chapter 103, laws of the thirty-second general assembly known as the

"sixteen hour law," and asking me for an opinion as to its several provisions.

Replying I have to say, that while I can only give official opinions upon request of some of the state departments, and while in most cases the propriety of my giving even my personal views is doubtful, I will in this case, out of courtesy to you and your co-laborers, suggest what I think about the several questions you propound.

The law was passed by the general assembly in response to a very general demand from the traveling public. Its purpose is two-fold; first: To protect employes of railway companies from unreasonable demands upon their physical endurance by their employers; and second, to reduce as far as possible the number of accidents due to overwork and loss of sleep on the part of the men in charge of trains and train service.

My judgment is, that the purpose of the legislature can best be accomplished by giving to the act a broad and liberal construction, keeping in mind, of course, always the question of the health and comfort of the employes themselves, and the safety to the traveling public.

In this view of the matter I would say:

First. That a crew would be entirely justified in remaining on duty long enough to properly dispose of a train partly made up of perishable freight, even though it requires more than sixteen hours.

I do not, of course, mean by this that in all cases the fact that perishable freight is being handled would justify ignoring the sixteen hour provision of the law; I simply mean that all parties concerned should exercise reason and judgment in the particular case, and if to properly care for the train or any part of it requires the men to work a little more than sixteen hours they would be justified in doing so.

Second. If the full sixteen hours is required in getting a train into a terminal it would not be a violation of the law for the men in charge of the train to use, as you suggest, from fifteen to forty-five minutes more in putting the train away.

Third. If, as you say, a crew consumed eight hours in going over a division there is nothing in the law to prevent them from proceeding at once on their return trip, the time, indicated in your question, required in the two trips being sixteen hours.

Fourth. If a crew has been on duty, as you suggest, fifteen hours and fifty minutes they could not be sent out again except

for service that would require not more than ten minutes until they had had ten hours rest.

I think this covers all the questions you ask, and in the order you stated them.

Very truly yours,
H. W. BYERS.

MUTUAL ASSESSMENT INSURANCE COMPANY.—May insure school building.

Des Moines, September 16, 1907.

MR. MAXFIELD,
McClelland, Iowa.

DEAR SIR: I am in receipt of your communication of the 12th instant in which you ask for an opinion as to whether a school board can lawfully obligate the district by insuring the buildings in a mutual assessment insurance company.

Section 1 of chapter 80 of the thirty-second general assembly, after prohibiting mutual assessment associations from insuring property not owned by one of their own number, expressly excepts school and church property situated within the territory in which they do business.

It is my opinion, therefore, that such companies may insure school property within the territory in which they do business, and that the school district would be liable for the regular current assessments.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

SHERIFF'S FEES.—Right to demand same in criminal action.

Des Moines, September 21, 1907.

MR. CLAUS LIGHT,
Pocahontas, Iowa.

DEAR SIR: I am in receipt of your communication of the 16th instant in which you ask for an opinion as to the right of a sheriff to demand that the complaining witness in a criminal case advance the sheriff's fees incident to such case.

It is my opinion that a complaining witness in a criminal case ought not to be required to advance any fees incident and necessary

to the prosecution of such case. There is a provision, of course, that where the magistrate finds there was no reasonable ground for instituting a case, that the costs may be taxed to the complaining witness, but that is a matter to be determined subsequent to the serving of the warrant.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

ANTI-PASS LAW.—Presidents of Eleemosynary institutions come within the prohibition of the law.

Des Moines, September 24, 1907.

MR. CARROLL WRIGHT,
Des Moines, Iowa.

DEAR SIR: I beg to acknowledge the receipt of your favor of the 17th instant, asking my opinion as to whether your company can legally grant free transportation to an officer of an eleemosynary institution who receives a salary for his services as such officer, and indicating that Drake University of Des Moines and the Iowa College of Grinnell come within the term "eleemosynary institutions."

In response thereto I have to say that while I cannot give you an official opinion upon the question submitted, I will out of courtesy to you and your company, give you my personal views

Chapter 112, acts of the thirty-second general assembly, after prohibiting the issuance of free transportation by common carriers of passengers, and defining the term free transportation, provides among other things: "Free tickets, free passes, free transportation, and discriminating reduced rates may be issued to * * * ministers of religion, traveling secretaries of Railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, *and persons exclusively engaged in charitable and eleemosynary work.*"

In recent years the courts of the country have broadened the definition of the term or word "eleemosynary" until it may now properly be applied to practically all educational institutions supported by public or private contributions, and where such institutions are conducted without profit, and where the "element of private gain is wanting." This construction of the words or term "eleemosynary institution" is supported by the authorities you quote in your letter.

I believe this construction is in harmony with the purpose and intent of the legislature in exempting the persons named in section 2 of chapter 112 and covered by your inquiry. I do not, however, believe it was the intention of the legislature to permit transportation companies to grant to such persons passes or free transportation to be used by them while traveling upon their own private business or for pleasure; but I do think the legislature intended to authorize or permit the granting of passes or other free transportation to such persons when making trips wholly in the interest of the institution they represent.

It is therefore my opinion that your company would have the right to grant a free trip pass to an officer of any of the institutions referred to in your letter to be used by him when traveling in the interest of the institution represented by him.

Yours very truly,
H. W. BYERS.

COUNTY ATTORNEY—ASSISTANTS—HOW PAID.

Des Moines, September 25, 1907.

G. G. WRIGHT, ESQ.,
Tipton, Iowa.

DEAR SIR: I am in receipt of your communication of the 19th instant, in which you call attention to the provision of section 3, chapter 122, laws of the thirty-first general assembly, and the provision of section 15 of said act, and ask for an opinion as to whether or not the expenses incurred under said section 3 for an assistant to the county superintendent in the holding of an examination shall be paid by the county, or whether the same is covered by the provision of section 15, and should be certified by the superintendent of public instruction to the executive council and paid by the state according to the provisions of said section.

You also ask for an opinion as to who shall determine the number of assistants the county superintendent may employ, and also the compensation thereof.

The language used in section 15, chapter 122, aforesaid, is comprehensive enough to cover the expenses of assistants as provided by section 3 of said act, but this was certainly not the intent of the legislature nor those who were responsible for the passage of the act in question.

Section 3 was copied almost verbatim from section 2735 of the code. Under that section the expenses of assistants to the county superintendent in holding examinations were to be paid by the county, and the county superintendent was to determine and select the number of assistants.

The evident intent of the legislature with reference to this point as expressed in section 3, was to limit the county superintendent to such assistants as are necessary, and while it is my opinion that the law contemplates that the county superintendent still selects the assistants and determines in the first instance the number to be selected, and the county pays for the services of such assistants, the board of supervisors have the right to determine whether the compensation paid for such assistants is reasonable, and the number appointed by the county superintendent necessary.

The evident intent of the legislature was that the expenditures referred to in section 15 of the act in question was to embrace those made necessary by the provisions of section 14 of said act.

Very truly yours,
GEORGE COSSON,
Assistant Attorney-General.

COMMISSIONERS OF INSANITY—EXPENSE—HOW PAID.

Des Moines, September 25, 1907.

GEORGE T. MASON,
County Attorney,
Mount Pleasant, Iowa.

DEAR SIR: I am in receipt of your communication of the 7th instant, and I note that you say that you and the clerk of the court cannot agree as to the manner of certifying and paying the expenses incurred by the commissioners of insanity in the performance of their duties.

You ask to be advised as to the custom in this regard. My opinion is, that the custom is for the clerk to certify the whole proceedings of the commissioners of insanity in to the county auditor, whereupon the county auditor should file the same, and the board of supervisors during their first session thereafter should audit and allow the same in toto if they find the whole record to be correct, if not to reject such parts of it as they deem to be improper, and

after the same is allowed persons who are entitled to fees may receive warrants therefor.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General

BOARDS OF POLICE AND FIRE COMMISSIONERS.—Manner of filling vacancies in departments.

Des Moines, September 26, 1907.

EDWARD L. HIRSCH, ESQ.,
Burlington, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your favor of the 24th instant, requesting an opinion as to whether or not "the chiefs of the fire and police departments respectively are compelled to fill the vacancies in their departments by taking those standing highest in the examination, or whether the chiefs have the right to choose any persons they desire from the list certified by the board regardless of the standing of such person."

In response I have to say, that in the passage of the act providing for local boards of police and fire commissioners it was the intention of the legislature to give the board the exclusive power to determine the question of fitness and competency of the members of these several departments, and to fix the standing of the persons named in the list certified by them, and the board undoubtedly has the power to adopt a rule providing that the chiefs of the police and fire departments in filling vacancies shall give the persons on the list preference in the order of their standing, and that the chiefs would be bound by such rule.

Very truly yours,
H. W. BYERS.

BANKS—MORTGAGES.—Assistant cashier may take acknowledgment of mortgage to the bank.

Des Moines, Iowa, October 1, 1907.

HON. F. N. SMITH,
Yarmouth, Iowa.

DEAR SIR: I am in receipt of your communication of the 27th ultimo, in which you ask for an opinion as to whether an acknowl-

edgment of a mortgage to a bank taken by the assistant cashier of said bank, the assistant cashier being a notary public, but owning no stock in the bank, would be legal.

An acknowledgment to a mortgage by an assistant cashier of a bank, he owning no stock and having no interest in the mortgage, would be perfectly valid.

Bardslay vs. German American Bank, 113 Iowa, 216.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

CONSTRUCTION OF SECTION 915 OF THE CODE SUPPLEMENT.—As to filing abstract of title with plat.

Des Moines, Iowa, October 29, 1907.

GEO. W. DVORSKY, ESQ.,
Iowa City, Iowa.

DEAR SIR. I beg to acknowledge receipt of your recent favor referring to section 915 of the code supplement, and asking as to whether or not abstract of title must be filed with the plat referred to in the section.

Replying I have to say, that the requirement to file with the plat a complete abstract of title was added to section 915 of the code by the twenty-ninth general assembly by the adoption of chapter 49. The requirement is a positive and definite one, and as adopted by the legislature provides "every such plat shall have a complete abstract of title attached thereto." This language is so plain I am unable to see how there could be any difference of opinion about it. The provision was adopted for the purpose of making it possible for every purchaser of platted property to know by an examination of the plat and the abstract attached just the condition of the title of the property. The provision is a reasonable one, and, in my judgment, the filing of a plat without an abstract attached would not be a full compliance with section 915 of the supplement of the code.

Very truly yours,
H. W. BYERS.

HUMANE OFFICER.—May accept transportation on street railway.

Des Moines, Iowa, October 29, 1907.

DR. ROSA LIEDIG,
Marshalltown, Iowa.

DEAR MADAM: I beg to acknowledge receipt of your recent favor in which you say, you are the humane officer of the city of Marshalltown duly appointed by the mayor with the same power to make arrests and preserve the peace under certain circumstances as the policemen of the city, and asking as to whether or not the exceptions contained in section 2 of chapter 112, laws of the thirty-second general assembly, are broad enough to cover your case and permit you when wearing the insignia of your office to accept and use a pass on the street railway.

Replying I have to say, that it is my opinion that under the circumstances stated in your letter, it would be legal and proper for the street railway company to give you free transportation on its lines, and that in accepting and using the same you would not be violating the provisions of the act above referred to.

Very truly yours,
H. W. BYERS.

ANTI PASS LAW—CONSTRUCTION OF.

Des Moines, Iowa, October 30, 1907.

CHAS. A. LAWRENCE & CO.,
Cedar Rapids, Iowa.

GENTLEMEN: I beg to acknowledge receipt of your favor of recent date referring to chapter 112 acts of the thirty-second general assembly known as the anti-pass law, and asking as to whether or not you could run a ledger account with the railroads with quarterly settlements covering advertising and transportation.

Replying I have to say, that it was undoubtedly the intention of the legislature in the passage of the act in question to put railroad transportation absolutely upon a cash basis, and to prohibit the railroads from exchanging transportation for anything but money.

If I am correct in this, then I do not think you could deal with the railroads with reference to transportation as you suggest in your letter.

Very truly yours,
H. W. BYERS.

OFFICIAL PAPERS—SELECTION.

Des Moines, Iowa, November 2, 1907.

W. E. BURLEIGH, ESQ.,
Tingley, Iowa.

DEAR SIR: I am in receipt of your communication of the 1st instant in which you advise that there will be a contest in your county over the selection of the official papers in January. You ask whether or not a paper which has not been established a year may have a list of bona fide subscribers; in other words, whether a subscriber in order to be properly classed as a yearly subscriber must have been actually taking the paper for the period of one year. It is my opinion that this is not necessary.

In the case of *Young vs. Rann*, 111 Iowa, 253, our supreme court speaking through Mr. Justice Deemer, said:

> "Plaintiff was not bound to show that all his subscribers had taken his paper for a year in order to prove the fact that they were yearly subscribers. If they had subscribed for a year they were yearly subscribers although they had not been taking the paper for more than a month."

It seems to me that this case settles the question you ask. You will, of course, understand that this is not an official opinion but simply my personal opinion given out of courtesy to you.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

COMMISSION PLAN OF CITY GOVERNMENT.—If a city under special charter adopts same it would forfeit its special charter.

Des Moines, Iowa, November 21, 1907.

J. E. HARDMAN, ESQ.,
Managing Editor Daily Times,
Davenport, Iowa.

MY DEAR SIR: My attention has just been called to your letter of the 7th instant, in which you inquire as to whether or not if Davenport adopts the commission plan of government it would forfeit its special charter.

