REPORT

OF THE

ATTORNEY GENERAL

OF THE

STATE OF IDAHO

FOR THE

YEARS 1909-1910

D. C. McDOUGALL
ATTORNEY GENERAL.

J. H. PETERSON,
O. M. VAN DUYN.
Assistants.

MARTHA HEUSCHKEL.
Stenographer.

Boise, Idaho.
The Statesman Shop.
1910.

Territorial Attorneys General.

*D. B. P. Pride.....1885-1886
Richard Z. Johnson.....1887-1890

State's Attorneys General.

George H. Roberts.....1891-1892
*George M. Parsons.....1893-1896
Robert E. McFarland.....1897-1898
Samuel H. Hays.....1899-1900
Frank Martin.....1901-1902
John A. Bagley.....1903-1904
J. J. Guheen.....1905-1908
D. C. McDougall.....1909-1912
*Deceased.

Justices Supreme Court, 1909-1910.

I. N. Sullivan, Chief Justice.....Hailey
George H. Stewart, Associate Justice.....Boise
James F. Ailshie, Associate Justice.....Grangeville

Justices Supreme Court, 1911-1912.

George H. Stewart, Chief Justice.....Boise
James F. Ailshie, Associate Justice.....Grangeville
I. N. Sullivan, Associate Justice.....Hailey

United States District Judge.

Frank S. Dietrich.....Boise

Idaho District Judges.

District.	1909-1910.	1911-1912.	Address.
First.....	W. W. Woods.....	W. W. Woods.....	Wallace.
Second.....	E. C. Steele.....	E. C. Steele.....	Moscow.
Third.....	Fremont Wood	Carl A. Davis.....	Boise.
Fourth.....	E. A. Walters.....	E. A. Walters.....	Shoshone.
Fifth.....	Alfred Budge	Alfred Budge.....	Paris.
Sixth.....	J. M. Stevens.....	J. M. Stevens.....	Blackfoot.
Seventh.....	Edwin L. Bryan...	Edwin L. Bryan....	Payette.
*Eighth.....	R. N. Dunn.....	R. N. Dunn.....	Coeur d'Alene.

*The Eighth Judicial District was created by an act of the Tenth session of the Legislature. (Sess. L. 1909, p. 194.)

Prosecuting Attorneys of the Various Counties of Idaho.

County.	1909-1910.	1911-1912.	Address.
Ada.....	C. P. McCarthy....	C. P. McCarthy.....	Boise.
Bannock.....	Robert M. Terrell..	H. V. A. Ferguson..	Pocatello.
Bear Lake....	Chas. E. Harris....	William Higgins....	Paris.
Bingham.....	Wm. L. McConnell..	James E. Good.....	Blackfoot.
Blaine.....	Henry F. Ensign...	Henry F. Ensign...	Hailey.
Boise.....	O. R. Woods.....	Dorsey L. Rhodes...	Idaho City.
Bonner.....	Peter Johnson.....	Jas. T. McDuffie...	Sand Point.
Canyon.....	O. M. Van Duyn....	J. A. Elston.....	Caldwell.
Cassia.....	T. Bailey Lee.....	T. Bailey Lee.....	Albion.
Custer.....	L. E. Glennon.....	Milton A. Brown...	Challis.
Elmore.....	John M. Owen.....	W. L. Harvey.....	Mountainhome
Fremont.....	A. H. McConnell...	Bert H. Miller.....	St. Anthony.
Idaho.....	Jesse M. Gilmore...	Edw. H. Griffith...	Grangeville.
Kootenai.....	C. H. Potts.....	N. D. Werneth.....	Coeur d'Alene.
Latah.....	Geo. W. Suppiger...	Geo. W. Suppiger..	Moscow.
Lemhi.....	Wm. H. O'Brien....	John K. Rankin....	Salmon.
Lincoln.....	Frank T. Disney....	James R. Bothwell.	Shoshone.
Nez Perce....	Dwight E. Hodge...	Dwight E. Hodge...	Lewiston.
Oneida.....	Thomas D. Jones...	Thomas D. Jones...	Malad.
Owyhee.....	Chas. M. Hays.....	Chas. M. Hays.....	Silver City.
Shoshone.....	James A. Wayne...	James A. Wayne...	Wallace.
Twin Falls....	Wm. P. Guthrie....	A. R. Hicks.....	Twin Falls.
Washington...	J. L. Richards.....	J. L. Richards.....	Weiser.

REPORT OF ATTORNEY GENERAL.

BOISE, IDAHO, DECEMBER 1, 1910.

TO HIS EXCELLENCY, JAMES H. BRADY, GOVERNOR:

As required by law, I have the honor to submit my official report, touching matters of public interest connected with the Attorney General's Department, and giving a brief synopsis of a portion of the work done by the office during the years 1909 and 1910.

Necessarily, a great portion of the work of the office cannot be reported by reason of the nature of the work itself. Cases tried, board meetings attended, abstracts passed upon and farm loans made, opinions rendered to State Officers and County Attorneys and to the Legislature represent but a very small portion of the work of the office. A great bulk of the time of the office is taken in rendering opinions to individuals, to school districts, to municipal corporations and to irrigation districts concerning matters of more or less public moment, in which case the Attorney General's office, by right of custom, has been made the clearing house for the settlement of moot questions. A great deal of time is also taken in rendering verbal opinions to State Officers and in discussing with them, from day to day, the business of their various offices with a view to directing them in the proper course with reference to smaller matters which come up with great regularity. We have endeavored to be uniformly courteous to all who have requested advice from the office and have, whenever the official duties of the office permitted it, given opinions to those who have requested them. In a

great many cases, however, the work of the office made it absolutely impossible to advise upon purely personal matters. We are constantly receiving communications from outside the State from individuals who desire information concerning our laws and concerning our State generally. We have made it a special point to answer all such communications promptly and fully.

Practically my entire time has been devoted to the duties of the office, and both myself and two assistants whom I have had during the greater part of my incumbency have spent all of our time in attending to the State's business.

The criminal business and civil business before the Supreme Court has been rather heavy and, in each case presented, we have prepared elaborate briefs on the points of law involved, knowing the benefits, financially and otherwise, to the counties of having the judgments of the lower courts affirmed. A statement of cases which we have argued in the Supreme Court and presented on briefs is appended hereto.

The land business of the State has been particularly heavy during my incumbency, as will be seen by the list of cases presented herewith. Many points have arisen in connection with the State's land business which have required the most exhaustive research. It might not be inappropriate in this connection to mention two lines of cases that have caused us a great deal of work and their importance to the State necessitated their being handled very carefully.

Under the Act of 1894 (28 Statutes, 394), in order that the State might secure its grants from the Federal Government, provision is made for withdrawal of unappropriated public lands upon the application of the Governor

of the State for the survey thereof being made to the Commissioner of the General Land Office, and publication thereof in a newspaper published in the vicinity of the land made within a prescribed period and covering a prescribed time. Under this act the State has made most of its selections. The statute was devised for this purpose, because it will be at once understood that the State cannot enter into a race with settlers and the railroad companies to secure its selections, and, in case such a course were necessary, the State selections would be so terribly cut up and would be in such small tracts that its handling would cost more than the land itself is worth. Under the act referred to, great bodies of land can be selected. The difficulty we have encountered is this: After the State has made its application in due form to the Commissioner of the General Land Office and publication thereof has been made in accordance with law, the land embraced in the application has, in many cases, been included within a forest reserve by a proclamation of the President and, under a recent ruling of the Secretary of the Interior founded upon an opinion of the Attorney General of the United States, in a case of this nature, *Heirs of Irwin vs. State of Idaho* (38 L. D. 219), the forest reserve takes precedence of the application of the State. We have thought that this ruling is a rank injustice to the State and have appealed and thoroughly briefed every case involving the point. Motion for rehearing of the Irwin case was made before the Secretary of the Interior and oral argument was made before the Secretary on behalf of the State by the Attorney General of Idaho. We have not yet received the decision of the Secretary, but, in case the decision is adverse to the State, this case should be taken up in the Federal Courts

and the decision of the Supreme Court of the United States should be had thereon. A holding to the ruling which the Secretary has made would involve the State in great financial loss, for the reason that, as far back as 1901 and earlier, the State made application for the survey of large tracts of land, has spent considerable money in investigating the land with a view to its selection when the plats of survey are filed and have, in many cases, advanced the money for the survey thereof. Naturally our State is settling up very rapidly and, depending upon these large bodies of land to secure the State's grants, great bodies of land have been settled up and thus it becomes a very difficult manner for the State to secure its grants.

Another line of cases which has caused us almost endless work is the series of cases known as the Marble Creek cases, involving land in Township 44 North, Ranges 2 and3 East, B. M. The land embraced in these cases was applied for under the act above referred to, but the Commissioner of the General Land Office failed to notify his local land officers of the State's prior right and such local land officers, having no notice of the State's right, permitted entrymen to file homesteads upon the land. When the plats of survey were filed, the State filed its lists covering the land, relying upon its preference right, and its position—after a very hard fought and bitter contest—was sustained by the Interior Department. It will be seen at a glance that injustice had been done the settlers on this tract of land, who, in good faith, had entered the land under the homestead law and spent their time and money in improving the land. The Tenth Session of the Legislature, realizing the equities of some of these settlers, appointed a committee, which went upon the

land and reported upon the bona fides of the settlers and reported that a large portion of the land should be relinquished for the benefit of the settlers whom they found to be in absolute good faith.

Before the Land Board had opportunity to even investigate the report of the legislative commission, proceedings were instituted in the Supreme Court by William Balderston, a taxpayer, asking for an injunction against the Land Board to prevent them from relinquishing any of the land. The settlers involved were given opportunity to be heard by their counsel, and the State Land Board was represented in the case by this office. The Supreme Court, in the case of *Balderston vs. Brady* (108 Pac. 742), decided that the State Land Board could not relinquish land involved in the case and held that the only method by which the title could be divested from the State was at public auction at not less than $10.00 per acre.

During the course of its opinion in this case, the Supreme Court, replying to oral arguments made by attorneys for the settlers, referred to the State's title to sections 16 and 36 wherever found and, in discussion of such title, used language which, wilfully or otherwise, has been misconstrued by every one contesting the State since the date of the decision. Immediately the decision was promulgated, this office asked for a modification of the language of the decision concerning the State's title to sections 16 and 36 in every township, and a subsequent decision was rendered, making the court's position more plain.

In order to understand the problem presented, it would be necessary to say that, since the inception of Statehood, the Land Board of this State has conceived the law to be

that, where sections 16 and 36 are lost to the State by reason of being included in Indian reservations, forest reserves, or otherwise, the State had a right to select lieu lands in place thereof. This policy has been consistently followed. In a great many cases, through protraction or otherwise, the State has ascertained that great numbers of its sections 16 and 36 were in forest reserves, were isolated and comparatively worthless. Such sections have been designated "lost," and lieu lands selected in place thereof in accessible places, to the great financial benefit of the State. This office, therefore, conceived that the decision, holding that sections 16 and 36 passed to the State at the date of the grant, absolutely worked a great hardship upon the State, and this was the interpretation which parties adverse to the State sought to place upon the decision of our Supreme Court in the case of *Balderston vs. Brady, Supra.*

Before motion was made to modify the language of the Court in this case, we were served by the Department of the Interior with a notice to show cause why the land selected in the Marble Creek District, heretofore referred to, should not be relinquished under the language of our Supreme Court in the *Balderston vs. Brady* case. That is because a great portion of the base used in the selection of this land was 16 and 36 in the Coeur d'Alene Indian reservation and in forest reserves.

We have answered by brief, very thoroughly, the order to show cause, but have received no decision thereon to this date. This is another matter which, if decided adversely to the State, must be threshed out in the Federal Courts of the land.

These two lines of cases and the preparation of the ex-

haustive briefs thereon have involved this office in tremendous work aside from its regular duties.

The Local Option Law, passed by the last session of the Legislature, has been before our Supreme Court in numerous cases and it has devolved upon this office to protect the law against the assaults of all comers. To date we have been successful, but consideration of these cases has required very close attention.

The Direct Primary Law, also passed by the last session of the Legislature, was in its formative stages. It was not understood; it was new and untried; many of its provisions are not yet thoroughly understood by the voters. The law has been before the Supreme Court and many of its obscure provisions have been clarified, but it has required the constant attention of one man in the office to answer questions concerning the Direct Primary Law and the Local Option Law. I shall make some recommendations concerning needed changes in both of these laws at a later stage of my report.

Many other cases of State wide importance have been before the Supreme Court during my term of office, and will receive such consideation as I deem they merit at a later stage of this report.

I have kept the work of the office within the appropriation prescribed by the Legislature, but have not been able to purchase needed furniture and supplies which the growing work of the office requires.

I desire to express my appreciation of the courtesy extended to this office by the members of the Legislature, the Supreme Court and District Courts, the various State Officers and the County Attorneys of the various counties. Because of the courteous treatment received from all we

have had dealings with, the work of the Attorney General's office has been greatly facilitated and pleasure added to what would otherwise have been mere drudgery in the performance of official duties.

RECOMMENDATIONS.

I apprehend that the heads of the various State departments will make recommendations and suggestions concerning needed laws for the benefit of their various departments, or changes in policy which should be adopted to facilitate the transaction of the State's business. I shall, therefore, refer to only a few changes in the law which I deem of paramount importance.

The land business of the State is the greatest business in which the State is engaged. It is a tremendously great institution. The effect of mishandling this business will redound to the State's detriment not only at present but for generations to come.

Under our constitution the land business of the State is vested in four (4) executive officers of the State, the Governor, the Attorney General, the Superintendent of Public Instruction and the Secretary of State. Under a recent amendment submitted, the State Auditor has been added to this list, making five (5) members of the State Land Board. All the business of the State concerning its lands must be acted upon directly by this board. I believe a moment's consideration will convince any one that this system of handling the State's most important business is inadequate and unbusinesslike.

Matters arise concerning the State's land business which should receive immediate attention, but they must be deferred until such time as the majority of the board can be

gotten together. In the meantime, the members of the board are attending to other official duties and may not be within reach. No important action can be taken without a meeting of this board.

The statute provides that the regular meetings of the board should be held on the second Wednesday of each month. The actual facts are that the State Land Board should meet every day, and it does meet day after day when a quorum can be secured. But great time is wasted in trying to get the attendance of members when pressing matters require immediate attention. The business of the office that should be taken up day by day and disposed of is delayed days and weeks, through no fault of the members of the board, who are compelled to give attention to other matters.

There are now in the State of Idaho 42 Carey Act projects, involving 2,630,833.43 acres of land. Thousands of settlers have come from various parts of the United States to make their homes among us. It has been the constant desire and effort of the State Land Board to look after their interests and protect them in every possible way, and this has been done as nearly as it can be done under existing conditions and with the antiquated method of doing business which the constitution of this State prescribes in matters concerning the land business of the State.

I have tried to detail some of the difficulties that arise concerning the business of this great board, and I believe that steps should be taken by this Legislature to bring about much needed changes in the method of administering the State's land business.

What has been said concerning the State Land Board might be said with almost equal force concerning the State

Board of Equalization. This board is created by the constitution, but the Legislature should give it more powers concerning especially the taxation of franchises, property of express companies, sleeping car companies and independent freight car companies doing business in this State, who, under existing law, practically escape taxation.

The State Board of Equalization is composed of executive officers of the State who are given, by statute, two (2) weeks in which to make assessments of all railroads, telegraph and telephone lines within the State and to equalize all other property as between classes and between counties. They are prohibited from beginning until all the reports of abstracts are in from the various counties, and, as a matter of practical experience, the board usually has five or six days in which to do this tremendous work. They must necessarily, at the same time, attend to their other official duties.

Considering the tremendous importance of this work, this method of handling it is simply farcical. The powers of this board should be enlarged both with regard to its duties and with regard to the methods it may employ in its duty of equalizing property and fixing the rate on corporations over which it has exclusive jurisdiction.

The State Board of Equalization should be empowered to employ an agent to visit such counties as it may decide upon, and report to the board such information as it may desire for use at the meeting of the board, and the board should be subject to a meeting at the call of the chairman at any time.

Concerning our revenue laws generally, I believe if the Legislature could devise a plan for enforcing them, that we have as good a set of revenue laws as any of the West-

ern States. The fault lies not in the law but in its enforcement.

Great bodies of the State's land are included within Carey Act projects, and it is necessary for the State to take steps to procure water for these lands. Under our statute an appropriator has nine years within which to put the water to a beneficial use and, in case this is not done within the prescribed time, the appropriator loses control of the water. Cases arise, therefore, where water has been contracted for State land but where the land, under our constitution, has not passed to the settler within the time allowed the irrigation company to put the water to a beneficial use. For the protection of this State land, therefore, it is necessary that an act be passed which would permit a greater time for the reclamation of State land than is allowed for private lands.

The school laws of this State are in a most deplorable shape by reason of the practice that has been engaged in of patching instead of substituting new laws. I believe the entire State school laws should be recodified. Under present conditions the law has become so conflicting as to be almost beyond interpretation.

Many minor changes should be made in the Direct Primary Law. Its basic principles are right, but some of the details of the law should be polished off and changed so as to bring about, in a fuller sense, that which the law attempts to accomplish. I would recommend that the second choice provision of the law be abrogated; that the primary elections be held earlier in the year; that a definite time should be fixed in the law when the expenses of candidates, for which an accounting must be made, should begin to run, and that a longer period of time than that

now allowed by the law should be given candidates at the primaries in which to file their expense accounts.

This law should be further amended with regard to the matter of selecting the party organization. Under the present arrangement, the party organization is selected by the candidates. I believe this results in personal friends of various candidates being put on the organization without regard to the needs of the party itself. I believe, further, that the law would be strengthened by providing that representation in the platform convention under the law should be proportionate to the party vote at the previous election. I believe also that the purpose of the law would be better subserved by a plan which would compel partisans to vote their party tickets at the primary. Any one of the number of plans adopted and used in other States would bring about this result.

In connection with this matter, I desire to call attention to the fact that, under the laws of this State, slander is not a crime. I believe that this oversight should be rectified by the present Legislature; that men should be made to understand that they are criminally responsible for slanders committed upon political stumps or otherwise. Such a law as I suggest would have a very salutary effect and, I believe, would purge our elections of one of their most hateful practices—that of slandering candidates without justification.

In the case of *State vs. Mallon*, (16 Idaho 737), the law of the State of Idaho, prescribing punishment for convicts escaping from the State Penitentiary, was held unconstitutional, and there is now no law on our books making escape from this institution an offense. For the

good of the discipline of the institution, the Legislature should supply this deficiency at once.

A casual visitor at the State Penitentiary is struck with the idleness which he finds among the prisoners there. These idle hands and idle brains have naught to do but plan desperate deeds, brood over their alleged wrongs and debase and degrade themselves personally. Provision should be made for the employment of the convicts of the penitentiary on the public roads of our State, or some other means should be devised for the employment of these idle men.

The indeterminate sentence law has been in force in the State for two years and has, I believe, justified its existence. It must be given a more thorough trial and, I believe, will vindicate those who consider it in the nature of a reform measure.

The District Judges who try felony cases in the first instance are, of course, familiar with all the evidence adduced at the trial; they are given opportunity to study the demeanor of the defendant and all the circumstances surrounding every criminal case which mitigate or add to the seriousness of the offense. I believe, therefore, that the District Judges should be empowered to fix the minimum sentence under the indeterminate sentence law. In this way they could, in a measure, fix the penalty according to the seriousness of the crime.

The County Commissioners of the various counties should be given additional power in the matter of securing evidence in cases of great public concern and a provision should be made for the seizure and confiscation, under well defined circumstances and with proper limitations,

of intoxicating liquor which is held obviously for illegal purposes.

Provision should be made by law authorizing the Attorney General, the Governor, or the Legislature, in cases of great public moment, to submit to the Supreme Court of the State, questions for decision. I am fully aware that the Supreme Court is almost overcome with work, but I believe that the public good requires the measure to which I have just referred, without the necessity for indulging in an obvious subterfuge in order to get test cases before the Supreme Court.

Under existing law there is no provision made for recording the clear list, which is the only patent the State receives from the United States Government for its selected lands, in the land district of the county in which such land is located, and hence no notice is given to the public of the ownership of the State of large tracts of land. This condition should be remedied by statute authorizing the County Auditor to record, without charge, clear lists of land owned by the State within the county.

The recent great forest fires in the northern part of this State have exhibited the inadequacy in many respects of our present fire patrol law. I believe that two things are necessary in order to make this law at all effective.

First: A separate appropriation should be made for fire patrol, in order that the money thus appropriated could be used for no other purpose and in order to insure a fund whenever an emergency should arise;

Second: Provision should be made for the expenditure of this money before the services are rendered by the fire fighter. When forest fires are raging it is necessary to

employ men immediately, and the earlier men are gotten in the field, the more easily the fire is handled. Men can not be hired unless money is advanced to them, and, under the present arrangement where they must wait weeks for their pay, it becomes impossible for the State to employ men as readily as it should be done in order to meet emergencies of this nature.

STATEMENT OF CASES ARGUED IN THE SUPREME COURT OF THE STATE—CRIMINAL APPEALS.

State vs. McGreevy (105 Pac. 1047)—The defendant was convicted in the District Court of the Seventh Judicial District, in and for Canyon County, of the crime of manslaughter, and sentenced to a term of three (3) years. The decision of the lower court was reversed.

State vs. Fleming (106 Pac. 305)—The defendant was convicted in the District Court of the Fourth Judicial District, in and for Lincoln County, of the crime of murder of the first degree, and was sentenced to death. The decision of the District Court was affirmed.

