State of Iowa
1924

FIFTEENTH BIENNIAL REPORT

of the

ATTORNEY GENERAL

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 1924

BEN J. GIBSON
Attorney General

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REPORT OF THE ATTORNEY GENERAL

To the Honorable John Hammill, Governor of Iowa:

I have the honor to submit herewith a brief report of the business of the Department of Justice for the years 1923 and 1924.

The work of this department has during recent years become so extended as to preclude the possibility of covering the same in a report such as is contemplated by law. Therefore, in the preparation of this report, I have endeavored to limit it to a few subjects which may be of interest and benefit to the people of the state.

During the past two years we have endeavored to follow the same policy relative to the affairs of the state government that were followed during the preceding two years. This policy is disclosed in the following quotation from the report of the department for the period mentioned. Therein, I say:

> "In the beginning of the year 1921 it was deemed advisable to attempt to reorganize the department, all to the end that the work of the various officers and branches of the department might be unified and co-ordinated. It was then the thought, and it is the thought now, of the writer, that the department of justice should be the law office of the state government, and that in connection with its work as such it should so attempt to conduct its business as to make possible complete co-operation between it and the other departments of the state government, as well as the several county and municipal governments.
>
> "The Thirty-ninth General Assembly enacted a statute authorizing the attorney general to establish in the department of justice a bureau of investigation. Under the authority thus granted all special agents and all special peace officers were consolidated into one force and placed under a chief. In addition to such consolidation of the work of the peace officers in one complete secret service department, there was also established a burden of criminal identification. The primary thought and purpose was to create a central clearing house for the use and benefit of the local governments of the state, and to stimulate and foster among the various officers, both local and state, a spirit of mutual assistance and co-operation. Schools of instruction were held throughout the state, attended by sheriffs, chiefs of

police and other police officers. These schools had to do not only with criminal identification and investigation, but also were a part of a general plan of state-wide attack upon all violations of the criminal law."

The correctness of the conclusions, which are thus expressed, I believe has been demonstrated by actual results during the past two years.

The Department of Justice is the law office of the State of Iowa and it must always be such. The dignity and honor of the State of Iowa must at all times be maintained and it has been our purpose in every act to so conduct the law business of the state as to give no one reason to say that they have been unfairly treated by the state.

DEPARTMENT FINANCES

This department has made its report to the Budget Director as required by law, setting out in detail the expenses and receipts of the department for the period. To repeat in this report is unnecessary and therefore only a brief summary is included herein. It will be observed that in every branch of the department's finances we have lived within the limit set by the legislature. We have felt that the maximum set by the legislature was the maximum to be expended and have therefore sought with success to reduce expenditures below such maximum.

TAXATION CASES

During the preceding two years a great amount of tax litigation arose throughout the state. This litigation has continued during the past two years and it is only recently that we have observed any let up in this class of litigation. This litigation has involved the taxation of railroads, banks and other classes of property and has involved millions of dollars in public revenues.

RAILROAD TAXATION

During the year 1922 the Chicago, Rock Island and Pacific Railway Company and the Chicago Great Western Railroad Company brought suits in the United States District Court for the Southern District of Iowa in which temporary injunctions were asked to restrain a portion of the assessments made by the Executive Council. These cases were submitted, upon the applications for temporary injunctions, to a three-judge court consisting of Circuit Judge Stone of the 8th Judicial Circuit and District Judges of the United States, Munger and Wade. This court after a full hearing denied the application for a temporary injunction. Thereupon the railroads

appealed to the Supreme Court of the United States and during the appeal a stay, staying in the case of the Great Western 12 per cent of the assessment and in the case of the Rock Island 8 per cent of the assessment, was granted. The railroads executing to secure the payment of the tax, should they be ultimately defeated, bonds in the amount fixed by the court. This appeal was recently determined by the Supreme Court of the United States in favor of the state on every question involved.

During the pendency of the cases in the Supreme Court of the United States the cases, upon the application of the carriers, were submitted to a Master who rendered a decision adverse to the state. The state filed exceptions and these exceptions have not been ruled upon by the district court. The questions involved were all involved in the appeal determined by the Supreme Court of the United States and it would seem that the district court will enter judgment and decree upon the exceptions in conformity to the ruling of the Supreme Court of the United States. These cases will be determined at the earliest possible moment.

KEOKUK DAM CASES

During the administration of Attorney General George Cosson the state became involved in what we commonly know as the Keokuk Dam Cases. These cases are cases which should have been handled locally but in some way or other the attorney general appeared for the local board of review. The cases involve the taxation of the power house operated in conjunction with the dam. The amount of the assessment as made by the local assessor was reduced by the local board of review very materially. Thereupon the assessor appealed to the district court for Lee county. This appeal was prepared by Mr. Cosson. Subsequently the cases were transferred to the United States District Court where they have been pending since.

The difficulty in connection with these cases lies in the following facts. The power house is located in the middle of the Mississippi river. The defense to the appeal is bottomed upon the contention that the power house is in Illinois instead of Iowa. If the power house is in Illinois, then undoubtedly the state will be defeated. If the power house is in Iowa the state should, in the absence of some unusual facts of which we have no knowledge, win.

As will be noted these cases were pending during the administration of Attorney General Cosson, continued during the administration of Attorney General Havner and have been pending during

our administration. At the last term of the federal court held at Keokuk, we filed a trial notice asking that these cases be tried. Thereupon by agreement the cases were set down for the first cases to be tried at the next term of the federal court at Keokuk. We have served notice upon the power company that if they are going to insist upon their defense that the power house is located in Illinois that it will be necessary for us to bring action in the Supreme Court of the United States to determine the location of the state line between Illinois and Iowa at the point in question. I had thought that the boundary commission would be able to dispose of this question and for that reason, two years ago, asked that the powers of the boundary commission be enlarged and the legislature granted my request. However, Illinois failed to appoint a boundary commission with like powers to the Iowa commission and the result was a failure in the matter.

I make this brief report on this case because it is the only case inherited by us from our predecessors which has not been disposed of and to inform the legislature of the fact that it is our purpose to dispose of it in some manner shortly.

BANK TAXATION

PRIVATE BANKS

It may be of interest to know that some two years ago this department was informed of the fact that private banks had been deducting from the amount of their assets for taxation purposes debts owing by such private banks. This was clearly contrary to the law. At the time of the enactment of the "moneys and credits statute" the provision for a deduction of debts in connection with the taxation of moneyed capital in private banks was eliminated. This department rendered an official opinion in conformity to the law, the result being an increase in the amount of taxes paid by private banks of several hundred thousand dollars.

NATIONAL BANKS

During the past two years this department in conjunction with the city of Des Moines, as represented by its corporation counsel, Mr. John J. Halloran, and Polk county, as represented by its counsel, Mr. George F. Henry, presented to the Supreme Court of the United States the case of the Des Moines National Bank v. Fairweather, et al. In this case the validity and constitutionality of the Iowa Bank Tax Statutes was involved. The Supreme Court sustained our position and thus we have a definite ruling sustaining the validity and constitutionality of our laws. The determination

of this case has determined practically all of the bank tax cases arising in the state.

This department also took part in the submission to the Supreme Court of Iowa of the case of the First National Bank of Guthrie Center v. Anderson, et al. In this case the question of the administration of our tax laws was involved. The Supreme Court sustained the position of the state. This case is now pending on appeal in the Supreme Court of the United States. We have filed arguments on behalf of the state and believe that the determination of the matter by the Supreme Court of Iowa will be sustained.

There are two other matters of vital importance in the administration of the tax laws that have been submitted, one of which has been ruled upon by the Supreme Court. These questions are the following: When and under what circumstances is a board of supervisors authorized to grant a refund of taxes? The Supreme Court has held recently that a refund can only be granted where the tax was absolutely void. That is—where the tax was levied without authority of law or where the property was not subject to taxation. The other question is—when does a court of equity have jurisdiction to grant an injunction to prevent the collection of a tax? This question has not been determined. It may be interesting to know that the position of the state is that an injunction will not lie, save where the tax is void as stated. That in connection with any other matters involved it is the duty of the taxpayer to appear before the board of review and there make complaint and from the decision, if adverse, to appeal. The thought behind our position in both of these matters has been that there must be a time when the government definitely knows just what its revenues will be. If taxpayers, years after the assessment has been made, can go into a court of equity and enjoin the collection of the tax upon some alleged irregularity, then the government can never know when the amount of its revenues is certain. The very purpose of the legislature in conferring the right upon a taxpayer to appear before the board of review was to definitely determine, after the board had adjourned and after the time for appeal had passed, the exact amount of property subject to taxation and upon which the levies should be made to raise the amount necessary for the purposes of government.

INSURANCE TAXATION

There is now pending in the district court of Polk county, Iowa, the case of the New York Life Insurance Company v. W. J. Burbank, et al., in which case is involved the construction of the insur-

ance tax laws of Iowa. It is the contention of the insurance companies that the gross premium tax of 2½ per cent has been erroneously and illegally computed during the past years. The custom of the Department of Insurance has been to apply the gross premium tax to the gross premiums as shown on the face of the policies issued, allowing only those deductions specifically set forth in the statute. This has been the custom for more than a half century. The insurance company contends that it is entitled to deduct from the gross amount of premiums as shown on the face of the policies such items as premiums returned, reserves set up, amounts paid for reinsurance, etc. This department believes the Insurance Department to be correct in the application of the rule for many reasons which we will not attempt to enumerate in this report. Suffice it to say that this case involves not less than a million dollars in ultimate results and is of the most vital importance to the state.

TAXATION IN GENERAL

To this date the department has been successful in sustaining the tax laws of Iowa. We have been successful in sustaining the action of the taxing authorities of the state and this result has been pleasing to us, in that, it demonstrated the fact that the administrative officers of Iowa have correctly construed and correctly applied such laws. It is true that many, many errors have crept in, but errors are always to be found in connection with taxation. As Mr. Justice Miller of the Supreme Court of the United States has said, "Absolute equality of taxation is a dream unrealized." On the whole therefore, it should be pleasing to the people of Iowa to know that while we have errors in our tax laws which should be remedied, still such laws have been on the whole correctly administered and construed.

BANK RECEIVERSHIPS

It is indeed unfortunate that during the past two years a number of state and savings banks and loan and trust companies operating under the laws of the state have failed. It is fortunate indeed that the legislature at its last General Assembly enacted the bank receivership statute placing such insolvent institutions under the jurisdiction of the banking superintendent. This has resulted in permitting him to reorganize more than a score of banks to the ultimate benefit of the communities affected, and it has also enabled him to conduct bank receiverships with a minimum of expense. I would that I had the space to point out the great saving to the depositors under this statute. A comparison between a bank receivership under

the new law as to expenses and a bank receivership under the old law as to expenses will demonstrate to all the correctness of our statutes.

The Superintendent of Banking has been confronted with many difficult problems, but in connection with the insolvent banks handled by him we have known of no grave criticisms. This is a matter of which the superintendent may justly be proud.

CASES IN THE SUPREME COURT OF THE UNITED STATES

We have already referred to a number of the cases determined by the Supreme Court of the United States and in which the State of Iowa has been interested. In addition to the foregoing a number of other cases have been submitted to that tribunal and have been determined in favor of the state.

Among the cases so referred to is that of the State of Iowa v. William Olander. In this case the question involved was the constitutionality of the statutes of Iowa providing for the filing by the county attorney of an information in lieu of an indictment by a grand jury. The Supreme Court of the United States affirmed the determination of this matter by the Supreme Court of Iowa and thus has forever settled the question of the validity and the constitutionality of the Iowa laws to such effect.

Among such cases also is that of the State of Iowa v. Wrenn. In this case was involved the constitutionality of the Iowa rape statute. This statute was enacted by the 40th General Assembly and classifies males and females with different degrees of punishment applicable to the different classes. The Iowa law was sustained by the Supreme Court of the United States as to that class including females under the age of sixteen years.

CRIMINAL CASES IN THE SUPREME COURT OF IOWA

During the past two years there have been submitted to the Supreme Court of Iowa 204 criminal cases. Of these, 157 have been affirmed and 42 reversed. Practically all of the cases submitted to the Supreme Court have been determined, but there are still pending not determined, 88 criminal cases.

We shall not burden this report with a discussion of the cases submitted to the Supreme Court of Iowa. Suffice it to say that they involve cases from the degree of murder in the first degree to the simplest misdemeanor. Scarcely any branch of the criminal law but has been passed upon by the Supreme Court during this period.

GENERAL CIVIL CASES

We have already referred to a number of civil cases and simply call attention to the list of civil cases pending and determined in the several courts of Iowa during the past two years.

CRIMINAL LAW ENFORCEMENT

During the past two years great activity on the part of the officers of this department in the matter of law enforcement has taken place. We simply call attention to the actual results as demonstrative of this activity. Such results are shown in the tables following.

INFORMATION AND IDENTIFICATION

We have become more impressed during the past two years with the importance and benefit of the Bureau of Identification. Iowa now possesses one of the best bureaus of identification in the United States. The files in the department are invaluable to Iowa. It may be interesting to note that this accomplishment has been without injury to the other work of the department and with scarcely any additional expense.

INTOXICATING LIQUOR LEGISLATION

During the past two years the legislature has rewritten the liquor laws of Iowa. The department for the convenience of the peace officers of the state has prepared a pamphlet setting forth these statutes with the decisions of the several courts construing the same. We take pleasure in presenting to each member of the legislature one copy of this pamphlet which may be of benefit in the work of the General Assembly.

During the past two years the enforcement of the liquor laws in Iowa has been good. True, we have communities in Iowa which seemingly have no desire to enforce the liquor laws and in such communities drastic action has been in many instances taken, but on the whole, Iowa has been successful in the enforcement of these laws.

The progress made during the past four years in the judgment of the writer is certain evidence of the fact that we are working nearer and nearer to a condition in Iowa where violations of the liquor laws will not be tolerated in any community.

Iowa has been proud of the enforcement of the laws in the state and it should be a matter of deep concern to every citizen that the enforcement of the liquor laws be just as good as the enforcement of the laws relating to any other class of crime.

PITTSBURGH PLUS

The Fortieth General Assembly provided an appropriation of $10,000.00 to be expended under the direction of the governor and the attorney general to secure if possible the elimination of the practice commonly known as Pittsburgh Plus. This practice may be generally described as a custom on the part of the steel manufacturers of the United States to charge on all steel, whether manufactured at Pittsburgh or elsewhere, the original base price and to add thereto the freight from Pittsburgh. The result was that Iowa, which is supplied with steel manufactured at Gary, Indiana, and other western points has been for years forced to pay a tribute amounting to the freight from Gary, Indiana, to Pittsburgh, Pennsylvania, on every ton of steel used in the state.

In beginning the fight on Pittsburgh Plus, Iowa negotiated with the states of Wisconsin, Minnesota and Illinois and an agreement was entered into between the four states to join in the fight, the expenses to be prorated. A certain well defined program was determined upon and the states began the fight. We appeared before the Federal Trade Commission, filing briefs and producing evidence, with the result that in the year 1924 the Federal Trade Commission entered a formal order directing the abolishment of the practice in the United States.

No appeal was taken from the order and it is now final, the net result being success to the several states.

OIL INVESTIGATIONS

In the year 1923 the prices of gasoline became so high that a general protest arose. The prices charged were without doubt unreasonable and unfair. The supply of crude oil was greater than ever in the history of the nation. The price of production was lower than it had been for years. It follows that the protest was justified. The attorneys general of the United States met at Chicago and gave consideration to this problem, adopting resolutions and appointing committees to investigate and take such action as might be necessary to protect the interests of the people. It was realized that the problem was a national one and that no individual state could very well succeed without the aid and assistance of the other states. This committee was continued until the gasoline prices were reduced very materially, when by mutual consent the work was abandoned, and the results turned over to the Attorney General of the United States. We mention this matter because we believe that in the future the problems which will arise in connection with the produc-

tion and sale of gasoline will become increasingly important to the people. Gasoline has become a necessity. It has been so declared by most of the states. The old conservative state of Massachusetts has adopted a statute for the investigation and possible solution of the problem. We believe that something should be done in Iowa looking toward the vesting of power in some one of the several boards and commissions of the state government such as will enable the state to protect, so far as possible, the interests of our people and the securing for them of this necessity at a fair and reasonable price.

RECOMMENDATIONS FOR REMEDIAL LEGISLATION

1. We believe that the Judiciary Committee of the House, and the Judiciary Committee of the Senate should designate subcommittees for the purpose of giving consideration to the elimination of unnecessary technicalities in the criminal law. These subcommittees, working in co-operation, may be able to accomplish something along these lines. I am frank in saying that I believe the people of Iowa will universally approve modifications in our law which will result in the speedy determination of criminal cases, preserving to the innocent every right, but insuring that the guilty shall not escape either through delays or technicalities.

2. The prohibitory laws of this state were carefully rewritten by the extra session of the 40th General Assembly and the writer is firmly of the opinion that Iowa has as good a code in this respect as any state in the Union. Certain changes may be made in this code, but in making such changes the writer believes that the primary rule to follow should be to always strengthen and never weaken any part of the law. I am inclined to believe that a section should be added to the law requiring either the county attorney or the clerk of the district court upon every conviction to forward a certified report to the Department of Justice, to the end that there may be kept a clearing house showing all convictions for a violation of the prohibitory laws so that when a case comes up in a given county the county attorney may be able to establish previous convictions. In this regard the writer believes that the habitual criminal statute should be amended so that previous convictions in the federal court may be given the same weight as previous convictions in the state courts. During the past two years many habitual violators of the intoxicating liquor laws have been sent to the penitentiary. More should inhabit that place of residence.

Unfortunately the last session of the General Assembly omitted

from the statute the rule of evidence to the effect that the finding of liquor in the possession of an individual was presumptive evidence of keeping with intent to sell. This rule of evidence should be restored and should be enlarged to include not only possession in a place but also on the person. The result will be that county attorneys will be able to better enforce the liquor laws.

3. The statutes of this state relative to the punishment of public officers for embezzlement of public funds should be amended so as to release the state from necessity of proving demand. I have never been able to distinguish between embezzlement on the part of a public officer and embezzlement on the part of an employee of a corporation. The writer believes that the punishment for embezzlement from the public should be greater than the punishment for embezzlement from a private corporation. There can be no more despicable crime that the betrayal of public trust and the conversion to personal use of funds exacted from the people.

4. The statutes of this state relating to the removal of public officers should be amended by the insertion of a rule of evidence raising a presumption in the event of continued neglect of duty.

5. The enforcement of the laws of the state depends upon the activity of local officers and the people of local communities. We have been impressed with the fact that if schools of instruction could be held for the sheriffs of the state that such schools would be worth while. True, the expense would be something to each county, but we believe that the communion of such officers one with the other, the exchange of ideas and information, the stirring up of the personal pride of the officer and the giving of instruction relative to investigations will be worth many, many times the expense to the state.

6. While it is perhaps outside the province of this department to say anything relative to the motor carrier law, I do not believe it improper to do so. This department is charged with the duty of assisting the railroad commission in the enforcement of this law. We have found during the past two years that the enforcement of this statute is impossible. When we have started to prosecute the courts have dismissed our cases. When we have sought to otherwise enforce the law we have been met with injunctions issued by the courts. We have now pending in the Supreme Court of this state a case involving the constitutionality of the statute. If we should win this case, it may be that our troubles will be over. The

writer believes, however, that this statute should be rewritten in entirety.

7. During the past two years this department has acted in conjunction with the banking departments in the work of liquidating closed banks. This work has brought to my attention many matters which I believe should be called to your attention with the recommendation on my part that remedial legislation be adopted.

A great many banking institutions have been closed which ought not to have been closed. This has been caused by the circulation of false rumors in a community to the grave injury of the institution. The banking business depends to no small extent upon the confidence of the community in its stability. The circulation of false rumors and malicious reports relative to a good and solvent bank results in a grave injury to the institution and often times in its destruction. Such a calamity falls most heavily on the community as a whole and its effect will be felt for years. One year ago the banking department submitted to the legislature a bill designed to criminally punish the circulation of false rumors and reports about a bank. The circulation of false rumors and reports is a crime in practically all the states and is a crime under the laws of the United States. In my judgment the legislature should give consideration to this matter.

Some time ago the writer made an analysis of the causes of the recent bank failures in this state. The result was that we arrived at the conclusion that with very rare exceptions such failures were caused by excess loans made in direct violation of the excess loan law. In many instances such excess loans grew up in the banks not through the direct act of the banking officers but as an almost necessary result because of the necessity of protecting its thin equities. The error was one of judgment in such cases but in the great majority of cases the excess loan represents loans made for speculative purposes and not for legitimate business. It is the firm opinion of the writer that the first and primary purpose of the legislature in dealing with banks and banking should be to so surround the prohibition on excess loans as to prevent such loans absolutely. Until this is done poor bankers will continue to violate this law. It is my judgment that not only should there be a stiff criminal punishment prescribed but there should also be an absolute forfeiture on the part of each and every officer to the bank of an amount equal to the amount of the excess loan with authority in the Superintendent of Banking to enforce the penalty. Thus, through hitting

the pocketbook as well as the liberty of the individual violating the law, the practice will disappear.

The punishment for bank embezzlement is insufficient. As I have heretofore said there is no more despicable crime than a violation of a trust. The innocent depositor relies upon the honesty and integrity of the bank officers. The state through its laws encourages such confidence. Under such circumstances the bank officers should be scrupulously honest. Their punishment should be such that the world may know that he who violates the trust of depositors in a bank will be compelled to retire from circulation for a long period of time. We therefore believe that the penalty for bank embezzlement or for cheating by false pretenses in connection with the operation of the banking business should be materially increased.

There are many other matters which might be referred to, but as they are matters more properly within the province of the banking department and other departments of the state government, I refrain from further comment.

8. In recent years price fixing of basic products has become a matter of general knowledge and likewise public concern. I am firmly of the belief that the anti-trust laws of this state should be amended so as to render it possible for those charged with the enforcement of the law to strike at the heart of conspiracies to fix prices. I am of the belief that a rule of evidence should be established which will render it possible to reach such law violators. In this connection may I state that such legislation can injure no one who is innocent, can do no harm to legitimate business and can only result in the punishment of the guilty and the protection of the people.

9. It would seem useless, considering the recommendations which I have heretofore made relative to concealed weapons, to make any recommendations relative thereto. I am still, however, firmly of the belief that a statute should be enacted which will really control this evil. My previous reports contain my views on this matter.

10. The procedure relative to the condemnation of private property for public use should, in our judgment, be simplified. The law provides many methods of condemning property for local purposes, as for roads, gravel beds, and schools. One simple, complete plan of procedure should be provided.

As to the condemnation of property for the use of the state, many difficulties have been encountered. Under the law property

taken for state use is appraised by a jury appointed by the Chief Justice of the Supreme Court. This board takes evidence and makes findings, fixing the amount to be paid by the state as just compensation to the property owner. This is all right as far as it goes. The difficulty arises by reason of the fact that the property owner may appeal to the district court, submitting his case to a local jury with no right on the part of the state to take a change of venue. Again, the state is prohibited from offering the findings of the appraisers in evidence or referring to such findings in argument. The result is that the case is tried anew. It might be just as well so tried in the beginning, so far as actual results are concerned. Our experience has been that the local juries very naturally, perhaps, are prejudiced against the state and the amount of damages allowed upon appeal have been exorbitant. Not only is the state seriously handicapped by this situation, but we find ourselves further embarrassed by the fact that the law provides that if the damages are increased at all, we must pay an attorney's fee, to be fixed by the court. We cannot even dismiss the proceedings without paying such attorney's fees. The result has been that we have been simply held up in many instances. Certainly the state should return to the property owner just compensation. Certainly the state should pay, if anything, more than the property is worth, but on the other hand, the state should not be the victim of an injustice.

The last session of the general assembly provided that the state cannot take for public use property occupied as a home until the final termination of the litigation. The result, if an appeal is taken, will be to prevent the state from acquiring the property until a long period of time has passed. This will seriously handicap the state in many instances. Some modification of this statute should be made so that the state can take property upon the payment of just compensation.

11. The secretary of state and the attorney general are required to enforce the corporation laws. Such laws are complete and provide penalties, forfeitures and fees to be paid the state. Our experience has been that unless we accidentally learn of the violation of such laws, we do not discover such violation. The writer feels that some provision should be made for the securing of the necessary information, thus protecting the interests of the state. This can be done through a suitable field force, small in number, under the

control of the secretary. We believe the result will be a marked increase in the revenues and in the protection afforded the people. I remain,

Respectfully,

BEN J. GIBSON, Attorney General.

SCHEDULE "A"—CRIMINAL CASES SUBMITTED TO THE SUPREME COURT OF IOWA

JANUARY TERM, 1923

Title of Case	County	Decision	Nature of Action.
State vs. Atkinson	Story	Affirmed	Bootlegging.
State vs. Bauer	Fayette	Affirmed	Assault with intent to commit murder.
State vs. Bolton	Floyd	Affirmed	Cheating by false pretenses.
State vs. Bige	Wright	Affirmed	Larceny from store in the night.
State vs. Bullis	Pottawattamie	Affirmed	Receiving stolen property.
State vs. Burch	Madison	Reversed and remanded	Larceny.
State vs. Cooper	Mahaska	Affirmed	Murder.
State vs. Decker & Sons	Cerro Gordo	Affirmed	Polluting stream.
State vs. Ellis	Johnson	Affirmed	Gambling.
State vs. Fairweather	Black Hawk	Affirmed	Nuisance.
State vs. Gardner	Van Buren	Affirmed	Seduction.
State vs. Gentle, et al.	Black Hawk	Affirmed	Nuisance.
State vs. Hamilton	Page	Affirmed	Robbery.
State vs. Hickman	Cass	Affirmed	Murder.
State vs. Kauffman	Dallas	Affirmed	Cheating by false pretenses.
State vs. Kennedy	Woodbury	Affirmed	Breaking and entering.
State vs. Kersberger	Mahaska	Affirmed	Bootlegging.
State vs. Krittenbrink	Union	Affirmed	Obtaining money by false pretenses.
State vs. Lebeck	Shelby	Affirmed	Murder.
State vs. Lynch	Story	Affirmed	Burglary with gas.
State vs. Maupin	Polk	Affirmed	Murder.
State vs. Mitchell	Woodbury	Affirmed	Robbery.
State vs. Moe	Woodbury	Affirmed	Larceny.
State vs. Phelps	Story	Affirmed	Larceny by embezzlement.
State vs. Pillsbury	Mills	Reversed and remanded	Rape.
State vs. Potter	Louisa	Petition for rehearing overruled	Larceny.

State vs. Purcell	Woodbury	Affirmed	Assisting prisoner to escape from jail.
State vs. Ralph	Benton	Affirmed	Grand larceny.
State vs. Ramsdell	Tama	Reversed	Seduction.
State vs. Sangster	Buchanan	Affirmed	Rape.
State vs. Schumacher	Scott	Reversed and remanded	Lewdness.
State vs. Shields	Woodbury	Affirmed	Burglary.
State vs. Smith (Seth)	Warren	Affirmed	Rape.
State vs. Steckel	Jefferson	Affirmed	Cheating by false pretenses.
State vs. Taylor	Polk	Affirmed	Rape.
State vs. Throst	Allamakee	Affirmed	Murder.
State vs. Tonn	Linn	Reversed	Conspiracy.
State vs. Trybom	Montgomery	Reversed	Murder, second degree.
State vs. Vanderpoll	Mills	Affirmed	Bootlegging.
State vs. White	Black Hawk	Modified and affirmed	Nuisance.
State vs. West	Cedar	Affirmed	Rape.
State vs. Williams, et al	Black Hawk	Reversed and remanded	Nuisance.
State vs. Williams	Polk	Reversed and remanded	Murder.

MAY TERM, 1923

State vs. Adelman	Polk	Affirmed	Liquor violation.
State vs. Alexander	Polk	Affirmed	Carrying concealed weapon.
State vs. Arhontis	Woodbury	Affirmed	Arson.
State vs. Bird	Monona	Affirmed	Robbery.
State vs. Boyd	Van Buren	Reversed	Receiving stolen goods.
State vs. Cahill	Lee	Affirmed	Escape from penitentiary.
State vs. Certain Intoxicating Liquors	Lucas	Reversed	Having for sale intoxicating liquor.
State vs. Esposito (Louis)	Pottawattamie	Affirmed	Murder, first degree.
State vs. Fortune	Wright	Affirmed	Breaking and entering.
State vs. Gorman	Ringgold	Affirmed	Possession burglary tools.
State vs. Grba	Cerro Gordo	Reversed	Murder.
State vs. Ivey	Chickasaw	Reversed	Larceny.

MAY TERM, 1923—Continued

Title of Case	County	Decision	Nature of Action.
State vs. Kinart	Harrison	Affirmed	Nuisance.
State vs. O. Little	Polk	Affirmed	Operating motor vehicle while intoxicated.
State vs. Ludden	Black Hawk	Modified and affirmed	Nuisance.
State vs. McCoy	Black Hawk	Modified and affirmed	Nuisance.
State vs. McKay	Woodbury	Affirmed	Arson.
State vs. Metcalfe	Woodbury	Reversed and remanded	Murder.
State vs. Otto	Iowa	Dismissed	Larceny.
State vs. Owens (Mrs. Chas.)	Audubon	Modified and affirmed	Larceny of poultry.
State vs. Ragsdale	Story	Affirmed	Operating motor vehicle while intoxicated.
State vs. Smalley (W. J.)	Polk	Affirmed	Larceny.
State vs. Shaver (Claude)	Woodbury	Affirmed	Murder.
State vs. Stricker, et al	Black Hawk	Affirmed in part; reversed and remanded in part	Nuisance.
State vs. Teddy Tedd (alias Van Walkenberg)	Linn	Reversed and remanded	Conspiracy.
State vs. Welsh	Woodbury	Affirmed	Breaking, entering.

SEPTEMBER TERM, 1923

State vs. Baem	Webster	Reversed	Rape.
State vs. Bernardi (Sam)	Warren	Affirmed	Nuisance.
State vs. Beddard	Woodbury	Reversed	Kidnapping.
State vs. Bradshaw (Dan)	Appanoose	Affirmed	Nuisance.
State vs. Bogue	Polk	Affirmed	Seduction.

State vs. Carter	Woodbury	Reversed	Seduction.
State vs. Clark	Linn	Reversed	Manslaughter.
State vs. Cleaver	Harrison	Affirmed	Bootlegging.
State vs. Coffman	Harrison	Affirmed	Bootlegging.
State vs. Crisinger	Mills	Affirmed	Larceny.
State vs. Fortune	Wright	Affirmed	Larceny.
State vs. Juvick	Fayette	Affirmed	Rape.
State vs. Kelley	Marion	Reversed and remanded	Murder, second degree.
State vs. King	Cerro Gordo	Affirmed	Bootlegging.
State vs. Lawson, et al	Warren	Reversed and remanded	Larceny.
State vs. Lebeck	Shelby	Affirmed	Murder.
State vs. Maupin	Polk	Supplemental opinion overruling petition for rehearing	Murder.
State vs. Pappas	Cerro Gordo	Affirmed	Nuisance.
State vs. Rowley	Polk	Affirmed	Attempting to produce miscarriage.
State vs. Shepard	Cerro Gordo	Affirmed	Nuisance.
State vs. Smalley	Polk	Affirmed	Larceny.
State vs. Hayes Van Gorder	Monroe	Reversed and remanded	First degree murder.
State vs. Waxman	Woodbury	Modified and affirmed	Bigamy.
State vs. Winterscherd	Fayette	Affirmed	Stealing chickens.

JANUARY TERM, 1924

State vs. Adams	Woodbury	Reversed	Murder.
State vs. Albery	Hardin	Affirmed	Receiving stolen goods.
State vs. Barrett	Mills	Affirmed	Attempting to produce miscarriage.
State vs. Bowers	Cherokee	Affirmed	Bootlegging.
State vs. Bradford	Polk	Affirmed	.....
State vs. Burke	Woodbury	Reversed	Robbery.
State vs. Burns	Wapello	Affirmed	Nuisance.
State vs. Burris	Wapello	Affirmed	Murder.

JANUARY TERM, 1924—Continued

Title of Case	County	Decision	Nature of Action.
State vs. Casper (Harvey)	Polk	Affirmed	Liquor nuisance.
State vs. Casper (William)	Polk	Affirmed	Liquor nuisance.
State vs. Chapman	Keokuk	Affirmed	Rape.
State vs. Coffman	Harrison	Affirmed	Bootlegging.
State vs. Coffman (George)	Harrison	Modified and affirmed. Supplemental opinion overruling petition for rehearing.	Bootlegging.
State vs. Crietello	Polk	Affirmed	Murder, first degree.
State vs. Cummings	Polk	Affirmed	Desertion.
State vs. Dean	Marion	Affirmed	Burglary with gas.
State vs. Decker & Sons	Cerro Gordo	Reversed	Polluting stream.
State vs. Dill	Johnson	Modified and affirmed	Liquor nuisance.
State vs. Epps	Poweshiek	Affirmed	Seduction.
State vs. Esposito (Louis)	Pottawattamie	Affirmed	Murder, first degree.
State vs. Eposito (Sebastino)	Pottawattamie	Affirmed	Murder, first degree.
State vs. Gates	Pottawattamie	Affirmed	Arson.
State vs. Gregory	Polk	Affirmed	Receiving deposits while insolvent.
State vs. Groat	Webster	Affirmed	Receiving and concealing stolen property.
State vs. Haley	Pottawattamie	Affirmed	Receiving stolen property.
State vs. Herring	Scott	Affirmed	Lewdness.
State vs. Henderson	Winneshiek	Reversed and remanded	Bootlegging.
State vs. Jacobson	Cerro Gordo	Affirmed	Lewdness.
State vs. Kelso	Polk	Affirmed	Robbery with a deadly weapon.
State vs. King	Pottawattamie	Affirmed	First degree murder.
State vs. Lehn	Allamakee	Affirmed	Rape.
State vs. Lennan	Webster	Affirmed	Nuisance.
State (Appellant) vs. Lorey	Polk	Reversed	Operating a motor vehicle while intoxicated.
State vs. Manley	Linn	Affirmed	Desertion.

State vs. Marvin	Poweshiek	Reversed and remanded	Lewdness.
State vs. Pock	Pottawattamie	Affirmed	Receiving stolen property.
State vs. Rowley	Polk	Affirmed	Attempting to produce miscarriage.
State vs. Schanenberg	Keokuk	Affirmed	Liquor.
State vs. Shaver	Woodbury	Affirmed	Murder.
State vs. Stewart	Montgomery	Affirmed	Murder, first degree.
State (Appellant) vs. Webber	Webster	Affirmed	Receiving and concealing stolen goods.
State vs. West	Cedar	Affirmed	Rape.
State vs. Williams	Polk	Affirmed	Murder.

MAY TERM, 1924

State vs. Abel	Polk	Dismissed	Liquor nuisance.
State (Appellant) vs. Bagen	Dickinson	Affirmed	Assault with intent to commit murder.
State (Appellant) vs. Bear	Webster	Affirmed	Bootlegging.
State vs. Beckner	Fayette	Reversed	Carnal knowledge of imbecile female.
State vs. Bige	Wright	Affirmed	Larceny.
State vs. Burch (Newton)	Marion	Affirmed	Larceny.
State vs. Dawson	Polk	Affirmed	Larceny.
State vs. Elliott	Dallas	Affirmed	Liquor nuisance.
State (Appellant) vs. Falkenstein	Worth	Affirmed	Rape.
State vs. Fox	Cedar	Reversed	Larceny.
State vs. Flory	Keokuk	Reversed	Murder, first degree.
State vs. Chapman Gibson	Polk	Affirmed	Practicing medicine without a license.
State vs. Hodges	Montgomery	Affirmed	Manslaughter.
State vs. Jackson, et al	Appanoose	Affirmed	Burglary with explosives.
State vs. Johnson	Woodbury	Affirmed	Assault with intent to commit robbery.
State vs. Lalley	Adair	Affirmed	Liquor nuisance.
State vs. Lovell	Adair	Affirmed	Liquor nuisance.
State vs. Leeper	Decatur	Affirmed	Murder.
State vs. Lewallen	Polk	Affirmed	Murder, first degree.
State vs. Ling	Taylor	Affirmed	Bootlegging.
State vs. Masters	Mahaska	Affirmed	Larceny.
State vs. Mackel	Plymouth	Affirmed	Murder.

MAY TERM, 1924—Continued

Title of Case	County	Decision	Nature of Action.
State (Appellant) vs. Morton	Harrison	Reversed	Larceny.
State vs. McCoy	Marion	Affirmed	Larceny by embezzlement.
State vs. Priebe	Woodbury	Affirmed	Cheating by false pretenses.
State vs. Rowley	Polk	Overruling petition for rehearing	Attempting to produce miscarriage.
State vs. Toner	Polk	Affirmed	Assault with intent to commit rape.
State vs. Turner	Wapello	Affirmed	Larceny.
State (Appellant) vs. Weymiller	Allamakee	Reversed and remanded	Desertion.
State vs. Wykert	Fremont	Affirmed	Subordination of perjury.

SEPTEMBER TERM, 1924

State (Appellant) vs. Amrine	Johnson	Reversed and remanded	Bastardy.
State vs. Baugh	Cherokee	Reversed	Desertion of children.
State vs. Bogossian	Scott	Affirmed	Larceny.
State vs. Boyd	Henry	Affirmed	Receiving stolen property.
State vs. Brodi	Appanoose	Affirmed	Assault with intent to commit murder.
State vs. Burch	Madison	Affirmed	Larceny.
State vs. Comer	Union	Reversed and remanded	Manufacturing intoxicating liquor.
State vs. Compton	Madison	Affirmed	Carrying intoxicating liquor with intent to sell.
State vs. Cooley	Polk	Affirmed	Nuisance.
State vs. Davenport	Polk	Affirmed	Breaking and entering.
State vs. Draden	Clarke	Affirmed	Rape.
State vs. Ellington	Mahaska	Affirmed	Assault with intent to commit rape.
State vs. Elmers	Madison	Reversed and remanded	Nuisance.

State vs. Ferroni	Dallas	Affirmed	Liquor nuisance.
State (Appellant) vs. Garcia	Jefferson	Reversed	Operating a motor vehicle while intoxicated.
State vs. Ivener	Woodbury	Affirmed	Nuisance.
State vs. James	Mahaska	Reversed	Rape.
State vs. Kelso	Polk	Affirmed	Robbery with a deadly weapon.
State vs. Kinkaid	Linn	Affirmed	Liquor nuisance.
State vs. Leeper	Johnson	Reversed and remanded	Murder.
State vs. Lozier	Polk	Affirmed	Receiving and concealing stolen property.
State vs. Marish	Cerro Gordo	Reversed and remanded	Assault with intent to commit manslaughter.
State vs. Martin	Van Buren	Affirmed	Adultery.
State vs. Maulsby	Marshall	Affirmed	Bootlegging.
State vs. Merkin	Woodbury	Affirmed	Liquor nuisance.
State vs. Patramanis	Linn	Affirmed	Liquor nuisance.
State vs. Price	Wapello	Reversed and remanded	Assault with intent to commit murder.
State vs. Reysha	Fayette	Affirmed	Cheating by false pretenses.
State vs. Reysa	Henry	Affirmed	Liquor nuisance.
State vs. Shackleford	Clarke	Affirmed	Liquor nuisance.
State vs. Steckel	Jefferson	Reversed and remanded	Cheating by false pretenses.
State vs. Smith	Poweshiek	Affirmed	Operating an automobile while intoxicated.
State vs. Toland	Union	Affirmed	Rape.
State vs. Ulrich	Polk	Affirmed	Liquor nuisance.
State vs. Van Treese	Poweshiek	Affirmed	Receiving stolen property.
State vs. Voorhis	Scott	Affirmed	Seduction.
State vs. Weaver	Woodbury	Affirmed	Seduction.

SCHEDULE "B"

CASES PENDING AND DISPOSED OF IN THE UNITED STATES DISTRICT COURT AND THE UNITED STATES SUPREME COURT

C., R. I. & P. Ry. Co. v. Kendall, et al. (2 cases).
C. G. W. Ry. Co. v. Kendall, et al. (2 cases).
Des Moines National Bank v. Fairweather.
First National Bank of Council Bluffs v. County Auditor and County Treasurer of Pottawattamie County.
First National Bank of Guthrie Center v. Anderson.
Olander v. Hollowell.
State v. Wrenn.

SCHEDULE "C"

CLOSED BANKS IN RECEIVERSHIP

Afton, Union County, State Savings Bank.
Allerton, Wayne County, Allerton State Bank.
Anita, Cass County, Citizens State Bank.
Arthur, Ida County, Arthur Savings Bank.
Arthur, Ida County, Citizens State Bank.
Atlantic, Cass County, Iowa State Bank.
Audubon, Audubon County, Iowa Savings Bank.
Bancroft, Kossuth County, Farmers State Bank.
Battle Creek, Ida County, Battle Creek Savings Bank.
Bode, Humboldt County, State Savings Bank.
Bouton, Dallas County, Farmers Trust & Savings Bank.
Boyer, Crawford County, Farmers & Merchants Savings Bank.
Bridgewater, Adair County, Bridgewater Savings Bank.
Braddyville, Page County, Farmers Savings Bank.
Bradgate, Humboldt County, Bradgate State Savings Bank.
Brighton, Washington County, Brighton State Bank.
Cartersville, Cerro Gordo County, Farmers Savings Bank.
Castana, Monona County, Castana Savings Bank.
Central City, Linn County, Central City Savings Bank.
Charlotte, Clinton County, Farmers & Merchants Savings Bank.
Charles City, Floyd County, Farmers Trust & Savings Bank.
Chester, Howard County, Chester Savings Bank.
Corwith, Hancock County, Peoples State Bank.
Corydon, Wayne County, Farmers & Merchants State Bank.
Danbury, Woodbury County, Danbury Trust & Savings Bank.
Dedham, Carroll County, State Savings Bank.
Derby, Lucas County, Derby State Bank.
Denison, Crawford County, Farmers State Bank.
Des Moines, Polk County, United State Bank.
Des Moines, Polk County, Commercial Savings Bank.
Des Moines, Polk County, Mechanics Savings Bank.
Dexter, Dallas County, State Bank of Dexter.
Dolliver, Emmet County, Farmers Savings Bank.
Dyersville, Dubuque County, Farmers State Bank.
Estherville, Emmet County, Estherville State Bank.
Fort Dodge, Webster County, Webster County Trust & Savings Bank.
Garden Grove, Decatur County, C. S. Stearns State Bank.
Grand Mound, Clinton County, Peoples Savings Bank.
Grinnell, Poweshiek County, Grinnell Savings Bank.
Hamburg, Fremont County, Farmers Savings Bank.
Haverhill, Marshall County, Farmers Savings Bank.
Kellogg, Jasper County, Burton & Co. State Bank.
Lake Park, Dickinson County, Iowa Trust & Savings Bank.
Lamoni, Decatur County, Farmers State Bank.

LeMars, Plymouth County, Plymouth County Savings Bank.
Leon, Decatur County, Farmers & Traders State Bank.
Letts, Louisa County, Citizens Savings Bank.
Lockridge, Jefferson County, Lockridge Savings Bank.
Logan, Harrison County, State Savings Bank.
Lost Nation, Clinton County, Lost Nation Savings Bank.
Magnolia, Harrison County, Magnolia Savings Bank.
Manchester, Delaware County, Farmers & Merchants State Savings Bank.
Manning, Carroll County, Iowa State Savings Bank.
Marble Rock, Floyd County, Farmers Trust & Savings Bank.
Marne, Cass County, Marne Savings Bank.
Mason City, Cerro Gordo County, Central Trust Co.
Melcher, Marion County, Melcher State Bank.
Menlo, Guthrie County, Menlo State Bank.
Mt. Pleasant, Henry County, Farmers & Merchants Savings Bank.
Malcom, Poweshiek County, Malcom Savings Bank.
New Hampton, Chickasaw County, State Bank of New Hampton.
Odebolt, Sac County, Odebolt Savings Bank.
Parkersburg, Butler County, Beaver Valley State Bank.
Perry, Dallas County, Security Savings Bank.
Pleasanton, Decatur County, Pleasanton Savings Bank.
Quimby, Cherokee County, Citizens Savings Bank.
Redfield, Dallas County, State Bank of Redfield.
River Sioux, Harrison County, Farmers Savings Bank.
Rockford, Floyd County, Rockford State Bank.
Rock Rapids, Lyon County, Iowa Savings Bank.
Sanborn, O'Brien County, Sanborn State Bank.
Sigourney, Keokuk County, Citizens Savings Bank.
Shell Rock, Butler County, Farmers State Bank.
Sherrill, Dubuque County, Sherrill Savings Bank.
Sioux City, Woodbury County, Iowa State Savings Bank.
Stockport, Van Buren County, Stockport Savings Bank.
Stout, Grundy County, Stout Savings Bank.
Stuart, Guthrie County, Exchange State Bank.
Superior, Dickinson County, Superior Savings Bank.
Sutherland, O'Brien County, First Savings Bank.
Treynor, Pottawattamie County, Treynor Savings Bank.
Washta, Cherokee County, Farmers State Bank.
Washington, Washington County, Farmers & Merchants State Bank.
Waterloo, Black Hawk County, Waterloo Bank & Trust Co.
Waterville, Allamakee County, Farmers & Merchants State Bank.
Webster City, Hamilton County, Webster City Savings Bank.
What Cheer, Keokuk County, What Cheer Savings Bank.
Wiota, Cass County, Wiota Savings Bank.
Waukon, Allamakee County, Citizens State Bank.
Yetter, Calhoun County, State Savings Bank.
Zwingle, Dubuque County, Zwingle Savings Bank.

SCHEDULE "D"

CIVIL CASES PENDING AND DISPOSED OF DURING PERIOD FROM JANUARY 1, 1923, TO JANUARY 1, 1925

Gerrit Aalbers and Mrs. R. Vander Ploeg v. Board of Supervisors of Marion County.
Automobile Dealers Mutual Ins. Ass'n v. State of Iowa.
Automobile Trade Mutual Ins. Co. v. State, ex rel Ben J. Gibson.
E. R. Bennett, Co. Treas. Polk Co. v. Finkbine Lumber Co.
W. J. Burbank v. W. E. Hanna, et al.
W. J. Burbank v. Jim Keller, et al., Members of City Council of Centerville, Iowa.
Roy Burtch v. Herman F. Zeuch.

Carroll Curtley v. John Williams Boyers and the Executive Council.
Chicago, Milwaukee and St. Paul R. R. v. Board of Supervisors of O'Brien County.
Otto Conrad v. Mame E. Shearer.
Cumberland Presbyterian Church v. W. J. Burbank.
Abe Edwards, J. H. Waters and C. H. Lund v. Board of Supervisors of Adams County.
Edward Fisher v. T. P. Hollowell.
Fred Grebow and Joseph Teeslink v. George Donohoe.
Hutchinson Company v. Railroad Commissioners, et al.
Iowa Electric Company v. Cass County, et al.
Iowa State College, Ames, v. McCarthy.
Sam Johanson v. North American National Insurance Co.
W. H. Joyner v. Park Findley.
Julius Kirchoff, et al. v. M. G. Thornburg.
Lehmar v. Clayton County.
Henry W. Lex, et al. v. Selway Steel Corporation.
Jessie Lyons v. O. D. Wheeler, Judge.
Mississippi River Power Co. v. S. H. Johnston.
Mississippi River Power Co. v. J. M. C. Hamilton.
Mississippi River Power Co. v. Edward W. Romkey.
Mississippi River Power Co. v. Cases, Miscellaneous.
Ernest McClain v. National Travelers Casualty Assn.
Marshall County, et al. v. W. E. McLeland, et al.
Henry P. S. Morgan v. T. P. Hollowell.
National Refining Company v. Dwight N. Lewis.
New York Life Ins. Co. v. W. J. Burbank.
North American National Ins. Co. v. John A. Thompson.
William Parenti v. District Court of Adams County.
Jos. Peiper, et al. v. C. O. Dayton and State Highway Com.
Peverill v. Board of Supervisors of Black Hawk County.
Red Ball Transportation Co. v. Board of Railroad Commissioners.
Richman v. Letts.
A. D. Schendel Spec. Adm. v. Ben J. Gibson, Atty. Gen.
State, ex rel Ben J. Gibson v. United States Automobile Insurance Co.
State, ex rel Ben J. Gibson v. Interstate Automobile Ins. Co.
State of Iowa, ex rel Ben J. Gibson v. Iowa Automobile Owners Mutual Ins. Ass'n.
State, ex rel Jno. B. Hammond v. C. C. Hamilton, Judge.
State, ex rel Seeburger v. L. W. LaValley.
State of Iowa, Iowa State Board of Conservation v. Green Foundry and Furnace Works.
State v. National Live Stock Ins. Co.
State of Iowa v. Standard Lumber Co.
Ettle Swayne v. Board of Supervisors of Polk County.
Harry Thompson v. T. P. Hollowell.
Frank Wegener v. City of Des Moines and John B. Hammond (now J. W. Jenney).
White's Iowa Manual Labor Institute v. Unknown Claimants.

SCHEDULE "E"

INHERITANCE TAX CASES—SUPREME COURT

Title of Case	County	Decision	Notation
In re Estate of Wayne Choate	Mills	Affirmed	Treasurer of State, Appellant.
In re Estate of Lucia S. Annis	Mitchell	Reversed	Treasurer of State, Appellant.
In re Waterman, Appellee, vs. Burbank, Appellant	Union	Reversed	Treasurer of State, Appellant.
In re Estate of Christ Pederson	Shelby	Affirmed	Treasurer of State, Appellant.
In re Estate of James Chaffin	Page	Still pending	Treasurer of State, Appellant.
In re Estate of Eliza J. Otis	Montgomery	Dismissed	Treasurer of State, Appellant.
In re Estate of Serina Nilson	Calhoun	Still pending	Treasurer of State, Appellant.

SCHEDULE "F"

PARTIAL LIST OF INHERITANCE TAX CASES—DISTRICT COURT

Title of Case	County	Notation
In re Estate of John L. Levere	Johnson	Court held legacies could not be prorated on the basis of value of property in Iowa and in Illinois.
In re Estate of J. B. Sax	Wapello	Held notes amounting to $60,000 given by decedent to his heirs were not deductible in determining the amount of inheritance tax due, because said notes were not based on valuable consideration.
In re Estate of Joseph Schefers	Carroll	Held that the executor was not liable for the payment of the tax, but reserved the right of state to proceed to collect tax at the death of life tenant.
In re Estate of Jos. Francis Brems		Court held that for inheritance tax purposes, widow's allowance should be reduced from $15,000 to $3,000.00.
In re Estate of Anna Baxter	Ida	Held that note and claims for rent amounting to $16,450.25 where the debtor resided in Iowa and the creditor in California were taxable because the guardian of the creditor in California also qualified as guardian under the laws of Iowa.
In re Estate of Gus D. Skondras	Polk	Held that where the amount of tax and the basis thereof was compromised upon the order of the court, the administrator could not secure a refund of the portion of the tax paid under the ruling of the Supreme Court in the case of In re Estate of Peterson, 196 N.W. 785.
In re Estate of Edw. Ensign Crosley	Lee	It was held that a collateral heir who took property that was devised to a son under the provisions of Section 3281 of the code took directly from the deceased and not through the legatee and that such property was, therefore, taxable.
In re Estate of Margaret Kalaher	Johnson	The court held that the estate was not entitled to the exemption and deduction under Section 5, Chapter 38,

		Acts of the 39th General Assembly because the property was inherited from the estate of a person in which the tax was paid before such statute became effective.
In re Estate of Peter Flindt.....	Wright	Court held a half brother was a brother within the meaning of Section 4, Chapter 38, 39th G. A. as amended by Chapter 164, 39th G. A., and that the tax on the portion passing to such other brother should be 10 per cent and not 20 per cent.
In re Estate of Patrick Callahan.....	Johnson	Action to recover tax. Still pending.
In re Estate of Oswald Schmidt.....	Scott	Application to exempt the estate from the tax on a portion of the property in said estate. Still pending.
In re Estate of Jacob Sinnema.....	Sioux	It was held that the remainder was taxable where the law at the time of the death of the decedent did not exempt step-children from the payment of a tax, notwithstanding the fact that the law was afterwards changed exempting such step-children from the payment of a tax, which law was in force and effect at the time of the death of the life tenant.
In re Estate of James Lee.....	Jasper	Court ordered a refund of the tax paid.
In re Estate of William H. Hennegan.....	Linn	Action to recover tax. Still pending.
In re Estate of Jacob S. Albright.....	Warren	The court held that an annuity contract of $100,000 was taxable.
In re Estate of Giovanni Cianciotto.....	Dallas	The court held that the amount in controversy was not taxable because it constituted compensation due the non-resident alien dependents of the deceased under the Workmen's Compensation Law, and that the amount involved is less than $1,000.
In re Estate of Thomas Kasper.....	Jones	Action to quiet title to real estate and to secure a cancellation of the lien for the inheritance tax paid. Still pending.
In re Estate of Louis B. Martin.....	Woodbury	Application to set aside or reduce widow's allowance. Still pending.

NOTE: In addition to the foregoing there were one hundred seventeen other cases in which compromise settlement was made with the approval of the court, the attorney general having investigated and advised settlement in said matters.

SCHEDULE "G"

REPORT OF BUREAU OF INVESTIGATION.

The agents of this bureau have assisted local authorities in the investigation of law violations, attempted law violations and suspected law violations as set out in the following schedule:

Crime	Number
Murder	24
Attempted murder	12
Suspected murder. (Not established as such.)	11
Attempted burglary with explosives, electricity or gas. (Bank.)	12
Burglary with explosives, electricity or gas. (Bank.)	10
Burglary with explosives, electricity or gas	6
Suspected attempt as above. (Bank.)	1
Entering bank with intent to rob	2
Larceny. (Grand and Petit.)	187
Breaking and entering	98
Forgery	13
Uttering forged instrument	9
Conspiracy	11
Obtaining money or property by false pretenses	28
Aiding prisoner to escape	4
Breaking and entering railway car	11
Robbery	23
Rape	6
Arson	6
Attempt to pass weapons to inmate of prison	1
Abortion	2
Possession of burglary tools	5
Carrying concealed weapons	9
Operating motor vehicle while intoxicated	24
Sodomy	4
Soliciting	7
Disorderly house	35
Seduction	3
Desertion of dependent wife or child	4
Fugitives from justice. (From other states.)	14
Fugitives from justice. (From Iowa.)	22
Total	604

As a result of investigations in which agents of this bureau assisted local officers, the following convictions have been had in the courts of Iowa:

Crime	Number of Convictions
Murder in first degree	12
Murder in second degree	2
Manslaughter	1
Assault to commit murder	10
Burglary with explosives. (Bank.)	7
Entering bank to rob	2
Placing explosives in building. (Bank.)	1
Attempted burglary with explosives	5
Larceny, grand and petit	134
Breaking and entering	78
Forgery	7
Uttering forged instrument	3
Obtaining money or property by false pretenses	8
Breaking and entering railway car	3
Robbery	9
Rape	2

Arson	3
Attempt to pass weapons to inmate of prison	2
Possession of burglary tools	4
Habitual criminal	2
Carrying concealed weapons	5
Operating motor vehicle while intoxicated	15
Seduction	1
Return of fugitives to Iowa	13
Return of fugitives to other states	11
Total	340

In addition to the above, assistance has been rendered to authorities in other states and to Federal authorities as shown below:

Number of cases of conviction in other states	17
Number of cases of conviction in Federal courts	7

In addition to the convictions shown, indictments have been returned or informations filed as follows:

Murder in the first degree	5
Manslaughter	3
Miscellaneous Crimes	74

Defendants in the above cases have not been brought to trial for various reasons.

This bureau has co-operated with local authorities in the investigation of violations of the liquor laws as set out in the following table:

Number of investigations	428
Number of liquor search warrants served	251
Number of cases in which evidence was secured in other ways	148
Injunctions secured	71
Writs of abatement	5

The following criminal convictions were secured as a result of the above:

Bootlegging	244
Liquor nuisance	151
Illegal transportation of liquor	23
Illegal possession of liquor	40
Total	458

The following liquor cases are pending as shown:

In State courts	81
In Federal courts	64

This bureau has assisted in the recovery of stolen property as set out below:

103 automobiles with an estimated value of	$57,250.00
Other property of a miscellaneous nature	19,150.00

SCHEDULE "H"

REPORT OF BUREAU OF IDENTIFICATION. STATISTICAL TABULATION.

July 15, 1921, to Jan. 1, 1925.

Number of finger print records received from sheriffs	2,817
Number of finger print records received from police	5,327
Number of finger print records received from penal institutions	4,858
Number of finger print records received from State Bureau	67
Number of finger print records received from outside of Iowa	3,694
Total number of finger print records received	16,763
Total number of finger print records filed by formulae	16,528
Total number of finger print records filed alphabetically	20,563
Total number of finger print records filed numerically	11,596
Total number of finger print records filed by crime	13,313
Total number of finger print records filed by photographs	8,354
Total number of finger print identifications made by formulae	1,911
Total number of finger print identifications made alphabetically	483
Total number of finger print identifications made by latent prints	17
Total number of finger print identifications made of unknown dead	2
Total number of finger print identifications made	2,413
Total number of confessions secured pertaining to forged finger prints	2
Total number of pleas of guilty from persons identified as having previous criminal records	1,528
Total number of convictions won by trial based on finger prints alone.	1
Total number of circulars issued for fugitives	33
Total number of fugitives apprehended by circulars	17

State of Iowa
1924

FIFTEENTH BIENNIAL REPORT

of the

ATTORNEY GENERAL

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 1924

BEN J. GIBSON
Attorney General

Published by
THE STATE OF IOWA
Des Moines

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H. M. HAVNER.....1917-1921
BEN J. GIBSON.....1921-

SOME OF THE

IMPORTANT OPINIONS

OF THE

ATTORNEY GENERAL

FOR

Biennial Period

1923-1924

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OPINIONS RELATING TO BANKS

BANKS: A Morris Plan is not entitled to a certificate from the Auditor of State unless conducting its business in the manner authorized by law so as to aid deserving persons, and if a certificate is not issued, the bank should not be assessed in the manner provided under the provisions of Chapter 151, Laws of the 38th General Assembly.