Replying I have to say, that chapter 48, acts of the thirty-second general assembly, and which is known as the Des Moines plan of government, is intended to furnish, if its provisions are adopted by a vote of the people, a complete plan of city government.

Section 21 of the act, among other things provides:

> "Any city which shall have operated for more than six years under the provisions of this act may abandon such organization hereunder, and accept the provisions of the general law of the state then applicable to cities of its population, or if now organized under special charter may resume said special charter by proceeding as follows," etc.

It seems quite clear to me that the adoption by your city of the plan of government covered by chapter 48 above referred to would be an abandonment of your special charter.

Very truly yours,
H. W. BYERS.

VACCINATION—REGULATION FOR IN CASES OF EMERGENCY.

Des Moines, Iowa, December 5, 1907.

HON. A. B. STORMS,
Ames, Iowa.

MY DEAR MR. STORM: I beg to acknowledge receipt of your letter of the 3d instant relating to emergency regulations for vaccination.

Replying I have to say, that in my judgment:

First. The city physician could not successfully prosecute injunction proceedings against either you or the board under the facts stated in your letter.

Second. As to whether you would be justified legally in suspending students who have taken the internal method of vaccination, I am not so sure. The courts are not in entire harmony on this question. It is, however, my opinion that in case of an epidemic you have the right, and in fact it is your duty, to carry out the order of suspension as to all students who fail to furnish *satisfactory* showing of successful vaccination.

Third. In the absence of an epidemic it would not be lawful for you to require students, as a condition precedent to their entering the institution, either to be vaccinated or show certificates of successful vaccination.

Very truly yours,
H. W. BYERS.

BOARD OF SUPERVISORS—WHEN NEW MEMBER MEETS WITH SAME.

Des Moines, Iowa, December 6, 1907.

A. G. ANDERSON, ESQ.,
Bloomfield, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your letter of December 5th in which you inquire as to whether the new member of the board of supervisors or the retiring member should take part in the meeting of the board on January 2, 1908.

Replying I have to say, that the usual procedure is to have the old board, including the retiring member, meet at the time fixed in January, after the meeting have the new member qualify by taking the prescribed oath, and immediately upon the qualification of the new member the retiring member's term expires, and he could not lawfully take any further part in the business of the board. If in your county the new member is qualified in time to sit with the board at the beginning of their meeting on January 2, 1908, then the retiring member could take no part in that meeting.

Very truly yours,
H. W. BYERS.

MATERNITY HOSPITAL—INSPECTION FEE—TO WHOM PAID.

Des Moines, December 18, 1907.

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

DEAR SIR: I am in receipt of your communication of the 3d instant referring to the inspection of the premises of applicants for a maternity hospital license and the fee paid therefor. You ask to be advised as to whether the person signing the application should pay said inspection fee direct to the physician or member of the board making the inspection, or whether the fee should be paid to the secretary of the board at the time the application is filed and the license fee of twenty-five dollars is paid; and if the inspection fee of five dollars is paid to the secretary at the time the application is filed, whether or not it should be covered into the state treasury, or retained by the secretary of the board and paid direct to the person making the inspection.

It is my opinion that the law would be complied with if the applicant would pay the inspection fee of five dollars direct to the physician making the inspection, but I think it would be perfectly proper and more in accord with good business principles if the

secretary at the time he received the license fee of twenty-five dollars, should collect the inspection fee of five dollars to be paid to the physician or member of the board as soon as the inspection is made.

If this method is adopted, that is to say, if the secretary of the board collects the inspection fee of five dollars from the applicant, it should be retained by the secretary and by him paid directly to the physician or member of the board making the inspection and not covered into the state treasury.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

CITY ELECTIONS—PRIMARY LAW.—What parties entitled to appear on ticket under chapter 51, thirty-second general assembly.

Des Moines, December 19, 1907.

LOUIS E. SCHMITT,
City Attorney,
Clinton, Iowa.

DEAR SIR: I am in receipt of your communication relative to the primary election law as found in chapter 51, thirty-second general assembly, and particularly in relation to that part of section 35 of said chapter requiring a candidate for city office to obtain the percentage of voters signing petitions for printing the names of a candidate upon the primary ballot, and which is based upon the vote cast for mayor by the respective parties in the preceding city election. You advise that the democratic party has not had a ticket in the field in your city since 1902, and you ask for an opinion as to whether the statement "and shall be based upon the vote cast for mayor by the respective parties in the *preceding city election*" found in section 35 aforesaid, necessarily refers to the city election next preceding, or whether it would be lawful to consider the vote cast for mayor by the democratic party in your city at the last election in which said democratic party had a candidate in the field for mayor.

I have given the question careful consideration without arriving at any positive conclusions. Considering however the provisions of section 3 of said act which define a political party to be "a party, which at the last preceding general election, cast for its candidate for governor at least two per centum of the vote cast

at said election," and that said act is expressly made to apply to such political parties for the purpose of placing in nomination candidates for public office, and from the further fact that in other parts of said act where the intention is absolutely clear the legislature meant the election just prior to the one in question, they used the terms "*next preceding.*" I think the word "preceding" as used in section 35 of said act ought not to receive the most narrow construction, but should be construed so as to refer to the last preceding election of the particular party in which party had a candidate in the field for the office of mayor of said city.

It seems to me that this construction is necessary from the general provisions of the act in question and chapter 3, title 6 of the code relating to election. To so hold is not at variance with the adjudicated cases wherein the courts have been called upon to interpret the meaning of the word "preceding."

It was held by the federal court that the word "preceding" does not necessarily mean only that which is next preceding.

In re Salmon, et al., 55 Fed., 285-286.

It was held by the supreme court of Georgia that although the words "preceding" and "aforesaid" mean generally next before, yet a different signification will be given to them if required by the context and the facts of the case.

Sampson vs. Robert, 35 Ga., 180.

See also the word "preceding" in Words and Phrases, Vol. 6.

It may be that a petition filed in the manner specified by section 1100 of the code might add something to the validity of the proceedings. This is meant however only as a suggestion for your consideration and not as the expression of an opinion.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

LOCAL BOARDS OF HEALTH.—Publication of rules and regulations.

Des Moines, Iowa, January 25, 1908.

MR. DAVID ALGYER,
Paulline, Iowa.

DEAR SIR: I am in receipt of your communication of the 23d ultimo in which you request an opinion from this department as to whether or not it is necessary for local boards of health to publish the rules of the state board of health. You say that it is your opinion that this is not necessary, and that it is only necessary for your local board to publish such rules as you may adopt which are additional to those adopted by the state board of health.

I am fully aware of the fact that the publication of these rules in your local paper will incur considerable expense; especially is this true where the full legal rate is charged, but this of course is a matter wholly for the consideration of the legislature.

It is my opinion that the law contemplates the publication of all the rules made by your local board or the state board which you expect to enforce in your community.

Section 2571 of the new code supplement, it seems to me, makes it incumbent upon local boards of health in cities, towns or townships to publish such rules in a newspaper having circulation in such cities, towns or townships; or if there is no newspaper printed or circulated in such city, town or township, then a copy of such rules and regulations must be posted in five public places therein.

Section 2572 of the new code supplement makes it incumbent upon local boards of health to obey and enforce the rules and regulations of the state board of health. I do not see how local boards may obey and enforce the rules and regulations of the state board without adopting same.

Again, section 2573 of the code provides a penalty for any person who knowingly fails, neglects or refuses to comply with and obey any order, rule or regulation of the state or local board of health. Before any person can be liable to the penalty provided therein, they must knowingly fail, neglect or refuse to comply with such order, rule or regulation of the state or local board of health, and it seems to me that the very purpose of the publication is that they may know, or have an opportunity to know, what rules and regulations adopted by the state board of health, they are subject to.

The practical thing to do is for several local boards in the same county to join together in one publication, each local board to adopt the same separately and have a separate certification.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

PRIMARY LAW—STATE CENTRAL COMMITTEE—HOW CHAIRMAN SELECTED.

Des Moines, Iowa, January 29, 1908.

G. F. RHINEHART,
Editor Democrat-Chronicle.
Des Moines, Iowa.

DEAR MR. RHINEHART: I beg to acknowledge receipt of your favor of some days ago asking for an opinion upon that part of section 27 of the primary law, covering the election of the state central committee, and asking whether or not the state convention as a whole selects the state chairman of the party.

In response thereto I submit the following:

> "Section 27 of the act in question in so far as it is material to your inquiry provides it (the state convention) shall also elect a state central committee consisting of not less than one member from each congressional district, and transact such other business as may properly be brought before it. The state central committee elected at said state convention may organize at their pleasure for political work as is usual and customary with state committees and shall continue to act until succeeded by another committee duly elected."

It will be noted that nothing is said in the section about the election by the convention of a chairman of the state central committee, on the contrary the section provides that the committee elected at the state convention may organize at pleasure, etc. This language indicates that it was the intention of the legislature to permit the committee to complete its organization by the election of a chairman and such other officers as it deemed necessary to properly carry on its work.

I am therefore of the opinion that the chairman of the state central committee is to be elected by the committee and not by the convention.

Response to your letter was delayed pending a general study and examination of the primary act made necessary by numerous inquiries for opinions upon its several provisions, I am,

Yours very truly,
H. W. BYERS.

PRIMARY LAW—WHO ELIGIBLE TO BE CANDIDATE UNDER.

Des Moines, January 31, 1908.

L. A. WILSON, ESQ.,
Corwith, Iowa.

DEAR SIR: I am in receipt of your communication of the 13th instant in which you ask for an opinion as to whether or not a person may legally be a candidate for nomination for a county office provided he has not been a resident of the county sixty days previous to the primaries, but would be a resident of such county sixty days before the general election.

The attorney-general is not authorized to give official opinions except to the various state officers but out of courtesy to you I will submit my personal views.

Ordinarily, if one is eligible for office at the date of election, it is sufficient.

See *State vs. Huegle*, 112 N. W. (Iowa), 234, and cases cited.

But the primary law, chapter 51, acts of the thirty-second general assembly, section 10, provides among other things that each and every candidate shall make and file his affidavit stating that *he is eligible* to the office in which he is and will be a bona fide candidate for nomination for said office, and shall file such affidavit with his nomination paper thirty days prior to the primary election. This, it seems to me, implies that the candidate must at the time he makes the affidavit in question be eligible to the office which he seeks.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

MULCT LAW—PETITION OF CONSENT.—When names being considered whether to take the list of voters at the last general election, or at a special or city election.

Des Moines, January 31, 1908.

CHAS. GIFFEY, ESQ.,
Muscatine, Iowa.

DEAR SIR: I am in receipt of your communication of the 15th instant in which you advise that a consent petition under the mulct law is about to be circulated in the city of Muscatine, and you ask for an opinion as to whether in considering the number of signatures required on such petition, you should take the last pre-

ceding general election, or whether you should consider the city or a special election which was subsequent to the general election.

The original enactment providing for the petition of consent in the twenty-fifth general assembly specified the last preceding general election in all cases where a consent petition is to be circulated. The code revisioners of the code of 1897 in section 2448 omitted the word "general" so that the law now reads, "at the last preceding election." Whether this was intentional I know not, but you will find in other parts of chapter 6, title 12, that the term "last preceding general election" is used.

See sections 2449 and 2451.

In the case of *Porter vs. Butterfield*, 116 Iowa, 725, on pages 730 and 731, Judge Deemer in writing an opinion relating to this question used the terms "at the last preceding election" and "at the last general election" interchangeably.

In section 2451 of the code supplement the legislature has provided means for revoking the authority obtained by the consent petition, and it is therein provided among other things that whenever there shall be filed with the county auditor a verified petition signed by a majority of the voters of the city, town or city acting under special charter, or county, as the case may be, as shown by the *last general election*, then the bar to proceedings as provided in section 2448 and 2449 of the code shall cease to operate, and the persons engaged in the sale of intoxicating liquors shall be liable to all the penalties provided in chapter 6, title 12, of the code.

It seems to me that our law-makers never intended that a different rule should obtain in securing the petition of revocation from the one in securing the petition of consent; but this would follow in case it was held that the election referred to in section 2448 was the last preceding election held regardless of whether such an election was a special election, a city election or a general election. That is to say, a petition of consent might be secured under some special election and shortly after saloons commenced to operate under the mulct law, a petition for revocation might be circulated and it would necessarily require a majority of the names as shown by the poll books of the last general election, and it might follow that a consent petition was properly and legally secured, and that a petition for revocation was also properly secured and not a single individual had changed his opinion or manner of voting. A construction which might lead to such results ought to be avoided.

I am therefore of the opinion that considering the chapter as a whole relating to the mulct tax and the apparent synonymous use in

which the supreme court has made use of the terms "at the last general election" and " at the last preceding election," in securing your consent petition you should use as a basis therefor the poll books of the last preceding general election, and that the sense in which the term "at the last preceding election" is used in section 2448 of the code, refers to the last preceding general election.

Of course you will understand that this is not an official opinion as the attorney-general is not authorized to give official opinions except to the various state officers, but out of courtesy to you I have submitted my personal views.

I suggest, however that before proceeding you submit this opinion to the county attorney and if he does not concur therein, it would be well for you to notify this department or have him take the matter up with this department so that there may be harmony between his office and this.

In general the duties of initiating and prosecuting the proceedings in the various counties and seeing that the laws are enforced therein devolve upon county attorneys and therefore their opinion upon the matter is of paramount importance.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

COLLATERAL INHERITANCE TAX—WHEN MAY BE IMPOSED.

Des Moines, Iowa, February 20, 1908.