State vs. Thos. Marren (107 Pac. 993)—The defendant was convicted in the District Court of the Fourth Judicial District, in and for Blaine County, of the crime of second degree murder, and was sentenced to a term of 18 years in the State Penitentiary. The decision of the lower court was affirmed.

State vs. Henzell (107 Pac. 67)—The defendant was convicted in the District Court of the Second Judicial District, in and for Nez Perce County, of the crime of unlawful sale of grain by warehouseman, and was sentenced to

a term of from one to five years in the State Penitentiary. The decision of the lower court was affirmed.

State vs. John Lockhart (not reported)—The defendant was convicted in the District Court of the First Judicial District, in and for Shoshone County, of the crime of murder in the second degree. Judgment of lower court affirmed.

State vs. Fred Gruber (not reported)—The defendant was convicted in the District Court of the First Judicial District, in and for Shoshone County, of the crime of murder in the first degree, and was sentenced to death. Notice of appeal has been served and the case is now pending before the Supreme Court.

State vs. Fred Harris (not reported)—The defendant was convicted in the District Court of the Third Judicial District, in and for Ada County, of the crime of burglary with explosives, and sentenced to a term of from ten to twenty-five years in the State Penitentiary. Judgment of the lower court was affirmed.

State vs. William Fuller (not reported)—The defendant was convicted in the District Court of the Seventh Judicial District, in and for Canyon County, of the crime of grand larceny, and sentenced to a term of twelve years in the State Penitentiary. The judgment of the lower court was affirmed.

State vs. Marshall Hammock (not reported)—The defendant was convicted in the District Court of the Seventh Judicial District, in and for Washington County, of the crime of rape, and sentenced to from five to twenty years in the State Penitentiary. The judgment was sustained.

State vs. Martin Henderson (not reported)—The de-

fendant was convicted in the District Court of the Fifth Judicial District, in and for Oneida County, of the crime of rape, and was sentenced to five years in the State Penitentiary. The case is pending before the Supreme Court.

State vs. C. E. Schmitz (not reported)—The defendant was convicted in the District Court of the Seventh Judicial District, in and for Washington County, of the crime of violation of the Local Option Law, and was sentenced to pay a fine of three hundred ($300.00) dollars. The case is now pending on appeal before the Supreme Court.

State vs. Fred W. Jordan (not reported)—The defendant was convicted in the District Court of the Fourth Judicial District, in and for Lincoln County, of the crime of violation of the Local Option Law, and was sentenced to pay a fine of five hundred ($500.00) dollars, and three (3) months in the county jail. The case is now pending on appeal before the Supreme Court.

CIVIL APPEALS.

A. S. Whiteway vs. State of Idaho (Not reported)—Action for recommendatory decision of the Supreme Court for extra work alleged to have been performed by the contractor upon the State wagon road constructed by the Intermountain Wagon Road Commission from a point near Warren to the Werdenhoff Mine, in the vicinity of Payette Lakes. The matter was referred to referee for report to the Supreme Court. Evidence has been taken, the referee has not yet reported.

Thomas & Faris vs. State of Idaho (100 Pac. 761)—This is an action in the Supreme Court for a recommenda-

tory decision against the Board of Trustees of the Albion State Normal School, said claims arising out of a contract between the board and the plaintiff. The plaintiff obtained judgment in the lower court; presented the said judgment to the Board of Examiners for the State of Idaho, who disallowed the same on the ground that the bill represented thereby had not been allowed by the Board of Trustees. The action in the Supreme Court was based upon the judgment of the lower court and the action of the Board of Examiners in refusing the claim. The State's position was that the Board of Trustees of the Albion State Normal, being an adjunct, or arm, of the State, could not be sued in the District Court, and that the action, in fact, was one against the State of Idaho. This position was sustained by the Supreme Court, and the case dismissed.

State vs. Bruce (102 Pac. 831)—This case was originally tried in the District Court of the Third Judicial District, in and for Ada County, upon a petition presented, asking that the State be declared a preference creditor of said defunct Capital State Bank. The petition was granted in part. An appeal was taken to the Supreme Court by the State.

The facts were that the Treasurer of the State of Idaho had deposited with the Capital State Bank certain State funds, contrary to law, and the Supreme Court held, on appeal, that, under these circumstances, the State of Idaho was a preferred creditor and that its claims should be allowed before the general claims against the bank.

Idaho Power and Transportation Co. vs. Jas. Stephenson, Jr., State Engineer (101 Pac. 821)—In this case a writ of mandate was asked for against the State Engineer

to compel him to issue to the corporation plaintiff a final license for the use of certain waters of the Snake River. The ground of contention was that, inasmuch as the plaintiff had no works of diversion and its power plant was constructed on the bed of the stream, no fee should be paid the State Engineer, required under section 3263 of the Revised Codes; in other words, that the plaintiff was not an appropriator within the meaning of the law, but was entitled to stand before the court as a common law riparian presented, there was a diversion within the meaning of owner. The court held in this case that, under the facts our law (Sec. 3252, Revised Codes), and that one using the State waters and desiring the protection of the State statutes thereon was compelled to comply with the provisions of the law.

The petition was, therefore, dismissed on motion of the State.

Edwin McBee vs. Jas. H. Brady (100 Pac. 97)—This was an original proceeding brought in the Supreme Court for mandamus to compel the Governor of the State to call an election in accordance with the constitutional amendment adopted by the voters of this State at the general election held on the 3d day of November, 1908. The constitutional amendment completely remodelled our system of courts. The Supreme Court held in this case that the constitutional amendment referred to was not properly submitted, and the writ was quashed.

Stephen Utter vs. D. H. Moseley, et al. (100 Pac. 1058)—This was an action to test the constitutionality of an amendment passed by the Legislature of 1907 and voted upon by the electors of the State at the 1908 election, providing that County Officers might hire extra and addi-

tional assistance, and arose out of the *McBee case, Supra.* The action was instituted to test the question of whether both amendments fell together. It wes held by the court that the amendment herein referred to survived and was valid and enforcible.

Paul H. Walker et al. vs. Elmore County (102 Pac. 389)—This was an appeal from the order of the County commissioners of Elmore County, Idaho, allowing the bill for services of a certain water master in that county. The decision of the District Court was reversed.

Mackay Irrigation Company, Ltd., vs. Jas. Stephenson, Jr., State Engineer (102 Pac. 365)—This was an application for a writ of prohibition directed to the State Engineer to enjoin his proceedings to hear and determine a contest instituted under the provisions of the Irrigation Act of 1909 for the cancellation of a water permit, attacking the constitutionality of said act. The Supreme Court sustained the law and, on motion, the application was dismissed.

Lewis vs. Brady et al. (104 Pac. 900)—This was an action to compel the State Treasurer and other State Officers to issue bonds, in compliance with the act contained in the Idaho Session Laws of 1909, page 407, for the purpose of erecting buildings at the State University. In this case, for the first time in the history of the State, there came before the Supreme Court, the question of whether the Legislature had a right to pass a bonding act providing for the issuance of bonds at some future date when, at the time of the passage of the act, such bonds could not be issued without exceeding the bonded debt limitation prescribed by the constitution.

It was held in that case that the Legislature could not

use, as a basis for issuing bonds, assessed valuations that might be fixed at some future period. The bonding acts referred to were held unconstitutional and void. The writ was quashed.

State of Idaho vs. Butterworth Live Stock Company (106 Pac. 455)—This was an action instituted to test the constitutionality of the grazing fee law passed by the Tenth Session of the Legislature, whereby a grazing fee was prescribed for sheep coming into the State of Idaho from other States or Territories. The court in this case held the said act to be an interference with interstate commerce, and held the act unconstitutional and void.

Thomas Gillesby vs. Board of County Commissioners of Canyon County (107 Pac. 71)—This was an act tried first in the District Court of Canyon County and appealed later to the Supreme Court, wherein it was sought to test the constitutionality of the Local Option Law passed by the Tenth Session of the Legislature. The decision of the Supreme Court sustained the constitutionality of the law.

Wm. Balderston vs. State Land Board (108 Pac. 742)—This was an action brought against the State Land Board to enjoin them from acting upon the report of the Legislative Committee of the Tenth Session with reference to certain lands in the northern part of the State of Idaho, known as the Marble Creek lands. The case has been discussed at some length in an earlier page of this report. The action of the court enjoined the board from acting upon said report.

Nims vs. Gilmore (107 Pac. 79)—This was an action instituted to enjoin the officers of Idaho County from enforcing the Local Option Law in conformity with an election held immediately previous to the institution of the

case. It was sought on the ground that the election was illegal, to enjoin its enforcements, various technical grounds were urged to sustain this position, and the Supreme Court, in its decision of the case, refused to grant the injunction.

Village of Ilo vs. W. J. Ramsey et al. (not reported)—This action was an appeal from the District Court of Nez Perce County, involving the validity of the incorporation of the Village of Ilo. The Supreme Court's decision was in favor of the validity of such incorporation.

J. W. Blake vs. J. S. Jacks, Assessor (108 Pac. 534)—This case involved the construction of a statute relating to the apportioning of debt upon a county division. A portion of Shoshone County, by an act of the Legislature of 1908, and a vote of the inhabitants thereof, was detached from Shoshone County and annexed to Nez Perce County. The action was brought to determine whether or not a special tax could be levied against the property of this territory to pay the interest on bonds issued by Nez Perce County prior to such annexation. The Supreme Court held that such territory so annexed was liable on such debt.

Chas. Mix vs. Wing et al. (not reported)—This was an action in mandate brought originally in the District Court of Nez Perce County to compel the County Commissioners of Nez Perce County to issue a liquor license to the plaintiff. The point relied upon was that the City of Lewiston, for which place the license was asked, existing under a special charter, was not subject to the provisions of the Local Option Law, and that cities of this nature, under our law, are given the right to regulate the liquor traffic within their boundaries. The decision in this case has

just been rendered and is as yet unreported. The decision holds that the Local Option Law is general and applies to all the territory within the State and to all the cities of the State, whether incorporated under general or special law.

Jas. P. McGrane vs. County of Nez Perce (not reported)—This was an action instituted to test the validity of the Local Option Election held in Nez Perce County. The Auditor, in preparing the ballots for such election, numbered the ballots as well as the stubbs, and the contention of counsel for the plaintiff is that this violated the secrecy of the ballot and invalidated the said election. The recent decision of the Supreme Court in this case holds the election valid.

Moscow Hardware Company vs. Regents of the University (not reported). *First National Bank of Moscow vs. Regents of the University* (not reported)—In these cases contracts had been let for the construction of the foundation of the administration building and the agricultural building at the University of Idaho.

On the strength of obtaining the contracts, the contractor purchased considerable material and received a considerable amount of credit at the bank above named for the purpose of carrying on his contract. On the administration building contract the contractor could not furnish a sufficient bond and his contract was cancelled and, in the First National Bank case, the contractor absconded without paying the bank the money loaned him.

Action is instituted to compel the State to pay the bank for money loaned the contractor and to meet the bills of material men and laborers on these buildings. The cases have been referred to a referee and testimony taken, but

the report of the referee has not yet been made to the Supreme Court.

Chas. Pendleton vs. Robert Lansdon, Secretary of State (not reported)—This was an action in mandate to compel the Secretary of State to certify the Socialist ticket to the various County Auditors. The writ was granted.

E. Vadney vs. State Board of Medical Examiners (not reported)—This was an action in mandate to compel the State Board of Examiners to issue a certificate to petitioner to practice medicine and surgery in the State of Idaho. The case is pending on demurrer before the Supreme Court at the writing of this report.

Wm. Binkley vs. W. N. Stevens, Game Warden (102 Pac. 10)—This was an action brought by certain individuals who have been found guilty of infractions of game laws for return to them of certain elk scalps taken in violation of the game law, said scalps having been confiscated by the warden. Judgment was rendered in favor of the Game Warden.

Gardner G. Adams vs. Robt. Lansdon (not reported)—This was a friendly suit to test the validity of the provisions of the Direct Primary Law, especially the second choice provision and provision with regard to expenditures of candidates and the method of nominating precinct officers. The Supreme Court, in its decision, held the second choice provision mandatory and illuminated many obscure provisions of the law, so that the law could be uniformly applied in all counties.

Riley Atkinson vs. County Commissioners of Ada County (108 Pac. 1046)—This was an action in mandate against the County Commissioners of Ada County to compel them to order an election under the statute of 1909,

providing for the organization of railroad and highway districts. The Supreme Court, in its decision of this case, held that the method adopted in this measure was indirectly attempting to saddle the debts of a corporation upon the State and the municipalities thereof, and held the act, for this reason, unconstitutional and void.

State vs. Wm. Wall (not reported).

State vs. Cambridge Club, a Corporation (not reported).

State vs. T. S. Youngblood (not reported).

State vs. Fred Roe (not reported).

State vs. John Hendel (not reported).

State vs. Clara Mason (not reported).

These were cases instituted in Washington County to collect license money of those who had been conducting liquor businesses in that county in violation of the State law.

The Supreme Court held that, inasmuch as they conducted the business, although irregularly and unlawfully, they should be held for the regular State and county license, and civil judgment was accordingly rendered against them for the amount of such license.

State vs. E. M. Hoover, (not reported)—This was a friendly suit instituted to test the title which the State, under the constitution, can confer upon those purchasing land upon which timber has been previously sold, pending the time granted the purchaser of the timber for the removal of such timber; and, secondly, whether more than one hundred sixty (160) acres of land, other than school land or university land, within the meaning of the law, can be sold to any one person in any one year, and whether to exceed twenty-five (25) sections of State land, other than school land or university land, may be sold by the

State Land Board in one year. This case is pending in the Supreme Court on appeal at the time of the writing of this report.

HABEAS CORPUS CASES IN THE SUPREME AND DISTRICT COURTS.

Ira Alzamon Lucas vs. State of Idaho (104 Pac. 657)—Petitioner was released on account of invalidity of sentence.

E. F. Walton vs. State of Idaho (104 Pac. 659)—Petitioner was released on account of invalidity of sentence.

John Whittle vs. State of Idaho (not reported).

J. A. Cameron vs. State of Idaho (not reported).

Joseph Chase vs. State of Idaho (not reported).

Wm. Graham vs. State of Idaho (not reported)

Harry O'Neil vs. State of Idaho (not reported).

Frank Martin vs. State of Idaho (not reported).

David Scott vs. State of Idaho (not reported).

These were cases where, through a misconstruction of the Indeterminate Sentence Law of this State, the District Judges applied indeterminate sentence to defendants who should have received a determinate sentence under the old law. The Supreme Court, having held that this sentence was good only to the minimum of the sentence, imposed by the District Court, the above prisoners were released on habeas corpus as soon as such minimum time had been served in the penitentiary.

State vs. Hull (not reported)—This was an action to test the applicability of the Sunday Closing Law to conduct a scenic railway on Sunday within the State of Idaho. It was held that the law did not apply to such amusement.

State vs. Bosner (not reported)—This was an action to

test the applicability of the Sunday Closing Law to conduct a moving picture show on Sunday within the State of Idaho. It was held by the Supreme Court that a Sunday Closing Law prohibited such amusement.

State vs. Jacob Lockman (not reported)—This was an action to test the applicability of the Local Option Law to the sale of "near beer." The Supreme Court held that "near beer" was prohibited under the statute.

State vs. Mallon (102 Pac. 374)—This was an action to test the constitutionality of the law punishing escapes from the State Penitentiary. The Supreme Court decision held the said law unconstitutional.

State vs. Elise Small (not reported)—For a minor offense, the Probation Officers of Canyon County, Idaho, sentenced one Small to the Industrial School at St. Anthony, but, before removing him to the said school, the officer left the boy in charge of an agent of the court, without committing him to jail. The boy's sister, the defendant herein, removed him from the jurisdiction of the court and was arrested on a charge of assisting an escape. The Supreme Court held the law inapplicable and discharged the petitioner.

MISCELLANEOUS CASES.

In Re Henry (99 Pac. 1054)—By direction of the Supreme Court, disbarment proceedings were instituted against Mr. Henry in the Supreme Court on the ground of his having been convicted of an offense involving moral turpitude. The defendant was disbarred.

State vs. Adiago (not reported)—An action in trespass against the defendant for herding sheep upon land which had been leased to another party by the State. The Dis-

trict Court of Ada County held the law (Sec. 1578, Revised Codes) inapplicable and dismissed the case.

State of Idaho vs. J. W. Herline et al. (not reported)—This was a foreclosure proceeding instituted by the State upon a mortgage given to it to secure a farm loan. The mortgage was foreclosed by the District Court of Canyon County, and at the time of the writing of this report is in process of settlement.

FEDERAL CASES.

United States vs. State of Idaho (not reported)—This was an action in condemnation instituted by the United States to condemn certain land in Bingham and Bannock Counties in Idaho desired for reservoir purposes. The State could not agree with the Federal Government upon a fair price for the land, and the State, on trial, recovered judgment for ten thousand eight hundred seventy-five ($10,875.00) dollars against the Federal Government—a sum far in excess of that offered by the Government.

United States vs. Bonners Ferry Lumber Company (not reported)—This was an action instituted by the United States against the Bonners Ferry Lumber Company to recover money for timber unlawfully taken from unsurveyed school sections. These school sections were leased to the said Bonners Ferry Lumber Company for the purpose of cutting timber and in the said case, the United States contends, that, inasmuch as said section in question had not been surveyed by the United States Government, the title would remain in the United States until surveyed, and that any lease by the State of Idaho would be unlawful. In this case, the State contends that it has a sufficient title in such school sections to warrant a lease. Case is now pending before the Circuit Court on demurrer.

LAND CASES.

State vs. Florence Kent. Land in Twp. 53 N., R. 6 W. State selections held intact.

State vs. Joseph Dunn. Land in Twp. 61 N., R. 2 W. State selections held intact.

State vs. Geo. A. Read. Land in Twp. 53 N., R. 5 W. State selections held intact.

State vs. Burgess. Land in Twp. 61 N., R. 2 W. State selections held intact.

State vs. Routhier. Land in Twp. 61 N., R. 2 W. State selections held intact.

State vs. William Wallace. Land in Twp. 61 N., R. 2 W. State selections held intact.

Jones vs. Ewing and the State of Idaho. Land in Twp. 9 N., R. 5 E. Pending before the Secretary of the Interior.

United States vs. State of Idaho (mineral protest). Land in Twp. 49 N., R. 2 E., Twp. 52 N., R. 5 W., Twp. 56 N., R. 1 W. Lands held non-mineral in character.

United States vs. State of Idaho. Land in Twp. 56 N., R. 1 E. Secretary of Interior rejected State selections.

Eugene Moliter vs. State of Idaho. Land in Twp. 31 N., R. 4 W. Relinquishment by Moliter filed.

Mattie Barton vs. State of Idaho. Land in Twp. 31 N., R. 4 W. Pending on appeal before Commissioner of General Land Office.

Maurice O'Brien vs. State of Idaho. Land in Twp. 60 N., R. 2 W. Protest filed by Forestry Service. State awaiting result of Government contest.

Geo. C. Degity vs. State of Idaho. Land in Twp. 20 N., R. 4 W. Passed and no protest filed.

Richard L. Owen vs. State of Idaho. Land in Twp. 32 N., R. 4 E. Passed and no protest filed.

Chas. L. Lester vs. State of Idaho. Land in Twp. 49 N., R. 3 W. Passed and no protest filed.

Mary Kalsch vs. State of Idaho. Land in Twp. 49 N., R. 1 W. Motion to reopen case. Entry cancelled pending before commission.

Henry Schlicht vs. State of Idaho. Land in Twp. 55 N., R. 3 E. Passed and no protest filed.

John N. Atkins vs. State of Idaho. Land in Twp. 5 N., R. 4 W. Passed and no protest filed.

Geo. F. Beckman vs. State of Idaho. Land in Twp. 33 N., R. 3 W. Pending.

Northern Pacific Railroad Company vs. State of Idaho. Land in Twp. 5 S., R. 10 E. Pending.

Amelia Garcecht et al. vs. State of Idaho (mineral protest). Land in Twp. 5 N., R. 5 E. Lands held mineral in character and protest allowed.

Frank E. Grice vs. State of Idaho. Land in Twp. 42 N., R. 3 E. Pending.

John E. Drake, for Heirs of C. A. Everson, vs. Northern Pacific and State of Idaho. Land in Coeur d'Alene Land District. Pending.

John B. Schneider vs. State of Idaho. Land in Twp. 43 N., R. 4 W. State selections held intact.

Hazel Broadwell vs. State of Idaho. Land in Twp. 44 N., R. 4 E. On recommendation of Field Agent motion taken.

Northern Pacific vs. State of Idaho. Land in Twp. 43 N., R. 4 E. Pending.

Arthur E. Ford vs. State of Idaho. Land in Twp. 43 N., Range 4 E. Pending before Commissioner of General Land Office.

Daniel R. Lester vs. State of Idaho. Land in Twp. 44 N., R. 4 E. Pending before Commissioner of General Land Office.

Horace L. Zorn vs. State of Idaho. Land in Twp. 44 N., R. 4 E. Pending before Commissioner of General Land Office.

State of Idaho vs. Northern Pacific. Land in Twp. 41 and 42 N., R. 4 E.; 41 and 42 N., R. 5 E., and Twp. 42 N., R. 3 E. Pending before Secretary of Interior.

Chas. P. Cooper vs. State of Idaho. Land in Twp. 43 N., R. 4 E. Pending before Commissioner of General Land Office.