March 3, 1924.

Auditor of State: We wish to acknowledge the receipt of your favor of the 26th requesting the opinion of this department. Your request is as follows:

"As you probably know, the Morris Plan Bank makes a report to the Auditor of State of the condition of their company at the close of business on the 31st day of December, 1923, as provided for in Chapter 151 of the Thirty-eighth General Assembly.

"The law requires that in the statement which they file with this office they should show the highest rate of interest charged and whether loans were made to deserving persons. The Morris Plan Company at Davenport, Iowa, which is known as the Davenport Morris Plan Company, did on the 9th day of January, file in this office a statement as required by law, but they failed to show the highest rate of interest charged and whether or not loans had been made to deserving persons. Prior to the filing of this statement, the Auditor requested that the Banking Department make an examination of the accounts and affairs of their company.

"The examiners in their report to this office, stated that the company had deviated from the original purpose of its organization, which was to finance the deserving person of limited means, and have made loans which do not come under this scope as follows:

Mueller & Zeuch	$ 3,380.18
Herman J. Zeuch (President)	3,500.00
Arnold L. Peterson	1,978.79
Frederic E. Zeuch Joint	2,700.00
Warren T. Zeuch (sons of President)	
Northwest Loan & Mtg. Co.	6,000.00
End. H. J. Zeuch (Pres.)	
Geo. Sheldon Co.	2,250.00
Jos. L. Wagner et al.	17,000.00
Indian River Farms Co.	16,632.16
(Pres. Zeuch interested)	

"On February 16th I received the following letter in the way of explanation and would ask that you kindly advise whether or not we should issue them a certificate which would entitle them to be assessed on their moneys and credits:

" 'We have your letter of February 14th, pertaining to the annual report of this corporation and have noted contents carefully.

" 'With reference to the omission of the statements regarding whether we loaned to deserving people and the highest rate of interest charged, this was due to an oversight on our part. Both of these have been included in our corrected statement which we are enclosing herewith.

" 'We note your comment in paragraph four regarding loans which do not come under the scope of the "Morris Plan." This requires a word of explanation. In order to function properly and earn just a fair rate for the people who have invested their money in our institution, we must loan approximately one-half million dollars per year. To date we have been unable to loan this amount of money on a strictly "Morris Plan" basis. Therefore, we have made a few loans in larger amounts to other individuals and corporations. In every instance these notes bear the endorsement of two or more individuals or they are properly collateralled. Most of these notes are also "On Demand" or for short maturities in order that they can be called in the event the funds are required for strictly "Morris Plan

Loans" which are given preference at all times. These loans usually are discounted at the rate of from eight to twelve per cent per annum.

"'The largest loan noted in your letter, that of Jos. L. Wagner for $17,000 was an emergency loan. This note is signed by eight or ten of our prominent responsible business men. When they could not obtain certain funds that they required, at the other banks, in order to keep them from having to sacrifice their property we made the loan to them, which loan is being rapidly reduced each month.

"'The loan of Mr. Herman J. Zeuch, who is President of our corporation, was made at the time we increased our capital stock. Mr. Zeuch purchased all of the additional stock that was not taken up by the other stockholders in order to enable us to function properly at that time.

"'It is our intention to reduce this type of loan as fast as possible, and I believe you will see by a comparison of the Examiner's report of a year ago that we have reduced them materially and have increased our Morris Plan loans accordingly.

"'We are performing a service in this community that no other institution is offering, and we believe have been justified in the policy we have pursued even though it has tested the elasticity of the statute at times in order to render this service.

"'As a further evidence of our performing a real service in this community, we can say that a large number of the so-called "loan sharks" have discontinued business since we have been in operation because it has enabled the deserving borrower to get his loan at from one-third to one-half the amount charged him prior to our entering the field.'"

The law governing loans made by concerns such as the Morris Plan banks is contained in Chapter 151, Laws of the 38th General Assembly. You will note that in Section 1 of this chapter it is provided:

"That any domestic corporation engaged in the business of loaning money to deserving persons whose business or circumstances are such as to make it desirable or convenient for them to accumulate funds with which to repay such loans by paying into a fund comparatively small amounts at frequent regular intervals, which fund may be held by such corporation as collateral security for the payment of such loans, may take advantage of the provisions of this act on or before January 15 of each year by filing with the Auditor of State, of the State of Iowa, a verified report and statement of its financial condition, and showing the following items:

"a. * * * * * * * *
"b. * * * * * * * *
"c. * * * * * * * *
"d. The highest rate of interest charged and collected on loans made by it.
"e. Whether its loans have been made to deserving persons whose business or circumstances are such as to make it desirable or convenient for them to accumulate funds with which to repay such loans by paying into a fund comparatively small amounts at frequent regular intervals.
"f. * * * * * * * *"

Section 3 of this act in part provides:

"If the auditor of state finds from such report or said examination, or both, that such corporation has honestly and in good faith so conducted its business as to aid deserving persons in the manner provided in section 1 of this act, and that the corporation has not collected usurious rate of interest from the borrower on his loan; then the auditor of state shall issue to said corporation a certificate to that effect which shall entitle the corporation to be assessed on the net actual value of its moneys and credits at the rate of five mills on the dollar, * * * * * *"

It is therefore apparent from the reading of this law that the Auditor of State must make a finding based upon the report submitted by the corporation or the examination of its affairs, and if the Auditor of State finds from the report or examination that the corporation has honestly and in good faith conducted its business in the manner authorized by Section 1 of this law so as to aid deserving persons, then he shall issue to the said corporation a certificate to that effect, entitling

the corporation to be assessed on the net actual value of its moneys and credits at the rate of five mills on the dollar. If the finding of the Auditor of State, however, is that the corporation did not conduct its business as provided in Section 1 of this law and so as to aid deserving persons, or has charged a usurious rate of interest, then he should not issue a certificate authorizing the corporation to be assessed in the manner provided for corporations which have complied with this law.

"Deserving persons," referred to in this law, are persons of limited means who require small loans from time to time, and who, because of their limited means or other circumstances, prefer to repay these loans by paying comparatively small amounts into a fund for that purpose, this fund to be held by the corporation as collateral security for the loan. This law does not authorize or contemplate the loaning of large sums of money to any one individual or to corporations which are doing business upon a large scale. The loans referred to in your communication made by this corporation to Joseph L. Wagner of $17,000, and to the Indian River Farms Company of $16,632.16, and to other certain individuals in comparatively large amounts are clearly not such loans as are contemplated or authorized by this law. It is furthermore apparent that this corporation fully realized that it was deviating from the plan of business authorized by Chapter 151, Laws of the Thirty-eighth General Assembly, from the letter quoted by you. They say in this letter:

"To date we have been unable to loan this amount of money on a strictly 'Morris Plan' basis. Therefore, we have made a few loans in larger amounts to other individuals and corporations. * * * * * Most of these notes are also 'On Demand' or for short maturities in order that they can be called in the event the funds are required for strictly 'Morris Plan Loans' which are given preference at all times. These loans usually are discounted at the rate of from eight to twelve per cent per annum."

It is therefore quite apparent that these large loans were made by this corporation with the full realization that it was acting outside of the plan contemplated by Chapter 151, Laws of the Thirty-eighth General Assembly. It further appears that certain of these loans were made to the president of the corporation who used the money to purchase additional stock therein. In our opinion these loans were not made for the purpose of aiding "deserving persons" whose business and circumstances required them to repay such loans by paying into a fund comparatively small amounts at frequent and regular intervals.

We are therefore of the opinion that you should not issue this corporation a certificate authorizing it to be assessed on the net actual value of its moneys and credits at the rate of five mills on the dollar.

TRUST COMPANIES—Word "trust" must be eliminated from name of companies not coming under law relating to trust companies.

April 8, 1924.

Superintendent of Banking: This department is in receipt of your letter dated April 2nd in which you request an official opinion. Your letter is in words as follows:

"The Pocahontas Loan & Trust Company is a general corporation, which was organized early in 1904 and recently filed Renewal Articles of Incorporation. This Department has asked them to eliminate the word 'trust' from their title, basing our authority on Section 1889, Code of 1907 (C. C. 5814). They do not agree with us in our conclusions and desire an opinion from you as to whether or not this law applies to their company.

"From the enclosed letter, you will note the president of the company contends that inasmuch as the company was organized just prior to the amendment to Sec-

tion 1889 (C. C. 5814), the provision does not apply to them, and that Section 1889-i, supplement to the code, 1913 (C. C. 5828) eliminates their company because of the use of the words 'hereafter organized.'

"As we see it, the language of Section 1889 (C. C. 5814) 'and all corporations in whose name the word "trust" is incorporated and forms a part' makes it applicable to all existing corporations, regardless of the date of organization or the nature of the business transacted. It is also our opinion that Section 1889-i (C. C. 5828) does not supersede Section 1889 (C. C. 5814) but only broadens its application to include unincorporated associations.

"We are unable to find the opinion referred to in the president's letter. Please return the letter with your opinion."

You are advised that in the exercise of your discretion when renewal articles of incorporation are filed, you may require the elimination of the word "trust." Your conclusions as to the applicability of the statutes conform to ours in detail.

CONSTITUTIONAL PROVISIONS—Construction of provision relating to regulation of banks. Senate File No. 326 not in conflict with constitutional provision since that provision only relates to banks of issue.

April 26, 1924.

Governor of Iowa: This department is in receipt of your letter of April 24, 1924. In this letter you request an official opinion from this department. Your letter is in words as follows:

"I enclose herewith Senate File No. 326 which has been enacted by the special session of the General Assembly.

"I am just today in receipt of a letter from Honorable W. C. Children, Representative in the legislature from Pottawattamie County, copy of which I transmit herewith.

"I ask you for your official opinion as to the constitutionality of the provisions incorporated in the Bill."

The letter from Mr. Children is in words as follows:

"Senate File No. 326 relating to the Banking Department passed the House April 23rd by a vote of 64 Ayes to 27 Nays, with 20 members not voting.

"Section one of the bill carries the following provision: 'The organization and re-organization of State and Savings Banks shall be subject to the approval of the Superintendent of Banking.'

"This provision is clearly amendatory to the law 'Authorizing—corporations or associations with banking powers.' Should this bill become a law, no corporation or association with banking powers may secure a charter without the approval of the Superintendent of Banking or the Executive Council. This would clearly seem to amend the law authorizing such corporations or associations.

"In this connection I respectfully call your attention to Section 5, Article VIII of the Constitution of the State, which seems to provide that no such law shall take effect or be in force until ratified by a vote of the electors of the State.

"I also respectfully call your attention to Section 12 of the same Article, which seems to provide that, even while acting subject to the provisions of Article VIII in amending or repealing laws for the organization or creation of corporations, there 'must be a two-thirds vote of each branch of the General Assembly.'

"For these reasons it appears to me:

"First, that this bill so long as it carries the provision contained in section one cannot become a law until ratified by the electors as provided in Sec. 5 Article VIII.

"Second, that this bill did not receive the two-thirds vote required for the passage of such a measure by Section 12 of Article VIII."

You are advised that the matter to which reference is made has been determined by the Supreme Court of this state in *State v. Union Stock Yards State Bank,* 103 Iowa, 549-555 where the court says:

"It is claimed that chapter 208, Acts Eighteenth General Assembly, being the act under which the liability of stockholders is created, is unconstitutional because not submitted to a vote of the people, under the provisions of article 8, section 5, of the constitution of the state, as follows: 'No act of the general assembly author-

izing or creating corporations or associations with banking powers, nor amendments thereto, shall take effect, or in any manner be in force, until the same shall have been submitted, separately, to the people, at a general or special election, as provided by law, to be held not less than three months after the passage of the act, and shall have been approved by a majority of all the electors voting for and against it at such election.' This article of the constitution received construction in *Allen v. Clayton,* 63 Iowa, 11, and it was there held that section 5, with other sections, had reference only to banks of issue. Chapter 208 is amendatory of the general incorporation act, being chapter 1, title 9, Code. Neither the act amended, nor the amendment, creates or authorizes a corporation or association with banking powers as intended by the constitutional provision. The acts do not authorize banks of issue."

The act to which you refer, namely Senate File No. 326, does not apply to banks of issue. Therefore, the provision of the constitution to which you refer is unapplicable.

SMALL LOAN: A company engaged in the small loan business cannot as a requirement to securing the loan sell the borrower life insurance, including the cost in the sum borrowed.

May 7, 1924.

Superintendent of Banking: I wish to acknowledge the receipt of your favor of the 11th ultimo requesting the opinion of this department upon the following proposition:

"The Ransom-Ellis Company, Inc., Des Moines has been under discussion with your office in connection with its practice of exacting from borrowers, as a condition for making 8% chattel loans, life insurance policies the premiums for which are added to the notes and commissions retained by the company.

"This company has now taken out a license under the Small Loan Act under which they can make loans of $300 or less and charge 3½% per month on unpaid balances. The manager states, also, that it is their intention to take new notes at 3½% for all balances on past-due paper where such balances are $300 or less, (the past-due paper having been written at 8% and the premiums included, as above.)

"The department has advised the Ransom-Ellis Co., Inc., that balances of 8% notes may not be renewed at 3½%, and I shall be glad to have a letter from you with a ruling upon this matter."

We are of the opinion that a company engaged in the small loan business under the laws of this state cannot as a requirement to securing the loan, sell the borrower life insurance, include the cost of the premium in the loan and charge interest thereon.

We are of the opinion, however, that this company can loan to the borrower sufficient money within the provisions of the small loan act to pay off the prior loan that included the insurance premium and make new notes and mortgages securing this loan.

BANKS AND BANKING—An insolvent bank has no right to pledge any of the assets of the bank as security for county deposits made in the bank.

November 10, 1924.

Superintendent of Banking: This department is in receipt of your letter dated October 30, 1924, in which you request an official opinion. Your letter is in words as follows:

"A few weeks ago we submitted to you an inquiry from the Greenfield Savings Bank, regarding their right to pledge specific assets to secure County deposits. After consulting with you, we wrote them that we did not approve of such a course and doubted the legality of such a pledge.

"Today we have information from our examiner, that the bank in question, and another bank in Adair county, have actually placed a portion of their general assets

in safe keeping for the benefit of county treasurers of certain school districts and towns.

"Before this Department makes any demands, we desire a formal ruling by you as to a bank's right to make such a pledge, and we will appreciate all possible expedition in getting such ruling to us."

You are advised that neither a state nor a savings bank organized under the laws of this state can pledge any specific assets as security for any particular depositor. Therefore, the Greenfield Savings Bank would have no right under the law to pledge any of the assets of the bank as security for the county deposits in their county.

BANKS AND BANKING—Assessment is upon the capital stock of the stockholders. The amount is arrived at by taking capital stock, surplus and undivided profits and deducting real estate otherwise assessed.

November 13, 1924.

County Attorney, Jefferson County, Fairfield, Iowa: This department is in receipt of your letter dated November 10, 1924. This letter is in words as follows:

"A controversy has arisen in Jefferson County relative to the manner in which furniture and fixtures of banks should be assessed for the purpose of taxation. Prior to this year I am told, the furniture and fixtures of the banks were not assessed. When the state checker was here this year he instructed the auditor to assess the furniture and fixtures of the banks according to the figures as shown by the books of each bank. This was done and the tax entered.

"The Iowa Savings Bank now objects to this manner of assessment, as not complying with Section 7150 of the Code of 1924, and objects to taking the bank's figures as to the value of the furniture and fixtures as the basis of the assessment. It is the bank's contention that the furniture and fixtures should be taken on a basis of fair market value, for the reason that it has carried in its furniture and fixtures account, the cost of installing different equipment, such as vaults, which are a part of the realty, and as such has been taxed with the realty.

"It seems to me that there is merit in the bank's contention, however, I do not wish to act contrary to the state auditor's office. Would you please advise if I should require the bank to seek its remedy in the District Court, or have the county auditor make an adjusted assessment according to the fair market value of the furniture and fixtures?"

You are advised that a bank is to be assessed in conformity to the law, that is, it is assessed upon its capital stock to the stockholders. The amount at which it is assessed is to be arrived at by taking the capital stock, surplus and undivided profits and deducting the real estate otherwise assessed as the law provides. This eliminates all questions of personal property as suggested, except that the value thereof is important as determining the value of the real estate.

BANKS AND BANKING—Bank stock of an insolvent bank should be assessed and placed on the tax list by the auditor.

November 13, 1924.

County Attorney, Cass County, Atlantic, Iowa: This department is in receipt of your letter dated November 11, 1924. This letter is in words as follows:

"The County Auditor has asked me to write to you on the following proposition. The Iowa State Bank of Atlantic, Iowa, closed its doors on January 9, 1924. The Assessor did not assess bank stock, although the assessors were advised by me to assess the bank stock and if they thought it was of no value to so state in their report. The Receiver of the bank, Mr. Enyart, a little later made a report giving a list of the names of the owners of this bank stock and the value of the same at the time they purchased it. The County Auditor wants to know whether she should correct the error in the assessment and tax list and assess and list for taxation this stock as the law provides under Section 1385-B of the 1913 Code. I stated to her that I thought the bank stock should be listed for taxation, but if

in her opinion, after investigation, it was of no value she should place it on the tax list and mark it as of no value. If this advice is correct kindly let me know as the Board of Supervisors meet again on November 14th and they would like to know on that date if possible."

You are advised that the bank stock should have been assessed as of date January 1, 1924 in the ordinary way. If not assessed in the ordinary manner it should be put on the tax list by the auditor. It is not a question under law as to the value of bank stock because the statute fixes the value at which it is to be assessed. The Auditor has no right to fix the value of the property. He only has the right to assess it as the law provides and place it on the tax list.

LOANS—Small Loan Act—Interpretation of certain phases.
BANKING DEPARTMENT—Small Loan Act—Interpretation of certain phases discussed.

February 19, 1923.

Superintendent of Banking: I am in receipt of your letter dated February 1, 1923, in which you request an opinion from this Department.

Your request is in words as follows:

"We have interpreted the Small Loan Act as set out in Section 13 to mean that the consideration for all such loans shall be new money furnished by the licensee. This interpretation is questioned by a licensee. We would, therefore, deem it of great importance to be guided by a written opinion on the following questions:

"1. Can the Superintendent of Banking legally prevent a licensee from converting or extending loans negotiated under other authority than this Act to loans bearing a higher rate under the Small Loan Act?

"2. If so, may we legally demand a refund of all interest collected in excess of the former contract rate on such loans now being carried at the increased rate?

"3. May the Superintendent of Banking withhold the renewal of license from one who is operating contrary to the law or to your opinion?"

There is no doubt as to the correctness of your determination of the three questions submitted by you. However, in order that the matter may be clear may I call your attention to the fact that under the law the licensee might loan money to an individual with which the individual would take up an old debt whether in the form of a note or other chose in action. However, the Statute applies to the loan of money and not to the extension of paper. In other words, assume that an individual had operated a business for a number of years and had accumulated one hundred thousand dollars in small loans at the legal statutory rate. If he could renew his loans under the small loan act, he might simply take out a license and then renew all of such loans at three and one-half percent per month.

The purpose of the Act in question is to provide for the loaning of money, and this should be constantly kept in mind.

I might say further that under the second question, what you should do is to revoke the license as this appears to be your remedy. I have not entered into detail in this letter because I understand you want it tonight, and am therefore just referring briefly to the situation.

In my opinion, however, if this Statute is to continue you should propose an amendment which would give you general supervision and control over all licensees and the business conducted by them to the end that you may prevent fraud and wrongdoing on the part of such licensees. This would enable you to prevent a person from carrying a license in another person's name and using such licensee as a mere tool for the accomplishment of unscrupulous purposes.

BANKS—Assessment—Deduction of Real Estate—All real estate owned by bank is to be deducted from value of shares and all stock owned by bank in corpora-

tions owning real estate on which bank is located may be deducted. Construing Section 1322 Supplement Code, 1913.

April 26, 1923.

County Attorney, Madison County, Winterset, Iowa: This department is in receipt of your letter of the 20th instant in which you request an interpretation of section 1322 of the supplement to the code, 1913, relative to the assessment of the shares of stock of national, state and savings banks and loan and trust companies.

The particular question in which you are interested is whether or not all real estate in which the capital of the bank is invested may be deducted from the value of the shares of stock of the bank. Section 1322 to which you refer insofar as it is pertinent to the question propounded by you reads as follows:

"In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them and in the shares of stock of corporations owning only the real estate (inclusive of leasehold interests, if any,) on or in which the bank or trust company is located, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed."

You will observe that the part of the section just quoted contains only one provision with reference to the deduction of real estate from the value of the shares of stock and that provision authorizes the deduction of "the amount of their capital actually invested in real estate owned by them." There is a further provision authorizing the deduction from the shares of stock of the bank the amount of their capital actually invested in the shares of stock of a corporation owning real estate on which the bank building may be located.

In other words, all of the real estate actually owned by the bank is to be deducted and if the bank building happens to be located on real estate owned or leased by a corporation and the bank has invested in the shares of stock of such corporation, the amount invested in such shares of stock may also be deducted.

BANKS—Branch Banks prohibited—Branch banks are not permissible under the laws of this state.

May 26, 1923.

Superintendent of Banking: This department is in receipt of your letter dated May 22, 1923 in which you submit for an opinion the question as to whether or not after consolidation of several banking houses in one institution, the consolidated institution can maintain several banking houses or offices for the purpose of receiving deposits and transacting other banking business.

As I understand the facts in the particular case at hand, a state bank has purchased the assets and business of several other banking institutions in one of the cities in this state. Since purchasing the business of such institution, it has continued to maintain offices in the old banking houses for the purpose of receiving deposits and transacting some other banking business.

The statutes of Iowa do not expressly or by implication authorize the establishment of branch banks. It is fundamental that in the absence of express statutory authority that such branch banks cannot be established. 7 *Corpus Juris,* 490; *Magee on Banks & Banking,* 2 Ed. p. 46; *Brunner vs. Citizens Bank,* 134 Ky. 283.

It follows therefore that under the laws of this state branch banks can not be established.

From the very beginning of this government the establishment of branch banks has been frowned upon for several reasons:

1—It eliminates the element of local pride and interest that each community takes in its own institutions.

2—The stimulus and aid which banks under local control give to the building up of local individuals is lacking.

3—The tendency of branch banking to monopolistic and ultimately destructive of the independent bank system.

4—It is contrary to the fundamentals of the banking business as it has been built up in America.

It is contended, however, that notwithstanding the general rule that branch banks can not be established in the absence of express statutory authority, yet within the same community a banking institution may have branch offices at which it may receive deposits for the parent institution. It is contended that this right is necessary in order to carry on successfully the business of banking. It is contended that the result will be increased custom for the bank and incidentally increased opportunity to business interests to do their banking business in such additional banking houses or offices. This argument may be made in favor of permitting banks to establish branches in other cities, towns or villages and in other states than that designated in the original charter. That is to say, if the establishment of such branches in the community is correct, it is also correct as to county and as to a state and as to a nation. In other words, the monopolistic character of the practice is exactly the same whether on a small or an extensive scale.

It is undoubtedly true that the establishment of branches will result in the possibility of more business being transacted by the single institution, but it is also true that if the single institution grows it stifles the life of all other institutions in the same community.

It has been contended further that the establishment of an office for the purpose of receiving deposits and transacting a certain banking business is not the establishment of a branch bank, but the establishment of a branch office only. It would seem to the writer that the mere statement of this proposition is an answer to it. There can be no distinction between a branch office and a branch bank. Both are established for the same purpose—namely that of extending from the parent institution arteries to all parts of the community, the county, or the state, as the case may be.

Certainly what can not be accomplished directly can not be accomplished indirectly and the establishment of a branch office for the purpose named is at least indirectly attempting to accomplish what can not be accomplished directly under the law.

It is the ruling of this department that under the laws of this state branch banks can not be established, nor can branch offices be maintained by a state bank for the purpose of receiving deposits or transacting other banking business.

BANKS—TAXATION—REFUND—When the assessed and not the actual value of real estate of a bank is deducted from the value of the assets by the county auditor no refund of any excess can be made where payment has been voluntarily made.

July 27, 1923.

Auditor of State: We have received a communication from Mr. A. S. Lawrence, State Examiner, submitting to this department the following proposition:

"We are submitting a question which is of considerable importance and is causing much trouble and discussion to the officials here. It is the question of whether the board have the right, at this time, to grant a refund of taxes to the

First National Bank of Lake Mills, Iowa, for what they claim, were taxes illegally exacted of them and covering a period of previous years. For the purpose of fully explaining the situation, we enclose copy of their petition to the board demanding this refund. We are advised the facts are correctly set forth in said petition. We might state further that the county attorney has been requested to give them an opinion on the matter, but he has failed to take a positive position on the question.

"The question has been put up to us and we have advised that no action be taken until they have reliable authority on which to base their action.

"The only question that we can see in it is, whether the refund can be granted at this time, considering that the tax was voluntarily paid. It also seems clear, in view of the present supreme court decision, that an over-assessment was made, but whether they can set up that claim at this time and have same reviewed, is a question.

"However, considering diversity of opinion and the amount of money involved, it seems only fair to the officials that they should have some tangible and reliable authority upon which to rely before taking action."

For the purpose of getting a clear understanding of the question submitted, and the facts with reference thereto, we will summarize the material allegations of the application asking for a refund of the taxes, filed by the First National Bank of Lake Mills, Iowa, with the board of supervisors of Winnebago county.

Said application contains the following allegations:

"That in each of the years 1918, 1919, 1920 and 1921, the said bank had a large part of its capital stock, surplus and undivided earnings invested in real estate and that in each of said years it made a statement to the assessor as required by law, of its assets, liabilities, stock holders and property, and that each of said statements, among other things disclosed the amount thus actually invested by it in said real estate on January first of each of said years.

"That the statement furnished by said bank contained the proper information for the assessor's use in making the proper deduction, that is the amount actually invested in real estate, and that said statements were originally made and filed claiming and computing said deduction, and valuing the shares of stock for taxation accordingly.

"That without the consent of the said bank and without the direction of the board of review, or any taxing body, the county auditor, on his own motion, illegally altered and changed said statements, and each of them, and erased or struck out the amount originally deducted (being the proper amount actually invested in real estate) and substituted in lieu thereof the assessed value of said real estate, which raised the value of the shares for taxation purposes accordingly. That the value thus appearing, was the value on the books of the county treasurer; but that said amount was not in fact the amount originally fixed or assessed.

"That the taxes paid by the said bank for its stockholders for said years were based on the illegal listing thus made and were paid under the demand of the treasurer and by duress, excepting the tax for the year of 1920 which still stands unpaid.

"That the amounts of tax actually paid, because of such erroneous action of the auditor, and the amount of the excess for each year is as follows:

Year	Amount Invested in Real Estate	Assessed Value of Real Estate	Amount of Tax Improperly Exacted
1918	$67,680.73	$22,180.00	$1,287.22
1919	52,127.07	28,380.00	791.14
1921	62,281.05	28,380.00	1,508.90
Total amount improperly exacted			$3,587.26

"That said application asked the board of supervisors to refund to said bank the sum of $3,587.26, which it is claimed therein was erroneously and illegally exacted and paid for the years 1918, 1919 and 1921, and that the proper warrants and payments be drawn and made therefor."

It will be observed that said application contains the statement that said taxes were paid under demand of the treasurer and by duress, with the exception of the tax for the year of 1920 which still remains unpaid.

This statement is in the nature of a conclusion and is insufficient to give either the board of supervisors, or this department any conception of what was done, which forms its basis for the claim of duress, and for that reason we can give it no consideration whatever in the preparation of this opinion.

While the formal rules of pleadings which prevail in the district court do not apply in all their strictness to proceedings before the board of supervisors, yet application filed therewith should contain a statement of facts, and not conclusions of law, or conclusions of fact. Obviously, the facts upon which the applicant relies to establish the ultimate fact only should be stated therein.

We are assuming that the taxes in question were paid to prevent the assessment of the penalties for the non-payment thereof, and not because of duress on the part of the County Treasurer. This opinion is prepared upon such assumption.

Section 1322 of the Code Supplement 1913, the statute which authorizes the assessments in question, provides as follows:

"Shares of stock of national banks and state and savings banks, and loan and trust companies, located in this state, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located. At the time the assessment is made the officers of national banks and state and savings banks and loan and trust companies shall furnish the assessor with lists of all the stockholders and the number of shares owned by each, and the assessor shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the said corporation shall furnish him a verified statement of all the matters provided in section thirteen hundred twenty-one of the supplement to the code, 1907, which shall also show separately the amount of the capital stock and the surplus and undivided earnings, and the assessor from such statement shall fix the value of such stock based upon the capital, surplus, and undivided earnings. *In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them and in the shares of stock in corporations owning only the real estate (inclusive of leasehold interests, if any) on or in which the bank or trust company is located, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed.* A refusal to furnish the assessor with the list of stockholders and the information required under this section shall be deemed a misdemeanor and any bank or officer thereof so refusing shall be punished by a fine not exceeding five hundred dollars."

The underlined portion of the above section is the one that is material to the question under consideration. The Supreme Court has construed this section as follows:

That from the total amount of capital, surplus and undivided profits, as provided in said section 1322, there should be deducted the amount of capital *actually* invested in real estate, and *not the amount which the assessor has seen fit to place on such real estate for taxation purposes.*

Security Savings Bank v. Board of Review of the City of Waterloo, 189 Iowa, 463;

Iowa State Bank of Osceola v. Judkins, County Treasurer (Iowa) 181 Northwestern Reporter, 462;

Langhout, County Treas. v. First National Bank of Remsen, (Iowa) 183 Northwestern Reporter, 506.

So it must be conceded that the act of the County Auditor in changing the assessed value of the real property of the bank, by fixing as the basis thereof the assessed value instead of the amount actually invested therein, was not in accord-

ance with the construction of the statute adopted by the Supreme Court in the above case.

It is also the law that the act of an assessor in computing the value of the shares of bank stock, and the ascertainment of such value from the bank's verified statement, as provided in section 1322, is purely ministerial. His right and power to assess bank stock must be in accordance with the method of computation prescribed by such statute, and the mistakes of assessors and Boards of Review are final in the absence of an appeal to the District Court. The assessorial bodies have no discretion in the matter of making such assessments. They must follow the plain provisions of the statute.

Langhout, County Treasurer v. First National Bank of Remsen, Supra;
First National Bank of Remsen v. Hayes, (Iowa) 171 N. W. Reporter, 715.

This brings us to the question of the right of the County Auditor to make such changes in the assessment of the stock of said bank. It is not so stated, but we are assuming that the County Auditor made the changes on the assessment books in the current years in which said assessments were made. Unquestionably, the County Auditor has the right to correct the errors of the assessor in computing the value of the shares of bank stock, because the ascertainment of such value by the assessor is purely a ministerial act.

Code Supplement 1913, Sections 1385-b and 1385-c;
First National Bank of Remsen v. Hayes, (Iowa) 171 N. W. Reporter, 715;
Security Savings Bank v. the Board of Review of Waterloo, 189 Iowa, 463.

However, the right of the County Auditor to make such correction is limited to the current year in which the assessment is made.

Meade v. Story County, 119 Iowa, 69;
First National Bank of Remsen v. Hayes, (Iowa) 171 N. W. Reporter, 715.

There remains for our consideration the most difficult question submitted to us, and that is as to whether the tax in excess of the amount prescribed in the statute can be recovered from the County by the Bank. In the consideration of this question, it is well to keep in mind certain facts, which cannot be disputed and which will have a material, if not a controlling bearing, upon this question.

The facts referred to may be briefly stated as follows:

First: That Section 1322 of the Code Supplement 1913, the statute under which the assessments in question were made, is legal and valid and not in contravention of any constitutional provisions of the state.

Second: That said statute is not inhibited by Section 5219, or any other section of the Federal Statutes.

Third: That the assessment of said bank stock was in some manner authorized by law.

Fourth: The most that can be claimed is that said assessments were merely excessive and based on a wrong conception of the meaning of said section 1322.

Fifth: That the claimed illegality in said assessments referred to the manner or basis of assessment, and not to the right of the properly constituted authorities to order, or make an assessment, by any procedure whatever.

Sixth: That said assessments were made at a time when there was some doubt as to the meaning of said section and before the statute was construed by the Supreme Court in the opinions hereinbefore cited, and that the assessment thereof and the payment of said taxes was manifestly made under a misapprehension or mistake of law.

Seventh: That the said taxes were paid under the impression that they were legally assessed and apparently no complaint was made until after the Supreme Court had construed the statute.

Eighth: That the said levy was made under the provisions of a statute that the bank does not claim is illegal or void.

Ninth: That the payment of said taxes was voluntary on the part of the bank, and not through compulsion or duress, and that they were paid without protest.

Ordinarily, where taxes were paid voluntarily and not under protest, they cannot be recovered by the taxpayer because of some irregularity in the levying of, or on account of some claim of invalidity of such taxes, where such taxes were not void on account of being absolutely unauthorized by law, or levied under an invalid law. The cases so holding are as follows:

Odendahl v. Rich, 112 Iowa, 182;
Lindsey v. Boone County, 92 Iowa, 86;
Epsy v. Town of Ft. Madison, 14 Iowa, 226;
Hawkeye Loan and Brokerage Co. v. City of Marion, 110 Iowa, 468;
Sears v. Marshall County, 59 Iowa, 603;
Morris v. the County of Sioux, 42 Iowa, 416;
The Dubuque & Sioux City Ry. Co. v. Board of Supervisors, 40 Iowa, 16;
Winzer v. City of Burlington, 68 Iowa, 279;
Bibbins v. Polk County, 100 Iowa, 493;
Kehe v. Blackhawk County, 125 Iowa, 549;
Adair County v. Johnson, 160 Iowa, 683.

In the opinion of the Court in Odendahl v. Rich, Supra, this language was used:

"The land in question was subject to taxation somewhere. It could make no possible difference to the owners whether it was taxed in the independent district of Carroll or in the district township of Grant, if the rate of taxation had been the same in both. Complaint was made that it was burdened with a larger tax by its location in the former district. *The taxes levied and collected were not illegal. The most that can be said is that they were excessive* and this was what was continually claimed by the plaintiff and his assignors."

A part of this language is strikingly applicable to the facts in the case we are considering. The taxes levied against the bank stock were not illegal and the most that can be said in regard thereto is that they were excessive.

That these taxes were paid voluntarily must be conceded. The mere statement that the taxes were paid under duress, which appears in the bank's application, is, as already stated, a conclusion and does not constitute a statement of facts, and because thereof, it must be disregarded in the determination of this question. In our opinion, the facts submitted to us bring the question at issue clearly and plainly within this rule of law.

There is another reason why these taxes cannot be recovered by the bank. It is quite evident that they were paid under a misapprehension of the law. In other words, that until the Supreme Court handed down its decision in the Security Savings Bank case, hereinbefore cited, there was doubt as to just what was the meaning of that portion of Section 1322 providing for the deduction of the value of the real estate from the value of the assets and property of the bank. It must not be overlooked that at the time such taxes were paid, the officers of the bank had full and complete knowledge of the facts with reference to said assessments and the basis thereof; in other words that they paid the same with full knowledge of the manner of making such assessments. It is a well settled principle of law that taxes, paid under a mistake, or misapprehension of the law, when voluntarily paid, cannot be recovered. We cite in support of this rule the following cases:

Epsy v. Ft. Madison, 14 Iowa, 226;
Dubuque and Sioux City Ry. Co. v. Board of Supervisors, 40 Iowa, 16;
Kraft v. City of Keokuk, 14 Iowa, 86;
Kehe v. Blackhawk County, 125 Iowa, 549;
Ahlers v. City of Estherville, 130 Iowa, 272.

Excerpts from the opinions of the Supreme Court may help us solve this question. In the case of Kraft v. the City of Keokuk, Supra, we find this language:

"The principle upon which courts refuse to relieve mistakes in law, is, we suppose, the fact that the law presumes every man to be cognizant not only of what are its provisions in force, but how far they are valid and operative."

The opinion in the case of Kehe v. Blackhawk County, above cited, contains the following language:

"This notice was not, as we have already said, an assessment of the property, nor was it a demand. So that the taxes were not erroneously or illegally exacted. The payment was not illegally made, nor was it erroneous, as that term is used in the statute before us. True, plaintiff could not have been compelled to pay; *but by a mistake of law, or through a desire to avoid a law suit he voluntarily appeared and settled his supposed obligations to the county.* The error, if any, was not on the part of the county officials, but of plaintiff himself, and the statute was clearly not intended to cover such a case."

We quote the following from the opinion of the court in the case of Lauman v. County of Des Moines, supra:

"It is conceded, that when money has been voluntarily paid, in consequence of a demand as of right, with a full knowledge of all the facts, there being neither duress, fraud nor compulsion, the mistake being one of law, not of fact, it cannot, as a rule, be recovered back."

Applying the rule of law thus laid down to the state of facts we have before us, there can be no escape from the conclusion that the taxes in question were paid under a mistake of law and because thereof cannot be recovered by the bank.

We assume that the bank bottoms its right to recover, upon the provisions of Section 1417 of the Code. The provisions of this statute, in part, are as follows:

"The Board of Supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been *erroneously or illegally exacted or paid,* with all interest and costs actually paid thereon."

Obviously, the question as to whether the state of facts submitted to us comes within the provisions of the portion of the section just quoted depends upon the definition or meaning of the phrase "found to have been erroneously or illegally exacted or paid."

The Supreme Court has, at various times, had occasion to pass upon the meaning of said phrase as used therein.

Winzer v. City of Burlington, 68 Iowa, 282;
Isbell v. Crawford County, 40 Iowa, 102;
Lauman v. County of Des Moines, 29 Iowa, 310.

We gather from these authorities and others that the rule may be stated as follows: That where a tax is merely informal and irregular, or merely excessive, but not illegal and absolutely void because levied upon property not liable to taxation, or because no law authorizes the taxation thereof, it is not erroneous and illegal within the meaning of the term as used in said statute. The rule is based upon reason and logic. If any mere irregularity in making an assessment, or an overassessment, or an assessment made under an erroneous view of the law on the part of the assessorial officers, should make the exaction or payment of the taxes erroneous and illegal, then the rule as to voluntary payment, or payment under a mistake of law could have no application to any state of facts and would be absolutely meaningless. There must be some situation to which it could apply. It must be remembered in this connection that the law, under which the assessments were made, is legal and so regarded by the courts. The property was subject to assessment in some amount, and the only error in assessing it was in adopting the wrong basis or value thereof. If such a situation brings the tax within the provisions of Section 1417, then there is no conceivable tax, in the assessment of which some error or irregularity enters, that would be excluded from its provisions. We be-

lieve that every consideration of public policy and the security and permanency of the tax laws demand the construction we have placed upon said section.

Therefore we are of the opinion that under the facts submitted to us the bank is not entitled to and does not have the legal right to recover from the County the amounts specified in the application.

It may be advisable for us to say that, under section 1417 of the Code, any taxes illegally or erroneously collected for any of the public organizations or corporations for whose benefit the County Treasurer collects taxes, such as cities and school districts, cannot be ordered refunded without proof that there remains in the County Treasury funds belonging to such corporations or organizations which can properly be applied to the satisfaction of such claims.

The Iowa Railroad Land Co. v. Woodbury County, 64 Iowa, 212;
Commercial National Bank of Council Bluffs, Iowa, v. Board of Supervisors, 168 Iowa, 501.

Therefore, for all of the reasons stated in this opinion, we believe that the application of said bank should be denied and the Board of Supervisors should not order the refunding of said taxes.

PRIVATE BANK—Is not entitled to deduct any stocks or bonds except stocks and bonds otherwise taxed in this state.

November 17, 1923.

County Attorney, Mitchell County, Osage, Iowa: I am in receipt of your letter dated November 16, 1923 in which you request an opinion from this department. This request is in words as follows:

"Will you kindly give me an opinion on the following:
"What, if any items, can be allowed to a private bank as a credit on tax assessment, in the way of U. S. bonds or stocks and bonds otherwise taxed? A bank is claiming such credit, among other items, for school bonds and warrants, stocks of corporations in other states and drainage bonds and warrants. Are they entitled to such credit?"

A private bank is not entitled to deduct any stocks or bonds except stocks and bonds otherwise taxed in this state. Before the assessor or the auditor would be entitled to allow for a deduction he should make an investigation and determine whether as a matter of fact the stocks and bonds referred to are otherwise taxed in Iowa.

MORRIS PLAN BANK: A company operating upon what is known as the Morris Plan comes within the provisions of Chapter 151, Laws of the 38th General Assembly and the deduction of interest in advance does not make the plan usurious. A company operating in this manner does not come within the so-called "small loan act," Chapter 35, Laws of the 39th General Assembly. The requirement of weekly deposits does not make the plan usurious as long as the company does not exact more than the maximum rate of interest from the borrower. The weekly deposit need not be regarded as collateral by the company and held intact.

December 15, 1923.

Superintendent of Banking: Your favor of the 25th ult. to this department has been referred to me for reply. You request an opinion upon four provisions. These we will consider in the order that you have stated them. Your request is as follows:

"Assuming that a domestic corporation makes loans ranging from $10.00 to $1,000.00, operating under what is known as the 'Morris Plan,' in which the maximum legal rate of interest is charged and deducted in advance and the borrower is required to make weekly payments or deposits of one-fiftieth of the principal amount of the loan to accumulate a fund with which to pay off the loan at the end of the year,—

"First. Is a company operating as above outlined entitled to the benefits of Chap-

ter 151 of the Acts of the 38th G. A., providing for the assessment of the stock of such corporation at five mills on the dollar, or does the deduction of the maximum interest in advance and the requirement of the weekly deposits make the transaction usurious so as to deprive such corporation of the benefits of Chapter 151 of the Acts of the 38th G. A.?"

Answering your first proposition, it is the opinion of this department that a corporation operating upon what is known as the "Morris Plan" as stated by you does come within the provisions of Chapter 151, Laws of the 38th General Assembly, and the fact that the maximum rate of interest is deducted in advance and a weekly deposit required by this corporation of the person securing the loan, does not make the plan usurious, thus depriving the corporation of the benefits of this chapter.

Your second proposition is stated as follows:

"Assuming that such a corporation is transacting its business strictly within the plan outlined in Chapter 151, but has not applied to the State Auditor for a certificate entitling it to be taxed at five mills on the dollar, does the so-called 'Small Loan Act,' being Chapter 35 of the Acts of the 39th G. A., apply to such corporation?"

We are of the opinion that your second proposition should be answered in the negative. The so-called "Small Loan Act," being Chapter 35, Laws of the 39th General Assembly does not apply to such a corporation.

Your third proposition is stated as follows:

"If the deduction of the maximum legal rate of interest in advance is not in itself usurious, is the requirement of weekly deposits, according to the plan outlined above, in Chapter 151, such a plan as to make the transaction usurious,—that is, should such deposits necessarily be regarded as partial payments upon the loan, or may they be regarded merely as deposits without interest?"

Whether the weekly deposits according to the plan outlined by you are regarded as partial payments or deposits without interest we believe to be immaterial, the usury law being aimed to protect the borrower and not to prevent a corporation from earning more than eight percent upon money deposited with it or upon its capital as long as a corporation does not exact more than the maximum rate from the borrower.

Your fourth proposition is as follows:

"Calling particular attention to the provision of Section One of Chapter 151 above which provides in part, 'which fund may be held by such corporation as collateral security for the payment of such loans,' must a corporation requiring such weekly deposits regard them as merely collateral and hold them intact, or may the fund derived from such weekly deposits be mingled with the other funds of the corporation and re-loaned to other borrowers?"

The clause quoted by you from Section 1 of Chapter 151, Laws of the 38th General Assembly is an amendatory provision, and the corporation is not necessarily required to regard the weekly deposits as collateral and hold them intact. This question is also answered by our opinion in regard to propositions one and three submitted by you.

OPINIONS RELATING TO THE BOARD OF CONSERVATION

BOARD OF CONSERVATION—Lands of State given jurisdiction over all, except such as excepted by statute. See Ch. 336, Acts 40th G. A.

January 17, 1924.

Iowa State Board of Conservation: This department is in receipt of your letter dated January 12, 1924 in which you request an opinion from this department. This request is in words as follows:

"The Iowa State Board of Conservation desires a written opinion regarding Chapter 336, Acts of the Fortieth General Assembly.

"Under the provisions of Chapter 33, Acts of the Fortieth General Assembly, which makes all state land under the supervision of the Board of Conservation, the board desires to know if they have control of this land under Chapter 336, Acts of the Fortieth General Assembly."

You are advised that under the statute to which you refer the State Board of Conservation is given jurisdiction over all state lands except such lands as are by specific statutes placed under the jurisdiction of other boards or departments. The control is vested in the Board of Conservation and is subject only to the provisions of the Act. You will note that there is a general supervisory power in the Executive Council and the approval of the Executive Council should be had in all instances where required.

CONSERVATION—BOARD OF—Resolution relative to Lacey-Keosauqua State Park golf course held legal.

March 20, 1924.

Iowa State Board of Conservation: This department is in receipt of your communication dated March 19, 1924 in which you request an opinion. Your request is in words as follows:

"The Iowa State Board of Conservation directed the writer to request your opinion as to the legality of the following resolution which was passed by the board at their meeting held March 14, 1924:

" 'WHEREAS, the Lacey-Keosauqua Country Club, a corporation composed of citizens of Van Buren and surrounding counties, has made application to the State of Iowa, for permission to occupy and use a portion of the Lacey-Keosauqua State Park in Van Buren County, Iowa for the purpose of constructing a Golf Course open to the general public on equal terms and for such purpose has agreed to maintain such course, protecting the trees and growth on the park and not to injure the same; and also to use the building situated thereon for the purpose of a club house, be it

" 'RESOLVED, that permission be requested of the Executive Council, State of Iowa, for the Lacey-Keosauqua Country Club to lay out, establish and maintain a Golf Course on such portion of the tract, not exceeding sixty acres, as may be designated by the Board of Conservation or some member thereof authorized by said board. Said Golf Course shall be open to the general public without fee to be charged, except such small fee as may be necessary to help keep the Course in condition to play, but this permission is given without prejudice to the right of the State of Iowa, to enter upon said Course for any purposes it desires and may be terminated at any time, when in the judgment of the State such use is detrimental to the Park, or for any other reason.

" 'The right to use of the building situated on the tract is also hereby given for such purpose with the right also to make necessary improvements without charge to the State and all under the sanction and direction of the Board of Conservation of the State of Iowa.

"'It is expressly understood that this permission and authority does not vest in said Country Club any rights in the Park or Park property except as above stated, and may be terminated at any time and when so terminated any improvements made shall be turned over to the State without obligation of the State to pay therefor.'"

You are advised that in our opinion the resolution is legal. You will observe that no title is vested in the Club and that the Golf Course will be open to the general public. This being true, the park is being used for the public and the purpose is clearly consistent with the purposes to which a state park may properly be devoted.

In my judgment, however, the resolution should have the approval of the Executive Council and the Board of Conservation.

BOARD OF CONSERVATION—Has jurisdiction over all meandered streams and lakes of this state and of state lands bordering thereon not now used by some other state body for State purposes.

August 1, 1923.

Executive Council: This department desires to acknowledge receipt of your letter of July 24, 1923, inclosing the following letter from Geo. W. Spencer of Rockwell City, Iowa:

"I, in common with many others, am a lot owner at Twin lakes, where there are two resorts, and a state park is being located, and expect to build a cottage and make other improvements, among which will be a pier into the lake. In this connection some questions have been raised as to the rights of the property owners and also the public. In view of the fact that the two lakes known as Twin Lakes are state property and under the jurisdiction of the state, I am herewith submitting these questions to you at this time for your decision in order that there may be no question as to the rights of all parties concerned:

"Has a party owning a lot on the lake front the right to build a pier in front of his lot for his private use ,and if so, should application be made to the state for a permit to build such pier?

"In the event that a private individual is granted a permit to build such pier, has he rights that are paramount to the rights of the public in the use of said pier, or can the public use it at pleasure against the protests of the party who built it?"

Without entering into any discussion on the question of law submitted to us, we desire to advise you that under the provisions of Chapter 33 of the Acts of the Fortieth General Assembly, the State Board of Conservation has jurisdiction over all meandered streams and lakes of this state and of state lands bordering thereon not now used by some other state body for state purposes. This statute is comprehensive in character and in our opinion vests full authority in said board to make all necessary and reasonable rules and regulations in regard to the use of said streams or lakes by the public. We therefore suggest that said board adopt rules and regulations that will protect and subserve the rights of the public and the property owners whose property borders on said streams or lakes in the use thereof so that the greatest good to the greatest number may be accomplished.

BOARD OF CONSERVATION has jurisdiction over all meandered streams in the state and by proper proceedings may require the Power Company to remedy defects in the construction of a dam in such streams.

October 31, 1923.

Board of Conservation: I wish to acknowledge receipt of your favor of the 21st ult., with the attached letter from Mayor C. V. Findlay of Fort Dodge, Iowa, concerning the authority of the Board of Conservation to compel the Northwestern Power Company to enlarge the openings in the dam, near that city. The request is as follows:

"The Northwestern Power Company has constructed a dam at Fort Dodge just below the city, having completed the same before I had any connection with this office. They also constructed a dam without permission of anyone in authority. They are now asking the district court to give them permission to construct such a dam.

"The city is complaining of one feature in the construction that should be eliminated. They have built the dam with two small openings to allow the water to escape. These openings are not large enough to let the water get away in the lowest flow of the stream. It appears to the council that the openings in the dam should be large enough to allow the water to escape promptly if it were found necessary. I have been informed that this matter," etc.

Section 9, Chapter 33, Acts of the 40th G. A. gives the Board of Conservation jurisdiction over all meandered streams in the state. If the dam in question in a meandered stream, in any way obstructs the proper flow thereof, so as to cause flooding of the city's property, we are of the opinion that the Board of Conservation has jurisdiction and may by proper proceedings require the Northwestern Power Company to remedy this defect in the construction of the dam.

OPINIONS RELATING TO THE BOARD OF HEALTH

January 7, 1924.

DIVORCE—Ground for in Iowa.

State Board of Health: I am in receipt of your letter dated December 28, 1923 in which you request an opinion from this department. Your request is in words as follows:

"I am enclosing herewith communication from the Director of the Census Bureau of the United States Government, and as the Iowa State Board of Health is engaged in using and preserving transcripts of divorce records in this State I will appreciate your advising us whether or not the following causes:

Nonsupport,
Wilful neglect,
Refusal to provide,
Failure to provide,
Neglect to provide,

constitute grounds for causes for divorce, according to Iowa Statutes."

You are advised that none of the grounds contained in your communication constitute a ground for divorce in this state.

BOARD OF HEALTH: A certificate of a physician may be revoked by the Board of Health only after giving the notice and hearing as provided in Section 2578-a, Supplement to the Code, 1913.

July 9, 1924.

State Board of Health: I wish to acknowledge receipt of your favor of the 7th requesting the opinion of this department as follows:

"Will you kindly give this office your written opinion as to whether or not the Board of Medical Examiners may revoke the certificate of a physician convicted of violation of the Harrison Act (Narcotic law), under definition No. 7, page 24 of the enclosed booklet, or would the Board be required to proceed in the manner prescribed at the bottom of page 24, by serving formal notice, etc."

Section 2578-a, Supplement to the Code, 1913 providing for the procedure in the case of the revocation of a certificate, in part, reads as follows:

"Before the revocation of any certificate issued by the state medical examiners the licentiate shall have been afforded an opportunity for a hearing before the board.

At least twenty days prior to the date set for such a hearing, the secretary of the state board of medical examiners shall cause written notice to be personally served upon the defendant in the manner prescribed for the serving of original notice in civil actions. Said notice shall contain a statement of the charges and the date and place set for the hearing before the board. * * *"

Section 2578, Supplement to the Code, 1913, enumerates the grounds upon which a certificate may be revoked. No. 7 thereof of which you inquire is as follows:

"7. Conviction of any offense involving moral turpitude."

This is merely one of the grounds for revocation of a certificate and before any certificate may be revoked we are of the opinion that the procedure outlined in Section 2578-a, Supplement to the Code, 1913, hereinbefore referred to, providing for a notice and hearing, must be followed.

CITIES AND TOWNS—VITAL STATISTICS LAW: Municipalities have no authority to prohibit the local registrar from issuing a permit for a funeral on Sunday.

October 25, 1924.

Secretary, State Board of Health: We have received your letter of September 3, 1924, asking this department for an opinion upon the question that you have stated as follows:

"I am enclosing herewith a letter from Sioux City requesting information relative to the legality of an ordinance prohibiting the holding of Sunday funerals.

"Section 19, Chapter 222, Laws of the 39th General Assembly provides for the issuing of burial permits, and I am wondering also whether the ordinance prohibiting the Local Registrar from issuing a burial permit on Sunday will hold.

"We have had so much to contend with from the undertakers and the new Vital Statistics Law, for the reason that the undertakers felt as though they were being imposed upon and were required to do entirely too much running around obtaining permits, etc. Hence taking into consideration that everything is running smoothly at the present time and I am receiving the co-operation of the entire profession, I dislike very much to have any community adopt any ordinance interfering with any provision made in the Vital Statistics Law."

Section 1 of the Sioux City ordinance, referred to in your letter which is the only portion thereof that it is necessary for us to consider in the determination of this question, reads in part as follows:

"Sec. 1. It is hereby declared unlawful for any person or persons, firm or corporation, to hold funeral services or to conduct or hold a funeral on Sunday. It is further declared unlawful to inter any human body in any cemetery within the city of Sioux City, Iowa, on Sunday, *and the local registrar of said city and his deputies and assistants are hereby forbidden to, and prohibited from, issuing permits for the interment of human bodies upon Sunday within the city limits of the city of Sioux City, Iowa;* * *"

We have omitted from the first section thereof the portion which permits the holding of Sunday funerals in extreme cases, or when absolutely necessary, for the reason that it is not material in the consideration of the question you have submitted.

We do not deem it necessary or advisable to determine the question as to whether or not the portion of the ordinance in question prohibiting the holding of funeral services on Sunday is valid, or a proper exercise of the powers granted to municipalities by the laws of the State. We shall only determine the question as to whether or not the city council may prohibit the local registrar, his deputies and assistants, from issuing permits for the interment of human bodies on Sunday.

At the outset it may be advisable to advert to certain principles relating to the powers and rights of municipalities. Such municipalities possess the following powers and no others:

First: Those granted in express words;

Second: Those necessarily implied or necessarily incident to the powers expressly granted;

Third: Those absolutely essential to the declared objects and purposes of the corporation.

Any doubt as to the existence of a power is resolved by the courts against the existence of such power. *Merriam v. Moody's Executors,* 25 Iowa, 163; *Logan & Sons v. Pyne,* 43 Iowa, 524; *Brooks v. Brooklyn,* 146 Iowa, 136; *Farmers Telephone Co. v. Town of Washta,* 157 Iowa, 447; *Town of Hedrick v. Lanz,* 170 Iowa, 437; *Huston v. City of Des Moines,* 176 Iowa, 455.

The limits of the powers and rights of municipalities may be briefly stated as follows:

"They may enact ordinances even where the state has legislated upon the same subject, but even then the ordinance must not be inconsistent with or contravene the policy of the state as expressed in its legislation." *Town of Hedrick v. Lanz,* 170 Iowa, 437; *Town of Neola v. Reichart,* 131 Iowa, 492; *Town of Bloomfield v. Trimble,* 54 Iowa, 399; *Town of Sibley v. Lastrico,* 122 Iowa, 211; *Town of Avoca v. Heller,* 129 Iowa, 227.

It therefore becomes our duty to determine, under the rules just stated, whether the provisions of the ordinance under consideration, are in conflict with the provisions of the State law. To determine this question we must resort to certain features of what is known as the Vital Statistics Law embraced in Chapter 222 of the Laws of the 39th General Assembly.

A reading of the statute in question will show that it contains a comprehensive and complete plan or procedure for the regulation of the registration of births and deaths and for the burial or interment of the dead. It seems manifest that it was the purpose of the legislature, in enacting this statute, to devise a plan therefor that should take the place of any existing statutes upon the subject and that should be free from any interference upon the part of any local bodies or municipalities.

We shall now refer to certain portions of the statute. Section 5 contains the provisions relating to the issuance of a permit for the burial or interment of a human body. It contains the following provisions:

"That the body of any person whose death occurs in the state or which shall be found dead therein, shall not be interred, deposited in a vault or tomb, cremated or otherwise disposed of, or removed from or into any registration district or be temporarily held pending further disposition more than seventy-two (72) hours after death, unless a permit for burial, removal, or other disposition thereof, shall have been properly issued by the local registrar of the registration district in which the death occurred or the body was found."

Section 19 is the one that deals with the duty of the local registrars and contains the following statements:

"That each local registrar shall supply blank forms of certificates to such persons as require them. Each local registrar shall carefully examine each certificate of birth or death when presented for record in order to ascertain whether it has been made out in accordance with the provisions of this act and the instructions of the state registrar; and if any certificate of death is incomplete or unsatisfactory, it shall be his duty to call attention to the defects in the return, and to withhold the burial or removal permit until such defects are corrected. All certificates, either of birth or of death, shall be written legibly, in durable black ink and no certificate shall be held to be complete and correct that does not supply all of the items of information called for therein, or satisfactorily account for their omission. *If the certificate of death is properly executed and complete, he shall then issue a burial or removal permit to the undertaker; provided,* that in case the death occurred from some disease which is held by the state board of health to be infectious, contagious, or communicable and dangerous to the public health, no per-

mit for the removal or other disposition of the body shall be issued by the registrar, except under such conditions as may be prescribed by the state board of health."