W. W. MORROW,
Treasurer of State,
Capitol Building.

DEAR SIR: In reply to the request of Harrison S. Moore of Flushing, N. Y., for an opinion in regard to the liability of the estate of B. H. Cutter to the tax imposed upon collateral inheritances under chapter four (4), title seven (7), of the code, and amendments thereto, upon a bequest in the will of the said B. H. Cutter, the material portions of said bequest being as follows: "I order and direct my executor * * * to sell * * * to the best advantage all the rest of my real and personal estate here and in Iowa * * * and the proceeds of the same, I give and bequeath to the American Bible society in the city of New York to be used by them for the society books," I submit the following:

Section 1467 of the code imposes a tax upon all bequests by will except when "to or for the use of father, mother, husband, wife, lineal descendant, adopted child, the lineal descendant of an adopted child of a decedent, or to or for charitable, educational or religious societies or institutions *within this state.*"

It is conceded that the American Bible Society is a corporation organized under the laws of New York and that the offices of the organization and its principal place of business are in the city of New York.

The business of said society is the publication and distribution of bibles, "both at cost and free of any charge, as a charity or benevolence," and exemption from the tax imposed by chapter four (4), title seven (7), is claimed because of the fact that some of the books of this society are, or may be, distributed as a charity to the citizens of this state.

The exemption granted by section 1467 is of such societies as are "within this state," and the only question to be determined is, does the fact that this society maintains depots within this state for the distribution of its books bring it within the class of societies "within this state" that are exempt. It is my opinion that it does not.

In the state of New York where this society is incorporated, the exemption from the tax imposed upon collateral bequests is of bequests "to any religious corporation." The courts of that state have held that this exemption only applied to "corporations created by the state and over which it has the power of visitation and control. The law in such cases is dealing with its own creations."

In Re Prime's Estate, 32 N. E. Rep., 1095;
In Re Merriam's Estate, 36 N. E. Rep., 506;
In Re Balleis Estate, 29 N. Y. Supp., 38 N. E. Rep., 1008.

The American Bible Society is not incorporated within this state and the state exercises no control over it.

The words of the Iowa statute "within this state" must be considered as restricting the exemptions that might be claimed under a law exempting "any religious corporation."

If such an exemption applies to such corporations only as are created by the state granting the exemption, certainly exemption from taxation under the Iowa statute cannot rightfully be claimed in the case of a bequest to a foreign corporation simply because such corporation maintains within this state agents for the distribution of its products. The words "within this state" make it more clear that the intent was to limit the exemption to such societies as are under the control of this state.

Undoubtedly this bequest is subject to the tax imposed upon collateral bequests.

Yours very truly,
H. W. BYERS.

Des Moines, Iowa, Jan. 24, 1908.

HON. J. M. HADDOCK,
Bedford, Iowa.

ORGANIZATION OF CITIES AND TOWNS—OFFICERS.—Construction of chapter 26, acts of the thirty-second general assembly.

SIR: This department has received so many requests from mayors and city attorneys for an interpretation of chapter 26, acts of the thirty-second general assembly, relating to the organization and officers of cities and towns, that an opinion covering all of the questions presented will tend to expedite matters.

The questions submitted are as follows:

1. In cities of the second class that elect a mayor in even numbered years, is the composition of the city council to be changed at the March, 1908, election, or is said election to be governed by paragraph 2 of section 646 of the code?

2. In towns will there be one or two councilmen elected at the March, 1908, election; that is to say, will that part of section 2, chapter 26 aforesaid, which provides that town councils shall be composed of five councilmen at large, become operative at the March, 1908, election so that the council thereafter shall be composed of five councilmen instead of six?

3. Shall the council at its first meeting after the March, 1908, election appoint a clerk, or should such clerk be elected as formerly?

The questions are not easy of solution. Parts of the act aforesaid are capable of various constructions, but a careful analysis of the same reveals the legislative intent. The repealing clauses in said act give rise to the greatest difficulties, and if they had been passed separately a different construction than the one herein adopted might be required. But the repealing clauses must be read in connection with the entire act, and when so read, they do not become effective or operative until by said act its affirmative provisions are to take effect.

First. Section 3 of said act provides in part as follows: "That section 646 of the code be repealed and the following enacted in lieu thereof:

> "On the organization of a city or town, or on its reorganization after the change of its class, or at the first regular municipal election hereafter, a council shall be elected as follows, except that in those cities of the second class that elect a mayor in odd numbered years, the term of those councilmen and officers expiring in 1908 is extended one year; in those cities of the second class that elect a mayor in even numbered years, the term of those councilmen and officers expiring in 1909, is extended one year; and at the municipal election *at which a mayor is elected in* 1909 *or* 1910, as the case may be, *the council shall be elected in accordance with the provisions of this act;* by the election of two councilmen at large. * * * There shall also be elected at the same time one councilman from each ward, who shall be chosen by the electors residing within the limits thereof. Thereafter, the successors of such councilmen at large and ward councilmen and officers shall be chosen at the regular biennial elections, and shall hold office for two years."

The statement "at the municipal election at which the mayor is elected in 1909 or 1910, as the case may be, *the council shall be elected in accordance with the provisions of this act*" indicates that it was the legislative intent that *the council should be elected until such time,* under the provisions of section 646 of the code, and that said section 646 of the code was not to be repealed until the council was elected in accordance with the provisions of the act.

This position is strengthened when we consider that there is absolutely no authority in the act for the election of two councilmen at large until the election of the mayor in 1909 or 1910. To adopt the contention of a number of city attorneys, that the repealing clauses, to be found in chapter 26 aforesaid, must become operative and effective at the time the act became a law, or at the March, 1908, election, would necessitate a construction which would reduce the council in cities of the second class below the number they would have when the act becomes fully operative in 1909 or 1910, as the case may be, and during such time change the composition of such councils, for the reason that until the year 1909 or 1910 they would be deprived of the two councilmen at large. It needs

no argument to demonstrate that this was the intent of the legislature.

Again it is apparent that the legislature did not intend that the repealing clauses of said act should become effective at the time said act became a law, or at the March, 1908, election, for the reason that section 3 expressly provides that in those cities of the second class that elect a mayor in odd numbered years the term of those councilmen and officers expiring in 1908 is extended one year. In other words, the composition of said council in cities of the second class that elect a mayor in odd numbered years, is to be and remain the same as formerly until the year 1909, at which time in said cities the mayor and council shall be elected pursuant to the provisions of chapter 26 aforesaid.

Second. The argument made in determining the first question applies in determining the second. You will notice the statement in section 3, commencing in line 20, "in towns in which the mayor is elected in even numbered years, the officers and councilmen *shall be elected under the provisions of this act in the year* 1910 and the *councilmen* and officers to be elected in 1908 shall be elected for a term of two years, and the term of councilmen and officers whose terms expire in 1909 shall be extended one year. In other words, the act itself is not to become fully operative in towns which elect a mayor in odd numbered years until the year 1911, at which time the number of the members of the council in such towns will be reduced to five. In towns which elect a mayor in even numbered years, the usual number of councilmen will be elected at the March, 1908, election, and the term of office is fixed at two years. In towns which elect a mayor in odd numbered years, the usual number of councilmen will be elected at the March, 1908, election and the term of office is fixed at three years.

The following statement is also to be noted: "The councilmen and officers to be elected in 1908 shall be elected for a term of two years.' Now if the repealing clause was to become effective at the March, 1908, election, a town council would then be reduced to the number of five councilmen instead of six, and there would only be one councilman elected at the March, 1908, election, and the term should have been singular instead of plural.

Third. The reasons which operate to prevent the repealing clauses from becoming effective at once in sections 1, 2 and 3 of said act, do not apply to the third propositions in this opinion which involves a consideration of sections 5, 6, and 7 of said act.

The argument advanced against the appointment of a clerk after the March, 1908, election, instead of the election of a clerk at said election in towns where the office of a clerk becomes vacant, is based upon the statement found in section 7, that in all cities and towns the council at its first meeting after the *biennial election* shall appoint a clerk.

The contention is also made by certain city attorneys that the same construction placed upon sections 2 and 3 of said act should apply in the construction of section 7 in the appointment of a clerk. But this contention is not sound although a cursory examination of the act warrants it.

As previously stated, the reasons which operate to prevent the repealing clauses in the former sections referred to, taking effect at the March, 1908, election do not apply to sections 5, 6 and 7 of said act.

The term "biennial election" was borrowed from sections 647, 648, and 649 of the code, where reference is made to electing biennially a mayor, solicitor, clerk, treasurer and assessor; the intention being to provide for the appointment of a clerk by the council at the first meeting after the biennial election of a mayor.

The conclusions herein reached may be summarized as follows:

In cities of the second class where a mayor is elected in odd numbered years, there will be no election in March, 1908, the term of office of those councilmen and officers expiring in 1908 being extended one year. In 1909 in cities of the second class that elect a mayor in odd numbered years, an election will be held and a mayor, two councilmen at large and one councilman from each ward shall be elected.

In cities of the second class that elect a mayor in even numbered years, the usual number of councilmen shall be elected at the March, 1908, election according to the provisions of paragraph 2, section 646 of the code. In 1909, however, no election will be held in such cities, the term of those councilmen and officers expiring in 1909 being extended one year. In 1910 such cities shall elect two councilmen at large and one councilman from each ward.

In towns in which a mayor is elected in even numbered years, the usual number of councilmen shall be elected at the March, 1908, election, the term of office being fixed at two years. In 1909 there shall be no election in such towns, the terms of councilmen and officers of such towns whose terms expire in 1909 being extended one year. In 1910 the number of the members of the council in such towns shall be reduced to five.

In towns in which the mayor is elected in odd numbered years, the usual number of councilmen shall be elected at the March, 1908, election, and the term of office of such councilmen and officers so elected at the March, 1908, election, is fixed at three years. In such towns an election shall be held in 1909 and the usual number of councilmen and officers shall be elected at said time for a period of two years. There shall, however, be no election in such towns in the year 1910, the term of councilmen and officers whose terms expire in 1910 being extended one year. In 1911 the number of the members of the council in such towns shall be reduced to five.

All town officers elected in 1910 in towns which elect a mayor in even numbered years, shall be elected for the term of two years. All town officers elected in 1911 in towns which elect a mayor in odd numbered years, shall be elected for the term of two years.

In all cities and towns in which a mayor is elected in odd numbered years, the council at its first meeting after the March 1909, election shall appoint a clerk for the term of two years.

What is said with reference to the appointment of a clerk shall apply to the appointment of a solicitor in cities of four thousand population or less.

While there are objections to the interpretation herein adopted in this opinion, it is the only interpretation which admits of uniformity, because it is impossible to give a literal interpretation to the repealing clauses in sections 2 and 3, and have the same become operative as soon as the act becomes a law, for the reasons heretofore stated; and when it is once admitted that they do not become operative in all cases and for all purposes at the March, 1908, election, the entire argument against the construction placed upon said act in this opinion fails.

Moreover, I am favored with an opinion from the city solicitor of Des Moines, Mr. W. H. Bremner, who was a member of the legislative committee of the league of Iowa municipalities, and also an opinion from Mr. Frank G. Pierce, secretary of the league of Iowa municipalities, who drafted the original bill in question. Both of these gentlemen appeared before the legislative committees and the sub-committees of the House, and I am authorized to say that they concur in the construction herein placed upon the act in question, and they advise that this was undoubtedly the view taken by the legislative committee and the legislature itself in passing said act.

Yours very truly,

GEORGE COSSON,

Assistant Attorney-General.

CORPORATIONS—NEWSPAPERS, JOB PRINTING, BINDING BUSINESS—HOW ASSESSED.

Des Moines, Iowa, February 24, 1908.

HON. LAWRENCE DEGRAFF,
Des Moines, Iowa.

MY DEAR MR. DEGRAFF: In response to your letter of several days ago in which you ask:

1. "Would a corporation, organized under the laws of the state of Iowa, doing business in the state, whose business is 'The publication of a newspaper,' be assessed under section 1323 of the code, or should it be classed as a merchant or manufacturer for the purpose of taxation?

2. "If the corporation operated a job printing business in connection with its newspaper business, how should it be classified?

3. "If the corporation operated a job printing business and a book-bindery plant in connection with the publication of a newspaper, how should it be classed for purposes of taxation?

4. "Should an Iowa corporation, whose principal business is 'the printing, publishing and binding business' be assessed under section 1328 or should it be classed as a merchant or manufacturer?

I have to say that while, as you very well know, it is not the duty of this department to settle questions of this kind, I will out of courtesy to you give you my personal views upon the several questions submitted.

Section 1319 of the code, in so far as it affects your inquiry, provides:

> "Any person, firm or corporation who purchases, receives or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, * * * or by the combination of different materials, with a view to making gain or profit by so doing, and selling the same, shall be held a manufacturer for the purposes of this title, and he shall list for taxation such property in his hands; * * * Corporations organized under the laws of this state for pecuniary profit, and engaged in manufacturing as defined by this section, and which have their capital represented by shares of stock, shall, through their principal accounting officers, list their real estate, personal property and moneys and credits in the same manner as is required of individuals. The owners of capital stock of manufacturing companies, as herein provided for, having listed their property as above directed, shall be exempt from assessment and taxation on such shares of capital stock."

And the question is, would the corporation referred to in the several divisions of your inquiry, come within the provisions of this section; that is, would such corporation be a manufacturer as defined in the section.