State of Idaho vs. Lon E. Bishop. Land in Twp. 41 N., R. 5 E. Passed, no protest filed.

State of Idaho vs. Harry Torkelsen. Land in Twp. 40 N., R. 4 W. Passed, no protest filed.

State of Idaho vs. Daisy Torkelsen. Land in Twp. 40 N., R. 4 W. Passed, no protest filed.

State of Idaho vs. Jack Fino. Land in Twp. 41 N., R. 5 W. Passed, no protest filed.

State of Idaho vs. Dixon Robinson. Land in Twp. 38 N., R. 3 E. On recommendation of Field Agent no action taken.

State of Idaho vs. Susanha Flora. Land in Twp. 8 S., R. 6 W. Homestead application pending.

Martha W. Blanchard vs. M. Ray Blanchard. Involving ownership of an island in Snake River in Twp. 5 S., R. 4 E. No action required.

State of Idaho vs. John P. Kloweno. Land in Twp. 44 N., R. 2 E. Passed, no protest filed.

United States vs. State of Idaho (mineral protest). Land in Twp. 5 N., R. 6 E.; Twp. 6 N., R. 5 E.; Twp. 5 N., R. 5 E. Pending before Register and Receiver.

State of Idaho vs. John P. Vollmer (mineral protest). Land in Twp. 40 N., R. 1 E. Entry cancelled as to conflict with section 16.

State of Idaho vs. Joshua Peterkin. Land in Twp. 56 N., R. 5 W. Pending before Register and Receiver.

Northern Pacific vs. State of Idaho. Land in Twp. 43 N., R. 4 E. Pending.

State of Idaho vs. Peter Severson. Land in Twp. 44 N., R. 2 E. State selections held intact.

State of Idaho vs. E. E. Steele. Land in Coeur d'Alene Land District. Petition requesting reopening of cases involving lists 1-16 denied by Department of Interior.

State of Idaho vs. J. F. Irons and L. A. Irons. Land in Twp. 37 N., R. 1 E. Passed by State.

State of Idaho vs. Freeman Collins. Land in Twp. 41 N., R. 5 E. Pending before Register and Receiver.

State of Idaho vs. Lawson W. Dewey. Land in Twp. 44 N., R. 2 E. No action taken on recommendation of Field Agent.

United States vs. State of Idaho. Land in Twp. 5 N., R. 6 E. Pending before Register and Receiver.

State of Idaho vs. Lewis P. Dalberg. Land in Twp. 44 N., R. 3 E. Pending before Register and Receiver.

Joseph Poirer vs. State of Idaho. Land in Twp. 52 N., R. 5 W. Pending before Commissioner of the General Land Office.

John O. Bender et al. vs. State of Idaho (mineral protest). Land in Twp. 33 N., R. 5 E. Pending before Secretary of Interior.

United States vs. State of Idaho. Land in Twp. 4 S., R. 40 E.; Twp. 5 S., R. 41 E.; Twp. 6 S., R. 42 E.; Twp. 6 S., R. 41 E. Decision in favor of the State.

Lincoln Flanagan vs. State of Idaho. Land in Twp. 44 N., R. 2 E. Pending.

Fredrick Schafer vs. State of Idaho. Land in Twp. 44 N., R. 2 E. Pending.

United States vs. Bonners Ferry Lumber Company. Unsurveyed sections 16 and 36 in forest reserves. Pending.

The following cases, involving lands in Twps. 41 and 42 N., R. 4 E.; 41 and 42 N., R. 5 E., and 42 N., R. 3 E. are now pending on appeal, involving the validity of State selections, before the Secretary of Interior:

State vs. Edward Frei.
State vs. Isaac F. Roberts.
State vs. Chas. D. McGregor.
State vs. Herbert Clark.
State vs. George Nifong.
State vs. Fred Gregory.
State vs. James A. W. Cox.
State vs. Thomas J. Braum.
State vs. John Bartholomew.
State vs. Alfred Gustavel.
State vs. Alfred Myers.
State vs. Maurice Benedict.
State vs. Pearl Sugars.
State vs. Thomas Currie.
State vs. Louis Couture.
State vs. Hubert I. Porter.
State vs. Wm. F. Carter.
State vs. Frank Henemlotter.
State vs. Wm. K. Jameson.
State vs. Robert Hughes.
State vs. James M. Mannon.

State vs. A. J. Courtemanche.
State vs. Frank Buel.
State vs. Frank Buel.
State vs. Alfred Herrman.
State vs. Mary Graves.
State vs. W. K. Jamison.
State vs. William Mitchell.
State vs. Henry Herrman.
State vs. Richard Schubert.

The following cases, involving lands in Twps. 41 and 42 N., R. 4 E.; 41 and 42 N., R 5 E., and 42 N., R. 3 E., involving the validity of State selections, are now pending on appeal before the Commissioner of the General Land Office:

State vs. Louis C. Boehl.
State vs. Wallace C. Roberson.
State vs. Frank O. Daniels.
State vs. Geo. A. McDonald.
State vs. John Landers.
State vs. Sol Ward.
State vs. Glen Avery.
State vs. John B. Ricketts.
State vs. John Vient.
State vs. Louis E. DesVoignes.
State vs. James F. Brown.
State vs. Ina B. Fertig.
State vs. Elsie Watkins.
State vs. Albert H. Farrell.
State vs. Napolean Blair.
State vs. Clint Clemens.
State vs. Mary H. Mix.
State vs. Pat Keenan.

State vs. Della Griffith.
State vs. Kathryn Driscoll.
State vs. Mary Wells.
State vs. Glen O. Grice.
State vs. Frank A. Larkin.
State vs. Fred Fricbe.
State vs. John Colwell.
State vs. Chas. J. Larson.
State vs. Morgan Woodward.
State vs. August A. Anderson.
State vs. Cornelius Willis.
State vs. Edward O'Donnell.
State vs. Thomas O'Donnell.
State vs. Geo. A. Gleason.
State vs. Hugh Stanton.
State vs. Claude Stanton.
State vs. Chuck Wells.
State vs. Mary Graves.
State vs. Wm. C. Bartholomew.

The fact that a great portion of my time is taken up by board meetings has made it necessary to rely, to a considerable extent, upon my assistants for the detail work of this office. I have at all times, except about two months of my term, had two Assistants Attorney General in the office. The first year Messrs. John F. MacLane and J. H. Peterson, and the last year my office force has consisted of J. H. Peterson and O. M. VanDuyn. Their time has been taken up entirely with the work of the office, and much credit is due them for the able and conscientious work done in achieving the results set out in this report. They, and each of them, have my upmost confidence, and I desire to commend them for the services they have rendered to the office and to the State.

As stated in the early part of this report, much time is required in answering questions and in writing opinions for public officers and individuals in private life. The Attorney General is by statute required to advise State Officers, Members of the Legislature and County Attorneys on questions of law, but we have in a great many instances, whenever the work of the office has permitted, given opinions to individuals where points involved seemed to be of public importance. Following are a few of the opinions which have been rendered during my incumbency, and are included in my report, as it is believed their promulgation in this fashion will save much time in the future in answering the same questions which are attempted to be answered in these opinions.

Respectfully submitted,

D. C. McDOUGALL,

Attorney General.

OPINIONS.

January 12, 1909.

Hon. James H. Brady. Governor, Building.

Dear Sir: Replying to your verbal inquiry, I have to say that on December 5, 1908, this office advised Governor Gooding as follows:

> "Replying to your inquiry as to whether under House Joint Resolution No. 3, passed by the last legislature, you should call a special election of judges in accordance with the provisions of the amendment adopted, I would advise you that in the opinion of this office the amendments in question were not regularly submitted and ratified. We have not had an opportunity of going as fully into the authorities as we would desire, but are quite certain as to the correctness of the conclusion reached.
>
> "I would advise you, therefore, not to call the special election in regard to which you inquired."

We are quite sure that the above opinion is well founded.

A suit is about to be filed to have the question determined by the Supreme Court, and in view of the fact that all the courts as well as the bar of the State desire the question to be settled, and the vast public interests involved, I advise that all questions of jurisdiction be waived to the end that a speedy adjudication may be had.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

In Re Senate Bonding Acts.

January 26, 1909.

Hon. Jacob Goodnight, State Senate, Boise, Idaho.

Dear Sir: Replying to your inquiry made of this office as to the constitutionality of S. B. No. 21, providing for the issuance of bonds and appropriating their proceeds for the construction of a wagon bridge across the Salmon river, and authorizing an annual advalorem tax to provide for the payment of principal and interest on said bonds, it is our opinion that said bill and similar measures should originate in the House of Representatives. Constitution, Article 3, Section 14, provides that "Bills for raising revenues shall originate in the House of Representatives." There has been considerable discussion by text writers and by the courts as to the application of this constitutional provision. While on the one hand, it has been suggested that every bill which indirectly or consequentially may raise revenue is a revenue bill, which should originate in the House (1 Tucker's Black App. 261 and note), yet the practical construction which has been placed upon the similar provisions of the federal and other state constitutions is against this view, and supports the doctrine that the requirement does not extend to bills primarily for other purposes, which may incidently create revenue. Story Constitution, Section 880. It is well settled that the provision is limited to bills that transfer money from the people to the State, and does not include bills that appropriate money from the State Treasury to particular uses. Opinion of Justices, 126 Mass. 557. This is true even though the bill may lead to the subsequent necessity of taxes. Curryer vs. Merrill, 25 Minn. 1. Further-

more, bills the direct consequence of which is to create a revenue by license, fines, postage charges, are not revenue measures within the meaning of this constitutional provision. U. S. vs. James, Fed. Cas. No. 15464; Twin City Bank vs. Nebecker, 167 U. S. 196; Re Nashville Fed. Cas. No. 10023.

But on the other hand, it has been held that those legislative measures which impose taxes upon the people, either directly or indirectly for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the common enjoyment of the benefit of good government are "unmistakably bills for raising revenue," U. S. vs. James, Fed. Cas. No. 15464. Applying this decision, we think that S. B. No. 21 plainly provides for raising revenue. It levies an annual ad valorem tax on all property in the State to be collected as other taxes for State purposes. If this provision of the act stood alone, there could be no question that it would be a revenue law, and we do not think that the fact that it is coupled with provisions directing the mode of expenditures of the money raised by the tax can take it out of the constitutional requirement, that the bill originate in the lower house. As stated in the James case, the citizen gets no direct equivalent for the money which he pays to meet the tax, but merely experiences the benefit which the whole State derives from the improvement.

The number of similar bills pending in the Senate which may be affected by this decision has induced us to express our advice at such length, and we trust that to obviate any question as to the validity of these measures, should they be enacted, that they will be introduced anew in the House of Representatives.

Yours very truly,
D. C. McDOUGALL,
Attorney General.

February 16, 1909.

S. D. Fuller, Esq., Rexburg, Idaho.

Dear Sir: Replying to yours of the 13th inst. asking whether it would be legal for the trustees of independent school districts to loan money from the district sinking fund to members of the school board, taking as security first mortgage on improved real estate, situated in the district, will say, in my opinion, such transaction would not be warranted for the reason first, that Sec. 613, Revised Codes provides that sinking funds should be invested in State bonds, United States bonds, State warrants or county warrants; and second, Sec. 655 expressly provides that no trustee must be interested in any contract made by or with the board, or with any officer thereof, etc. Any such contract is void.

Yours respectfully,
D. C. McDOUGALL,
Attorney General.

March 18, 1909.

Hon. James H. Brady, Governor.

Dear Sir: I have examined the question submitted to me by you yesterday involving the construction of Senate Bill No. 152, creating the Eighth Judicial District, with particular application to whether you may appoint a judge for said district until the qualification of a judge to be elected as provided for in the act.

Section 6, Art. 4 of the Constitution expressly requires the Governor to fill vacancies which may occur in the office of District Judge. Section 26 of the Revised Codes, as amended by S. B. No. 152, divides

the State into eight judicial districts, and Section 350 provides for the election of a judge every four years in each such district. Sections 320 and 321 authorize the Governor to fill vacancies in State and District offices, and are practically a repetition of the Constitution. Sec. 317 enumerates and defines the causes of vacancies, and it must be conceded that the case in question does not come within any of these enumerated causes.

The case presented is whether an office newly created and for which no incumbent is provided until the holding of an election and qualification of the person elected, is vacant within the meaning of the Constitution so as to authorize the appointment of a temporary incumbent by the Governor, notwithstanding the absence of statutory grounds of vacancy. After due consideration, I am inclined to answer this question in the affirmative. The act in question contains an emergency clause, and went into effect immediately upon its approval by the Governor. There is, therefore, a judicial district for which there is no Judge. While the act provides for a special election to fill the office yet such election cannot be held for almost two months after the act takes effect. While there is no express authority conferred on the Governor to appoint a Judge during this interim, Sections 3 and 4 imply that such an appointment might be made, as that refers to "the election or appointment" of a Judge. Much inconvenience would arise from a construction of this statute which would deny the right to make an appointment at this time. This question and similar ones have been raised in a number of cases, and the power of the Governor to make appointments has as a rule been sustained. See State vs. Irwin, 5 Nev. 111; in re Board of Commissioners 32 Pac. 850. While there is some conflicting authority on the proposition, yet the weight of adjudicated cases sustains the right to make temporary appointment.

I would, therefore, advise you that you are authorized to appoint a Judge for this district to hold office until the qualification of the Judge, under the special election provided for in the act.

Respectfully,

D. C. McDOUGALL,
Attorney General.

March 19, 1909.

H. F. Ensign, Esq., County Attorney, Hailey, Idaho.

Dear Sir: Replying to yours of March 18th asking my opinion of the following question, "Do Sections 642 and 643 of the Revised Codes permit the holding of school district bond elections at any time of the year the majority vote of the trustees designate?" In my opinion they do. Section 642 says, "The board of trustees may whenever the majority so decide," etc. In my opinion this section controls as to the time of holding such election.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

April 1, 1909.

Mr. G. A. Condie, Carey, Idaho.

Dear Sir: This office is in receipt of your letter of March 27th in re school district bonds in which you ask our advice on questions therein submitted as follows:

First—Where a school district is divided subsequent to a bond issue for the purpose of building a school house, is the district newly created liable for its share of the bonds? This question is a very difficult

one in view of the very uncertain and ambiguous language of our statutes. Revised Codes, Sec. 619 provides:

> "If any new district is organized from any part of any other organized district or districts, as provided in this chapter, the county superintendent, after having ascertained the amount of moneys belonging to said old district or districts and deducting said indebtedness and liability, must apportion to said new district its due per capita proportion of money or indebtedness as the case may be, from said districts from which it may be formed."

Without specifically pointing out the inconsistency in this section, it is enough to say this language is very vague and it does not specify with any degree of clearness what indebtedness or liability are included in the apportionment. Construing the section, however, with Sections 642-650 inclusive, relating to school district bonds, which provide, among other things, for the payment of such bonds by a tax to be levied by the district trustees on property within the district, and further taking into consideration the fact that there is no provision whatsoever by which the new district procures any portion of the benefit accruing to the old, through the erection of the school house for which the bonds are issued, or by which such new district may be credited on its liability in an amount representing its loss of benefit from the school house, I am of the opinion that the indebtedness to be apportioned between the old and new school districts, on the creation of the latter, is the current floating indebtedness for teachers' salaries, text books, apparatus and the like, and not the bonded indebtedness. The old district, which retains the school house, is in my judgment primarily liable for bonds issued for the construction thereof, and must provide for their payment without recourse to the new district. I do not here consider the question of the right of the bond holders to recourse against all the property included in the district at the time the bonds were issued for payment of said bonds, in case the taxing power of the old district is insufficient, but have considered the question solely as between the two districts.

Second—You ask, "Must the issue of bonds be made before the county commissioners act on said petition?" i. e. the petition for the division of the district.

I would answer this question in the affirmative for the reason that the bonds should be issued by the same district which voted them. It might be that only a small proportion of the voters in the old district had voted in favor of the bonds, and that the voters in the proposed new district have cast the decisive vote. This statement of facts is supposed merely to illustrate the necessity of having the same district make the issue as had cast the vote. As a practical proposition, however, it would in my judgment be unwise for the trustee to issue these bonds until the question of district division had been settled. If you defeat the proposition, you can then issue the bonds without any question being raised as to their legality. If you do not defeat the proposition I should think it would be preferable to hold a new election so that the persons remaining in the old district could determine whether they care to incur the expense of a bond issue, after detachment of part of their territory. This, however, is merely a practical suggestion, which local conditions in your district may obviate.

Third—"If a man owns land in the proposed new district, but maintains his home and family in district 14 proper, or for that matter, in other district, can he vote on the question of levying a special tax?"

This question is answered by the language of the Revised Codes,

Sec. 622, which defines the qualifications of voters at these elections as, "actual resident freeholders, or heads of families of said district." Under this language, it is clear that a man maintaining a home and family in one district can vote in that district regardless of whether or not he holds property in any other district.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

April 27, 1909.

Mr. J. B. Hunter, Chilly, Custer County, Idaho.

Dear Sir: This office has your letter of the 21st in which you inquire whether a man living on a homestead filing, with taxable improvements thereon is eligible to vote at a school election on special tax or bonding.

The statute provides that those who are residents, "freeholders or householders" may vote at such election. I have no hesitancy in saying that one living on a homestead with taxable improvements thereon would come within this provision of the statute, and should be allowed to vote at such school election.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

April 28, 1909.

M. I. Church, Register Land Office.

Dear Sir: Replying to yours of the 27th in which you ask whether or not one person could purchase more than 160 acres of land, and whether or not that part of the Constitution referring to the sale of not more than 160 acres to any one individual includes the special grant land, such as penitentiary, insane asylum, charitable institutions, etc. I would say, Sec. 8, Art. 9 of the Constitution provides for the location and disposition of public lands, and in last clause thereof provides as follows:

> "Provided that not to exceed 25 sections of school land shall be sold in any one year, and to be sold in subdivisions of not to exceed 160 acres to any one individual, company or corporation."

Section 10 of the same article provides for the location, regents and lands of the State University, and provides among other things:

> "No university land shall be sold for less than $10.00 per acre, and in subdivisions, not to exceed 160 acres to any one person, company, or corporation."

The above provisions are the only constitutional limitations upon the disposition of State lands, and in my opinion, the limitation applies only to the sale of the school and university lands, and not to other State lands. I do not take these sections to be a limitation upon a man's right to own more than 160 acres of school land, but simply limits his right to purchase more than 160 acres at any one sale.

Respectfully yours,

D. C. McDOUGALL,
Attorney General.

April 30, 1909.

Peter Johnson, Esq., County Attorney, Sand Point, Idaho.

Dear Sir: Replying to yours of the 28th inst. in which you state that a new school district has recently been created out of District 48 in your county, that upon the division, District 48 had on hand

$304.96, and a bond issue of $1,500, which had been issued for the purpose of building and equipping a school house, and making what distribution should be made of the cash on hand between the two districts.

Under Section 619 of the Revised Codes, it will be the duty of the County Superintendent, after ascertaining the amount of money on hand by the whole district, to deduct from that amount the amount of floating indebtedness, if any, and apportion the remainder between the two districts, per capita. The law is not clear as to bonded indebtedness, and this office has held that, in the absence of any statute, and where the old district retains the property for which the bonded indebtedness was incurred, that the new district would not be held for any portion of the bond, and that the division relates only to the cash on hand and the floating indebtedness.

Very respectfully yours,

D. C. McDOUGALL,
Attorney General.

May 10, 1909.

To the Honorable Board of Pardons and the Prison Board.

Gentlemen: In response to verbal discussion by the members of your honorable bodies with reference to the effect of House Bill No. 214, relating to Indeterminate Sentence (see Session Laws 1909, page 81), I beg to report that I have examined the said act with particular reference to the Constitution, Art. 4, Sec. 7, relating to the Board of Pardons anod the provisions of the Revised Codes (Sections 8259-8263) relating to parole of convicts. In order that there may be no misapprehension, I would state at this time, while it is doubtless unnecessary, that the Prison Board created by House Bill No. 214, is not to be confused with the Board of Prison Commissioners, created by Art. 4, Sec. 18 of the Constitution. These boards, while comprising substantially the same personnel, are distinct bodies, having diverse functions.

Constitution, Art. 4, Sec. 7, creates a State Board of Pardons, composed of the Governor, Secretary of State and Attorney General, and vests in that board the power "to remit fines and forfeitures, and to grant commutations and pardons after conviction and judgment, either absolute or upon such conditions as they may impose, in all cases of offenses against the State, except treason or conviction of impeachment." The section further provides that the Legislature shall "prescribe the sessions of said board, and the manner in which application shall be made, and regulate the proceedings thereof." In pursuance of these constitutional provisions, the Legislature has enacted Sections 8248-8264 of the Revised Codes. Among these, Sections 8259-8263 regulate the subject of paroles.

House Bill No. 214 creates a "Prison Board" composed of the members of the Board of Pardons and the warden of the penitentiary. It contains no repealing clause, and expressly provides in Section 6, "Nothing in this act shall be construed as impairing the power of the Governor or Board of Pardons to grant a pardon or commutation in any cause." In view of this fact, and applying the well known rule of statutory construction, that in the absence of a repealing clause, a later statute does not repeal another except when necessarily in conflict therewith, I am of the opinion that House Bill No. 214 does not in any way repeal or amend Sections 8259-8263 of the Codes, relating to paroles of the Pardon Board, but that the two acts are to be construed together, and applied concurrently, the one to the cases falling within its provisions, and the other to those covered by its

terms. Furthermore, said House Bill No. 214 cannot in any way affect or impair the constitutional power of the Board of Pardons to grant remittances, reprieves and commutations, nor indeed does it attempt so to do.