Section 23 reads in part as follows:

"That each local registrar is hereby charged with the strict and thorough enforcement of the provisions of this act in his registration district, under the supervision and direction of the state registrar. And he shall make an immediate report to the state registrar of any violation of this law coming to his knowledge, by observation or upon complaint of any person, or otherwise. The state registrar is hereby charged with the thorough and efficient execution of the provisions of this act in every part of the state and is hereby granted supervisory power over local registrar, deputy registrars, and sub-registrars, to the end that all of the requirements shall be uniformly complied with. The state registrar, either personally or by an accredited representative, shall have authority to investigate cases of irregularity or violation of law, and all registrars shall aid him, upon request, in such investigations."

Section 26 is in the following language:

"That all laws and parts of laws inconsistent with the provisions of this act are hereby repealed only as far as it refers to this act; and no system for the registration of births and deaths shall be continued or maintained in any of the several municipalities of this state other than the one provided for and established by this act."

A reading of the sections just quoted will show that the provisions thereof relating to the duties of the local registrar with reference to the issuance of a burial permit are full and complete. The entire act, and especially the portion quoted, manifests the intention of the legislature to enact a statute that should fully cover the subject and leave nothing for municipalities to add thereto. The statute contains a complete regulation of the subjects embraced therein, and nothing is left to be supplied by any other body and no further regulation of any other kind or character is permissible. This is made certain by the last part of Section 26, which reads as follows:

"no system for the registration of births and deaths shall be continued or maintained in any of the several municipalities of this state other than the one provided for and established by this act."

We find nothing in this statute, or in any other statute of the state, that grants to municipalities any control over or any right to interfere with the duties of local registrars, as prescribed by the statute. The local registrar is an official created by State statute and for an obvious State purpose. His rights and duties are prescribed by statute, and its provisions are intended to be exclusive. To make him subject to additional regulations prescribed by municipal ordinances would create an intolerable condition and would have a tendency to defeat rather than to uphold the law.

We are, therefore, of the opinion that the portion of the ordinance in question prohibiting local registrars from issuing permits for the interment of human bodies on Sunday is inconsistent with the provisions of the Vital Statistics Law and for this reason is absolutely null and void.

While we do not determine the validity of the portion of the ordinance providing for Sunday funerals, yet the practical effect of declaring invalid the portion thereof containing the inhibitions upon the rights of the local registrar will be to nullify the entire ordinance. If such local officer cannot be prevented by ordinance from permitting a funeral to be held on Sunday, then the permit signed by him will be sufficient to authorize the holding of such a funeral, and the local officials will be powerless to prevent it. There is nothing inherently

wrong or radically out of harmony with the proper observance of the day, in the performance of funeral rites, or the interment of a human body, on the Sabbath day. Such ceremony is not in any sense the performing of labor within the ordinary and accepted meaning of the term. It is more like the performance of the solemn and sacred religious ceremony, we have serious doubts about the legal right of municipalities to prohibit such funerals, but we are abidingly convinced that they do not have the right to regulate or prescribe the manner in which the registrar shall carry out or perform the duties enjoined upon him by statute even though the practical effect may be to permit the holding of such funerals. The rights and duties of such officials are fully and completely covered by the statute and are exclusive of any further regulation on the part of the municipalities.

LOCAL REGISTRARS—Local registrars are not to be paid immediately under the provisions of Section 2420 of the Code of 1924, but in the manner in which other claims are paid by the county.

December 8, 1924.

State Board of Health: You have requested the opinion of this department as to the interpretation to be given Section 2420 of the Code of 1924.

"I am enclosing herewith a letter from F. W. Esher, Auditor of Black Hawk County wherein he raises the question as to paying Local Registrars as provided for in Section 2420, Code 1924.

"This office certifies to the County Auditor the amount due the Local Registrar, according to the returns made to this office and now the question is whether or not the County Auditor shall wait for a meeting of the County Board of Supervisors to O. K. the claim, or, is he permitted by law to draw county warrant upon the certification made by this office.

"While the wording of Section 2420 is that the 'amounts payable to a registrar under the provisions of this Chapter shall be paid by the County *immediately* upon certification by State Registrar,' but the wording goes on to say, 'in the manner in which other claims are paid by the County.'

"Will you kindly give me an opinion as to whether or not the County Auditor has to hold the certifications of pay for the County Board?"

It is my opinion that under the above section, bills for the payment of local registrars must be presented to the Board of Supervisors before payment.

It is my opinion that the provision "in the manner in which other claims are paid by the county" requires their presentment to the Board of Supervisors before they are paid from the county funds.

The effect of the phrase "immediately upon certification by the state registrar" is that the bills should be presented with other current bills at the monthly meeting of the Board, and the use of the word "immediately" is to prevent unnecessary delay in presenting the bills to the Board of Supervisors for their approval.

VITAL STATISTICS—Fees for reporting births not to be paid for reports prior to July 4, 1921, under chapter 222, 39th G. A.

May 22, 1923.

State Board of Health: You have submitted the proposition to this department for an opinion of whether or not a local registrar is entitled to the fee of twenty-five cents for filing a certificate of birth dated April 9, 1921, under the provisions of section 20 of chapter 222 of the acts of the 39th General Assembly.

It will be observed that chapter 222 of the acts of the 39th General Assembly repealed the provisions of the law then in existence relative to vital statistics and reports. That chapter, however, did not go into effect until July 4, 1921. The old law as contained in chapter 326 of the acts of the 37th General Assembly

was effective on April 9, 1921, the date of the certificate of birth under discussion. The law as it then stood required that a certificate of birth must be returned within ten days after birth. It further provided that on or before the 5th day of the following month clerks of the district court shall record number and index in order of filing, all certificates of birth in a proper record book received during the preceding month. It appears that under the old law all things relative to the reporting and filing of the birth certificate in question should have been done long before July 4, 1921. That being true, the provisions of section 20, chapter 222 of the acts of the 39th General Assembly would not apply and it is therefore the opinion of this department that a local registrar is not entitled to the fees provided for filing certificates of birth prior to the taking effect of chapter 222 of the acts of the 39th General Assembly.

CLERK—CITY OR TOWN—May be appointed Registrar of Vital Statistics for his particular community.

REGISTRAR OF VITAL STATISTICS—Office may be held by any city officer within his community.

October 8, 1923.

Auditor of State: You have requested the opinion of this department on the proposition as to whether or not a city or town clerk may be appointed the registrar of vital statistics for his particular community and also whether or not he may retain personally the fees authorized by statute to be paid for such services.

Section 4 of Chapter 222 of the Acts of the 39th General Assembly provides for the appointment of local registrars by the Board of Supervisors in each county. Section 20 of the same chapter provides for the compensation to be paid local registrars for reporting and recording birth and death certificates. There is no provision contained anywhere in the law relative to vital statistics enjoining on any city or town clerk or auditor the duties of local registrar. In the absence of any provision in a city ordinance to the contrary, we know of no reason why a city or town clerk or auditor may not be appointed local registrar and receive the fees provided by statute to be paid for services rendered as such.

It is therefore the opinion of this department that the office of registrar of vital statistics is so far removed from any city office that any such city officer may accept an appointment as registrar of vital statistics within his community and may retain personally the fees allowed by him as such registrar provided there is no ordinance of city or town to the contrary. The recent case of Burlingame v. Hardin County, reported in 180 Iowa, 919 sustains this contention.

PLUMBING—The *State Board of Health* does not have authority to enforce the rules and regulations provided by the Code for plumbing in cities having a population of less than 6,000, unless such cities by ordinance adopt the rules and regulations provided in the plumbing code.

December 3, 1923.

Secretary Department of Health: Your favor of the 24th ult. to the Attorney General requesting an opinion has been referred to me. Your request is as follows:

"Referring to Section 2, Chapter 378, Acts of the 38th General Assembly, regulating the installation and inspection of plumbing, can the State Board of Health require in towns having a population of less than 6,000 that the provisions of the plumbing law be complied with insofar as it will insure protection to the health of the people?"

Chapter 378, Laws of the 38th General Assembly, in Section 1 amends Section 737-a Supplement to the Code, 1913, by inserting after the "," before the word "including" in the first line thereof, the following clause:

"having a population of less than six thousand (6000)".

As amended this section reads as follows:

"Cities and towns, having a population of less than six thousand (6000), including cities acting under Commission Form of government and cities acting under special charter, shall have power to regulate and license plumbers; to create a board of examiners to determine the qualifications thereof; to prescribe rules and regulations," etc.

This section as amended gives the power to regulate and license and to provide rules and regulations, etc., in regard to plumbing, in cities and towns having a population of less than 6,000. The statute is not mandatory, and before the provisions thereof would be effective, the city would be required to enact ordinances adopting the authority given them by this section. Therefore, insofar as the regulation and control of plumbers and rules and regulations for the installation of plumbing work and material and for inspection thereof and compelling the removal of plumbing installed in violation of the rules and regulations, the State Board of Health would not have authority in cities and towns having a population of less than 6,000, to enforce the provisions of the rules governing installation of plumbing in the State of Iowa. However, the State Board of Health would have authority under the provisions of Chapter 37, Laws of the 40th General Assembly, from preventing the befouling of public waters, by reason of unsanitary plumbing conditions. Neither would the fact that the State Board of Health could not enforce the plumbing rules and regulations in cities of this size, unless the rules had been adopted by the city, affect the general supervision of the Board of Health generally.

Your second proposition on which you ask the opinion of this department, is stated as follows:

"The second paragraph in Section 2, that the Governor appoint a committee of three to meet with and assist the State Board in drafting a Code for plumbing. Said committee shall serve without compensation. Then later on in the same paragraph wording is as follows: 'That said committee shall receive no compensation except from such funds as may accrue under this Act.'

"Taking into consideration that there is a State fund created by examination fees in the plumbing department, has the State Board of Health or Executive Council authority to grant the members of this committee compensation or per diem while meeting at this office to revise the State Plumbing Code,"

The second paragraph of Section 2, Chapter 378, Laws of the 38th General Assembly is as follows:

"The state board of health is hereby empowered to make such provisions as may be necessary to establish a code of rules governing the installation of plumbing in the state of Iowa. The governor of Iowa, shall, within sixty days (60) after the passage of this act, appoint a committee of three, two of whom shall have had at least five (5) years experience in the business of plumbing, to meet with and assist the state board of health in drafting a state code for plumbing, specifying the grade of materials to be used, and regulating the *installation of same. Said committee shall serve without compensation but shall be paid necessary travelling and hotel expenses.* All necessary and incidental expenses in carrying out the provisions of this act shall be paid by the state treasurer from the plumbing inspection fund hereinafter provided, in the manner provided in section one hundred seventy-s (170-s), supplemental supplement to the code, 1915, as amended by chapter 67, acts of the thirty-seventh general assembly, provided, however, that said *committee shall receive no compensation except from such funds as may accrue under this act.*"

The following language in the above section is quite significant:

"Said committee shall serve without compensation but shall be paid necessary travelling and hotel expenses."

This section of the law authorizes only the payment of necessary travelling and hotel expenses with no provision for compensation. The section continues further and after referring to the manner of auditing claims of the plumbing board uses this language:

"* * * provided, however, that said committee shall receive no compensation except from such funds as may accrue under this act."

We believe the compensation referred to in this clause is the "necessary travelling and hotel expenses" and does not, in the absence of clearer provision therefor authorize the payment of a per diem to any of the members of this board, while attending meetings for the purpose of revising the plumbing code. Had it been intended by the legislature that a per diem might be allowed the members of this board by the executive council, an express authorization for such allowance would undoubtedly have been inserted in this law.

BOARD OF MEDICAL EXAMINERS—The Board of Medical Examiners under the statute are not authorized to require one year's interneship in some hospital approved by the Board of Medical Examiners before issuing its certificate.

December 7, 1923.

Secretary Iowa State Board of Health: Your favor of October 13th requesting an opinion from this department has been referred to me for reply. Your request refers to Rule 13 found on page 17 of the "Rules and Regulations of the Iowa State Board of Medical Examiners" and to Section 2576, Supplement to the Code, 1913, your request being as follows:

"On page 17 you will find rule 13 which was passed by this Board requiring each graduate of a Medical College to complete one year interneship in a hospital approved by this Board, before he is eligible to receive a State Certificate.

"The State Board of Medical Examiners infer that they are obligated to make rules, regulations, and requirements to cope with necessary advancement of educational qualifications. Will rule 13 conflict with the law as found on page 21 to the extent that the State Board of Medical Examiners cannot withhold an applicant's State Certificate one year subject to his completed year in interneship in a hospital? In other words the applicant applies for examination immediately upon graduating from his four years medical school, and after taking the examination, enters a hospital for his one year in interneship. Is there anything in the medical practice law cited above conflicting with the Board's requirements as specified in rule 13, which we desire to enforce by withholding issuing State Certificate until the year's interneship has been completed?"

Rule 13 referred to by you, of the "Rules and Regulations of the Iowa State Board of Medical Examiners" is as follows:

"Rule 13, All persons beginning the study of medicine after July 1, 1919, will be required to complete one year of hospital interne service in a hospital approved by this Board following graduation from a recognized medical school before being admitted to the examination for licensure in Iowa."

Section 2576 Supplement to the Code, 1913, in part provides as follows:

"Board of medical examiners—examinations—certificates. * * * All examinations shall be in writing, each candidate for examination in any school of medicine being given the same set of questions covering anatomy, etc. * * * The examination papers, when concluded, shall be marked upon a scale of one hundred, each candidate for examination first to pay to the secretary of the board a fee of ten dollars therefor. The average required to pass shall be fixed by the board prior to the examination. * * * All matters connected therewith shall be filed with the secretary and preserved for five years as a part of the records of the board, during which time they shall be open to public inspection. If the examination is satisfactory to three members of the board, *it shall issue its certificate,* under its seal, signed by its president, secretary, and not less than

three other members, * * *. The certificate, while in force, shall confer upon the holder the right to practice medicine, surgery and obstetrics, and be conclusive evidence thereof. * * *"

As will be noted, Section 2576 just quoted provides:

"If the examination is satisfactory to three members of the board, it shall issue its certificate. * * * *"

This statement is mandatory, and together with the other provisions of this section clearly provides the only requirements necessary to obtain a certificate authorizing the holder to practice medicine, surgery and obstetrics in the State of Iowa. There is no provision in the law authorizing the board to impose an additional requirement of one year interneship in some hospital approved by the board as provided by Rule 13 of the "Rules and Regulations of the Iowa State Board of Medical Examiners."

VITAL STATISTICS—Public Records—May only be used or furnished for certain purposes—Cannot be used for purely commercial purposes.

December 17, 1923.

State Board of Health: I am in receipt of your letter dated December 14, 1923, in which you request an opinion from this department. Your request is in words as follows:

"I desire your opinion relative to the meaning of Section 18, Chapter 222, Laws of the 39th General Assembly, relating to preserving records.

"The section states that no certificate of birth or death, after its acceptance for registration, and no other record made in pursuance of the Act, shall be altered or changed in any respect otherwise than by amendments properly dated, signed, and witnessed, and that the records shall be open to inspection by the public subject to such reasonable conditions as the State Registrar may prescribe, and subject to certain fees.

"While this Section 18 makes provisions for the preservation of the records and provides for the safeguarding against possible changing of the information by individuals, would it be proper for the State Registrar in the future to allow any individual to have access to these records for the purpose of copying names and addresses.

In referring to Section 21, reference is again made to copies and information which may be obtained from the records, and the section states that the State Registrar shall upon request supply to any applicant for legal or other proper purposes, certified copies, etc.

"During my administration I have refused to allow Savings Banks, Comfy-Cab, Malted Milk, Baby Book, Medicinal, Bottle, Health Clothing Companies and Insurance people, to copy names and addresses from birth certificates. I have also refused to allow Tomb Stone and Burial Vault manufacturers, to copy names and addresses from death certificates.

These birth certificates, especially from counties like Johnson, Woodbury and Polk contain information relating to illegitimate births in maternity hospitals, and information regarding putative fathers, that I have never thought was intended for public purposes.

"For my future guidance, I would appreciate your opinion as to whether or not these birth and death records which are collected for legal, statistical and historical purposes at the expense of $28,750 annually to the State, are open to the public for the purpose of individuals copying names and addresses from same."

While these records are public records for certain purposes, still they are not for all purposes. The statute expressly provides that these records shall only be available under the provisions of the law. Under no circumstances should they be furnished for any other than proper purposes. You are quite right in refusing to permit these records to be used for purely commercial purposes.

OPINIONS RELATING TO BONDS

BONDS—A special election to vote upon the issuance of bonds for the purpose of erecting a Court House may be called for the same day as the primary election, and the same election officials may serve providing they are appointed for both special and primary elections.

March 7, 1924.

County Attorney, Ringgold County, Mount Ayr, Iowa: I wish to acknowledge receipt of your favor of the 29th ultimo in which you request the opinion of this department upon the following proposition:

"Bonds voted at a Primary Election for the purpose of erecting a Court House would, no doubt, be illegal and invalid, but: Suppose all the necessary legal steps were taken to call a Special Election on the same date—June 2 and the Board having appointed the judges and clerks for the Primary, make a separate and distinct appointment for the Special Election and appoint the same judges and clerks—that is to say—make two appointments of the judges and clerks—thus in effect having a primary election and a special election and using the same judges and clerks but to all intent and purpose—holding a Primary Election and a Special Election at the same time.

"Would bonds voted under such circumstances be valid and legal?"

We are of the opinion that the special election for the purpose of voting on the bonds in question may be called to be upon the same day as the primary election and that the same election officials can serve for bond elections providing the election officials appointed for the primary election are also appointed for the special election, and bonds voted under such conditions would be valid.

CITIES—BONDS—Warrants should be paid from the fund that is to be charged with the indebtedness. Funding bonds should be issued for the full amount of all outstanding indebtedness, and the proceeds distributed into the various funds. Such bonds should be advertised if over $25,000.00. Such bonds cannot be issued and exchanged for outstanding warrants without advertisement. The Treasurer is to secure the best available terms.

March 4, 1924.

Auditor of State: I wish to acknowledge receipt of your favor of the 11th ultimo requesting an opinion upon the request submitted to you by the City Auditor of Ottumwa, Iowa. This request is as follows:

"We are issuing some bonds to take up warrants used largely to pay paving deficiencies and grading. There are some for general purposes such as condemnation of certain right-of-way for streets, etc. As I understand it the warrants were all originally drawn on the general fund. Most of them, however, properly belonged in the matters payable from the general fund and improvement fund.

First: Can the indebtedness represented by these outstanding warrants be transferred from the general fund to the grading fund and improvement fund? That is, such proportions of it as rightfully belong to those funds? Or, in reality, is not the indebtedness really an indebtedness of those particular funds regardless of its having been originally drawn on the general fund?

Second: Can warrants issued on the general fund be later transferred to the funds to which they belong and bonds issued to cover the specific class of indebtedness which they represent, such as in this case, grading bonds, street improvement bonds and funding bonds? Or, would all the bonds have to be funding bonds, if the warrants were originally drawn on the general fund, regardless of the purpose for which the money was used or where the funds really belonged?

Third: In the event that funding bonds over and above $25,000.00 are issued

and exchanged for outstanding warrants, would they have to be sold and advertised for sale as provided in section 683-a1 and section 683-a3-b, supplement to the compiled code?

Fourth: If instead of issuing funding bonds, the amount is divided up into the different purposes for which the funds were used, each of these amounts being under $25,000 but the aggregate of all of them being over $25,000, would it be necessary to advertise the bond issue when said bonds are exchanged for outstanding warrants; said bonds being originally drawn on the general fund but used for the purposes and in the amounts indicated in the different classes of bond issues?

Fifth: In just what case is it necessary to advertise bond issues such as this, and in what cases is it not necessary to advertise?

I might say that I understand that Chapman, Cutler and Parker hold that when funding bonds are exchanged for outstanding warrants it merely changes the form of indebtedness and that the bonds may be issued to the owner of the warrants to take up the warrants without advertising, regardless of the size of the issue. They evidently consider, I presume, that compiled code supplement sections 683-a1 and 683-a3-b are qualified by compiled code section 4065 wherein there seems to be a distinction drawn between the *sale* of bonds and the *exchange* of the same for outstanding indebtedness."

In answer to your first proposition, we will assume that you wish to know whether or not warrants issued on the general fund but that should be paid from special funds such as the grading or paving fund, can be paid from the latter funds although issued on the former. It is the opinion of this department that the warrants should be paid from the fund that is to be legally charged with the indebtedness regardless of the fund upon which the warrant is drawn.

We believe the answer to your first inquiry also answers your second except that we would add that funding bonds should be issued for the amount of all outstanding indebtedness, and the proceeds of these bonds distributed into the various funds in sufficient amounts to take up the outstanding warrants, or cover the outstanding indebtedness of that fund.

If funding bonds are issued over and above $25,000.00 they should be advertised and bids received as provided by chapter 170, Laws of the Thirty-ninth General Assembly and chapter 14, Laws of the Fortieth General Assembly.

We are of the opinion that any issue of bonds in the sum of $25,000.00 or more should be advertised as provided by chapter 170, Laws of the Thirty-ninth General Assembly and chapter 14, Laws of the Fortieth General Assembly.

We are of the opinion that funding bonds issued by the city cannot be exchanged for outstanding warrants without advertisement and the receipt of bids as provided in the law just referred to. Section 910, Code, 1897 providing for the sale of bonds by the city treasurer contains this language:

"He shall, under a resolution and the direction of the council, sell the bonds for cash on the best available terms, or exchange them on like terms for legal indebtedness of the city or town evidenced by bonds, warrants or judgments outstanding at the date of the passage of the resolution authorizing the issue thereof, and proceeds shall be applied and exclusively used for the purposes for which said bonds are issued. In no case shall they be sold or exchanged for a less sum than their face value and all interest accrued at the date of sale or exchange. * * *"

There is no doubt but that there is a clear distinction between the words "sale" and "exchange". *Reynolds v. Lyon County*, 121 Iowa 736. If the distinction between the exchange and sale of bonds is carried to its ultimate conclusion, it naturally follows that it is not necessary to advertise where the bonds are simply exchanged. The statute, however, referring to the exchange or sale of bonds specifically provides that such bonds shall be sold or exchanged on

the best available terms. The purpose and intent is manifest that the bonds shall be disposed of on the best available terms whether by sale or exchange. If the best terms can be secured through the sale of the bonds, then it is the duty of the treasurer to sell them. If, however the best terms can be obtained by the exchange of the bonds, then it is the duty of the treasurer to exchange them, provided always, that the city council so directs. In either event, the purpose of the statute is to secure for the city the best available terms for the bonds. It is clearly not the intention of the statue to give the treasurer discretion to either sell or exchange the bonds without requiring that he secure terms or bids therefor in order that he may obtain the best available price, but the legislature has specifically provided that he cannot sell the bonds when the amount of the issue is in the sum of $25,000 or more without first advertising and receiving bids. Before he can determine what are the best available terms which can be received from the sale of the bonds, he must follow the mandate of the statute and advertise. With the bids in hand, he should then determine whether or not there is a possibility of receiving a higher bid at private sale, and if so, he has the discretion of rejecting all the bids and selling at private sale; or new bids may be received. If none of the bids received by him are equal to the price he would receive for the bonds if he exchanged them, it would then be his duty to exchange the bonds, the whole purpose being to secure the highest price available for the bonds.

It is therefore the duty of the treasurer in selling or exchanging funding bonds of the city to use every method available in order to determine justly and fairly the best available terms, and the statute providing for the advertisement and receipt of bids must be followed.

BONDS—OFFICIAL—Attorneys at law cannot be accepted as sureties on official bonds required by law.

April 8, 1924.

County Attorney, Washington County, Washington, Iowa: Your letter of April 3 directed to this department has been received. You are advised that Section 358 of the Supplement to the Code, 1913, provides that attorneys at law shall not be accepted as sureties upon any official bond provided for or authorized by law. It is further made the duty of the board of supervisors when it is discovered that an attorney is surety on any official bond to require the officer to forthwith file a new bond.

Your attention is called to Section 1457 of the Supplement to the Code, 1913, which provides that a bank in which county funds are deposited shall file a bond with sureties to be approved by the treasurer and board of supervisors in double the amount deposited, conditioned to hold the treasurer harmless from all loss by reason of such deposit or deposits. In view of the provisions of this section and of the facts contained in your letter, there is no question but what the bond which your local bank has offered to furnish your county treasurer is an official bond and the provisions relative to attorneys being surety on such bonds apply.

PRIMARY ROAD BONDS—1. Cannot run longer than 15 years—Sec. 2951-C. C.
2. Primary road bonds are general obligations of the county—Sec. 2936-a1-S. C. C.
3. If at maturity funds are insufficient to retire bonds, Board of Supervisors may refund by issuing county funding bonds under Sec. 3261-S. C. C. and 3266 of C. C.

May 19, 1924.

Hon. M. L. Bowman, Senate Chamber: You have submitted an inquiry to this department in regard to certain matters involving the primary road law.

Your first question is as to how long bonds may run which have been issued for hard surfacing purposes. You are advised that Section 2934 of the Compiled Code, 1919, provides that no such bonds shall be issued with maturity date postponed more than fifteen years. You are further advised that Section 2951 of the Compiled Code, 1919, provides that the amount of bonds issued by any county shall not, when added to all other indebtedness of the county, exceed in the aggregate 3% on the actual value of the taxable property within such county. Any other statute to the contrary notwithstanding. Said limit to be ascertained by the last date of the county tax list previous to the incurring of the indebtedness.

Your second question is whether or not a county can refund bonds which have matured and for which there is no money on hand to pay them. You are advised that Section 2936-a1 of the Supplement to the Compiled Code, 1923, provides that the bonds authorized to be issued for the payment of hard surfacing primary roads are general obligations of the county. It is further provided that should the funds on hand not be sufficient to retire said bonds on the date of maturity thereof, the board of supervisors shall refund the same through the issuance of county funding bonds as provided in Section 3261 of the Supplement to the Compiled Code and Section 3266 of the Compiled Code.

I trust that the foregoing will sufficiently inform you as to the law on these questions.

HIGHWAY BONDS—Where the electors of a county vote in favor of the issuance of bonds for road improvement in a sum exceeding the limit prescribed in the highway statute, the authorization, therefore, would not be void.

May 8, 1924.

County Attorney, Palo Alto County, Emmetsburg, Iowa: We have received your letter of March 10, 1924, asking this department for an opinion upon the question which you have stated as follows:

"A few years ago Palo Alto County voted to hard surface its Primary Road System, but no bonds were voted to undertake the work. A petition, however, under Section 25, Ch. 237 Acts 38th General Assembly, has been presented to the Board of Supervisors asking that said board call an election for the purpose of voting on a bond issue to meet the cost of such hard surfacing. The petition calls for a bond issue of $800,000, whereas the limitation for this county at this time as determined under Section 43, Ch. 237, Acts 38th G. A. is about $682,618. The question therefore, is the status of the bonds if voted; whether the entire issue would be void or simply the amount in excess of the 3% statutory limitation. In this connection I wish to refer you to the case of *Anderson v. Orient Fire Ins. Company,* 88 Ia. page 579."

We also received a letter from E. A. and W. H. Morling, Attorneys of Emmetsburg, Iowa, asking for an opinion upon substantially the same question. The letter is in words and figures as follows:

"The Highway Commission, and the most of the counties, are trying to get the North Iowa Pike, the A. Y. P. Trail, paved through. The difficulty seems to be largely with our County, which is still in the mud road stage. It now appears that under Compiled Code section 2951 the bond issue, including all other indebtedness, cannot exceed 3%. This at the present time would limit the bond issue for this county to $650,000, whereas the Commission's program calls for $800,000. There will be probably before all of the bonds are required some changes in conditions by payment perhaps of some of the bonds now outstanding, and then beginning with next year as we are informed the new bonds will be gradually taken up out of the primary road fund. As I read Section 2951 the prohibition is not on voting or authorizing the issue in excess of 3%, but on the issuance of them. I do not have time to go into this matter in detail, but your office is working on this all the time and I wish you would kindly write me

what you know and what your opinion is and what you can suggest in regard to this obstacle."

The answer to the questions propounded to us involves the construction of certain features of what is known as the Primary Road Law embraced in chapter 237 of the Acts of the 38th General Assembly, as amended by the 39th and 40th General Assemblies. (Sections 2909 to 2963, both inclusive, of the Compiled Code, as amended.) Section 2933 of the Compiled Code contains the following provisions with relation to the election to be held for the purpose of voting on the proposition of issuing bonds for the improvement of Primary Roads:

"The board may submit or upon petition of a number of the qualified voters of the county equal to twenty per cent of the total vote cast in said county at the last preceding general election, presented to the board in writing so to do, must submit to the voters of the county at a general election, or at a special election called by the board for such purpose, the question of issuing bonds for the purpose of raising funds to meet the cost of such work, and to provide for the retirement of such bonds and interest thereon.

Notice of such election shall be given by publication once each week for two successive weeks in all the official newspapers of the county, stating the time when such election will be held, and substantially the proposition that will be submitted; the last publication to be at least five days prior to the day such election is to be held.

Special elections shall be conducted in the same manner as general elections are conducted. Said question shall be set forth on the ballots substantially as follows: 'Shall the board of supervisors be authorized to issue bonds from year to year, in the aggregate amount not exceeding ..... dollars, for the purpose of providing the funds for hard surfacing the primary roads of the county, and to levy a tax on all the property in the county from year to year not exceeding ..... mills in any one year, for the payment of the principal and interest of said bonds, provided, however, that the annual allotments to the county of the primary road fund shall be used to retire said bonds as they mature, and only such portions of said tax shall be levied from year to year as may be necessary (1) to pay the interest annually and (2) to meet any deficiency, if any, between the amount of the principal of the bonds and the said allotments from the primary road fund, together with assessments on benefited property provided by law.' Immediately to the right of said proposition shall appear two squares of appropriate size, one above the other. Immediately after the first square shall appear the word 'yes'. Immediately after the other square shall appear the word 'no'. The voter shall indicate his vote by a cross in the appropriate square.

The returns of said election shall be canvassed by the board, and its findings shall be entered at large in the minutes of its proceedings. No proceedings to test or review the legality or correctness of said election shall be maintainable unless instituted within thirty days after the findings of the board have been entered upon the record. The fact of each authorization of bonds by the county shall be at once certified by the county auditor to the state highway commission, with such data relative thereto as the commission may demand."

Section 2951 of the Compiled Code reads as follows:

"The amount of bonds issued under this chapter by any county shall not, when added to all other indebtedness of the county, *exceed in the aggregate three per cent on the actual value of the taxable property within such county,* any other statute to the contrary notwithstanding—to be ascertained by the last state and county tax list previous to the incurring of such indebtedness."

In approaching the consideration and solution of the question you have submitted to us, it may be advisable to keep in mind certain pertinent facts. The proposition to be submitted to the electors of a county under the provisions of section 2933, is to bond the county for a sufficient amount to "hasten the drainage and grading

or the hard surfacing of the primary roads of the county at a more rapid rate than would be accomplished by merely employing each year its allotted portion of the primary road fund for such year," using the exact language of the statute. It contemplates the authorization by a vote of the electors of the issuance of bonds in a sum not exceeding the amount submitted to the electors of the county. It contemplates, undoubtedly, the issuance of the bonds in the aggregate amount of the sum authorized thereby, not necessarily at one time, but covering a period of years. It manifestly is the purpose of section 2951 to place an absolute limit upon the amount of bonds that may be issued and outstanding at any one time under the provisions of chapter 7, title 11, of the Compiled Code, the primary and secondary road law of the state. This limit was fixed at 3%, so that the aggregate amount of the indebtedness, including all other indebtedness, incurred before the electors authorize the issuance of bonds under the provisions of the statute, together with the bonds voted, should not exceed said limit. The provisions of this section are plain and mandatory. It should be given such construction as to carry out the plain and unambiguous provisions thereof. No subterfuge or liberal construction should be adopted that will evade or circumvent the provisions thereof. In a sense, no indebtedness is incurred until a contract has been entered into, or the obligations provided for therein are issued and in the hands of creditors of the city. Yet, in a larger sense, the authorization of the indebtedness is the first step in the creating of such indebtedness or perhaps it may be more aptly described as the condition precedent to the creating thereof.

We have given to the question you have submitted the careful and thorough consideration that its importance demands. We are not unmindful of the importance of the solution thereof to the people of the state, and we do not deem it advisable to place a narrow or strict construction thereon that will hamper the officials of the state in the carrying on of the work of improving the roads. However, our duty is plain and we shall give to the statute such a construction as we believe to be consonant with the interests of the state and with public policy.

It will be observed that the proposition to be submitted to the voters relates to the issuance of *"bonds from year to year,* in the *aggregate amount not exceeding* $....., for the *purpose of providing the funds for hard surfacing the primary roads of the county,* and to levy a tax on all the property in the county from year to year not exceeding ..... mills in any one year for the payment of the principle and interest of said bonds, * * *".

It will be observed that the statute contemplates the issuance of bonds covering a period of years in an aggregate amount not exceeding a particular sum. The purpose of providing the funds is the hard surfacing of the primary roads of the county. It also involves the levying of the tax from year to year. It is quite apparent that it was the purpose of the legislature in enacting the statute in question to provide a comprehensive method for the improvement of the highways of the county covering a period of time that it thought necessary for the accomplishment of such purpose. It is not the intention of the statute that such bonds should all be issued at one time or in one year. In other words, under the statute it is not necessary to issue and sell or negotiate all of the authorized issue at one time, but only as the funds are needed to carry on and complete the improvement of the primary roads. If, in any one year, bonds are issued up to the limit prescribed in the statute, then no more bonds may be issued by the county, even though within the authorized issue until such a time as the indebtedness

of the county together with the bond issue make it possible to issue additional bonds within the limit authorized by the statute.

We are, therefore, of the opinion that, under the facts stated in your letter, if the electors of Palo Alto County vote in favor of the issuance of bonds for road improvement in a sum not exceeding $800,000.00, the authorization thereby would not be void because the statute contemplates the issuance of bonds in the aggregate amount covering several years' period of time.

In no event, however, can the county at any time issue bonds in excess of the statutory limit, even though authorized by the electors.

This opinion is limited strictly to the question you have submitted and it is not the intention to pass upon any other question that may incidently be involved therein. We do not attempt to pass upon the validity, or invalidity, of any bonds that may be issued in excess of the statutory limit, or the remedies, if any, that the holders of such bonds may have.

BONDS—Interest rate—Reduction effective July 4, 1923, does not affect interest rate on contracts entered into before that date and work commenced in good faith.

June 4, 1923.

Iowa State Highway Commission, Ames, Iowa: You have submitted the proposition to this department for an opinion as to what effect Senate File No. 532 of the acts of the 40th General Assembly will have upon contracts for paving made prior to July 4, 1923, on which date Senate File 532 goes into effect.

Senate File 532 of the acts of the 40th General Assembly reduces the maximum rate of interest that may be paid on bonds or certificates, issued by counties or municipalities for the payment of public improvements and enterprises, from six per cent to five per cent. There is no publication clause or time stated in the law as to when it shall be effective. That being true, the constitutional provision and general statute relative hereto will apply and the act will be effective from and after July 4, 1923.

The only questions raised are, first, whether or not a contractor, who prior to July 4, 1923, contracts to build any improvement, acquires a vested right to the rate of interest on bonds or certificates permitted by the provisions of the law in effect up to July 4, 1923; and second, whether or not any person who has prior to July 4, 1923, entered into a contract with a political subdivision of the government, which has undertaken a public improvement, binding such political sub-division to sell the bonds necessary to be issued to pay for said improvement, so that they shall bear a rate of interest permitted under the provisions of the law then in force, acquires a vested right to the rate of interest authorized under the law existent prior to July 4, 1923, even though the bonds are not issued until after that date.

A contractor may acquire a vested right under the statute in force prior to July 4th if he agrees to take for his compensation certificates issued by the municipality at a rate of six per cent or if he agrees to accept as his compensation bonds issued by the political sub-division bearing six per cent interest as provided by the statute then in force. The fact that the work is not completed prior to July 4th, or is just begun before such date, will not change the liability of the political sub-division under the prior statute. A similar legal point arose in the early case of Starr v. The City of Burlington, the opinion which is reported in 45 Iowa, page 87. In that case certain general provisions applicable to cities and towns were by an act of the Legislature extended to special charter

cities. Prior to the taking effect of that act, proceedings were had and a contract entered into for the work under question. The new provision changed the relative liability of the city to the contractor considerably. In the opinion in that case it was said that the proceedings in question were had and the rights of the parties involved in the action, accrued before the clause in question was enacted. It is there held that even though the proceedings and rights involved constituted a proper subject for retrospective legislation, the statute will not be construed so as to affect them unless an intention of the Legislature to give the statute that operation clearly appears. The amendment to the law in that case did not either expressly or by implication indicate such intention. Such being true, the court held that the provision under consideration should be so construed as to have a prospective operation only.

The prospective and retroactive effect of statutes is fully discussed and many cases cited in the opinion of the case of *Benshoof v. The City of Iowa Falls,* reported in 175 Iowa, commencing at page 30. The question there arose out of an appeal from special assessments for paving. After the work of making the improvement had started, a new law went into effect extending the limits of benefited districts. The city council then attempted to extend assessments for the improvement then under way to include additional benefited districts under the provisions of this new statute. It was there said that:

"Courts quite generally hold that, if the contract has been let and the improvement commenced before a change in the law, and the work be suspended until after a change in the law and not completed until sometime thereafter, the assessment is to be levied under the old law." Citing numerous cases.

It is further said in the opinion in that case that the repeal or amendment of a statute does not affect any right which has accrued, any duty imposed or any proceeding commenced under or by virtue of the statute in force prior to the taking effect of the new law. Section 48, paragraph (1), code 1897, provides specifically to the same effect. It is further said in the opinion in this case that before a statute can be given a retrospective effect the intent on the part of the Legislature to do so must clearly appear. These rules of construction are well established and there are numerous Iowa decisions sustaining them. The amendment made to the various sections of the law by Senate File 532 of the acts of the 40th General Assembly now under discussion do nothing more than change the word and figure "six (6)" to the word and figure "five (5)" wherever the same appears throughout the sections affected. There are no phrases appearing anywhere in the amendatory law which specify or set a date from and after which the amendments shall be effective nor is there any provision indicating that the amendments are to have a retrospective effect.

Under the proposition submitted all parties to contracts entered into prior to July 4, 1923, are subject to the provisions of the law then in force up and until that time. So far as the rate of interest on bonds and certificates, authorized by statute to be issued in order to secure funds for the making of improvements by political sub-divisions of the government, is concerned the parties are bound by the law then in effect if they proceed under said law. It is clearly evident that an amendment changing the rate of interest on such bonds or certificates, which is not effective until July 4, 1923, and after, could not affect transactions and contracts entered into prior to July 4, 1923, and under the provisions of the old law. We do not wish to be understood as saying that prior to July 4, 1923, a political sub-division of the government could not contract with a contractor or with any person desiring to purchase improvement certificates or bonds so that the

political sub-division will have the benefit of the provisions of the amendatory law which would subsequently become effective. What we do say is that a contract entered into under and by virtue of the provisions of an existing law, is valid and binding even though the law is changed so as to affect the terms of said contract before the work thereunder is well under way or completed.

Therefore, in view of what we have said it is the opinion of this department that should a contract for any improvement, affected by the provisions of Senate File 532 of the acts of the 40th General Assembly, be entered into with a contractor and by the terms of which the contractor agrees to take for his compensation improvement certificates or bonds bearing interest at six per cent, all of which is done prior to July 4, 1923, the contractor will be entitled to certificates or bonds bearing that rate of interest even though they have not been issued nor the work completed until after the taking effect of Senate File 532.

It is also the opinion of this department that should any person contract with a political sub-division of the government making an improvement affected by Senate File 532 of the acts of the 40th General Assembly, by the terms of which contract said person agrees to buy the bonds to be issued therefor, said bonds to bear six per cent interest, and all of which is done prior to July 4, 1923, such person will be entitled to bonds bearing that rate even though the work is not completed nor the bonds issued until after the taking effect of Senate File 532. We do not wish to be understood as holding that a political sub-division of the government may bind itself to the higher rate of interest when the work on the improvement is not to be started until a long time after July 4, 1923. This ruling is applicable only to those cases where in the natural course of events it is necessary to enter into contracts of this nature prior to July 4th in order that the public might not suffer by the delay. The opinion herein applies only to good faith propositions and must not be construed so as to permit an evasion of the provisions of the amendatory act.

BONUS BONDS.

June 6, 1923.

Treasurer of State: You have orally requested this department for an opinion upon the following proposition:

Under the provisions of chapter 332 of the acts of the 39th General Assembly there has been issued and sold the sum of $22,000,000.00 in Iowa Soldiers' Bonus Bonds, which bonds mature in equal installments from December 1, 1923, to December 1, 1942, inclusive. The entire issue of bonds has been sold to a syndicate headed by Estabrook & Co., brokers of New York City. The sale took place on the 2nd day of June, A. D. 1923, and is evidenced by a written contract of sale on file with the Treasurer of State of Iowa.

There was levied under the law in 1922 a tax sufficient to pay the principal of said bonds maturing in the year 1923 together with the interest coming due during such year. The said bonds are dated December 1st and therefore the first interest pay day was June 1, 1923. The bonds not being sold prior to June 1, 1923, there would be no accumulated interest to pay from the taxes raised under the tax levy to which reference has been made. The result is that there has accumulated in the office of the Treasurer of State at this time a sufficient fund to pay and retire the said bonds, the sum of $1,100,000.00, due December 1, 1923. This can be done without in any way reducing the fund which will be collected to pay the interest due December 1, 1923.

It will be observed from what has been said that if you can at this time pay and retire the bonds due December 1, 1923, you will save to the state the interest on such bonds for six months. You ask whether or not there is any legal objection to this procedure. You are advised that there is no legal objection to your payment of these bonds at this time if you have the funds on hand and the syndicate which has purchased such bonds so agrees. It occurs to me that not only are you legally authorized to do this but that it is the part of good business for you to so do.

BONDS—Interest rate—Reduction in allowable rate by legislature does not affect contracts entered into prior to the taking effect of the act.

August 7, 1923.

Corporation Counsel, Des Moines, Iowa: I am in receipt of your letter dated July 26, 1923, in which you request an opinion from this department. Your request is in words as follows:

"The City of Des Moines, in the months just preceding July 4, 1923, and during some of the months of the latter part of 1922, made contracts with different contractors for the construction of street improvements such as paving, sewering, curbing, etc. By the terms of these contracts it is provided that the city is to pay for the improvement by the issuance of either Street Improvement Bonds or Sewer Bonds, as the case may be, upon the completion and acceptance of the work, and the contractor is obligated to take said bonds in payment of his contract price.

"These contracts make no specific provision for the rate of interest that the bonds are to bear, but by long established custom in the transaction of the affairs of the city it has become recognized that said bonds will bear the same rate of interest attaching to the special assessmens from which payment is ultimately to be made of the bonds, and these special assessments uniformly bear six per cent interest. Undoubtedly when the contracts referred to were entered into it was accepted and understood by the conractors and by the City Council that this custom would apply to the several contracts.

"It now transpires that quite a considerable number of these contracts are now in process of completion and the city will soon be called upon to issue the bonds in payment, and the question arises as to the power of the City Council to issue bonds under such circumstances, bearing a rate of interest of six per cent, the contractors insisting that they are entitled to that rate because of the custom referred to, and that it was within the contemplation of the parties when the contract was made.

"As you undoubtedly know, the last legislature, by Chapter 108 of the Acts of the Fortieth General Assembly, fixed the rate of interest on street improvements and sewer bonds at five per cent, and this law became effective July 4th. The query is, can the city issue bonds on these contracts bearing a rate of interest in excess of the five per cent limit fixed by the statute? There is no question at all but what, on contracts entered into after the law became effective, the statute would be a complete limitation, and any contractor submitting a bid or taking a contract under the laws that now exist would be conclusively presumed to do so in the light of the five per cent limitation. It is contended by representatives of the contractors that to insist on liquidating these contracts by bonds bearing but five per cent at this time would be in effect an impairment of the obligations of their contract, and that it was beyond the power of the Legislature of the State of Iowa to enact a law having that effect.

"As you can see from the statement of these facts, the question involved is one of general interest to the cities and towns of the entire state, as undoubtedly other cities and towns find themselves in the same position as the City of Des Moines, and because of the statewide importance of the question I would be pleased to have an opinion from your Department on the same."

It is fundamental that a state cannot, by legislation, impair the obligations of a contract. It is also fundamenal that where a contract is entered into with a city

for the construction of public improvement, the provisions of the statutes in force at the time become, in and so far as applicable, a part of the contract. It follows that the contract to which you refer is to be interpreted, construed, and enforced under the law as it existed at the time the contract was made.

BONDS—Cost of printing may be paid by County.

September 6, 1923.

County Attorney, Greene County, Jefferson, Iowa: This will acknowledge receipt of your letter of the 30th ult. in which you request the opinion of this department as to whether it is permissible for the county to pay the cost of printing bonds issued by the county, to be paid from the Primary Road Fund.

It is our opinion, that the actual cost of printing the bonds, is an expense that can be paid by the County.

PRIMARY ROAD BONDS—Interest on anticipation primary road bonds, may be paid from Primary Road Fund when primary roads of county are fully improved.

January 5, 1924.

Hon. Wm. E. G. Saunders, House of Representatives: In reply to your letter of recent date, making inquiry as to the proper construction to be placed on Section 2, Chapter 89 of the Acts of the Fortieth General Assembly, I beg to advise that the section, taken in connection with other provisions of the law, clearly indicates that interest on primary road bonds, issued in anticipation of a county's allotment of the primary road fund, should not be paid out of the primary road fund allotted to the county until after the primary road system, as constituted when the act took effect, namely, July 4, 1923, is fully improved by grading, draining and graveling or other surfacing approved by the Highway Commission. After the primary road system is fully improved as specified, the Highway Commission is directed to appropriate from the county's allotment of the primary road fund a sufficient fund to pay the costs described in sub-divisions a, b, and c of the section.

Section 27 of Chapter 237 of the Acts of the Thirty-eighth General Assembly provides that the Board of Supervisors shall each year levy a tax which shall be sufficient when collected to pay the interest on outstanding bonds, and this provision must be followed until the status described above is reached.

I trust that the foregoing will sufficiently answer your inquiry.

CITIES AND TOWNS—BONDS—city is not liable generally on street improvement bonds when all of the proceedings in connection therewith are regular and all provisions of law have been complied with.

January 5, 1924.

Auditor of State: You have requested from this department an opinion upon a proposition submitted to you by an officer of the city of Grinnell, as to the liability of the city, under the following facts:

"On April 1, 1923 there were bonds due, numbers 116 to 135 of $500 each and bond number 136 of $106.72 in Street Improvement Trust Fund number 2. These were the last bonds in this issue but we did not have sufficient funds to pay all of them, so we paid numbers 116, 117, 118, 119 and 136, leaving bonds 120-135 inclusive. These bonds are now past due and we have only $205.20 in this fund. There may be a little more money come in from the County Treasurer as back taxes, but I don't suppose there will be enough to take care of the interest on the $8,000.00 due.

"The greater part of this shortage comes from back taxes on property, and the property not being sold on account of lack of bids."

Chapter 8 of Title V of the Code contains the provisions of law relative to the issuance of bonds to pay for street improvements. Section 842 of the Code, 1897, as amended by Chapter 244 of the Acts of the 37th General Assembly, pro-

vides that for the purpose of providing for the payment of the assessed cost of any street improvement which is to be or has been assessed upon property subject to assessment therefor, the council may, by ordinance or resolution, provide for the execution and delivery of bonds for the amount of so much of the assessed cost or any part thereof, in anticipation of the deferred payment of the assessments levied therefor, such bonds to be called "Street Improvement Bonds."

Section 843 of the Code, 1897, as amended by Chapter 64 of the 39th General Assembly and by Chapter 108 of the Acts of the 40th General Assembly, which prescribes the form of and the conditions, as set out in the form contained in this section of the law, reads as follows:

"* * *and this bond is payable *only* out of the.....fund created by the collection of said special tax, and said fund can be used for no other purpose."

Section 847 of the Code, 1897, also provides that such street improvement bonds and coupons "shall be payable out of funds derived from the special taxes and interest thereon pledged to the payment of same." The section further provides that such bonds and coupons "shall not make the city liable in any way, except for the proper application of said special taxes."

Thus it will be observed that the law specifically prescribes that the bonds are payable only out of the funds derived from the special assessment and that the law specifically exempts the city from liability in any way on such bonds or coupons except for the proper application of said special taxes. By this is meant that if the city should receive funds derived from special taxes which should be devoted to the payment of a particular bond issue, and should pay off said bonds and coupons with all of said funds received, there would be no liability on the part of the city, but, if the city should divert these funds and apply them to some other bond issue or purpose than provided under Section 847 of the Code, the city would become liable.

It was the intention of the Legislature, as is clearly evidenced by these provisions as contained in the law, that the city should not be liable as such, for the payment of these bonds, but that the property benefited should be held liable. It therefore follows, that any person buying such bonds does so at his own risk and is charged with the knowledge as to whether or not the property benefited is worth the assessments against it. True, the latter part of Section 847 provides that if interest shall become due on any of said bonds and there are no funds from which to pay it, the council *may* make a temporary loan for the payment thereof, which loan shall be repaid from the special taxes and interest pledged to secure said bonds. It is further provided that if in such cases the city should be compelled to purchase said property at a tax sale, it shall then be repaid from the city improvement fund. Thus it will be observed that it is optional with the city whether or not it will pay delinquent interest when due and when there are no funds available.

In view of the foregoing statement of the law, it is the opinion of this department that a city is not generally liable on street improvement bonds when all the proceedings in connection therewith are regular and when the city has complied with all of the provisions of law relative to the disposition of funds derived from special assessments levied against the property to pay for such improvements.

OPINIONS RELATING TO THE BUDGET LAW

ACCOUNTANTS—STATE—Budget Law does not automatically abolish offices of state accountant and assistants provided by Sec. 3, Ch. 334 Acts 40th G. A. Executive Council must abolish these offices.

May 17, 1924.

State Accountant: You have requested an opinion on the proposition of whether or not the offices of accountant and the three assistant accountants, authorized under the provisions of Section 3, Chapter 334, Acts of the 40th General Assembly, have been automatically abolished by reason of the taking effect of the so-called new Iowa Budget Law.

We are advised that the so-called Budget Law became effective by publication on May 2, 1924, and that it provides among other things for the appointment by the director thereof of a state accountant and such assistants and other employees as may be necessary from time to time to carry into effect the provisions of the act. Section 3, Chapter 334, Acts of the 40th General Assembly is that part of what is commonly known as the Salary Act which pertains to the office of the Executive Council. That section specifically authorizes the Executive Council to employ one accountant and three assistant accountants, and specifies the salaries which shall be paid to the accountant and the assistants for the biennium ending June 30th, 1925. Nowhere in the new Budget Law is there any provision providing that the offices of accountant and assistant accountants authorized by the provisions of the Salary Act just referred to, shall be automatically abolished on the taking effect of the Budget Law. So far as the two provisions of law are concerned, they have no connection whatever and the Executive Council would still have the authority to employ an accountant and three assistants even though the director of the Budget also employs a state accountant and necessary assistants.

However, we think that as soon as the Budget Law is put into operation and is functioning that there would be no occasion for the Executive Council to retain on its force the accountant and three assistant accountants which they now have, although there is nothing in the law to prevent their being retained even after the Budget Law commences to function.

Therefore, it is the opinion of this department that the accountant and assistant accountants employed by the Executive Council under the provisions of the Salary Act will continue as such and will be entitled to their compensation in the manner provided in said Act, until their offices are discontinued by the act of the Executive Council.

COUNTY FUNDS: Certain funds of the county may be transferred to another fund under the provisions of Section 78, Budget Law.

July 1, 1924.

County Attorney, Union County, Creston, Iowa: I wish to acknowledge the receipt of your favor of the 27th ultimo requesting the opinion of this department upon the following proposition:

"Our County Board of Supervisors has a heavy surplus in the Insane Fund of over $25,000.00 and the General County Fund is needing money and will be depleted before the end of the year so that it will be insufficient unless it is reinforced. So the Board of Supervisors on June 12th resolved that it would transfer $25,000.00 from the Insane Fund to the General County Fund, as indicated by enclosed copy of publication. I may add here that this copy of publication seems

not sufficient to comply with Chapter 228 after amended by the Acts of the 39th General Assembly. * * * * *

"However the question arises as to whether Section 78 of the Budget Law may not take care of this without bothering the General Assembly with the legalizing matter and Representative Colbert of this county, requested me to get the opinion of the Attorney General's office as to whether said Section 78, if the director approves, could not authorize the transfer of this fund. If the opinion could be received in time to permit the publication before the General Assembly meets, in case it appears necessary to present this to the General Assembly, it would be appreciated."

Section 78 of the budget law provides as follows:

"Subject to the provisions of law relating to municipalities, and upon the approval of the director, it shall be lawful to transfer money from one fund of a municipality to another fund thereof, and the certifying board or levying board, as the case may be, shall provide that money so transferred must be returned to the fund from which it was transferred as soon as may be, provided, that it shall not be necessary to return to the emergency fund or to any other fund no longer required, any moneys transferred therefrom to any other fund."

The word "municipalities" used in the section just quoted is defined in section sixty of the budget law to include "county." As will be noted in the section hereinbefore quoted, the county, with the approval of the director of the budget, may transfer money from one fund of the county to another with a provision made for its return. Section seventy-eight, as will be noted, places the only limitation upon such transfer by providing that the same is subject to the provisions of the law relating to counties. The general statutes do not specifically restrict or prohibit the transfer of county funds. Section seventy-eight expressly authorizes the transfer, and we are therefore of the opinion that the money in the county insane fund may be transferred to the county general fund as provided in section seventy-eight of the budget law. It would seem, however, that this transfer accomplishes only partially the purpose you have in mind and does not entirely remedy the situation.

We are not clear from your request whether or not you desire to return the moneys transferred from the county insane fund or not. Under the method authorized by the budget law, its return is to be provided for. If you do not desire to return these funds, your remedy would be by an act of the legislature legalizing the transfer. However, under chapter 228, Laws of the Thirty-ninth General Assembly as amended and now contained in chapter one-half, title twenty-five, Supplement to the Compiled Code, 1923, it would be first necessary to introduce the bill in the legislature before the publication would comply with the statute.

We are therefore of the opinion that the publication of notice enclosed by you, of a proposal to legalize such transfer, does not meet the requirements of the statute just referred to.

BUDGET LAW—Requirements of as regards municipalities.

July 2, 1924.

Director of the Budget: This department is in receipt of your request for an opinion. In order that the matter may be clear, I quote your letter in full, as well as the letter of Messrs. Harrington & Dickinson. The letter of Messrs. Harrington & Dickinson is in words as follows:

"I am requested by the County Auditor to ask your advice upon the question whether or not it is necessary that estimates be made under the budget law on a drainage district, contract for which was awarded on June 26th, the total cost under the contract is $32,364.90.

"I advised the board that in my judgment an estimate under the budget law was not necessary prior to awarding the contract, but it is probable that such an esti-

mate would have to be made before levying the tax. I am acting as attorney for a board of supervisors on all drainage matters and would appreciate a word from you on this proposition at your earliest convenience."

The letter from your department is in words as follows:

"Here is another inquiry from Harrington & Dickinson, asking whether it is necessary that estimates be made, under the budget law, in a drainage district on a contract awarded June twenty-sixth."

Without entering into a detailed brief of the budget law, may I suggest that any municipality including drainage districts desiring to levy special assessments should conform to the following:

1. It should comply with all of the provisions of the law as the same is without regard to the budget law.
2. After this has been done it should make up a complete estimate and publish it as required by the budget law and certify the tax.
3. The certification may be made at any time after the public hearing provided in the budget law.

BUDGET LAW—County Newspapers.

1. The taxing board must make publications in the official county newspaper located in the county seat, and cannot make publications in an official paper outside the county seat.
2. A municipality must publish in a county seat official newspaper even though there is an official newspaper in the municipality.

July 11, 1924.

Director of the Budget: You have requested an opinion from this department upon the two following propositions:

"If an official newspaper is not located within the county seat, may that paper serve as a medium of publication in lieu of an official newspaper actually published at the county seat, if the taxing board so desired?

"If an official newspaper is published in a municipality located away from the county seat, can the municipality in which such official newspaper is published, publish their notice in that official newspaper and serve the purpose of publication in both an official and local newspaper, as required by the law?"

Section 66 of Chapter 4 of the Laws of the Extra Session of the Fortieth General Assembly contains the provision of law relative to the propositions submitted. This section provides for the filing of estimates by every municipality and for the fixing of a date for a hearing thereon. It is further provided that such estimates, together with notice of the time when and the place where such meeting shall be held shall be published at least ten days before the hearing. The portion of the section applicable to the questions presented, reads as follows:

"For the county and any municipality embraced with the county seat, such publication shall be in an official newspaper published at the county seat. For a municipality outside the county seat in which one or more newspapers are published, such publication shall also be in one of such newspapers."