It will be noted that the section from which the quotation is taken does not exempt from taxation the property of a corporation engaged in manufacturing, but simply provides a method of listing its property and ascertaining its value, and then relieves the corporation and the owners of its stock from assessment in the ordinary way of assessing stock companies. The reason and motive of the legislature in enacting this section was undoubtedly to give to persons and corporations engaged in the business of manufacture an advantage in the assessment of their property, with a view of encouraging enterprises furnishing employment to labor, skilled and unskilled, and in the passage of the act it evidently occurred to the legislature that the term "manufacture" as commonly used, would not be broad enough to include many of the industries sought to be given this advantage, so it defined the business and provided that a corporation engaged in the business of combining different materials with a view to making gain or profit, and selling the same, shall be held a manufacturer, etc.

In Utah the same question that is made here was raised in bankruptcy proceedings, and the question was whether the Salt Lake Daily Review was a manufacturer, and the court, Judge Hawley writing the opinion, in 1 Utah, at page 50, says:

> "Though it is not necessary to decide that the printing and publishing of a daily newspaper is manufacturing in the strict sense of the law, yet my brother judges have expressed the opinion it would be, and I am inclined to the same conviction. A newspaper publication is as much the result of manufacture as that of books or cards or billheads. To make a distinction between them, when in fact there is no distinction, would seem to be an utter disregard of the objects as well as the legal intendment of the law; for they buy, manufacture and sell."

In Louisiana a provision in their constitution exempts manufacturers from certain license taxation. Under this constitutional provision the question was raised in the *State of Louisiana vs. Dupre & Hearsey*, reported in La. Ann. Rep., Vol. 42, page 561, as to whether under this provision newspaper publishers were entitled

to the exemption, and in that case the court, speaking through Judge Fenner, says, after quoting a definition of a manufacturer:

> "Keeping this definition in view, the statement of facts embodied in this record shows that defendants use in their business valuable machinery and implements; that, in addition to the clerical laborers, such as type-setters, engineers, pressmen and their assistants; that they purchase and use great quantities of raw materials, such as paper, ink, glue, etc.; that, by means of this machinery and mechanical labor, they convert this raw material into a new and distinct article, fit for use and in commercial demand, called a newspaper, which they sell directly to dealers and consumers. Certainly, from a mechanical point of view, this presents all the essentials of manufacture under every definition of the word."

Again the court says:

> "All manufacturers combine, in greater or less degree, the products of intellectual and of mechanical labor, and in very many the intellectual elements confer upon the article produced its peculiar and greatest value. Such is conspicuously the case with a newspaper; but since the making of newspapers is a business; since the newspaper, when made is a new and distinct article of commerce; since the process of making it requires machinery and manual labor and physical raw material as essential and important factors, aggregating, as this record shows, much the larger part of its cost, we can see no sound reason why such a business does not fall within the letter and spirit of the constitutional exemption as that of a manufacturer."

In New Jersey and Minnesota it has been held that under statutes similar to the ones construed by the Utah and Louisiana courts, a newspaper publisher is not a manufacturer, but they do hold that book makers and binders and job printers are manufacturers. In none of the adjudicated cases, however, was the language of the statute or constitution under consideration as clear and definite as it is in ours.

As above stated, our statute says that any person, firm or corporation that combines different materials with a view to making gain or profit and selling the same is a manufacturer for the purpose of taxation. Now it will be conceded, I think, that it would be impossible to get out a newspaper without doing just exactly

what the statute includes in this definition. For instance, you take one of our large newspaper plants here in this city: it takes paper of various kinds, ink, paste, metal, glue, truth and fiction and combines them, works them into the finished product of newspapers, magazines, books, maps, calendars and numerous other manufactured articles. It also manufactures every day the types used in a portion of its work and the electrotyped plates from which the printing is done. To do this work both skilled and unskilled labor is required, and I am told that wages to the amount of nearly one hundred thousand dollars a year are paid by this one institution.

We have then here a business that not only comes clearly within the statutory definition, but one that meets the very motive and purpose the legislature had in the adoption of the act in question.

I therefore conclude:

First. That a corporation organized under the laws of the state of Iowa for the purpose of the publication of a newspaper should be classed for the purpose of taxation as a manufacturer.

Second. That a corporation operating a job printing business is a manufacturer.

Third. That a corporation operating a job printing business and book bindery plant in connection with the publication of a newspaper is a manufacturer and should be so classed for the purpose of taxation.

Fourth. That an Iowa corporation, whose principal business is the printing, publishing and binding business, should be classed as a manufacturer, and assessed under section 1319 of the code and not under section 1323 of the code.

Yours very truly,
H. W. Byers.

Primary Law—Right of Newspaper to Sell Space to Candidate.

Des Moines, March 11, 1908.

Mr. O. E. Hull,
Leon, Iowa.

My Dear Sir: I have your favor of March 2d referring to newspapers running political advertisement and accepting pay therefor, and asking me to modify or rather simplify, as your resolution states, the opinion given some time ago on the primary law.

Replying I have to say that the opinion referred to in the resolution adopted by your association was an official one given upon

request to the governor of this state, and contains what I believe to be a correct interpretation and construction of the primary law, and especially that part found in section 32.

I devoted a great deal of time to the preparation of the opinion and tried hard to make it so clear and definite that every one could understand it.

You will note I say "It would be unlawful for a newspaper to accept pay for an advertisement for a candidate *urging* reasons for his nomination." Farther along in the same division of the opinion it is said in substance, that the publisher may lawfully accept pay for printing a candidate's announcement; thus drawing a distinction between an advertisement in the paper urging reasons for a candidate's nomination and a mere announcement of his candidacy.

I may have been unfortunate in the language used, but my thought was that the publisher in the one case would make up the advertisement and run it in such a way that the general public would understand that the publisher was urging the nomination of the candidate while in the matter of an announcement, the public would understand that the candidate was furnishing the material for the space used and was paying for it. In other words, in the one case the candidate would simply be paying for space to be filled with matter furnished by himself, while in the other, he would be paying for the support of the paper.

I think under the law the publisher of a newspaper has a perfect right to sell space to a candidate just as the owner of a hall would have the right to lease or rent his hall to a candidate. On the other hand, I think the publisher is prohibited from filling the space with his suggestions and reasons for the nomination of the candidate and accepting pay for it, just as the owner of the hall would be prohibited from accepting pay for making a speech in the hall in the interest of the candidate.

If I am right in this, then it follows that publishers may accept pay from candidates running proper matter in a newspaper under the title or heading "Political Announcement."

Yours very truly,
H. W. Byers.

Primary Election Expenses.—Expense of hiring halls for county conventions for political parties not such expense as should be included.

Des Moines, March 19, 1908.

Mr. F. W. Herbert,
County Auditor,
Atlantic, Iowa.

Dear Sir: Your communication of the 12th instant to Hon. B. F. Carroll has been referred to this department for reply.

You request to be advised as to whether the expense of hiring halls for the use of political parties in holding county conventions, pursuant to the provisions of section 25, chapter 51, acts of the thirty-second general assembly, may be included as a part of the primary election expenses and audited by the board of supervisors and certified to the executive council.

It is my opinion that the expense of hiring halls for county, district and state conventions authorized by the primary law, is not a part of the expenses of the primary election proper, and that such expense should not be included in the expenses of the primary election which are to be audited by the board of supervisors and certified to the executive council.

Yours very truly,
George Cosson,
Assistant Attorney-General.

List of Delegates at Primary—Anyone May Prepare List and Have Same Printed—May Be Handed to Voter With Copy of Ballot.

Des Moines, March 21, 1908.

Mr. W. R. Hines,
Osceola, Iowa.

Dear Sir: I am in receipt of your communication of the 16th instant requesting an interpretation of the primary law.

1st. As to who is authorized to select delegates to the county convention in case the list of names is selected and written or printed upon uniform white pasters, pursuant to the provisions of section 25 of said act.

2d. Who is authorized to write or print these pasters?

3d. May a judge of election hand a paster with a ticket to the voter?

4th. Does the primary act prohibit the giving of cigars?

For the sake of brevity I shall group the answers as follows:

Anyone who desires may have prepared a list of names for delegates, and he may have the same written or printed by whomsoever he desires. If tickets are gotten out by each faction and each party, I see no objection to a judge of election handing a voter a copy of each of these tickets, but I do not believe it would be proper for a judge of election to work in the interest of any particular party or any particular faction, while acting in his official capacity as such judge of election.

With reference to the giving of cigars, the law does not prohibit the ordinary courtesy of handing a man a cigar, provided that no promises are exacted or given.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

PRIMARY LAW.—There is only one way an adherent of one party can vote for a candidate on another ticket at the primary, that is to call for such ticket and register as an adherent of that party.

Des Moines, April 1, 1908.

HON. E. A. DAWSON,
Waverly, Iowa.

MY DEAR MR. DAWSON: I beg to acknowledge receipt of your letter of the 30th ultimo, referring to a democrat voting for a republican at the June primary. Replying I have to say that an elector who is a democrat has a right to write the name of a republican candiate upon his ticket and vote for such republican candidate, but the judges could not legally count such vote for the candidate as a republican. It would count as one vote for the person whose name was written in as a democrat. In other words, there is but one way that a democrat can vote for a republican candidate at the primary, and that is by calling for a republican ticket and having himself registered as a republican.

Your question is fully and clearly answered in section 6 of the primary law, a marked copy of which I enclose you,

Yours very truly,
H. W. BYERS.

MULCT LAW—WHEN IN OPERATION IN A COUNTY.

Des Moines, April 6, 1908.

MR. H. HERBERT SAWYER,
Sioux City, Iowa.

MY DEAR SIR: Replying to your recent favor I have to say without in any sense passing upon the question you submit officially, that in all prosecutions for the sale of liquor in the state of Iowa, the burden is upon the defendant, who claims to be operating under the mulct law, to show that every step required by statute to be taken with reference to the petition, resolutions of consent, etc., has been taken; and the rule is that all the provisions of the mulct law shall be strictly construed. Taking this view of the matter it would seem that unless the board of supervisors covered all the requirements of section 2450, the mulct law would not be in operation in the county you refer to. That section, as you indicate, deals with the whole county and requires a finding as to each of the townships.

Hastily and sincerely yours,
H. W. BYERS.

TOWNSHIP COMMITTEEMEN—HOW NAMES GET ON BALLOT—COUNTY CONVENTIONS.

Des Moines, April 6, 1908.

MR. E. H. LEWIS,
Chariton, Iowa.

MY DEAR SIR: Replying to your recent favor, and without in any sense passing officially upon the questions you submit. I have to say that the township committeeman is not one of the offices for which candidates may file an affidavit with the county auditor and have his name placed on the ballot. Committeemen are to be selected and their names written or printed upon the ballot in the same way that delegates to the county conventions are selected.

As to your second question, I have to say that under the primary law the board of supervisors certify to the county convention a list of the offices for which no person was nominated at the primary, and the county convention is authorized to nominate candidates for all such places. This of course would authorize the convention to nominate a candidate for an office for which no candidate's name appeared upon the primary ballot.

Yours very truly,
H. W. BYERS.

COUNTY ATTORNEY—ENTITLED TO PERCENTAGE ON ALL FINES.

Des Moines, April 17, 1908.

MR. BRADFORD KNAPP,
Clarion, Iowa.

MY DEAR SIR: In going through an accumulated lot of correspondence today I find your letter of January 30th, asking for an interpretation of section 308. Replying I have to say, that this question has been raised in several of the counties of the state. In some counties the county attorney receives the percentage on all fines whether collected by him or voluntarily paid by the defendant; while in others, the county attorney is allowed the percentage only upon fines collected by him.

It is my judgment after a careful reading of the section that the county attorney is entitled to the percentage upon all fines collected in cases where he appears for the state without reference as to how the collection is made; that is, as to whether or not the county attorney enforces collection or whether the defendant voluntarily pays it into the clerk's office.

Yours very truly,
H. W. BYERS.

FAILURE OF PRIMARY TO NOMINATE SENATOR.—Where a senatorial district is composed of but one county and no nomination made for senator, county convention may nominate.

Des Moines, Iowa, April 17, 1908.

J. J. HUGHES, ESQ.,
Council Bluffs, Iowa.

DEAR SIR: Replying to your letter of the 10th instant, I have to say that where a senatorial district is made up of a single county and no candidate for senator is voted for at the primaries, the county convention, under section 25 of the primary law, is given the power to nominate a candidate for senator; and the person so named will be entitled to have his name printed upon the official ballot.

Yours very truly,
H. W. BYERS.

ANTI PASS LAW.—Does not prevent library trustees from accepting transportation on street railway.

Des Moines, Iowa, April 18, 1908.

G. WALTER BARR, ESQ.,
Keokuk, Iowa.

DEAR SIR: I beg to acknowledge receipt of your letter of the 10th instant referring to free transportation for library trustees over your street railway. Replying I have to say that under the facts stated in your letter I am of the opinion that there is nothing in the so-called "Anti-Pass Statute" which would make it unlawful for the street railway company to furnish passes to your library trustees.

Yours very truly,
H. W. BYERS.

PRIMARY ELECTION—PARTY AFFILIATION.

Des Moines, Iowa, April 20, 1908.

M. H. KEPLER, *County Attorney*,
Northwood, Iowa.

MY DEAR SIR: Replying to yours of April 17th, I have to say that the first primary election, which is to be held on the second day of June, will proceed without reference to past party affiliations. That is to say, at the June primary any person who is a qualified elector in the particular precinct at the time of the primary election is entitled to vote with the party that he at the time indicates he desires to affiliate with.

Yours very truly,
H. W. BYERS.

QUARANTINE—What should be furnished under chapter 111, acts of thirty-first general assembly.

Des Moines, April 23, 1908.

MR. CARL W. REED,
Cresco, Iowa.