There may be a question as to whether a parole is within the constitutional power of the Board of Pardons to grant. That is as to whether a parole is a "conditional pardon" within the meaning of the Constitution. That question is, however, unimportant for the reason that the Legislature, by an act, which has never been questioned, has vested a parole power in said board, and that act is, as above stated, not repealed by the new law. I refer, of course, to Sections 8259 et seq. above referred to. Furthermore, the Supreme Court, in the Prut case, 12 Idaho 494, has treated pardons, commutations and paroles as analogous acts of clemency, and has shown a disinclination to draw any refined distinctions.

Analyzing constitutional and statutory provisions, we present the following considerations: In the first place, pardons, remittances and commutations, whether absolute or conditional, can be granted only by the Board of Pardons. The Prison Board has nothing to do with any of these, and its act in terminating a sentence is a pardon or commutation, but merely operates to determine that which by the judgment of the court is left indeterminate. Therefore, the provisions of Section 5 of House Bill No. 214, that no parole shall be granted until the expiration of the minimum term of the sentence, is binding on the Prison Board in granting paroles and discharging, but does not affect the power of the Board of Pardons to grant a pardon or commutation at any time.

The Board of Pardons may grant absolute or conditional pardons. A conditional pardon is one which contains a condition that the convict shall comply with certain terms therein prescribed, and as held by the Supreme Court in the case above cited, the Board has power to fix any conditions which it may see fit so long as they are not illegal or impossible of performance. The decision in that case to the effect that the board in recalling a conditional pardon, cannot confine after the time fixed for the expiration of the original sentence, has been obviated by the act of 1907 contained in Sec. 8260 of the Codes. As to the general power of the board to retake conditionally pardoned or paroled convicts for breach of pardon or parole agreement, I refer for convenience in subsequent reference to 37 Century Digest, column 2093 et seq. There seems to be no question that the board has such power.

Turning now to the parole power of the Board of Pardons, I would observe that such power under the statute is general and unrestricted, except by the following limitations, contained in Sec. 8259 of the Codes, as follows:

1. That no convict shall be paroled who is known to have received previous sentence in any prison for felony.

2. That no convict may be paroled until he has served at least one-third of the full term for which he was sentenced, not allowing any good time.

3. That no life convict shall be paroled.

These conditions apply to paroles and not to pardons or commutations; thus, for example a life convict, while he could not be paroled, could have his sentence commuted to 30 years for example, and thereafter, he could be paroled after he had served 10 years.

Under a parole granted by the Board of Pardons, the convict is in the custody and under the control of that board, and may be retaken for any violation of his parole agreement. The procedure on re-

capture is clearly defined by Sec. 8262 of the Codes. By Sections 8261 and 8262, a person paroled by the Board of Pardons, is under the oversight of the sheriff of the county within which he is paroled.

Paroles, under House Bill No. 214, seem to be a step primarily to termination of sentence and discharge. Prior to granting any such, the Prison Board should, in compliance with Sec. 5, establish rules and regulations covering the subject. The following limitations are prescribed by statute on the granting of paroles by this board:

1. That no parole shall be granted until the minimum term fixed by law for the offense has expired.

2. That no prisoner shall be released on parole until arrangements have been made for the employment of the prisoner so released,

3. That no parole shall be granted to one who has served a previous term in any penitentiary.

Prisoners paroled under this act are subject to the oversight of the warden of the penitentiary (Sec. 6) instead of that of the sheriff, and in case of breach of his parole, the warden is to issue warrant for the apprehension and return of the prisoner to custody. He should, however, before his arrest, be declared a delinquent by the Prison Board, as prescribed by Sec. 7.

Under Sec. 8, persons now convicted in the penitentiary for felonies, other than treason or murder in the first degree, may be paroled if they have served the minimum sentence fixed by law for the offense of which they were convicted. The same rule evidently applies to persons convicted of felony prior to the taking effect of the act.

At the conclusion of Sec. 8, it is provided that paroles should be signed by the Governor, and attested by the Secretary of the Board. The secretary is not designated, and the board must, therefore, elect one. I would suggest that in order to prevent confusion between this board and the Board of Pardons, of which the Secretary of State is secretary, that the board establish a standing rule declaring the warden of the penitentiary to be ex-officio secretary of the Prison Board, and custodian of the records thereof.

In conclusion, I would advise, in order to prevent conflict of jurisdiction that the said Board of Pardons adopt a standing rule that no application for parole will be received by the Board of Pardons until such application had been first made to the Prison Board, and referred by the latter to the Board of Pardons, because of want of jurisdiction in the Prison Board in the particular case. To illustrate. if it should be desired to permit a convict who was unable to work to return to his family for care, no parole could be granted by the Prison Board because they have no authority to parole one for whose employment no suitable arrangements had been made, therefore, in such a case, the prison board on receiving the application would refer the same to the Board of Pardons on whose action no such limitation exists. Similarly, if it is desired to release a prisoner on parole for any purpose other than as a step primarily to termination of sentence. The Prison Board should doubtless refer the application to the tions there made, I think that we can conduct the operations of the Board of Pardons.

With the foregoing analysis in mind, and observing the sugges- Prison Board and the Board of Pardons harmoniously and profitably to the State and its prisoners.

Respectfully submitted,

D. C. McDOUGALL,
Attorney General.

May 13, 1909.

Mr. John F. Vincent, Rupert, Idaho.

Dear Sir: Replying to your letter of May 8th, we would say that a homestead settler may, under the provisions of Sec. 2288 of the Revised Statutes of the United States, as amended by the act of March 3, 1891 (26 Stat. 1095) transfer by warranty against his own acts, any portion of his claim for "churches, cemetery or school purposes," without losing his right to complete and perfect title. Such a transfer would not, in our judgment, create a good title as against the government or any subsequent entryman in case the homesteader should fail to perfect the title and procure a patent.

A school district, therefore, in acquiring such a portion of a claim would have to take the chances of the title of the homesteader.

As to the validity of the title, as a basis for bond issue, we would advise that the right of the district to issue bonds does not depend upon its title to the land on which the school building is erected, but, under Section 642 of the Codes, on the vote of the people, and the taxable property in the district, it being provided that such bonds shall not exceed eight per cent of such property. Whether the State would accept the bonds or not, would depend on the compliance with the statutory requirements.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

May 14, 1909.

G. W. Suppiger, Esq., Moscow, Idaho.

Dear Sir: This office has your letter of the 5th in which you inquire as to the procedure necessary in order to procure a license to sell liquor not to be drank on or about the premises, where sold, under the provisions of Sec. 1510 of the Revised Codes, and as to whether the county commissioners have discretion in the granting or refusing of such license. We have to say that in the case of West against the Board of County Commissioners of Latah County, 14 Idaho, 353, the court held that the county commissioners had discretion in the matter, and could either grant or refuse such license. The question of whether or not application should be made for license and bond filed, as is required in applications to sell liquor to be drank on the premises, was not squarely passed upon by the court, but the reason for the rule seems to apply in both cases, and while, as I say, this matter has not directly been passed upon, we are of the opinion that the application should be made in the same form, and bond filed in the same manner as is required in application to sell liquor to be drank on the premises.

Further, this section unquestionably applies to all those who sell liquor, no matter from what source they derive the same, whether it is bought and sold, or whether it is manufactured by them.

With regards, I am, yours very truly,

D. C. McDOUGALL,
Attorney General.

May 20, 1909.

Hon. Daniel T. Mackintosh, Kendrick, Idaho.

Dear Sir: Replying to yours of the 14th inst. in which you state that a resident of Latah county, who is an old soldier of the Civil War has received a tax notice from the assessor in Nez Perce county, that the soldier has some property in both counties, all of which does not exceed the amount of the exemption, and asking my opinion as to

whether, under the circumstances, he would be exempt in both counties. Sec. 1644 of the Revised Codes is as follows:

"The following property is exempt from taxation:

"Subdivision 4. Property of resident widows, orphan children and honorably discharged soldiers or sailors, who served in the army or navy of the United States during the War of Rebellion, not to exceed $1000 to any one family, when the total assessment is less than $5,000."

The determination of the question will depend on the construction of the meaning of the word resident, whether it means a resident of the State or of the county.

This exemption is given to all soldiers within the State, under a State law, and in my judgment, the proper construction to be placed on the section is that the person exempt is entitled to the full amount of the exemption of the property within the State, notwithstanding that it may be located in several counties.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

May 29, 1909.

George D. Casto, Esq., Preston, Idaho.

Dear Sir: I have you letter of the 25th regarding right of chairman of the board of trustees of the village to vote upon matters before the board.

It is my opinion that such chairman has a vote upon all matters before the board. He is not elected by the people as chairman, but is elected as a member of the board the same as all other members, and by a vote of his fellow members is made chairman of the board for the purpose of presiding, but this position does not in any way deprive him of the right to vote.

Respectfully yours,

D. C. McDOUGALL,
Attorney General.

June 12, 1909.

Miss Ivy Wilson, County Superintendent, Boise.

Dear Madam: Replying to your verbal inquiry relating to the removal of the school house in the Eagle district, we have to say as follows:

Section 625 of the Revised Codes provides that the trustees have power when directed by a vote of their district to build or remove school houses, etc., provided that a school house shall not be removed or new school site designated, except when directed by a two-thirds vote. The electors can not in our judgment designate the site, but can mrely authorize the trustees so to do. Therefore, when the electors write upon their ballots a site to which they wish the building removed, they render their ballots void for the reason that their vote is coupled with a condition, which they have no right to impose. That is emphatically so in the case at hand, for the reason that several of the voters designated one site, and several another. It can not be learned from their ballot whether those who voted for one site would not have voted negatively were the other site to be chosen. Even though all the votes should be voted for one site, it would be very questionable whether the vote could stand for the reason that, should the votes be counted, it would divest the trustees of their discretionary power, under the statute, to designate the site, and certainly the trustees could not designate any other site where

the vote was upon condition that a certain site should be chosen.

It will, therefore, be necessary for a new vote to be taken on this proposition. Should the trustees desire an expression of the will of the people on the selection of a site, we would recommend that a separate ballot box be established at the voting place and that the voters be given a special ballot with words somewhat like the following printed thereon: "Advisory Ballot. My choice is..... site." This would amount to an informal method of ascertaining the will of the people, which would not be binding on the trustees, but which they would doubtless follow. This ballot box and these ballots should be very carefully segregated from the regular ballot on removal of site.

Yours very truly,
D. C. McDOUGALL,
Attorney General.

June 21, 1909.

C. H. Potts, Esq., Prosecuting Attorney, Coeur d'Alene, Idaho.

Dear Sir: We are in receipt of your letter of June 16th, requesting a construction of the Revised Codes, Section 1644, Paragraph 12, which exempts from taxation "all irrigation canals, ditches and water rights appurtenant thereto, when the owner or owners of said irrigation canals and ditches use the water exclusively upon land or lands. owned by him, her or them; provided, in case any water rights be sold or rented from any such canals or ditches, then and in that event, such canals or ditches shall be taxed to the extent of such sale or rental."

Under the case presented by your letter, the Spokane Land & Water Company owns their irrigation ditches, supplying water in various tracts of land, which they have sold to private owners, and on which they charge a maintenance fee of $1.50 per acre. They sell a perpetual water right to the purchasers of land, adding the cost to the price of the land. It does not appear from the facts as stated that they sell any interest in their ditch to the purchaser of water rights, other than the contract right to demand and receive water. But it is reasonably apparent that the purchaser of a water right acquires in effect a proportionate interest in the ditch, that is, whenever all the lands are sold, the company will have practically nothing left. Their title would be a barren legal one, with no beneficial interest.

A letter written to this office by the company, under date of May 8th states that it is their intention, when all the lands susceptible of irrigation, under their system, are sold to turn the same over to the water users, and we suppose that there is some such provision in their contract. The maintenance fee seems to be intended to cover costs of operation, and is hardly equivalent to a rental.

Our opinion in the whole matter is that the company should be assessed in accordance with the provisions of Sec. 1656 of the Codes, on their unsold interest, for example, where the land along the ditch is sold, that the value of the water right, including the settlers' proportionate interest in the ditch, should be assessed to the land owner, but where the land along the ditch is not sold, the mileage assessment prescribed by Section 1656 should run against the company. If the land is sold on one side of the ditch, and not on the other, half of the assessment would lie against the company and the other half against the land owners. Our conclusion in this matter is fortified by the fact that the same question was raised in a suit between the county of Twin Falls and the Twin Falls Land & Water Company, which was settled on the foregoing basis, and that is the system now adopted for

the taxation of Carey Act companies. Its system of the sale of water rights seems to be the same.

With respect to the canal of this company which serves land in the State of Washington, I think that so much of its canal as lies in Idaho should be taxed at the prescribed rate per mile.

Yours very truly,
D. C. McDOUGALL,
Attorney General.

June 22, 1909.

O. V. Badley, Esq., Clerk County Commissioners, Caldwell, Idaho.

Dear Sir: This office is in receipt of your letter of June 17th requesting an opinion as to the construction of Laws 1909, page 9, commonly known as the Local Option Law, with reference to the meeting at which the commissioners shall act upon a Local Option petition.

Section 1 of the act provides that whenever a petition has been signed and filed, "the board of county commissioners, at its next regular meeting, shall order a special election to be held," etc.

Section 2 provides among other things, "The petition shall be filed with the county auditor at least 10 days prior to a regular meeting of said board, and shall be presented to the board on the first day of its next regular meeting, and shall be acted on by the board within 10 days thereafter."

Construing these sections together, we think it is evident that the commissioners shall act on the petition at the first meeting held more than 10 days after filing the petition. Where a petition is filed, the "next regular meeting" is the first meeting held after filing. It is only by this construction that the two sections can be harmonized.

If, therefore, a petition is filed more than 10 days prior to the July meeting, it is our opinion that the election shall be ordered at the July meeting.

Very truly yours,
D. C. McDOUGALL,
Attorney General.

July 7, 1909.

Peter Johnson, Esq., Sand Point, Idaho.

Dear Sir: This office has your letter of July 3d in which you inquire whether certain improvements created by the Northern Pacific Railroad Company on land which they have purchased, off their right of way, in the way of repair shops, round houses and other buildings, should be assessed by the county assessor or by the board of equalization.

As you suggest in your letter, this statute was before the court in the case of O. S. L. vs. Gooding, 6th Idaho, 773, and in that case it was decided that property of a railroad company, other than rolling stock, outside of the right of way of the railroad track as defined by the statute of this State was assessable by the local assessor and not by the State Board of Equalization. This case was decided upon the following statute (Session Laws 1895, page 114, Sec. 1490):

> "The State Board of Equalization shall have exclusive power to assess and value for purposes of taxation all telegraph and telephone lines, and the 'railroad track' and 'rolling stock' of all persons, companies or corporations, owning, operating or constructing any telegraph or telephone line, or railroad, wholly or partly within this state. For the purpose of this act 'railroad track' shall be deemed to include right of way, superstructures

on the right of way, whether on main, side, or second track, or turnouts and the stations and improvements thereon belonging to, used, operated or occupied by any person, company or corporation, owning, operating or constructing any line of railroad, wholly or partly within this State."

This statute was very materially changed in 1901 (Session Laws 1901, page 233, Sec. 74) which change was apparently made with the special intention of obviating the effects of the decision herein referred to. The statute as changed by the 1901 Legislature, and which remains on our statute books unchanged, is as follows:

"The State Board of Equalization shall have exclusive power to assess and value for purposes of taxation all telegraph and telephone lines and the 'railroad track' and 'rolling stock' and franchises of all persons, companies, or corporations owning, operating or constructing any telegraph or telephone lines, or railroads wholly or partly within this State.

"For the purposes of this chapter, 'railroad track' shall be deemed to include the right of way, station, and other necessary grounds, and all other immovable property used, operated, or occupied by any person, company or corporation, owning, operating or constructing any line of railroad, wholly or partly within the State, and reasonably necessary to the maintenance and operation of such road.

"All property belonging to any person, company or corporation, owning, operating or constructing any railroad wholly or partly within this State, not included within the terms 'railroad track' or 'rolling stock,' namely, property not reasonably necessary for the maintenance and successful operation of such road, consisting of vacant lots and tracts of lands, and lots and tracts of land together with the buildings thereon used for non-railroad business purposes; also tenement and residence property (except section houses); also hotels and eating houses situated more than one hundred feet from main line track shall be assessed by county assessors as other property is assessed in this State."

It would seem from the reading of this statute that the State Board of Equalization should have jurisdiction to assess all immovable property used, operated or occupied by any company, such property being reasonably necessary to the maintenance and operation of such road. The second paragraph herein quoted seems to put the question beyond all controversy, and it would seem clear that where such immovable property, even though situated off the right of way is reasonably necessary for the maintenance and operation of the road, and is used for railroad purposes, such property should be assessed by the State Board.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

July 13, 1909.

Hon. James H. Brady, Governor, Building.

Dear Sir: Replying to your question contained in letter from Ralph Edmunds of Idaho Falls, relating to the status of officerss in the militia, whose commission is dated prior to March 12, 1907, would say the law prior to that date, as found in Session Laws 1905, provided, among other things, that:

"All the commissioned officers should hold their commission for three years from the date of election or appointment."

In 1907 the law was amended to add thereto the following clause:

"and continuously thereafter, subject to removal at any time for cause."

Section 705 of the Revised Codes provides:

"At the expiration of the term of office, or upon the acceptance of the resignation of a commissioned officer, the Adjutant General, upon the approval of the Governor, shall issue to such officer a discharge, showing the reason therefor and length of term served."

There do not appear to be many decisions of the courts upon the question presented, and the one which seems to be nearest the point, I find in Volume 62, New Hampshire Reports, page 706, under a statute which provided that militia officers should hold office for the term of five years and provided that officers and commissioned men in the state militia should serve for five years, the opinion of the judges was as follows:

"We do not find any statute limiting the tenure commission of non-commissioned militia officers to five years. We think the statute which requires them to serve five years, unless sooner discharged, was a limitation, not of the officers' tenure, but of their resignation. It imposed an obligation to perform the duties of their commission for five years, but did not withhold the right of command after that time.

"We find no satisfactory evidence of the Legislature's intent to make such a change as the reduction of militia commission to five years. We are of the opinion that an officer of the militia, appointed and commissioned under statute, continues to hold office after the expiration of five years from the date of his commission."

I am of the opinion that officers appointed prior to the date of the present law, will continue to hold their respective commissions after the expiration of the three years, or until their successor has been duly elected, appointed and commissioned, according to law, with the full powers, duties and privileges.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

July 16, 1909.

Hon. S. D. Taylor, State Auditor, Boise.

Dear Sir: Replying to your verbal request for construction of Revised Codes, Sec. 1886, relating to the appraisement of the taxable transfers in which you requested an opinion as to the fund from which the expenses of appraisement is payable, I would advise you that the concluding sentence of the section provides:

"The said appraiser shall be paid by the county treasurer out of any funds that he may have on hand on account of said tax," etc.

The only funds which the county treasurer holds, "on account of said tax" are the taxes paid over to him by the administrator as prescribed by Sec. 1883. It is, therefore, my opinion that the expenses of appraisement are payable from the tax.

The practical difficulty arising from this state of the law, when applied to small transfers can be readily obviated by the exercise of a reasonable discretion by the various probate judges themselves appraising the value of small transfers, and thereby giving the expense of such appraisement.

Appraisers should only be appointed under the provisions of Sec.

1886, "when the value of any inheritance, bequest or other interest, subject to the payment of said tax, is uncertain."

Very respectfully yours,

D. C. McDOUGALL,
Attorney General.

July 19, 1909.

O. M. Van Duyn, Esq., County Attorney, Caldwell, Idaho.

Dear Sir: Replying to your verbal inquiry of July 17th in respect to the form of the order to be made by the county commissioners in acting on the Local Option petition, we would advise as follows:

Revised Codes, Sec. 483, declares the provisions relating to general elections applicable to special elections, and Sec. 484 provides for the issuance and posting of notice of special election in the same manner as of general elections. The Local Option law (Laws 1909, page 9) provides in Sec. 1 that 20 days' notice of a local option election shall be given in the manner provided by law for general elections and for the submission of questions. Sec. 9, relating to the ubject of registration, provides that registered voters for the last preceding general election need not register again, but the lists for the general election shall be used, and persons who were not then registered, may register according to the statute relating to registration. Section 10 makes the general election laws applicable in so far as they can be made so. The statutes relating to registration are found in Title 3, Chapter 8 of the Revised Codes, Sections 393 et seq. Sec. 394 requires notice of registration prior to the first day of August next preceding a general election. There is no provision anywhere for issuance of notice of registration for special elections, and under the General Election law, the time of registration is considerably longer than it can be under the Local Option law.

The concrete question by you presented on this statement of the law is whether the board of county commissioners can make any order in reference to registration under the Local Option law, and if so, what that order must be, and further, whether the indefiniteness of the provisions of the Local Option law relating to registration are such as to vitiate that law or render it inoperative.