It will be observed that the law specifically provides that for the county and any municipality embraced within the county seat that the publication *shall* be made in an official newspaper published *at the county seat*. Therefore, in answer to the first proposition submitted, it is the opinion of this department that the taxing board concerned has no other alternative than to use the official paper located at the county seat.

It will be noted that the last sentence of the provision just set out above provides that for a municipality located outside the county seat in which one or more news papers are published that such publication shall *also* be in one of such newspapers. In answer to your second proposition, it is the opinion of this department that the

word "also" necessarily means by direct inference that the publication must be made in an official newspaper located at the county seat and if a newspaper is published in the municipality concerned, which is outside of the county seat, such notice must also be published in that paper. Hence, it is required that in such cases, publication be made in two papers, one at the county seat and one in the municipality located outside the county seat.

I trust that the foregoing will sufficiently answer your inquiry.

BUDGET—Opinion construing Sections 77 and 78 of the Budget Law relating to the transfer of funds.

August 18, 1924.

Director of the Budget: We have received your several requests for opinions construing certain provisions of the new Budget Law embraced in Chapter 4 of the Laws of the Extra Session of the 40th General Assembly.

For the purpose of convenience, we have concluded to prepare one opinion covering all of these requests. They may be briefly stated as follows:

First: Under Section 77 of the statute providing for the permanent transfer of funds, is the power of the municipality to transfer such funds therein granted absolute or is it limited in any way or subject to the control or approval of any other body or officer.

Second: Does Section 78 of said statute, the portion thereof relating to the temporary transfer of funds, relate to all funds of counties, cities, and towns, and school districts, or are its provisions limited to certain funds only.

Third: Do the provisions of said Section 78 relate to special assessments levied by cities and towns.

Fourth: Are the provisions of said Section 78 applicable to the improvement funds levied by cities and towns under the provisions of Section 4038 of the Supplement to the compiled Code, 1923.

Fifth: Are the provisions of said Section 78 applicable to funds that are raised by taxes levied on a portion of the property in cities and towns, that is, within restricted areas, or portions thereof, as provided in subdivisions 5, 6, 8 and 10 of Section 4038 of the Supplement to the Compiled Code, 1923.

Sixth: Must the procedure pointed out in subdivision 13 of Section 4038 of the Supplement to the Compiled Code, 1923, be followed by cities and towns before the application for the transfer of funds provided for therein may be made to, and the order granted by the Director of the Budget, or are the provisions thereof rendered nugatory or void by the enactment of Sections 77 and 78 of the Budget Law.

We shall now proceed to a consideration and determination of the questions you have submitted, in the order in which they are stated above. Sections 77 and 78 of Chapter 4 of the Laws of the Extra Session of the 40th General Assembly read as follows:

"Subject to the provisions of any law relating to municipalities, when the necessity for maintaining any fund of the municipality has ceased to exist, and a balance remains in said fund, the certifying board or levying board, as the case may be, shall so declare by resolution, and upon such declaration, such balance shall forthwith be transferred to the general or contingent fund of the municipality, unless other provisions have been made in creating such fund in which such balance remains." Sec. 77.

"Subject to the provisions of law relating to municipalities, and upon the approval of the director, it shall be lawful to transfer money from one fund of a municipality to another fund thereof, and the certifying board or levying board, as the case may be, shall provide that money so transferred must be returned to the fund from which it was transferred as soon as may be, provided, that it shall

not be necessary to return to the emergency fund or to any other fund no longer required, any moneys transferred therefrom to any other fund." Sec. 78.

The term "municipality" is defined in the act passed by the Special Session of the 40th General Assembly, being Senate File No. 330, which was approved on July 28th, 1924, in the following language:

"The word 'municipality' shall mean the county, city, town, school district (other than rural independent school district and school township divided into sub-districts,) and all other public bodies or corporations that have power to levy or certify a tax or sum of money to be collected by taxation, but shall not include any drainage district, township, road district or rural independent school district or school township divided into sub-districts."

It will thus be seen that the term "municipality" as used in the statute covers counties, cities, towns, and school districts other than rural independent school districts, and school townships, divided into sub-districts.

Before considering specifically the questions you have submitted, it may be advisable to consider in a general way the construction to be placed upon these two sections. It will be observed that each section contains the phrase "subject to the provisions of any law relating to municipalities." To determine, therefore, the full extent or limits of the power granted, we must determine the meaning of the quoted phrase. The phrases "subject to the laws" and "shall be subject to the laws" have several times been the subject of discussion on the part of the appellate courts in this country. To use a quotation from the opinion of *Byrne v. Drain,* 127 Calif. 663, its meaning is defined as follows:

"The constitution does not declare that the provisions of the charter under such circumstances are repealed or annulled. It declares merely that the charter provisions shall be subject to and controlled by general laws. As was well said by the trial judge in passing upon the demurrer: 'The word "subject," when used as an intransitive verb, means to become subservient to;' and as a transitive verb it means 'to cause to become subject or subordinate.' The word 'control' is defined as follows: 'To exercise a directing, restraining, or governing influence over; direct; counteract; regulate.' (Standard Dictionary). Neither of these terms is used to express the idea of repealing, extinguishing, or doing away with. Nothing in the context indicates such a meaning. The very idea of being subject to or controlled by a higher power or law necessarily implies the continued existence of the thing controlled or subjected so long as the control or subjection continues. That which is extinguished, repealed, or destroyed cannot be said to be afterward under control or subjection."

In the following authorities the phrase is defined in substantially the same way: *Davies v. City of Los Angeles,* 86 Calif., 37; *Head v. University,* 86 U. S., 526.

Lexicographers define the phrase "subject to" to mean "under the control, power, or dominion, or subordinate to." Webster's Dictionary. This definition has also been followed by the courts. *Van Duyn v. Chase & Company,* 149 Iowa, 222.

It is therefore apparent that in the enactment of the two sections in question, it was not the intention of the legislature to repeal or modify any existing provisions of law relating to the temporary or permanent transfer of funds of counties and cities, but that the power granted therein must be exercised by the municipalities in connection therewith and such municipalities must comply with the provisions of the law relating thereto in force at the time the Budget Law was enacted.

We will now, therefore, consider the questions you have submitted to us in the light of the construction we have just placed on these two sections.

I.

Section 77 relates alone to the permanent transfer of funds, when the necessity for maintaining such fund has ceased to exist and a balance remains therein, there-

by becoming what is commonly known as a "dead fund." It will be observed that aside from the provisions making the powers granted therein subject to the provisions of any law relating to municipalities, there is no limit to the power granted. Such transfer may be made by the mere adoption of a resolution by the municipality, as defined therein, providing for such transfer. We are, therefore, of the opinion that municipalities may exercise the powers granted therein without submitting the proposition to any other officer or body, unless the statutes in force at the time the act was passed make such a requirement necessary.

II.

Section 78 contains the following phrase:

"* * *it shall be lawful to transfer money from one fund of a municipality to another fund thereof,* * *."

It will thus be observed that the above language is broad and comprehensive and may cover any funds of such municipality. Therefore, there is in the statute no apparent limit to the funds that may be thus transferred for a temporary purpose. We are, therefore, of the opinion that, with the exceptions hereinafter noted, there is no limit to the funds that may be transferred temporarily from one fund to another. This right, however, is subject to the provisions of any law relating to transfer of funds in existence at the time the budget law was passed.

III.

For the purpose of determining the third proposition stated above, we must briefly consider for what purpose special assessments are levied and to whom the amounts raised thereby are payable. The statute providing for the making of street improvements and assessing the cost thereof against the abutting property is embraced in Chapter 23 of Title 13, Sections 3849 to 3936, both inclusive, of the Compiled Code, and Chapter 26 of said title, Sections 3955 to 3965, both inclusive, of the Compiled Code. Under the provisions of Chapter 26 thereof improvement certificates, including sewer certificates, may be payable to bearer or to the contractors who have constructed any street improvements or sewer. Section 3955.

Section 3956 provides for the issuance of bonds for the amount of so much of the assessed cost of such improvements, or any part thereof, as is assessable against abutting and adjacent property, in anticipation of the deferred payments of the assessments levied for such improvements, such bonds to be called "street improvement bonds" or "sewer bonds."

Section 3961 contains the following provision:

"Such street improvement and sewer certificates, bonds and coupons shall be payable out of funds derived from the special taxes and interest thereon pledged to the payment of the same, and such certificates or bonds shall not be delivered in excess of the special taxes levied; but such certificates, bonds and coupons shall not make the city liable in any way, except for the proper application of said special taxes."

It will thus be observed that such tax is raised for the purpose of paying such improvement and sewer certificates and bonds, and that the city is in no way liable for the payment of such bonds and certificates, except for the proper application of said special taxes. The assessments against the abutting and adjacent property are made for the purpose of paying such certificates and bonds. When the tax is paid to the County Treasurer, it immediately becomes available for the payment of such certificates and bonds, or the portions thereof that are due. No part thereof is ever paid to the City Treasurer, but is paid direct by the County Treasurer to the holders of the bonds and certificates. In such cases the city and town

merely act as the agents of such bond or certificate holders in making the proper levy of the special assessments and certifying same to the County Auditor, and then the County Treasurer becomes the agent of the bond and certificate holders in the collection of the installments due and the application thereof to the payment of such bonds and certificates. It is customary, however, for the city clerk to collect the first installment of such special assessments, before the tax is certified by him to the county auditor.

The original statute in defining the word "tax" used the following language:

"The word 'tax' shall mean any general or special tax *or any special assessment levied against persons, property, or business,* for public purposes as prescribed by law."

Chapter 5 of Chapter 4, Section 60, sub-division 5.

The legislature, however, at the Special Session held in July, 1924, by the enactment of Senate File No. 330, which was approved on July 28th, 1924, changed Section 5 so as to read as follows:

"The word 'tax' shall mean any general or special tax levied against persons, property, or business for public purposes as provided by law, *but shall not include any special assessment* nor any tax certified or levied by township trustees."

The change in the statute, therefore, eliminated special assessments from the provisions of said Chapter 5 of the Budget Law. We are, therefore, of the opinion that this chapter does not apply to special assessments, and that the money raised thereby may not be transferred under the provisions of either Sections 77 or 78.

IV.

Section 4038 of the Supplement to the Compiled Code, 1923, in the second subdivision thereof provides for the levying of a tax by municipalities for a city improvement fund to be used for the purpose of paying the cost of the making, reconstructing, or repair of any street improvements at the intersection of streets, highways, avenues or alleys, and at spaces opposite streets, highways, avenues and alleys, intersecting but not crossing, and at spaces opposite property owned by the city or the United States, and for the purpose of paying the purchase price and subsequent tax assessed against property purchased by the city at tax sale.

Your fourth inquiry relates to the transfer of such funds under the provisions of the transfer section of the budget law. You are advised that under sub-division 13 of said section 4038, cities and towns may, under the conditions stated therein, make a transfer of this improvement fund. We are, therefore, of the opinion that this fund may be transferred under the provisions of section 78 of said statute.

V.

Subdivision 5 of Section 4038 of the Supplement to the Compiled Code reads as follows:

"A tax not exceeding, in any one year, five mills on the dollar, which, with the water rates or rents authorized, shall be sufficient to pay the expenses of running, operating and repairing waterworks owned and operated by any city or town, and the interest on any bonds issued to pay all or any part of the cost of construction, renewal, repair or extension of such works; *but such tax shall not be levied upon property which lies wholly without the limits of the benefit and protection of such works, which limits shall be fixed by the council each year before making the levy.*"

Therefore, the tax provided therein must be levied only upon property which lies wholly within the limits of the benefit and protection of such waterworks, which limits shall be fixed by the council each year before making the levy. Substantially similar provisions are contained in subdivision 6 thereof relating to the tax for gas works or electric plants, in subdivision 8 relating to the tax for gas, or electric

light or power, in sub-division 10 relating to the tax for water or gas works or electric plant bonds, and also in sub-division 14 relating to the sewer tax. The portion of the statute contained in sub-division 5, above set forth, is fairly typical of the similar provisions contained in the other sub-divisions thereof, which are cited above.

It will thus be seen that such taxes are levied upon property lying within the benefited or restricted area of such cities and are not raised by general levies against all the property within the city or town limits. We must, therefore, determine whether each and all of the funds which are thus raised are funds of the city or town within the meaning of the term as it appears in Section 78.

A consideration of the apparent purpose for the transfer of funds under the cited section undoubtedly affords a solution of the question. In construing statutes, a material inquiry always is the purpose or intent of the particular statutory enactment under consideration. It was manifestly the purpose of the legislature to permit, under certain conditions, the temporary transfer of money from one fund to another, where the money in one fund is sufficient to permit it to be done, so as to render it unnecessary for the city to borrow money or to mark the warrants issued "not paid for want of funds," which would require the city to pay interest on the sums borrowed, or the amounts represented by the warrants that are not paid. We can see no good reason for holding that the transfer provision of the statute as contained in Section 78 does not apply to such funds. For illustration, if the general fund becomes depleted there is no sound reason why, under the statute, money in one of the funds raised by taxes upon property in restricted areas should not be transferred to the general fund for the purpose of making it unnecessary to borrow, or stamp warrants "not paid," and thus save the city the interest on the money that it would necessarily have to raise by a loan or by inability to pay the warrants when presented. All the taxpayers in the cities and towns, including those who contribute to such funds, would derive a direct benefit from such transfer. We are, therefore, of the opinion that such funds clearly come within the provisions of Section 78.

The transfer of such funds is specifically provided for in sub-division 13 of Section 4038 of the Supplement to the Compiled Code, 1923, and for the reasons stated in another portion of this opinion, it is our opinion that this provision has not been changed or repealed by the enactment of the Budget Law, but that an additional condition has been added thereto, and that is that the transfer of such funds shall be made only upon the approval of the Director of the Budget.

VI.

Sub-division 13 of Section 4038 of the Supplement to the Compiled Code, 1923, reads as follows:

"Cities and towns having a population of eight thousand eight hundred or less may make either temporary or permanent transfers from one fund to another by resolution concurred in by unanimous vote of the council; provided that the funds herein referred to shall be those provided for in subdivisions one, two, three, five, six, seven, and eight of this section; and provided said transfer and resolution are approved by the judge of the district court of the county in which the city or town is situated, after a hearing had on a day to be by him fixed for the hearing of the same, after the publication in one or more newspapers published in said city or town or circulating therein five days or more prior to such hearing, which notice shall be addressed generally to the taxpayers of said city or town and shall recite the substance of the proposed transfer, the amount thereof and the time when objections to such transfer will be heard. Proof of publication shall be made as in

case of original notices and the order of said judge shall be indorsed on the original resolution and entered of record in the minute book as a part of said resolution. Provided that in no case shall such transfer of funds be made where, as a result of such transfer, there would be a greater sum credited to any one fund than would be placed in such fund by the levy of the maximum number of mills, as provided for by statute.

"Whenever there shall be in the treasury of any city or town any money in any judgment fund which was levied by the said city or town or any other authority under and by virtue of any order, judgment or decree of court, which fund remains after the judgment for which said fund was levied has been fully paid and any bonds issued there against have been fully paid, it shall be lawful for the city or town council by a majority vote thereof to transfer the balance in said fund remaining after the payment of said judgment or bonds to the general fund of the city or town."

The provisions of the above subdivision are limited to cities and towns having a population of eight thousand eight hundred or less, and the only funds that may be transferred thereunder are those provided in subdivisions 1, 2, 3, 5, 6, 7 and 8 thereof, providing for an improvement fund, sewer fund, waterworks fund, gas works or electric plant fund, water fund, and gas or electric light and power fund.

Your inquiry on this question is limited to whether or not the provisions of subdivision 13 are still applicable to the transfer of the funds provided therein, notwithstanding the provisions of Section 78 of the Budget Law; in other words, whether the conditions provided in this subdivision must be complied with before the application is made to or passed upon by the Director of the Budget. It will be observed that a condition precedent to the transfer of funds, as provided therein, is that a resolution permitting such transfer be concurred in by unanimous vote of the council, and that it be approved by the judge of the district court in which the city or town is located, after a hearing had on a day to be fixed by such judge, and the notice thereof published in one or more newspapers published in said city or town, or circulating therein, for five days or more prior to such hearing, which notice shall be addressed generally to the taxpayers of said city or town, and shall recite the substance of the proposed transfer, the amount thereof and the time when the objections to such transfer will be heard.

The statute under consideration, Section 78, as already stated, provides for the transfer of such funds and makes the same subject to the provisions of law relating to municipalities. We have already given our conclusion as to the proper construction of such phrase. Therefore, it is our opinion that this portion of the section makes the transfer of such funds subject to the provisions of law in force at the time the Budget Law became effective, and that before the application may be submitted to the Director of the Budget for his approval, the conditions specified in the statute must be complied with, and the city council must adopt the resolution providing therefor by unanimous vote, and that the resolution and transfer must be approved by the judge of the district court after a hearing had thereon, under the provisions of such statute.

It was manifestly not the intention of the legislature to change, modify or repeal the provisions of the present statute relating to such transfers. With the exceptions noted in this opinion, the transfer of money from one fund to another, not specified in subdivision 13 of said Section 4038, may be made by making application to and securing the approval of the Director of the Budget, but as to any of the funds, the transfer of which is provided for in subdivision 13, the transfer thereof, to any other fund cannot be made without complying with the provisions of such subdivision.

In conclusion, however, we desire to emphasize the fact that the transfer of funds under the provisions of Section 78 are temporary in character only; in other words that such transfer amounts to loaning a specific amount from one fund to another which must be returned to the original fund at as early a date as possible.

This opinion is limited strictly to the questions we have decided and shall not be construed as applying to any other questions.

BUDGET—SPECIAL ASSESSMENTS—Assessments for removing snow, weed cutting, delinquent water rent, etc., is a special assessment within the meaning of Section 60 of Chapter 5 of Chapter 4 of the Budget Law.

August 20, 1924.

Director of the Budget: You have referred to this department a request for an opinion construing certain portions of the new Budget Law, submitted to your department by George W. Haynes, Deputy County Auditor of Hardin County. The letter of Mr. Haynes is as follows:

"On the 2nd page of the form, certificate of incorporation tax, at the bottom is the following: 'A sidewalk tax in the amounts set opposite the owner's name and description of property.' Does this mean tax for sidewalk construction abutting property only or should this include all delinquent tax against the property such as snow shoveling, weed cutting, delinquent water rent, etc. If this includes this delinquent tax, should the delinquent occurring after the fiscal period be carried on to the next budget or should this delinquency be reported by the City Clerk to be put on the book in the fall as heretofore.

"Please let us hear from you on this at your earliest possible convenience, and oblige. Also when should the copy of the budget estimate be filed in your office? On the filing side of the sheet is a place for the different funds, dollars levied in mills. Should this be filled out from the estimates of the former valuations?"

The determination of the question submitted involves the consideration and construction of Chapter 5 of Chapter 4 of the Laws of the Extra Session of the 40th General Assembly, known as the Local Budget Law. This chapter relates to the preparation of the budget and the levying of taxes by local bodies which are denominated municipalities in said chapter.

The legislature when in session in July, 1924, amended certain features of the chapter we have under consideration. In section 60 of the act under the head "Definition of terms," the word "tax" included special assessments levied against persons, property, or business, for public purposes as prescribed by law. This was changed, however, by the enactment of Senate File No. 330, which was approved on July 28, 1924, so that the word "tax" does not now include any special assessment.

Paragraph 5 of Section 60 now reads as follows:

"The word 'tax' shall mean any general or special tax levied against persons, property, or business for public purposes as provided by law, but *shall not include any special assessments* nor any tax certified or levied by township trustees."

So it will be observed that said chapter 5 does not apply to special assessments of any kind. We are of the opinion that a sidewalk assessment, or an assessment for the cost of removing snow from sidewalks, constitutes a special assessment within the meaning of the term as used in section 60. We are, therefore, of the opinion that the cost of removing snow from sidewalks weed cutting, delinquent water rent, etc., should be levied as a special assessment in the same manner as was done before the law was enacted.

The law does not specify the time for the forwarding of copies of the local budgets to the Director We are, therefore, of the opinion that copies thereof should be forwarded to the director within a reasonable time after they are com-

pleted, which means that they must be prepared and forwarded as soon as is reasonably convenient, considering the amount of labor in preparing the same. They should be forwarded without any unreasonable delay, so that the copies may be in the hands of the Director at the earliest possible date.

In answer to the last inquiry with reference to the summary of the tax, which you have referred to under the head of "Dollars levied in mills," we assume that you refer to the final summary of the tax that is certified by the county auditor to the Director of the Budget. If this be true, then you are advised that the amount inserted therein should be based on the estimates of the present valuations, or the valuations for the current year.

PRIMARY ROAD FUND—Certificates issued in anticipation of future allotments to the primary road fund do not come under provisions of Chapter 4 of the Budget Law.

October 20, 1924.

Auditor, Iowa State Highway Commission, Ames, Iowa: You have requested the opinion of this department on the following proposition:

"We desire an opinion from your department as to whether or not the issuing of road certificates in anticipation of future allotments to the primary road fund comes under the provisions of Chapter 4 of the Budget Law."

Section 55 of Chapter 4 of the Budget Law provides as follows:

"Before any municipality shall institute proceedings for the issuance of any bonds or other evidence of indebtedness, excepting such bonds or other evidence of indebtedness as have been authorized by a vote of the people of such municipality, and except such bonds or obligations as it may be by law compelled to issue, a notice of such action, including a statement of the amount and purpose of said bonds, or other evidence of indebtedness shall be published at least once in a newspaper of general circulation within such municipality at least ten (10) days before the meeting at which it is proposed to issue such bonds." Acts of the Extra Session of the 40th G. A.

The term "municipality" as defined in section 44 of this Chapter, provides as follows:

"The word 'municipality' as used in this chapter shall mean county, *except in the exercise of its power to make contracts for primary road improvements,* city, including those acting under special charter, town, township, school district, state fair board, state board of education, and state board of control." Acts of the Extra Session of the 40th G. A.

From the above definition it will be seen that acts of the county done in the exercise of its power to make contracts for primary road improvement are not within the terms of the Budget Law, and therefore, it is our opinion that anticipation certificates of future allotments to the primary road fund come within the provisions for the exercise of its power by the county to make contracts for primary road improvements and that therefore such certificates are not within the terms of the Budget Law and do not come within its provisions.

However, this opinion should not be construed to extend to any case other than certificates issued on the primary road fund.

BONUS BOARD—BUDGET—The financial transactions of the Bonus Board are covered by the Budget Law.

November 5, 1924.

Director of the Budget: This department is in receipt of your letter dated October 30th, in which you request an official opinion. Your letter is in words as follows:

"Section 24 of the budget law sets up in detail the things it is necessary for the

director of the budget to include in his budget report to the Governor. Paragraph 7 of this section is as follows:

"'7. A detailed statement of all appropriations made during the two preceding bienniums, also of unexpended balances of appropriations at the end of the last fiscal year and estimated balances at the end of the current fiscal year.'

Under the provisions of this paragraph, is it your opinion that the Director of the Budget should include in his report a statement of the business transacted by the Bonus Board of Iowa: a statement showing the total receipts from the bond sale and accrued interest and their total disbursements for the payment of bonus claims and administrative expense?

"It is, of course, a fact that the administration of the Bonus fund is not a matter coming under the supervision of the director of the budget; however, are not the financial transactions of the Bonus Board a proper item to be included with the director's report for the information of the General Assembly? Also is it not necessary for the director to know the exact status for the fund, in order that he may consider the needs thereof in connection with his calculations of the tax levy for the coming biennium?

Section 37 of the budget law is as follows:

"'Sec. 37. Definition. The term 'department' shall be construed to mean any authority charged by law with official responsibility for the expenditure of public money of the state and any agency receiving money from the general revenues of the state.'

"Is it your opinion that the provisions of this section require the director of the budget to report upon the condition of the so-called 'trust funds' which have been operative in the financial affairs of the state. In this connection we have particularly in mind the Banking Department, the Game Warden and any other departments which exist entirely upon the fees and miscellaneous receipts of the respective departments?"

You are advised that the financial transactions of the Bonus Board of the State of Iowa are covered by the budget law. The report should be made by the Board to your department, and by your department to the legislature.

There are many reasons for this, among which are those set up in your letter. The most important reason of all is that the statute so requires.

BUDGET—TRANSFER OF FUNDS—Money transferred from improvement fund to the fire apparatus fund cannot be accomplished where the amount in the fire apparatus fund is the maximum amount which can be raised by the fire apparatus fund levy.

December 19, 1924.

Director of the Budget: We have received your request for an opinion as to the right of the City of Chariton to transfer funds from the improvement fund to the fire apparatus fund thereof.

It appears from the communication of the mayor of said city to your department that the fire apparatus which the city of Chariton desires to purchase, will cost the sum of $9,975.00, and that there is now in the fire apparatus fund the sum of $1,000.00, and the fire department, a voluntary association, intends to donate $1,500.00 for such fund, leaving the sum of $7,475 to be obtained from other sources.

The levy of one and one-half mills for the fire apparatus fund will bring in annually about the sum of $900.00. Section 388 of the Code of 1924 relates to the temporary transfer of funds and forms a part of the local budget law, and reads as follows:

"Subject to the provisions of the law relating to municipalities, and upon the approval of the director, it shall be lawful to transfer money from one fund of a municipality to another fund thereof, and the certifying board or levying board as the case may be, shall provide that money so transferred must be

returned to the fund from which it was transferred as soon as may be, provided that it shall not be necessary to return to the emergency fund or to any other fund no longer required, any moneys transferred therefrom to any other fund."

It will be observed that by the specific provisions of said statute, the right to transfer funds thereof is subject to the provisions of the law relating to municipalities. We must, therefore, determine whether any provision of law limits the right to make such a temporary transfer of funds.

Section 6215 of the Code reads as follows:

"Cities having a population of eight thousand eight hundred or less, and towns, may make either temporary or permanent transfers from the grading fund, improvement fund, sewer fund, the waterworks fund, gas or electric plant fund, water fund, gas or electric light or power fund, to any of said funds by resolution concurred in by a unanimous vote of the council, if approved by a judge of the district court in the county wherein such city or town is located at a hearing had on a day to be fixed by said judge."

It will be observed that under the provisions of the above section, money may be transferred from any of the funds specified therein to any other such funds. It will also be observed that the fire apparatus fund is not included therein. Therefore, we do not believe that it is necessary for the city to comply with the provisions of said section in order to transfer money from the improvement to the fire apparatus fund. Section 6216 of the Code reads as follows:

"In no case shall the transfer of funds be made where as a result of the transfer, more money is placed in any one fund than would have been placed in such fund by the levy of the maximum millage provided therefor."

This provision is comprehensive in character and we believe must be read in connection with the section relating to the temporary transfer of funds hereinbefore quoted. Therefore, we are of the opinion that the transfer of money from the improvement fund to the fire apparatus fund covered by the resolution of the city council thereof may not, under the law, be accomplished because of the fact that there is now in the fire apparatus fund of such city the maximum amount that may be raised by the fire apparatus fund levy. It can readily be understood why the legislature placed this limit on the right to transfer. The transfer is only temporary in character and the fund must within a reasonable time be retransferred to the original fund. If the amount transferred is in excess of the amount authorized to be levied for such fund it could not be retransferred within a reasonable time.

BUDGET LAW—The Budget Law does not apply to taxes levied in the year 1923 as it became effective in 1924.

December 22, 1924.

County Attorney, Delaware County, Manchester, Iowa: We desire to acknowledge receipt of your letter of October 17th, 1924, requesting this department to prepare an opinion upon the question which is stated therein as follows:

"The following is a part of a letter which I received from the President of a school district, and I would like your opinion in regard to same:

" 'We wish to know how the budget law effects the following case:

" 'During the year 1923, a certain school board, governed by this law, made their levy for the purpose of maintaining and operating their schools during the school year of 1924-1925. In the meantime and prior to the passage of the budget law, the board has authorized the issuing of warrants far in excess of the levy which is paid in as taxes in 1924.

" 'The question is, when the funds are used up, will the school have to stop the issuing of warrants? There are a considerable number of warrants outstanding, which were issued prior to the passage of the budget law, and which were to be held by the payees therein for a period of time and falling due this

winter. The Board made their estimates for the 1925 taxes to include these outstanding warrants, but as you see those warrants will be due before the taxes will be paid in 1925. Should the Treasurer hold the money paid in for operating the school this present year, and refuse to pay the outstanding warrants referred to, until such time as the levy made this year to meet those warrants has been collected and paid over to the school treasurer?' "

Your inquiry relates, as we understand it, entirely to what effect the Budget Law will have upon the facts stated in your letter. You are advised that the Budget Law can have no application to the taxes levied in the year 1923 for the reason that the Budget Law was not then in force and effect. It became effective during the year 1924. You are also advised that the levy of taxes in the year 1924 may be made under the provisions of what is known as the Local Budget Law or under the law in effect and force prior to the taking effect of this act.

Chapter 87 of the Laws of the Extra Session of the 34th General Assembly contains the following provisions:

"That all taxes heretofore and hereafter certified and levied in the year nineteen hundred and twenty-four (1924) by a municipality as defined in chapter five (5) of chapter four (4) acts of the extra session of the fortieth General Assembly, in conformity with said chapter four (4) acts of the extra session of the fortieth general assembly, or in conformity with the law as it existed prior to the taking effect of said chapter four (4), acts of the extra session of the fortieth General Assembly, are hereby legalized."

This act, therefore, legalizes and authorizes the levying of taxes in the year 1924 under the old law without complying with the provisions of the Local Budget Law.

This law also permits the marking of warrants, "not paid for want of funds."

Section 4318, which reads as follows, authorizes this procedure:

"Whenever an order can not be paid in full out of the fund upon which it is drawn, partial payment may be made. *All school orders shall draw lawful interest after being presented to the treasurer and by him indorsed as not paid for want of funds."*

Under the Budget Law no municipality, which includes school districts with certain exceptions, shall expend more money for any specific purpose than the amount estimated and appropriated therefor, except in cases of certain emergencies.

Sections 373, 380 and 381 of the Code, 1924.

You are advised that by an amendment to the local Budget law which became effective on July 29, 1924, the term "municipality", as used in the Local Budget Law, includes all school districts with the exception of rural independent school districts and school townships divided into sub-districts. Therefore, rural independent school districts and school townships divided into sub-districts do not come within the provisions of the Local Budget Law and such districts are not required to comply with such statute in levying their taxes.

OPINIONS RELATING TO CIGARETTES

CIGARETTE LAW—Held in submitted case that city council had not revoked cigarette permit.

January 21, 1924.

Treasurer of State: You have requested an opinion from this department upon a proposition arising out of the enforcement of some of the provisions of the cigarette law at Newton. It appears from your letter and the attached communications received by you from some of the officers of the city of Newton, that the city council on December 26, 1923, voted to revoke the cigarette permit of Roussos Brothers by a vote of four to three, the mayor casting the deciding vote. At the next meeting of the council which was on the 7th day of January, 1924, one of the councilmen, who had voted in favor of the revocation of this permit, moved that the matter be reconsidered, which motion carried. The action taken at the former meeting revoking the permit was then rescinded. On the next day the proceedings of both meetings, insofar as they pertained to the Roussos Brothers' permit, were certified to the Treasurer of State. The question then is, whether or not the city council of Newton has authority to reconsider the action taken relative to the revocation of the cigarette permit and rescind such action in the manner just described.

In determining the proposition submitted, it is necessary to first ascertain and determine the authority of the city council to do the things which it did. Section 3 of Chapter 203 of the Acts of the 39th General Assembly provides that the council issuing a cigarette permit shall revoke the permit of any person who has violated any of the provisions of the act, and that no such permit can again be issued for a period of two years thereafter. We do not understand that the question of the right to revoke, is before us and we will not enter into a discussion of that proposition. We only refer to it so as to show that the council has authority to revoke cigarette permits. It is provided also in Section 695 of the Code, that cities and towns "shall have the general powers and privileges granted, and such others as are incident to municipal corporations of like character, not inconsistent with the statutes of the state," etc. It is a fundamental and accepted proposition that city and town councils, in the absence of any provisions in the law to the contrary, may adopt such reasonable rules of procedure for the conduct of their meetings such as is customary among other deliberative and legislative bodies. This power is so well recognized in the decisions and by the text book writers that it is hardly necessary to cite authority sustaining it. However, see 28 Cyc. 340; McQuillin on Municipal Corporations, Supp. Vol. 7, Section 612, Cooley's Municipal Corporations, Page 160; Dillon on Municipal Corporations, 5th Ed. Vol. 2, Section 539.

The city council of Newton had previously adopted a rule, which was in force at the time in question herein, providing that "a question may be reconsidered at any time during the same meeting or during the first meeting held thereafter". It had further provided by rule that a motion to reconsider must be made by some member voting in the affirmative. This rule is similar to the rules of the councils in other cities and towns relative to the reconsideration of questions, and we believe is recognized generally as being reasonable. It is, therefore, our opinion that as a matter of procedure the council of the city of Newton had authority to adopt and follow this rule relative to the reconsideration of questions before it.

Turning now to the procedure in the proposition submitted, it will be noted that the city clerk did not certify to you, as Treasurer of State, a revocation of the permit immediately after the first meeting, nor prior to January 8, 1924. The clerk certified the minutes of the two meetings to you the day after the second meeting was held and after the action revoking the permit had been rescinded. In view of this situation the record of the proceedings of the council of the city of Newton at the close of the meeting on January 7, 1924, showed that the cigarette permit of Roussos Brothers was not revoked. On the 8th day of January, when the city clerk certified these proceedings to you as Treasurer of State, the permit of Roussos Brothers was not revoked and, therefore, no revocation was certified to your office.

It is the opinion of this department that under the facts submitted you should not consider the cigarette permit of Roussos Brothers as being revoked.

CIGARETTES—Minor cannot buy for another even though he has written order.

March 10, 1924.

Treasurer of State: This department is in receipt of your letter dated February 7th, 1924, in which you request an opinion from this department. Your request is in words as follows:

"Much controversy has arisen over that portion of the Cigarette Law found in Section 1, to-wit:

" 'Any person who shall furnish to any minor under twenty-one years of age by gift, sale or otherwise, any cigarettes or cigarette papers, etc.'

"In order that this department may intelligently give to every dealer in Iowa a ruling in the matter, will you kindly furnish this department your written opinion in reply to the following questions:

"Is a dealer justified under the law in accepting a written or verbal order for cigarettes and cigarette papers, using a minor as a go-between and deliver to the minor and place in the minor's hands cigarettes and cigarette papers, either for delivery or for temporary or permanent possession thereof."

You are advised that a dealer is not justified under the law in delivering to a minor cigarettes and cigarette papers even though the minor at the time holds a written or verbal order from an adult.

CIGARETTE LICENSE—A wholesaler with his place of business in the state of Iowa taking orders for cigarettes direct to customers is required to secure a permit.

October 13, 1924.

County Attorney, Lee County, Keokuk, Iowa: I wish to acknowledge receipt of your favor of the 3d requesting the opinion of this department as to whether or not a wholesale dealer in cigarettes, with his place of business in the state of Iowa, can take orders for the shipment of cigarettes direct to the customer, and thereafter collect for the cigarettes.

We are of the opinion that the wholesaler, operating as above stated, would be required to secure a permit if the sale is made in the state of Iowa, the money paid in this state and the transaction all completed here. We believe the opinion of the Attorney General found on page 309 of the Report of the Attorney General for 1922, also answers your question.

CIGARETTES—Husband having permit cancelled, transferring business to wife, State Treasurer does not have to sell stamps to wife, until satisfied she is a bona fide permit holder.

January 18, 1923.

County Attorney, Humboldt County, Humboldt, Iowa: You have requested an opinion from this department upon the following statement of facts:

"The city council of the town of Livermore cancelled the cigarette permit of a party by the name of Frank Collins for the illegal selling of cigarettes to minors. Mr. Collins then transferred the business to his wife and the city council has issued a permit to sell cigarettes to his wife."

You then ask whether or not the treasurer of state is compelled to sell cigarette stamps to the present holder.

Section fourteen (14), chapter two hundred three (203) of the Acts of the Thirty-ninth General Assembly in part provides:

"The treasurer of state shall sell the stamps herein provided for only to dealers holding permits issued as provided in this Act * * *".

It is evident that the treasurer of state shall not authorize the selling of cigarette stamps to any person except a bona-fide permit holder, and before Mrs. Collins could require the treasurer of state to sell her cigarette stamps it would be incumbent upon her to satisfy the treasurer of state that she is a bona-fide permit holder.

CIGARETTE MULCT TAX—Delinquent —Additional penalties provided by Section 2436, Code of 1897 should be assessed.

September 26, 1923.

County Attorney, Madison County, Winterset, Iowa: Your favor of the 30th ult. to this department requesting an opinion has been referred to me. Your request is as follows:

"Before the cigarette law passed by the Thirty-ninth General Assembly went into effect search warrant proceedings were instituted, cigarettes seized, and condemned and a mulct tax assessed against the property.

"The owner brought injunction proceedings to prevent the collection of the mulct tax. He was defeated in the lower court, appealed the case and the Supreme Court affirmed the lower court and the tax must now be paid.

"Section 5007-b says that the tax is to be collected in the same manner as the mulct liquor tax. Section 2436 provides that if the mulct liquor tax is not paid within one month after the same becomes due, then a penalty of twenty per cent shall be added thereto together with one per cent per month thereafter.

"The question I desire answered is this, Will we now be entitled to add the penalty provided for in Section 2436 or are we limited to just the $300.00 specified in Section 5007-b?"

Section 5007, Code of 1897 provides in part as follows:

"Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property both personal and real used in connection with the business,"

This section clearly provides for the collection of this tax under the provision of Section 2436, Code of 1897, that provides for the penalty of 20% and an addition thereto of 1% per month if the tax is not paid within one month after the same is due and payable.

We are of the opinion that in addition to the tax of $300.00 provided for in Section 5007-b, Supplement to the Code of Iowa, 1913, that the additional penalties provided by Section 2436, Code of 1897 should be assessed against this property.

CIGARETTE INSPECTORS—Payment of salaries and expenses—Ruling on effect of act of 40th G. A. attempting to place inspectors under Attorney General.

November 8, 1923.

Auditor of State and Treasurer of State: I am in receipt of a letter from Mr. Burbank dated November 1, 1923, in which he requests an opinion from this department. His request is in words as follows:

"Prior to July 1, 1923, the State Auditor's office raised the question of the validity of the appropriation for the salaries and expenses of traveling of inspectors in the

Cigarette Department under Chapter 334, Section 7, of the 40th General Assembly, and up to the present time, the question has not been adjudicated by the courts.

"We desire your opinion upon the following matters:

"First, has the Treasurer of State authority under the law to pay salaries and traveling expenses out of the appropriation for those purposes under Chapter 334, Section 7 of the 40th General Assembly, when said warrants are properly signed by the Auditor of State and presented for payment?

"Second, if the Auditor of State should pursue the question raised and attack its validity in the court and it should be adjudged invalid, would the Treasurer of State be personally liable for having paid warrants under this section of the law?

"A very early reply to these questions is necessary to this office."

As I have previously stated to you, I have grave doubts as to the validity of Chapter 334 of the Acts of the 40th General Assembly to which you refer. However, the determination of its validity is unnecessary to a determination of the two questions submitted by you.

Prior to July 4, 1923, the cigarette inspectors in your department were designated under the provisions of Chapter 203 of the Acts of the 39th General Assembly. Section 15 of this chapter provides for the employment of the necessary persons to carry into effect the provisions of the Act. It has been held that under this section, the Treasurer of State might employ inspectors, the compensation to be fixed by the Executive Council. The compensation of such inspectors so appointed to be paid from the revenues derived from the sale of cigarette stamps.

Under the provisions of Section 7 of Chapter 334 of the Acts of the 40th General Assembly, the inspectors are to be paid from the revenues derived from the sale of cigarette stamps. Therefore, whether the inspectors be appointed under the provisions of Chapter 203 of the Acts of the 39th General Assembly, or under the provisions of Section 7 of Chapter 334 of the Acts of the 40th General Assembly, such inspectors are to be paid from the same fund.

In order to avoid any possible question which might arise, due to claimed invalidity of that portion of Section 7 to which I have referred, it was suggested that the inspectors appointed should have the approval of both the Attorney General and the Treasurer of State, and for compensation, of the Executive Council and the Retrenchment and Reform Committee, so that no possible objection might be raised. The thought being, that if that portion of Section 7 referred to is invalid, then the old law would be necessarily revived. In either event, the appointments being good and the payment of the compensation legal. This was for the purpose of carrying out the true intention and purpose of the legislature,—namely, to secure the enforcement of the Cigarette Law. It follows, therefore, that whether the warrants referred to be designated for payment under Section 7 of the Acts of the 40th General Assembly or under Section 203 of the Acts of the 39th General Assembly, the payment will be from the proper fund and will be legal.

I would suggest that in order to avoid confusion, the warrants be designated for payment under Section 7, Chapter 334, Acts of the 40th General Assembly, and have the approval of both yourself and of the Attorney General. This will make bookkeeping easy and will be legal. It naturally follows that the payment being legal, neither the Auditor of State nor the Treasurer of State would be personally liable for payments of such compensation.

CIGARETTES—Permit—A permit cannot be legally issued to cover two or more separated stands even though upon same or contiguous lots.

December 24, 1923.

Deputy County Attorney, Lee County, Fort Madison, Iowa: I am in receipt of your letter dated December 20, 1923, which is in words as follows:

"The Anthes Hotel of this city covers three lots. The entrance to and the lobby of the hotel occupy the corner lot. Next West is a barber shop, then cigar store, the cigar store being on a separate lot, yet all in one building, and connects with the lobby by a hallway.

"The owner of the cigar store has a cigar case in the lobby of the hotel. The City Council has granted him a cigarette license covering Nos. 901 to 907 which includes the entire building on Front Street.

"Can he legally sell cigarettes in his cigar store and in the lobby of the hotel under the same permit, by arranging with the clerk to act as his selling agent?"

You are advised that in our opinion, the permit contemplated by the statute is a permit to do business at one particular stand. This has been a uniform custom throughout the state and we see no reason why it should not be insisted upon in this instance.

You are advised that his permit is given for a particular place of business. The case submitted by you shows that there is in fact, more than one place of business. There would necessarily have to be a license for each place. The question is always one of fact, but in the case submitted, we are of the opinion as stated.

OPINIONS RELATING TO CITIES

CITIES—The interest on waterworks sinking funds, ordinary water funds in cities of the first class, and interest on waterworks funds in cities of 100,000 inhabitants or over must remain in such funds and Section 3530 of the Compiled Code does not apply thereto.

January 14, 1924.

Auditor of State: We have received your communication of recent date asking this department for an opinion upon the following proposition:

"In making an audit of the accounts and affairs of Mason City, the examiners found that the interest on the daily balance in the water fund had been credited back to this fund instead of being credited to the general fund.

"We would like to have an opinion from your office as to whether or not the interest on all daily balances of city funds should be credited to the general fund or should the interest go to the fund from which it was received, such as water, library, firemen's pension, and policemen's pension fund? You understand that these funds are handled by separate boards of trustees instead of the city council."

Section 3530 of the Compiled Code is in part as follows:

"Treasurers of cities of the first and second class, and cities under the commission form of government shall, with the approval of the city council as to place and amount of deposit, by resolution entered of record, *deposit all city funds in any bank or banks in the city to which the said funds belong, at interest at the rate of not less than two per cent per annum on ninety per cent of the daily balances payable at the end of each month, all of which interest shall accrue to the benefit of the general fund.*"

You will observe that the above section provides that all of the interest that accrues on the daily balances on all city funds shall accrue to the benefit of the general city fund.

The provisions of this section undoubtedly apply to cities in general, and unless there are special statutes applying to a certain class of cities only, it is determinative of the question you have submitted. However, we believe there are special statutes that make this section inapplicable to a certain class of cities. We shall briefly review and summarize these sections.

Chapter 28 of title 13 of the Compiled Code, embracing sections 3981 to 3993, both inclusive, relates to the purchase and construction of waterworks in cities of the first class. Section 3981 provides that cities of the first class shall have power to levy in addition to the regular water tax authorized by law, a tax of two mills upon the dollar upon all the property within the corporate limits of said cities for the purpose of creating a sinking fund to be used as provided in such chapter for the purchase or erection of waterworks in such cities, or for the payment of any indebtedness incurred by such cities for waterworks now owned by the same. It contains the following provisions:

"The proceeds of such two mill levy shall be deposited in one or more solvent banks or trust companies of the city making such levy, at the rate of interest not less than three per cent per annum, compounded semi-annually, and payable, principle and interest, on demand, after sixty days' notice in writing."

Sections 3982 and 3983 of the Compiled Code are as follows:

"In all cities of the first class, where a sinking fund has been accumulated as provided in chapter twenty-eight, title thirteen, and in which waterworks have not been purchased under said chapter, such cities are hereby authorized to use and apply such sinking fund and all accumulations thereof upon the cost of waterworks purchased or erected under the provisions of sections thirty-nine hundred sixty-six to thirty-nine hundred seventy, inclusive."

"Any member of the city council, or any officer of any city levying and collecting taxes under the provisions of this chapter, who shall in any manner participate in or advise the diversion of any part of said tax to any other purpose than that provided for in this chapter, shall be deemed guilty of the crime of embezzlement, and shall be punished accordingly."

It will be observed that section 3982 provides that such cities, meaning cities of the first class, are hereby authorized to use and apply such sinking fund and all accumulations thereof upon the cost of waterworks purchased or erected under the provisions of sections 3966 to 3970, both inclusive. Section 3983 makes any city official who in any manner participates in or advises the diversion of any part of said tax to any other purpose than that provided for in such chapter, guilty of embezzlement. So far as the discussion of this question, as it relates to the sinking fund provided for therein, is concerned, our inquiry is limited to the question as to whether interest upon such funds may be embraced within the definition of the term "all accumulations". The "accumulation" is defined in Webster's Unabridged Dictionary as follows:

"Addition of earning or profits to the active capital of a corporation, otherwise distributable as dividends; the increase of a fund or property by the continuous addition to it of the interest or income of it."

The word "accumulated", as applied to a fund, has been defined by the courts as including interest accruing on the principal fund. *Lippincott v. Ridgway,* 11 New Jersey Equity 536; *Hussey v. Sargent,* (Ky.) 75 S. W. 211; *In re Davidge's Will,* 193 N. Y. Sup. 245; *Hazelton v. New York Life Insurance Co.,* (Wis.) 124 N. W. 1014.

Therefore, we are of the opinion that the term "all accumulations" in section 3982 includes interest on the sinking fund referred to therein and that such accumulations of interest become a part of such sinking fund and that section 3530 of the Compiled Code providing that interest shall accrue for the benefit of the general city fund does not apply.

Section 3989 of the Compiled Code reads in part as follows:

"All money so deposited *and all tax money received by the city treasurer from any source, levied and collected for and on account of the waterworks, shall be kept by the city treasurer as a separate and distinct fund.* The city treasurer

shall be liable on his official bond for such funds the same as for other funds received by him as treasurer. Such moneys shall be paid out by the city treasurer only on the written order of the board of waterworks trustees, who shall have full and absolute control of the application and disbursement thereof for the purposes prescribed by law, including the payment of all indebtedness arising in the construction of such works, and the maintenance, operation, and extension thereof."

Under the provisions of the statute which is quoted above, undoubtedly it was the intention of the legislature to provide that the waterworks funds regardless of the source of the same, should be kept as a separate and distinct fund subject to the control of the waterworks trustees and payable out only on their written order. The other city officials manifestly have no control over such funds.

Therefore, it is our opinion that the interest on such funds would remain as a part thereof and would not be subject to the provisions of section 3530 of the Compiled Code.

There is a special statute which relates to the purchase of waterworks by cities of 100,000 inhabitants or over, and the incurring of an indebtedness therefor and the levy of a tax for the payment thereof. This statute is chapter 29 of title 13 of the Compiled Code including sections 3994 to 4010, both inclusive. Section 3996 provides for the levying of a special tax not exceeding in any one year five mills on the dollar for a period of years not exceeding fifty for the purpose of acquiring waterworks either by purchase, condemnation or construction, and from time to time making permanent extensions thereof. Section 3997 reads in part as follows:

"It shall be the duty of the city treasurer to collect and receive said tax *and to hold the same separate and apart in trust for the payment of said bonds and interest, and to apply the proceeds of said tax pledged for that purpose to the payment of said bonds and interest.*"

Section 4003 of the Compiled Code reads as follows:

"The board shall immediately after its organization make and prescribe all the necessary rules for the government of the waterworks and prescribe the form of records and the kind of accounts to be made and kept in the operation of such waterworks. It shall institute and require the keeping of a uniform and perfected system of accounts and requisitions showing the purchase, storing and use of materials for operation, construction and other purposes. Said accounts shall be kept distinct and separate from other city accounts, and in such manner as to show the true and complete financial results of the operation of said waterworks. The board shall at least twice a year cause to be prepared and printed for public distribution a full and complete financial report. The account of such waterworks shall be examined at least once a year by an expert accountant selected by the city council."

Section 4009 of the Compiled Code reads as follows:

"Any member of the board of waterworks trustees or any member of the city council, or any other person who shall while there are outstanding obligations against such waterworks, divert or attempt to divert any of the income derived from the operation of the said waterworks by the city for any purpose than that of maintaining, improving, extending or paying the obligations of said waterworks, shall be held to be guilty of embezzlement and punished accordingly."

Giving to said chapter, when considered as a whole, the construction which we deem it entitled to, and especially that portion of section 3997 which makes the proceeds of the tax provided for in section 3996 a trust fund for the purpose specified therein, we are of the opinion that the interest on the waterworks fund provided for in such chapter remains a part of such fund and that section 3530 does not apply thereto, so that the law does not require the

transfer of the interest on such fund to the general fund. The word "proceeds" as used in section 3997, in our opinion, includes not only the amount orginally raised by the levy of such tax, but also to the income or accumulation therefrom. *State v. Brian,* (Neb.) 120 N. W. 916; *Dittemore v. Cable Milling Co.,* (Ida.) 101 Pac. 593; *People v. City of Chicago,* (Ill.) 75 N. E. 239.

It must, of course, be remembered that chapter 29 of title 13 relates entirely to cities of 100,000 population or over, which makes it applicable alone to the city of Des Moines.

It is, therefore, our conclusion from a consideration of all of the statutes that section 3530 providing that the interest on city funds shall be transferred to the general fund applies to all funds with the exception of the waterworks funds provided for in chapter 29 of title 13 and the tax levied for the purpose of paying for the purchase of waterworks by cities of 100,000 inhabitants or over.

We do not pass upon the question as to what the law requires to be done with interest on water funds in cities of the second class and in towns. This opinion is confined strictly to the questions upon which the opinion is rendered.

LIBRARY—Traveling Library—Can furnish books to city or town council under provisions of Sec. 741-n Sup. to Code 1913.

CITIES AND TOWNS—Council of any city or town not having a public library may contract with State Travelling Library for books and pay expense incurred in manner provided in Sec. 741-n Sup. to Code 1913.

February 26, 1924.

Iowa Library Commission: You have requested an opinion from this department upon the proposition submitted by E. C. Gilbert, Mayor of the town of Keota, as to whether or not the council of a town in which there is no public library has power to contract with the State Library Commission for the use of library books and whether or not the library commission may extend its service to such a town.

Section 741-n of the Supplement to the Code, 1913, provides among other things that the council of any city or town in which there is no free public library shall have power to contract with any free public library for the free use thereof by the residents of such city or town as provided in Section 729-a of the Supplement to the Code, 1913. It is further provided that such city or town may pay such library an amount as may be agreed upon therefor, and levy annually on the taxable property of such city or town a tax not exceeding one mill on the dollar to be used exclusively for such purpose. Said tax to be levied until the contract is terminated. Section 729-a of the Supplement to the Code, 1913, provides that the board of trustees of any free public library may contract with the council of any city or town for the free use of said library by the residents of such city or town by one or more of the following methods in whole or in part:

"1. By lending the books of such library to such residents of the city or town in which said library is situated.

"2. By the establishment of depositaries of books of such library to be loaned to such residents at stated times and places.

"3. By the transportation of books of such library by wagon or other conveyance for lending the same to such residents at stated times and places.

"4. By the establishment of branch libraries for lending books to such residents."

It is further provided that such contracts, unless otherwise provided therein, shall remain in force for five years unless sooner revoked.

Section 2888-d of the Supplement to the Code, 1913, provides that the Iowa Library Commission shall operate traveling libraries and shall loan books to libraries and other organizations in the state free of cost, except for transportation, under such conditions and rules only as shall protect the interests of the state and best increase the efficiency of the service it is expected to render the public.

Reading all of these provisions of law together and giving them a reasonable construction, it is the opinion of this department that the library commission may furnish library books to a city or town and that a city or town not having a library may contract with the library commission to furnish library books to such city or town for the use of its citizens and such city or town may pay the expense thereof by a tax as provided in Section 741-n of the Supplement to the Code, 1913, said tax to be used to pay the cost of transportation and other incidental expense made necessary by such an arrangement.

CITIES AND TOWNS—Cannot divert public funds to private enterprises.

LIBRARY—TRAVELLING—Can furnish books to city or town not having a library, expense to be paid by tax levied by city or town under 741-n Supplement to Code, 1913.

CITIES AND TOWNS—May, when there is no public library contract with State Travelling Library for books and pay for same by a tax as provided in 741-n Supplement, 1913.

March 4, 1924.

Secretary Iowa Library Commission: You have submitted to this department for an opinion a proposition presented to you from the town of Keota in words as follows:

"Several years ago the mayor without a vote authorizing the levy of a tax for library purposes made an appropriation therefor. This was not used but has been in the bank accumulating interest.

"The Woman's Club which is conducting a library in Keota at the present time is now asking for this money for use for library purposes. The mayor contends that the only use to which it can be put is for contract with another library for the loaning of books, making Keota a rural extension branch of such a library.

I am inclined to think myself that this is so but it will not be for the best interest of the library and I do not know that any neighboring library would be willing to contract with them and there must be two sides to a contract."

Insofar as the statement contained in the first paragraph of the proposition set out above is concerned, you are referred to Section 741-n of the Supplement to the Code, 1913, which authorizes the council of any city or town in which there is no free public library to enter into a contract with a library to furnish books to the residents of such city or town and to pay all expenses incident thereto by a tax levied annually against the taxable property of such city or town, said tax not to exceed one mill on the dollar. It is further provided that said funds so raised shall be used exclusively for such a purpose. It is not required that such a matter be submitted to a vote of the people before such a tax may be levied. In view of the fact that the fund so raised was not used for this specific purpose, and the further fact that it could not be used for any other purpose, it was proper that it be retained in the bank on interest until such time as it could be used for the purposes for which it was intended.

You next state that the Woman's Club of Keota is conducting a library, and that they have requested that this money be given to them for use for library purposes. As is contended by the mayor, the city or town is not authorized to divert any moneys raised by taxation to the use of any private organization. Our law does not authorize a sub-division of our government to levy a tax and to divert the proceeds of such tax to any person or organization not recognized by law or not a part of the established government. For this reason these funds can not be turned over to any private organization even though such organization will expend it for the public good.

Any funds raised under the provisions of Section 741-n of the Supplement to the Code of 1913 can be expended only by the proper officials of the city or town for the purpose of securing library facilities for the use of the citizens of such city or town in which there is no free public library. You are referred to our opinion to Mr. Johnson Brigham, Chairman of the Iowa Library Commission, dated February 26, 1924, in which the provisions of this section are construed to include the service offered by the State Travelling Library. It is the opinion of this department that the funds, raised by the council of the town of Keota, under the provisions of Section 741-n Supplement to the Code of 1913, may be expended by such town as long as it has no free public library in such a manner as to secure to such town, library facilities either by contract with the library of another town or by an arrangement entered into with the Iowa Traveling Library.

CITIES AND TOWNS—Mayor—A member of faculty of state college is eligible to election as mayor and may serve as such.

March 8, 1924

President Iowa State College, Ames, Iowa: This department is in receipt of your letter dated March 1, 1924, in which you call attention to three matters. For convenience, your letter is set out at length. It is as follows:

"1. Is there any law or other good reason you know of for not allowing a member of our faculty paid from state funds to serve as mayor of Ames, providing his fellow citizens feel he should so serve? No one is more interested than this college in having good government in Ames. Some down town people feel that the relations between the college and the city could be straightened out most quickly by having a member of our faculty elected. This may not prove to be desirable but I want to know if there is any legal objection. The position of mayor carries a salary of $600.00. If illegal for a professor to take that salary, could he serve without salary?

"2. What is the law regarding students voting in the district where they reside as students? I have been told that a decision was given on this point in connection with the State University some years ago. Can a young man in college, over twenty-one years of age, receiving support from home qualify as a voter? The question might come up as to whether he can vote if he partially supports himself while in college. Under that condition, of course, almost anyone could qualify because most students earn a few dollars.

"3. If a college employee away on official work in a college automobile returns to Ames late in the afternoon and parks his car down town while he gets dinner and attends a moving picture show and then proceeds home at about eleven o'clock P. M. and meets with an accident, is the state responsible for the damage or should the individual make good this damage?"

You are advised that in our opinion a member of the school faculty may serve as mayor of Ames. However, the Board of Education should make proper deduction for loss of time on the part of the professor.

For your information I am enclosing you a letter which expresses my opinion as to the right of the student body to vote.

In my judgment, the college employee who deviates from the course of his employment would not be entitled to recover compensation.

CITIES AND TOWNS—Limit of Indebtedness—"Venard Amendment" to House File 178 does not create an indebtedness within meaning of constitutional provisions.

March 19, 1924.