MY DEAR SIR: Replying to your letter of the 20th instant referring to chapter 111, acts of the thirty-first general assembly, I have to say that we have numerous inquiries as to just what should be included in "needful assistance, nurses, medical at-

tendance and supplies'' as these terms are used in that act. No fixed rule can be observed with reference to these matters. In one case needful assistance, medical attendance and supplies might properly cover clothing for members of the family under quarantine, also groceries, meats and food stuffs for the entire family. The question turns largely upon the situation of the family. Of course if the head of the family or the several members are able to furnish themselves with clothing and food, the fact that they are quarantined would not justify the local board in supplying them with these things.

It is my judgment that food and clothing for families under quarantine can only be furnished to what might be termed destitute persons.

Yours very truly,
H. W. BYERS.

NOMINATION PAPERS—PUBLIC RECORDS.

Des Moines, April 23, 1908.

MR. E. G. ENSMINGER,
Grundy Center, Iowa.

MY DEAR SIR: Replying to your letter of recent date I have to say that nomination papers on file in your office are public records, and are suject to inspection by the public, and I can see no objection to your allowing the local newspapers to copy and publish the names of the signers, if they desire to do so.

Yours very truly,
H. W. BYERS.

GOPHER BOUNTY.—The amount of bounty is left to the board of supervisors. May be from one to ten cents.

Des Moines, Iowa, April 23, 1908.

HON. A. W. KENDALL,
Delmar, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your favor of the 21st instant, with two letters from the auditor of Clinton county referring to the bounty on gophers. Replying I have to say that the county auditor is right in his interpretation of the law. The amount of the bounty is left to the discretion of the board of supervisors, and they may fix it at any sum from one cent to ten cents. I am returning to you the auditor's letters.

Yours very truly,
H. W. BYERS.

PRIMARY LAW—NOMINATION PAPERS.—The law requires each signer to give his postoffice address.

Des Moines, Iowa, April 23, 1908.

DAN P. HILL, *County Auditor*,
Burlington, Iowa.

MY DEAR SIR: Replying to your favor of the 22d instant referring to nomination papers, I have to say that the law requires each signer to give his postoffice address. The purpose of this requirement is to identify and locate the signer if any question should ever be made as to the validity of his signature.

In the case you refer to where the signers have given their street and house number, but have failed to give the name of the city or town, these nomination papers being for county office it would of course be no trouble to identify and locate them, and I do not think that the omission of the name Burlington would invalidate the nomination papers. Still it would be better if the name of the city was added to the address.

It would be entirely proper where the city is once written, the other signers all living in the city to indicate the same by ditto marks. In some cases it is noted on the nomination paper "that all of the above are residents of ———." The person who circulated and made the affidavit to the nomination papers would have the right to write "Burlington" after the addresses of the several signers even after the papers were filed with you, if you thought they were invalid without the full address.

The question you raise in your letter came up here in the secretary of State's office some time ago. Some papers had been filed in his office in which the address had not been stated, and in view of the fact that there was plenty of time to have them corrected, this department advised that the papers be returnd for correction. I state this here because if I remember correctly some of the papers returned involved the candidacy of citizens of your city.

Yours very truly,
H. W. BYERS.

PRIMARY LAW—PER CENT NECESSARY TO RECEIVE TO NOMINATE.

Des Moines, Iowa, April 25, 1908.

P. J. KLINKER, *County Attorney,*
Denison, Iowa.

MY DEAR SIR: Replying to your letter of yesterday referring to the primary law, I have to say that section 19 of that act provides among other things as follows:

> "And the candidate or candidates of each political party for each office to be filled by the voters of a county having received the highest number of votes, and not less than thirty-five per centum of all the votes cast by the party for such office, shall be duly and legally nominated as the candidate of his party for such office."

Under this provision, any candidate who receives thirty-five per centum or more of the votes cast by his party for the office must be declared the nominee no matter whether his name was printed on the primary ballot or whether it was written in.

Yours very truly,
H. W. BYERS.

PRIMARY LAW—SAMPLE BALLOTS—VACANT SPACE ON OFFICIAL BALLOT—NAME WRITTEN IN.—County auditor shall mail one sample ballot to each candidate entitled to have his name on ballot. A blank line should be left so that a voter may vote for whomsoever he please for any office. If a candidate's name is written in and he has received thirty-five per cent of all votes cast by his party for that office he shall be the nominee.

Des Moines, April 29, 1908.

MR. G. W. PATTERSON, *County Auditor,*
Winterset, Iowa.

DEAR SIR: I am in receipt of your communication of the 27th instant, submitting the following questions:

1. "Does the county auditor have to send sample ballots to candidates for township offices?

2. "Should a vacant place be left on the official primary ballot so that the elector may vote for some one by writing the name of the person of his choice for county or township office? This refers to instances where no nomination papers have been filed and no affidavits made.

3. "If the second question is answered in the affirmative, and only a few votes be cast for some candidate by writing in his name in the blank line left therefor, would such candidate be nominated?

In reply to your first question:

Section 15 of the primary law provides that the county auditor shall mail one sample ballot to each candidate who is entitled to have his name printed on the official primary ballot of any party in any precinct in his county; and section 10 of said act provides that candidates for offices less than a county may have their names printed upon the primary ballot by filing an affidavit with the county auditor at least thirty days prior to the primary election. It follows, therefore, that it is the duty of the auditor to send a sample ballot to each and every person, including candidates for township offices who have complied with the provisions of the primary act, and are entitled to have their names printed upon the official primary ballot.

Second. A blank line should be left on the official primary ballot with a square to the left thereof so that an elector may vote for whomsoever he pleases for any office, and this is true regardless of the fact whether there are any candidates for such office.

Third. If the office is one to be filled by the voters of any subdivision of a county, and the person has been voted for in the manner suggested in the answer to question number two, and has received the highest number of votes, he shall be duly and legally nominated as the candidate of his party for such office, regardless of the number of votes received by him. If the office is one to be filled by the voters of the county, and the person has received the highest number of votes and not less than thirty-five per centum of all the votes cast by the party for such office, he shall be duly and legally nominated as the candidate of his party for such office regardless of the number of votes received by him.

I enclose you herewith copy of the attorney-general's official opinion.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

PRIMARY ELECTIONS—TOWNSHIP OFFICERS.—If a candidate for township office files no affidavit to that effect, the only way his name can get on the ballot is to be written in.

Des Moines, May 2, 1908.

HENRY GRAFF, *County Auditor,*
Maquoketa, Iowa.

MY DEAR SIR: Replying to your letter of a day or two ago, I have to say, that if no affidavits are filed by candidates for township offices there is no way that their names can be placed upon the primary ballot except by the voter on primary election day writing in such names as he desires to vote for for the several township positions.

In response to your second question I have to say, that if John Jones received ten or twenty votes, as you indicate, for assessor he would be nominated. If no township officers are voted for at the primary then the only way these officers can get their names on the official ballot for general election would be by petition.

Very truly yours,
H. W. BYERS.

CITY OFFICERS—SHALL HAVE NO INTEREST IN ANY CONTRACT OR JOB WORK OR MATERIAL FURNISHED BY THE CITY OR SERVICES TO BE FURNISHED OR PERFORMED FOR THE CITY OR TOWN.

Des Moines, May 2, 1908.

MR. HARTNESS, ESQ.,
Greene, Iowa.

MY DEAR SIR: Replying to your recent favor referring to a letter written to Mr. D. H. Ellis of your city I have to say, that I enclose you a copy of the letter written to Mr. Ellis. What I say to Mr. Ellis is based entirely upon section 879-q of the new supplement to the code (Sec. 19, ch. 26, 32d G. A.). This section in so far as it is material to the controversy here provides:

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

If I understand your situation, you are a stockholder and officer of a corporation having a contract with the town. This being so it is difficult for me to see how you could retain your interest in the

corporation while serving as city solicitor without subjecting yourself to prosecution under the above section.

I note what you say about the opinion you gave as to members of the council who are interested in lumber yards. In respect to this matter I agree with you that such members were not disqualified because they happen to be interested in lumber yards so long as the city or town was not dealing with the lumber yards; it seems to me, however, their situation is entirely different from yours; your company is dealing with the city every day. If the city had a contract with the lumber firms referred to for material, etc., then the councilmen who are interested in these lumber firms would be in the same situation you are in.

I regret exceedingly that this controversy has arisen in your little city, and am sorry that I allowed myself to be drawn into it by giving to Mr. Ellis even a personal opinion.

Very truly yours,
H. W. BYERS.

RETURNS OF PRIMARY ELECTION — COUNTY CONVENTIONS. — The judges of election to be allowed a reasonable time to get their returns to county auditor. County conventions to be held at same time and place, complied with if all are held at the same place the same day.

Des Moines, Iowa, May 7, 1908.

GEO. C. COLEMAN, *Auditor,*
Sidney, Iowa.

MY DEAR SIR: Replying to your recent favor I have to say that under section 1087-a17 of the supplement to the code, it would be entirely proper for you to allow the judges of election a reasonable time to get their returns to you. It is only when the returns do not reach you within 24 hours after the primary election has closed, and you know of no reason for the delay, that you would be justified in dispatching a messenger for the *missing* returns.

As to your second question, the provision requiring all of the parties to hold their county conventions at the same time and place has to be construed liberally, and there ought to be little if any difficulty about a substantial compliance with this provision. If the conventions are all held on the same day at Sidney this would

be sufficient, even though they were not all in session at the same moment.

Yours very truly,
H. W. Byers.

Primary Law—Withdrawal of Candidate—Candidate Filing Nomination Papers for Two Separate Offices.—A candidate may withdraw after filing his nomination papers. A candidate may file affidavit or nomination papers and have his name appear on the ballot for two offices.

Des Moines, Iowa, May 7, 1908.

W. H. Ramsey, *Attorney*,
Garner, Iowa.

My Dear Sir: I beg to acknowledge receipt of your letter of recent date in which you ask:

"First. Can a candidate for any office, after filing proper nomination papers with the county auditor, have his name withdrawn and not printed on the primary ballot by filing with such auditor his written withdrawal as such candidate in manner similar as provided by law section 1101 of code of 1897?

"Second. Can a candidate under the 'primary law' file nomination papers for and have his name printed on the ballot for two offices to be filled at the ensuing general election, such as justice of the peace and county supervisor or justice of the peace and township trustee or other office which could be filled by the same person during the same time?

"Third. In cases of townships wherein is located an incorporated town, should the county auditor have printed on the primary ballots the names of the candidates for township assessor or would Sec. 1107 of the code require him to omit from the official primary ballot such names of such candidates?"

In response thereto I have to say:

First. Section 1087-a1 of the 1907 supplement to the code provides among other things that "The provisions of chapters three (3) and four (4), title six (6), and chapter eight (8), title twenty-four (24), of the code, shall apply as far as applicable to all such primary elections, the same as general elections, except as hereinafter provided.

Section 1101 of chapter 3, title 6 of the code authorizes a candidate to withdraw his nomination and prescribes the method of such withdrawal. These provisions make it clear to me that your first question should be answered in the affirmative.

Second. I am unable to find anything in the primary law which would prevent a candidate from filing nomination papers, or an affidavit, as the case might be, and have his name printed on the primary ballot for two offices if the offices are such that they may be filled by the same person at the same time.

Third. This question is fully answered by the copy of an opinion which is herewith enclosed, and which has been forwarded to all county auditors.

Hastily and sincerely,
H. W. Byers.

Primary Law.—A candidate for office may be a delegate to county convention or precinct committeeman and delegate. Section 118 of the code provides who may enter booth with voter.

Des Moines, May 13, 1908.

O. U. Conwell, Esq.,
Buxton, Iowa.

My Dear Sir: Replying to your recent favor I have to say:

First. There is nothing in the primary law that would make it either illegal or improper for a candidate for office to be a delegate to the county convention.

Second. Nor is there anything in the law that would prevent the election of the same person as precinct committeeman and as a delegate to the convention.

Third. No one may enter the booth with the voter to assist him in marking his ballot except as provided in section 1118 of the code.

Very truly yours,
H. W. Byers.

Party Affiliation.—A judge or clerk of one party at a primary election could not consistently vote the ticket of another party at the same primary.

Des Moines, May 25, 1908.

C. C. Pease, Esq.,
Stuart, Iowa.

My Dear Sir: Replying to your letter of some days ago I have to say, that I do not see how it will be possible for a democratic

judge at the primary election to vote a republican ticket at the same primary; the fact that he is acting as a democratic election judge would fix his party affiliation, at least for that primary. The same rule would apply to the clerk. To hold otherwise would be to say, that a man might act as a democratic election judge and be a republican voter at one and the same time.

When a voter calls for his ticket he is, by the primary law, given the right to declare his party affiliation by designating the party ticket he wishes to have handed to him; the declaration, however, must be in good faith, that is to say, a party asking for democratic ticket must in good faith at that time intend to affiliate with that party. A voter would not be acting in good faith if he asks for the ticket of the party to which he does not belong and with which he has no intention of affiliating further than simply voting the ticket at that particular primary.

Very truly yours,
H. W. BYERS.

PRIMARY ELECTION—COUNTING BALLOTS.—If a person voting one party ticket write the name of a candidate on the other party ticket in, it would count one vote for the party as a candidate for the office on the ticket of the party voting.

Des Moines, May 25,1908.