On the first branch of this question, our conclusion is, from an examination of the provisions of all the sections of the statutes and of the Local Option law above cited, that it was the purpose and intent of the Local Option law to dispense with the necessity of a new notice of registration and to permit qualified registered voters to vote without registering anew, and at the same time to permit the registration of qualified voters, who for any reason had not registered at the last general election. This registration is to be made "according to the statute relating to registration," but by this it is not meant that the same preliminary steps, such as the issuance of notice, etc., must be taken, but simply, assuming the books open for registration and the registrars ready to act, the registration must be made in the same manner. Thus we think the old registrars and such new ones as are appointed by the county auditor, should register voters as required by Revised Codes, Sec. 396, preserve their papers, prepare their check lists, estimate the tickets required, and issue transfer certificates as required by Sections 397, 398 and 399.

There is a good reason for this construction of the law, which is that the notice of registration to be issued by the commissioners preparatory to general elections is for the purpose of acquainting the public generally with the names of the newly appointed registrars and their places of registration, whereas, under the Local Option law,

the old registrars are to act and they may be assumed to be still at the old places of registration during the proper hours; thus the reason for the issuance of register notices by the commissioners does not apply to elections under the Local Option law.

As to the form of the order to be prepared by the commissioners, we would suggest that the order for the election shall include, among other things, the substance of Section 9 of the Local Option law; thus, for example, it might recite that no person should vote at the Local Option election, unless duly registered, provided, that voters registered in the county for the last preceding general election, need not register again, etc., for which purpose the registrars appointed for such general election, to wit, John Smith for Precinct No. 1, Bill Jones for Precinct No. 2, etc., shall act.

The answer to the foregoing question disposes of the second, for, if the statute may be construed in the way suggested, it is sufficiently definite to be enforcible.

Our attention has been called to the case of Knight vs. Trigg, 100 Pac. 1060, in which our Supreme Court passed on a somewhat similar special election statute. We would call attention to the fact that the act construed in that case presented many points materially distinct from the Local Option law. For example, in that case, there is no provision that the registration should be "according to the statute relating to registration." There was no mode prescribed for filling vacancies in the office of the registrar. It authorized registration contrary to the requirements of the general statute up to the day of election. It attempted to, or apparently did qualify as voters, persons registered at the last general election, although they might have become disqualified by removal from the county. These points of distinction are sufficient to show that such decision does not control in this case.

We trust that the foregoing sufficiently answers your questions.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

August 6, 1909.

John A. Steinlein, City Attorney, Sand Point, Idaho.

Dear Sir: Replying to your letter of August 4th, it is our opinion that the limitation of municipal indebtedness prescribed by Sec. 2315 of the Rev. Codes applies to the aggregate indebtedness of the municipality and is not confined to the separate items thereof. As there are eight subdivisions to that section, each defining a different purpose for which bonds could be issued, any other construction would make it possible for a municipality to issue bonds to the extent of 120 per cent of the assessed valuation, which of course would be absurd.

Very truly yours,

D. C. McDOUGALL,
Attorney General.

August 10, 1910.

Mr. R. W. Childs, Clerk of Village of Wendell, Wendell, Idaho.

Dear Sir: In reply to your letter of August 6, 1910, in the matter of filling a vacancy in your board of village trustees, I have to say as follows: That when a vacancy is to be filled or an officer appointed it is necessary for the board of trustees to vote viva voce, and the name of those voting shall be recorded and the parties for whom they vote shall also be recorded. You will find this provision in Section 2275 of the Revised Codes of Idaho.

In the matter of the vote necessary to fill a vacancy of this kind, in our opinion you should have a majority of all the trustees elected. You will find in said Section 2275 of the Revised Codes of Idaho the clause, "A concurrence of a majority of the whole number of members elected to the council or trustees shall be required." Had this statute read otherwise the two members could have undoubtedly filled the vacancy, but I find from a thorough search of the authorities that a majority of the courts hold, under a statute similar to ours, that it requires a majority of the whole number elected, and that a majority of those present and voting is not sufficient.

McQuillan on Ordinances, page 167, Sec. 106, says:

> "Under a provision requiring a vote of the majority of the members elected, it would be apparent that the act specified may not be done legally by a bare majority of a quorum."

McQuillan is one of the best authorities on the procedure of municipalities. Supporting this view set out by McQuillan, we herewith cite a few of the cases that have been found upon this matter:

Edgerly vs. Emerson, 23 N. H. 555.
Pimental vs. San Francisco, 21 Cal. 351.
McCracken vs. San Francisco, 16 Cal. 591.
State vs. Dickie, 47 Ia. 629.
Atkins vs. Phillips, 26 Fla. 281.
People vs. Hearing, 71 Pac. 413 (Col.)
City of Evanston vs. O'Leary, 70 Ill. App. 124.
Cascaden vs. City of Waterloo, 106 Ia. 673.
Blood vs. Beal, 100 Maine, 30.

This view is also supported by Abbott on Municipal Corporations, Vol. 2, Sec. 507.

In the cases of Pimental vs. San Francisco, McCracken vs. San Francisco and San Francisco vs. Hazen, 5 Cal. 169, the court held.

> "Where vacancies occur, the whole number entitled to membership must be counted and not merely the remaining members."

There are a few dissenting authorities to this view, but they are so limited in number that it would be extremely hazardous for your municipality to fill the vacancy therein existing in any other manner than by a majority of the whole number of trustees elected. If as you say, you are desirous of floating bonds for your city, this step of filling the vacancy now existing is a highly important one, and will be closely scrutinized by the attorneys for the bond buyers. They are very strict in their opinions upon such matters as this, and you should put the matter beyond all doubt by bringing about a majority vote of all the members elected—that is the majority vote of five. There will then be no question whatsoever, and no fault could be found with your procedure.

Trusting that we have answered in this letter those things that you desire to know, we are,

Very respectfully yours,
D. C. McDOUGALL,
Attorney General.

August 17, 1909.

Hon. James Stephenson, State Engineer, Boise.

Dear Sir: This office has your letter of the 14th, which is as follows:

> "On June 8th, the above application for permit to appropriate 200 second feet of the waters of Lemhi river was filed in this office by R. W. McBride, et al. On the request of Mr. Mc-

Bride, the application was immediately returned to him for completion as provided by statute. Under the law he had 60 days within which to return the completed application still retaining June 8th as his date of priority. As a matter of fact, the application did not return to this office until August 9th, the 62d day after June 8th, when as a matter of fact to be in time it should have been received in this office during business hours of the 7th."

You ask the opinion of the Attorney General as to what action you should take in the matter of the acceptance of the papers as of the original date, or as a refiling under the date upon which the application was actually received the second time in your office.

The law seems to be well settled in this State with reference to the question you present, and I would say that where a perso nemploys the United States mail as his agent for the service of papers, as was done in the case you present, such person so employing the mails is responsible for delays occurring during the transmission of such papers, and it would, therefore, be our view that in order to protect his priority obtained under the first filing, the corrected application should be in your hands within the 60 days allowed by law. Cole vs. Fox, 13 Idaho, 123.

Yours very truly,
D. C. McDOUGALL,
Attorney General.

August 25, 1909.

Judge Willard White, Boise.

My Dear Judge: Replying to your verbal inquiry as to the construction of the law providing for the preservation of records, mementos, etc., of the Grand Army of the Republic, as passed by the Ninth Session of the Idaho Legislature, Session Laws 1907, page 152, and amended by the Legislature of 1909, Session Laws, 1909, page 7, I would say that the appropriation made by the Ninth Session is $600 in amount and to be applied to "maintaining and furnishing headquarters and to pay the salary of the Assistant Adjutant General, who shall have charge of such headquarters." The 1909 amendment follows the identical language employed in the 1907 statute except that the amount was raised to $900.

It will be thus seen that the exact amount to be used for the salary of the adjutant general is not fixed, and under the present law, he may draw the entire amount appropriated, towit, $900 a year. If, however, it is deemed advisable to use a portion of this money for the "maintenance and furnishing of the headquarters," then the remainder is all that can be used for the payment of such salary. This entire amount of $900, according to the evident meaning of the bill can be used only for maintaining and furnishing the office and paying the expense of the Adjutant General in charge, and can be used for no other purpose.

Very respectfully yours,
D. C. McDOUGALL,
Attorney General.

August 28, 1909.

Mr. William Cruse, State Bank Commissioner, Boise.

Dear Sir: We are in receipt of your letter of August 26th in which you request an opinion as to the regularity of the incorporation of a single company, both under the guarantee, title and trust law, and also under the banking law. You advise us that certain companies in

this State are organized under both of these laws, and are purporting to transact business under each. The statutes drawn in question are Chapter 12 of Title 4 and Chapter 13 of Title 4, Civil Code, Revised Codes of Idaho.

After a careful comparison of the statutes, and an examination of the authorities construing similar statutes, we are of the opinion that the same company cannot, on the same capital, do business both as a guaranty, title and trust company, under Chapter 12, and as a bank company, under Chapter 13 of the title above cited. The powers of a trust company are defined by Section 2961 and include business of abstracts of title, the holding of property in trust, the administration of estates, the purchase and sale of real estate without limitation, and other powers of like nature. There is probably no form of corporation which has wider powers than a trust company under our statutes. In addition to this consideration, it is expressly provided by Section 2964 that the capital of trust companies shall be taken and considered as security for the faithful performance of their duties, "and shall be absolutely liable in case of any default whatever."

On the other hand, the ownership of real estate by a bank is strictly limited by Section 2978 of the Codes, and the investment of its funds is limited by Section 2992 to certain forms of investment, and in the event of insolvency or bankruptcy of a bank, the depositors are made preferred creditors of Section 2990.

I am not unmindful of the provisions of Section 2991, which provides that the trust company may carry on the business of banking, but said section continues, "as prescribed and limited in this chapter." It seems to me that such limitation amounts practically to a negation of the power to carry on a general trust compny business, because a company cannot invest its capital in the manner permitted by the trust company statute, and at the same time comply with the requirements of the banking law. How the same capital stock can at one time be absolute security for the purpose of certain obligations, as provided by Section 2964, and at the same time be subject to another set of obligations, under Section 2990, it is impossible to conceive. However, it is not necessary at this time to hold that the same company cannot in any event transact both a banking and trust company business, but we do hold that if a trust company does carry on a banking business, it cannot invest in real estate in excess of the amount prescribed by Section 2978, nor impair its capital stock by investments other than those permitted to banks. If it does so, we think you are authorized to proceed to liquidate the bank under the provisions of Sections 3004 and 3005 of the Revised Codes.

Our views in this matter are fortified by the case of Henderson Loan & Real Estate Association vs. People, 45 N. E. 121.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

September 9, 1909.

Mr. Ed. Smith, 2920 Forest Ave., Kansas City, Mo.

Dear Sir: The deputy treasurer has handed me your letter of September 1st in which you inquire whether State funds may be invested in bonds of irrigation companies, or in municipal irrigation bonds made in Idaho. In reply, I have to say that the subject of securities for State's moneys is governed by Section 130 of the Political Code of this State wherein security or securities for such deposits is defined to mean:

"United States bonds, bonds of the State of Idaho, and those

for which it is ultimately liable, bonds of the several counties, cities, villages, towns and school districts of the State, and warrants of the State of Idaho, and all the several counties thereof, drawn on the current expense fund."

County moneys may be loaned upon securities as follows:

(a) United States bonds or obligations, or those for which the faith of the United States is pledged to provide for the payment of the interest and principal, including the bonds of the District of Columbia.

(b) Bonds of the State of Idaho, or those for which the faith of the State of Idaho is pledged, or for which the State of Idaho is ultimately liable.

(c) Bonds of the several counties, cities, villages, towns, and school districts of the State of Idaho, warrants of the State of Idaho or warrants or interest bearing obligations of any county or city of the State of Idaho issued pursuant to the authority of any law of the State of Idaho for the payment of which the faith and credit of said county or city issuing them are pledged.

(d) Bonds of any association, corporation or company approved by the board of governors of the New York Stock Exchange and listed on the New York Stock Exchange.

No securities shall be approved unless their market value shall equal their par value, nor where there has been default within three years in the payment of the principal or interest of any obligation issued by the same maker.

Upon payment to the county of the deposits and accrued interest for which security was given, it shall be returned to the bank furnishing the same, and when such securities can be conveniently segregated, the amount thereof may be reduced in proportion as such deposits shall be reduced or repaid to the county.

The surplus moneys of school districts may be invested in United States bonds, State bonds, State warrants or county warrants when the market value is not below par.

The deposits of municipal funds is governed by ordinance but no ordinance may be passed by which the custody of such moneys shall be taken from the treasurer and deposited elsewhere than in some regularly organized bank, nor without a bond being taken from such bank for such penal sum and with such securities as the council or board of trustees shall direct and approve.

I trust the above will be found sufficiently explicit, but if any further information is desired, I shall be glad to communicate with you.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

September 10, 1909.

Hon. James H. Brady, Governor, Building.

Dear Sir: I have considered the letter of A. W. Lee, returned herewith, in which he states that he has examined ninety-two scales and more than half of them are out of repair showing a remarkable uniformity of light weights.

In my opinion a few prosecutions brought under section 1544 of the Revised Codes, wihch reads as follows:

Sec. 1544. Any person, persons, firm or corporation who shall use any scales, beam, weight or measure falsely, or who shall mark or stamp false weight or measure on any container,

> package or cask, or who shall sell, offer for sale, or have in his possession for sale any article which does not conform to the United States standard or the standards designated in this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not to exceed three hundred dollars, nor less than twenty-five dollars for each offense, or imprisoned in the county jail not exceeding ninety days, nor less than thirty days.

would straighten this matter out without any expense to the state, and probably obtain a fairer system of weighing than all the inspectors in the country could do by examining scales.

The owner of any scale is bound to keep it correct, and if he does not do so, he is subject to this penalty.

Under section 1118, as amended Session Laws 1909, page 233, the State Board of Health may, in case of necessity, appoint a deputy inspector. Under this section, in case Mr. Wallis cannot be sent north to examine these scales, I see no reason why the Board of Health, in the emergency existing could not appoint Mr. Lee, inspector for that purpose.

In my judgment, if the attention of the owners of these scales is called to the section abbove referred to and quoted, and they are notified, unless they put their scales in condition, they will be vigorously prosecuted, under it, the inspector's duty would be found very light.

Respectfully yours,

D. C. McDOUGALL,
Attorney General.

September 16, 1909.

A. H. McConnell, Esq., County Attorney, St. Anthony, Idaho.

My Dear Sir: Your favor of the 10th inst. in which you state that a question has arisen over the Local Option law as to what extent it affects licenses issued after the date of the approval of the act and the time the act takes effect is received.

Sec. 8 of the Local Option bill, found on page 12, Session Laws 1909, is as follows:

> Sec. 8. If a majority of the votes cast at an election held under the provisions of this act shall be in favor of the proposition so submitted, then after 90 days from the date of said election, all licenses for the sale of intoxicating liquors granted in the county after the passage of this act, shall become void and be of no force or validity, and the holder thereof shall be liable for any sale of liquors made by him the same as though no such license had been issued, and there shall be refunded to him of the amount paid for such license, a sum proportionate with the unexpired time for which the license fee shall have been paid, out of the several funds to which it has been apportioned.
>
> No license issued prior to the passage of this act shall be terminated or in any manner affected by this act or by any election held hereunder.

This act was passed without any emergency clause, and, therefore, became a law 60 days after the adjournment of the legislature on the 6th day of March, 1909. The bill was approved by the Governor February 20, 1909.

Our Supreme Court has construed a similar statute as to when it was passed, and held that the

> "Passage of an act in the statute means its approval, or the time when the act takes effect, and the words 'passage of the act' have a technical meaning, and refer to the date when it

takes effect and not to the date of the approval by the Governor." Snyder vs. Hussey, 2 Idaho, page 8.

Therefore, it is quite clear that the time of the passage of this act, the 6th day of May, 1909, or 60 days after the adjournment of the Legislature.

By the terms of Sec. 8, above quoted, no license issued prior to the passage of this act shall be terminated or in any manner affected by this act, or any election held thereunder, but all licenses issued after the 6th day of May must terminate at the end of 90 days after date of election in any county where the majority vote cast at an election, under the provisions of this act, are in favor of the prohibition of the sale of intoxicating liquors.

My attention has been called to the case of Shoshone County vs. Thompson, 11 Idaho, 130. This case was for construction of the statute requiring the appointment of commissioners to apportion the debts among several counties, and providing for an election to take place in the future, and if the majority of the residents of the portion of the county to be segregated voted in favor of the proposition, then the county commissioners were to appoint accountants to ascertain the whole amount of the indebtedness of Shoshone county, "at the date this act takes effect." In that case the court held of necessity that the act did not take effect until the election was had, bu does not in any way conflict with the rule laid down in the Snyder case, but on the other hand holds that the law was "passed" at a date 60 days after the adjournment of the Legislature.

The Local Option law provides that upon a vate being taken in a county, and that vote being in favor of the proposition, all licenses which were issued after the passage of this act shall become void in 90 days.

There is clearly a distinction between the two statutes, as one refers to the "passage of the act," and the other refers to a time when the act "takes effect."

Very respectfully yours,

D. C. McDOUGALL,
Attorney General.

September 27, 1909.

A. H. McConnell, Esq., County Attorney, St. Anthony, Idaho.

Dear Sir: Yours of the 24th inst. regarding respective duties of assessor and auditor in the assessment and collection of sprinkling tax, levied by the village of St. Anthony is at hand.

In my opinion, it is the duty of the assessor to assess and list property against which this assessment is made, the same as any other assessment for general or special taxes, under Section 1804 of the Revised Statutes. It will then become the duty of the auditor, under Section 1720, to extend this tax upon the assessment book in the same manner as other taxes, and when the book is returned to the assessor, it is his duty to collect the same.

Very respectfully yours,

D. C. McDOUGALL,
Attorney General.

November 1, 1909.

Hon. Charles S. Sumner, Idaho Falls, Idaho.

Dear Sir: Replying to your favor of the 28th of October relative to further construction of Sec. 8 of the Local Option law, I beg to say, Sec. 8 is as follows:

Sec. 8. If a majority of the votes cast at an election held under the provisions of this act shall be in favor of the proposition so submitted, then after 90 days from the date of said election, all licenses for the sale of intoxicating liquors granted in the county after the passage of this act, shall become void and be of no force or validity, and the holder thereof shall be liable for any sale of liquors made by him the same as though no license had been issued, and there shall be refunded to him of the amount paid for such license, a sum proportionate with the unexpired time for which the license fee shall have been paid, out of the several funds to which it has been apportioned.

No license issued prior to the passage of this act shall be terminated or in any manner affected by this act or by any election held hereunder.

In my opinion, the granting of the license by the county commissioners is simply the approval of the board and the authorizing by them of the proper officials to issue the license from the date applied for in the application.

The application to the board for a license must show, among other things, the time from which it is desired to run. The bond must also recite, among other things that the business will be carried on at a certain place for one year, beginning at a certain date, and the granting of the license to the commissioners is the authorizing of the proper officer to issue the license at the date set forth in the application and bond. In fact, until it is issued, it is no license, merely authority given or granted to the officer to issue at the proper time.

This section is undoubtedly intended to give persons engaged in the sale of intoxicating liquors, ninety days after the local option election to dispose of their stock and to close up their business, and where one makes the application before the 6th day of May (the date of the passage of the Act referred to), which application and bond requires that the license so applied for began to run after the passage of the Act, he takes it with the knowledge of the statute, and it must be presumed that the commissioners granted it and authorized it subject to the provision of the law, that if it were issued after the passage of the Act, that it would terminate within ninety days after the county should vote dry.

I am clearly of the opinion that all licenses which were dated and began to run after the 6th day of May of this year will terminate at the close of ninety days after the county voted dry.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

November 1, 1909.

Robert J. Koffend, Esq., Wendell, Idaho.

My Dear Sir: Replying to yours of October 30th inquiring as to the qualifiifations to vote at the special election to be held in your county, I beg to say, the Local Option statute provides that persons having qualifications to vote at the regular election shall be entitled to vote at the special election.

Section 357 of the Revised Codes of Idaho provides that every person, over the age of twenty-one years, possessing the qualifications following, shall be entitled to vote at all elections; he shall be a citizen of the United States, shall have resided in this state six months immediately preceding the election at which he offers to vote, and in the county thirty days, etc. The electors' oath contains among other things the following clause:

"I do swear (or affirm) that I am a citizen of the United States of the age of twenty-one years, or will be the..... day of....., A. D., 19.... (naming the date of the next succeeding election); that I have or will have, actually resided in this state for six months, and in this county for thirty days next preceding the next ensuing election."

It is my opinion that this provision requiring actual residence of six months in the state is binding, and that the time spent in preparation and intention to remove to the state could not be counted.

I regret very much that this construction will bar yourself and undoubtedly a large number of most estimable citizens from voting at the very important election on the 16th of this month.

I send you the last pamphlet of the Election Laws of the state.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

November 22, 1909.

Hon. James H. Brady, Governor, Building.

Dear Sir: Replying to your verbal inquiry accompanying letter of J. Benjamin Hall, dated November 19, 1909, in which he states that there is considerable difference of opinion as to when the Local Option law takes effect in his county of Twin Falls as applied to illegal sale of intoxicating liquors by bootleggers, druggists and those not running a saloon upon a regular license issued prior to the election.

Senate bill, No. 62, known as the Local Option Act is and has been the law of this state since it went into operation on the 6th day of May last. Section 28 of said Act is as follows:

"A prohibition district within the meaning of this Act, is any district or territory in the State of Idaho, in which the sale of intoxicating liquors is prohibited by law."