Honorable W. S. Baird, Senate Chamber: You have called the attention of this department to the opinion of the department dated March 10, 1924, in which we rendered an opinion to the effect that the so-called "Venard Amendment," House File No. 178, would not create an indebtedness within the meaning of Section 3 of Article XI of the Constitution of Iowa. The amendment to which you refer is in words as follows:

"Amend the Substitute for House File No. 178 by adding after section 3 of the bill the following:

"Sec. 3-a1. Any city of the second class having less than five thousand (5,000) population according to the last state or national census, which owns and operates a combined electric light, power and water plant, or electric light and power plant, may, when authorized by a vote of the people at a general election or a special election called for that purpose, mortgage the said plant or plants and the net revenues to be derived therefrom as a security for the payment of bonds to be issued for the purpose of reconstructing and enlarging such plant or plants and acquiring a site therefor.

"Sec. 3-a2. Such bonds shall bear not to exceed six per cent (6%) interest and be due not more than twenty (20) years after date of issue and shall be payable only out of the said net revenues of such plant or plants or from a sale thereof on foreclosure. Failure to pay interest within ninety (90) days after due shall entitle the holder of the mortgage to foreclose, in which case the laws of this state relative to foreclosure of real estate mortgages shall govern.

"Sec. 3-a3. In case of foreclosure such cities shall grant to the purchaser thereat and his successors and assigns a franchise to operate the same for a period of twenty-five (25) years, reserving therein, however, to said city the power to compel the holder of the franchise to furnish reasonable service to th inhabitants of said city at reasonable rates and to be subject to reasonable regulations. The holders of the bonds shall look alone to the security on the plant and the revenues thereof for the payment of such bonds and the city shall not be liable therefor."

I am not entirely satisfied with the opinion which I then rendered and I am substituting this opinion in lieu thereof in the records and files of this office.

You have called my attention to two letters received by you, one from Mr. Rex H. Fowler, dated March 13, 1924, and one from the firm of Tinley, Mitchell, Ross & Mitchell, dated March 8, 1924. Without quoting these two letters at length, it is sufficient to say that they both express the opinion that the amendment in question does create an indebtedness within the meaning of the constitutional provision referred to.

After giving the matter the most careful consideration, I am frank in saying that I am unable to agree with the writers of these two letters, and that I am of the conclusions reached in my former opinion, namely, that the amendment in question does not create an indebtedness within the meaning of the constitutional provision. It is true that the Federal Court in *City of Ottumwa v. City Water Supply Company,* 119 Federal 315 holds otherwise. The determination by the Federal Court, however, is in direct conflict with the authorities and the Supreme Court of this state as announced in the following line of authorities:

Windsor v. The City of Des Moines, 110 Iowa 175; *Swanson v. The City of Ottumwa,* 118 Iowa 161; *Rowley v. Clark,* 162 Iowa, 746. It is also in conflict with the great weight of authority, the cases being gathered in the note to be found in 59 L. R. A., at page 604. See also: *Donohue v. McNulty,* 24 Cal. 411; *Faulkner v. Seattle,* 19 Washington, 320; *Joliet v. Alexander,* 194 Illinois 457; *Citizens Bank v. City of Terrell,* 78 Texas 450; *Davis v. City of Des Moines,* 71 Iowa 500; *Tuttle v. Polk & Hubbell, et al,* 92 Iowa 433; *Corey v. City of Fort Dodge,* 133 Iowa 666; *Keihl v. City of South Bend,* 22 C. C. A. 618, 44 U. S. App. 687; *Saleno v. City of Neosho,* 127 Missouri 627; *Kennebec Water District v. City of Waterville,* 96 Maine 234.

This department is bound to follow the decisions of the Supreme Court of this state. It follows that we can reach no other conclusion than that announced by such court.

Mr. Tinley's letter seems not to be based upon the question as to whether or not the debt created is within the constitutional provision, but upon the advisability for legislation. With such question we do not deal. The legislature is to determine upon the advisability of the legislation, and not this department or the courts.

MUNICIPALITIES.

May 21, 1924.

Auditor of State: We have received your communication of May 5, 1924, submitting to this department for an opinion certain questions that were submitted to your deparment by the Board of Waterworks Trustees of Mason City, Iowa. The letter of said Board of Waterworks Trustees is in words and figures as follows:

"In connection with our letter dated February 26th, relative to report of the Municipal Examiners covering City Waterworks, of Mason City, Iowa, and particularly that part of the same referring to the issuance of $300,000.00 City of Mason City, Waterworks System Bonds, which the report states, 'becomes due in 1930 and at the present time there is no provision for meeting these bonds except a 2 mill levy' (This levy is to be collected this year under a 'WATER BOND SINKING BOND').

The report further states: 'If these bonds are to be paid when due the Waterworks Trustees must set aside a part of the earnings of the Waterworks Trustees each year, to be known as a Sinking Fund which together with the proceeds of the 2 mill levy will be used for the payment of the bonds when due.'

In explanation of local conditions, not otherwise cited in the report, and correcting certain items of information, would advise as follows:

"The Board of Waterworks Trustees is operating under the provisions of Chapter 85 of the 38th General Assembly becoming effective as of Nov. 1, 1920.

"The Board has up to the present time received the proceeds of the regular 5 mill Waterworks Tax, and the Department's receipts from water sales. (The City does not pay the Water Department for water for fires or other municipal purposes, or for services rendered.)

"As stated in our letter dated February 27th, under a Resolution of the City Council, all of the proceeds of the five mill Waterworks Tax, have been set aside and used for the purpose of paying interest on the above mentioned bonds.

"This left the Department only the receipts from its water rates wherewith to operate the plant, maintain the same, improve and extend the same, for the past two years.

"During these two years, these receipts have been sufficient to operate, and furnish water for consumers, as well as the City for water for fire protection, and other municipal uses without remuneration, from the city, other than the regular tax.

"For this reason, it hardly seems consistent to ask the consumers,—who may not be owners of property which receives the benefit of fire protection,—by means of increasing water rates to assume the further burden of paying for improvements in the water system, occasioned wholly by reason of required fire protection. The only equitable method of apportioning this cost for fire protection would seem to be taxation against the property benefited.

"The use of the proceeds of the 5 mill tax to pay the interest on these bonds, has left the Department absolutely without funds wherewith to make extensions to its system, though many are badly needed, and warranted.

"The failure to levy the 2 mill sinking fund, as requested by the Board the past three years, leaves the Department with no means in sight wherewith to maintain its plant at an efficient point, the same depreciating and necessitating renewal of much of it in a fixed term of years.

"In view of the foregoing it is apparent that the present revenues of the plant, even augmented by an increase in water rates, would be inadequate to liquidate the present indebtedness for an indefinite term, and the funds of the plant dissipated in the payment of interest for such indefinite term.

"We are therefore, in view of the examiners' report, submitting to you for opinion and instructions, the following questions:

"1st. What is the legal course to pursue to properly liquidate the above referred to bond issue?

"2nd. Could the provisions of Sub-Div. 10 of Sec. 4038, cited, be invoked to pay the principal of the bonds, in view of the statutes under which same were issued, upon a vote of the qualified electors?

"3rd. If so, would not the proceeds thereof be administered, and under the jurisdiction of the Boards, as per Sec. 3989?

"4th. Should the proceeds of a Sinking Fund Levy, be applied upon the principal and interest of the above referred to bonds, such levy not now being made or any accumulations therefrom being available now or at the time of issue of said bonds?

"5th. Or, should the proceeds of such Sinking Fund, when levy is made, be conserved for future extension and improvements ,and applied upon such obligations *after* funds have accumulated in such Sinking Fund, which seems to be implied by statutes?

"6th. Would not the proceeds of Sinking Fund be administered, and under the jurisdiction of the Board, as per Sec. 3989?"

In this opinion we shall discuss the questions you have submitted in the order in which they appear in the letter of the Board of Waterworks Trustees.

I.

The answer to your first question is found in the provisions of Section 3981 of the Compiled Code, which reads as follows:

"Cities of the first class shall have power to levy, in addition to the regular water tax authorized by law, a tax of two mills upon the dollar upon all the property within the corporate limits of said cities, excepting lots greater than ten acres in area, used for horticultural or agricultural purposes, for the purpose of creating a sinking fund, to be used as provided in this chapter for the purchase or erection of waterworks in such cities, or for the payment of any indebtedness incurred by such cities for waterworks now owned by the same. *The proceeds of such two-mill levy shall be deposited in one or more solvent banks or trust companies of the city making such levy, at a rate of interest not less than three per cent per annum, compounded semi-annually, and payable, principal and interest, on demand, after sixty days' notice in writing.* The city treasurer depositing the proceeds of such tax shall exact from the bank or trust company wherein such money is deposited a satisfactory bond, payable to the city, to be approved by the treasurer and mayor of such city, and to be filed in the office of the city treasurer."

It will be observed that, under the provisions of the above section, the tax of two mills provided for therein shall constitute a sinking fund to be used for the purchase, or erection, of waterworks in cities, or for the payment of any indebted-

ness incurred by such cities for waterworks now owned by the same, so that the way for the waterworks trustees of Mason City to create a fund to pay the waterworks bonds as they become due is to levy the tax as provided in said section.

II.

Sub-division ten (10) of Section 4038 of the Compiled Code reads as follows:

"A tax as authorized in the preceding sub-division, to be levied in the proportions therein set forth, and to be used exclusively in payment of the principal of bonds issued for the construction of water and gas works and electric light and power plants, which tax shall not be levied upon property lying wholly without the limits of the benefit of such works or plants, which limits shall be fixed by the council each year before making the levy."

The above quoted statute is plain and the purpose for the levying of such tax as stated therein is not ambiguous. It provides that such tax shall be used exclusively in payment of the principal of bonds issued for the construction of water, gas works, electric light and power plants. Therefore, it is apparent that such tax may be used in payment of the principal on bonds issued for the construction of waterworks.

III.

We are of the opinion that the proceeds of the tax provided for in sub-division 10 of Section 4038 of the Compiled Code should be administered by the Board of Waterworks Trustees and it has jurisdiction thereof under the provisions of Section 3989. This conclusion is made certain by the following provisions of said section:

"All money collected by the board of waterworks trustees shall be deposited at least weekly by them, with the city treasurer; *and all money so deposited from all tax money received by the city treasurer from any source, levied and collected for and on account of the waterworks, shall be kept by the city treasurer as a separate and distinct fund.* The city treasurer shall be liable on his official bond for such funds the same as for other funds received by him as such treasurer. *Such moneys shall be paid out by the city treasurer only on the written order of the board of waterworks trustees, who shall have full and absolute control of the application and disbursement thereof for the purposes prescribed by law, including the payment of all indebtedness arising in the construction of such works,* and the maintenance, operation, and extension thereof."

It is our opinion that the phrase "such moneys" as used in the above section relates to all money collected by the Board and all tax money received by the city treasurer from any source levied and collected for and on account of the waterworks and that, therefore, the proceeds of the tax raised under the provision of sub-division 10 of said section 4038 should be administered by the waterworks trustees.

IV.

We shall group the 4th and 5th questions for the purpose of rendering an opinion thereon. We do this because the questions submitted therein are closely allied to each other. We are of the opinion that the tax raised under the provisions of Section 3981 of the Compiled Code, which is hereinbefore incorporated in this opinion, should be applied and used on the principal and interest on the bonds referred to in the communication of said waterworks trustees. The fact that such levy has not been made, or that there are no accumulations therefrom now available, or at the time of the issuance of said bonds, will make no difference in the statement just made. The tax, however, provided for in sub-division 10 of Section 4038 of the Compiled Code may, under the express provision of the sub-division, be used

only in payment of the principal of bonds issued for the construction of a waterworks plant. We are also of the opinion that the proceeds of such sinking fund when levy is made should not be conserved for future extension and improvements and applied upon the obligations incurred after funds have accumulated in such sinking fund, but may be used in the satisfaction of claims that have been incurred in the past.

V.

For the reasons stated in the answer to your third question, we are of the opinion that the sinking fund should be administered by and should be under the jurisdiction of the Board of Waterworks Trustees. No other construction can be placed upon Section 3989 of the Compiled Code.

CITIES AND TOWNS—PAVING ASSESSMENTS—City may bid on property offered for sale for delinquent paving assessment.

November 19, 1924.

County Treasurer, Bremer County, Waverly, Iowa: We have received your letter of November 8th, 1924, asking this department for an opinion upon the question which you have stated as follows:

"I have a paving installment that has been advertised and offered at tax sale for the last three years, but there were no bidders thereon. When the same is advertised for sale this year the city intends to bid on the property. The city issued bonds for the improvements. Does the city have the legal right to bid on this property?"

Section 6039 of the Code 1924 reads as follows:

"At any such sale, where bonds have been issued in anticipation of such special taxes and interest, the city may be a purchaser, and be entitled to all the rights of purchasers at tax sales."

Section 829 of the Code, 1897, contains the same provisions. It will, therefore, be observed that the city may be a purchaser of property that is sold at tax sale because of the failure of the property owner to pay the paving assessment, where bonds have been issued in anticipation of such special taxes and interest. As bonds were issued in the case submitted, we are of the opinion that the city may bid in the property at the tax sale.

CITIES AND TOWNS—SALARIES—The members of the city council may fix the amount of their salaries in the first instance but they cannot be changed while in office.

December 8 ,1924.

Auditor of State: We have received your letter of November 22nd, 1924, submitting to this department the following proposition:

"Mr. Frank G. Pierce, Secretary of the League of Iowa Municipalities has inquired of this department whether the officers of a city or town, who, on taking office, find that no salary ordinance has been adopted or is in effect, have authority to adopt such an ordinance and place the same into effect at once, making their own salaries subject to its terms. Mr. Pierce has turned over to the department a letter which he received from you in which you suggested that if he would take the matter up with the Auditor of State that you would be pleased to give the question consideraion.

"Hoping you will find time to give us an early opinion on this matter, as several cities and towns have propounded the same inquiry to this department."

Section 5672 of the Code contains the following provisions:

"No member of any city or town council shall, during the time for which he has been elected, be appointed to any municipal office which has been created or the emoluments of which have been increased during the term for which he was elected,

nor shall the emoluments of any city or town officer be changed during the term for which he has been elected or appointed, unless the office be abolished."

The term "emoluments" as applied to a public official is defined to be any prerequisite, profit or gain arising from the possession of an office and includes all amounts received for services in connection with any office. *Scharrenbroich v. Lewis & Clarke Company,* (Mont.) 83 Pac. Rep. 482; *Commonwealth v. Mathues,* (Pa.) 59 Atl. Rep. 961; *McDaniel v. Armstrong,* 59 Atl. Rep. 865; *Reals v. Smith,* (Wyo.) 56 Pac. Rep. 690; *Apple v. Crawford Co.,* 105 Pa. 300; *Van Sant v. Atlantic City,* 53 Atl. Rep. 701; *Town of Bruce v. Dickey,* 6 N. E. Rep. 435; *Hoyt v. U. S.,* 51 U. S. 109; *State v. Bauer,* (N. D.) 47 N. W. Rep. 378.

So, the term as used in the statute includes not only salary but any other fees or profit that may arise from the possession of the office. It will be observed that the phraseology therein is "nor shall the emoluments of any city or town officer be changed during the term for which he has been elected or appointed." It does not state that the emoluments or salary shall not be fixed. There is a clear distinction between these two terms and the distinction must be kept in mind in determining the question you have submitted.

The word "change" as a verb may be defined as follows: "To alter, or make different; to come to pass from one state or place to another; to put one thing in the place of another; to exchange." (11 C. J. 286). The word presupposes an existing condition or thing which may be altered, modified, increased or reduced, or made different in some manner, or superseded by another. To apply this definition to the concrete case we have in hand, it is quite apparent that the city has no ordinance fixing the salary, compensation or emoluments of the city officers. The city council may, therefore, fix or specify such salaries without violating the provisions of the statute in question. Under the law there is no more authority for reducing salaries than increasing them.

The rule is well stated in the case of *James v. Duffy,* a Kentucky case, reported in the 140th American State Reports, on page 404, as follows:

"The compensation of such officers may be fixed after their election, if not fixed before, but when once fixed cannot be changed so as to affect the then incumbent."

The provisions of the constitution under consideration in that case were as follows:

"The compensation of any city, county, town or municipal officer *shall not be changed* after his election or appointment, or during his term of office * * *"

So, it will be seen that in the provisions of the statute under consideration and in the provisions of the constitution of Kentucky, the same word "change" is used. The rule adopted in the case of *James v. Duffy,* Supra, also finds support in the following cases: *City of Louisville v. Wilson,* 36 S. W. Rep. 944; *Piercy v. Smith,* 80 S. W. Rep. 201; *Spalding v. Thornbury,* 103 S. W. Rep. 291.

We believe that the rule as adopted by the Supreme Court of Kentucky is correct as a matter of law, and that a city council under the laws of the State of Iowa may fix the salaries of city officers in the first instance, but that such salaries cannot be changed during the term for which such officers have been elected or appointed, if an ordinance provided for salaries therefor at the time they were elected.

FUNDS—City under 8,800 in population cannot transfer funds raised under Par. 7, Sec. 894, Sup. 1915, to any other fund.

January 18, 1923.

Auditor of State: You have asked for an opinion from this department upon the following statement of facts:

"Will you kindly get for me an opinion from the Attorney General of Iowa the procedure to follow in order to dispose of a fund in the hands of the city treasurer known as the water fund.

"The facts are these:

"The city has a water fund of some $3,000.00 which has accumulated under a levy made under subdivision 7 of Section 4038 of C. C., for the payment of hydrant rentals, water having been supplied by the Peoples Water Company under a contract with the city.

"The city purchased the water plant of the Peoples Water Company and by an election placed the plant in the hands of waterworks trustees for management and control.

"Can the city council transfer this money thus accumulated in what is known as the water fund to a new fund to be called "Municipal Water Fund" to be disbursed by the waterworks trustees in the general operation of the plant; or can the city pay to the waterworks trustees hydrant rentals, as heretofore, until this fund is exhausted?"

The city of Oskaloosa is a city of more than 8,800 in population. The only statutory authority for a transfer of funds in cities of a less population than 8,800 will be found in Section one (1), Chapter one hundred twenty-six (126) of the Acts of the Thirty-seventh General Assembly which authorizes the transfer of funds created for the purpose of paying the amount due or to become due to any company operating waterworks for water supply to the city. However, this authority is limited to only such cities as have a population of 8,800 or less.

Section nine thousand forty (9040) of the Code as amended by section two (2), chapter one hundred twenty-six (126), Acts of the Thirty-seventh General Assembly further provides:

"Any councilman or officer of a city or town who shall participate in, advise, consent to, permit or allow any tax or assessment levied by such city or town, or by other lawful authority, for city or town purposes, to be diverted to any purpose other than the one for which it was assessed and levied, except as provided in subdivision seven, section forty hundred thirty-eight, and subdivision thirteen of section forty hundred thirty-eight, or shall in any way become a party to such diversion, shall be guilty of embezzlement."

It is a general rule of law that when funds are created for a specific purpose by statutory authority such funds cannot be used for any other purpose. While the funds in question are desired for use in maintaining the municipal water plant at Oskaloosa, the fund in question was created for the express purpose of paying charges to a private corporation furnishing water to the city, and inasmuch as there is considerable doubt as to the legality of transferring such fund to a fund to be known as the Municipal Water Fund and to be disbursed by the waterworks trustees in the general operation of the municipal water plant I am constrained to resolve the doubt against making the transfer.

I would suggest in this connection that the matter be presented to the Legislature for permission to transfer the fund to the Municipal Water Fund.

CITIES AND TOWNS—MUNICIPAL ICE PLANT—The law does not require that the proposition of whether or not a city shall erect a municipal ice plant nor the question of whether or not the city shall establish, erect, purchase, or otherwise utilize exhaust steam in the manufacture of ice be submitted to the people.

February 22, 1923.

Auditor of State: We are in receipt of your letter in which you ask for the opinion of this Department upon whether or not it is necessary for the city council to submit to the voters of the city the question of whether such city may establish

and direct an artificial ice plant to utilize the steam and excess power of a municipally owned water plant.

The law as it stood prior to the enactment of Chapter 326, Acts of the 38th General Assembly provided that cities and towns should have power to purchase, establish, erect, maintain and operate within or without the corporate limits of such city or town, heating plants, water works, gas works or electric light or electric power plants with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, hose, wires, burners, machinery apparatus and other requisites of said works or plant, and they were further given authority to lease or sell the same.

There appeared, however, in the law this restriction:

"No such works or plants shall be authorized, established, erected, purchased, leased or sold, or franchise extended or renewed or amended, or contract of purchase entered into, unless a majority of the legal electors voting thereon vote in favor of the same at a general city or special election." (Sec. 720, Supplement to the Code, 1913.)

Following this, Section 721 of the Supplement, 1913, provided for the submitting of said question to the voters and provided for the notice to be given of the election.

There can be no question with reference to the absolute necessity of submitting to the voters of the city the question of whether or not any of the works or plants specified in the statute should be authorized, established, erected, purchased, etc., and it is the view of this Department that this still remains the law.

Chapter 326, Acts of the 38th General Assembly in its title provides thus:

"An Act to amend section seven hundred twenty (720) supplement to the code, 1913, granting cities under ten thousand (10,000) population owning their own water plant the right to utilize the exhaust steam and excess power in the manufacture of artificial ice."

and the Act itself provides in Section 1 as follows:

"Section 1. That section seven hundred twenty (720) supplement to the code, 1913, be and the same is hereby amended by adding after the period at the end of said section the following:

"And such plant so established and erected may utilize steam and excess power in the manufacture of artificial ice and may install the necessary machinery and equipment therefor. Provided, howeved, that this shall only apply to cities, including cities under special charter or commission plan of government under ten thousand (10,000) population."

Prior to the passage of this chapter there was no provision whatsoever in the statute with reference to cities engaging in the business of the manufacture of artificial ice.

It is not one of the works or plants the authorization, establishment, erection, purchase, etc., of which must be submitted to the voters for their approval. There is nothing in the law that specifically provides for obtaining an expression of the electors upon the establishment of such a plant.

The right to vote is not a natural right, but one dependent on law, by which it must be conferred to permit its exercise. I can emanate only from the people, either in their sovereign statement of organic law or through legislative enactment which they have authorized. (20 C. J. 60; *Taylor v. Earlham Ind. School Dist.*, 181 Iowa 544; *Coggeshall v. Des Moines,* 138 Iowa 730.)

Confronted by a rule such as the foregoing and by a statute which does not specifically authorize the submitting of the question of the erection of a municipal ice plant to the electors, we are of the opinion that the law does not require the council to submit to the electors the question of whether such city shall establish,

erect, purchase, or otherwise utilize their exhaust steam and excess power in the manufacture of artificial ice.

BOARD OF SUPERVISORS—No authority to change or alter streets in cities and towns.

County Attorney, Clayton County, Guttenberg, Iowa: Your favor of March 8th at hand in which you ask for an opinion upon the following proposition:

"The Supervisors have constructed a bridge within the corporate limits of the Town of Volga City, Iowa, and have built it about a block from where the old bridge stood, thereby making it necessary to drive about an angle back to the road approaching the old bridge.

"The Town of Volga City insists that the Board of Supervisors relocate the road approaching the bridge in question so as to run straight to the County Road system, and the Supervisors have taken the position that they have no authority.

"Please furnish me with your opinion on this subject and greatly oblige."

I wish to refer you to Section 751, Supplement of 1915 that gives to cities and towns the power to establish, straighten, extend, improve, etc., the streets within the corporate limits. The Board of Supervisors has, therefore, no authority to attempt to alter or change any street within the corporate limits of Volga City.

CITIES—SPECIAL CHARTER—Cannot issue warrants in anticipation of funds for purpose of paying cost of extensions to water mains, unless provided for under 941 and 942 of the Code.

April 27, 1923.

Auditor of State: You have requested an opinion from this department upon the following proposition involving a special charter city:

"(1) Is section 1306-b of the supplement to the code, 1913, as amended, applicable to cities under special charter?

"(2) May such a city extend its water mains and pay for such improvement by the issuance of warrants which would be retired as soon as funds were available therefor?"

In answering the first proposition submitted, let us call your attention to the provisions of section 933 of the code, 1897. It is there provided that the provisions of the law other than those contained in the chapter relative to special charter cities, shall not apply to such cities except the same be specifically included by special reference. Nowhere in the chapter relating to special charter cities are we able to find any provision referring to or incorporating within said chapter, the provisions of section 1306-b of the supplement to the code, 1913, as amended, which section defines limits of indebtedness for municipal and political corporations.

Therefore, it is our opinion that the provisions of this section do not apply to special charter cities.

Your second proposition submits the question of whether or not a special charter city may extend its water mains and pay for same by the issuance of anticipatory warrants which would be retired as soon as funds are available therefor. There are different provisions relative to the erection and management of water works' plants in special charter cities depending upon the population. We have been orally informed that the special charter city desiring to make this improvement belongs to the class having a population of less than 10,000. Therefore, the provisions of sections 952, 955 and 956 are applicable to cities of this class. Section 952 incorporates as a part of the chapter relative to special charter cities sections 724 to 920 of the supplement to the code, 1913, as amended. These sections relate to the power of cities and towns to purchase, establish, erect, maintain and operate water works and certain other utilities. They provide also for the method of sub-

mission of such a proposition to a vote, for the condemnation of land for such purposes and other matters incident to such an enterprise. Section 724 specifically authorizes such cities "to levy a tax, as hereafter provided, to pay or aid in paying the expenses and repairing such works or plants, owned and operated by such city or town." This section authorizes such cities to make extensions and to levy a tax to pay the cost thereof.

The principal use confronting us then is, whether or not the city may make such improvement and pay the cost of same by the issuance of warrants in amounts not exceeding one thousand dollars ($1,000.00) and pay the same whenever funds are available therefor. Section 941 of the code, 1897, provides that each officer, board or committee shall file an estimate and statement of the necessary expenditures and requirements for his or their department during the last fiscal year. Section 942 of the code provides that the council shall make an appropriation for all the different expenditures for the fiscal year at or before the beginning thereof, and that it shall be unlawful to issue any warrant, or to enter into any contract or appropriate any money in excess of the amount thus appropriated for the different expenses of the city during the year for which said appropriation shall be made. It further provides that cities may anticipate their revenues for the year for which appropriation is made. Section 1007 of the code, 1897, provides that

"loans may be negotiated or warrants issued by any such city in anticipation of its revenues for the fiscal year in which such loans are negotiated or warrants issued but the aggregate amount of such loans or warrants shall not exceed one-half of the estimated revenues of such corporation for the fund and proposition for which the taxes are to be collected for such fiscal year."

Under the provisions of this section such a city may anticipate its revenues as estimated for the fiscal year, by the issuance of warrants against such anticipated funds, provided such anticipation does not exceed one-half of the total estimated revenues for that year..

In view of these provisions it appears that in order for a special charter city to make any expenditure whatever by the issuance of warrants, there must first have been an estimate by the department concerned and then an appropriation by the council for such purpose. In the absence of any such an estimate or appropriation being made, there is no authority by which warrants may be issued in anticipation of funds.

It may be that such extension may be made by submitting the proposition to the voters of the city, together with the question of the issuance of bonds to defray the cost of same. If such procedure is followed and the vote is favorable, there would be no question but what such city could procede with such a proposition under the provisions of the law relating to such procedure.

In view of the foregoing, it is the opinion of this department that a special charter city may not issue warrants in anticipation of funds for the purpose of paying the cost of the extensions to the water mains of such city unless estimated and appropriated therefor by the council as provided in sections 941 and 942 of the code.

CITIES AND TOWNS—MAYOR'S FEES—Mayor must account for all fees and fines collected.

April 30, 1923.

Auditor of State: I am in receipt of your letter dated April 16, 1923, in which you request an opinion from this department. Your request is in words as follows:

"We are in receipt of the following letter from a Municipal Examiner:

"'Dear Sir:

"'In regard to the fees in Mayor's cases at Knoxville, Iowa, I am enclosing herewith all the information to be obtained.

"'Ordinance No. 143.

"'The Mayor shall receive as his compensation the sum of $300.00 per annum, to be paid in monthly installments at the end of each month in the sum of $25.00 and the fees allowed by law when acting in judicial capacity, provided however that the city shall not be liable to the mayor for any uncollected fees accruing to said mayor in any prosecution or other proceedings instituted by said city.

"'Approved and adopted this 4th day of April, 1904.

"'H. Shivvers, Clerk W. P. Gibson, Mayor.'

"'This is the only ordinance I can find in regard to Mayor's salary and is in fact the only one there is. Ordinances of Knoxville have not been revised since this date.

"'In this particular case, the mayor was deducting fee in all cases whether collected or uncollected. In cases which were dismissed or found not guilty, the Mayor would deduct his $3.00 fee from the next fine which he happened to impose. The only argument he set forth for doing this was the fact that mayors preceding him had done it.'

"Kindly favor this department with an official opinion as to whether it would be legal for the Mayor under Ordinance No. 143 to apply fines collected on one case to his own fees on another case wherein the costs had not been collected.

"An early reply will be appreciated."

The question submitted by you must be answered in the negative. The Mayor must account for all fees and fines collected. Each case stands on its own bottom and the Mayor would not be authorized to take a fine collected in one case and apply it against costs uncollected in another case.

OPINIONS RELATING TO CORPORATIONS

BUILDING AND LOAN ASSOCIATION—Auditor of State should annually examine each domestic and each foreign building and loan association. Domestic locals should be examined on request of 20 shareholders.

June 14, 1924.

Auditor of State: You have requested an opinion from this department upon the question of whether or not it is the duty of the Auditor of State to make an annual examination of all building and loan associaions operating in this state.

Section 1904 of the Code, 1897, as amended by Section 57 of Chapter 209 of the Acts of the 39th General Assembly, provides that the Auditor shall cause to be examined at least once in each year all domestic and foreign building and loan and savings and loan associations doing business in this state. There is, therefore, no question but what he is required to annually examine each of these classes of associations.

Section 1905 of the Code, 1897, provides that domestic local building and loan and savings and loan associations shall be examined by the Auditor of State when twenty shareholders of such association shall in writing request an examination. Hence, the Auditor is not required to examine these associations except upon proper request or upon his own initiative should he have any occasion to make such an examination.

FOREIGN CORPORATIONS: A foreign corporation not for pecuniary profit must file a report with the Secretary of State, but is not required to pay the annual fee.

July 18, 1924.

Secretary of State: We have received your letter of July 8, 1924 asking this department for an opinion upon the questions which you have stated as follows:

"Will you please give to this department a written opinion upon the following questions:

"1. Is a foreign corporation not for pecuniary profit, which has qualified to do business in this state under the provisions of Sections 5441, 5442 and 5443 of the Compiled Code, required to file an annual report with the Secretary of State between July 1st and August 1st of each year?

"2. Is such a foreign corporation required to pay an annual fee of $1.00?"

Sections 5441 and 5442 are as follows:

"Any corporation organized under the laws of another state, or of any territory of the United States, for any of the purposes mentioned in the preceding section, desiring a permit to do business in the state of Iowa, shall file with the secretary of state a certified copy of its articles of incorporation duly attested by the secretary of state, or other state officers in whose office the original articles were filed, accompanied by a resolution of its board of directors or stockholders authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in the state. If it appears that said foreign corporation is, in fact, organized not for pecuniary profit, the secretary of state shall, upon the payment of ten cents per hundred words, record said articles of incorporation and issue a permit to such corporation to do business in the state of Iowa, for which permit the secretary of state shall charge, and receive, a fee of five dollars. Upon the issuance of such permit the corporation shall be entitled to carry on its business in the state of Iowa."

"Any corporation, organized as provided in the preceding section shall, between the first day of July and the first day of August of each year, make an annual report to the secretary of state, said report to be in such form as he may prescribe and upon a blank to be prepared by him for that purpose."

It will be observed that Section 5442 requires a foreign non-pecuniary corporation to make an annual report to the secretary of state between the first day of July and the first day of August of each year, such report to be in such form as the secretary of state may prescribe and upon a blank to be prepared by him for that purpose. Therefore, such a corporation must file an annual report as therein provided.

Section 5338 of the Compiled Code is as follows:

"Every corporation whose corporate period has not expired, which has heretofore obtained, or may hereafter obtain, *a certificate of incorporation or permit under the provisions of this chapter to transact business in this state as a corporation,* whether the same be a domestic or a foreign corporation, shall pay to the secretary of state an annual fee in the sum of one dollar."

A reading of the above section will disclose the fact that its provisions relate alone to the corporations which secure a certificate of corporation or a permit to transact business in this state under the provisions of the chapter referred to therein. To what does the statute refer in using the term "this chapter?" There can be no doubt as to its meaning. This phrase can only refer to the chapter in which it is found, namely, chapter 1, title 17, of the Compiled Code. Its provisions, therefore, are limited to corporations for pecuniary profit.

Section 1 of chapter 6 of the Acts of the Extra Session of the 40th General Assembly exempts certain corporations from the requirement of paying an annual

fee and making a report. This section is a rewriting of section 5345 of the Compiled Code and with some slight changes is the same as the original statute.

This section is found in the chapter relating to corporations for pecuniary profit. It is inconsistent with the provisions of section 5542 which we have copied into this opinion. It is a well known rule of construction of statutes that they will be construed in such a way as to give full force and effect to all the provisions thereof, if this can be done without doing violence to the language used therein.

Applying this rule to the statute under consideration, we are of the opinion that section 1 of said chapter 6 does not apply to foreign non-pecuniary corporations, and therefore, has no application to the question we are considering.

Therefore, it is our conclusion that under the laws of this state a foreign corporation not for pecuniary profit must file the report with the Secretary of State as required by section 5442 of the Compiled Code, but that there is no requirement of the statute that such corporation must pay the annual fee.

CORPORATIONS: Held on a statement of facts that a corporation had not complied with the law in renewing its corporate existence.

December 31, 1924

Secretary of State: Under date of the 22nd instant you submitted to this department a request for an opinion as to whether or not the procedure followed by a certain corporation in attempting to extend the period of its corporate existence was proper. The facts as stated by you are as follows:

On February 4, 1905 Articles of Incorporation were filed which provided in part as follows:

"The corporation shall commence and begin on the 2nd day of February, 1905 and terminate on the first day of February, 1925, unless sooner dissolved by a two-thirds vote of the capital stock."

That on January 28, 1921 the same corporation filed in your office what purported to be an amended and substituted Articles of Incorporation increasing the capital stock. The certificate forwarded to your department upon which it acted is as follows:

"That at a special meeting of the stockholders of said corporation held at Dubuque, Iowa, on the 14th day of December, 1920, at which meeting ninety percent (90%) of all of the outstanding capital stock of said corporation was represented either in person or by duly authorized proxies, the authorized capital stock of said Corporation was increased from One Hundred Thousand ($100,000) Dollars to Three Hundred Fifty ($350,000) Thousand Dollars, and said Articles were also changed in other respects and amended and substituted Articles of Incorporation hereto attached and made a part hereto were duly adopted by the unanimous vote of all of the stockholders of said corporation."

And among other things the amended and substituted articles provide:

"This corporation shall commence business on the first day of January, 1921, and shall terminate on the 31st day of December, 1940 unless sooner dissolved by a two-thirds vote of the outstanding capital stock."

The certificate furnished by the corporation of the meeting of the stockholders held on the 14th day of December, 1920, shows upon its face that only ninety per cent of the outstanding capital stock was represented at such a meeting. It fails to show that any stockholder was notified of the intention of the corporation to extend its period of corporate existence. It is the view of this department that any stockholder not present and participating in such meeting would have a right to object at any time to the action of the corporation in extending its period of existence because such a stockholder was deprived of a right he had under the statute to a liquidation of the corporation upon the termination of the period for which it

was originally incorporated. Not only is this true, but Section 1618 of the Supplement to the Code of Iowa, 1913, which is now Section 8365 of the Code of Iowa, 1924, provides that corporations may renew their corporate existence "within three months before or after the time for the termination thereof." This provision of the statute was called to your attention in an opinion rendered by the Attorney General on the 14th day of Ocober, 1921, and in that opinion this office held that the renewal must be made within that period fixed by statute, and not at any other time. In view of the opinion I have referred to and the record in this case, this department is of the opinion that the act of the corporation in attempting to renew its period of corporate existence at the time and in the manner in which it attempted to do the same is a nullity and that its corporate existence will cease at the time prescribed in the original articles of incorporation.

BLUE SKY LAW—People's Service Company of Garner, Iowa, should be required to qualify under provisions of Blue Sky Law before soliciting in this state.

July 23, 1923.

Supt. Securities Dept.: This department desires to acknowledge receipt of your communication of July 6, 1923 asking us for an opinion upon the following proposition:

"We hand you herewith a copy of the trust agreement of the People's Service Company of Garner, Iowa, together with application blanks, certificates, notes and literature and ask that you examine same at your early convenience and advise us as to whether in your opinion this trust association should be required to qualify under the provisions of the Blue Sky Law before soliciting in this state."

We do not deem it advisable or necessary to set forth in this opinion in their entirety, or to abstract or summarize, the declaration of trust of the Peoples Service Company of Garner, Iowa, the application blanks, certificates, notes and literature, but it will be sufficient for us to state that in our opinion the said company comes within the provisions of what is commonly known as the Blue Sky Law and that such company should be required to qualify under the provisions thereof before soliciting in this state. 1920-u to 1920-u-22, both inclusive, of the Code Supplement 1915, as amended by Chapter 189 of the Acts of the Thirty-ninth General Assembly, and Chapter 167 of the Acts of the Fortieth General Assembly.

Chapter 167 of the Acts of the Fortieth General Assembly seems to remove any doubt as to whether such Service Companies are included within the terms and provisions of the statute.

Section 1 of Chapter 189 of the Acts of the Thirty-ninth General Assembly, as amended by said Chapter 167, reads as follows:

"Every person, firm, association, company, or corporation that shall, either directly or through representatives or agents, sell, offer, or negotiate for sale, within this state, any stocks, certificates, bonds, debentures, certificates of participation, certificates of shares or interest, preorganization certificates and subscriptions, memberships, profit sharing certificates, investments, contracts, unit interests in property, estates, *shares of participation, common law trust agreements,* or real estate, oil, gas or mineral leases * * * shall be subject to the provisions of this act, except as herein otherwise provided: and shall, before selling or offering for sale any such securities in this state, be required to secure a permit from the secretary of state of the state of Iowa."

We find no provisions of Section 2 of said Chapter 189 that exempt companies of the character of the Peoples' Service Company of Garner from the provisions of the Blue Sky Law. Companies such as the company in question have many of

the attributes of corporations, among which is the exemption of the certificate holders therein from liability for debts and obligations of the trust created thereby. If such companies are not subject to the provisions of said law, then there is a plain and effective way of evading and defeating the purpose of the legislature in enacting said statute, thus depriving the people of the state of the protection of the statute in so far as such companies are concerned.

We are convinced that it was not the intention of the legislature to exempt such companies from the requirements of the statute. We therefore hold that the Peoples' Service Company of Garner, Iowa should be required to qualify under the provisions of the Blue Sky Law before soliciting in this state.

COOPERATIVE ASSOCIATION—Discussion of law relative to, as contained in Chap. 122, Acts 39th G. A.

December 4, 1923.

Mr. G. O. Chapman, Secretary, Chariton, Iowa: You have requested an opinion from this department upon the following propositions arising under the law relative to cooperative associations as contained in Chapter 122 of the Acts of the 39th General Assembly:

"We have a Corporation in Lucas Co. for the purpose of buying, selling, shipping and handling livestock and other farm supplies.

"1st. We have no authorized capital stock, our liability limitations are fixed at $1.00 or the price of membership fee paid.

"2nd. Where shall we place the amount received for Membership fee. At present we have it in our sinking fund.

"3rd. Are we allowed to buy, sell and ship for non members providing we do so at cost or nearly so as possible.

"4th. Our membership does not approve of the producers contract. Is this compulsory or not as we did include same in our Articles of Incorporation."

The first proposition submitted is as to the liability of members of the association. Section 13 of the chapter provides that members of such an association may limit their personal liability to the amount of their membership fee by providing therefor in their Articles of Incorporation.

Your second proposition inquires as to which fund the membership fee shall be placed in. Section 14 of the chapter provides that such an association may provide for meeting the costs of operation through dues, assessments or service charges which must be prescribed in the by-laws. It is further provided that such charges shall be set high enough to provide a margin of safety above current operating costs and fixed charges upon borrowed capital. Then if there is any surplus remaining at the end of the year it is provided that the directors shall set aside not less than 10% of such savings for the accumulation of a reserve fund until such fund shall equal at least 40% of the invested capital of the association. It is further provided that out of said surplus not less than 1% nor more than 5% shall be set aside for a permanent educational fund from which expenditures shall be made annually at the discretion of the directors for the purpose of teaching co-operation. The remainder is then to be returned to the members as a patronage dividend prorated on a uniform basis to each member upon the value of the business done by such member through the association.

Your third proposition inquires as to whether or not you may handle products of a non member. Section 2 of the chapter specifically prohibits any such association from handling products of any non member.

Your fourth question relates to what you term a producer's contract. I take it that you refer to the contract required by Section 11 of the chapter which provides

that the "association *may* require members to sell all or a stipulated part of their specifically enumerated products exclusively through the association or to buy specifically enumerated supplies exclusively through the association." It will be observed that the word "may" is used in this provision. The word "may" is used in a permissive sense and it is, therefore, optional with the association as to whether or not it will require the members to come within such a provision. If it is desired to require members to contract with the association to deal in the manner provided in Section 11, all of the requisites contained in the section should be complied with.

We suggest that the officers of your shipping association secure a copy of this law and read over the provisions thereof carefully. They are in clear and plain language and we believe that a careful study of them will materially aid you in the conduct of the affairs of your association. If there is any question which arises relative to the interpretation to be given any legal phraseology contained therein, we suggest that you consult wih your County Attorney who will undoubtedly be able to give you the correct explanation thereof. I trust that the foregoing will sufficiently answer your inquiry.

CORPORATIONS—Cooperative Associations—Such associations cannot issue preferred stock.

December 7, 1923.

Secretary of State: You have orally requested the opinion of this department upon the question of whether, under the law authorizing the organization of cooperative associations under Sections 1641-r1 to 1641-r20, Supplemental Supplement to the Code 1915, such associations may issue preferred stock.

Without going into the subject in detail, we are of the opinion that in view of the character of these associations and the language of the statutes authorizing their creation, they cannot issue any stock except common stock. Being cooperative in character, it was the clear intention of the law makers to limit the shares of stock to those entitling the owner to full participation in the management of the association.

Section 1641-r8 of the law referred to reads as follows:

"No stockholder in any such association shall own shares of a greater aggregate par value than one thousand dollars, except as hereinafter provided, nor shall he be entitled to more than five votes."

This section, we believe, practically determines the question which you have propounded, limiting the number of shares any one member may own and providing that those shares shall participate in the management of the affairs of the association with certain limitations as to the number of votes such shareholders are entitled to cast in the management of the organization.

OLD COLONY BOND COMPANY—Discussion of methods of doing business.

CLEVELAND DISCOUNT COMPANY—Discussion of in connection with business of Old Colony Co.

December 14, 1923.

Auditor of State: This department is in receipt of your letter of recent date in which you request an opinion from this department. For convenience we quote your letter which contains a full and complete statement of the facts:

"The Old Colony State Bond Company is authorized to transact business under chapter 13-a, title IX, supplement to the code, 1913. This company is selling a bond on the partial payment plan and under the law is required to deposit certain securities in this office to cover its liabilities to the contract holders in Iowa. At

the time the company was admitted it was required to deposit a corporate bond for $25,000 and at the end of a year deposit certain securities as are set out in chapter 1806 of the code to the amount of $25,000, or more if its liabilities were more, $25,000 being the minimum amount of securities to be on deposit.

On July 20, 1922, the executive council approved a form of contract submitted by the Old Colony State Bond Company to be used by it in selling bonds of the Cleveland Discount Company on the partial payment plan, the Old Colony State Bond Company being required to deposit these Cleveland Discount Company bonds in the auditor of state's office to cover its liabilities to the bond purchasers, that is for every dollar the Old Colony State Bond Company received from the contract holders it had to deposit Cleveland Discount Company bonds for a like amount.

In February, 1923, the Cleveland Discount Company went into the hands of a receiver. At a conference held with Mr. L. D. Ross, secretary and treasurer of the Old Colony State Bond Company, early in March, at which conference you were present, an agreement was made which reads as follows:

'Whereas, the Old Colony State Bond Company, a corporation duly organized and doing business under the laws of the state of Iowa, holds a permit issued by the state authorizing such company to sell certain bonds of the Cleveland Discount Company, a corporation, on the partial payment plan, and

Whereas, under such permit the said Old Colony State Bond Company has issued certain contracts for the sale and delivery of the bonds of the said Cleveland Discount Company, and

Whereas, it now appears that the Cleveland Discount Company is in the hands of a receiver and that the time of the termination of such receivership is uncertain, as is the further fact as to whether or not a liquidation of the assets of such corporation will follow.

Now therefore, the said Old Colony State Bond Company agrees for the use and benefit of the Auditor of the State of Iowa, and of each and all of the holders of contracts sold under the permit so granted:

1. That the Old Colony State Bond Company shall within six months from and after February 24, 1923, deposit securities to be approved by the Auditor of State and such as are classified in subdivisions 1, 2, 3, 4, and 5, of section 1806, supplement to the code, 1913, in lieu of the bonds of the Cleveland Discount Company now deposited as security with the Auditor of State.

2. That all payments on contracts now outstanding and for the security of which, securities have not been deposited with the Auditor of State, shall be invested in that class of securities set out in subdivisions 1, 2, 3, 4, and 5 of section 1806, supplement to the code, 1913, to be approved by and deposited with the Auditor of State.

3. That the securities deposited with the Auditor of State shall at all times be equal to the total amount of all payments made on such contracts together with accumulated interest as provided in such contracts.

4. That the Old Colony State Bond Company shall at once prepare a rider to be approved by the Auditor of State, which rider shall be forwarded to each contract holder within fifteen days from and after the signing of this agreement. Such rider shall provide in substance that the holder of the contract to which the same is attached shall have the option upon the completion of the provisions of the contract, to accept the Cleveland Discount Company bonds sold under the provisions thereof in accordance with the terms and provisions thereof, or in lieu thereof to accept collateral trust bonds issued by the Old Colony State Bond Company and secured by securities of the class provided in subdivisions 1, 2, 3, 4, and 5, of section 1806, supplement to the code, 1913, which securities shall be subject to the approval of the Auditor of State.

5. That the Old Colony State Bond Company shall deposit a bond of five thousand dollars ($5,000) to guarantee the deposit of securities with the Auditor of State for all moneys received from those persons now holding contracts for the purchase of Cleveland Discount Company bonds. Such bonds shall be kept on deposit with the Auditor of State for a period of one year from and after the taking effect of this contract.

6. That the Old Colony State Bond Company shall not sell any additional contracts for the delivery of Cleveland Discount Company bonds until express authority so to do shall be granted by the Auditor of State with the approval of the Executive Council.

7. That nothing herein provided shall deprive any contract holder of the rights which he now possesses under the law.

All of which is finally agreed to this 8th day of March, 1923.'

This agreement was signed by the officers of the Old Colony State Bond Company who were authorized and empowered to do so by the directors of the company. It was submitted to the Executive Council and was approved by the Executive Council on the fifteenth day of March, 1923. I am enclosing a copy of the rider sent out to the contract holders for Cleveland Discount Company bonds. When the above agreement was made the Old Colony State Bond Company had on deposit in this office $21,000 in Cleveland Discount Company bonds, that being approximately its total liability to contract holders. The company has not substituted other securities for any of these bonds.

An examination made of the books of the Old Colony State Bond Company to and including October 31, 1923, shows that the company has received from contract holders for the purchase of Cleveland Discount Company bonds $15,462.63; and that it has received from contract holders who elected to accept collateral trust bonds issued by the Old Colony State Bonding Company in lieu of the Cleveland Discount Company bonds, $10,369.01; a total of $25,831.64. The examination also shows that the company has issued first mortgage collateral trust five per cent bonds to the amount of $2,800; and first mortgage certificates to the amount of $474.89; a total of $3,274.89. This amount the company claims is secured by first mortgages on real estate deposited with the Northern Trust and Savings Bank, as trustee. According to the examiners' report made from the books of the company it would appear that $29,106.53 is the liability of the company to those persons who contracted to purchase Cleveland Discount Company bonds. The examination further shows that the Old Colony State Bond Company has received from contract holders for the purchase of the Old Colony accumulative bonds, $24,635.78. Of this amount the company claims that $12,580.52 is the reserve or the amount of its liability to contract holders.

The company has on deposit in this office approved securities in the amount of $27,700 and Cleveland Discount Company bonds of the face value of $21,000, or a total of $48,700. The company contends therefore that it has an excess on deposit of $7,012.95. It is my belief that no part of the $25,000 of security deposited by the Old Colony State Bond Company can be used to secure its liability for Cleveland Discount Company contracts, and therefore that the company has but $2,700 in securities in addition to the $21,000 in Cleveland Discount Company bonds and that it should have securities to the amount of $5,406.53 in addition to the $21,000 and the $2,700. But allowing the company the $3,274.89 which it claims to have on deposit with the Northern Trust and Savings Bank, as trustee, it would still be short $2,131.64, and I have made demand upon Mr. L. D. Ross, secretary and treasurer of the company, for this amount of money plus any amount received since and have been advised by him that he has ample security here and will not deposit more.

The questions involved are these:

First: What is the liability of the Old Colony State Bond Company to the purchasers of its accumulative bonds? That is, is it liable for every dollar paid into the company for an accumulative bond plus the interest, or is it only liable for the so-called reserve? The company reserves the right to cancel the bond and when so cancelled agrees to pay all money paid into the company plus interest at five per cent.

Second: In the event the company's liability on this accumulative bond is less than $25,000 (the minimum amount the company must put up), can it use the difference as security for Cleveland Discount Company bond purchasers (see agreement as to Cleveland Discount Company bond purchasers)?

Third: Is the company complying with its agreement (a copy of which is made a part of this letter) when it deposits with the trustee securities to cover

its first mortgage collateral trust five per cent bonds without having securities on deposit in this office?

Under section 1920-s it is provided that if upon examination the auditor of state finds among other things that the affairs of the company are not in a sound condition, he may revoke its certificate of authority to do business in the state, and having revoked the certificate of authority of an association organized under the laws of the state, he shall report the same to the attorney general who shall proceed as provided in section five of chapter 13-a.

It is contended by this office that the Old Colony State Bond Company has failed to comply with section one of its agreement relative to the Cleveland Discount Company bonds; that it has also failed to comply with sections two, three, and five thereof. The Old Colony State Bond Company admits that it has not complied with sections one and five but claims it has ample security on deposit to cover its entire liability.

I would thank you to advise me at your earliest convenience, if I would be justified in revoking the certificate of authority of this company under the provisions of section 1920-s.

For your further information in this connection I am enclosing a copy of the examiners' report of the books of the Old Colony State Bond Company."

The first question submitted by you is very important. I trust that it will not be inconvenient for you to permit this department to have a week or two in which to communicate with other states having a law similar to ours, so that we may have the precedents throughout the United States.

In answer to the second question you are advised that this company has qualified separately for the sale of its own accumulated bonds and for the sale of the Cleveland Discount Company's bonds. Permission was granted this company as to each class of bonds upon two separate and complete applications and upon two orders. It necessarily follows that as to each qualification and order the statutory deposit should be required. It is undoubtedly true that you could hold all of the bonds in your hands for the payment of any damages resulting by reason of a failure to comply as to each of the classes, but this in no wise would authorize you to waive the requirement as to the statutory deposit so referred to.

In answer to your third question, you are advised that it is in our opinion your duty to demand a compliance with the agreement referred to by you unless the agreement is modified with the approval of the Executive Council. It was upon this agreement that the approval of the Executive Council was secured and it should not be modified or changed without authority.

Should there be a failure to comply, it would of course be your duty to protect the state as contemplated under the law. In connection therewith you would undoubtedly have a right to revoke the certificate of authority of this company.

OPINIONS RELATING TO COUNTIES

TUCK BILL—Collectible revenues must be applied to payment of outstanding endorsed warrants against the road fund as they exist.

July 24, 1923.

County Attorney, Buchanan County, Independence, Iowa: I am in receipt of your letter dated July 21, 1923, in which you request an opinion from this department. Your request is in words as follows:

"Permit me to submit the following, on which I respectfully request your opinion at your earliest convenience.

"On Jan. 1, 1923, the Buchanan County Road Fund was in the following condition:

Outstanding endorsed warrants	$ 29,538
Balance of cash in road fund	7,248

"On July 4, 1923 the Buchanan County Road Fund was in the following condition:

Outstanding endorsed warrants	$ 34,964
Balance of cash in road fund	26,499

"It also appears that for the year 1923 the

Total Collectible Revenues for the year for the Road Fund are	$ 35,885
Warrants drawn on Road Fund from January 1, 1923 to July 4, 1923	20,594
"Leaving a balance of	$ 15,291

of the revenues actually collectible for 1923 and for which warrants have not been drawn during 1923.

"I desire to be advised if the officers of Buchanan County may during the remainder of the year 1923 proceed to expend the balance of the collectible revenues for 1923 over and above the expenditures already made during the year 1923. In other words may said officers of the county continue to expend the above mentioned balance of $15,291 for road work during the balance of 1923? Or does Chapter 104, 40th G. A. require that such balance of the collectible revenues be applied to the payment of the outstanding endorsed warrants against the Road Fund as they existed either on January 1, 1923 or July 4, 1923?"

You are advised that the collectible revenues must be applied to the payment of outstanding endorsed warrants against the road fund as they exist, whether on July 1, 1923, July 4, 1923, or any other date. The proper rule to adopt is to place in one column the legally collectible revenues for the year, that is, the amount shown on the tax books plus any other collectible revenues due during the year, as against the total of such sums must be placed all outstanding warrants unpaid, and the difference is the amount remaining to be expended during the balance of the year. It must be understood, however, that any contracts existing prior to July 4, 1923 may be completed without regard to the provisions of the act to which you refer.

May I suggest to you that if your road fund is in such condition that it will be difficult for you to operate during the remainder of the year that the board of supervisors should avail itself of the provisions of the law which permits the board to order a refund to the county road fund of any expenditures made for rights of way for the benefit of the primary road system. In order that there may be no injury to the primary road fund, however, I would suggest that you should take the matter up with the Highway Commission and secure their cooperation, all to the end that the roads of Buchanan County may be cared for during the remainder of the year.

TUCK BILL—Does not affect statutes of this state providing for the funding of indebtedness outstanding.

August 18, 1923.

County Attorney, Appanoose County, Centerville, Iowa: This department is in receipt of your request for an opinion, which request is in words as follows:

"I call your attention to sub-section 8, Section 2, Chapter 105, 40th G. A., which says that the law on limitation of expenditures shall not apply 'to expenditures from the county general fund legally payable from that fund and contracted prior to January 1st, 1924.'

"It seems clear on the face of it that if on January 1st, 1924 the general fund is found to be exhausted, by reason of expenditures that are legally payable from that fund or contracted prior to January 1st, 1924, bonds may be issued by the county to make up the deficiency. However, one bonding company has instructed the board of supervisors that bonds, if issued, should be dated December 31st, 1923, in order to keep within the provisions of Chapters 104 and 105, 40th G. A.

"Now, I would like to have the opinion of your department on the following matters:

"First, if, on January 1st, 1924, the general fund is found to be exhausted, by reason of expenditures legally paid out of said fund prior to January 1st, or contracted prior to January 1st and to be paid after that date, can bonds be issued and dated after said January 1st to take care of the deficiency already created and the anticipated deficiency by reason of contracts made prior to said January 1st, altho not to be paid until after that date?

"Second, if dated December 31st, 1923, would the bonds be illegal by reason of conflicting with Section 409-e, Chapter 1, Title 4, Supplement of 1913?"

You are advised that it is the opinion of this department that Chapters 104 and 105 do not in any manner affect the statutes of this state providing for the funding of indebtedness outstanding. If the indebtedness is outstanding, and such indebtedness is legal, then such indebtedness may be funded. What Chapters 104 and 105 apply to is the creation of the indebtedness originally. This being true, if you have conformed to the provisions of these two chapters, then it makes no difference whether bonded indebtedness is dated prior to January 1, 1924, or afterward, the result would be exactly the same, and such bonded indebtedness would be valid.

In conclusion may I express to you regards.

COUNTY AUDITOR—Not entitled to additional pay for care of voting machines.

September 12, 1923.

Auditor of State: Your favor of the 15th at hand requesting an opinion from this department has been referred to me for reply. Your request is as follows:

"In settlement of an item charged by Examiner Paul N. Loomis to the county auditor of Webster County, we are confronted with an objection on the part of the county auditor to whom the charge is made. The facts in the case are as follows:

"The county auditor claims to have been appointed custodian of the voting machine which belongs to Webster County. After the primary election, claim No. 100 was filed on which the auditor was allowed and paid $158.50. This claim was itemized as 'Expense Setting Up Voting Machines for Primary Election.' Then after the general election, on claim No. 156 the auditor was allowed and paid $168.62, this claim being itemized as 'Custodian of Voting Machines, Preparing Them for election November 7, 1922, and Expense Delivering Supplies.' You will note on these claims the county auditor received a total sum of $327.12.

"After going over the matter carefully, with the auditor, the examiner concluded Mr. Snook, the auditor, might be allowed for actual expense in connection with these elections $127.12, and set this matter out in his report as a legitimate portion of the expense. The balance, amounting to $200.00 he has charged back to the auditor, asking him to make refund of the $200.00 to the county. Mr. Snook, the auditor, contends that as custodian, of the machines, he is entitled to this $200.00. The question is, Can the auditor have an allowance for acting as custodian of the voting machines if the Board, by resolution, appoints him custodian?