C. C. ORVIS, ESQ.,
Oskaloosa, Iowa.

MY DEAR SIR: Replying to your letter of a day or two ago I have to say, that should a democrat write the name of A. B. Cummins upon his ballot for United States senator the vote would not be counted for the governor as a republican, but would be counted as one vote for the governor on the democratic ticket, and the same would be true as to the democratic ballot upon which the name of John F. Lacey might be written as a candidate for congress. The vote would count for Lacey as a democrat; the fact that he had filed no petition or affidavit would make no difference. Names written upon the respective ballots will be counted notwithstanding no petition or affidavits have been filed, so that if John F. Lacey should receive more votes on the republican ballot than the other two candidates he would be the republican nominee. The same rule applies to your third proposition, so that answers to your questions as stated on the sample ballot you enclose me would be:

First. No. 1 would be counted for A. B. Cummins as a democratic candidate for United States senator.

Second. No. 2 would be counted for John F. Lacey as a democratic candidate for congress, but in neither case would the votes thus received be added to the total received on the republican ballot.

Third. No. 3 would be counted as one vote for John Smith as a democrat for representative.

Very truly yours,
H. W. BYERS.

ELECTION BOARDS—WHO MAY COMPOSE.—It would be improper for any person to act as judge of election in a precinct of which he was not a resident.

Des Moines, Iowa, May 27, 1908.

E. K. DAUGHERTY,
Attorney,
Ottumwa, Iowa.

DEAR SIR: I have your favor of May 25th in which you ask to be advised as to "whether under the law a township trustee living in one precinct in the township can act as judge of election in another precinct."

Section 1093 of the supplement to the code pertains to the formation of election boards and provides, among other things, that:

> "In township precincts, the clerk of the township shall be a clerk of election of the precinct in which he resides, and the trustees of the township shall be judges of election, except that, in townships not divided into election precincts, if all the trustees be of the same political party, those two only whose terms shall next expire shall be judges of such precinct. The membership of such election board shall be made up or completed by the board of supervisors from the parties which cast the largest and next largest number of votes *in said precinct* at the last general election, or that one which is unrepresented," etc.

I am of the opinion that the section above referred to contemplates that election boards be made up of residents of the precinct and that it would be improper for any person not a resident of the precinct to act on said board.

This department is not authorized to give official opinions to any one except the state officers, but out of courtesy to you I am giving you my personal views.

Yours very truly,
CHARLES W. LYON,
Assistant Attorney-General.

PRIMARY LAW—RIGHT TO VOTE.—The primary law makes no provision for registration. Any qualified voter in a ward may cast his vote whether registered in the ward or not.

Des Moines, Iowa, May 28, 1908.

MR. E. A. CHESLEY,
Independence, Iowa.

DEAR SIR: I have your favor of May 27th in which you submit the following question:

> "I am a qualified elector and reside in the city of Independence, Iowa. I was duly registered in the first ward of this city and qualified to vote in that ward until about April 10, 1908, when I removed to the third ward in said city. No provision for registration has been made for the primary election to be held June 2d. I would like to know by return mail whether I can vote June 2d in the ward of my present address without being registered in the same?"

In reply I submit the following: Section 1087-a7 of the 1907 supplement to the code, among other things, provides that:

> "At the primary election to be held in June in the year nineteen hundred eight any person shall be entitled to participate therein who is a qualified elector in such precinct at the time of said primary election."

The primary law makes no provision whatever for registration, and it is my opinion that the fact that you are not registered in the ward in which you now reside would not deprive you of your right to vote, providing you are otherwise qualified.

Yours very truly,
CHARLES W. LYON,
Assistant Attorney-General.

COMMITTEEMEN ELECTED AT PRIMARY—CHAIRMAN OF COUNTY CENTRAL COMMITTEE—SELECTION OF DELEGATES.—Committeemen commence their term on the adjournment of the county convention. The chairman of the county central committee may be selected from outside the committee. Primary law does not designate the manner of selecting delegates to state and district conventions.

Des Moines, June 9. 1908.

E. D. Y. CULBERTSON, ESQ.,
Fairfield, Iowa.

MY DEAR SIR: Replying to your favor of a day or two ago referring to the primary law, I have to say:

First. That the term of office of the committeemen elected at this primary will begin immediately upon the adjournment of the county convention, the old committee standing until that time.

Second. It is not necessary that the chairman be named from the members of the county central committee, he may be an outsider if the committee so desires.

Third. The primary law does not designate the manner in which delegates to state and district conventions shall be named. That matter is left entirely to the convention after it is organized. The fairest way, however, and the method that results in the least friction, is to nominate the delegates on the floor of the convention and let everybody have an opportunity to vote upon each delegate, but as I said above, this is a matter that is left entirely with the convention.

Very truly yours,
H. W. BYERS.

PRIMARY LAW—COUNTY CONVENTION MAKING NOMINATIONS—WRITING NAME ON BALLOT.—County conventions can nominate candidates for offices where there was no nomination at the primary. If a name was written in for an office on a ticket which had no candidate for the office, the man receiving the one vote would be nominated.

Des Moines, June 9, 1908.

B. A. GOODSPEED, ESQ.,
Atlantic, Iowa.

MY DEAR MR. GOODSPEED: Replying to your letter of yesterday referring to the primary law I have to say, that I am of the opinion

that the county convention can nominate candidates for every office for which no person was nominated at the primary, that is to say, that if nomination papers were filed by several candidates and none of them received 35 per cent of the total votes cast for that office, then the convention could nominate some one, and it would not be limited to the persons whose names had appeared on the primary ballot; and, again, if no nomination papers were filed for an office, then the convention could also nominate for that office.

As to your second question, I think if a name was written upon a democratic ballot for an office for which no nomination papers had been filed, that the person receiving the vote would be the nominee of the democratic party for that office. The law simply provides that the candidate shall receive 35 per cent of the votes cast for the particular office. If there was but one vote cast, of course, the candidate would receive 100 per cent of the votes.

Very truly yours,
H. W. BYERS.

PRIMARY LAW—PERSON NOMINATED BY TWO DIFFERENT PARTIES—ELECTION OF PARTY NOMINATED—VACANCY ON OTHER TICKET.—A person may be nominated by more than one political party. The result should be certified as if different parties had been nominated. The candidate would have to elect which party ticket his name would appear on. Such election would create a vacancy on the other ticket.

Des Moines, June 9, 1908.

ALBERT HANSEN, ESQ.,
County Auditor,
Harlan, Iowa.

DEAR SIR: Replying to your letter of the 5th instant referring to the primary I have to say:

First: That a candidate for county office may legally be nominated by more than one political party.

Second. In the event one person is nominated by more than one political party the canvassing board should certify the result exactly the same as if the nominations were for two separate persons.

Third. A candidate nominated on two tickets must forthwith, which would mean, of course, as soon as the returns were filed, file with the proper officer a written declaration indicating the party designation under which his name is to be printed on the official ballot for the general election.

Fourth. The filing of such a declaration, in my opinion, would create a vacancy and such vacancy could be filled as provided in section 1087-a24 of the primary law.

Very truly yours,
H. W. BYERS.

PRIMARY ELECTION—COST OF PUBLISHING NOTICE.—Publishing notice of primary election does not come under section 1293 providing for publishing of official ballot.

Des Moines, June 9, 1908.

W. M. WILSON, ESQ.,
Indianola, Iowa.

MY DEAR SIR: Replying to your favor of June 1st referring to the cost of publishing the notice of primary election I have to say, that I doubt very much whether the provisions in section 1293 of the code referring to the publication of the official ballot would apply to the publication of the notice of the primary election. I am inclined to think that the first half of the section authorizing a charge of $1.00 for one insertion, and fifty cents for each subsequent insertion for each ten lines of brevier type or its equivalent would control the charges for publishing the primary notice, providing, of course, the notice was run in columns not less than two and one-sixth inches in width. The next legislature will undoubtedly make some provision covering this question so that the notice can be published for some reasonable price.

Very truly yours,
H. W. BYERS.

A PARTY NOT NOMINATING CANDIDATES AT PRIMARY CAN ONLY get its candidates on official ballot by petition and they would not go on under party name.

Des Moines, Iowa, June 10, 1908.

L. H. ANDREWS, ESQ.,
Clearfield, Iowa.

MY DEAR SIR: Replying to yours of June 8th I have to say that if I understand the situation of the prohibition party in your county as stated in your letter, there is no way that the party can get its candidates on the official ballot now except by petition.

There is nothing to prevent you from holding a convention if you wish and at the convention selecting the candidates, but the names of such cadidates, as I stated above, would have to go on the official ballot by petition. They could not, however, go on under the party name.

Yours very truly,
H. W. BYERS.

PRIMARY LAW—FILING OF EXPENSE ACCOUNTS BY CANDIDATES FOR LEGISLATURE.—For convenience it seems the expense account of candidates for the legislature should be filed with the county auditor and not the secretary of state.

Des Moines, Iowa, June 10, 1908.

HON. L. D. TETER,
Knoxville, Iowa.

MY DEAR SIR: I am in receipt of your favor of the 9th inst., and note what you say about the filing of expense accounts by candidates for the legislature. Replying I have to say that as section 1137-a1 of the 1907 supplement to the code is drawn there is a difference of opinion, not only among the candidates for the legislature but also the lawyers, as to the proper construction to be put upon that part of the section fixing the place of filing the statement of expenditures.

While strictly speaking a member of the legislature is a state officer, I doubt very much whether he comes within the term "state officer" as used in this act and as the term is commonly understood. But however that may be the purpose of the statement is to advise interested citizens and voters as to the facts which are required to be included in the statement, and it seems to me that the people of the legislative candidate's county are the ones directly interested in the matter, and for their convenience it would seem that the statement ought to be filed with the county auditor and not with the secretary of state. And upon the same theory candidates voted for by more than one county should file with the scretary of state. At any rate there was a difference of opinion about the matter and it came up to me from the secretary of state and I gave him the opinion you saw in the newspaper.

I may be wrong about it, but no great harm will come to anyone because of my error. With kind personal regards, I am,

Yours very truly,
H. W. BYERS.

PRIMARY LAW—COUNTY CONVENTION DELEGATES—PRECINCT COMMITTEEMEN.—The primary law makes no provision for election of county convention delegates if none are selected at the primary. Precinct committeemen in office at the time of the primary hold their offices until their successors are elected.

Des Moines, June 11, 1908.

H. A. NASH, ESQ.,
Perry, Iowa.

MY DEAR SIR: Replying to your favor of June 9th referring to delegates to the democratic county convention and members of the county central committee I have to say, that since the primary law makes no provision for the selection of delegates to the county convention where there was a failure to elect at the primary, I think the convention would undoubtedly have the power to allow representation in the convention from the precinct in question. The situation, however, as to precinct committeemen is entirely different, as under the primary law the precinct committeemen in office at the time of the primary hold their offices until their successors are elected in the manner provided in the primary law.

Very truly yours,
H. W. BYERS.

PRIMARY LAW.—In re filing expense accounts of candidates for the state legislature.

Des Moines, June 12, 1908.

HON. L. D. TETER,
Knoxville, Iowa.

DEAR SIR: I am in receipt of your letter of the 11th instant referring again to filing of expense account. In trying to reach a right conclusion on the question under discussion I had considered the reasons you suggest for holding that the office of representative in the legislature would come within the term state office as used in chapter 50, but I found so many other provisions in the primary law, and in the expense law, as well as numerous provisions in the code inconsistent with that view, that I was at least reasonably certain that the question was not free from doubt, and for the reason stated in my prior letter held as I did.

You will notice that the act reads: *"If for a state office, or any other office to be voted for by the electors of more than one*

county such statement shall be filed with the secretary of state, etc.'' If it was thought by the legislature that state senators and other district officers which were to be voted for at the primary were state officers, why the use of this clause?

Again, section 3 which requires statements to be filed by the chairmen of the respective party central committees seems to make the same classification or distinction; that is to say, that the state and district committees must file with the secretary of state, while county central committees file with the county auditor.

Section 1087-a10 of the primary law, you will notice, does not include members of the general assembly in the term ''state office.'' It is there provided, ''and no candidate for nomination for an elective state office, * * *, or member of the general assembly, shall have his name, etc.''

Again, at the end of the section, you will notice, that the legislature divides the persons who must file nomination papers into three classes; in the first is included candidates for state office, United States senator, and electors at large, in the second, representative in congress, district electors, senators in the general assembly in districts composed of more than one county; in the third offices to be filled by the voters of the county, which of course, would cover members of the legislature.

In section 1087-a20, 1907, supplement to the code, you will find the same classification.

Then again, if you will turn to chapter 1, title 6, of the 1907 supplement to the code, you will find the same classification. The governor, lieutenant-governor, secretary of state, auditor of state, treasurer of state, attorney-general, and superintendent of public instruction being classified under the head of state officers, and section 1089 of the code, you will notice, classifies the officers as national, state, judicial, district, county, and township, etc., and this classification seems to run all through the code, so that I think if you want to be absolutely sure that you are complying with the so-called expense law, you had better file your statement with both the auditor and secretary of state, and then this winter have the act amended as you suggest.

While I am not anxious to invite any further trouble over this primary and expense law, I should like to hear further from you after you have examined these provisions that I have referred to.

With best wishes for you personally, I am,

Yours very truly,

H. W. BYERS.

PRIMARY ELECTION LAW—TOWNSHIP OFFICES.—The person receiving the highest number of votes for all offices that are to be filled by the voters of a subdivision of a county shall be the nominee.

Des Moines, June 15, 1908.

DAVID DINNING, ESQ.,
Cincinnati, Iowa.

DEAR SIR: Replying to your recent favor I have to say, that under the primary law it is not necessary that candidates for township offices receive 35 per cent of the votes cast in order to be nominated. The law provides that the person receiving the highest number of votes for all offices that are to be filled by the voters of a subdivision of a county shall be the nominee. See section 1087-a19 of the 1907 supplement to the code.