Section 7 of said Act, among other things provides:

". . . if a majority of the votes cast at such election shall be in favor of the proposition submitted, it shall thereafter be unlawful for the board of county commissioners to grant any person, firm, association, corporation or club a license to sell or dispose of intoxicating, spirituous, malt or fermented liquors or wines within said county, until at a subsequent election held under the provisions of this act, the majority of the legal voters of the county, voting at such subsequent election, shall vote against prohibiting the sale or disposal of intoxicating liquors."

Section 8 of said Act provides that persons engaged in the sale of liquors, under a license duly issued prior to any election held under this Act, shall have ninety days after such election before the license shall become void.

This section is intended to, and does apply only to those persons who are carrying on a business under such license and in no way relates to any violation of the Act by other persons. In my opinion, as soon as a county has voted dry and the vote is canvassed by the county commissioners, and the result declared, the county is then a prohibition district, and the provisions of the law relating to illegal sales are in force, and the time provided in Section 8, in which regular licensed saloons are allowed to run has no application to any other sale whatever, and it becomes the duty of all peace officers, within their respective jurisdictions, to enforce the same.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

November 29, 1909.

In re Power of County Commissioners Under Section 1508 of the Revised Codes of Idaho to Refuse a License for the Sale of Intoxicating Liquors in Villages.

Section 1508 of the Revised Codes provides that before any license is issued that the applicant shall produce before such board a receipt of the sheriff showing that he has paid into his hands the amount due for such license, and shall issue a bond in the sum of $3,000, and sets forth the form and requirements of the bond and provides further, that when application is made for the sale of intoxicating liquors, as in this section provided, for a place outside of any incorporated city, either on their own motion, or upon objection duly filed upon the part of any citizen and resident of the precinct within which it is intended to carry on such sale, the county commissioners shall determine: first, whether or not the granting of such license will be conducive to the best interests of the community in which such saloon or business is proposed to be established; second, whether or not such applicant is a fit person to have such license and carry on said business; third, whether or not such place of sale and business will likely be conducted in a quiet, orderly and peaceable manner. It further provides that should the said board of county commissioners determine adversely to the applicant on any of the grounds above specified, the license must be refused, and the sheriff return the amount deposited to said applicant, otherwise the said license may be granted; and that said order of the board of county commissioners should be subject to appeal to the district court as in the case of other orders of said board.

It will be noticed that the language of the proviso is peculiar in that it applies to "a place outside of any incorporated city" and does not use the words "city or village" which are frequently used in conjunction in our statutes. It must be assumed that the Legislature omitted the word "village" from this proviso with a purpose, and that purpose could only be to authorize county commissioners to exercise their police jurisdiction in liquor license matters in villages as well as in country precincts.

It will also be noted that under out statutes, as indeed in the general acceptation, the words "city" and "village" are not synonymous terms. Our Supreme Court has held that the words "town" and "village" have the same import, but cities and villages are differently organized and have different powers. From a practical standpoint, there is also a distinction between a city and a village in respects to police matters, as villages may be, and frequently are very small settlements without adequate police force and without means to suppress or control a saloon business conducted in an unlawful manner.

In the case of West. vs. Board of County Commissioners, reported in 14th Idaho, page 354, our Supreme Court construed this section. In that case the petitioner filed his application before the board of county commissioners of Latah County for a license to sell intoxicating liquors in the village of Onaway in said county, and the board of county commissioners refused the license upon the ground "that it would not be conducive to the best interests of the community in which said saloon or business is proposed to be established." The court said (page 359): "This they had authority to do, and their discretionary action in this matter cannot be controlled by this court or any other court."

It is entirely discretionary with the board whether or not they grant the license. The remedy of the applicant, if he feels aggrieved, is by appeal to the district court.

In view of the section above quoted, and the case cited, I am of the

opinion that the board of county commissioners have the discretion to refuse state and county licenses for the sale of intoxicating liquors in an incorporated village.

Respectfully,

D. C. McDOUGALL,
Attorney General.

December 4, 1909.

Ed R. Coulter, Esq., Attorney at Law, Weiser, Idaho.

Dear Sir. Replying to yours of November 26 asking whether a druggist has a right, under section 15 of the Local Option Law, to sell alcohol or liquor on prescription of a veterinary surgeon, I will say, the only exception to the absolute prohibition in prohibited districts is found in section 15, which permits the sale of pure alcohol for medicinal, mechanic, manufacturing or scientific purposes, or wines for sacramental purposes, but provides that intoxicating liquors shall never be sold in prohibited districts as medicine, except in the case of actual sickness and on written prescription of a duly licensed physician of this state, and such prescription shall contain the name and quantity of liquor prescribed, etc.

It would, therefore, appear to me that the only exception the Legislature intended to make in this act was to duly licensed physicians, and cannot be construed to permit the sale upon prescription of veterinary surgeons. I am inclined to the opinion that pure alcohol may be sold upon making the application set forth in said section for the purpose of compounding medicine for animals, in good faith and in a scientific manner.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

December 20, 1909.

Dr. Ralph Falk, Secretary Board of Health of Ada County, Boise, Idaho.

Dear Sir: Yours of the 16th inst. in which you ask for my opinion as to whether the Ada County Board of Health can pass rules regulating the handling and sale of milk in Ada County, and if so, whether a penalty can be provided for violations of their regulations, is at hand. In reply, I beg to say, Sec. 1095 of the Revised Codes of Idaho, as amended by Session Laws, 1909, page 154, provides among other things, as follows:

> "The County Board of Health shall be empowered to make its own local rules and regulations, which shall not be inconsistent with law nor with the rules and regulations of the State Board of Health and must make and establish for the County or any district or place therein, such sanitary rules and regulations as they may deem necessary and proper to prevent the outbreak and spread of dangerous, contagious and infectious diseases."

Section 1097 of the Revised Codes provides as follows:

> Section 1097. Such local board of health shall take cognizance of all unhealthy nuisances within the limits of their sanitary jurisdiction and every person or corporation refusing or neglecting, after due notice to comply with the requirements of said board in this respect shall be liable to a penalty of not exceeding fifty dollars or imprisonment in the county jail for more than sixty days, or to both such fine and imprisonment. All questions arising between local boards as to jurisdiction or

their relative duty in the abatement of any particular nuisance shall be referred to the State Board of Health for settlement.

The law providing for crimes against public health and safety is contained in Secs. 6908 to 6935, inclusive, of the Revised Codes, together with the notations following in the same chapter. Sec. 6910 of the Revised Codes defines "nuisance."

From the foregoing sections, I am of the opinion that the County Board of Health may adopt such sanitary rules and regulations as they may deem necessary and proper to prevent any form of a nuisance that would be liable to cause the outbreak or spread of dangerous, contagious or infectious diseases, and that, under Sec. 1097, violation of any such rules would be a misdemeanor and subject to a fine as therein provided. This would apply to the sale of infected milk or any other impure food, which would come within the inhibition of the statute, or would be in a condition likely to cause or spread dangerous, contagious or infectious diseases.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

December 21, 1909.

T. B. Brush, Esq., Richfield, Idaho.

Dear Sir: Yours of the 15th inst. in which you state that you were regularly appointed one of the trustees of the village of Richfield, and that since your qualification you have rented and moved into a house about fifty or sixty feet outside the village limits, but that you are a taxpayer in the village and hold the position in the village of cashier of the First State Bank, is at hand.

Sec. 2224 of the Revised Codes, prescribing the qualifications of trustees, is as follows:

> Sec. 2224. Any person may be a trustee who shall be a qualified elector of this State and who shall have been an inhabitant and taxpayer of the village at the time of his election, and shall have resided therein for three months next preceding his election, and every trustee so elected shall hold his office for the term of two years, and until his successor is elected and qualified.

Section 317 of the Codes provides:

> Sec. 317. Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows:
>
> * * *
>
> 5. His ceasing to be a resident of the State, district or county in which the duties of his office are to be exercised, or for which he may have been elected.

Section 321 provides that vacancies may be filled in city and village offices by mayor and council or board of trustees.

The statute has made no provision for vacancies by removal of its officers from the boundaries of the village, and on examination of the authorities, I find that the cases have held that where an officer has removed from the limits of a municipality, of which he is an officer, the question of whether or not the office thereby becomes vacant is one to be decided upon the facts in each particular case.

The courts have held that after the removal to a considerable distance which will extend to a considerable length of time, so that the duties of the office will be neglected, and particularly if there is no intention on the part of the officer to return, the office becomes va-

cant and may be filled, but if the removal is but temporary and the party intends to return, the office does not become vacant.

Applying the foregoing rules, it would not be a difficult matter to arrive at a proper conclusion in this particular instance.

Very respectfully yours,

D. C. McDOUGALL,
Attorney General.

December 21, 1909.

Harry T. West, Esq., Clerk District Court, Twin Falls, Idaho.

Dear Sir: Replying to yours of the 2d inst. asking for my views upon the proper construction of the Clerks' Fee Bill, page 22, Session Laws, 1909, the amount to be paid for filing cases on appeal from the justice court.

Section 3986 of the Revised Codes is the original section providing for the payment by the plaintiff in all civil actions commenced in the District Court at the time of filing the complaint, the sum of $3.00, which sum the clerk must remit to the State Treasurer to be placed to the credit of the general fund. This section and this fee, so far as I know, has never been held to apply to other than civil cases originally filed in the District Court, and was undoubtedly intended to create a fund for the payment of the court reporters.

The Act of 1909, found on page 22, Session Laws, makes a distinction between the amounts to be paid to the clerk of the court by the cases originally filed and cases brought to said court on appeal from inferior courts and inasmuch as the original Section 3986 has not been changed or amended, in my opinion, it was the intention of the Legislature to require the payment by the plaintiff of the sum of $7.00 for the county and $3.00 for the State on all cases originally filed in the district court, and on all civil cases brought to said court from an inferior court on appeal to require the payment of $5.00 to the county and nothing to the State as the stenographer's fees.

The Legislature undoubtedly recognized the fact that usually cases filed originally in the inferior courts involved but small amounts, and, therefore, made the distinction in the amount of fees to be charged.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

January 6, 1910.

H. F. Ensign, Esq., County Attorney, Hailey, Ida.

My Dear Ensign: We have your letter of the 27th in which you ask the opinion of this office concerning the right of a saloon man to open his place of business for the purpose of selling articles that are not prohibited from sale on Sunday, under the Sunday Rest Law. Under the Dolan case, 13 Ida. 693, on page 714 of the opinion, the Court says:

> "This act permits any store or place of business to open and engage in the class of business not prohibited by the act. It does not say that a grocery store, which handles cigars, may not open, but it does say that it shall open only for the purpose of selling cigars. The defendant in this case could have opened his place of business and have engaged in the sale of cigars and candy. Any person is permitted to open his place of business for trade on any of the articles not prohibited from sale, unless the business itself is prohibited. The fact that a person does not carry for trade any of the articles allowed to be sold on Sunday, is not an argument against the constitutionality of the

act. The act does not prohibit him from putting in stock for sale such articles. He is permitted to engage in trade on Sunday upon the same terms every other person is permitted. That is, in carrying for trade such articles as the law permits to be sold on such day."

Thus it would appear that so far as the Sunday Rest Law is concerned, it is not violated by the opening of a place of business for the purpose of selling articles permitted to be sold on Sunday under the said law.

I readily understand the difficulties into which this view will lead a prosecuting attorney, and I can say to you personally that it would be the wise policy to keep these places closed if possible. I doubt, however, that a conviction could be had for the selling of articles allowed to be sold on Sunday, even though such sales were made in a saloon.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

January 21, 1910.

Mr. James A. Green, Richfield, Ida.

Dear Sir: Your letter, answer to which has been delayed by the press of official business, is at hand. You ask for our opinion concerning the validity of an ordinance passed by the village trustees, one member of said board living outside the village limits, the second member having left the state, the third member being temporarily absent in Europe. The vacancy created by the removal from the state of said member was filed by the board. The board thus constituted, as I understand, voted for the ordinance.

I am of the opinion that the board thus constituted is a valid one, and that its acts are legal. The mere fact that a member of the board of trustees was compelled to move outside of the village limits would not of itself ipso factor create a vacancy, and until his removal, his acts would be valid. This would leave three duly qualified members of the board, who, under the statute, are empowered to transact the business of the village, even without the addition of the member who has been appointed.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

January 24, 1910.

Hon. Robert Lansdon, Secretary of State, Building.

Dear Sir: In answer to your question as to whether the amendment of Section 2745 of the Revised Codes, as amended by the 1909 Session Laws, page 158, still makes it necessary for corporations desiring to avail themselves of the provisions of said Section 2745, to cause to be written or printed after the corporation name on the stock certificate, letter heads and bills and all official documents the word "limited," also after the corporate signature to all official and public documents the word "limited," I have to say that this is no longer necessary as this provision in regard to the word "limited" has been entirely eliminated by the amendment of said Section 2745, and said section, as amended, is now to be read and interpreted as if no provision or statement in regard to the word "limited" had ever been in the statutes of the state.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

January 25, 1910.

Colonel Allen Miller, Glenns Ferry, Idaho.

My Dear Colonel: This office has your letters of the 19th and 23d in which you state the Village of Glenns Ferry is about to arrange for a water works system, that an application is before the trustees of said village asking for a franchise for that purpose, and that the question has arisen as to whether the trustees and the proposed grantees of the franchise can, under Section 2839 of the Codes, fix in the ordinance granting the franchise the price to be charged for water for village use, also whether the trustees can contract for a flat rate per thousand gallons, or a certain rate per month for consumers for domestic use and lawn irrigation. You state further that you represent the village attorney in this matter.

While this office cannot officially advise the officials of villages, we are always glad to lend any possible assistance, and any advice we give is given to you personally and is for your personal guidance, and not intended to be binding upon anybody.

In the first place, the trustees undoubtedly have the right to refuse a franchise to a company asking for the privilege of furnishing water to a village, and if the village authorities so determine, there is no question in my mind but what they could compel the fixing of rates as prescribed by section 2839 in the manner there set out, towit, by the appointment of a commission, and that commission could doubtless, under that statute, fix the rate to be charged for private users of water in said village.

I believe if I were acting as village attorney, I would incorporate Section 2839 in the ordinance itself, and then there could be no question about it. The Supreme Court of this state has strongly indicated in the case of Bothwell vs. Consumers Company, 13 Idaho, 568, that the rate for water to private users in a city or village can be legally fixed only by compliance with the terms of Section 2839, above referred to, and that unless the procedure there outlined were followed that the corporation furnishing the water could not compel private users to pay the price otherwise determined upon.

In case the commission is appointed as contemplated by Section 2839, it seems to me clear that they could fix the rate per month or per thousand gallons, or in any other manner they see fit.

I am not sure that I have grasped the purport of your letter entirely, but if not, I shall be pleased to write you further upon your request.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

February 1, 1910.

Mr. L. E. Sigmond, City Attorney, American Falls, Idaho.

Dear Sir: Your letter of the 25th is at hand. The question you ask is as I understand, whether the provisions of the Local Option Law with reference to issuing search warrants to be used in searching premises where it was thought liquor is being sold contrary to law, is applicable to your county, where the county is dry, not by the operation of the Local Option Law, but by the action of the County Commissioners, under the old law.

An examination of the title of the Local Option Law reveals that the Act was intended as a general measure to "regulate, restrict, control and prohibit the sale and handling of intoxicating liquors . . . to provide for the submission at special elections in the several counties of this State, of the question whether the sale of intoxicating

liquors, as a beverage, shall be prohibited, etc." The intent and purpose of the law was not only to provide a means whereby a county might vote dry, but also to regulate the sale and disposition of intoxicating liquors, even where the special election provided for by the act was not had.

Section 26 of the Act provides that a "prohibition district" within the meaning of the Act, is any district or territory in the State of Idaho in which the sale of intoxicating liquors is prohibited by law. Section 19 provides that any person who sells intoxicating liquors in any "prohibited district" in violation of the law, is guilty of a misdemeanor, and Sec. 21 provides for searching enclosures in certain cases where Sec. 19 of the Act has been violated.

The only question that arises then is whether a district that is "dry" under the old law, by the act of the board of county commissioners, is a "prohibition district" within the meaning of the law. A "prohibition district" being defined by law as a district in which the sale of intoxicating liquors is prohibited by law, it would seem clear that as the county commissioners in refusing a license are acting in conformity with law, and as the sale of liquors in a district where they had refused a license would be a violation of law, that such a district would be a "prohibition district" under the provisions of the Local Option law, and the provision with reference to searching enclosures, provided by the Local Option law, would be applicable thereto.

Before invoking the provisions of Section 21 of the Local Option law, its provisions should be very carefully analyzed. It does not provide a method whereby search may be made for the purpose of finding liquor; but rather for apprehending a person who conceals himself and is unknown to tthe person making the complaint, and who has violated Section 19 of the Act. I think the courts would place a strict construction on this section, and an officer attempting to enforce it should follow its provisions very carefully, and should not seek to enforce it except in the specific cases enumerated in the section.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

February 1, 1910.

Mr. Byrd Trego, Editor Idaho Republican, Blackfoot, Idaho.

My Dear Trego: This office has your letter of the 29th asking for a construction of Section 1477 of the Codes, which section was Senate Bill 25, Session Laws 1907, page 27. The statute reads as follows:

> Sec. 1477. The rate to be charged for all official notices, required by law to be published in any newspaper in this state, by any state, county, municipal official or other person, shall be one dollar per vertical inch, single column measure, consisting of not less than ten lines in nonpareil type or its equivalent, or sixty words to the inch, for first insertion; and fifty cents per inch for each subsequent insertion; and for table or figure matter, one dollar and one-half per vertical inch, consisting of not less than ten lines in nonpareil type or its equivalent, and seventy-five cents for each subsequent insertion; fractional inches to be charged for pro rata; Provided, That no charge shall be made for less than an inch in any case.

The difficulty seems to be with relation to the interpretation of the proviso that no charge shall be made for less than an inch in any case. I believe, construed with the body of the section, the intent is made clear, that where an insertion covers more than an inch that the fraction may be charged for pro rata, but in case the insertion amounts to

less than an inch, an inch is to be charged for. I think it would be unreasonable to view the matter that the Legislature intended insertions of less than one inch to be run gratis.

Trusting this meets your inquiry, and with kind personal regards, I am

Yours very truly,

D. C. McDOUGALL,
Attorney General.

February 1, 1910.

Mr. J. W. Rogers, Superintendent Pacific Express Company,
Salt Lake City, Utah.

Dear Sir: Replying further to your letter of the 7th relative to the situation in Oneida County, Idaho, with reference to shipments made in said district of intoxicating liquors, it would seem to us, after a most careful examination of the Local Option statute, which has been held constitutional since our last letter to you, that the provisions of Section 25 of the said Act would apply in all districts of the State where the sale of inoxicating liquors is prohibited by law. This section is as follows:

> Section 25. Any person, firm, corporation, society or club within this state who shall accept for shipment, transportation or delivery, or who shall ship, transport or deliver any intoxicating liquors to any person, firm, corporation, society or club in any prohibition district in the State of Idaho, or to any point or place in this State where the sale of intoxicating liquors is prohibited by law, except as may be authorized by this Act or the Inter-State Commerce Law of the United States, shall be guilty of a misdemeanor and punished as provided in Section 30 of this Act.

You understand that under the law of this State, prior to the passage of the Local Option Law, the county commissioners were given power to refuse to grant licenses for the sale of intoxicating liquors outside of incorporated towns and villages. Through the operation of this law, and the law vested a like discretion in the board of trustees of villages, Oneida County has no saloons within its boundaries and we are of opinion that the intention of the Legislature with reference to prohibiting liquor was to apply the provisions of the Local Option statute to so-called dry territory within the State, whether the same was voted dry under the provisions of the Local Option law or became so by reason of the action of the local authorities, under the old law.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

February 7, 1910.

C. E. Wright, Esq., Montpelier, Idaho.

My Dear Sir: Yours of the 5th inst. asking if the independent school district of Montpelier is entitled to one-half of the pool, billiard, show licenses, etc., collected under the municipal licenses of Montpelier, is at hand.

I am of the opinion that school districts are entitled to one-half of all the licenses of every description collected within the city, and respectfully refer you for your consideration to the case of Twin Falls School District vs. The Village of Twin Falls, found in 13 Idaho,471.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

February 11, 1910.

Mr. John S. St. Clair, Silver City, Idaho.

Dear Sir: We are in receipt of your letter of the 6th in which you ask for a construction of Sec. 1510, Revised Codes, and whether or not, under such section, the Commissioners have anything to do with application for licenses to sell liquor not to be drunk in, or about the premises.

In the case of West. vs. Board of County Commissioners of Latah County, 14 Idaho, 353, the Supreme Court of this State held that the County Commissioners had discretion in the matter of granting or refusing to grant licenses of this character, and it has been the uniform holding of this office that application should be made and bond filed in the same manner as is required in an application to sell liquor to be drunk on the premises.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

February 11, 1910.

Hon. W. N. Stephens, State Game Warden, Boise, Idaho.

Dear Sir: We are in receipt of your letter of the 9th enclosing letter from Roger O. Wearne of Coeur d'Alene, Idaho, in which he requires of you a construction of the Game Law relative to the sale of Pend D'Oreille white fish. The quesaion he puts is as follows:

> "A has a proper license and catches Pend D'Oreille white fish and sells them to B and ships them properly tagged, etc., mailing you copy of shipping bill. B is a dealer in meats and fish and sells them to C who conducts an eating house. C retails them to his customers. Are B and C required to have a license similar to that of A?"

The answer to this question involves a construction of Section 4 of the Game Law of 1909, pages 38 and 39, and especially the following portion of the said section:

> "It is also provided that Bear Lake troua and Pend D'Oreille white fish lawfully taken in accordance with the provisions of this Act, may be sold upon a permit issued by the State Game Warden."