"An early opinion on this question will be appreciated."

The County Auditor is by statute made the custodian of the voting machines or ballots and ballot boxes, regardless of any resolution by the board of supervisors. His compensation is fixed by statute and the board of supervisors could not by resolution or any other method change the compensation provided by the statute, either by increasing or decreasing the same. Any allowance by the board of super-

visors of additional compensation to the county auditor as custodian of the voting machines would be clearly unauthorized and illegal. The county auditor would be entitled to the actual expense incurred by him in distributing the voting machines or ballots and ballot boxes and in preparing them for the election. Any amount received by him in excess of these actual legitimate expenses should be charged back to him and refunded to the county.

TOWNSHIP TRUSTEES—May use gravel from pits purchased by the county without payment to county for same.

September 26, 1923.

County Attorney, Webster County, Fort Dodge, Iowa: Your favor of the 30th ult. has been referred to me. You request the opinion of this department on the following proposition:

"I wish you would give me your opinion as to whether or not under Sec. 2024-I and 2024-I, 1 Supplement to the Code, 1913, which provides for the condemnation of gravel pits by the County Board of Supervisors, the Township Trustees can use gravel from these pits, which are purchased by the County, without payment for the gravel used. Section 2024-I, 1 seems to indicate that township trustees may use the gravel purchased by the County, and the question has arisen here and I would appreciate your opinion on the matter."

The clear meaning of Section 2024-I, 1 is that the trustees of any township shall have the right to enter upon, take and use such gravel for the purpose of improving the highways and roads in their respective townships. It would seem that the Legislature clearly intended that the trustees could appropriate this material without payment to the county for the same.

We are of the opinion that if payment by the trustees had been within the intention of the Legislature they would have used different language than that contained in the section just above referred to.

TUCK BILL—Interpretation given to Chaps. 104 and 105. 26 different phases covered.

September 28, 1923.

Auditor of State: This department is in reecipt of your letter of recent date in which you submit a number of inquiries as to the proper interpretation to be given chapters 104 and 105 of the Acts of the 40th General Assembly. This letter being general in its character and the requests being so numerous, we refrain from quoting the letter at length and we likewise refrain from extending the opinion beyond the mere determination of the questions submitted. Our conclusions are as follows:

First: The term "collectible revenue" as used in the statute means the amount of revenue which is actually on the tax books, and either paid, or to be paid during the year. The fact that some portion of the tax may not be paid is immaterial.

Second: The proper rule to adopt is to place in one column the collectible revenues in a particular fund for the year, that is the amount shown on the tax books plus any other collectible revenues during the year of any unexpended balance in said fund for any previous years. Against the total of such sums must be placed all outstanding warrants, and the difference is the amount remaining to be expended during the year.

Third: The board of supervisors may proceed by allowing claims, issuing warrants, or entering into contracts, involving a particular fund until the limit prescribed in the statute is reached and then no further action can be taken by the board that will increase the expenditures from such fund during the balance of

the year. The obligations contracted, or warrants issued for any of the purposes specified in the non-applicability clauses are not to be considered in determining when the limit prescribed by the statute has been finally reached. The board of supervisors may proceed to carry out any of the purposes specified in the non-applicability clauses even though it may increase the expenditures from a particular fund beyond the collectible revenue of the year as herein defined.

Fourth: The evident purpose of the statute is to compel counties in the future to operate on a cash basis or within the collectible revenue for the year.

Fifth: If a warrant has been issued for a legal indebtedness within the meaning of the statutes in question, and if there be no money in the fund against which it has been issued, the warrant may be stamped not paid for want of funds under the statutes which were enacted prior to the taking effect of the Tuck and Holdoegel statutes.

Sixth: For the purpose of determining the amount of expenditures from any particular fund, under these statutes, the collectible revenue and the warrants issued have reference entirely to the year in which collected and issued regardless of the amount of warrants remaining unpaid at the end of the previous year.

Seventh: For the purpose of determining whether the expenditures from the county fund are less than the collectible revenue for the year, the expenses incurred in connection with the operation of the courts should be deducted from the total amount expended in arriving at the amount to be recognized as a legitimate expenditure from the county fund.

Eighth: The construction adopted as to the method of determining the limit of expenditures in the county fund, stated in the seventh paragraph hereof also applies to the bridge fund in cases of bridges destroyed by fire or to the county fund in case of buildings destroyed by fire.

Ninth: By the specific provisions of the statutes, these statutes do not apply to contracts entered into prior to July 4, 1923. Therefore the limitation of the collectible revenue will not prevent the payment of the consideration specified in Road and Bridge contracts entered into prior to that date. The same rule would apply to contracts entered into for improvements on county buildings or improvements on the county home, where the contracts have been made prior to July 4, 1923.

Tenth: The collectible revenues as defined herein must be applied to the outstanding endorsed warrants against a particular fund as they exist, whether on July 1, 1923, July 4, 1923 or any other date.

Eleventh: Expenditures contracted prior to July 4, 1923, may be funded or refunded under the provisions of sections 403 and 404 of the Supplement to the Code, 1913. The act of the board of supervisors in funding or refunding such indebtedness may be after July 4, 1923, and would have the same force and effect as though prior to July 4, 1923.

Twelfth: The board of supervisors is vested with power to determine when there has been an extraordinary casualty such as contemplated in sub-section 1 of section 2 of said chapter 104. The finding by the board, in the absence of fraud will be upheld. Prior to the incurring of the indebtedness, however, the board should by proper resolution make a finding based upon the facts and enter such resolution of record. In determining that there has been an extraordinary casualty, the board should fairly and honestly consider all of the facts, advising with the County Attorney, and finally determine the question and reduce such determina-

tion to a resolution to be entered on the record. If the board of supervisors finds, as a matter of fact, there has been an extraordinary casualty such as contemplated by the law, then such board may proceed in accordance with sub-section 1 of section 2 to which we have referred.

Thirteenth: Under sub-section five of section two of said chapter 105, if there has been in truth a contract entered into prior to July 4, 1923, then the contract may be completed without regard to the provisions of said chapter 104. The evident purpose and intent of the legislature was to allow the completion of all contracts entered into prior to July 4, 1923, without regard to prohibitions contained in said chapter 104.

Fourteenth: Chapters 104 and 105 do not, in any manner, effect the statutes of this state providing for the funding or refunding of indebtedness outstanding. If the indebtedness is outstanding, and such indebtedness is legal, then such indebtedness may be funded or refunded. What chapters 104 and 105 apply to is the incurring of the indebtedness originally. This being true, if the board of supervisors has conformed to the provisions of these two chapters, then it makes no difference whether the bonded indebtedness is dated January 1, 1924, or afterwards. The result would be exactly the same and such bonded indebtedness would be valid.

Fifteenth: These statutes are not applicable to the primary road fund. The anticipation of such road fund, by the issuance of road certificates, as provided in section 3922 of the Compiled Code, is not contrary to the provisions of these statutes. The primary road fund is not a "county fund" within the meaning of the phrase as used in said statutes. Under sub-division eight of section 2 of said chapter 105, warrants may be issued for the salary of county officials to and including the month of December, 1923.

Sixteenth: The county may issue warrants in anticipation of the amount to be received from the state as the refund due for the maintenance of the primary road system. As this amount is certain, definite and fixed, the refund, while actually in the primary road fund, in truth, is the property of the county to the same extent as though it were cash in the county treasury.

Seventeenth: It is not necessary for the board of supervisors to provide for the issuance of bonds on the first day of January, 1924, to take up any outstanding warrants in any fund on that date. The board of supervisors may carry such indebtedness provided they do not expend more than the anticipated allotment for the ensuing year.

Eigheenth: Where there is no money in the poor fund, under the provisions of sub-division 3 of section 2 of said chapter 104, warrants should, nevertheless, be issued to pay claims for widow's pensions, which have been allowed by the court and also for the expenses of running the County Home. The board should allow bills that are presented for the benefit of persons entitled to receive help from public funds such as groceries, medicines and other expenditures of like character.

Nineteenth: After the limit prescribed by the statute has been reached, and there is no money in the County Fund, no bills should be presented to the board for allowance unless the bills were incurred for some purpose as specified in section 2 of chapter 104 and section 2 of chapter 105. However, all claims against the county that are filed with the county auditor should be entered on the claim register provided for in section 2 of chapter 317 of the Acts of the Thirty-eighth General Assembly regardless of the fact that they may not be allowed by the board of supervisors under the provisions of said chapters 104 and 105.

Twentieth: If court expenses are paid from the county fund and warrants are issued for legitimate expenses in excess of the collectible revenues in said fund as defined herein, bonds may be issued for such outstanding warrants at the beginning of the year under the statutes providing therefor. This would also apply in all similar cases where the expenditures come under the non-applicability clauses of these statutes.

Twenty-first: Bills that are incurred for the operation of the County Home such as the salary of the steward, repairs and any other legitimate expenses in connection therewith may be paid and warrants issued therefor whether funds are available or not under the provisions of section 2, sub-division 3 of said chapter 104.

Twenty-second: The provisions of these statutes do not apply to the funds of drainage districts or any other special assessment projects. Such funds are not "county funds" within the meaning of these statutes.

Twenty-third: Notwithstanding the fact that county officials and deputies are elected and appointed to serve two year terms, their salaries for the entire two year period do not come within the provisions of sub-division eight of section 2 of chapter 105 which reads:

"To expenditures from the county general fund legally payable from that fund and contracted prior to January 1, 1924."

Such salaries for the year 1924 are subject to the provisions of said statutes.

Twenty-fourth: The salaries of the county engineer and his assistants must be paid from the county fund and cannot be paid from the road or bridge funds. The road and bridge funds can be used only for the purposes enumerated in the statutes creating them.

Twenty-fifth: The expenses incurred for the care of children at the juvenile home at Toledo cannot, under the law, be paid out of the Poor Fund. Section 2470 of the Compiled Code, as amended, does not prescribe the fund from which such expenses are payable. Therefore such expense must be paid from the County Fund.

Twenty-sixth: It is our opinion that the State Hospital accounts, or the amounts due the state from the county for the care and treatment of inmates of the State Hospitals for the Insane, do not come within the meaning of paragraph 3 of section 2 of chapter 104. Chapters 104 and 105 do not apply to these expenditures for the reason that they are covered by a special statute relating thereto.

Any opinions of this department construing these two statutes, which may be inconsistent with this opinion, are hereby recalled.

BOARD OF SUPERVISORS—Delegation of powers—Board has no power to delegate its authority in the matter of purchasing supplies.

October 31, 1923.

County Attorney, Page County, Clarinda, Iowa: I am in receipt of your letter dated October 24, 1923 in which you enclose a list of questions requesting in connection therewith the opinion of this department. These questions are as follows:

"1—Has the Board of Supervisors the power to delegate their authority to purchase supplies for the county offices, to a purchasing committee composed of one member of the Board, the Auditor and the Treasurer?

"2—Can the Board delegate their power to pass on claims?

"3—Can the Auditor hold out claims and not present them to the Board for their approval and not file them in the customary way by stamping filed thereon?

"4—Has a County Officer the authority to bind a county for the necessary supplies for his office?"

The Board of Supervisors has no power to delegate its authority to purchase supplies for county officers. However, it is customary for the Board to have the purely ministerial work of purchasing these supplies done by a committee or officer appointed by the county auditor. The acts of such an officer, however, must be ratified by the Board of Supervisors in order to give them validity. This is ordinarily done by the approval of the claims and the allowance.

The Board of Supervisors cannot delegate its power to pass on claims filed with the Board except where expressly provided by statute.

All claims filed with the Auditor must be presented to the Board of Supervisors for action. No county officer has authority to bind the county in the purchasing of necessary supplies for an office. The same customary rule, however, with reference to this prevails with reference to the committee of which I have just spoken.

COUNTY GRAVEL PITS—Cities and towns are not authorized to use gravel from the county gravel pits, free of charge.

November 14, 1923.

County Attorney, Emmet County, Estherville, Iowa: Your favor of the 17th to this department has been referred to me for reply. You request our opinion upon the following statement of facts:

"Emmet County has a gravel pit which was procured for the purpose of obtaining gravel for the county roads. Gruver is a town in this county, and this town is using or has attempted to use, gravel from this county gravel pit, to gravel the streets within this town. The question is this: Can a city or town take and use the gravel from the county gravel pits to gravel the streets and alleys within such cities or towns?"

Section 2024-i2 Sup. to Code, 1913, reads in part as follows:

"Road improvement companies, corporations, voluntary associations, commercial clubs, road improvement districts, and individual citizens shall have the right to enter upon said land and haul and use said material for public road improvement."

The Legislature further provided in Sections 2024-j and 2024-k Sup. to Code, 1913, for the condemnation of gravel pits by cities and towns, and under the provisions of these sections, cities and towns would have the authority to condemn land for this purpose, independent of any action taken by the county. Section 2024-i Sup. to the Code, 1913, providing for the condemnation of land for gravel pits by counties, in speaking of the purposes for which the gravel shall be used, employs the following language:

"* * * * *with which to improve the roads and highways of such county."

The law thus clearly provides for the use of gravel from county gravel pits upon county highways and also provides for the condemnation of land by cities and towns for gravel pits. In the absence of clearer statutory authority, cities and towns would not have the right to take gravel from county gravel pits for use upon streets and alleys within the corporate limits of such cities and towns.

The only provision in this law for the use of gravel from county gravel pits by other than the county is contained in Section 2024-i2 Sup. to the Code, 1913, that reads as follows:

"Road improvement companies, corporations, voluntary associations, commercial clubs, road improvement districts and individual citizens shall have the right," etc.

If cities and towns have authority to use the gravel from county gravel pits, such authority must be found within the provisions of the above quoted section. From a reading of this section, it will be seen that cities and towns or municipal cor-

porations are not specifically enumerated therein. The word "corporations" as used therein must be interpreted to include municipal corporations and cities and towns in order to include them in the organizations specifically authorized to use this gravel. The word "corporations" has been repeatedly defined to mean private or ordinary business corporations and is not extended to embrace municipal corporations, cities and towns. *Emes v. Fowler,* 89 N. Y. Supp. 685; *Donahue v. City of Newburyport,* 98 N. E. 1081 (Mass.); *Kearney v. Jersey City,* 73 Atl. 110 (N. J.); *Bank v. Framingham,* 98 N. E. 925 (Mass.).

We are of the opinion that the word "corporations" as used in the section hereinbefore referred to does not include municipal corporations, cities, and towns. As used in connection with the language of this section, the word "corporations" must refer to private corporations that desire to use the gravel for improvement of the public highways within the county.

We are therefore of the opinion that the town of Gruver does not have the right to take gravel from the county gravel pits for use upon the streets and alleys within its corporate limits.

I—BOND ISSUE: Bonds issued by the county to take up outstanding warrants drawn on the general fund do not need to be made before January 1, 1924, the issue not coming within the provisions of the Tuck bill.

II—BOARD OF SUPERVISORS: A supervisor elected from the county at large in a county not divided into supervisor districts, is not disqualified by the reason of the fact that he moves from the township of his residence at the time of his election into another township in the county, in which latter township another member of the board of supervisors resides.

December 17, 1923.

County Attorney, Pottawattamie County, Council Bluffs, Iowa: I have your favor of the 13th at hand in which you request our opinion upon two propositions.

Your first proposition is stated as follows:

"This county has a considerable amount of outstanding warrants drawn on the general fund and they propose to have a bond issue cover the outstanding indebtedness against that fund. I gather from the Attorney General's opinion on the Tuck Bill that he holds that such a bond issue does not need to be made before the first of January 1924, but may be made at any time subsequent thereto."

Your interpretation of this department's opinion upon the above proposition is correct and the bond issue does not need to be made prior to January 1, 1924.

Your second proposition is stated as follows:

"One of the members of the Board of Supervisors of this county was elected from Silver Creek Township. We have two members of the Board of Supervisors from Council Bluffs, Kane Township. Since the election and within the last month or so, the man elected from Silver Creek Township has moved to Council Bluffs in Kane Township. Does Section 411 of the Code 1897 disqualify him from serving as a member of the Board under such circumstances?"

Section 411 Code, 1897 as amended and as appearing in the compiled code, Section 357 is in part as follows:

"* * * * * * * * * * * *

"There shall be elected, biennially members of the board of supervisors for a term of three years to succeed those whose terms of office will expire * *. .No member shall be elected who is a resident of the same township with either of the members holding over (but a member-elect may be a resident of the same township as the member he is elected to succeed), except that, in counties having five or seven supervisors, and having therein a township embracing an entire city of

thirty-five thousand inhabitants or over, he may be a resident of the same township; and in no case shall there be more than two supervisors from such township."

Section 664 of the Compiled Code provides that every civil office shall be vacant upon the happening of either of certain events therein enumerated.

Paragraph three of said section reads as follows:

"The incumbent ceasing to be a resident of the state, district, county, township, city, town or ward by or for which he was elected or appointed, or in which the duties of his office are to be exercised."

The supervisor in question was elected from the county at large, your county not being divided into supervisor districts, the only resident restriction being that contained in the part of section 357, Compiled Code, heretobefore quoted, in reference to townships embracing a city of thirty-five thousand inhabitants or over within the limits thereof. This section has reference only to the election of the supervisor, providing that not more than two supervisors at the time of their election shall be residents of the township conaining a city of thirty-five thousand inhabitants or over. This does not prevent a supervisor elected from outside of the township containing the city, from, after the election, changing his residence to the city and retaining his office as supervisor.

Section 664 of the Compiled Code, paragraph three herein quoted, provides in what instance a vacancy shall occur because an official ceases to be a resident of the township, etc., from which he was elected. It will be seen from a reading of this paragraph that the incumbent must cease to be a resident of that particular territory, "by or for which he was elected or appointed," or in which the duties of his office are to be exercised. The supervisor referred to by you in your second question, was elected from the county and by the county as a whole. He was not elected by or for any particular subdivision of the county, the duties of his office are not restricted by law to the particular township from which he was elected nor to any other particular subdivision of the county. The fact that this supervisor changes his residence from one township within the county to another, would not make a vacancy in his office under the provisions of this section. Such a vacancy will only arise when the incumbent changes his residence outside of the particular county or district that he was elected to serve and as this supervisor was elected to serve Pottawattamie County, no vacancy would result because of his change of residence from Silver Creek Township to Kane Township.

COUNTY OFFICERS—Compensation and Expenses in counties having two county seats—under Ch. 250, Acts 40th G. A.

December 24, 1923.

Auditor of State: You have submitted to this department for an opinion the following propositions as presented by one of the examiners in your county accounting department:

"Now another question with me is this: whether the county auditor and county treasurer are entitled to their expenses in going to Keokuk, or is the $500.00 additional salary to cover this expense?

"The county attorney in this county lives in Keokuk and has a deputy here in Fort Madison. Court is held in two places, both Fort Madison and Keokuk. Now is the county attorney entitled to his expenses while trying cases in Fort Madison, and is the deputy entitled to his expenses when assisting the county attorney in Keokuk?"

The 40th General Assembly enacted Chapter 250 which provides for the compensation to be paid county officers, their deputies, assistants and clerks. Section 1

thereof relates to the compensation to be paid county auditors and Section 3 to the compensation to be paid county treasurers in each county, the amount varying according to population.

It will be observed that the last sentence of Section 1 and also Section 3 provides that both the county auditors and the county treasurers shall, in counties having two places where the district court is held, receive $500.00 additional compensation. There is no other provision in the law relative to the compensation of these officers.

There is a well established rule of law that public officials are only entitled to such compensation for the performance of their prescribed duties as is fixed by statute and that where a salary or other fixed compensation is provided for any such official, and no other fees or compensation is provided by statute, then such salary or fixed compensation includes within itself all the compensation to be paid for the performance of such duties. See *Moore v. Independent District,* 55 Iowa 654; *McNider v. Sirrine,* 84 Iowa 745; *Guanella v. Pottawattamie County,* 84 Iowa 36; *Ryce v. City of Osage,* 88 Iowa 558; *Burlingame v. Hardin County,* 180 Iowa 919. It has always been the rule that a right to compensation for the discharge of official duties is purely a creature of statute and that the statute which is claimed to confer such right must be strictly construed. If an officer is unable to show a statute providing for any claimed compensation or fee, he is not entitled to such compensation and fees. In other words, a public officer is entitled to only such compensation and fees as are expressly provided by law.

The question of the expenses actually incurred by an officer in the performance of a duty raises a somewhat different question. Expenses do not ordinarily constitute compensation. They are simply the returning to the officer of that which he has actually expended in the public service. A public officer is, therefore, entitled to expenses under certain circumstances and none other. If the statute either specifically or by necessary implication creates a duty which is to be performed by an officer and in the performance of which necessary expenses must be incurred, then in our judgment the officer would be entitled to such expenses. However, this would not apply to state officers for the reason that unless there is an appropriation for the payment of expenses of state officers, such expenses cannot be paid from the public funds. Neither can a county officer receive expenses for the performance of a duty imposed by law as stated, unless such officer files a claim showing the actual expenditure in the public service and such claim is allowed by the board of supervisors.

The second question presented is whether or not the county attorney and his deputy are entitled to expenses in going back and forth between the two places where court is held in counties where such is the case. Section 9 of Chapter 250 of the Acts of the 40th General Assembly provides the salary which the county attorney in each county shall be paid. Paragraph 10 of said section provides that the county attorney in counties where district court is held in two places shall receive an additional sum of $500.00. Paragraph 11 provides that the county attorney shall also receive his necessary and actual expenses incurred in attending upon his official duties at a place other than his residence and the county seat.

It will be observed that in Lee County there are two county seats, one at Ft. Madison and the other at Keokuk. Court is also held at each of these places. Paragraph 11 is so worded so that the county attorney shall receive his necessary and actual expenses "incurred in attending upon his official duties at a place other than his residence and the county seat," only. Thus it will be observed in view of this language that the county attorney is entitled only to expenses incurred while

on official duty away from the place of his residence and the county seat. There being two county seats in Lee County, the county attorney will not be entitled to expenses while engaged upon the performance of official duties at either place, nor to his expenses in travelling between the two county seats.

Section ten relates to the compensation to be paid the assistant county attorney and does not authorize the payment of expenses to him incurred in travelling from one county seat to the other.

I trust that the foregoing will sufficiently explain the provision of law to which reference has been made.

COUNTY FUNDS—ELECTIONS: The salaries of county officials are fixed charges which should be given preference where the amount of the general funds of the county are insufficient to meet all expenses. A general election must be held biennially as provided by the State Constitution even though there is a delinquency in the county funds from which the costs of such election must be paid.

August 7, 1924.

County Attorney, Pottawattamie County, Council Bluffs, Iowa: We desire to acknowledge receipt of your letter of July 30, 1924, asking for an opinion upon the proposition quoted therein as follows:

"Our County Auditor advises me that in two funds, the General fund and the Bridge fund in this county, the collectible revenues for this year will be inadequate to take care of the necessary expenses. The balance on hand in the general fund is $72,210.71. He expects to receive from miscellaneous collections $8,400.00, making a total of $80,610.71. He estimates the expenditures at $91,026.06. The fall election will cost, he estimates, approximately $8,000.00. He estimates he will have an overdraft in the bridge fund of approximately $57,068.00.

"Now, the precise question he desires answered is what he is to do under chapters 104 and 105, 40th G. A., commonly known as the 'Tuck Bill.' He says he will not have sufficient funds to conduct the fall election nor to pay county officers or to make ordinary repairs on bridges. He desires me to ask you if, in your judgment, such county officers' salaries as Clerk of District Court, County Attorney, Sheriff, Auditor and Treasurer could be allowed and paid on the theory that they are expenses incurred in connection with the operation of the courts. If there are not sufficient funds to carry on the fall election does the Tuck law disfranchise the voters of Pottawattamie County?"

We observe from your statement that there is now on hand in the general fund the sum of $72,210.71, and that the treasurer will receive from miscellaneous collections the further sum of $8,400.00, which will make a total of $80,610.71 in the general or county fund. It is the opinion of this department that the board of supervisors should retain or set aside a sufficient sum of money in the general fund to pay all of the fixed charges against such fund or such charges as are made definite and certain by statute, which of course, includes the salaries of the county officials. Some arrangement should be made to take care of such fixed charges. The amount on hand is sufficient to permit this to be done.

In answer to your second inquiry you are advised that under Section 16, Article 12 of the Constitution, the biennial election amendment, it is the plain mandate thereof that a general elecion shall be held biennially for the election of state and county officers. No statute of the state can change or prevent the proper observance of this constitutional provision.

We are, therefore, of the opinion that the general election must be held in November, 1924, in every county in the state.

PROBATE OF ESTATES—CLERK OF COURTS: A clerk of the District Court is entitled to charge a fee of one dollar for posting notice of probate of an estate and may keep the fee so collected as his personal property.

September 13, 1924.

Auditor of State: This department is in receipt of your letter dated September 6, 1924 in which you request an opinion. Your letter is in words as follows:

"Our examiner in making the examination of Marshall county for the year 1923 calls our attention to a practice in the clerk's office that gives rise to a question in regard to certain money received by the clerk.

"The facts are as follows: In opening an estate in probate the Judge makes the order that the notice shall be served by posting. The administrator or his attorney then directs the clerk to post the notice, which notice I understand is posted in three different places. For this service the clerk taxes a fee of $1.00 and when the fees are paid in the case the clerk taxes these $1.00 fees as his personal fee for performing the service for posting these notices. He claims that the posting of these notices is no part of his official duty as clerk and for that reason holds that he is entitled to the fees. During the year 1924 the examiner finds that the clerk received in the neighborhood of $200.00 in this class of fees. The question occurs to us is the clerk entitled to these fees or must he account for them to the county? Kindly give us your opinion in regard to this matter as soon as possible so that the examiner may properly shape the findings of his report."

You are advised that the clerk is entitled to retain the fee referred to by you as his personal property.

The Supreme Court of this state has determined this matter definitely. See *Burlingame v. Hardin County*, 180 Iowa, 919.

WITNESS FEES—A sheriff or deputy is not entitled to witness fees except by an order of court.

October 13, 1924.

County Attorney, Lucas County, Chariton, Iowa: You have requested a ruling from this department as to whether or not the sheriff and deputy are entitled to witness fees when appearing before the grand jury, and also in criminal cases in the district court.

Section 4661 of the Code of 1897 provides in part as follows:

"* * *No peace officer shall, in any case, receive fees as a witness for testifying in regard to any matter coming to his knowledge in the discharge of his official duties in such case, unless the court so orders.* * *"

I am of the opinion that this provision of the statute governs your case and that under it the sheriff or deputy would not be entitled to witness fees except under an order of the court.

TUCK LAW—COLLECTIBLE REVENUE—Collectible revenue under the provisions of the Tuck Law includes interest received on bank deposits and fees paid into the county by the county officers.

October 14, 1924.

County Attorney, Humboldt County, Humboldt, Iowa: You have requested the opinion of this department upon the following proposition:

"I am writing for an opinion in reference to Chapters 104 and 105 of the laws of the 40th General Assembly, which Chapters are commonly known as the Tuck Law. This county is running short of money in the general county fund, although there is still sufficient on hand to issue warrants for the present, but there is a grave prospect of the county running out of money in this fund before the first of January.

"What we particularly wish an opinion on is whether, in computing the collectible revenue for the present year we may take into account interest received on bank deposits and fees paid in by county officers as these two items will make considerable difference in the amount of money which the county is entitled to expend. * * *"

It is the opinion of this department that in computing the collectible revenue of the county for the present year it is proper to consider and include interest received on bank deposits and fees paid into the county by the county officers.

I hope this sufficiently answers your inquiry.

BOARD OF SUPERVISORS—TAX LEVY: The Board of Supervisors may levy taxes after the regular meeting in September. This date is merely directory.

October 24, 1924

Secretary of Agriculture: We have received your request for an opinion upon a question submitted to you by Mr. Frank Schweiger, County Agent, of Corning, Iowa. The letter of the County Agent is as follows:

"I wish you would secure a written opinion from the Attorney General's office instructing the Board of Supervisors on the legality of making a levy this year. The main contention that the Auditor has now is that the board cannot levy after the last of September."

The question submitted is free from doubt. The Supreme Court of this state has several times passed upon the identical question we are now considering. It is the opinion of this department that the statute requiring the Board of Supervisors to make the levy of taxes at the regular meeting in September is merely directory, and if the Board of Supervisors does not do so at such meeting, the levy may be made at any time before the tax records are actually delivered by the County Auditor to the County Treasurer, provided the taxpayer is not prejudiced by the delay. This conclusion finds support, in principle, in the following cases: *Hill v. Wolfe,* 28 Iowa, 577; *Easton v. Savery,* 44 Iowa, 654; *Perrin v. Benson,* 49 Iowa, 325; *Burlington Gas Light Co. v. City of Burlington,* 101 Iowa, 458; *Prouty v. Tallman,* 65 Iowa, 354; *Hubbell v. Polk County,* 76 N. W. Rep. 854; *Hawkeye Lumber Co. v. Board of Review,* 161 Iowa, 504; *Taylor v. McFadden,* 84 Iowa, 262; *Grout v. Kendall,* 195 Iowa, 467.

Therefore, it is our opinion that the board of supervisors of Adams County may now levy the tax provided for in the statute relating to the eradication of bovine tuberculosis even though the levy were not made at the September meeting of the Board of Supervisors.

BONDS—County cannot contract with third party to sell its drainage bonds and pay commission for doing so.

January 18, 1923.

Auditor of State: You have requested an opinion from this department as to whether the contract entered into between the Board of Supervisors of Cerro Gordo county and the First National Company of Mason City bearing date of October 20, 1921 is legal.

The contract referred to was executed in connection with the share of a large amount of drainage bonds in Cerro Gordo county and provides as follows:

"Mason City, Iowa, Oct. 20, 1921.

"To the Board of Supervisors of Cerro Gordo County, Ia.
"Gentlemen:
"We agree as follows:

"1. That we will furnish printed bonds ready for signature, furnish Chapman, Cutler & Parker opinion on these bonds and pay all expenses incurred by us.

"2. By the acceptance of this agreement you agree to furnish us with a full and complete certified copy of the proceedings evidencing the validity of the bonds to the satisfaction of the attorney selected by us and in the event that the validity of the proceedings is not approved by the attorney this contract shall be terminated.

"3. We will undertake to dispose of said bonds at a price not less than the par value; the bonds to be delivered to us at Mason City, Iowa, for delivery to the purchaser on or before December 1, 1921.

"4. In consideration of the services to be rendered by us as above stated, we are to receive as compensation from said Drainage Districts an amount equal to three per cent of the bonds issued.

"Respectfully submitted,
"THE FIRST NATIONAL COMPANY,
"By Hanford Mac Nider
"Pt.

"The above and foregoing proposition is hereby accepted and we hereby agree to deliver said bonds to the First National Company as above provided, and to make payment of compensation for services as above provided.

"W. F. Doderer, Chairman.
"Paul Weigand, County Auditor."

It is a general rule of law that public funds may be expended for only public purposes as the statute clearly authorizes. The law covering the issuance and selling of drainage bonds also provides that the bonds must be sold at par and accrued interest, and in the event a premium is received that the amount so received as premium shall be credited to the Drainage Fund. I can find nowhere in the statute any express authority conferring upon the Board of Supervisors the power to enter into such a contract as the one in issue, and inasmuch as there is considerable doubt as to whether or not that power is inferred and incidental to the issuance and selling of such bonds I am constrained to resolve the doubt against the authority on the part of the Board of Supervisors to expend public moneys in that manner.

OFFICERS: COUNTY SALARY EXPENSES: Salaries of clerk of district court, sheriff, and county attorney must be paid from the general fund under Code Commissioners Bill No. 137 enacted by the 40th general assembly. Expense of maintaining prisoners prior to commitment may be paid from the court expense fund.

April 26, 1923.

Auditor of State: I am in receipt of your letter dated April 16, 1923 in which you request an opinion from this department. Your request is in words as follows:

"We summarize the questions arising in this matter as follows:

"1. Can the salaries of officers, deputies and clerks in the office of the Clerk of District Court, Sheriff, and County Attorney be paid from the 'Court Expense Fund'?

"2. Can the expense incurred for records and supplies for the offices named in No. 1, including Board of Prisoners, Jail Expense, and meals for jurors, be paid from the 'Court Expense Fund'?

"3. If all expenses of items shown in No. 1 and No. 2 cannot be paid from 'Court Expense Fund' what part, if any, can be paid from this fund?

"4. If payments have heretofore been made at variance from what would have been the proper fund by the rule established in answer to Questions 1, 2 and 3 above, shall transfers to correct, according to the established rule, be recognized and required?

"5. If transfers to correct funds heretofore paid at variance from the rule here established are recognized as proper, over how many years back shall corrections extend?"

Taking the questions submitted by you in order, you are informed:

1. That your first question must be answered in the negative. Code Commissioners Bill No. 137, which became a law by publication, on the 16th day of April, 1923, provides as follows:

"The salaries fixed by the foregoing sections of this chapter shall be paid out of the general fund of the county in twelve (12) equal installments, one on the first day of each calendar month."

This section relates to the salaries of all county officers, including those of which you speak. This being true, the salaries of such officers must be paid from the general fund of the county and not from the Court Expense fund.

In order that there may be no confusion with reference to the answer to question No. 1, may I state that the salaries of such officers, or such portion thereof as may be found by the board of supervisors to be a direct court expense, could be paid from the Court Expense fund up to the time that Code Commissioners Bill No. 137 became a law. After such time, such salaries could not be paid from the Court Expense fund, but only from the general fund of the county as therein provided.

2. The second question submitted by you must be given consideration as it involves both an affirmative and negative answer. It is apparent at once that the expense of the meals for jurors is a proper court expense and can be paid from the Court Expense fund. It will also be apparent at once that the Board of Prisoners and that portion of the Jail Expense which is represented by the expense prior to the commitment under a sentence can properly be paid from the Court Expense fund. The Board of Prisoners that have been committed under sentence would not be paid from the Court Expense fund for the reason that such expense is an expense not incidental to the operation of the court but succeeding the court action. Up to the time that a prisoner is actually committed under a sentence imposed by the court, such prisoner is in the custody of the court and of the officers of the court. Once he is committed, however, he is under the executive branch of the government and not the judicial branch. It is realized that there may be some difficulty in saying just exactly what Jail Expense should be paid from the Court Expense fund and what part from the general fund, but this is a matter for the board to determine and its determination will, in the absence of fraud, be final.

3. The third interrogatory submitted by you has been answered in disposing of the two preceding interrogatories.

4. Interrogatory No. 4 must be answered in the affirmative. Whenever errors have been made in payments, the various funds should be restored to the condition in which they should have been had all the requirements of the law been complied with. Such act is in effect, not a transfer of funds but a correction of the records.

5. Interrogatory No. 5 is a question difficult of answer in this—that conditions may have arisen in counties wherein the imposition of the strict letter of the law would result in gross injury to the business and affairs of the county. Under such circumstances, officers must use that judgment which is necessary in order to correct as far as possible the errors made without gross injury to the welfare of the government itself.

I would suggest that ordinarily you govern the period of this examination.

SHERIFF—COMPENSATION—Entitled to allowance for house unless house is provided. Entitled to commission on money received on execution whether there is a sale or not.

May 9, 1923.

Auditor of State: You have requested an opinion from this department relative to the compensation and fees of the sheriff. Your request is in words as follows:

"(1) Where there is a residence in the jail, but it is occupied by the jailer, is the sheriff entitled to the extra $300.00 compensation?

"(2) Should the sheriff collect the commission on money received where an execution has been issued; but no sale made, when the money could just as well have been paid to the Clerk as to him to satisfy the account?"

Where the Board of Supervisors of the County permits the occupancy of the jail, or other residence provided for the sheriff by the jailer or by someone else, it is then the duty of the Board to either furnish an additional residence to the sheriff or to allow the $300.00 provided therefor by statute.

The sheriff is entitled to the commission provided by statute on all moneys received on an execution, whether a sale is actually consummated or not.

COUNTY OFFICERS—EXPENSES—CONVENTIONS: Senate File No. 636, Acts 40th G. A. prohibits payment of expenses of county officers, excepting county superintendents incurred in attending group conventions.

May 15, 1923.

Auditor of State: You have requested an opinion from this department as to the power of a board of supervisors of a county to pay the expenses of county officers incurred in attending group conventions, district, state or national.

County officers only receive expenses where such expenses are expressly provided by statute or are incurred in the performance of a duty imposed by law. There is no statutory authority for the payment of the expenses of county officers excepting only county superintendents incurred in attending such conventions. There is now a statute directly to the contrary, Senate File 636. The law does not impose any duty, except in cases of county superintendent, upon any couny officer to attend such conventions. This being true the board of supervisors has no power to allow such claims.

SHERIFF: Refund of fees in foreclosure cases—where time of redemption in foreclosure cases had not expired March 18, 1923, debtor or other lien holder is entitled to refund of sheriff fees on sale.

July 2, 1923.

County Attorney, Appanoose County, Centerville, Iowa: I am in receipt of your letter of recent date in which you ask for an opinion from this department. Your request is in words as follows:

"I want the opinion of your office in regard to the working of Section 3, H. F. No. 357.

"According to the wording of this section it seems clear that property that has heretofore been sold by the sheriff, under foreclosure proceedings, and the year of redemption not yet expired, that the county shall refund to the certificate holder, or the person who redeems, the amount of fees collected by the sheriff at the time of sale. However, as it means that this county must refund several thousand dollars that have been collected as fees, it was thought best to secure your construction of this section.

"As an illustration, we have a farm that was sold some ten or eleven months ago, before the passage of this act, and the fees for selling were collected as provided by the laws then in force pertaining to foreclosures. Now, does the

passage of this act make it necessary for the county to refund these fees, so collected under the law as it then was?

"I do not know the legislative intent, nor what evil this act was meant to correct, however, coming on us at the same time as the famous Tuck Bill, it is going to work a hardship on this county, and to a far greater extent on other counties of the state. It simply means that whereas heretofore the sheriff's salary was paid in full by these fees, now it will be necessary to dig down in the general fund for the sheriff's salary, and, let me add, the general fund will have troubles of its own in paying the obligations already heretofore imposed on it, without the obligation which this act imposes upon it.

"Please give me at your early convenience the ruling of your department as to the necessity of refunding fees collected within the past year (where the year of redemption has not yet expired, or had not up to March 18th), under the law then in force."

House File 357 to which you refer is Chapter 102 of the Acts of the 40th General Assembly. This statute is in words as follows:

"Section 1. That paragraph seven (7) of section one (1) chapter 49, acts of the Thirty-seventh General Assembly (c. c. 3206), is hereby repealed.

"Sec. 2. Section one (1) of chapter forty-nine (49) acts of the thirty-seventh (37th) general assembly is amended by renumbering paragraphs eight (8) to eighteen (18), inclusive, as seven (7) to seventeen (17), inclusive.

"Sec. 3. Where property has heretofore been sold at sheriff's sale and the time of redemption has not yet expired and the debtor, or other lien holder, redeems from the sale, the county shall refund to the debtor, or whoever redeems, the fees collected by the sheriff at the time of sale under the law repealed by section 1 of this act, or if the property is not redeemed, then the county shall refund said fee to the holder of the certificate of sale at the time the redemption period expires.

"Sec. 4. This act being deemed of immediate importance shall take effect and be in full force and effect after its publication in the Des Moines Register and the Des Moines Capital, newspapers published in Des Moines, Iowa."

Approved March 15, A. D. 1923.

Section one of this act repeals sub-section seven of section one of Chapter 49 of the Acts of the 37th General Assembly. This sub-section is in words as follows:

"7. For collecting and paying over money, on the first five hundred dollars or fraction thereof, two per cent; on all in excess of five hundred dollars and under five thousand dollars, one per cent; on all over five thousand dollars, one-half per cent."

Section three of Chapter 102, to which we have referred provides that where the time of redemption has not yet expired, (that is, expired prior to the 18th day of March, 1923, at which time the act became a law) that the county shall refund either to the debtor or other lien holder redeeming, or to the holder of the certificate of sale at the time the period of redemption expires, the fees collected under sub-section seven of Chapter 49 of the Acts of the 37th General Assembly. The fact that the statute will result in the refunding of large sums of money throughout the state is immaterial, the Legislature having spoken it is not for this department to question its wisdom or action. The power to enact laws is vested in the Legislature. The Legislature having acted, its determination, in and so far as the administrative bodies of the state are concerned, is final.

COUNTY ENGINEER—Should be paid from the general fund of the county—Sec. 2872 C. C. 1919.

BOARD OF SUPERVISORS—Acting under authority Sec. 4603-4604 C. C. 1919, may equalize value of property in county by raising or lowering same generally throughout the county.

July 24, 1923.

County Attorney, Louisa County, Wapello, Iowa: Your favor of the 15th requesting an opinion from this department has been referred to me for reply. You request an opinion upon two propositions. The first one, in substance, is whether or not the board of supervisors of your county acting as a board of review under Sections 4603-4604 of the Compiled Code, 1919, have authority to raise the value of taxable property within the county.

It is the opinion of this department that the board of supervisors, acting under the authority of the above section, may equalize the value of property in your county by raising or lowering the same generally through the county.

Your second proposition, in substance, is whether or not the county engineer can be paid from the funds other than the general fund of the county. Section 2872 of the Compiled Code, 1919, provides that the board of supervisors shall employ a competent engineer who shall be paid out of the "county funds," the sum to be fixed by the board of supervisors. The road and bridge funds provided for by the statute can be used only for the purposes enumerated in the statute creating them. There is nothing in these statutes that would authorize the payment of the county engineer from either the road or bridge fund.

It is our opinion that the words used in the statute authorizing the board of supervisors to pay the engineer from the "county fund" refers to the general fund of the county, and that the engineer should be paid from this fund.

COUNTY TREASURER—Has authority to appoint delinquent tax collector.

July 12, 1923.

County Treasurer Cass County, Atlantic, Iowa: We have received your communication asking this department for an opinion upon the following propositions:

1. Has the county treasurer the right to appoint a delinquent tax collector for taxes becoming delinquent in previous years?
2. Do the Board of Supervisors have authority to appoint a delinquent tax collector to collect taxes and write receipts in the treasurer's books without the approval of the treasurer?
3. What percentage is allowed for the work in the law passed in the last general assembly?

Section 1407 of the code supplement, 1913, provides as follows:

"Immediately after the taxes become delinquent, each county treasurer shall proceed to collect the same by distress and sale of the personal property of the delinquent taxpayers, *and for this purpose he may appoint one or more collectors to assist him in collecting the same. Each collector appointed shall receive for his services and expenses the sum of five per cent on the amount of all taxes collected and paid over by him, which percentage he shall collect from the delinquent, together with the whole amount of delinquent taxes and interest;* and pay the same to the treasurer at the end of each month, and in the discharge of his duties as collector, should it become necessary to make the delinquent taxes by distress and sale, or should no collector be appointed, or should the collector fail to institute proceedings to collect said delinquent taxes, the treasurer shall place the same in the hands of the sheriff, or a constable, who shall proceed to collect the same, and either shall be entitled to receive the same compensation, in addition to the five per cent, as constables are entitled to receive for the sale of property on execution. *And the board of supervisors may in their discretion authorize the appointment by the treasurer of one or more collectors to assist in the collection of such delinquent personal property tax as*

the board may designate and may pay such collector as full compensation for all services rendered and expenses incurred a sum not to exceed ten per cent of the amount collected which sum shall in no event be paid or allowed until all such taxes collected have been paid over to the county treasurer by such collector."

It is our opinion that under the section above set forth, the county treasurer has the right to appoint a delinquent tax collector for the purpose of collecting taxes that became delinquent in previous years. The very evident purpose of the statute is to collect delinquent taxes, and there is no reason why the said collector should be limited in his efforts to collect to the year in which such taxes may become delinquent.

You are advised that the Board of Supervisors has no authority under the section quoted, or any other, to appoint a delinquent tax collector. This right is vested exclusively in the county treasurer. You will observe that the county treasurer may appoint one or more collectors to assist him in collecting delinquent taxes.

The difference in the two italicized portions of the statute above quoted is apparent. In the first portion italicized, a county treasurer has the absolute right to make an appointment regardless of the action of the Board of Supervisors. In the second portion italicized he may do so only in the event that the supervisors authorize the appointment. In our opinion, the latter portion recognizes the fact that it may be necessary to employ men of unusual skill and experience to make collections of what may be known in common parlance as "tough collections" and that such collectors should receive extra compensation for their efforts in doing so.

When it becomes necessary to appoint collectors of such taxes, where the authority of the board is required, as provided in said Section 1407, we would suggest that the County Treasurer and the Board of Supervisors co-operate in the exercise of the power therein granted to the end that there may be a speedy collection of such taxes.

It is our opinion that the delinquent tax collector has authority to write and deliver to the tax payer receipts for the amount paid. In fact, it has been so held by the Supreme Court in the case of *Jones v. Welsing,* 52 Iowa 220.

In answer to your third question, we only have to say that so far as we are able to discover there has been no change made in the percentage allowed for collecting delinquent taxes.

COUNTY BUILDINGS—Cost of replacement when destroyed by fire—On particular case held must be submitted to vote of people.

January 15, 1924.

County Attorney Calhoun County, Lake City, Iowa: This department is in receipt of your letter dated January 11, 1924, in which you request an opinion. Your request is in words as follows:

"The main building of the Calhoun County Home was destroyed by fire a few days ago. The cost for replacement will be about $30,000.

"Chapter 273, Laws of the 39th G. A. provides that 'cost of said county home, if in excess of $15,000, should be approved by vote of the people.'

"In case of rebuilding, and an expenditure of over $15,000, does this Chapter contemplate that the question must be submitted to a vote of the people?"

We are clearly of the opinion that the provisions of the law apply either to rebuilding a building which has been destroyed by fire or to an original structure.

COUNTY ATTORNEYS—The board of supervisors is required to furnish the county attorney with an office at the county seat suitable for the performance of his duties as county attorney. This office need not be suitable for the county attorney's private practice. The office should be furnished in the county building if possible; if not, an agreement should be reached as to the arrangements for rent for an office elsewhere.

January 29, 1924.

County Attorney, Audubon County, Audubon, Iowa: I have your favor of the 21st to this department requesting an opinion upon the following proposition:

"Compiled Code Section 3131 provides that the Board of Supervisors shall furnish to the County Attorney and certain other officers, certain items including fuel, lights, blanks, books and stationery. It also provides that the county supervisors shall furnish the officers, including the county attorney with his office at the county seat.

"The undersigned upon assuming his office some three years ago asked the county board of supervisors to comply with the provision of the law relative to furnishing him with an office, and they offered him one in the court house, but same was refused due to its absolute unsuitableness for an office, and because it was so located that any private practice would have been impossible in such an office. The office offered was about as follows:

"It was located at the rear of the court room, and at the rear of the building, removed from any stairway; visitors to the said office would have had to go up stairs, and through the court room in order to reach the office. It was a jury room, and during court time would be so used, and if occupeid for an office the County Attorney would have to remove from the office during terms of court. The office as stated was refused because of its absolute unsuitability and the undersigned has maintained an office at his own expense down town ever since. It has also been necessary to pay the phone and light bills of the office.

"Will you please tell me as quickly as possible whether if a bill were presented to the Board of Supervisors for the payment of rent, phone and light for the period the undersigned has been in office, same should be allowed by the said board?"

Section 3131 Compiled Code, 1919 provides:

"The board of supervisors shall furnish the clerk of the district court, sheriff, recorder, treasurer, auditor, county attorney and county superintendent with offices at the county seat, together with fuel, lights, blanks, books and stationery necessary and proper to enable them to discharge the duties of their respective offices; but in no case shall any of such officers, except the county attorney, be permitted to occupy an office also occupied by a practicing attorney. Nothing herein shall be construed to include the law books or library of the county attorney."

The section just quoted clearly provides that the supervisors shall furnish the county attorney with offices at the county seat. This office should be suitable for the performance of his duties as county attorney. The fact that this office would be unsuitable for use in connection with his private practice would not enter into the question. The county attorney's private practice, if any, is entirely separate and distinct from his official business, and the board of supervisors is not required to furnish him with an office suitable for such private practice. If the office that the supervisors offered the county attorney is suitable for use by the county attorney for the transaction of the county's business, this is all that is required. If it is impossible for the supervisors to furnish an office in the county building, they should arrive at an agreement with the county attorney regarding the amount of rent to be allowed by the county to the county attorney for an office at some other place. The other things named in the statute to be furnished the officer are to be furnished him only in connection with the performance of his official duties and not in connection with his private business.

The question submitted by you involves as we believe purely a question of fact as to the suitability of the office offered by the supervisors for the performance of

your duties as county attorney. If this office was suitable for the performance of your official duties, that is all that was required. If this office was not suitable, then some other provision must be made for an office which is suitable for the performance of your official duties. If the supervisors refuse to furnish the county attorney with a suitable office in which to perform his official duties, he may provide one at his own expense and recover from the county the reasonable rental value thereof, (see *Hill v. City of Clarinda,* 103 Iowa, 409) together with the reasonable cost of light, fuel and other supplies required by the county attorney in the performance of his official duties.

COUNTY GRAVEL PITS: It is mandatory upon the board of supervisors, if suitable land is obtainable upon which gravel deposits are located, to proceed under the provisions of Sec. 2888, Supplement to Compiled Code, 1923, to condemn land for gravel pits provided the cost of condemnation is no greater than the combined cost of obtaining and hauling the same kind of material. The location of gravel pits in the county is to be determined by the board of supervisors, having in mind accessibility, cost, quality and suitability of the gravel, and if practical should be located near the center of each block of four townships.

January 29, 1924.

County Attorney, Benton County, Vinton, Iowa: Your favor of the 24th to this department requesting an opinion has been referred to me for reply.

In this request you state your proposition in your opinion upon the interpretation of the law in reference to the purchase of gravel pits by the county. (Section 2888, Supplement Compiled Code) and you arrive at the conclusion that the purchase of land for gravel pits is not mandatory upon the board of supervisors. We regret to say that we differ with you in this conclusion and we will herein state what we believe to be the correct interpretation of this law.

Section 2888, Supplement to Compiled Code, 1923, provides as follows:

"The board of supervisors of any county is hereby authorized and empowered within the limits of such county and without the limits of any city or town, to procure, purchase or condemn, enter upon and take any lands for the purpose of obtaining gravel or other suitable material with which to improve the roads and highways of such county including a sufficient roadway to such land by the most reasonable route, and to pay for the same, one-half out of the primary road funds and one-half out the county road funds, and it shall be the duty of the board of supervisors of each county, where such material can be found within the county as herein provided, to procure, purchase or condemn such tracts so that no part of the county shall be more than six miles distant from land where such material can be obtained for highway purposes; provided that the board of supervisors shall not be required to purchase such land, but may procure the road material at any place within or without the county when the combined costs of obtaining and hauling the same is not greater than the cost would be by condemnation proceedings under this section."

It will be noted in this section that it is provided "* * * * * and it shall be the duty of the board of supervisors of each county, where such material can be found within the county as herein provided, to procure, purchase or condemn such tracts so that no part of the county shall be more than six miles distant from land where such material can be obtained for highway purposes; * * * *"

We are of the opinion that if suitable land in your county can be obtained upon which gravel deposits are located, that it is the mandatory duty of the board of supervisors to proceed under the provisions of the section just quoted, provided the cost of condemnation is no greater than the combined costs of obtaining and hauling the same kind of material.

It was the purpose of the legislature in enacting this law to provide a means for the counties and municipalities of the state to secure road building material in competition with the large gravel interests of the state that have a virtual monopoly upon the output.

We do not believe it to be necessary that at least one gravel pit be located in the center of each block of four townships as suggested by you. This method of locating the gravel to be used for highway purposes by the county should be followed if practical. However, the locations of these gravel deposits or pits that are to be operated by the county are to be determined by the board of supervisors, having in mind the accessibility of the land, the cost of the same and the quality and suitability of the gravel in each location.

COUNTY FUNDS: Salaries in municipal court, $25.00 attorney fee for liquor injunctions paid from court funds. Commissions on collections of delinquent court costs paid from the funds collected, to wit: County general fund. The salary of the steward of the county home and the compensation paid the County physician paid from the poor fund. When taxes are suspended or cancelled under the provisions of Chapter 281, Laws of the 39th General Assembly, the City Council should approve both in the case of age and infirmity.

March 3, 1924.

Auditor of State: We wish to acknowledge the receipt of your favor of the 16th ultimo in which you request the opinion of this department in the following language:

"1. Can the following items of expense be legally paid from the court expense fund:

a. Salaries in municipal court.
b. Twenty-five dollar fee to county attorney for convictions in liquor cases.
c. Commissions on court costs collected by one employed by the board of supervisors to collect these costs that have been outstanding for considerable period.

"2. Can the following items of expense be paid from the poor fund:

a. County physician's salary as provided by Code (2238).
b. Salary of overseer of the poor.
c. Salary of steward at county home.

"3. When the board of supervisors suspend or remit taxes under the provisions of Chapter 281 of the 39th G. A., is the approval of the city council necessary in both cases before action can be taken by the board of supervisors?"

We will consider the proposition in the order stated by you.

Section 694-c47, Supplemental Supplement, 1915 as amended by Chapter 152, Laws of the Thirty-seventh General Assembly, paragraph 1, provides in part:

"* * * * * * * * * * * The salaries of municipal judges, clerks and all deputies shall be paid monthly on the first Monday of each month. For the first month, such salary shall be paid from the city treasury, and the second month such salary shall be paid from the county treasury. Each month thereafter such payments shall alternate from the city to the county treasury in like manner."

Under the provisions of the section just quoted the salaries therein referred to are to be paid in alternate months from the court funds of the city and county.

The attorney fee of $25.00 for the county attorney in liquor cases must refer to the fee authorized by Section 2406, Supplement Code, 1913 providing for the taxation of a fee of $25.00 to the plaintiff's attorney when successful in the prosecution of liquor injunction cases. This fee should clearly be paid from the court fund.

The commission on the collection of delinquent court costs should be paid from the funds collected, and necessarily from the fund into which these delinquent costs are paid upon collection. Delinquent court costs collected by the county are

paid into the county general fund and therefore the commission allowed for this collection should be paid from the same fund. In this connection your attention is invited to Chapter 266, Laws of the Fortieth General Assembly. In section 4 thereof, the following language is used:

"The clerk of the district court shall charge and *collect* the following fees * * * * * * * * * * *"

This chapter amends Section 296, Supplement Code, 1913 that contains this language:

"The clerk of the district court shall be entitled to charge and *receive* the following fees: * * * * * *"

It will be noted from the wording of this section as amended that it is now the duty of the clerk of the district court to collect the fees which he is authorized to charge. It is therefore the duty of the clerk of the district court to exercise all diligence in collecting fees charged as provided by the statute.

The compensation paid the county physician employed under the provisions of Section 2238, Code, 1897, who is employed by the supervisors to furnish medical attention to the poor should be paid out of the county poor fund provided by section 2247, Code, 1897.

The salary of the steward of the county home should be paid from the county poor fund.

The salary of the overseer of the poor should also be paid from the county poor fund.

The provisions of chapter 281, Laws of the Thirty-ninth General Assembly, providing for the suspension or cancellation by reason of age or infirmity of taxes, require the approval of the city council in both the case of age and infirmity before the board of supervisors is authorized to suspend the collection thereof.

COUNTY: The county is not liable for damages because of injuries received by defective road. If the road is under construction by an independent contractor, such contractor would be liable for injuries sustained because of negligence.

March 24, 1924.

Hon. J. A. Shaff, Senate Chamber: We wish to acknowledge the receipt of your favor of the 17th in which you request the opinion of this department in the following language:

"I would like to know whether the board of supervisors or a contractor is responsible for damages caused by a road which is under construction, and which has been barricaded, but with no warning sign or light displayed. I assume, of course, that the party injured would be driving in compliance with the Iowa speed law."

We are of the opinion that the county is not liable for any damages occasioned through injuries received by a person driving a motor vehicle upon a county highway under construction and which was barricaded, but no warning sign or light displayed. Our court has repeatedly held that a county is a political organization, and is merely a part of the organization of the state. That there is no more reason or legal principle for holding the county liable for damages for negligence of its officers than for holding the state liable for such damages for negligence of its officials, and it has never been contended that the state could be liable under such circumstances. *Post v. Davis County,* 191 NW 129, 133; *Smith v. Jones* County, 190 Iowa, 1041; *Elgin v. Guthrie County,* 194 Iowa, 924; *Snethen v. Harrison County,* 172 Iowa, 81.

It is assumed that the contractor entered into a contract with the county according to the plans and specifications prescribed for the improvement in question by which the contractor undertook for a stated consideration to furnish the necessary labor and materials for the work. The specifications approved by the State Highway Commission generally provide that the contractor assumes all responsibility for damages sustained by any person due to the carrying on of the work, and provide that the contractor shall maintain such warning signs and barriers so as to effectively prevent accidents.

There is always the question in determining the liability of the contractor in cases of this kind of whether or not he is an independent contractor or merely the servant, agent or representative of the county. In a case very much in point of *Grennell v. Cass County,* 193 Iowa, 697, our court held that the contractor was an independent contractor, and at page 705 says:

"It was an independent contractor, which had undertaken to construct the bridge with its own labor and materials. Its legal responsibilities, so far as third persons are concerned, were neither greater nor less than are assumed by every contractor who undertakes to produce a given result, for an agreed consideration. The employes engaged in the work are its own, and it alone is responsible for the damages, if by its negligence some third person is injured. * * * * * * * * Had the alleged nuisance in the highway in this case been chargeable to a defective plan adopted by the county or its engineer, a very different question would be presented; but, as alleged, and as the demurrer admits, the obstruction was of the contractor's own creation; and the injury to the plaintiffs was the result of its failure to exercise reasonable care to provide proper guard or warning to render the way safe to public use. Such negligence is actionable, whether it be considered a breach of contractual duty or a breach of the common-law obligation which rests upon every person who creates a danger in a public highway to remove it or properly guard it."