Yours very truly,

H. W. BYERS.

PRIMARY LAW—TIE VOTE FOR DELEGATES AND COMMITTEEMEN.—The judges of election shall determine all tie votes for delegates and committeemen.

Des Moines, June 15, 1908.

L. H. PICKARD, ESQ.,
Harlan, Iowa.

MY DEAR PICKARD: Replying to your postal card of yesterday I have to say, that under section 1087-a24 of the primary act as contained in the 1907 supplement to the code it was the duty of the judges of election to determine all tie votes for delegates and committeemen. In all cases where the judges failed to do that the precinct will have to be represented by the delegates who had a majority, and were therefore declared duly elected, that is to say, in the case you refer to where six of the seven delegates received a majority, and there was a tie as to the other one, which tie was not settled by the judges of election, the six delegates will have the right to

represent the township or precinct, and under section 1087-a25 to cast the full vote for the precinct.

Hastily yours,
H. W. BYERS.

WITHDRAWAL OF NAME FROM TICKET.—The withdrawal of a person's name from a ticket must be by written request, signed and acknowledged before an officer authorized to take acknowledgments, and filed with the secretary of state or county auditor.

Des Moines, June 29, 1908.

HON. ERNEST R. MOORE,
Cedar Rapids, Iowa.

MY DEAR SIR: Your communication of the 27th instant addressed to the attorney-general relative to the method of withdrawing a name from the ticket who was nominated at the primary has been referred to me for reply, Mr. Byers being out of the city on account of the illness of his brother.

Section 1087-a1 of the supplement to the code 1907, provides among other things that:

> "The provisions of chapters 3 and 4, title 6, and chapter 8, title 24, of the code shall apply so far as applicable to all such primary elections, except as hereinafter provided."

Section 1101 of the code authorizes a candidate to withdraw his nomination by written request signed and acknowledged by him before an officer empowered to take the acknowledgment of deeds, and filed in the office of the secretary of state fifteen days, or the proper auditor or clerk eight days, before the day of election.

The place of filing the statement will depend upon whether the office is a county or state office.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

PRIMARY LAW—FILLING VACANCIES IN SUBDIVISION OF A COUNTY AFTER THE PRIMARY ELECTION.—A vacancy on a ticket in a subdivision of a county. No provision is made for filling same.

A party nominated would have to go on the ballot by petition and not under the party name.

Des Moines, July 2, 1908.

J. M. BERRY,
County Attorney.
Pocahontas, Iowa.

MY DEAR SIR: I am in receipt of your communication of the 21st ultimo advising me that your county is divided into supervisor districts; that a member of the board of supervisors in one of the districts was nominated on both the republican and democratic ticket; that after the primary he immediately filed his election to have his name printed upon the democratic ticket, thereby causing a vacancy in the republican ticket. You ask how this vacancy may be filled.

The attorney-general has given an opinion that the word "district" as used in section 1087-a24 of the code supplement of 1907, which section provides in part that, "vacancies occurring after the holding of any primary election occasioned by death, withdrawal or change of residence of any candidate, or from any other cause, shall be filled by the party committee for the county, district, or state, as the case may be, representing the party in which the vacancy nomination occurs, does not refer to a subdivision smaller than a county."

Under this interpretation of the word "district" I know of no method by which a nomination may be made for a subdivision less than a county in case of vacancies occurring subsequent to the primary, except by petition pursuant to the provisions of section 1100 of the code. If this method, however, is followed section 1087-a29 of the code supplement of 1907 must be complied with, and no person so nominated by petition shall be permitted to use the name of any political party authorized or entitled under the primary law to nominate a ticket by primary vote, or that has nominated a ticket by primary vote under the provisions of said law.

You will, of course, understand that this is not an official opinion, but simply my personal views given out of courtesy to you.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

MAYOR OF CITY OR TOWN—VACANCY IN OFFICE OF—HOW FILLED.—The city or town council have authority to fill a vacancy in the office of mayor.

Des Moines, July 9, 1908.

MR. J. F. WIENAND,
Danbury, Iowa.

DEAR SIR: I have your favor of July 8th in which you state that "at our last general election we re-elected the same party to the office of mayor. He did not qualify and after a long illness, he died about two weeks ago. The councilmen at their meeting last evening appointed a man to fill the office of mayor," and you ask to be advised as to whether or not the town council has power to make such appointment.

In reply will say that section 1272 of the 1907 code supplement among other things 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, who shall qualify in the same manner as persons regularly elected to fill such office, and shall hold such office until the qualification of the officer elected to fill such vacancy, who shall be elected at the next regular municipal election."

Under the provisions of the above section, it is clearly apparent that the city council had authority to fill the vacancy caused by the death of the mayor.

Yours very truly,
CHARLES W. LYON,
Assistant Attorney-General.

CORPORATIONS.—The general corporation laws do not require a corporation to have a board of directors.

Des Moines, July 23, 1908.

GRAY OPTICAL COMPANY,
Cedar Rapids, Iowa.

GENTLEMEN: Replying to your favor of the 22d instant, I have to say, that there is nothing in the laws covering corporations in this state that makes it necessary to have a board of directors. I am, of course, speaking now of the general corporation laws and have no reference to banks nor building and loan associations.

As to your second question there is nothing in the law to prevent the corporation you refer to issuing the remaining $7,000 of its capital without notifying the secretary of state, providing that when the stock is issued it is paid for in cash. If the stock is to be exchanged for property then it will be necessary to make application to the executive council for authority to make the exchange.

I am unable to give an intelligent answer to your last question without having a clearer statement of the situation involved in your question.

Yours very truly,
H. W. BYERS.

INTOXICATING LIQUORS.—A wholesale liquor dealer may not use more than one floor. Brewers are not limited to the use of one floor, but are governed by special statute.

Des Moines, July 25, 1908.

THE JOHN ELLWANGER COMPANY,
Dubuque, Iowa.

GENTLEMEN: I am in receipt of your communication of the 21st instant requesting to be advised:

First. As to whether a wholesale liquor dealer selling to the trade only and not to private parties, and not by the drink, may lawfully conduct his business on more than one floor and have more than one entrance to the building.

Second. Is a manufacturer, such as a brewer, limited to the use of one floor the same as a retail saloon in order to comply with the mulct law?

It is my opinion that your first question must be answered in the negative, and that a wholesale liquor dealer must comply with the provisions of section 2448, code supplement, 1907.

In the case of *Cameron vs. Fellows*, 109 Iowa, 534-538, the supreme court said:

> "The keeping of a place under the mulct law does not authorize the peddling of beer in all parts of the city. If this may be done at wholesale, it can be done at retail as no distinctions are made by the statute. The accused might lawfully sell beer at the cold storage plant but not otherwise."

The sales referred to were made by the Fred Miller Brewing Company by soliciting orders from the saloon keepers and filling the orders by delivering direct from the cold storage building.

Your second question, however, I think should be answered in the affirmative. There is a special provision relative to manufacturers and brewers. See code sections 2456-2461 inclusive.

A manufacturer, however, is not authorized to permit any drinking on the premises, nor is he authorized to sell the same at retail and he must not sell to dealers to be shipped in quantities of less than four gallons contained in a single case, vessel or package, and no vinous liquors shall be sold or shipped in less quantities than two dozen pints or one dozen quarts in any one case or package.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

SENATORIAL CONVENTIONS.—When the convention should have been held. To whom it should certify its nominations.

Des Moines, July 27, 1908.

MR. CHAS. B. WOLF,
Alton, Iowa.

DEAR SIR: I am in receipt of your communication of the 23d instant requesting to be advised the last day in which a senatorial convention may be held. You also ask to whom shall the convention certify nominations.

The last day in which the senatorial convention could have been held wherein the senatorial district is composed of more than one county, was the fifth Thursday following the county convention, being the 23d day of July, 1908. (1087-a26, code supplement, 1907.)

Replying to your second question I have to say, that the senatorial convention should certify its nominations to the secretary of state. (Code, section 1104.)

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

COUNTY CONVENTION—PERMANENT OFFICERS.—Delegates selected by the people hold their places until the next regular primary.

Des Moines, July 31, 1908.

HON. J. M. JUNKIN,
Red Oak, Iowa.

MY DEAR SENATOR: I am in receipt of your favor of the 30th instant and note what you say about the permanent officers of the county convention.

Replying I have to say, that while the question of filling the Judge Bishop vacancy was pending before me I received numerous suggestions with reference to what should be done in the way of holding conventions. Some contended that the precinct delegates elected at the June primary would hold their places or office, whichever it may be termed, for two years, or in other words, until the next primary election, and that if it should be necessary to hold another county convention it should be made up of such delegates; others contended that the delegates selected by the county conventions to the state and district conventions could be re-convened in a state convention, while still others insisted that new caucuses would have to be held in all of the precincts of the state.

It seemed to me that since the purpose of the primary law was to, in so far as possible, name party nominees by direct vote of the people, that it would be in harmony with that purpose to hold that delegates selected by direct vote would hold their places until the next regular primary election, and, of course, if the state central committee follows this suggestion, then the delegates when they come together would have the right, I think, to organize a convention either by retaining the former officers or by selecting new ones.

Very sincerely yours,
H. W. BYERS.

TRANSIENT MERCHANTS OR PEDDLERS.—A person soliciting orders for future delivery does not come under the term transient merchant or peddler.

Des Moines, August 19, 1908.

UNITED SUPPLY HOUSE,
Lyons, Iowa.

GENTLEMEN: Replying to your letter of the 18th instant referring to the power of cities and towns to exact a license fee from persons taking orders from sample for future delivery, etc., I have

to say, that section 700 of the 1907 supplement to the code, among other things, gives to cities and towns the power to regulate, license and tax transient merchants and peddlers. Under this section our supreme court has held that persons engaged simply in taking orders or making delivery of goods on behalf of another is not a peddler nor a transient merchant.

I suggest that you get this case and read it; you will find it reported in the 128 Iowa Reports on page 740. This report or book you will find in any lawyer's office in your city.

You will understand, of course, that what I am saying to you in this letter is in no sense an official opinion, as I have no authority to give such opinions except upon request from some of the state departments; I am simply giving you my personal views out of courtesy to you. I think you will get out of the case above referred to all the information you need with reference to the questions you submit to me.

Yours very truly,
H. W. BYERS.

BOARD OF MEDICAL EXAMINERS—POWER TO SUBPOENA WITNESSES. Section 4669 of the code would apply to the board of medical examiners, and they may subpoena witnesses pursuant to said section. There is no provision for such witnesses receiving their pay.

Des Moines, August 20, 1908.

DR. L. A. THOMAS,
State House.

DEAR SIR: I am in receipt of your communication of the 4th instant requesting to be advised as to whether the provisions of section 4669 of the code apply to the board of medical examiners; if so, and witnesses were subpoenaed pursuant to said section, from what source would such witnesses receive their fees?

It is my opinion that the section in question is comprehensive enough to include the board of medical examiners. I know of no provision in the law, however, authorizing the payment of witnesses subpoenaed by the board of medical examiners or designating the fund from which said payment may be made.

Yours very truly,
H. W. BYERS.

PRIMARY LAW—TOWNSHIP CAUCUSES—VACANCIES.—There is no authority for political parties to hold township caucuses for the purpose of filling vacancies on ticket.

Des Moines, September 2, 1908.

MR. H. B. ROSENKRANS,
County Auditor,
Charles City, Iowa.

DEAR SIR: I am in receipt of your communication of the 31st ultimo advising that in your county where vacancies now exist on township tickets by reason of the fact that no nominations were made at the primary, or that after nominations were made they have since been vacated by resignation, or where the nominations made do not give general satisfaction, and that it is proposed to hold township caucuses in the manner such caucuses were held previous to the enactment of the primary law, for the purpose of making nominations to fill such vacancies. You ask to be advised as to your duty with reference to placing the names of the caucus nominees on the general election ballot under the heading of the political party holding the caucus instead of an independent heading.

This department is not authorized to give official opinions except to the various state officers. Your county attorney is by law made your legal adviser. My opinion, however, is that there is no authority for holding township caucuses by the various political parties in the manner suggested by you for the purpose of filling vacancies now existing, and that therefore you have no right to place the names of such caucus nominees on the official ballot at the general election under party headings of such political parties as were entitled to make nominations at the primaries held in June, 1908.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

REGISTRATION OF VOTERS ON DAY OF ELECTION.—A voter should be permitted to register on election day and vote if he comes within the provision of section 1082 of the code providing for same.

Des Moines, September 12, 1908.

MR. L. H. NELSON,
615 Water Street,
Webster City, Iowa.

DEAR SIR: I am in receipt of your communication of the 10th instant advising that you are a legal resident of Webster City,

Iowa, but that your work takes you out of the city and state during the greater part of the year; and that because of this fact you were denied the right to vote at the last election, for the reason that you were not there to register. You request to be advised in the premises.

Section 1082 of the code provides that the registers shall be in session on the day for the holding of each election at some place convenient to but not within one hundred feet of the voting place, and that they may on that day grant certificates of registration to such persons who were necessarily absent from the city during all the days fixed for registration of voters for that election.

If you are a legal resident of Webster City, Iowa, and it is and has been your intention to keep your residence there, you are entitled to vote at Webster City at the coming general election even though you are not in the city on the days provided for registration, but you should go to the board of registers on said day and register and receive a certificate pursuant to the provisions of section 1082 of the code. If you are challenged, you should swear in your vote, and if you are then denied the right to vote, you should consult some lawyer there in Webster City as to your rights.