It is provided in the body of the section that one desiring to ship fish from a private pond may do so upon procuring a ten-dollar license from your Department.

We have given this section careful consideration, and are of the opinion that it was the intention of the Legislature that Pend D'Oreille white fish and Bear Lake trout might be sold after procuring a license of ten dollars, and that only one license was necessary in such cases. That is to say, the person first gaining possession of the fish and shipping them would be required to take out a ten-dollar license. The other persons into whose hands the fish pass are not required to take out the license required by said section. This, we think, is consistent with the true intent and meaning of the said law—that when once the fish become commerce and are reduced to private ownership, the State has no desire to further tax the same.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

February 15, 1910.

Hon. Charles P. McCarthy, Prosecuting Attorney, Boise.

Dear Sir: We have to acknowledge receipt of your communication

of recent date in which you state that you have been asked to prosecute under Sections 1458, 1459 and 1460 of the Revised Codes with relation to the employment of aliens by a corporation of this state, and you submit an opinion by L. Worth Clark, Esq., attorney for the railway company, to the effect that the said statute is unconstitutional, and you ask for the opinion of this office with reference to its constitutionality.

While we recognize this is a matter of some importance, and would not desire you to be bound in your official action by the opinion of this office, we believe, after a most careful examination, that this section of the statute is in violation of the treaty rights existing between the United States and the Empire of Japan.

Aside from his fact, we find that statutes identical with the one upon our books have been held unconstitutional in various states of the Union as being a deprivation of property without due process of law.

In this letter, we have merely stated the results of our findings without bothering you with a detailed reference to the authorities and the treaty to which we refer.

Herewith return Mr. Clark's letter to you with other enclosures.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

March 1, 1910.

G. W. Suppiger, Esq., Prosecuting Attorney, Moscow, Idaho.

Dear Sir: We are in receipt of your letter of February 24th enclosing copy of complaint for the sale of intoxicating liquors. We have carefully examined the same and believe it to be sufficient both in form and substance.

However, I do not think it at all necessary to make the allegations as full as you have done, but in my judgment, a much shorter form would be sufficient. Under the complaint which you have sent us, we are inclined to think that you would be compelled to prosecute under section 1510, which in a general way limits you to the prosecution of wholesale liquor dealers. We believe a general prosecution under section 1518 would be most effective in the ordinary case, and judging from the concluding part of your complaint this is an ordinary sale by a person without any license at all.

We herewith submit a form which has been used by many prosecuting attorneys in this state, and has been found to be effective. We believe that it will stand the test of the courts.

The following decisions seem to hold the form or ones like it good:

State vs. Hickok, 90 Wis. 161.
McClellan vs. State, 23 S. W. Rep. 732.
State vs. Devers, 38 Ark., 518.
Commonwealth vs. Taylor, 45 S. W. 356.

The complaint which we send you can, of course, always be changed to suit the circumstances; for example, inserting "malt" for "spirituous," and "beer" for "whiskey."

If we can be of service to you at any time in any such matters as this or other matters, we shall be very glad to have you call upon us.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

March 16, 1910.

Mr. E. A. Knight, Goldburg, Custer Co., Idaho.

Dear Sir: Replying to your letter of March 9th, the Two Mile Limit Law reads as follows:

"It is not lawful for any person, owning or having charge of sheep to herd the same, or permit them to be herded on the land or possessory claims of other persons, or to herd the same or permit them to graze within two miles of the dwelling house of the owner or owners of such possessory claim."

You will notice from the foregoing quotation that the limit extends from the dwelling house and not from the outskirts of the claim. The law does not require the posting of notices. The statutes prescribe no time limit during which sheep may trail within prohibited territory, but our Supreme Court has held that sheep may lawfully pass in transit within two miles of the dwelling house of a settler, eating grass as they go, and stopping for needed rest, Phipps vs. Grover, 9 Idaho, 415. In each case, it is a question whether the sheep are actually herded, or grazing within the prohibited limit.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

March 1, 1910.

In re Investment of Carey Act Trust Funds in Bonds of Irrigation Districts.

State Board of Land Commissioners, Boise.

Gentlemen: The provisions of the federal Carey Act are as follows:

"Provided that said state shall not sell or dispose of more than 160 acres of said lands to any one person, and any surplus of money derived by any state from the sale of said lands in excess of the cost of their reclamation shall be held as a trust fund for and to be applied to the reclamation of other desert lands in such state."

Section 1627 of Idaho Revised Codes, in respect to Carey Act lands provides as follows:

"As provided in the Act of Congress, all moneys received by the board from the sale of lands selected under the provisions of this chapter shall be deposited with the State Treasurer, and such sums as may be necessary shall be available for the payment of the expenses of the board, of the State Engineer's office incurred in carrying out the provisions of this chapter. Such expenses shall be paid by the State Auditor in the manner provided by law, on vouchers duly approved by the state board of examiners for the work performed under the direction of the State Board of Land Commissioners and by the State Engineer for all work performed for the State Engineer's office; and any balance remaining over and above the expenses necessary to carry out the provisions of this chapter shall constitute a trust fund in the hands of the State Treasurer to be used only for the reclamation of other arid lands."

It will be perceived by a reading of the foregoing provisions of the United States and State law that the funds derived from Carey lands are funds to be used in a certain way, towit: "to the reclamation of other desert lands in such state," and under the provisions of Section 1627, Revised Codes, aforesaid, it is to be used only for the reclamation of other arid lands. Under the federal law, as expressed above, it will be readily seen that an express trust is created, and under the state law, this express trust is affirmed, and the conditions to be performed are assumed by the State.

The law of express trust is that the power of the trustee is limited to the uses and objects of the trust. This law is so well determined that we will cite only a few cases upon the subject, and the general provisions of the law as expressed in legal works.

"The powers of a trustee to deal with the funds are limited not only by the express provisions of the settlement, but to the uses and objects for which the fund is committed to its management by the settler, and a trustee cannot legally appropriate the fund to other purposes. His control, however, over the property is co-extensive with those objects." Amer. and Eng. Encyc. of Law, Vol. 28, 2d Ed., page 982 (B).

The following cases are hereby cited as confirming the law as above laid down:

Ball vs. Strutt, 1 Hare, 146.
Thomas vs. James, 32 Ala. 726.
Newitt vs. Woodburn, 190 Ill. 783.
Angel vs. Jewett, 58 Ill. App. 596.
Madison Academy vs. Board of Education, 26 S. W. Rep. 187.
Clark vs. Maguire, 16 Mo. 302.
Hilberth vs. Pinkerton Acad., 28 N. H. 227.
Richardson vs. Cole, 2 Swan (Tenn.) 100.
Heth vs. Richmond R. Co. 4 Grat. (V) 482, 5 Am. Dec. 88.

It is evident from the above citations and the rule of law therein stated that the power to use trust funds shall be clearly limited to the trust. We, therefore, believe that to attempt to invest the said funds in irrigation bonds for the purpose of deriving revenue in the way of interest from the same is not such a purpose as is contemplated by the federal law. We believe that the proper construction to be placed upon the federal law is that this fund shall be kept in such manner that it may at all times be instantly available for use in developing arid lands. This trust was not given to the state for the purpose of giving it an interest income, but for the purpose of putting dry lands under irrigation and thereby making homes for the people of the United States and the state, and give to the United States and the state a consequent advantage resulting from the cultivation and the occupation of these lands. Should these funds be tied up for a long series of years in irrigation bonds, and occasion should arise for their application to the purposes of the trust, the State would not be in a position to devote to the purpose of the trust the said funds, and thus the intention of the federal government would be thwarted. Further, I do not believe that the said Carey trust fund is a state fund, and that not being a state fund, there are no provisions of the law authorizing loaning the same. The Carey trust funds are moneys derived from the United States to be used by the state for a certain purpose. The state is not the owner of these funds, but simply the trustee of the United States, the United States being in a sense the owner of the said funds. Whatever rights the state may have in the said funds are subject to the carrying out of the trust, and we doubt not that if the trust is not carried out in the way provided by law, that said trust would revert to the United States, and could be reclaimed by the United States under a proper procedure.

For authority in support of our conclusion that said Carey fund is not properly a state fund, we desire to call attention to the case of State ex rel. Armington, Relator, vs. Wright, State Treasurer, Respondent, 17 Mont. 565. This is a case interpreting the same provision of the federal statute, towit: Carey trust funds. The court in referring to this fund says as foliows:

"The state cannot make it a fund of its own, to be dealt with as may be state funds contemplated by the constitution. No control can be exercised under it beyond such as is consistent with the Act of Congress in the execution of the trust, which is to aid the state in the reclamation of desert lands and the set-

tlement, cultivation and sale thereof, in small tracts to actual settlers. The power of the state is limited to the acceptance of the offers of the United States and the execution of a trust assumed by the acceptance thereof. The officers of the state are but agents designated by the law of the state to carry out the legislative will."

There is even some doubt under this construction of the fund not being a state one, whether the said money could be deposited in the banks to draw interest, but we do not believe this doubt of such importance to justify the withdrawal of state money from the banks for the reason that by the manner in which said moneys are deposited, they are subject to instant withdrawal, the interest bearing feature being merely an incident thereto.

Very respectfully,

D. C. McDOUGALL,
Attorney General.

March 5, 1910.

Mr. J. W. Keefe, Deputy Insurance Commissioner, City.

Dear Sir: Replying to your verbal inquiry as to House Bill No. 337, which among other things amends Sec. 2855 of the Revised Codes so as to prescribe that no joint stock insurance companies shall be permitted to do business unless possessed of a capital stock of $100,000, it is the opinion of this office that the bill does not in any way affect title, guarantee and trut companies, organized under Sec. 2961 et seq. Sec. 2933 authorizes such companies to do business on a capital stock of $25,000. The proposed law contains no repealing clause, and could not affect these companies, as to which special provision is made. In addition to these considerations, title guarantee and trust companies are not insurance companies, within the meaning of the law, and are not under the jurisdiction of insurance companies, but under that of the banking department of the state.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

March 22, 1910.

G. W. Suppiger, Esq., County Attorney, Moscow, Idaho.

Dear Sir: Your letter of March 13, 1910, in relation to the Local Option Law is at hand. In our opinion, a prohibition district may be not only a county which has been voted dry by a vote of the electors, but it may be also any part of any county which has been made dry, either by ordinance or by a refusal of the county commissioners to issue liquor licenses. In the latter instance we refer to where county commissioners withhold liquor licenses from places outside incorporated cities. Thus a prohibition district may be a city of the second class, which has passed an ordinance prohibiting the sale of intoxicating liquors within its limits, or it may be a village or any part of the county other than incorporated cities, where the commissioners have refused to issue licenses, or it may be the whole county itself where the people have voted it dry.

Our opinion is that in any of these districts, howsoever created, whether by vote of the people, or by ordinance, or by act of the commissioners, the provisions of sections 12, 15, 16, 17, 19, 20, 21, 22, 25, 26, 27, 32 and 33 would apply. In such a case, the offense can be alleged and proved under section 12 by alleging that such and such a district is a prohibition district, and that liquors therein have been sold without a license. The proof in the case of districts smaller than coun-

ties, towit, cities wherein an ordinance has been passed prohibiting the sale, etc., would consist in offering the ordinance of the city, then proving that the defendant had sold the liquor after the passage of the ordinance. The same proof would apply to the other limited districts. All that could be alleged or proved would be that the defendant had sold liquor in said districts without first having obtained the license required by law.

It is not our understanding that this act is a special one and dormant in any county until life is given it by a vote of the people. We understand the words of section 28 to mean a prohibition district created by any law, either that which follows upon the vote of the people, or that which is made into a law by act of council or commissioners because they all are legal creations of the law and one is as powerful as the other to create the district. In one case the whole county is created by a vote of the people, in the other the limited district is created by ordinance or act of the county commissioners on making it prohibitive upon the liquor seller, and in our judgment, it makes no difference how the law was brought into force just so long as it is brought into force, under the statutory provisions of our state.

We think the reading of section 24 itself would be but added evidence that this law was intended to be of more than special application, towit, in respect to its provision relating to other things and other districts than those created under a Local Option vote. Section 24 aforesaid, we regard as being applicable to all parts of the state, whether in Local Option districts or not, thus of itself showing that the law is broader and covers other than local option districts created by a vote of the people.

In our judgment, we would deem it advisable to prosecute cases arising in all the districts mentioned within this letter, and if the defendant should appeal to the Supreme Court, and the decision should be otherwise than what we think it should be, it would be more satisfactory to all parties concerned. We believe that the position that we have indicated the safest and best position to take, and if the Supreme Court should decide that such is not the law, the prosecuting attorney would be relieved of all inconvenience and embarrassment that might arise if you should refuse to prosecute at this time.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

March 24, 1910.

T. Bailey Lee, Esq., Prosecuting Attorney, Albion, Idaho.

My Dear Sir: Replying to the question contained in your letter of the 17th as to the liability of druggists who sell to a person upon application regularly made when the person is known to be a boozer, or when the man's actions indicate bad faith, I would say, under section 15 of the Local Option Act, pure alcohol may be sold for medicinal, mechanical, manufacturing or scientific purposes, or wines for sacramental purposes, provided, however, that no pure alcohol or wine for any of the purposes mentioned shall be sold or delivered to any person until such person signs written application therefor in the form given.

I do not understand that a druggist will be absolutely protected when the applicant signs the application. He can only justify himself on the ground that the alcohol was sold for medicinal, mechanical, manufacturing or scientific purposes, and if he knows, or had reason to know that the applicant was lying when he signed the statement, or that the person did not intend to use the alcohol for the purposes stated, that he would be selling in violation of law. In other words, he could

not sell alcohol for the purpose of being drunk, and protect himself by the production of a statement provided by the statute that that was not the purpose for which it was purchased.

In my judgment, the production of the application signed would probably make a prima facia defense, and that the burden would then be upon the state to prove that it was only a subterfuge or was not taken in good faith, and that the druggist knew or had reason to know that the party had made a false statement in the application.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

April 14, 1910.

N. M. Ruick, Esq., Boise, Idaho.

Dear Sir: Replying to your inquiry in which you state that the question has been raised as to the power of the Carey Act Company to enforce a lien against the Carey Act lands under the contract adopted in the State of Idaho, I beg to say, this matter has received a great deal of attention both by the former State Land Board and Attorney General, as well as by the present officials, and it has been the continuous opinion of this office that such liens are valid and can be enforced in the courts.

The Act of Congress, known as the Carey Act, authorizes the lien, and the Act of the Idaho Legislature accepting the provisions of the Carey Act, provides especially that—

> "Any person, company or association furnishing water for any tract of land shall have the first and prior lien on said water right and the land upon which said water is used for any deferred payments for said water right; said lien to be in all respects prior to any and all other liens granted or attempted to be granted by the owner and possessor of said lands; said lien to remain in full force and effect until the last deferred payment for the water is fully paid and satisfied according to the terms of the contract under which said water right is acquired; the contract for the water right upon which the aforesaid lien is founded shall be recorded in the office of the county clerk of the county where the said land is situate."

The form of contract approved by this office and the Land Board in the various Carey Act Projects have uniformly contained provisions wherein the purchaser covenants and agrees that upon default in the payment of any of the deferred payments for the water rights in the contract that the company, its representatives, or assigns may proceed either in law or equity to collect the amount thereof and to enforce any lien which it may have on the water rights or upon the land to which the water right is dedicated.

The contracts further provide that the purchaser covenants that to secure the payment of the amount due, or to become due, under the purchase price and all interest, tolls and charges provided in the contract—

> "He will, and by these presents does, hereby grant, assign, transfer and set over by way of mortgage or pledge to the company, any and all interest which he now has, or which he may hereafter acquire in and to said lands."

This contract is then acknowledged before a notary public, and the statute provides for its record in the county where the land is situated, and undoubtedly to my mind becomes as much of a lien upon the lands described as a real estate mortgage, and may be foreclosed in the same manner.

In the case of Brown vs. Brown, 6 Idaho, page 1, the Supreme Court of this state held that every instrument intended to secure the payment of money is a mortgage, and must be foreclosed by a judicial sale, etc.

There seems to be no question but what a lien is authorized by law. There can be no question but what the purchaser is authorized under our jurisdiction by his own contract to create a lien upon the land, or any interest in it, and the contract being made within the state upon real property, situated within the state, and the procedure would be under the laws of this state, and that procedure seems to me to be well defined and settled.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

April 22, 1909,

J. W. Webster, Esq., Mayor of City of Rexburg, Rexburg, Idaho.

Dear Sir: Replying to your question submitted to me through Mr. Wallace, as to the power of the city council of Rexburg, sitting as a Board of Canvassers, to go behind the returns and where questions as to the irregularities of the proceedings, if any, prior to the election in said city are raised, I will say, the courts have uniformly held in a long line of decisions that: "Canvassing Boards, in casting up the returns of an election, act in a purely ministerial capacity, and have no power to go behind the returns, and reject those regular on their face and not shown to be spurious," and again: "The Board of Canvassers have no authority to pass on regularities of an election, or qualifications of persons voting thereat." Applying these principles to the statement submitted, it would appear clear that it is the duty of your board to issue certificates of election to the parties who appear from the face of the returns to have the majority of votes cast.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

April 23, 1910.

Frank T. Disney, Esq., County Attorney, Shoshone, Idaho.

My Dear Mr. Disney: The assessor and tax collector of your county was in the office some time ago and inquired whether or not lands under the government reclamation project in your vicinity, upon which the General Land Office had issued a receipt covering residence, and releasing the entryman from further residence on the land, was or was not taxable. He was advised that we would look into the matter and write him further. This office was apprised by the assessor and collector that you had not ruled with reference to the matter, and our opinion is, therefore, directed to you that you may use the same if you deem it advisable and coincide with our view of the law.

We find that the Land Office has been issuing what is called a five-year certificate in such cases, which recites that the entryman has complied with the ordinary provisions of the homestead law, and will be excused from further residence on the land, and when he shall have paid the charges announced by the secretary, and reclaimed at least one-half of the irrigable area of his entry, as required by the Reclamation Act, patent will issue for the land. It will be thus seen that this receipt varies materially from all "final certificates." The entryman holding a final certificate is entitled to patent, but the entryman holding the five-year reclamation certificate is not yet entitled to his patent.

For your information, we are attaching hereto the form of receipt used by the General Land Office in such cases. We have ascertained that in most of the receipts issued, the phrase "in your name" is omitted, and also in most of the receipts, the phrase "your entry" is altered into reading "the entry."

There is now pending in Congress a bill which authorizes the transfer of such lands after a five-year certificate has been issued, and providing that the land shall be taxable after this certificate is issued.

In view of all the circumstances surrounding this case, we are satisfied that entries of the nature herein discussed are not subject to taxation. The introduction of a bill in Congress along the line above indicated would seem to lead to the opinion that there is a doubt in Congress that these lands are taxable in their present status.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

April 24, 1909.

Henry Ensign, Esq., Hailey Idaho.

Dear Sir: I enclose you statement from county superintendent of your county asking for my opinion upon a question submitted, together with my reply. Section 250 of the Revised Codes is as follows:

> "Every qualified elector shall be eligible to hold any office of this state of which he is elector, except as otherwise provided by the Constitution."

Assuming that Mr. A has the proper qualifications of citizenship and age, and has resided within the state for six months, it would seem clear to me that his residence in Bellevue since the 6th of January, 1909, a period of ninety days, would be sufficient residence on his part to entitle him to vote at any election held at Bellevue, provided, of course, that his removal there at that time was with the intention of making it his permanent home.

The question of his intention is a question of facts, which can be determined largely from his statements and acts, which from the statement of facts enclosed are that he moved to Bellevue on the 6th of January, 1909, and purchased a business, and has continued to reside there during working days ever since, together with his declaration of intention to remove his family as soon as arrangements can be made, together with the fact that he voted at the municipal election and afterwards voted at the school election, it would seem clear to me that he was a resident and citizen of Bellevue, and as such entitled to vote at the school election, and, therefore, entitled to hold the office of school trustee to which he was elected on April 17 of this year.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

May 5, 1910.

Hon. S. D. Taylor, State Auditor, Building.

Dear Sir: Replying to your letter of May 2d asking for the opinion of this office with reference to the rates to be charged under the transfer tax law of this state, and especially with reference to the estate of Peter H. Ready upon which report is made, which report you enclose, we desire to say that Sec. 1875 of the Codes provides for the rate to be charged in all cases where the property passed exceeds in value the exemption specified in the Act and does not exceed in value $25,000. Sec. 1876 provides the rate to be charged where the value of the property exceeds $25,000, and provides that in such a case where the property exceeds $25,000 but does not amount to $50,000,

one and one-half times the primary rate shall be charged for such excess over $25,000.

We believe the probate judge in the case submitted has figured the rate correctly.

Herewith the papers you submitted.

D. C. McDOUGALL,
Attorney General.

May 6, 1909.

DeMead Austin, Montpelier, Idaho.

Dear Sir: This office is in receipt of your letter of May 5th with reference to the construction of the word "householder" as used in Section 642 of the Revised Codes, which authorizes "resident free holders or householders of the district and their wives" to vote on the question of a bond issue.

Generally speaking, we would define a householder as the head of a family, occupying with his family a dwelling house or apartment, regardless of whether or not he is the owner of such house or apartments or lessee thereof. A man and his wife would constitute a family, of which the man would be the head even though there should be no children. The question whether the person claiming the status is a free holder or taxpayer can, we think, hardly enter into the definition.