Therefore, assuming the above state of facts to exist, we would be of the opinion that the contractor is liable for injuries sustained by a party driving in compliance with the law upon the highway in question.

COUNTY HOME FOR THE POOR.—The board of supervisors have the right to remove the site of and designate a new site for the erection of buildings for the care of the poor and to sell any interest that the county may have in the old home for the poor.

April 11, 1924.

County Attorney, Hardin County, Eldora, Iowa: The statutes relating to the powers of Boards of Supervisors contain a conclusive answer to the question you submitted to me over the telephone yesterday, with reference to exchanging the property now owned and used by Hardin County as a poor farm for other lands to be used for that purpose.

Section 422, Code Supplement of 1915 has been amended by Chapter 33, Acts of the Thirty-seventh (37) General Assembly. The amendment adds to the powers of the Board with reference to property used for the support of the poor the following:

"To remove the site of and designate a new site for the erection of any building or buildings for the care and support of the poor, and in case of such removal or change of site or purchase of real estate for buildings and a place to be kept and used for the care and support of the poor, to sell any interest that the county may have in the real estate and improvements thereon which were theretofore used and occupied for that purpose."

This amendment undoubtedly gives to the Board of Supervisors the authority to do what you indicated in your telephone conversation it desires to do.

CLERK OF DISTRICT COURT-FEES IN SETTLEMENT OF ESTATE.—Fees are based on estate actually administered by the court. Value of real estate not administered upon, should not be included.

April 12, 1924.

Auditor of State: This department is in receipt of your oral request for an opinion upon a proposition which is in words as follows:

"I have your letter of March 26 enclosing copy of the Attorney General's opinion in regard to clerk's fees to be charged in an administration and thank you for same.

This opinion I think covers the point where there is a straight administration, however, my mind is still clouded as to the proper fee to be charged, where there is a will in an estate and an executor is appointed, and both the real estate and the personal property is distributed by the executor, or say where a will leaves a life estate in the widow and the real estate goes to the children after the widow's death, she to be the executor. It seems that in such cases the executor administers the real estate as well as the personal property and the fee would be computed thereon.

Also in guardianship matters where there is nothing but a share in real estate, should the value of the real estate be taken into consideration, or should just the inventoried value of the guardianship at the time of the appointment be the basis, or should we take the total amounts of rents, etc. as handled by the guardian as the amount to figure the fee on."

You are advised that the fees of the Clerk of the District Court are provided in Chapter 266 of the Acts of the Fortieth General Assembly. Paragraph 29 of Section 4 of the Act covers the fees to be charged in the settlement of estates. The fee to be charged is to be based upon the estate actually administered by the court. If the real estate is not administered upon, that is if the same is not sold to pay debts, or otherwise acted upon by the court, then the value of such real estate is not to be taken into consideration in determining the fees to be charged.

COUNTIES—A county will not be liable in damages to the land owner whose lands have been over-flowed because of the construction of the approach to a bridge and the raising of the grade.

May 8, 1924.

Iowa State Highway Commission: We have received your communication of February 20, 1924, asking this department for an opinion upon the following question:

"We have a situation in Clayton County which is somewhat typical of several similar situations in other parts of the state and which raise a legal question upon which we would respectfully request your advice.

Last year the Board of Supervisors of Clayton County constructed a bridge over the Volga River, which stream is the dividing line between the incorporated lines of Elkport and Garber. On either side of the bridge there is a flood plain a thousand feet or more in width. The road serving as the approach to the bridge originally crossed this flood plain on a grade which was several feet below ordinary high water. The board in constructing the bridge over the Volga River assumed that this grade would not be raised above high water and that not being raised above high water it would permit some overflow over the road in times of extremely high water. Immediately upon the completion of this bridge the towns of Elkport and of Garber each proceeded to construct a grade serving as an approach to the bridge which is above ordinary high water and which in times of high water will necessitate the bridge structure carrying the entire stream flow.

We should like to be advised as to the Board's responsibility in connection with damages which may occur to adjacent property on account of the ponding effect of these high approach grades as well as their responsibility in connection with

damages which occur to the structure proper owing to its being inadequate to carry the extreme flood flow. Any improvements of the channel conditions effecting the bridge site or of modifications to the approach fills by the Board of Supervisors would necessitate their assuming some jurisdiction over matters wholly within an incorporated town. We should appreciate very much your advising us as to their rights under such conditions. This is a question that comes up quite frequently in connection with bridge structures that are built within incorporated cities and towns and it has caused considerable confusion and embarrassment to the Boards and Commission in a number of cases. The case cited above is fairly typical of a number of similar situations that we have in mind at the present time."

Under the statutes, the duty to construct and maintain all bridges throughout the county, with the exception of bridges in cities of the first class, is imposed upon the Board of Supervisors and the cost thereof must be paid out of the county bridge fund. Section 2877 of the Compiled Code.

As your inquiry involves what you term the "approaches to the bridge" and the grade thereof, we will first consider whether the approach thereto is a part of the bridge. This may be very material in determining the question you have submitted under the facts stated in your letter. It is well established that the term "bridge" includes all the appliances necessary to the proper use of the bridge. Both under the common law and usually under the statutes, a bridge includes the abutments and approachments necessary to make it accessable and convenient for public travel. The bridge would be useless without access to it. However, what would be regarded as approaches would depend largely upon the demands of the traveling public and upon what would be reasonable under the circumstances and the local situation in each case, and the determination of the question of how much of the embankment constitutes the approach so as to be a part of the bridge is one of fact, rather than one of law. 9 Corpus Juris, 421.

The rule thus stated is supported by opinions of the Supreme Court of the United States and by authorities in the following states: Connecticut, Georgia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersy, New York, Ohio, Oregon, Pennsylvania, Vermont, and also by the English authorities and the Supreme Court of Iowa. Among the authorities cited in support thereof in 9th Corpus Juris are the following: *The Clinton Bridge,* 77 U. S. 455, 19 L. E. 969; *People v. Chicago & N. W. Ry. Co.,* 249 Ill. 170, 94 N. E. 57; *Chicago v. Pittsburgh, etc., Ry. Co.,* 247 Ill. 319, 93 N. E. 307; *State v. Illinois Central Railway Co.,* 246 Ill. 188, (241); 92 N. E. 814; *Whiticher v. Sumnerville,* 138 Mass., 454; *Shaw v. Saline Township,* 113 Mich., 342; 71 N. W. 642; *Francis v. Franklin Township,* 179 Pa., 195; 36 Atl. 202; *Westfield Borough v. Tioga County,* 150 Pa. 152; 24 Atl. 700; *Moreland v. Mitchell County,* 40 Iowa, 394, (398); *Allbee v. Floyd County,* 46 Iowa, 177; *McGee v. Jones County,* 161 Iowa, 296; *Sewing v. Harrison County,* 156 Iowa, 230; *Eginoire v. Union County,* 112 Iowa, 558; *Nimms v. Boone County,* 66 Iowa, 272; *Casey v.* Tama County, 75 Iowa, 656.

For the purpose of showing the reasoning of the Iowa Supreme Court upon this question, we quote from one of its opinions the following portion thereof:

"That this approach was a part of the bridge, there can be no reasonable doubt. The main structure, as it is called, being that part which spans the river, would be incomplete as a bridge without the so called approaches. It would be utterly useless as a bridge, because totally inaccessable without the approaches, which are in fact a prolongation of the bridge, to enable persons traveling on the highway to cross the river on the bridge. Without the approaches, connecting the highway with the

main structure of the bridge, the traveling public would be in the situation of the petitioners for a certain road, in a sister state, which was intended to cross, and a portion of which lay on each side of a river." *Moreland v. Mitchell County,* 40 Iowa, 398.

That counties are not liable for the negligence of their officers or agents has been repeatedly held by the Supreme Court. *Kincaid v. Hardin County,* 53 Iowa, 432; *Cunningham v. Adair County,* 190 Iowa, 914; *Lane v. the District Township of Woodbury,* 58 Iowa, 463; *Nutt v. Mills County,* 61 Iowa, 754; *Smith v. Jones County,* 190 Iowa, 1041; *Lindley v. Polk County,* 84 Iowa, 308; *Gibson v. Sioux County,* 183 Iowa, 1006; *Dashner v. Mills County,* 88 Iowa, 401; *Snethin v. Harrison County,* 172 Iowa, 81; *Packard v. Voltz,* 94 Iowa, 277; *Wilson v. Wapello County,* 129 Iowa, 77; *Wenck v. Carroll County,* 140 Iowa, 559; *Post v. Davis County,* (Iowa) 191 N. W. 129.

The grounds upon which it is held that quasi corporations such as counties, school districts and the like are not liable in damages is that they are involuntary and political divisions of the state created for governmental purposes and that they give no assent to their creation. However, in an early case, the Supreme Court created an exception to this rule in cases of an injury to persons or property caused by a defective county bridge. *Wilson & Gustin v. Jefferson Co.,* 13 Iowa, 181; *Cunningham v. Adair County,* 190 Iowa, 913; *Huston v. Iowa County,* 43 Iowa, 456; *Wilson v. Wapello County,* 129 Iowa, 77; *McCullen v. Blackhawk County,* 21 Iowa, 409; *Soper v. Henry County,* 26 Iowa, 265; *Davis v. Allamakee County,* 40 Iowa 217; *Moreland v. Mitchell County,* 40 Iowa, 396; *Chandler v. Fremont County,* 42 Iowa 58; *Krause v. Davis County,* 44 Iowa, 141; *Cooper v. Mills County,* 69 Iowa, 350; *Leonard v. Wakeman,* 120 Iowa, 140; *Snethin v. Harrison County,* 172 Iowa, 81; *Smith v. Jones County,* 190 Iowa, 1041; *Gibson v. Sioux County,* 183 Iowa, 1007.

The rule as to the liability of the county for negligence in connection with the building or repairing of bridges was abolished by the Supreme Court in the case of *Post v. Davis County,* 191 N. W. 129. The holding of the court was based upon the comparatively recent legislation abolishing the distinction between county bridges and township bridges and making the acts of supervisors in the construction of bridges within the county as well as in the maintenance of highways subject to control by the State Highway Commission and also subject to Federal regulations for the purpose of obtaining Federal aid. Acts of the Thirty-seventh General Assembly, chapter 249. (Supplemental Supplement to the Code, 1915, sections 1527s2 and 1527s8).

The non-liability rule as applied to counties, and as originally adopted in this state in *Kincaid v. Hardin County,* supra, has been applied to a situation somewhat similar to the facts in the case you have submitted. Where the county constructed a ditch and embankment which caused adjacent land to become overflowed to the injury of the owner, it was held that the county was not liable in damages to the owner. *Nutt v. Mills County,* 61 Iowa 754.

It has also been held that a county is not liable in damages for negligently constructing or failing to keep open a ditch, under a statute, which authorized the construction of ditches whenever the same was conducive to the public health, convenience or welfare. *Dashner v. Mills County,* 88 Iowa, 401.

The rule adopted in the *Dashner* case has since been followed in *Packard v. Voltz,* 94 Iowa, 277, and *Wenck v. Carroll County,* 140 Iowa 558.

Perhaps we have set forth the holdings of the Supreme Court more in detail, and cited more authorities in support thereof, than is necessary, but we have done

this largely because of the importance of the questions involved. We deem it advisable and desirable that the matters should be covered fully and comprehensively in this opinion.

The bridge involved in your inquiry is such a bridge as is covered by section 2877 of the Compiled Code. In other words, it is such a structure as this section imposes the duty to construct and maintain upon the Board of Supervisors.

We are, therefore, of the opinion that, under the facts stated in your letter, the county would not be liable in damages to the land owners whose lands have been overflowed because of the construction of the approach to the bridge and the raising of the grade. While the Board of Supervisors has the right to maintain not only what is ordinarily embraced within the physical structure of the bridge itself, but also the ordinary approaches thereto, yet it should not assume jurisdiction over any part of a permanent grade of a street in a city or town upon the assumption that it is a part of the approach to the bridge. The right to establish grades and to maintain the same in cities and towns is vested exclusively in the councils thereof.

BOARD OF SUPERVISORS—Mileage—Boards of supervisors are entitled to mileage going from their homes to a regular, special or adjourned session and in returning from such session. The boards are in session until they legally adjourn even though during the session a day is taken for drainage matters. Members of the boards are not entitled to mileage going to and returning from their homes during such session.

May 9, 1924.

Auditor of State: We wish to acknowledge the receipt of your favor of the 2nd to this department requesting our opinion on the following proposition:

"We have a question raised by one of our examiners in regard to the mileage for the Board of Supervisors on consecutive days of session work. The question comes in connection with drainage session work provided for by Code Section 1989-a1, from which we understand that Board proceedings in connection with drainage may be had at a regular, special or adjourned session of the Board of Supervisors.

"To illustrate: A Board of Supervisors are in session May 1, 2, and 3. On May 1 and 3 they do regular session work but on May 2, they spend the entire day with drainage session work. Under this condition the question is, is the Board entitled to mileage from their homes and back on May 1, and the same on May 2 and 3, or are they entitled to mileage coming on May 1, and returning on May 3?"

Section 1989-a1, Supplement to the Code, 1913 provides in substance that the Board of Supervisors shall have authority at any regular, special or adjourned session to care for certain drainage business. This work, it will be noted, is to be done while the board is in session as the Board of Supervisors.

Section 469, Supplement to the Code, 1913 as amended provides in part:

"The members of the Board of Supervisors shall receive five dollars per day each for each day actually in session, and five dollars per day exclusive of mileage when not in session but employed on committee service, and ten cents for each mile traveled in going to and from the regular, special and adjourned sessions thereof, and going to and from the place of performed committee service * * * *".

We are of the opinion that the clear intention of the legislature in enacting the section just quoted was to provide that the Board of Supervisors were to receive mileage in going from their homes to a regular, special or adjourned session and in returning from such session. The Board is in session within the contemplation of this section until they legally adjourn. A continuous session of three days during one of which certain drainage work and business is cared for would constitute

one session, and we are of the opinion that the members of the Board of Supervisors would be entitled to mileage only in going from their homes to the session on May 1st and returning from the session on May 3rd. The fact that a member of the Board of Supervisors while attending such a session desires for his own accommodation or any other reason to return to his home during the session does not entitle him under the statute quoted to mileage for each day he leaves the session and returns.

COUNTIES—The interest on the county bond fund should be transferred to the general fund.

May 21, 1924.

Auditor of State: We have received your letter of recent date asking this department for an opinion upon the question you have stated as follows:

"Following is an extract from a letter received from our examiner, Thos. C. Meader, in regard to whether the interest for certain funds placed on certificates of deposit properly accrues to the benefit of the particular fund:

"I find that the treasurer has been putting the money received on certificates of deposit in the bond funds, under the following resolution:

" 'Resolved, that the county treasurer be authorized to deposit the money coming into his hands from the county bond sinking fund and the county bridge bond sinking fund, and that the interest received on these certificates of deposit be credited to each of said funds as carried by such funds deposited. Adopted.'

"Have they any right to post the interest to any fund except the county fund?"

Section 4767 of the Compiled Code reads in part as follows:

"The county treasurer shall, with the approval of the board of supervisors as to place of deposit, by resolution entered of record, deposit such funds in any bank or banks in the state to an amount fixed by such resolution at interest at the rate of at least two per cent per annum on ninety per cent of the daily balances payable at the end of each month, *all of which shall accrue to the benefit of the general county fund.*"

It will be observed that the portion of the statute just quoted provides that all interest on county funds shall accrue to the benefit of the general fund. This provision is determinative of the question you have submitted in the absence of a special statute relating to the County Bond Fund which provides for a different disposition of the interest thereon. It, therefore, becomes our duty to examine the statute with reference to the County Bond Fund to determine whether there is any exception as to the disposition of the interest on such fund therein.

Section 3265 of the Compiled Code reads as follows:

"The board of supervisors shall cause to be assessed and levied each year upon the taxable property in the county, in addition to the levy authorized for other purposes, a sufficient sum to pay the interest on outstanding bonds issued in conformity with the provisions of this chapter, accruing before the next annual levy, and such proportion of the principal that, at the end of eight years, the sum raised from such levies shall at least equal fifteen per cent of the amount of bonds issued; at the end of ten years, at least thirty per cent of the amount; and at or before the date of maturity of the bonds shall be equal to the whole amount of the principal and interest; *the money arising from such levies shall be known as the bond fund, and shall be used for the payment of bonds and interest coupons, and for no other purpose whatever;* and the treasurer shall open and keep in his books a separate account thereof, which shall at all times show the exact condition of said bond fund."

It will be noted that the statute provides that "the money arising from such levies shall be known as the bond fund" and shall be used for the payment of bonds and interest coupons and for no other purpose whatever.

This language is plain and its meaning apparent. We are of the opinion that the language "the money arising from such levies shall be known as the bond fund", refers alone to the money raised by taxation and not to the interest that may accrue thereon, and that only the amount raised thereby shall be used for the payment of bonds and interest coupons.

We are, therefore, of the opinion that the interest on the county bond fund should be transferred to the general fund and that no part thereof should remain in the bond fund.

COUNTIES—The board of supervisors may not enter into a contract with a bank for the sale of all drainage bonds that are issued during a period of two years. A contract requiring the deposit of drainage funds in a bank for a period of two years is void.

May 22, 1924.

Auditor of State: We have received your letter of March 24, 1924, asking this department for an opinion as to the validity under the laws of Iowa of the contract which is as follows:

"THIS AGREEMENT made and entered into the.....day of....., ..., by and between the County of ..... of the State of Iowa, and through their Board of Supervisors in session, party of the first part, and the Iowa Savings Bank of ....., Iowa, party of the second part,

"WITNESSETH: That for and in consideration of the making of this contract, the said Iowa Savings Bank of ....., Iowa, hereby agrees to purchase all drainage improvement certificates and bonds, bearing interest at the rate of six (6) per cent, per annum, that may be issued on all drainage districts established or to be established in said .....County, Iowa, or in connection with adjoining counties, on the lands assessed located in the several districts, same being duly established and levied, subject to their legality, and agrees to take the said drainage improvement certificates and bonds at par value and accrued interest from date of issue to date of delivery to said bank. Said certificates or bonds to continue drawing interest at six (6) per cent per annum on amounts remaining unpaid until presented for payment, in consideration of the agreements hereinafter made by party of the first part and upon the conditions hereinafter stipulated.

"First Parties agree that all proceeds from the sale and negotiation of such drainage certificates and bonds together with any other receipts, including all assessments and taxes paid into the County Treasury in any way arising from or on account of said drainage districts, shall be deposited in the Iowa Savings Bank of ....., Iowa, and there be kept on deposit and to be withdrawn only as needed to pay estimates of expenses, drainage warrants and other necessary expenses drawn on said drainage districts.

"It is further agreed that all certificates shall be issued as expeditiously as possible under the law and delivered to the said bank as soon as it can be legally done.

"Second party agrees to pay Five (5) per cent interest on the average daily balance during the life of this contract, on all moneys on deposit to the credit of the said drainage districts in accordance with this contract.

"It is further agreed that the life of this contract shall be for two (2) years from the date hereof, except that the deposits made under the contract shall continue with the said party of the second part until they are used for payment of the improvements for which they are levied.

"Party of the first part authorized the Chairman of the Board of Supervisors and the County Auditor, and hereby directs them to issue, negotiate and transfer said drainage improvements certificates and bonds and hereby authorizes the said County Treasurer to deposit all said funds arising from the sale of drainage certificates or bonds or from any other source in connection with drainage districts established as hereinbefore mentioned, with the Iowa Savings Bank, ..., Iowa."

The statute providing for the issuance of drainage improvement certificates contains the following provisions:

"And the board may provide by resolution for the issuance of improvement certificates, payable to bearer or to the contractors who have constructed the said improvement or completed part thereof within the meaning of this chapter in payment or part payment therefor, each of which certificates shall state the amount of one or more assessments or part thereof made against the property, designating it and the owners thereof liable to assessments for the cost of same, and said certificate may be negotiated. Such certificates shall transfer to the bearer, contractor assigns all right and interest in and to the tax in every such assessment or part thereof described therein, and shall authorize such bearer, contractor or assignee to collect and receive every assessment embraced in said certificate, by or through any of the methods provided by law for their collection, as the same mature. Such certificates shall bear interest not to exceed six per centum per annum payable annually, and shall be paid by the taxpayer to the county treasurer who shall receipt for the same and cause the amount paid to be applied to the payment of the certificate issued therefor; provided that any person shall have the right to pay the full amount of the tax so levied against his property, together with interest thereon to date of payment, at any time he desires so to do, even before the maturity of any certificates issued therefor. No certificate shall be issued or negotiated for the use of the drainage district for less than par value with accrued interest up to the delivery or transfer thereof." Section 4874 of the Compiled Code.

Section 4875 of the Compiled Code, the statute relating to the issuance of drainage bonds, provides in part as follows:

"If the board of supervisors shall determine that the estimated cost of reclamation and improvement of such district of land is greater than should be levied in a single year upon the lands benefited, instead of issuing improvement certificates as provided in the preceding section, it may fix the amount that shall be levied and collected each year and may issue drainage bonds of the county, bearing not more than six per centum annual interest and payable semiannually in the proportions and at the times when such taxes shall have been collected, and may devote the same at par, with accrued interest, to the payment of the work as it progresses or may sell the same at not less than par, with accrued interest, and devote the proceeds to such payment; *and if in the sale of said bonds a premium is received, such premium shall be credited to the drainage fund,* and should the cost of such work exceed the estimate, or should the proceeds of the tax when collected be insufficient to pay the principal and interest of bonds sold, a new apportionment of the tax may be made and other bonds issued and sold in like manner, to meet such excess of cost or shortage in the proceeds of tax, but in no case shall the bonds run longer than not more than twenty years."

It will be observed that the drainage certificates must be made payable to the bearer, or to the contractors, who have constructed the improvement, and that no certificate shall be issued or negotiated for less than par value with accrued interest up to the delivery or transfer thereof. It is apparent, we think, that under the provisions of section 4874, it is the imperative duty of the board of supervisors to negotiate and sell said certificates for the highest price and upon the best terms obtainable, even though they are paid or delivered to the contractor in satisfaction of his claim for constructing the improvement. It also becomes the duty of the board in each drainage district to determine whether the certificates shall be payable to bearer, or to the contractors, and the right to act under this section cannot be contracted away by the board of supervisors in advance. The provisions of section 4875 with reference to the use of the bonds provided for therein, while phrased differently from the like provisions in section 4874 are, in our opinion, of like tenor and effect. It will be observed that the bonds may be devoted at par with accrued interest to the payment of the work as it progresses, or the same may be sold at

not less than par with accrued interest and the proceeds devoted to such payment. We believe it is manifest that, under this section, it is the duty of the board of supervisors to secure the highest price and the most favorable terms for the bonds, whether delivered to the contractor or sold for the purpose of creating a fund to pay for the improvement. If this be true, then it is the duty of the board to negotiate the bonds issued thereunder in each drainage district separately, and that the right to do so cannot be abandoned or bartered away in advance of the negotiation thereof.

The fact that a better price may be obtained by doing so cannot affect or in any way change the proper construction thereof. To permit the board of supervisors to enter into a contract for the sale of all certificates or bonds that may be issued under the provisions of the two sections quoted herein would be subversive of the best interests of the county and the drainage districts, and would be contrary to the principles of public policy. The board of supervisors, in entering into such a contract, in most cases, would bind the county, if such a contract were valid, beyond the period when the board as then constituted would be in office. Some of the members would retire before such contract expired by limitation. The power to bind a subsequent board is not vested in the board of supervisors. Any drainage district that may be established after the reorganization of the board by the election of one or more new members would be subject to such action as the new board might desire to take and the contract, if entered into, could not legally interfere therewith.

We are therefore of the opinion that the contract, a copy of which is embodied in this opinion, would not be binding upon the board, or the drainage districts that such board represents, but that, notwithstanding the provisions of such contract, the board would have the right and authority to proceed in the negotiation of the improvement certificates or bonds, under the provisions of the statute, the same as though no contract had ever been entered into. This department has, on three occasions, rendered opinions on questions closely analogous to the question we have just considered. We refer to the following opinions: one prepared by the Attorney General on June 18, 1921 for Hon. Glenn C. Haynes, Auditor of State, found on page 315 of the Opinion Records in this office; one prepared by the Attorney General on March 1, 1922 for H. C. Schulz, County Attorney, Newton, Iowa, found on page 297 of the Report of the Attorney General, 1922; one prepared for Geo. E. Allen, County Attorney, Onawa, Iowa, June 24, 1919, found on page 668 of the Report of the Attorney General 1919-1920. All of these opinions involve the issuance of refunding bonds, but we believe the rule announced therein would be equally applicable to the issuance and sale of drainage certificates and bonds. It was held in each of these opinions that county funding bonds should not be sold on contract before issue, but should only be sold after their issuance.

We are also of the opinion that the provisions of the contract that all moneys or proceeds received from the sale of drainage certificates and bonds, together with any other receipts including all assessments and taxes paid into the county treasury in any way arising from or on account of said drainage districts, shall be deposited in the said bank and there be kept on deposit and to be withdrawn only as needed to pay estimates of expenses, drainage warrants and other necessary expenses drawn on the drainage district, is absolutely void and beyond the power of the board to enter into. Sections 4874 and 4875, when properly construed, contemplate that the proceeds received from the sale of certificates or bonds shall be paid to the county treasurer and by him held until such time as the funds are properly paid for the

cost or expense of constructing the improvement. Therefore, the general statutes relating to the duties of the county treasurer, and the method of accounting for the funds of the county, will apply thereto. Section 3165 of the Compiled Code defines the duties of the county treasurer in a general way. It reads as follows:

"The treasurer shall receive all money payable to the county, and disburse the same on warrants drawn and signed by the county auditor and sealed with the county seal, and not otherwise, and shall keep a true account of all receipts and disbursements, and hold the same at all times ready for the inspection of the board of supervisors."

Section 3173 prescribes the method to be adopted by the county treasurer in keeping an account of the several funds. Its provisions are as follows:

"The treasurer shall keep a separate account of the several taxes for state, county, school, highway, and all other funds created by law, opening an account between himself and each of those funds, charging himself with the amount of the tax and crediting himself with the amounts paid on each, and with the amount of delinquent taxes, when authorized so to do."

Section 4767 reads in part as follows:

"the county treasurer shall, with the approval of the board of supervisors as to place of deposit, by resolution entered of record, deposit such funds in any bank or banks in the state to an amount fixed by such resolution at interest at the rate of at least two per cent per annum on ninety per cent of the daily balances payable at the end of each month all of which shall accrue to the benefit of the general county fund;"

Section 4771 contains the following statement:

"the state treasurer and each county treasurer shall at all times keep all funds coming into their possession as public money, in a vault or safe, to be provided for that purpose, or *in some bank legally designated as a depository for such funds.*"

We are of the opinion that the particular provisions of the contract now under consideration are absolutely void and not binding upon the county. The statutes quoted above make the county treasurer the custodian of all funds that are paid to or for the county, and prescribe the exact method that must be used by him in keeping the accounts of such funds. They also provide that the county treasurer shall however, deposit such funds in any bank or banks in the state in an amount fixed by resolution at a rate of at least 2½ per cent payable at the end of each month. It is our opinion that to authorize the deposit of county funds, including drainage funds, in a bank or banks, the county treasurer and board must jointly act in the selection of such a depository.

It is the treasurer who may or shall make the deposit and the sole function of the board is to fix the limit of such deposit and to approve the place where it is to be made and with the concurrence of the treasurer, pass upon the sufficiency of the bond offered by the selected depository. *State v. Rhein, Treasurer,* 149 Iowa, 80.

The insertion of such a provision in a contract is nothing more than an attempt to wrest from the county treasurer the right vested in him by the provisions of the statute. No such authority is vested in the board of supervisors. It may be advisable to refer to the fact that under sections 4874 and 4875 of the Compiled Code, by specific provisions of interest on drainage funds becomes and remains a part of the drainage fund, and does not become a part of the general county funds as provided in section 4767 of the Compiled Code, as is true of the ordinary funds of the county.

It is our opinion also, that the board may not in advance enter into a contract requiring the county treasurer to deposit such funds in any bank for so long a period

of time as two years as prescribed in the contract. It will be observed that the statute does not require the entering into a contract between the county and the bank, but the initiative therefor rests entirely with the county treasurer and the board, and that these officers may change the depository at any time and as often as they desire. The banks under this statute acquire no vested right to have the deposit retained or kept therein for any definite period of time.

Therefore, we are of the opinion that the provisions of the contract requiring the deposit of drainage funds in the Iowa Savings Bank for a period of two years is null and void and should not be carried out, or performed by the county, if such contract should be entered into.

COUNTIES: Detention Hospitals—Funds raised by levy authorized under the provisions of chapter 299, Laws of the 38th General Assembly, for the establishment of detention hospitals by the board of supervisors in a county cannot be used for any other purpose and cannot be used to pay for a clinic for the care of patients who might otherwise be treated in the detention hospital.

May 26, 1924.

Auditor of State: You have requested the opinion of this department on the following proposition:

"In regard to the Hospital maintenance fund in Marshall county, this was created under sections 13 and 14 Chapter 299 of the 38th G. A. in regard to venereal diseases, said chapter has been amended by Chapter 301 of the 39th G. A. and Chapter 280 of the 40th G. A. No levy has been made for the last two years, but they have about $6,000.00 in this fund. In 1923 they made a contract with the clinic to take care of those kind of cases, with the idea that it would be a less expense to the county, than to maintain this hospital."

Chapter 299, Laws of the 38th General Assembly is an act relating to public health and it is therein provided for the establishment of detention hospitals by the Board of Supervisors of any county when advised or notified by the State Board of Health of the necessity therefor. Section 13 of this act provides for the establishment of such hospitals, for the erection, purchase or rent, and the equipping and maintenance thereof. Section 14 of this act provides for the special tax levy therefor and in part reads as follows:

"* * * * *for the purchase of real estate for hospital purposes, and for the construction, purchasing or renting of such hospital and for equipping, and maintaining the same, for either or all of such purposes. The tax so authorized shall be collected and paid over to the treasurer of such county in the same manner as other taxes are collected. The proceeds of such tax shall be known as the hospital fund, and shall be paid out on the order of the board of supervisors for the purposes authorized by this act, and for no other purpose whatever."

It will be noted that this section specifies the purposes for which this fund may be used and restricts the use thereof to such purposes, "and for no other purposes whatever." The uses of this fund being thus restricted, it can be used for no other purpose. Payment to a clinic, for the care of patients who would otherwise be treated in the detention hospital is not one of the purposes for which this fund may be used.

COUNTY ATTORNEYS—A county attorney cannot collect a per diem fee from the county for appearing in the bankrupt courts in his district.

August 4, 1924.

County Attorney, Franklin County, Hampton, Iowa: You have requested the opinion of this department as to whether or not a county attorney has a right to

collect from the county a per diem for his services in prosecuting the collection of a debt due the county where he brings the suit in the bankrupt courts, and where no such court is situated in his county.

Code section 301 of the Supplemental Supplement of 1915 provides for the duties of county attorneys. Section 2 provides:

"To appear for the state and county in all cases and proceedings in the courts of his county to which the state or county is a party. * *"

We are of the opinion that the bankrupt court constitutes a court of the county within the meaning of the above section, and that it is the duty of the county attorney to represent his county on official business in the said courts within his district without being paid an additional per diem for such services.

OPINIONS RELATING TO ELECTIONS

ELECTIONS: The expenses of the primary and general election are not to be considered in determining the expenditures of a county under the provisions of the Tuck Law.

November 10, 1924.

County Attorney, Appanoose County, Centerville, Iowa: This department is in receipt of your letter of November 8, 1924 in which you request an official opinion from this department. Your letter is in words as follows:

"I am writing you as per your request in a telephonic conversation with J. B. McNeal, County Auditor, as to whether, in your opinion, the Primary and General Election expense for 1924 would come within the provisions of the Tuck Law. Also, as to whether the funds paid to the Farm Bureau would come under the Tuck Law.

"Will you kindly give me your opinion on these matters at your earliest convenience."

You are advised that under the law the expenses of the primary and general election are not to be considered in determining the expenditures of a county under the provisions of Sections 5258 and 5259 of the Code, 1924, commonly known as the Tuck Law. This is an extraordinary expense, especially provided by the Constitution of the State as well as the laws, and is not subject to the provisions of the law referred to.

Referring to the appropriation for the aid of the Farm Bureau, you are advised that this is to a person within the meaning of the statute and therefore would not be covered by the provisions of Sections 5258 and 5259 of the Code, 1924.

ELECTIONS—Special for State Senator. Discussion of procedure.

March 8, 1923.

Mr. R. W. Bergsell, Senatorial Committeeman: You have orally requested this department to advise you relative to the procedure to be followed in connection with the nomination and election of a state senator at a special election to fill the vacancy occasioned by the death of the Honorable D. C. Chase of Webster City, Iowa.

Under the state of facts as existing, the Governor has called a special election to fill the vacancy in question, which special election is to be held on March 31, 1923.

By way of beginning, your attention is called to the opinion of this department dated December 27, 1917, which opinion is in words as follows:

"Your inquiry addressed to the attorney general as to how to fill a vacancy in the office of state senator has been directed to me for answer.

"The Constitution of Iowa, Article 3, Section 12, provides:

" 'When vacancies occur in either house, the governor, or the person exercising the functions of governor, shall issue writs of election to fill such vacancies.'

"Section 1279 of the code provides:

" 'A special election to fill a vacancy shall be held for a representative in congress, or senator or representative in the general assembly, when the body in which such vacancy exists is in session, or will convene prior to the next general election, and the governor shall order such special election at the earliest practicable time, giving ten days' notice thereof.'

"It seems plain therefore that because of the constitutional and statutory provisions above quoted that in order to hold a special election for the purpose of filling a vacancy in the office of state senator in your district it will be necessary for the governor to issue a writ of election and cause notice thereof to be given for the time described in the section quoted.

"The nomination of a candidate to fill such vacancy we believe is made by the methods provided by Section 1098 of the Code.

"Section 1087a30 of the 1913 Supplement to the Code provides that the act relating to primary elections does not apply to special elections to fill vacancies. The law then, so far as nominations to fill vacancies is concerned, must be the same as before the enactment of the primary law.

"Section 1088 of the Code provides that the provisions of Chapter 3 of Title VI applies to all elections known to the laws of the state, except school elections. This, of course, would include special elections, and as Section 1098 is a part of said chapter, the nomination for the purpose of filling the vacancy in question would be governed by section 1098.

"Section 1104 of the Supplemental Supplement of 1915 provides:

" 'In case of special election to fill vacancies in office, certificates of nomination or nomination papers, for nomination of candidates for office to be filled by the electors of a larger district than a county, may be filed with the secretary of state, not later than fifteen days before the time of election.'

"It is our opinion, then, as before stated, that the election should be called by the governor upon the proper notice and that the nomination should be made by convention and a certificate of the nomination filed with the secretary of state, as indicated by the section quoted above."

It will be observed that the provisions of the primary election law do not apply to special elections to fill vacancies such as that in question. Section 1087a30 of the Supplement to the Code, 1913, relates to all of the act in question and therefore, relates as fully to section 1087-a25 as to any other section of the act.

It will, therefore, be necessary for the party organizations of each of the political parties to proceed in the manner provided in section 1098 of the code.

Suggesting only, may we observe that you should take the matter up at once with the several county chairmen and they with the precinct chairman to the end that caucuses may be held in each of the several voting precincts in each of the counties for selection of delegates to the county convention. The county convention should assemble at such time as may be fixed for the purpose of selecting delegates to the senatorial convention. The delegates to the senatorial convention should select the nominee for the office and certify the fact of such nomination to the Secretary of State, to be received and filed by him in his office not later than Saturday, March 17, 1923.

ELECTIONS—CITIES AND TOWNS NOMINATION. A candidate at the city election may have his name placed upon the ticket by petition as provided by

section 1100, Code, 1897 and may designate the name and ticket upon which he desires to run, providing none of the parties whose names he selects have nominated a ticket as provided by law. In case one of the parties would not have a candidate for mayor, then the next succeeding candidate on the ticket would be the head of the ticket, and the percentage necessary for nomination would be based upon the vote received by this person.

February 21, 1924.

County Attorney, Clinton County, Clinton, Iowa: I wish to acknowledge receipt of your favor of the 15th to this department in which you request an opinion upon the following statement of facts:

"The facts are, about two years ago at the spring election there was no Democratic candidate for mayor, and there is a contention that the Democratic party is not entitled to a place on the ballot at the primary, because of Section 1087-a34 of the Supplement to the Code of 1913 which states that a candidate must have filed papers with signers in the amount of at least two per cent of vote of his party cast for mayor at the preceding city election. Since there was no vote cast for mayor in that election, it is contended that there can be no candidate for mayor or other officers, nothing to base a percentage upon, and that no Democratic ticket is entitled to be printed on the ballot. There was, however, at the last election a Democratic ticket, but no candidate for mayor."

In this opinion we wish to call your attention to the provisions of Section 1087-a29, Supplement Code, 1913 that provides:

"Nothing contained in this act shall be construed so as to prohibit nomination of candidates for office by petition as now authorized by law; * * * * *"

Section 1100, Code 1897 provides for the nomination of candidates by petition and in part reads:

"and for township, city, town or ward, by such paper or papers signed by not less than ten qualified voters, residents of such township, city, town or ward; but the name of a candidate placed upon the ballot by any other method shall not be added by petition for the same office. * * * * *"

Under the provisions of the two sections above referred to a candidate for office at the primaries of your city election could have his name placed upon the ticket by petition. This candidate could designate any name of the ticket upon which he desired to run, choosing the name "democratic" or "republican" provided neither one of these parties nominates a ticket as provided by law. (*Lowery v. Davis,* 70 N. W. [Iowa] 190.)

From your request we assume that there was a democratic ticket upon the ballot at the last city election, but that there was no candidate for mayor upon that ticket. A candidate for the office of mayor upon the democratic ticket at this year's primary election may have his name placed upon the ticket by filing nomination papers signed by at least two per cent of the party vote at the last preceding city election to be determined by the vote received by the head of that party ticket. In case there was no candidate for mayor, then the next succeeding candidate on the ticket would be the head of the ticket, and the percentage should be based upon the vote received by that candidate.

Sections 1087-a10 and 1087-a12 together with Section 1087-a34, all of the Supplement to the Code, 1913, cover this last means of securing a place upon the ticket.

We are therefore of the opinion that the candidate may have his name placed upon the ballot by petition and may designate the democratic party as his party, providing that the democratic party has not placed a ticket in the field as provided by law, or that he may secure a place upon the ballot on the democratic ticket by

filing nomination papers containing at least two per cent of the number of votes cast for the head of the democratic ticket at the last preceding city election.

SCHOOL ELECTIONS: Nomination papers filed seven days previous to election entitles nominee's name to place on ballot. Signatures secured on Sunday are legal.

March 11, 1924.

County Attorney, Crawford County, Denison, Iowa: This department is in receipt of your letter dated March 10, 1924, in which you inquire as follows:

"I would like your opinion on the following proposition:

"Section 2754 of the Supplement to the Code, provides among other things that 'the names of all persons nominated as candidates for office in all independent city or school districts shall be filed with the Secretary of the School Board not later than seven days previous to the day on which the annual school election is to be held.'

"If the nomination papers were filed on Monday, March 3rd, and the election is held on the following Monday, March 10th, would they be filed within seven days previous to election day within the meaning of the statute?

"Would the fact that signers were secured to said nomination papers, on the Sabbath day, invalidate same?"

You are advised that nomination papers filed March 3 would be in time. You are also advised that if the nomination papers are complete and if there has been no withdrawal of the names on the nomination papers by those that signed on Sunday, in our opinion, the fact that the nomination papers were signed on Sunday would not invalidate them.

ELECTION COSTS—Under present law at June Primaries there would be insufficient funds to pay such costs in many counties.

TUCK LAW—Election costs.

March 18, 1924.

Hon. John Hammill, Senate Chamber: This department is in receipt of a communication from the Iowa State Senate in words as follows:

"Senator Buser moved that the department of justice be requested to file a written opinion with the secretary of the senate, stating whether or not the general funds in any county in Iowa will be so exhausted June 2nd, that they can not pay the warrants issued for election expenses."

This question almost answers itself. However, for the information of the Senate, may I state that the statute relating to the limitation of expenditures from the county funds in a given year in practical operation works substantially as follows: On the first day of January the legally collectible revenues for the ensuing year are placed on one side of the ledger. On the other side of the ledger are to be placed the expenditures for the year as they arise from day to day and month to month until the two balance, at which time all expenditures from the fund must cease. This being true, it will be apparent to you that on June 2nd there would not be such a ledger balance.

I am frank in saying, therefore, that in my judgment, although I have no specific knowledge, the general funds in Iowa counties would not be exhausted on June 2nd.

ELECTIONS: BALLOT-FORM OF. Blank spaces should be provided for writing of names. Offices to be filled should be placed on ballot substantially in same order as prescribed by law.

March 26, 1924.

Auditor of State: You have requested an opinion from this department upon

two questions involving the form of the ballot for city elections. Your first question briefly stated is whether or not upon the ballot to be used there should be provided blank lines preceded by a square for use in writing in or pasting in the names of candidates whose names did not appear upon the printed ballot.

In answer to this question you are advised that there should be placed under the name of each office which is to be filled by the voters a blank space with a square in front thereof so that the voter may write in the name of any person for whom he wants to vote for the particular office whose name does not appear upon the printed ballot. Sec. 1119 Supplement to the Code of 1913 as amended by Chapter 87, Acts of the 38th General Assembly.

Your second question refers to the order in which the various offices for which there are candidates should be placed on the printed ballot. You are advised that the order should be substantially in the form provided and suggested by Section 1106, Supplement to the Code of 1913 as amended by Chapters 86 and 353 of the Acts of the 38th General Assembly, and Chapter 19 of the Acts of the 39th General Assembly. (Supplement to the Compiled Code, 1923, Section 432.) It is the opinion of this department that the offices on each ticket should appear opposite each other so that there may be no confusion in the mind of the voter in selecting the candidate for whom he wishes to vote for any particular office. Under the provisions of the section of the law referred to, the order when once determined must be followed on every ticket printed. If there should happn to be no candidate for a particular office on a ticket the space should be left blank opposite the place for that office in the regular form of order adopted.

For your information you are also advised that Section 1109, Supplement to the Code of 1913, prescribes the mechanical specifications for the printing of ballots. It is provided among other things that the party name or title shall be printed in capital letters not less than one fourth of an inch in height. It is also provided that the names of candidates shall be printed in capital letters not less than one eighth nor more than one fourth of an inch in height and at the beginning of each line on which the name of a candidate is printed a square shall be printed, the size of which shall not be less than one fourth of an inch in height. It is further provided that on the back or outside of the ballot so as to appear when folded, shall be printed the words "Official Ballot" followed by the designation of the polling place for which the ballot is prepared, the date of the election and a fac-simile of the signature of the officer who has caused the ballot to be printed.

I trust that the foregoing will sufficiently answer your inquiry.

ELECTIONS—BALLOTS. Discussion of what constitutes spoiled ballot.

April 8, 1924.

County Attorney, Des Moines County, Burlington, Iowa: This department is in receipt of your letter dated April 2, 1924 in which you request an opinion. Your letter is in words as follows:

"Please send us a pamphlet on the election laws, if you have such a thing prepared. We have a question arising in which the municipal election is to be contested. The question will probably resolve upon whether or not certain ballots are spoiled.

"(1) If the voter has voted for both candidates for an office, will that render the ballot defective in its entirety or only for the office where the voter voted for both candidates?

"(2) Another question arises is that of erasures. The voter having voted for one candidate, in error, erased his vote and voted for the other candidate. Will

that likewise affect the entire ballot or only the office where the erasure occurred?

"(3) Another instance is where the voter voted before and after a candidate's name, there being no question of the voter's intention, the (x) merely being both before and after the candidate's name. It is our contention that such a ballot is not spoiled.

"(4) Another error on part of the election judges, the returns were not tallied in the poll book, and the total votes for each candidate were written down in figures only, and not written out in words, as required by section 472 of the Compiled Code."

Answering your first question, you are advised that in cases where a voter votes for two candidates for the same office, the vote is not counted for either candidate for such office, but otherwise the ballot is legal.

Answering your second question, you are advised that the voter should secure a new ballot where he spoils the old one. The question, of course, is one of fact depending upon whether the ballot can be identified by reason of erasure, but ordinarily the courts will reject a ballot of this character, and for that reason the election judges should not count such a ballot unless it is clear that the erasure does not constitute an identification mark.

Answering your third question, you are advised that the same rule will prevail as to a ballot of this character as applies in cases of erasures, the question being as to whether or not there is an identification mark. The judges of elections in the first instance determine this fact, and on contest the court likewise determines it. We assume the cross is in the square.

Answering your fourth question, you are advised that mere technical errors on the part of the election judge or judges will not nullify the returns. The statutes to which you refer are generally directory and not mandatory. If there is no doubt as to the results certified, they should be accepted. The purpose of all elections is to insure the will of the elector being expressed and given effect, and a mere technical failure to comply with some statute will not nullify the ballot. The election judges should always comply with the provisions of the law, but some mere failure, minor in character, should not and will not be permitted to defeat the will of the electors.

ELECTIONS—PRIMARY—Candidate for office of a sub-division of a county, name printed on ballot when (1) petition of 10 voters filed or affidavit of candidate filed with auditor 20 days prior to election date.

April 15, 1924.

Auditor of State: You have requested an opinion upon a proposition stated in your letter as follows:

"Code Commission Bill No. 21 as passed by the Senate and House, signed by the Governor, and published March 31st, provides as follows in section No. 21:

"'Candidates for township or precinct office. The name of a candidate for an office to be filled by the voters of any subdivision of a county, including the office of party committeeman, shall be printed on the official primary ballot of his party:

"'1. If a nomination paper signed by ten (10) qualified voters of said subdivision is filed in his behalf with the county auditor at least twenty (20) days prior to such primary election, or

"'2. If the candidate files with the county auditor, twenty (20) days prior to such primary election, his personal affidavit as provided by section eighteen (18) of this chapter.'

"Some questions arise in connection with this act upon which we think we should have a clear ruling in order to establish uniformity of practice under the provisions made.

"First, if a nomination paper signed by ten qualified voters is filed with the county auditor twenty days prior to the primary, is it necessary that the affidavit of the candidate as provided in section 18 be also filed with the auditor before the candidate's name is placed on the official primary ballot?

"Second, if a candidate for an office to be filled by the voters of a subdivision of a county files an affidavit under the provisions of paragraph 2 of this section 21, is it necessary that a petition also be filed before placing the name of the candidate on the official primary ballot?"

It will be observed from a careful reading of the provisions of law set out in your statement that candidates for township or precinct offices may secure their names printed on the official primary ballot in one of two ways, namely, by a nomination paper signed by ten qualified voters of the political subdivision being filed in his behalf with the county auditor at least twenty days prior to the primary election. Or the candidate himself may file with the county auditor twenty days prior to the primary election his personal affidavit as provided by section 18 of that chapter.

It is therefore the opinion of this department in answer to your first question that when a nomination paper signed by ten qualified electors is filed with the county auditor twenty days prior to the primary, nominating him for a particular township or precinct office, it is not necessary that the affidavit of the candidate be filed also.

In answer to your second question, it is also the opinion of this department that if an affidavit of the candidate is filed in accordance with the provisions of the second subdivision set out in your proposition, no nominating petition is required to be filed.

ELECTIONS—L. E. Eickelberg, candidate for republican nomination for United States Senator, held to be invalid because supported by affidavit of candidate.

April 23, 1924.

Secretary of State: This department is in receipt of your letter dated April 23, 1924. In this letter you request an official opinion. For convenience your letter is set out at length. It is in words as follows:

"I beg to advise that nomination papers have been received in this department from Mr. L. E. Eickelberg of Waterloo, Blackhawk County, Iowa, proposing his name as a candidate for nomination in the June 1924 primary election for the office of Senator in the Congress of the United States.

"This party computes the required percentage of signatures to his petitions upon the vote cast for U. S. Senator at the last general election, upon which basis he offers for filing, a petition signed by 2,080 electors.

"The writer holds that such required percentage under the law should be based upon the vote of the party cast for Governor at the last general election as the head of the ticket, upon which basis the percentage would amount to 2,099 signatures.

"As the law is construed by the writer, the party indicated would be 19 signatures short of the required number for filing.

"Further, the party indicated has personally made the affidavit required of those circulating such papers, in the case of 1,646 of such signatures.

"The writer holds that under Section 1087-a10 such affidavit shall not be made by the candidates and thus 1,646 signatures are invalidated, leaving 434 lawful signatures to the petition offered for filing.

"Under the circumstances as herein indicated am I not justified in rejecting such petition and refusing to certify the name of the party indicated as a candidate for nomination for the office of United States Senator?

"An immediate reply in writing to the above inquiry is required."

You are advised that Mr. L. E. Eickelberg has not been properly nominated for the office of United States Senator to be voted upon at the primary election to be held in June, 1924. The nomination papers filed with you are supported by the affidavit of the candidate. This is in direct conflict with Section Seventeen (17) of Senate File Number Twenty-One (21) of the extra session of the Fortieth General Assembly, which governs nominations by primary elections. We quote this section at length.

"The affidavit of a qualified elector, *other than the candidate*, shall be appended to each such nomination paper, or papers, if more than one (1) for any candidate, stating that he is personally acquainted with all the persons who have signed the same; that he knows them to be electors of that county and believes them to be affiliated with the party named therein; that he knows that they signed the same with full knowledge of the contents thereof; that their respective residences are truly stated therein; and that each signer signed the same on the date stated opposite his name."

There is no other conclusion to reach than that the nomination papers, not being in form, the nomination is improperly made.

ELECTIONS: There is no statutory provision authorizing the removal of a candidate's name from the official ballot after the candidate's death.

May 27, 1924.

County Attorney, Audubon County, Audubon, Iowa: We wish to acknowledge receipt of your favor of the 23rd in which you ask for the opinion of this department on the following proposition:

"There are three republican candidates in the field for election to Clerk of the District Court at the coming June Primaries. One dies. He has filed his nomination papers as by law provided and as far as any provision of the law that I can find is concerned his name should go upon the ballot at the primary. Is there any procedure by which this name can be removed and if so please give same; if not kindly inform if name should be published upon the ballot notwithstanding the decease of the candidate considered."

There is no provision of the statute authorizing the removal of the name of the deceased candidate from the official ballot at this time. Consequently, the name of the deceased candidate must be printed upon the official ballot.

ELECTIONS—BALLOTS—Use of Stickers, cannot be used when they in effect substitute a portion of the ballot.

May 31, 1924.

County Attorney, Montgomery County, Red Oak, Iowa: You have requested an opinion from this department upon the question of whether or not voters belonging to a political party participating in the primary election to be held on June 2nd next may use and paste on the official ballot a printed sticker containing a considerable portion of the ballot and which when pasted on the official ballot will cover a considerable portion thereof.

You have enclosed for our information a sample ballot together with one of the stickers referred to. The sticker contains the complete form of ballot for the office of State Representative, County Auditor, County Treasurer, Clerk of the District Court, Sheriff, County Recorder, County Attorney, Coroner and Member of the Board of Supervisors. It is made up in such a manner as to completely cover the official ballot for these offices, including the name of each particular office and the squares printed on the official ballot in front of the blank spaces provided for the writing in of names.

There is no question but what a voter has the right to write or paste upon his ballot the name of any person for whom he desires to vote. (*Barr v. Cardell,* 173 Iowa 18). We have heretofore construed the provision of law permitting the writing in of names to include the use of a paster with the name of the person for whom the voter desires to vote for for any particular office printed or written thereon. We are of the opinion, however, that such a paster must be in form such that it may be inserted in the blank space provided on the ballot for the writing in of names and must not in any manner cover up or change the printed portion of the ballot. In other words, it must not be of such a nature as to become a substitute for the official ballot or any portion thereof. Therefore, it is the opinion of this department that the particular proposition presented by you will be a violation of the provisions of law and if used will spoil the ballot.

ELECTIONS:

1. In case of a tie vote, the judge of election shall determine the tie by lot, and this may be done after the returns are made to the auditor if within a reasonable time.
2. A delegate to a county convention receiving one vote is not duly elected.
3. Where only a part of the delegates of a precinct have been elected, they may cast the full vote of the precinct.

June 19, 1924.

County Attorney, Tama County, Toledo, Iowa: We have your letter of June 16th, 1924, asking this department to render an opinion upon the following propositions:

First: Under Section 77 of Chapter 5 of the Acts of the Special Session of the 40th General Assembly, if the judges of election fail to determine the tie vote, how is the question as to who shall sit in the party convention determined?

Second: Does section 55 of such statute prevent a person who receives one vote for delegate from sitting in the convention?

Third: Where only a part of the delegates to which a precinct is entitled are elected, may the delegates present at the county convention cast the entire vote to which the precinct is entitled?

Section 77 provides as follows:

"In case of a tie vote resulting in no nomination for any office, or election of delegates or party committeeman, the tie shall forthwith be determined by lot by the board of canvassers, or judges of election, as the case may be."

Section 93 of said statute contains the following statement:

"* * * * * * that the judges of election shall canvass the returns as to delegates and members of the county central committee, and certify the result to the auditor with the returns."

It will be observed that under the portions of the statute, just quoted, the judges of election constitute a canvassing board so far as delegates to the county convention are concerned. Section 77 also provides that *the tie shall forthwith be determined,* meaning that it shall be done before the returns are made to the county auditor.

However, we are of the opinion that this provision of the statute is merely directory, and that in the event of the failure of the judges of election to determine the tie vote by lot, before the returns are delivered to the county auditor, they may convene the making of the returns and determine the tie as provided therein and certify the result to the county auditor, provided, of course, it is done within a reasonable time.

Section 55 of the statute reads as follows:

"The candidate or candidates of each political party for each office to be filled by the voters of any subdivision of a county having received the highest number of votes shall be duly and legally nominated as the candidate of his party for such office, except that no candidate whose name is not printed on the official primary ballot, who receives less than five per cent (5%) of the votes cast in such subdivision for governor on the party ticket with which he affiliates, at the last general election, nor less than five (5) votes, shall be declared to have been nominated to any such office."

It will be noted that Section 55 relates to candidates of each political party for each office to be filled by the voters of any subdivision of a county. Under section 95 of the statute, delegates to the county convention are officers and their term of office is fixed at two years and until their successors are elected. Manifestly, Section 55 applies to candidates for delegates to the county convention, and the candidates who received only one vote for delegate was not elected and cannot sit in the convention as a delegate from his precinct.

Section 97 of such statute is as follows:

"If any precinct shall not be fully represented the delegates present from such precinct shall cast the full vote thereof, and there shall be no proxies."

It is a significant fact that the quoted section contains the phrase "fully represented," impliedly meaning that to entitle the precinct to the full vote to which it is entitled in the county convention, there must be some delegates legally elected and qualified to act therefor.

We are of the opinion that under this section, where only a part of the delegates to which the precinct is entitled to have been elected, then the ones elected may cast the full vote of such precinct. It is obviously the purpose of this statute to preserve to each precinct the right to cast full vote when represented at all. We believe this construction is in harmony with the spirit and purpose of the primary election law.

ELECTIONS—BOARD OF SUPERVISOR. The 35% for election rules does not apply to candidates for the board of supervisors and where the judges of election and the auditor think such rule applies and so declare no one nominated they shall reconsider their decision and declare the one having the plurality as nominated.

July 9, 1924.

County Attorney, Cedar County, Tipton, Iowa: This department has received your letter of June 30, 1924, asking for an opinion upon the proposition which you have stated as follows:

"Pursuant to request by the board of supervisors I am herewith requesting your opinion on the following:

"There were three candidates for the office of board of supervisor in one district, on the same ticket. When the official count was made it appeared that no one had received thirty-five per cent of the vote cast for said office. The board and the Auditor merely took it for granted that the thirty-five per cent rule applied, and thus declared the office vacant as not having been filled. They thought that the delegates to the county convention for such district then would fill said vacancy. This was understood by the three candidates, and no appeal from the ruling declaring said vacancy was made.

"Now when the Board is informed that the thirty-five per cent rule does not apply to the office of supervisor, but that the one having the highest number of votes is nominated, as provided in section 55 of Chapter 5 of the Special Session Laws of the 40th General Assembly, (on page 42 thereof), which is merely a new presentation of the old law, the Board desired to know whether they shall or can

rescind their former order, declaring such vacancy, now after time for appeal therefrom, whether any appeal can be taken from such ruling or order, or whether any petition for a recount can now be entertained, or is the vacancy to be filled by the party committee as provided in section 88 of the above act. It was the understanding that the thirty-five per cent did apply, and this misapprehension by the board and the Auditor was due to the fact that they took it for granted, and did not look it up or ask for any opinion on the matter, but thought that as the supervisor is in the nature of a county officer that said rule did apply, and as there was a vacancy the delegates to the county convention from the district could select the nominee. This though erroneous was the basis of their erroneous act."

Section 55 of Chapter 5 of the Acts of the Extra Session of the 40th General Assembly reads as follows:

"*The candidate or candidates of each political party for each office to be filled by the voters of any subdivision of a county having received the highest number of votes shall be duly and legally nominated as the candidate of his party for such office,* except that no candidate whose name is not printed on the official primary ballot, who receives less than five per cent (5%) of the votes cast in such subdivision for governor on the party ticket with which he affiliates, at the last general election, nor less than five (5) votes, shall be declared to have been nominated to any such office."