Of course this opinion is given upon the assumption that Webster City is your legal residence and that you are not and have not been claiming a residence elsewhere within the past six months.

The attorney-general is not authorized to give official opinions except to the various state officers but as a courtesy to you I have submitted my personal views.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

SCHOOL BONDS—CONSOLIDATION OF SCHOOL DISTRICTS.—Right of women to vote for same.

Des Moines, September 14, 1908.

C. E. HARMON, ESQ.,
Wyman, Iowa.

MY DEAR SIR: I have your favor of the 12th instant in which you submit the question as to whether women are allowed to vote upon the question of consolidation of school districts, also as to whether they may be allowed to vote upon the question of issuing bonds to build a school building.

In reply will say that section 2747 of the code provides that women may vote where the question of issuing bonds for school purposes or for increasing the tax levy is being submitted.

Under this section the women would have the right to vote upon the question of issuing bonds to build the school building in question, but I find no provision in the law authorizing them to vote upon the question of the consolidation of school districts.

Yours very truly,
H. W. BYERS.

BOARD OF SUPERVISORS—REPORT.

Des Moines, September 15, 1908.

D. H. MILLER, *County Attorney,*
Adel, Iowa.

DEAR SIR: I am in receipt of your communication of the 11th instant requesting an opinion upon the following questions:

First. Is the board of supervisors required to publish as a part of its official proceedings its report made to the county auditor of the canvass of the returns of the primary election provided for by section 1087-a19, code supplement?

Second. Is that part of section 441 which provides that the board of supervisors shall publish as a part of its official proceedings "the schedule of bills allowed, and the reports of the county treasurer, including the schedule of the receipts and expenditures," mandatory; or is it simply discretionary with the board?

As to the first question I desire to investigate the matter further before expressing an opinion thereon.

As to the second question, however, I believe that the language of the statute is mandatory, and that the board has no discretion in the matter. The provision with reference to the publication of the reports of the county treasurer was formerly embraced in section 304 of the code of '73. Under the original act the board was not required to publish said report in more than one newspaper. The provision with reference to the selection of the official paper and the publication of the official proceedings was embraced in section 307 of the code of '73.

The twentieth general assembly, however, in chapter 197 repealed section 304 of the code of '73 and re-enacted the provisions of section 307, inserting therein the provisions of section 304. This act

of the general assembly was subsequent to litigation had upon this question.

See *Haislett vs. County of Howard*, 58 Iowa, 377;
McBride vs. Hardin County, 58 Iowa, 219.

In view of these facts I cannot believe that the legislature intended in passing said act to make it merely directory.

Again referring to the first question, I wish you would give me your views about the matter and your reasons therefor. If the act of the board in making the canvass of the returns is a part of their official proceedings, I do not now see how we can escape the conclusion that said proceedings will have to be published pursuant to the provisions of section 441 of the code supplement.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

BALLOT BOXES FOR SENATORIAL PRIMARY— ALPHABETICAL LIST OF VOTERS.

Des Moines, Iowa, Sept. 30, 1908.

MR. GEO. C. COLEMAN, *County Auditor,*
Sidney, Iowa.

DEAR SIR: I am in receipt of your communication of the 19th instant in which you submit the following questions:

1st. "Will it be necessary to provide an additional ballot box for the ballots on senator."

2d. "Will it be necessary to prepare the alphabetic list of voters voting at the June primary for the use of the judges and clerks at the November primary?"

With reference to your first question I know of no provision in the primary law or amendment thereto which makes it mandatory upon the judges of election to provide a separate ballot box for the senatorial primary. I think, however, that if this was done it would greatly facilitate the counting of the ballots.

The answer to your second question is not entirely free from doubt, but it is my opinion that it is the duty of the county auditor to prepare an alphabetical list of the voters voting at the June primary for the use of the judges and clerks at the November primary.

Section 1087-a7 of the code supplement, 1907, provides, among other things, that,

"Copies of the names and party entries on such list, together with the changes of party affiliation as hereinafter provided, arranged alphabetically, by surnames, shall be used at subsequent primaries for determining with what party the voter has been enrolled."

In the amendment to the primary act, passed by the special session of the thirty-second general assembly, it is provided, in division C of section 1 of said amendment, that,

"No person shall receive a primary ballot who participated in the last preceding primary election of any other political party *as shown by his enrollment.*"

If many challenges were interposed it would be difficult indeed to determine with what party a person was affiliated, unless the alphabetical list was prepared by the auditor, pursuant to the provisions of section 1087-a7 of the code supplement. While said section provides that, "these lists shall be delivered to the succeeding primary election boards in the year 1910 and biennially thereafter," this fact does not militate against the position herein taken for the reason that at the time of the enactment of said primary act the next succeeding primary election which could be held would be in the year 1910, and for the further reason that this part of said act is repealed by implication by the amendment to said primary law.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

BOARD OF SUPERVISORS—VOTING MACHINES.—Board of supervisors cannot install voting machines in incorporated town or city when the council has voted otherwise.

Des Moines, Iowa, October 13, 1908.

MR. HENRY GRAFF, *County Auditor,*
Maquoketa, Iowa.

DEAR SIR: I am in receipt of your communication of the 16th ultimo requesting to be advised as to whether the board of supervisors of Jackson county have the authority to rent the voting machines and install the same in the city of Maquoketa, to be used at the general election, notwithstanding the fact that the city council of Maquoketa has passed a resolution that voting machines shall not be used in the city of Maquoketa at said election.

Section 1137-a8 of the code supplement provides:

> "That at all state, county, city, town and township elections, hereafter held in the state of Iowa ballots or votes may be cast, registered, recorded and counted by means of voting machines, as hereinafter provided."

And it is further provided in section 1137-a12 of the code supplement that:

> "The board of supervisors of any county, the council of any city or town, may provide for the experimental use at an election in one or more districts, of a machine which it might lawfully adopt, without a formal adoption thereof; and its use at such election shall be as valid for all purposes as if it had been lawfully adopted."

It is clear from this provision that city and town councils may determine whether a voting machine shall be used at the general election within the corporate limits of such cities or towns, and that the jurisdiction of the board of supervisors in any county does not embrace voting precincts within the corporate limits of any city or town.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

RAILROADS—SIXTEEN HOUR LAW—CONSTRUCTION.

Des Moines, October 27, 1908.

A. J. O'HARA, ESQ.,
1304 N. Story St.,
Boone, Iowa.

MY DEAR SIR: Replying to your esteemed favor of the 23d instant, I have to say, that the nature of the railroad business and the interests involved make it necessary to give a broad and liberal construction of chapter 103, acts of the thirty-second general assembly, the so-called sixteen hour law—a construction that will effectuate the purpose of the legislature in its passage.

It was not the intention of the legislature in the passage of the law to reduce the earning capacity of railroad employes, nor to deprive them of any reasonable and proper opportunity to increase their income by putting in all of the time that their physical condition and the safety of the general public would justify; nor on

the other hand was it the intention of the legislature to make it unnecessarily inconvenient and expensive for the railroad company to operate its trains; in fact, its intention was to conserve the interests of all concerned in the business of railroading, and in the particular case you mention, if I fully understand it, the engineer should register "twelve hours on duty."

This would be in harmony with the rule laid down by the Interstate Commerce Commission in the pamphlet you forwarded me, and with which ruling I fully agree.

As I stated, however, in the beginning of this letter, the act in question in every case where the interest of the employe is involved should have a liberal construction, keeping in mind always the safety of the traveling public, and if the superintendents, train masters, train dispatchers, yard masters, and other officials of the railroads, whose duty it is to manage and operate trains, will exercise their good judgment in each particular case, remembering always that two things are involved in their decision—the safety of the traveling public, and the health, convenience and comfort of the men doing the work—there will be little trouble.

You will understand, of course, that this is not an official opinion, but simply my personal views given out of courtesy to you and the employes of the road.

Yours very truly,
H. W. BYERS.

MAYOR OF CITY OR TOWN—POWER TO MAKE ARREST—WHEN.

Des Moines, November 20, 1908.

REV. EDWARD R. KELLY,
Emerson, Iowa.

MY DEAR SIR: Replying to your favor of the 18th instant I have to say, that the mayor is without power to make arrests except in cases where the breach of the law is committed in his presence. In all other cases he may proceed only on sworn complaint. If the breach of the peace or violation of the law takes place in the presence of the mayor, he has the power, and it is his duty, to either cause the arrest of the guilty parties or arrest them himself. In case the arrest is made by the mayor himself it is his duty to proceed to try the offenders in exactly the same way as he would proceed if the complaint had been filed before him.

Yours very truly,
H. W. BYERS.

GENERAL ELECTION PROCLAMATION—PUBLICATION OF—COST OF PUBLICATION.

Des Moines, November 23, 1908.

THE TIMES REPUBLICAN,
Marshalltown, Iowa.

GENTLEMEN: I am in receipt of your communication of the 11th instant advising that "there is doubt among supervisors and newspaper publishers as to the amount that may be charged for publication of the general election proclamation issued by the governor to the sheriffs, and by them published in one paper in each county."

You request an opinion covering this question. Neither the proclamation by the governor, authorized by section 1061 of the code, nor the publication by the sheriff of a copy of such proclamation in some newspaper in the county, pursuant to the provisions of section 1062 of the code, constitutes any part of the official proceedings of the board of supervisors, and hence the compensation to be paid for the publishing of said notice is not governed by the provisions of section 441, code supplement 1907.

McBride vs. Hardin County, 58 Iowa, 219;
Haislett vs. County of Howard, 58 Iowa, 377.

The compensation for such publication is therefore governed by section 1293, code supplement 1907. The rate for such services is not definitely fixed, but the county is prohibited from paying more than one dollar for one insertion for each ten lines of brevier type, or its equivalent, in a column not less than two and one-sixth inches in width.

Yours very truly,
GEORGE COSSON,
Assistant Attorney-General.

DUTIES OF JUDGES OF ELECTION.—All should not leave room at once. Should announce when polls will close.

Des Moines, November 30, 1908.

W. R. ORCHARD, ESQ.,
Glidden, Iowa.

MY DEAR ORCHARD: Replying to your letter of yesterday by answering your questions in the order stated by you I have to say:

First. It would be a gross breach of duty for all of the judges to be absent from the room where the ballot box is kept at the same time.

Second. Failure upon the part of the judges to announce that the polls will close in thirty minutes would not invalidate the election, it would, however, be a breach of duty.

Third. If I understand your third question, each voter who received a ballot at the recent election was registered by the judges, that is, his name was entered upon the list at the time the ballot was handed to him, or at least when he voted, and it would be impossible for him to repeat if the judges and the challengers were attending to their business; in any event it was no easier to repeat at the recent election than it had been at former elections.

Fourth. I know of no other or different instructions which are given to the judges of election than the printed card of instructions that is prepared by the secretary of state and attorney-general and sent out to each precinct.

Very sincerely yours,
H. W. BYERS.

MULCT PETITION—HOW LONG GOOD—WHAT WILL AFFECT RIGHT TO OPERATE.

Des Moines, Iowa, December 10, 1908.

MR. CHAS. THIMRUESCH,
Dubuque, Iowa.

DEAR SIR: I have your favor of the 5th instant in which you submit the following questions:

1. For how long is a mulct petition good secured and accepted by city or county boards this fall?
2. What time in 1911 do the said petitions expire?
3. Should a church society buy a lot, build, and hold services within 300 feet of a saloon, which has, prior to this, complied with the law, would it drive the saloon out of business?
4. Should religious meetings be held in a town hall (used for all sorts of purposes) affect the rights of a saloon located within 300 feet?

In reply to your first question will say that the petition of consent would expire five years from the date it was granted.

In reply to your second question will say that all petitions of general consent in force and effect previous to the first day of July, 1906, unless sooner revoked, will expire at midnight on the 30th day of June, 1911.

The answers to the first two questions are based on section 2450 of the 1907 supplement to the code.

Under the conditions stated in your third question there is no doubt under the provisions of paragraph two of section 2448 of the supplement to the code but that the saloon would have to go out of business.

In answer to your fourth question will say that under the conditions stated, it is my opinion that the temporary or occasional holding of religious services in a city hall would not operate to make the conducting of a saloon within 300 feet, for that reason, illegal.

Yours very truly,
CHARLES W. LYON,
Assistant Attorney-General.

DRUGGIST—WHEN ITINERANT VENDOR OF DRUGS.

Des Moines, December 19, 1908.

MR. JOSEPH S. GOSS,
President State Pharmacy Commission,
Atlantic, Iowa.

DEAR SIR: I have your favor of recent date in which you submit the following:

> "A druggist prepares a medicine chest containing eleven different remedies, this chest containing the remedies he wishes to place in the homes of his friends and customers with this understanding:
>
> "It is especially understood that these goods are not to be paid for unless used, and are the property of the druggist whose name appears on the chest. It is also expressly agreed you are privileged to use one-fourth of the liquid and bulk goods and ten of any of the tablets and if dissatisfied with the results same not to be paid for. About twice a year we will have a man check up each chest and anything you have used that has given satisfaction is to be paid for and another package to be left in its place."

You wish to be advised as to whether under such conditions the druggist would be deemed an itinerant vendor of drugs and required to pay the license fee provided for in section 2594 of the code; and if so, when such license fee should be paid.

In reply will say that it is my opinion that the facts stated in your inquiry would constitute the druggist in question an itinerant vendor of drugs, and that such druggist would be required to procure the license provided for in section 2594 of the code at the time he commenced the distribution of such medicine chests.

Yours very truly,
CHARLES W. LYON,
Assistant Attorney-General.

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