We would, therefore, hold that the person about whom you write, viz, one living in an independent school district with his wife, in a house rented and furnished by him for residence purposes, is entitled to vote at a bond election although he pays no taxes.

For your convenience, we would cite you to Vol. 4 of "Words and Phrases," page 3366, for authorities.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

May 17, 1909.

Adrian Nelson, Deputy Clerk of Court, Moscow, Idaho.

Dear Sir: This office is in receipt of your letter of May 11th, asking for construction of House Bill, No. 23. We think that the provisions requiring the payment of $3.00 for filing of a cross complaint, imposes an additional fee to that required upon the filing of a simple appearance. For example, a defendant, who simply answers or puts in a counter claim, need pay only $3.00, but, if in addition to so doing, he also files cross complaint, he must pay an additional fee of $3.00, even though the cross complaint is contained in the same instrument with the answer.

As to the definition of cross-complaint, we cannot enlighten you. The bar of the state has been waiting for thirty years or more to have the term adequately defined. I suppose that the clerk will in the first instance have to accept the designation by the attorney of his pleading. There is no real reason for this distinction in fees unless it be that in some cases, if a cross complaint is filed, it requires the bringing in of new parties, the issuance of new summons, etc. However, the distinction is made, and must be followed.

The Act is obscure with reference to the fee to be paid on change of venue. I think it may be said, without hesitation, that no new stenographer's fees need be paid, after the change. I am also of the opinion that the clerk of the court to which the proceedings are transferred, cannot collect any fee for this service, nor is he entitled to any portion of the fee paid to the first clerk. While this may not be a just

conclusion, yet no fee is provided by the statute, and the courts could not supply the deficiency.

The Legislature adjourned, according to their records, on March 6, 1909, and the certificate of the Secretary of State to the Session Laws, has given that as the date of adjournment.

Yours very truly,

D. C. McDOUGALL,
Attorney General.

May 18, 1909.

Hon. Fremont Wood, District Judge, Boise, Idaho.

Dear Sir: This office is in receipt of your letter of May 15th asking for a construction of Sec. 3987 of the Revised Codes, relating to the appointment of deputy court reporters when required by the business of the court.

It is our opinion that when, through a rush of business, a necessity exists for a deputy reporter the court has power to make the appointment, and to fix the compensation of the appointee, which when so fixed should be paid out of the fund in the State Treasury, apportioned for the salaries of court reporters. In case a deficiency is created, that will have to be taken care of by the Board of Examiners when the time comes.

We would suggest that in case the appointment is made, the vouchers of the deputy reporter, to be presented quarterly, should be audited and approved by you, and accompanied by a certified copy of the order making the appointment.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

May 23, 1910.

Mr. Walter Keefe, Deputy Insurance Commissioner, Boise.

Dear Sir: In regard to your letter of recent date respecting status of mutual benefit insurance companies in this state, and also in regard to what effect insolvency has upon insurance policies, I have to say as follows:

First, that I have made an exhaustive investigation of authorities in regard to the first proposition stated, and have reached the conclusion that the policy holders of mutual insurance companies are mutually liable, under our statute, and must remain so as long as there is no allowance made by statute for cash premiums. This in effect means that in case of insolvency of the association in question, its members must be liable pro rata to pay the amount of debts outstanding; you will observe that this opinion agrees with the one originally given you about a year ago by Assistant Attorney General Peterson.

I would say further, however, in this connection that in my judgment, while the policy holders of the said companies would be proportionately liable for losses occurring in Idaho, yet Idaho policy holders or other policy holders, working under the laws of a state that has a like statute as of the laws of Idaho, would not be liable pro rata for losses occurring through insolvency in the State of Washington. This would be brought about by the fact that the laws of the State of Washington allow a cash premium to be paid in lieu of assessment and release the policy holders from all further liability. Therefore, the Washington laws release not only all policy holders, but also all other policy holders wheresoever situated, for all losses occurring in the State of Washington. The difference in this liability is simply brought about by the difference in the statute. As our state statute does not

release the policy holders, all policy holders, wherever situated are liable for losses occurring in the State of Idaho.

In re effect of insolvency upon outstanding policies, I have to say that the rule of law is that insolvency of a company automatically vitiates and annuls all outstanding policies.

Yours very respectfully.

D. C. McDOUGALL,
Attorney General.

June 13, 1910.

Dwight E. Hodge, Esq., County Attorney, Lewiston, Idaho.

My Dear Sir: Replying to yours of the 9th inst. presenting two questions on the Direct Primary Law will say, in reply to your first question as to who is to pay the nomination fee where a candidate filed no petition, and whether the same can be paid under the provisions of section 24, while these two sections would seemingly conflict and be inconsistent with each other if it were construed that the candidate himself should pay the fee required by section 7, yet I am inclined to the opinion that the whole must be construed together, and to hold that he could not pay this fee and yet require the fee to be paid would in effect do away entirely with his right to be nominated without a petition, and this in my opinion is not the intention of the Legislature, or a reasonable construction of the law taken as a whole.

Replying to the second question, I agree with you that any number of petitions may be fastened together so as to show the requisite number of names, and no other way would be feasible.

As to the form, I do not think that it is necessary to address the petition for nomination to anyone. The form that has been generally adopted here is in accordance with the one enclosed.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

July 8, 1909.

Hon. James H. Brady, Governor, Building.

Dear Sir: I have before me your letter transmitting committment papers of Maggie Pool to the Insane Asylum at Blackfoot, together with letter of Mr. Hoover, medical superintendent, asking for an opinion as to whether idiots can be confined at the said asylum. Section 770 of the Revised Codes of Idaho is as follows:

> Sec. 770. Whenever it appears by affidavit to the satisfaction of a magistrate of the county that any person within the county is so far disordered in his mind as to endanger health, person or property, he must issue and deliver to some peace officer for service, a warrant directing that such person be arrested and taken before any judge of the court of record within the county for examination.
>
> Sec. 777. The judge after such examination and certificate made, if he believes the person so far disordered in his mind as to endanger health, person, or property, must make an order that he be confined to the insane asylum.
>
> Sec. 780. No case of idiocy, imbecility or simple feebleness of mind must be maintained at, nor must any case of delirium tremens be admitted to the asylum.

Construing these sections together, I am of the opinion that the last section refers only to idiots or simple minded persons, whose mind is not disordered to such an extent that would endanger life, person or property, but should one of this class of idiots or feeble minded per-

sons be inclined to destructiveness, or other habits which would endanger life, person or property, they would be proper subjects to be committed.

Section 791 is as follows:

> "All persons from the Counties of Kootenai, Bonner, Latah, Shoshone, Nez Perce and Idaho, who are in the future regularly tried upon charges of insanity and found guilty of said charge, and all idiots, not otherwise provided for, whose freedom is considered a menace to public safety, shall be committed to the North Idaho Insane Asylum; and persons having been heretofore committed from the six above mentioned counties, and are now confined in the state insane asylum at Blackfoot, shall at the direction of the board of directors of the two asylums and the approval of the Governor, be removed from the asylum at Blackfoot to the North Idaho Asylum; and under the same conditions, any of the inmates of the asylum at Blackfoot, whether now or in the future, may be removed to the North Idaho Asylum, and if it is thought advisable by the two boards of directors, the Governor concurring, any insane person or idiot may be committed direct to the North Idaho Insane Asylum from any counties of the state."

This last section quoted was passed for the purpose of removing inmates of the Blackfoot Asylum, who were committed from the six counties mentioned, from the Blackfoot Asylum to the northern asylum and to direct where insane persons committed after that date would be confined.

This section, in my judgment makes no distinction between ordinary insane persons and those called idiots, who are a menace to public safety, or in other words, who are so far disordered in their minds as to endanger health, persons or property.

Such persons, if committed in the six northern counties should be confined in the northern asylum, and those committed in the other counties of the state should be confined in the Blackfoot Asylum, unless the Board of Directors of each of the asylums, with the approval of the Governor, order them confined in the North Idaho Asylum.

In reference to the committment blanks submitted, I call attention to Section 775, which sets out the facts which the examining physician must certify, and I am of the opinion that the magistrate's committment should also certify that, from the evidence, he believes the person to be so far disordered in his mind as to endanger health, person and property, in compliance with the requirements of the statute.

Very respectfully yours,

D. C. McDOUGALL,
Attorney General.

July 14, 1910.

Mr. C. E. Crowley, Assessor of Bingham County, Blackfoot, Idaho.

Dear Sir: Your letter of June 21, 1910, was received some days ago, but we have been so busily occupied with pressing matters in this office that we were unable to get to it before. I understand from your letter that a number of parties are applying to redeem property sold to the county. I have carefully investigated this question, and to the query set out in your letter reply as follows:

How long a time should the assessor continue to run the property on the roll after it is sold to the county?

For answer to this question, I cite you to section 1755 of the Revised Codes, which provides that it shall run on the roll until the county is entitled to a tax deed, which is for three years. At the ex-

piration of the three years, the assessor should properly issue his tax deed to the county. In my judgment, it is not then necessary to carry said property any further on the rolls, and also in my judgment, if the law should be strictly construed, the party originally owning the land would not be entitled to redeem.

Should the auditor estimate taxes for all or any of years as soon as the property was deeded to the county, and make the redemptioner pay that also?

In my judgment, it is not necessary for the tax assessor to make any estimate after deed for the simple reason, as said in my answer to the question just above, that I do not believe that under a strict construction any party would have the right to redeem because the redemption period had passed. However, should your office, as many other offices in this state have done, allow the original owner to redeem, it certainly would be right and proper that an estimate be made and the redemptioner be made to pay it on the basis of a fair estimate.

Can parties redeeming be made to pay taxes and costs and penalties that were levied on said property after the property was deeded to the county for taxes?

In answer to this question, I will say that the answer tto the question above sufficiently answers the same, that if you do allow the redemptioner to redeem, he should pay these penalties, because, in my judgment, it does not necessarily follow, as said before, that he has the right to redeem at all.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

July 15, 1910.

W. L. Gifford, Esq., Lewiston, Idaho.

Dear Sir: Replying to yours of the 8th inst. in which you ask if in my opinion the announcement by a person that he will be a candidate for the primary election is a violation of the primary law, even if he has not paid for the space, will say, I have not so construed the law. In fact, a number of questions have arisen as to just what a candidate may do in order to let the voters of his county know that he will be a candidate, and I think it is contemplated by the statute in question that the person could make the statement that he is a candidate and publish it for the reason that it is certainly contemplated by the statute that the widest publicity of the mere fact of the candidacy of a candidate should be given so that the people could be advised of the persons seeking the nomination.

I have not seen the copies of the notices to which you refer, and it is possible that they could be made to conflict with the law.

I find nothing in the law which would prevent one who had signed the petition of someone else for nomination, afterwards becoming a candidate himself for the same position.

With best wishes to you personally, I am,

Yours respectfully,

D. C. McDOUGALL,
Attorney General.

July 21, 1910.

Hon. Charles P. McCarthy, County Attorney, Boise.

Dear Sir: In reply to your letter of July 18, 1910, asking as to the compensation of county surveyors, I will say that county surveyors are to be paid exactly as other county officers are to be paid, and all fees received by them through and by virtue of their office must be turned

into the county treasury. Owing to the failure of a great many counties to fix the salaries of the county surveyors at a proper figure and owing to constitutional limitation on said salaries, a very difficult situation has arisen. That situation is that competent surveyors would never consent to turn over all their fees to the county and accept the small salary provided, nor could they afford to work for the county alone and receive only the compensation provided by the laws and constitution. The constitutional provision is as follows:

> Art. 18, Sec. 7. County officers and deputies shall receive quarterly salaries in full compensation for their services and actual and necessary expenses incurred in the performance of their official duties, and shall turn all fees received over and above expenses into the county treasury.

Section 2115, Revised Codes of Idaho provides as follows:

> Sec. 2115. The salaries of county officers as full compensation for their services must be paid quarterly from the county treasury, upon the warrants of the county auditor, and before being paid to such officers, must be allowed and audited by the board of commissioners as other claims against the county and no officer or deputy must retain out of any money, in his hands belonging to the county, any salary, but all actual and necessary expenses incurred by any county officer or deputy in the performance of his official duty shall be a legal charge against the county, and may be retained by him out of any fees which may come into his hands. All fees which may come into his hands from whatever source, over and above his actual and necessary expenses, shall be turned into the county treasury at the end of each quarter. He shall, at the end of each quarter, file with the clerk of the board of county commissioners, a sworn statement, accompanied by proper vouchers, showing all expenses incurred and all fees received, which must be audited by the board as other accounts.

Section 2116 of the Revised Codes provides as follows:

> Sec. 2116. Any county officer or deputy who shall neglect or refuse to account for and pay into the county treasury any money received as fees or compensation in excess of his actual and necessary expenses incurred in the performance of his official duties, within ten days after his quarterly settlement with the county, shall be guilty of embezzlement of public funds, and be punishable as provided for such offense.

Section 2118 of the Revised Codes provides as follows:

> Sec. 2118. It shall be the duty of the board of county commissioners of each county, at its regular session in April next preceding any general election, to fix the annual salaries of the several county officers, except prosecuting attorneys, to be elected at said general election, for the term commencing on the second Monday in January next after said meeting, and in no case shall the salary of any county officer be less than the lowest amount hereinafter designated for such officer and in no case shall it be higher than the highest amount hereinafter designated for such officer. The salary of prosecuting attorney shall be fixed at the regular July session next preceding each general election.
>
> * * *
>
> The county surveyor shall receive a salary of not less than fifty dollars per annum, and not to exceed eight hundred dollars per annum.

You will observe by the constitutional article that it says county

officers shall receive quarterly salaries in full compensation for their services and actual and necessary expenses incurred in the performance of their duties. It is readily to be seen since the surveyor is a county officer that his salary shall be full compensation, and that to allow him fees from the county, in a strictly legal interpretation would be contrary to the constitution as well as to sections 2115, 2116 and 2118 of the Revised Codes, hereinbefore cited. I particularly call attention to that part of section 2118 where it says, "and in no case shall it (the salary) be higher than the highest amount hereinafter designated."

In re Rice, 12 Idaho, page 305, the Supreme Court in discussing the right of a public administrator, towit, the treasurer, to receive fees, says:

> "We have no hesitancy therefore in holding that all fees and compensations received by the public administrator as such and in his official capacity must be accounted for by such officer and are chargeable against him by the said county."

The court says in the same opinion that section 7 of article 18 of the constitution, "specifically provides that the salaries of the various county officers shall be full compensation for the discharge of all official duties and services. . . . We do hold that he must account to his county for any and all fees which he has collected as such officer."

Although we are reluctant to give this decision in view of the fact that it creates not only a great hardship upon the surveyor, but also upon the county, yet it seems to me that it is impossible to escape the conclusion that the county surveyor is not entitled to receive any more from the county than his salary and actual and necessary expenses.

The remedy to ameliorate this difficulty, if it is possible of betterment, will lie with your county commissioners.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

August 16, 1910.

Hon. Charles P. McCarthy, County Attorney, Boise, Idaho.

Dear Sir: In reply to your communication asking as to whether or not a voter at the coming primary election may write in the ballot for first or second choice the name of some person whose name does not appear upon the ballot as a candidate, I have to say that it makes no difference whether or not the first or second choice desired to be voted for appears upon the ballot. If the voter so desires, he may write in as either first or second choice, or both first and second choice the name of any party or parties whose name or names are not printed upon the official ballot.

If a voter were compelled to vote for first or second choice or both the names of the candidates appearing upon the ballot, the provision of the statute in regard to writing in names would be a nullity. Section 14 of the Primary Election law, among other things, says:

> "And a blank space shall be provided under each official heading in order that a voter may write in the name of a candidate for any office."

The Supreme Court in the recent case of Gardner G. Adams vs. Robert Lansdon, Secretary of State, said as follows:

> "The contention that a person is not a candidate until after he has filed his nomination papers is not in accord with the clear purpose and intent of the primary election law. It is provided among other things in section 14 of said Act that a blank space shall be provided under each official heading in order that a voter may write in the name of the candidate for any office.

It is possible under that provision for a person to be nominated for an office who has not been nominated by paying the fee or filing the petition as required under the provisions of sections 6 and 7 of said primary election law and whose name is not printed on the ballot."

The provision of the statute and the decision of the Supreme Court is so plain in that matter that there is no room for ambiguity or difference of opinion.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

October 17, 1910.

C. W. Jessup, Esq., Julietta, Idaho.

Dear Sir: In reply to your letter of October 12, 1910, I desire to say that I have carefully investigated the question of the rural high school which you ask and I see a great many difficulties that might arise should you desire to organize a rural high school district under the conditions set out in your letter. I observe from your letter that you state that you wish to combine districts in two counties. The high school district law has no reference to the combination of districts in two counties, but the Legislature evidently had in mind only the organization of such a district in one county. The main objection that I see to this high school matter is that the law is very indefinite as applied to counties, and I fear very much that should you at a future time desire to erect a school house and to sell bonds of said district, that there would be much difficulty in getting anyone to take up the bonds.

If you carried the rural high school idea through at all, it would be necessary for a petition to go in to the board of county commissioners of both counties, and both boards would have to call an election upon the same day and at the same place, and returns would have to be made to both boards. If one of the boards of county commissioners do not consent to act with the other one, it would not be possible to carry the matter through at all.

In my judgment, it would be better to choose the bond district which you will find provided for in the school laws. This is expressly passed in order to give the districts in two counties a chance to combine. This is not very satisfactory from a legal standpoint, but of the two methods, it is more nearly legal than the other.

It is to be hoped that the Legislature will make our school laws a little clearer at the next session, which occurs in January, and it would be an easy matter to have the high school law so amended that it would clearly and unequivocally apply to districts in two counties. If this could be done, it would be a better plan to wait until the new law had been passed and then organize under that.

Very respectfully yours,

D. C. McDOUGALL,
Attorney General.

October 18, 1910.

William C. Dunbar, Esq., Justice of Peace, Boise, Idaho.

Dear Sir: In reply to your inquiry over the phone the other day as to whether or not it would be necessary for a person hunting game not specified in the game laws to have a license, I have to say, that I have carefully investigated the question, and, in my judgment, any person who hunts for any kind of game whatsoever, whether game that is protected under a closed season by our laws, or otherwise, must obtain a license before hunting.

In reading section 7180 of the Revised Codes, you will observe in the first and second lines thereof the words, "to hunt for any kind of game whatever." Game is of two kinds, that which is protected and conserved under our laws, and that which is not. In the latter class would perhaps fall quite a number of animals and birds—for example, bear, squirrels and a number of others. It is plainly the intent of the law to require the obtaining of a license from the state for the hunting of all game. So the only question to be determined, as I view it, is the determination of what is game. This would be in good part a definition for a jury. However, there are a few good definitions of game laid down by the law books. For instance:

> "The term 'game' has been defined as birds and beasts of a wild nature, obtained by fowling and hunting. Within the meaning of the game laws, however, it refers primarily to game fit for food, although, under some statutes, it applies also to animals valuable for their furs and otherwise." See 19 Cyc. page 987 (1) (A).

Yours very respectfully,
D. C. McDOUGALL,
Attorney General.

October 22, 1910.

Charles E. Harris, Esq., County Attorney, Montpelier, Idaho.

Dear Sir: Replying to yours of the 21st asking whether all constitutional amendments should be printed on one ballot, I beg to advise you that Section 405 of the Revised Codes, among other things, provides:

> "That if more than one constitutional amendment is to be voted on at any election, they shall all be printed on one ballot."

Another question that has been submitted by a number of county attorneys is whether a party motto can be put upon the ballot to which I have replied, quoting the same section, which provides that nothing shall be placed on the main ballot except the names of the different tickets, the emblems, if any of the different parties, the names of the candidataes, and the circles as provided in the same portion of the statute.

Yours very respectfully,
D. C. McDOUGALL,
Attorney General.

November 21, 1910.

Mr. C. E. Remington, Road Overseer, Athol, Idaho.

Dear Sir: This office has received your letter of October 22, 1910, and desires to reply as follows:

Whether or not a man can be made to work the road in a certain district depends altogether upon the facts as they exist in your precinct as applied to the law. There is no question but that permanent residents who are not specifically exempt by law, may be compelled to work or pay the road tax. In regard to transients, there is quite a conflict as to whether they may be compelled to work in a district, particularly when they do not reside therein. Ordinarily, in this section of the State where a man has been some time in the precinct, he may be called out at the proper time of the year. Proceedure in cases where a man has a large number of men working for him, is to serve notice upon him as required by law. This you will find particularly set out in the road pamphlets and road laws, of which we presume you have a copy. Should the employer fail to give the names or to hold out from the wages, the amount due, it can be settled in

due course of law as to whether or not the road taxes may be legally exacted from these men. We would suggest that in such cases as this of which you speak, that the matter be presented to the prosecuting attorney, who has full power and authority to act for you in such cases, and that his advice be relied upon as he is on the ground and knows the facts much better than this office, and, moreover, he has the sole control as far as the legal conduct of such cases is concerned.

In regard to protecting a road from a traction engine, I have to say that there is no special law in our statutes upon this subject, except in the way of protecting bridges by the laying of planks of certain dimensions. This you will find in the road laws. The only other law that may cover the subject at all is the general law regarding the obstruction of roads. Providing rocks and timber are placed in the road, I think it is quite possible that a case could ze brought against a man for road obstruction. This matter should also be referred to the county attorney for the reasons above stated.

Yours very respectfully,

D. C. McDOUGALL,
Attorney General.

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