Section 3116 of the Compiled Code empowers the board of supervisors at its regular meeting in January in any even numbered year to divide the county by townships into the number of supervisor districts corresponding to the number of supervisors in such county. It is provided in Section 3117 that each of such districts shall be entitled to one member of the board, who shall be elected by the electors of said district. It is the opinion of this department that a candidate for supervisor in a district of the county comes within the provisions of Section 55, Chapter 5 above quoted, and that the office for which he is a candidate is one to be filled by the voters of a subdivision of a county. As one of the candidates, referred to in your letter, received a plurality or the highest number of votes cast for such office, he was duly nominated as the candidate of his party and no action of the board of supervisors can deprive him of such nomination. It is our opinion that it is not only the right, but the duty, of the board to rescind its former action declaring a vacancy in the nomination for a member of the board as stated in your letter, and that the candidate receiving the highest number of votes should be declared the nominee for such office. The action of the board was contrary to the provisions of the statute and even though the mistake was honestly made, their action should not defeat the plain provisions of the statute, or deprive the candidate of the nomination. The will of the voters should not be defeated in such a manner.

ELECTIONS—When a name is written in at the Primary for supervisor but the vote is not 10% of the vote of Governor as provided under Section 54, Chapter 5, there is no vacancy which can be filled by the county or district convention.

September 29, 1924.

County Attorney, Monona County, Onawa, Iowa: We wish to acknowledge receipt of your favor of the 26th enclosing a request for an opinion made by your county auditor. You desire that we answer this request. The proposition submitted is as follows:

"At the Primary Election held June 2nd, 1924 the name of J. W. Townley was written in on the Democratic Ballot for the office of Supervisor for term commencing Jan. 2nd, 1926, and he received 130 votes. Section 54 of Chapter 5 of the Code relating to Primary Elections states that where a candidate does not receive

10% of the whole number of votes cast for governor on the party ticket with which he affiliates, at the last general election, shall not be declared nominated. The vote for Governor on the Democratic ticket for 1922 was 1,628 and Mr. Townley was declared to be not nominated.

"At the county convention held according to law the office of Supervisor for the term commencing Jan. 2nd, 1926 on the Democratic ticket was filled by said Democratic Convention and M. B. Riddle was declared by said convention to be the nominee of said Democratic Party for the office of Supervisor for the term commencing Jan. 2nd, 1926.

"The question has been raised as to whether or not the convention had the right and authority to so fill an office where the vacancy came about in the manner just described.

"I would therefore like to get a ruling from your office and that of the Attorney General as to whether or not I shall cause name of M. B. Riddle to be placed on the official ballot for the general election for office of Supervisor for the term commencing Jan. 2nd, 1926 on the Democratic ticket. I would like to further ask if there is any other method by which the Democratic Party can have the office of Supervisor for term commencing Jan. 2nd, 1926 filed and the name of such nominee placed on the official ballot."

You are advised that this department has given an opinion directly in point on the proposition herein submitted, (Opinions of the Attorney General of Iowa, 1922, page 73) wherein it was held that there is no vacancy that can be filled by the county or district convention. We see no reason for changing our position in this matter.

ELECTIONS—Where a party nominee withdraws after the primary and county convention did not nominate the party, central committee may fill the vacancy.

September 29, 1924.

County Attorney, Adams County, Corning, Iowa: We wish to acknowledge receipt of your favor of the 23rd requesting the opinion of this department on the following proposition:

"A candidate was nominated on the democratic ticket for recorder at the June primaries. Sometime before the county convention, said candidate withdrew, the county convention did not nominate, although they had notice of same, about this day the party committeeman filed statement nominating a candidate. Would this nomination be legal and should the name of the candidate thus nominated be placed on the ballot?"

Your attention is called to sections seventy-eight and seventy-nine of chapter five, Acts of the Extra Session of the Fortieth General Assembly. Section seventy-eight in substance provides for the filling of vacancies in nominations prior to the convention. Section seventy-nine, which we believe is controlling in the instant case is as follows:

"If the convention does not fill such vacancy, the same shall, except in case of vacancy in the office of United States senator, be filled by the party central committee for the county, district or state as the case may be."

A reading of the section just quoted makes it quite apparent that if a vacancy occurring prior to the convention is not filled by the convention, that such vacancy shall be filled by the party central committee. We are, therefore, of the opinion that the party central committee can fill the vacancy in question, and such nomination would be legal and entitle the nominee to have his name placed on the official ballot.

ELECTIONS—There is no vacancy that may be filled by the party convention when the name of a candidate is not printed on the ballot and the person whose name is written in does not receive ten per cent of the votes cast in the county for governor on the party ticket with which he affiliated at the last general election. The total vote received by two candidates whose names were written in for the same office cannot be considered in determining the percentage required, and the fact that the board of supervisors certified to the party central committee the names of the candidates written in would not alter the situation.

October 16, 1924.

County Attorney, Audubon County, Audubon, Iowa: I wish to acknowledge receipt of your favor of the 16th requesting the opinion of the department upon the following proposition:

"At the last primary election no nomination papers were filed for the office of member of the board of supervisors for the term beginning January 1, 1925. At the primary election the voters voting the democratic ticket wrote in the names of two men for this office. Neither of these men received ten per cent of the total vote cast for governor in Audubon county at the last election. However, the total vote of both candidates would slightly more than equal the ten per cent of the vote cast for governor. Thereafter the board of supervisors certified to the chairman of the Democratic central committee for Audubon county the list of candidates voted for at the primary election, showing the number of votes cast for each candidate; the names of the two men that were written in, as I have before stated, were certified in this list. The Democratic county convention nominated one of the men whose name was written in, for the office of supervisor, and certified this nomination to the county auditor. No objections have been filed with the county auditor to have this name printed on the official ballot. The county auditor, acting under my advice has refused to recognize the nomination made by the democratic county convention as aforesaid, and will not have the name of this candidate printed on the official ballot."

Your request is in effect on three propositions. The first is whether or not there has been a nomination at the primary election. Section 54, chapter 5, the Acts of the Extra Session of the 40th General Assembly, provides who shall be nominated for a county office. This section in substance provides that the candidate must receive not less than 35 per cent of all votes cast by the party for such office, except that no candidate whose name is not printed on the ballot and who receives less than ten per cent of the whole number of votes cast in the county for governor on the party ticket with which he affiliated, at the last general election, shall be nominated. The language of this section is plain and it is clear from your statement that there was no nomination at the primary election.

Your second proposition is in effect, whether or not the total vote of the two candidates whose names were written in for the office should be counted in determining whether or not ten per cent of the vote was received. We believe the wording of the section just referred to leaves no room for doubt upon this question. The section in part provides:

"* * * except that no candidate whose name is not printed on the official ballot who receives less than ten per cent of the whole number of votes cast in the county for governor on the party ticket with which he affiliates, at the last general election, shall be declared to have been nominated to any such office."

It is readily apparent that the vote is that received by each candidate and not the total number of votes received by all candidates for the office in question. It is difficult for us to understand how it could be contended that when two candidates are running for an office, that the total vote for both candidates might be con-

sidered in determining whether either one of them received ten per cent of the votes cast for governor.

Your third proposition is in effect whether or not the fact that the board of supervisors certified the names of these two candidates who were written in, to the chairman of the democratic central committee, would alter the situation. As we have heretofore pointed out, the statute is plain, and its provisions cannot be changed by any action on the part of the board of canvassers or any other public official. The mere fact that a mistake was made in certifying these names or that they were certified with full knowledge of the situation, is immaterial in determining whether or not there was a nomination or a vacancy.

There being no nomination, it necessarily follows that there could be no vacancy, within the meaning of our statutes. The county convention of any political party may only nominate to fill vacancies. It is, therefore, apparent that the democratic convention of your county in nominating one of the men whose name was written in for the office of supervisor, acted without authority and such action is of no legal force or effect. Nor does the fact that no objections have been filed with the county auditor alter the situation, or change the fact that no nomination was made, no vacancy resulted, and that the county convention had no authority to make a nomination for the office in which there was no vacancy.

The foregoing opinion is perhaps more elaborate than the situation warrants, owing to the fact that this department has repeatedly passed upon the propositions here presented, and this opinion merely follows the opinions of this department found in the Reports of Attorney General for 1917-1918, page 376; Reports of Attorney General, 1919-20, page 471; Reports of Attorney General, 1922, page 73.

ELECTIONS—Method of counting ballot explained.

November 18, 1924.

County Attorney, Emmet County, Estherville, Iowa: This department is in receipt of your letter dated November 15, 1924, in which you request an opinion. Your letter is in words as follows:

"There is to be a contest of the election of county recorder in this county. There are a large number of ballots marked with a cross in the circle on the Republican ticket and a cross for Dan Steck on the Democratic ticket, then a number of crosses back on the Republican ticket in the squares. As I understood our phone conversation you hold that this votes a straight Republican ticket even for those officers on the Republican ticket for whom no cross appears in the square opposite their respective names. Quite a number of ballots also have the name of Ray P. Kennedy written in on the Democratic ticket and a cross in the square opposite his name. He was a candidate on the Independent ticket. Do these votes in the Democrat column count for him as a candidate for the office? Where there is no cross in the circle on the Republican ticket and none in the square before the Republican candidate for county recorder, then the name of the Independent candidate written in on the Democratic ticket does it count as a vote for him?"

You are advised as follows:

1. A cross in the circle votes for every candidate on the ticket except for those offices for whom a cross is placed in the square on another ticket on the ballot. For example: A voter at the past election puts a cross in the circle at the head of the Republican ticket and a cross in front of the name of M. F. Donegan for attorney general. This voter votes for every candidate on the Republican ticket with

the exception of Ben J. Gibson for the office of attorney general. His vote is counted for Mr. Donegan.

2. The ballot is what we commonly call a fool proof ballot. As long as the voter stays in the circle and stays in the square the ballot will count. Of course, where one puts a cross in the square in front of two candidates for the same office, the vote would not count for either of such candidates. In this connection take the sample ballot enclosed by you. This ballot shows a cross in the circle at the head of the Republican ticket, a cross in the square in front of the name of Daniel F. Steck for United States senator and crosses in the squares for each of the Republican state officers. The question is, how does this ballot count? The crosses in the squares under the head of the Republican ticket are immaterial. They add nothing to the square in the circle. This ballot would count for every Republican on the ticket with the exception of Daniel F. Steck and Ray R. Kennedy, who rereives a vote for the office of county recorder.

3. The fact that Ray R. Kennedy is written in and receives a vote on the Democratic ticket is sufficient to count a vote for him notwithstanding the fact that his name is printed on the ballot on the Independent ticket. The provision relative to the name of a candidate not being on the ticket twice refers only to the printed ballot furnished the voter. He still has the right to write in the name of any person whether on the ballot or not and put a cross in the square in front of the name, thus casting his vote for that individual for whatever office.

OPINIONS RELATING TO EXECUTIVE COUNCIL

ADJUTANT GENERAL—Entitled to payment of telephone and telegraph expense under section 164 of the Code, because office is in State House.

February 26, 1924.

Executive Council: You have requested the opinion of this department upon the following proposition:

"The Executive Council desire an opinion as to whether or not claims for telephone and telegraph services, furnished the Adjutant General, may be paid from the fund appropriated covering section 164 of the Code."

It is provided among other things in section 164 of the Supplement to the Code, 1913, that the Executive Council "shall also make for the state all contracts for lighting and repairing the capitol building and other buildings belonging to the state situated in the city of Des Moines, and grounds connected therewith, and for the necessary telephone, telegraph and water service therein."

The Adjutant General is an officer of the state government provided by law and has an office in the capitol building. There is no provision in the section of law referred to or any place else in the law classifying or stating which departments may or may not have offices in the capitol building or other buildings belonging to the state situated in the city of Des Moines. It will be observed from a careful reading of section 164 and particularly the phrase therefrom herein quoted that the Executive Council is directed to assign apartments in the capitol building to the respective officers and to make all contracts for the necessary telephone and tele-

graph service in such building. It is further provided then that bills for such service shall be identified, subscribed and sworn to by the persons entitled thereto and filed with the board of audit who shall audit the same and order a warrant drawn upon the treasury therefor, payable out of the amount appropriated by the general assembly for that purpose. It will be noted also that it is provided in section 168, Supplement to the Code, 1913, that the Executive Council is required to supply the various state officers, including the Adjutant General, with all such articles required for public use necessary to enable them to perform the duties imposed upon them by law. In other words, it seems to be the intent and purpose of the legislature as expressed in these various provisions to consider the Adjutant General as being in the same status as other state officers and departments and subject to the same general provisions.

For the reasons set out herein, it is the opinion of this department that the Executive Council may pay out of the proper funds the claims for telephone and telegraph service furnished the Adjutant General.

MOTOR VEHICLE LAW—PURCHASE OF LICENSE PLATES—Executive Council authorized to let contract to lowest "responsible" bidder.

April 1, 1924.

Executive Council: You have orally requested an opinion on a proposition arising out of the purchasing of number plates, containers and other supplies under the provisions of section 6 of the motor vehicle law. The section referred to requires that the Executive Council "shall purchase all number plates, containers and other supplies required by this act after receiving competitive bids under open specifications." Your question is, can the Council under these provisions of law determine who is the lowest responsible bidder and let the contract to him even though they have received a lower bid from another person. It will be observed that nowhere in the section is it stated that the contract must be let to the "lowest responsible bidder."

After carefully reviewing the authorities it seems clear that the Legislature intended by the language used in section 6 just referred to, that the Council should not let the contract described to any bidder who in the judgment of the Council is not "responsible," basing such decision upon sufficient information or evidence to show a reasonable basis for their decision, to a person whom they did not consider responsible. It cannot be conceived that the Legislature intended that the Council should let contracts of such importance to the state to the lowest bidder regardless of whether or not such bidder was responsible or dependable. We, therefore, conclude that under the law the Executive Council should let such contracts only to the lowest responsible bidder.

The term "responsible" is not limited to pecuniary ability, but pertains to many other characteristics of the bidder such as general ability and capacity to carry on the work, his equipment and facilities, his promptness, and the quality of work previously done by him, his suitability to the particular task, and such other qualities as are found necessary to consider in order to determine whether or not, if awarded the contract, he could perform it strictly in accordance with its terms.

Hence, your honorable body in awarding the contract must exercise official discretion in determining who is the lowest responsible bidder upon the consideration of all of these elements of responsibility, and your decision based on a proper exer-

cise of your discretion in determining who is the lowest responsible bidder cannot be reviewed. When your honorable body has made a decision that a certain bidder is not "responsible" and this decision has support from evidence or information, then in hand, as to show that you did not act arbitrarily or from favoritism, ill will, or fraud, but from an honest conviction, based upon facts, and, that your action was for the best interests of the state, it is not the province of the courts to interfere even though the court should believe that your conclusion was erroneous.

PARKS—STATE—Highways through—cannot be constructed without consent of Executive Council.

BOARD OF CONSERVATION—Highways through parks—must first obtain consent of Executive Council before construction.

HIGHWAYS—Construction through state parks—consent of Executive Council must be obtained.

April 30, 1924.

Executive Council: This department is in receipt of your letter dated April 17, 1924, in which you request an official opinion from this department. Your letter is in words as follows:

"The Executive Council has had up for consideration certain resolutions of the Board of Conservation, relative to the construction of highways through certain state parks, and before action is taken on the resolutions, the Council desires an opinion as to whether or not it is necessary for the Board of Conservation to get the approval of the Executive Council for the construction of roads through the parks as provided by chapter 246, Acts of the Fortieth General Assembly."

You are advised that before the State Board of Conservation can construct a highway through a public park it is necessary to have the approval of the Executive Council.

ASSESSMENTS—The Executive Council cannot change an assessment once it is certified to the county auditors except for clerical or ministerial errors.

September 19, 1924.

Executive Council: This department is in receipt of your letter dated September 13, 1924, in which you request an opinion. Your letter is in words as follows:

"The Executive Council, at a meeting held September 12th, revised the assessments on the Fort Dodge Telephone Company, and on the Western Electric Telephone System, on condition that they have authority at this time to change the assessments made at the regular assessing period.

The council desires an opinion as to whether or not assessments can be changed at this time, and notice given to the county auditors of such change in assessment."

You are advised that the Executive Council, once it has certified the assessments, has no power to change the same except for the purpose of correcting clerical or ministerial errors. The change to which you refer would not be such a change but would be a change in valuation which has been finally determined. It follows that the change could not be made.

CERTIFICATION OF VALUATIONS: The Executive Council should certify out the valuation of each company on electric transmission lines in the amount to be found correct by the Council. The certification of a telephone tax should be in accordance with the actual miles operated whether leased or owned.

October 2, 1924.

Executive Council: This department is in receipt of your letter dated October 1, 1924, in which you request an official opinion. Your letter is in words as follows:

"The Executive Council desires the opinion of your office as to how to certify out valuations of electric transmission lines when lines of different voltages are carried on the same poles. The lines may belong to the same company, or to separate companies. They may be carried on their own poles part of the distance, then on those of another company. Is it permissible to certify out the valuations (including wire and other equipment aside from poles) of two or more companies over the same set of poles on leased pole mileage? (The value of the poles would be included but once and that in the valuation of the property of the owner.)

We also desire your opinion as to the following: The American Telegraph and Telephone Company operates 16,358.58 miles of wire in Iowa. 14,503.21 miles are strung on 881.23 miles of owned poles, and 1,855.37 miles on 255.51 miles of leased poles, the property of the Northwestern Bell Telephone Company. Should their valuation not be certified out over the leased mileage the same as owned? Otherwise counties like Monroe in which they operate over 100 miles of wire but own no poles would receive no tax."

You are advised that the Executive Council should certify the valuation exactly as it is. That is, they should certify out the valuation of each company in the amount found correct by the Executive Council. The certification of the telephone tax should be in accordance with the actual miles operated, whether leased or owned.

TAXATION—ASSESSMENT OF TRANSMISSION LINES.

TRANSMISSION LINES—ASSESSMENT FOR TAXATION—Council must assess the actual value of property and this includes physical, intangible and franchise values.

February 20, 1923.

Executive Council: I am in receipt of your letter dated February 16, 1923, in which you request an opinion from this department.

Without comment I quote your request. It is in words as follows:

"Enclosed you will find a proposed blank form to be used by transmission line companies in making an annual report for assessment purposes. The form includes a financial statement and other questions pertaining to the earnings of said companies. The question has arisen as to whether or not the Executive Council can take into consideration the earnings of transmission line companies in assessing properties of said companies located without the corporate limits of cities and towns. You will also find enclosed a communication from Chas. S. Bradshaw showing arguments advanced to the Executive Council against the Council's right to assess other than the physical property of said companies.

"That the Executive Council may adopt the proper form to be used by transmission line companies in making their annual report for assessment purposes, I have been directed to get an opinion from you as to whether or not earnings of transmission line companies may be taken into consideration in assessing property of said companies located without the corporate limits of cities and towns, or is the Council limited to assessing such property at its physical value only. The Council would like this information at your earliest convenience as the report blank should have been forwarded to the various companies some time ago."

Under the provisions of section thirteen hundred forty-six-k (1346-k) of the supplemental supplement to the code, 1915, every company owning or operating a transmission line or lines for the conduct of electric energy, which lines are located wholly or partly outside of cities and towns are required by the terms and provisions of section thirteen hundred forty-six-k (1346-k) of the supplemental supplement to the code, 1915, to make a report showing:

"1st. The total number of miles of line owned, operated or leased, located outside cities and towns within this state, with a separate showing of the number of miles leased;

"2d. The location and length of each division within the state and the character of poles, towers, wires, sub-station equipment and other construction of each such division, designating the length and portion thereof in each separate county into which each such division extends."

Section thirteen hundred forty-six-1 (1346-1) of the supplemental supplement to the code, 1915, authorizes the Executive Council to call upon such companies for additional information and facts. The portion of said section particularly applicable is as follows:

"Upon receipt of said statements from the several companies, the executive council shall examine such statements and if it shall deem same insufficient, and that further information is requisite, it shall require the company making same to make such other or further statement as it may desire, notifying such company thereof by registered mail."

Section thirteen hundred forty-six-m (1346-m) of the supplemental supplement to the code, 1915, relates to the assessment of such property by the Executive Council. The portion of said section particularly applicable is in words as follows:

"The executive council shall, at its meeting on the second Monday in July of each year, *proceed to find the actual value of that part of such transmission line or lines* referred to in section one of this act owned or operated by any company, that are located within this state but outside cities and towns, including the whole of such line or lines when all of such line or lines owned or operated by said company are located wholly outside cities and towns, *taking into consideration the information obtained from the statements required by or under this act, and any further information they can obtain, using the same as a means of determining the actual cash value of such transmission line or lines* or parts thereof, within this state, located outside cities and towns. The Executive Council shall then ascertain the value per mile of such transmission line or lines owned or operated by each company specified in section one of this act by dividing the total value as above ascertained by the number of miles of line of such company within the state located outside cities and towns, and the result shall be deemed and held to be the actual value per mile of said transmission line or lines of each said company within the state located outside cities and towns."

What the Executive Council is directed to do is to fix the actual value of the property for assessment purposes. It makes but little difference whether it be called the actual value, the actual cash value or the actual market value. In the ultimate, it is simply the actual value of the property that is sought. The actual value of a property includes not only the physical value of the property but includes also all other elements of value, whatever they may be, which may affect the ultimate actual value. It is true that there is always a minimum and that minimum is the actual cash value of the physical property, but such minimum is not always the actual value. The actual value goes further and includes not only the physical but intangible values as well.

July 12, 1923.

Executive Council: We have received your communication asking this department to render an opinion upon the following propositions:

"The Executive Council would like a written opinion as to the following questions regarding Electric Transmission lines:

"1. To which party should we look for the Annual Report for taxation purposes when a company of farmers put up the money to build a line and the Service Company from whom they are to purchase the current put up the line, keep it in repair and are eventually to become the owners thereof?

"2. Since the Executive Council does not assess municipally owned transmission lines, and large service companies furnish the cities with current, and through the cities extend their service to farm lines, should the Service Companies and the farm lines escape assessment at our hands?

"3. When municipally owned plants furnish current to farmers outside city limits on a regular meter basis and these farmers build their own lines and pay for current used the same as out of town patrons on municipally owned lines, should these farm patrons make a report to the Executive Council?

"4. Should the Council in no instance assess municipally owned lines when they extend beyond the city limits and furnish current to the farmers throughout the country?"

The provisions of the statute relating to the assessment of electric transmission lines are found in sections 1346-k to 1346-t, both inclusive, of the code supplement, 1915. The portion of the statute that is pertinent to the questions under consideration is as follows:

"That every company owning or operating a transmission line or lines for the conduct of electric energy and which line or lines are located within the state, and which said line or lines are also located wholly or partly outside cities and towns, shall on or before the first day of May in each year, furnish to the Executive Council of the State of Iowa a verified statement as to its entire line or lines within this state, when all of said line or lines are located outside cities and towns, and as to such portion of its line or lines within this state as are located outside cities and towns, when such line or lines are located partly outside and partly inside cities and towns, showing:

"1st. The total number of miles of line owned, operated or leased located outside cities and towns, within this state, with a separate showing of the number of miles leased;

"2nd. The location and length of each division within the state and the character of poles, towers, wires, sub-station equipment and other construction of each such division, designating the length and portion thereof in each separate county into which each such sub-division extends."

It will be observed that the language of the statute is that the company owning or operating a transmission line or lines for the conduct of electric energy and which line or lines are located within the state and wholly or partially outside cities and towns shall make the report to the Executive Council.

We do not have a copy of the contract entered into by and between the company, the contractor and the farmers under the terms of which the lines in question were constructed, but we do have a pamphlet entitled the Westinghouse Farm Transmission Line Specifications, in which is found a sample contract for the construction, operation and maintenance of a farm transmission line which, as we are informed was used in providing for the construction of the line in question. In this contract we find the following provisions:

"In consideration of the covenant herein referred to the high-tension transmission lines are to remain the sole property of the Company, party of the first part, or its successors or assigns; the sum set forth in paragraph 4, it is understood and agreed, conveys no ownership in the transmission lines to the consumer, party of the third part."

Paragraph 4 referred to therein is the portion of the contract which provides what sums and when the consumer called the party of the third part shall pay for the construction of said transmission lines. Considering the law as above quoted and the provisions of the contract just referred to, there is no escape from the conclusion that the operating company should make the reports to the Executive Council as provided in section 1346-k of the code supplement, 1915. There can be no doubt about the said company being the owner of the line in question and therefore our answer to the first proposition is that the said company should make the return to the Executive Council.

Your second proposition does not seem to us to be clear, but for the purpose of answering your question, we are assuming that the large service companies own the lines over which they furnish the municipally owned transmission lines with current and that the farm lines to which they furnish current through the cities belong to the farm companies. If this be a true statement, then the service companies should, of course, make the report for their lines and the farm companies for their lines. The ownership of the lines, and not the source of the current furnished for said lines should determine the question as to what parties or corporations should make the report and pay the taxes.

3. For the same reason we believe that the farm patrons referred to in the third inquiry should make a report to the Executive Council under section 1346-k of the Code Supplement for the lines owned by said farmers.

4. In answer to your last inquiry we are constrained to hold that the portion of municipally owned lines, which extend beyond the city limits and furnish current to the farmers throughout the country, is subject to taxation the same as any other transmission lines owned by individuals or corporations, and that such company should make a report to the Executive Council. The very purpose of erecting municipally owned plants is to furnish electric light and power to the inhabitants of the city, and not for the purpose of making a profit by reason of the operation thereof. Such lines are exempted from taxation only because they are operated for the benefit of the inhabitants of the municipality and not for profit making purposes.

When such a line is extended beyond the city limits, for all practical purposes, such line ceases to be a municipally owned plant, within the meaning of the term as used in the law, and becomes a transmission line for profit. It follows as a necessary corollary that the portion of the lines extending beyond the city limits should be taxed and that a report thereof should be made to the Executive Council.

RAILWAYS—Double track construed.—In case of R. I. and Des Moines Valley both lines operated by same company and they practically parallel for some distance but are operated as two roads not considered as double track but as two separate lines.

August 9, 1923.

Executive Council: We desire to acknowledge receipt of your letter of August 8, 1923, asking this department for an opinion upon the question contained therein. The question is as follows:

"Enclosed you will find an amended schedule of the track mileage as operated by the Chicago, Rock Island and Pacific Railway in Iowa.

"There seems to be a reduction of approximately seven (7) miles in the mileage as shown on the schedule, the major portion of the reduction being in the Des Moines Valley Division, located in Polk County. The previous reports for this division have shown double mileage between Des Moines and Altoona while the amended report shows a single mileage. The Rock Island operates a double track between Des Moines and Altoona—one track being owned by the Rock Island and the other track being leased.

"That the Executive Council may certify the proper mileage to the various counties for assessment purposes, it is designed that you give this department an opinion as to whether or not the amended mileage should be used in the certification of the assessments."

For the purpose of clearly setting forth the position of the Railway Company on the question submitted, we incorporate herein the following letter written by the Assistant General Auditor of said company to the Secretary of the Board of Railroad Commissioners:

"Your letter of the 19th inst., relative to miles of track shown under Keokuk & Des Moines Railway Company, as included on page 700 of the Chicago, Rock Island and Pacific Railway Company report for the year ended December 31, 1921:

"The Keokuk & Des Moines Railway Company leased its entire line 162.34 miles to the Chicago, Rock Island and Pacific Railway Company, but as that piece of line, Altoona to East Des Moines (9.52 miles) runs parallel with the track of the Chicago, Rock Island and Pacific Railway Company it was decided, effective January 1, 1919, to treat this 9.52 miles as second main track as per advice of Mr. J. E. Gorman, then Federal Manager, to Mr. W. J. Cunningham, Manager, Statistical Section, United States Railroad Administration.

"If the Keokuk and Des Moines was a line separately operated, it would have 162.34 miles of first main, but as it is operated by the Chicago, Rock Island and Pacific Railway Company, 9.52 miles is only a second main to that company, as it runs parallel with the main track of the lessee, and traffic going west uses the main track of the Chicago, Rock Island and Pacific Railway and traffic going east uses the Keokuk and Des Moines Railway Company's track."

The line referred to is a continuous line of railway from the city of Keokuk to the city of Des Moines, and is owned by the Keokuk and Des Moines Railway Company. It is operated by the Chicago, Rock Island & Pacific Railway Company under a lease with the owner thereof. It was formerly operated as an independent system by the company owning it. From Altoona to East Des Moines, a distance of 9.52 miles, the track of said railway runs parallel with the main track of the operating company. The two tracks, however, are not at all points along this entire distance the same distance from each other. At some points, the tracks are only 100 feet apart and, at other points from 400 to 500 feet. The two tracks were not constructed on the same grade, nor on the same right of way. Nor are the tracks on the same level, and at one point, one track is at least twenty feet higher than the other.

The question we have to determine is whether the two tracks from Altoona to East Des Moines constitute a double track railway within the meaning of the taxation statutes. Section 4535 of the Compiled Code, the statute requiring the railway companies to file with the Executive Council the statement, which is used as the basis for an assessment, contains the following provision:

"The whole number of miles of railway owned, operated or leased within the state, including *double tracks* and side tracks, the mileage of the main line and branch lines to be stated separately, and showing the number of miles of track in each county."

It is quite apparent that the solution of the question we are considering depends upon the definition of the term "double tracks" as found in the quoted portion of the statute. In Railway parlance such term, in our opinion, has a well defined meaning, and it must be assumed that the word was used in the statute in the sense that it is ordinarily used among railway men. Of course, the question as to whether the tracks in controversy come within the meaning of such term does not depend upon the intention or claim of the Railway Company, but must be determined entirely from the physical conditions or facts in connection therewith. It must not be overlooked, and we believe this to be a controlling circumstance, that the Keokuk and Des Moines Branch was constructed as a continuous line of railway from Keokuk to East Des Moines, and that it was not the intention, in constructing the portion of the track in controversy, to make it a part of the main line of the operating railway system. Originally, therefore, it was not intended as a part of a double track system, but was operated as a through line from terminus to terminus. The fact that it is not on the same grade, or on the same right of way,

as the main line of the Rock Island Railway, is a material fact to be considered in the determination of this question. If it were not a part of a double track system from Altoona to Des Moines when constructed, how could it become such by the mere leasing of said branch by the operating company? No change was made in the physical condition of the property after said leasing.

It is not now and never has been an indispensable link in the operation of the main line of the system and were it not for the leasing of the entire branch, it would be of little use or value to the Railway Company.

The use of the word "double" is a significant fact. It is defined in Webster's International Dictionary as follows: "Being in pairs; presenting two of a kind, or two in a set; coupled." In the connection used in the statute it obviously means something more than the phrase "two tracks." It implies or infers such a close connection between them as to become not two lines used for the same purpose but two parts of the same line. We can see no plausible or reasonable way the tracks hereinbefore described can possibly come within the above definition.

The expressions "double tracks" and "two tracks" are not necessarily equivalent or synonyms. To be sure, double tracks consist of two tracks or parts but two tracks are not always double tracks. To constitute the latter they must be in such close proximity to each other and be so connected as to be in pairs or in a sense coupled.

The fact that the two lines are parallel is a circumstance to be considered but not a controlling one. If this were the determining factor, then tracks a mile or more separated, if parallel, would be double tracks within the meaning of the term as used in the statute.

There is another conclusive reason why they cannot be so considered. As constructed, they are so far removed from each other as to be of different lengths. In all probability the variance is quite material. In such a situation, what would determine the mileage for taxation purposes, the longer or shorter track? There must be a definite ascertainable mileage for the purpose of determining the assessment therof.

The operating company itself, has placed its construction upon the phrase in question. For many years, including the year 1923, and during practically the entire period of the lease, it has reported the entire line of the Keokuk and Des Moines Railway including the portion from Altoona to Des Moines as one line. The only time it has contended otherwise was when it filed an amended return or statement with the Executive Council for the year 1923 eliminating the portion of the line in controversy from the branch line on the theory that it is a part of a double track system. This is a circumstance that should weigh most strongly against the company. It should not be permitted to "Mend its Hold" at a time when the lease is about to expire. In taxation matters there should be some consistency or stability on the part of the officials of Railway Companies.

It has been currently reported that the owning company is considering the advisability of operating the Keokuk and Des Moines Railway line under its own management when the lease expires. If this should be done, would the line in question then be a part of a double track system? It would be absurd to so contend. If it were not a part of such a system either before it was leased or after the lease expires, how could it, under the facts stated, and considering the physical conditions in connection therewith, be such during the period of the lease?

The fact that the line in question is owned by one company and the other track

by another, is, in our opinion, a conclusive and controlling circumstance in the determination of this question.

Therefore, for all of the reasons stated herein, we are of the opinion that the portion of the track of the Keokuk and Des Moines line of railway from Altoona to Des Moines should not be considered a part of the main line of the Chicago, Rock Island and Pacific Railway, and that it should be assessed as a branch line for taxation purposes.

LAND TITLES COMMISSION—Appropriation Chapter 326, Acts of 40th G. A. constitutes an appropriation for the expense of the Commission.

November 1, 1923.

Executive Council: This department is in receipt of your request for an opinion upon the following proposition:

"The Executive Council, at a meeting held August 1st, authorized the Commission on Land Titles to employ a law clerk and one stenographer as provided by Section 4 of Chapter 326, Acts of the Fortieth General Assembly.

"Since this authority was granted by the Executive Council, a question has arisen as to the payment of compensation of the authorized employees and the Council desire an opinion as to whether or not Section 4 of Chapter 326, Acts of the Fortieth General Assembly may be construed to appropriate sufficient funds to compensate the employees authorized by the Executive Council."

Upon the authority of *Prime v. McCarthy,* 92 Iowa 578, you are advised that the clear intention of the Legislature to make an appropriation in Chapter 326 of the Acts of the 40th General Assembly is manifest. You are therefore advised that the clerical help authorized by the Executive Council under the provisions of Section 4 of this chapter should be paid from the general funds of the State Treasury.

EXECUTIVE COUNCIL: INSURANCE—REFUND OF TAXES—Chapter 310, Acts of 39th G. A. as amended by Chapter 335, Acts of the 40th G. A. authorizes the refund of taxes erroneously collected subsequent to year 1913. Facts as to illegality of tax collected should be certified by Insurance Commissioner.

December 6, 1923.

This department is in receipt of your letter dated June 15, 1923 in which you request an opinion from this department. This department took this matter up with the Insurance Commissioner and supposed that the matters referred to were disposed of satisfactorily and that the claims which the Insurance Commissioner found had been erroneously paid would be paid as is provided in the two acts of the General Assembly referred to. For that reason your letter has not been answered. The Insurance Commissioner informs me that this matter has not been disposed of and that you are still waiting an answer from this department. Your request for an opinion is in words as follows:

"The Commissioner of Insurance has filed with the Executive Council certain claims for refund of taxes collected on reinsurance premiums. The claims as filed, do not show that the companies claiming refund had paid their taxes under protest.

"Chapter 310, Acts of the Thirty-ninth General Assembly, appropriated $125,000.00 for the payment of certain taxes paid under protest by insurance companies, which taxes have been adjudged by the Supreme Court of the State of Iowa to have been erroneously collected. Chapter 335, Acts of the Fortieth General Assembly, amended Chapter 310, Acts of the Thirty-ninth General Assembly, by appropriating the unexpended balance of the $125,000.00 to pay claims for taxes erroneously collected, subsequent to the year 1913, on reinsurance premiums.

"The Executive Council desire an opinion as to whether or not claims may be

approved by the Council for a refund of tax where a protest had not been filed at the time tax was paid."

You are advised that under the provisions of Chapter 310 of the Acts of the Thirty-ninth General Assembly, as amended by Chapter 335, Acts of the Fortieth General Assembly, the appropriation therein provided may be used to pay claims for taxes erroneously collected, subsequent to the year 1913, on reinsurance premiums.

You should require that the Commissioner of Insurance certify to you the facts and his findings as to whether or not the particular tax so certified was in truth erroneously and illegally collected as is provided in the law so referred to.

OPINIONS RELATING TO HIGHWAYS

HIGHWAYS—ROADS: Acquisition of rights of way.—Boards of Supervisors cannot secure clear title to land purchased or taken for highway purposes until all lien holders are reckoned with.

January 9, 1924.

Iowa State Highway Commission, Ames, Iowa: You have requested an opinion from this department upon the proposition of whether or not the Board of Supervisors, in purchasing land for use for public highways, should ascertain in addition to the title holder of said premises, all persons having an interest therein, whether by way of encumbrance or otherwise, and secure a signed and acknowledged waiver from, or settlement with such other persons before such a purchase is finally completed.

It is a fundamental law in this state that any person having any interest in real estate regardless of the nature of that interest, cannot be deprived thereof except by due process of law, or by voluntary alienation of his rights or interests therein. It then follows that the county, before it can secure a clear title to land purchased or taken for highway purposes or any other purpose, must either secure a waiver from each lien holder including the lessee, or must purchase their interest and secure a relinquishment thereby.

You have further orally requested that we suggest a general form which would apply to all lien holders waiving their interest in the land being purchased by the Board of Supervisors for highway purposes and which could be attached to any contract or deed of purchase. We suggest the following:

"For a valuable consideration, in hand paid by.....County, Iowa, the undersigned hereby waives and quitclaims unto the said county, for road and highway purposes, any interest he may have in the premises described in the foregoing instrument.

"Signed this.....day of..... A. D., 192.....

".....

".....

"State of Iowa,)
) ss
.....County)

"On this.....day of.....A. D., 192.., before me personally appeared....., to me known to be the person.. named in and who executed the foregoing instrument, and acknowledged that..... executed the same as.....voluntary act and deed.

"Notary Public in and for.....County."

I trust that the foregoing will sufficiently answer the question submitted.

HIGHWAYS. It is not necessary for an applicant for damages to file a bond as a condition precedent to the taking of an appeal for an award of damages. When an appeal is taken it is the duty of the county auditor to make and file in the office of the Clerk of the District Court a transcript of the papers on file relating to such appeal.

January 10, 1924.

State Highway Commission: I have examined the statute with reference to the questions you submitted to me over the telephone yesterday and my answers thereto are as follows:

Section 1527-r3 of the Code Supplement, 1915, provides that "claimants for damages may appeal to the district court from the award of damages in the manner and time for taking appeals from the establishment of highways generally." Turning to the general statutes relating to the taking appeals in the establishment of highways we find in section 1513 the following provisions: "Any applicant for damages caused by the establishment or alteration of any road may appeal from the final decision of the board to the district court of the county in which the land lies, notice of which appeal must be served on the county auditor within twenty days after the decision is made." It is also provided therein that if the road is established or altered on condition that the petitioners therefor pay the damages, such notice shall be served on the four persons first named in the petition if there be that many residing in the county in the manner in which an original notice may be served.

There is no provision in this section requiring the claimant for damages to file a bond. However in section 1514 relating to an appeal taken by the petitioners for the road as to the amount of damages, it is provided that if the establishment or alteration has been made conditional upon paying the damages an appeal may be taken by serving notice thereof on the county auditor and applicant for damages in the manner in which original notices are served and within twenty days after the decision of the board and filing a bond in the office of such auditor with sureties to be approved by him conditioned for the payment of all costs occasioned by such appeal.

This section, you will observe, relates entirely to an appeal taken by the petitioner and does not apply to an appeal taken by a claimant for damages. An appeal in the latter case is governed by section 1513. Section 1515 of the Code is as follows:

"When an appeal has been taken, the auditor shall, within ten days thereafter, make out and file in the office of the clerk of said court a transcript of the papers on file in his office, and proceedings of the board of supervisors in relation to such damages. The claimant for damages shall be plaintiff and the petitioners defendants, except the damages have been ordered paid out of the county treasury, in which case the county shall be defendant."

You will observe that it is the duty of the county auditor to make out and file in the office of the clerk of said court a transcript of the papers on file in his office relating to such appeal. The appellant, however, should in our opinion see that this is done by the auditor and the case docketed.

HIGHWAYS. Where a highway is laid out 30 ft. and property owners voluntarily widen the road to 50 ft. and it remains a 50 ft. road more than ten years, the public requires a right to a 50 ft. road by prescription.

January 23, 1923.

State Highway Commission: We have received your letter of January 14, 1924 asking this department for an opinion upon the proposition which you have stated as follows:

"We have a case of right of way which is bothering us a great deal at the present time where the records show that the road was originally established as a 30 ft. road and the property owners have for some reason set their fences out and widened this to a 50 foot roadway. We are proposing to widen this road to a 66 foot roadway and we are holding that all we are obligated to pay is for the difference between the 50 foot roadway and the 66 foot. The property owners are contending that due to the fact that this was originally petitioned and established as a 30 foot road they are entitled to the difference between the 30 foot and the 66 foot roadway, or 36 feet of right of way.

"Will you please give this office an opinion as to whether we should pay for the 36 feet of right of way or 18 feet of right of way?"

Although you do not so state in your letter, we are assuming that the property owners widened the road in question from 30 feet to 50 feet more than ten years before an effort was made on the part of the county officials to widen this road 16 feet, and this opinion will be prepared upon this assumption.

While adverse possession will not run against the public so far as highways are concerned, yet it is the rule in this state that adverse possession will run in favor of the public so that a highway, or a part thereof, may be established by prescription. The following authorities so hold: *Mosier v. Vincent,* 34 Iowa, 478; *Baldwin v. Herbst,* 54 Iowa, 168; *Onstott v. Murray,* 22 Iowa, 457; *Ewell v. Greenwood,* 26 Iowa, 377; *Sherman v. Hastings,* 81 Iowa, 372; *Hanger v. City of Des Moines,* 109 Iowa, 481; *Whetstone v. Hill,* 130 Iowa, 637; *Kinsinger v. Hunter,* (Iowa) 192 N. W. 264; *Haan v. Messter,* 132 Iowa, 709; *Davis v. Town of Bonaparte,* 137 Iowa, 197.

Where the public for more than ten years has traveled a route deviating slightly from that originally established by a reason of an obstacle in the surveyed route, and pursuant to some arrangement with the adjacent owners, and not by mistake merely, such traveled route becomes a highway by prescription. *Kelsey v. Furman,* 36 Iowa, 614.

In determining the question as to whether a road, or any part thereof, has been established by prescription, the courts seem to draw a distinction between that class of cases where the public, with the knowledge of the owner, has claimed and continuously exercised the right of using the same for a public highway for a period equal to that fixed by the statute of limitation of real actions, and the other class of cases where it appears that such use was by favor, permission or mistake. *Onstott v. Murray,* 22 Iowa, 457; *Ewell v. Greenwood,* 26 Iowa, 377; *Hougham v. Harvey,* 33 Iowa, 203.

The rule also seems to be well established that the dedication of a highway to the public may be established without evidence of an express grant or other affirmative act on the part of the owner. Long use by the public and acquiescence therein by the owner are of themselves evidence of a dedication. *Onstott v. Murray,* 22 Iowa, 457; *Wilson v. Sexon,* 27 Iowa, 15; *Hougham v. Harvey,* 33 Iowa, 203; *Manderschid v. City of Dubuque,* 29 Iowa, 74; *Gear v. C. C. & D. Ry. Co.,* 39 Iowa, 23; *Gerbering v. Wunnenberg,* 51 Iowa, 125; *Hanger v. City of Des Moines,* 109 Iowa, 480; *City of Cedar Rapids v. Young,* 119 Iowa, 552.

Section 3004 of the Code reads as follows:

"In all actions hereafter brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession thereof for the period of ten years, the use of the same shall not be admitted as evidence that the party claimed the easement as his right, but the fact of adverse possession shall be established by evidence distinct from and independent of its use, and that the party against whom the claim is made had express notice thereof; and these provisions shall apply to public as well as private claims."

It will be noted that the above statute applies to public as well as to private claims and that the evidence of adverse possession shall be established by evidence distinct from and independent of its use. In construing this statute, however, it has been held that evidence of the use by the public was competent for the purpose of showing the acceptance of the dedication, though not competent to show title to the public by prescription. *State v. Birmingham,* 74 Iowa, 407; *State v. Mitchell,* 58 Iowa, 567; *Duncan v. Powers,* 75 Iowa, 188.

In a comparatively recent case involving the question we are considering, the Supreme Court used the following language:

"The owner's acts and declarations should be deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use." *De Castello v. Cedar Rapids,* 171 Iowa, 18.

This same rule is supported by the following authorities: *O'Malley v. Dillenbeck,* 141 Iowa, 186; *McBride v. Bair,* 134 Iowa, 661, (664); *Jones v. Peterson,* 178 Iowa, 1389.

In one of the recent pronouncements on this question by the Supreme Court, it was held that while the mere permissive use of a highway, no matter how long continued, will not amount to the dedication thereof, yet, if, in addition to the long continued use thereof as a highway, it be shown that it has been so used with the knowledge and consent of the owner, and, if his conduct is reasonably explainable only on the theory of his consent, or on the theory of his waiver or abandonment of his right for the benefit of the public, he will not thereafter be permitted to repudiate or deny its legal effect. *Kinsinger v. Hunter,* 192 N. W. 264.

A case closely in point with the facts stated in your inquiry is the case of *Joseph v. Sharp,* 172 Iowa, 254. The facts as stated in the syllabus were as follows:

"an east and west highway was ordered established 'as nearly as practical on the section line.' In the actual laying out, the authorities purposely caused the road, at one point, to depart from the section line and to pass to the south and around a hill and then to angle back across the northeast corner of a section, thus detaching a triangular piece of land from the rest of the section. The then owner of this section *recognized this location by fencing accordingly.* Travel was strictly confined to said location, and the public authorities, claiming that the location was substantially as authorized, continued for some 30 years to improve the road. For 40 years, plaintiff lived within half a mile of the point in dispute. 19 years after the road was so located, plaintiff bought the east half of this northeast quarter and, 13 years later, fenced across said road and up to his northeast corner. In the meantime, another road was established along the east side of said section."

It was held that the record showed a highway (a) by prescription, (b) by dedication and (c) by estoppel. Basing our opinion upon the rules of law as stated in this opinion and as laid down in the authorities cited, we entertain the view that when the property owners voluntarily widened the established road by setting their fences back so that the road would be 50 feet in width, this amounted to a dedication of that portion of the 50 foot roadway in excess of the 30 feet as originally established, and that the use and possession of such portion of the highway for more than ten years would give the public a title thereto by prescription or adverse possession.

It is, therefore, our conclusion that the property owner is only entitled to damages for the appropriation of the land for highway purposes between the 50 foot roadway and the 66 foot as finally established.

HIGHWAYS—OBSTRUCTIONS—POLES—Sec. 1527-s17.

1. County and Twp. Boards are given control over location of poles and fixtures on highways.

2. Proper authorities may order poles on highway moved to whatever point is designated on the highways.
3. Proper authorities may require poles and fixtures be removed entirely off 66 ft. right-of-way until the rebuilding or reworking of the highway is completed.
4. County or Twp. has no authority to pay any part of cost of removing and relocating poles on the highway.

February 28, 1924.

Iowa State Highway Commission, Ames, Iowa: You have submitted a request for an opinion from this department upon the following propositions:

"1. Assuming a 66 foot right-of-way, may the county require that the poles be set back on the 33 foot line regardless of the fact that when so placed cross arms may extend beyond the right-of-way and over the adjoining land?

"2. During construction it often becomes necessary to move poles to a temporary location, some times outside the 66 foot right-of-way at the outer edge of the borrow pit and reset permanently within the right-of-way after construction work is completed; may the county require the poles to be moved to the outer edge of borrow pit and may the county legally pay for any portion of the cost of moving poles in such cases?"

Section 1527-s17 of the Supplement to the Code, 1913, as amended by Chapter 410 of the Acts of the 37th General Assembly contains the only provisions of law applicable to the propositions presented. That section is as follows:

"County and township boards, charged with the duty of improving public highways, shall have power to remove all obstructions in the highways under their jurisdiction, but fences and poles used for telephone, telegraph or other transmission purposes shall not be removed until notice, in writing, of not less than ten days, has been given to the owner, occupant, or agent of the land inclosed in part by such fence or to the owner or company operating such lines. The notice to any owner or operator of any such telephone, telegraph or transmission line may be served on any agent or officer of such line, and all such fences and poles shall, within the time designated, be removed to such line on the highway, and as designated by the engineer, and if not removed by the date fixed in such notice, same may be forthwith removed by the proper officials. Any new lines, or parts of lines hereinafter constructed, shall be located by the engineer, upon written application filed with the county auditor describing the highways upon which such lines, or parts of lines, are to be constructed and the applicant shall pay all of the expenses in locating said lines, and shall be removable according to the provisions of this section. The notice of removal may designate to which side of the highway the said poles shall be removed. Any removal made in compliance with this section shall be at the expense of the owners thereof, without liability on the part of any officer ordering or effecting the removal."

It will be observed that this section specifically provides that the county and township boards when improving the public highways shall have full power to remove all obstructions on the highways under their jurisdiction, and that they may require the removal of poles used for telephone, telegraph or other transmission purposes upon giving a written notice of not less than ten days to the owner or company operating such lines. If the poles or obstructions are not removed by the time designated, the boards or officers in charge of the improvement of the road may remove them. It is further provided in the section that the notice of removal should designate to what place on the highway the poles should be removed. Thus it will be observed that the county and township boards are given full power over the location and placing of poles and fixtures on the highways.

It is provided in Section 2158 of the Code that any person, firm or any corporation organized for such a purpose, may construct telephone and telegraph lines

along the public roads of the state and may erect the necessary fixtures therefor. Electric transmission lines can not be placed on or along the highways of the state except upon the express permission of the proper board and then only in the manner provided by law and under such reasonable restrictions as may be imposed by the board.

The public has a superior right to the use of the highways and any fixtures or poles placed on the highway must be so placed or constructed so as not to inconvenience the public in the use of any road. Neither can such fixtures be so placed as to interfere with the private property of an individual without obtaining his consent or paying him damages therefor. There may be cases where the placing of poles or fixtures upon a highway or a road or a portion thereof will interfere with the superior right of the public in the use of such road. In such an event it might be that such poles would be restricted entirely.

It is therefore the opinion of this department that the proper authority may order the poles or fixtures of any telephone, telegraph or electric transmission line company placed anywhere on the highway, subject to the superior right of the use of such highway by the public and in any manner and under such restrictions as are reasonable and practical.

In connection with the second proposition submitted, it would be well to call attention to the methods employed and the kind of machinery used in the rebuilding or construction of a primary road. Ordinarily a road on the primary system which is being rebuilt or reconstructed according to accepted methods, is completely torn up and worked over from line to line. The road machinery used is of such a ponderous nature and so built as to make it necessary to use all of the width of the highway being reconstructed and poles or other such obstructions left anywhere on such a highway would practically prohibit the reconstruction of the highway with such machinery. For these reasons it is imperative that the poles be removed entirely from the sixty-six foot right-of-way of such a highway until the improvement has reached a point where such poles will not interfere with the work. In view of these conditions, and keeping in mind the superior right of the public in the highways of the state, we are of the opinion that the language of the provisions of law set out above, is broad enough to permit the proper authorities to require such poles to be removed entirely off the sixty-six foot right-of-way until the improvement thereof has progressed to a point where such poles will not interfere therewith. It follows also that the poles may be ordered removed to the outer edge of the borrow pits along and adjacent to the highway during such road construction.

It is specifically provided in the last sentence of the section under discussion that any removal of poles or obstructions under the provisions thereof "shall be at the expense of the owner thereof, without liability on the part of any officer ordering or effecting the removal." We know of no provision in the law authorizing the county or township boards to pay any of the expense of removing poles under the provisions of this section, and in the absence of such a provision, no such expense or any portion thereof may be paid by the county or the township.

CITIES AND TOWNS.—Change of streets by Board of Supervisors.

1. Supervisors on agreement with council may change streets which are extensions of primary roads.
2. Necessary real estate may be purchased or condemned.

3. Cost may be paid in same manner as costs on primary roads outside cities and towns.
4. Cities may initiate machinery for a change of a street which is part of primary road system.

March 13, 1924.

County Attorney, Bremer County, Waverly, Iowa: You have requested an opinion from this department upon the following propositions:

"1.—Can the Board of Supervisors relocate a part of a city street which is the continuation of a county road for the purpose of making said street conform to the road?

2.—Can the County condemn property within the City limits for the purpose of relocating the City street which is the continuation of the County road being relocated?

3—Can the County purchase by agreement with the owners property within the corporate limits for the purpose as aforesaid, and pay the same out of the county road funds?

4.—Should the City Council acquire such property for the relocation of the street, can the Board of Supervisors pay for the costs and expenses of acquiring the property necessary for such relocation?"

Chapter 87, Acts of the Fortieth General Assembly directly refers to and covers the matters about which you inquire. That Section reads as follows:

"Section 1.—The Board of Supervisors is hereby given plenary jurisdiction subject to the approval of the council to purchase or condemn right of way therefor and grade, drain, gravel, or hard surface any road or street which is a continuation of the primary road system of the county, within any town or within any city including special charter commission plan and manager plan cities having a population of less than twenty-five hundred (2500), and to make said hard surfacing the same width within the town as the hard surfacing outside of the town on the primary road system, but no hard surfacing shall be done except as authorized by a vote of the electors of the county. After the completion of such improvement the same shall be maintained by the city or town and such city or town shall rest under the same obligation of care as to such improvements as is now provided by law for roads and streets generally.

Any such city or town through its council and each county of the state through its board of supervisors are hereby authorized to enter into written agreements subject to the approval of the state highway commission to determine the location of such improvements within such cities or towns. In case of disagreement the matter shall be referred to the state highway commission, whose decision shall be final. The Board of supervisors shall not drain, grade, gravel or hard surface any highway within the limits of cities other than those specified herein.

Section 2. In the improvement of extensions of the primary road system within cities or towns hereunder, the board of supervisors shall have power to purchase or condemn the necessary right of way therefor, and such condemnation proceedings shall be under the same laws as now apply to the condemnation of right of way for roads outside of cities and towns on primary roads."

At the outset, it is advisable to call attention to the fact that the foregoing provisions of law are applicable only to towns, and to cities, including special charter, commission plan and manager plan cities, having a population of less than twenty-five hundred.

In answer to your first question, it will be observed that the law specifically gives the board of supervisors full jurisdiction subject to the approval of the council to purchase or condemn right of way for the purpose of establishing a street which is the continuation of a primary road through a city or town within the class referred to, and if there is a disagreement between the two bodies, it is

provided that the matter should be submitted to the state highway commission whose decision shall be final.

Section 2 of said Act specifically authorizes the county to condemn the necessary right of way through such cities and towns under the same laws as are now applicable to the condemnation of rights of way for highways on the primary system, outside of cities and towns.

In answer to the third question, you are referred to Section 2 of the Act which provides that in the improvement of extensions of the primary road system within such cities or towns under this chapter, the board shall have power to purchase the necessary right of way, and such should be paid for in the same manner as is provided by law for the acquisition of land outside of cities and towns for the purposes of a primary road.

In answer to your fourth question, you are referred to Chapter 88 of the Acts of the Fortieth General Assembly which taken in connection with Chapter 87 above referred to, permits cities and towns within the class described therein, to institute action by which a city or town street may be improved as an extension of a primary road. It is provided also that the same may be paid for in the same manner as provided in Chapter 87.

I trust that the foregoing will sufficiently answer your inquiries.

HIGHWAYS—PRIMARY ROAD—BOND ISSUES. Question may be submitted at a general or a special election called for the purpose by the Board of Supervisors. No hearing or withdrawal of names from petition is authorized by law. It is mandatory on board to submit question when proper petition is filed.

March 20, 1924.

County Attorney, Henry County, Mt. Pleasant, Iowa: You have requested an opinion from this department upon the following propositions:

"A petition has been filed with the Auditor in this County, signed by more than twenty per cent of the total vote cast in this County at the last election, asking the Board of Supervisors, to submit a bond issue to the people at a special election.

The petition is filed under Section 2933 of the 1919 Code. I should like your opinion upon the following proposition:

Item One: Does the fact that this petition calls for a special election authorize the Board of Supervisors to submit it at a General Election? I have held that the Board may submit it at either a General or Special Election, under the provisions of that Section?

Item Two: After the Petition has been filed with the Auditor may a portion of the signers withdraw their signatures from the petition and thereby render it a nullity?

I have held that they can not do so, and based my opinion upon the fact that when the petition with the requisite number of names is filed that it then becomes jurisdictional with the Board of Supervisors, and a withdrawal is of no affect. The distinction that appears to run through the cases is that where a petition is filed giving the Board discretion that withdrawals may be made up to the time that the Board has acted upon it, but that where law states that upon the filing of the petition the Board *must* do certain things, then the filing of the petition creates a condition which the Board must comply with."

In answer to your first proposition, you are advised that the section referred to, which is section 25 of Chapter 237 of the Acts of the Thirty-eighth General Assembly, provides in the first paragraph thereof that the question must be submitted to the voters of the county "at a general election, or at a special election called by

the Board for such purpose". The section itself, provides that the question may be submitted at a general election.

In answer to your second proposition, you are advised that there is no provision contained anywhere in the law. The language of the section is such that it is mandatory upon the board to submit the question to the voters whenever a proper petition, as defined in the law, has been filed with it. The filing of the petition is the only prerequisite, and in the absence of any other provision of law the board is not required, nor could it pay any attention to withdrawals from such a petition.

HIGHWAYS. The voters of a county have the right to petition for a special election to vote on the hard surfacing of the roads of the county and issue bonds therefor. The board may submit the proposition of bonding the county upon its own motion or upon the petition of 20 per cent of the qualified voters of of the county, who voted at the last preceding general election. After the board has acted on the petition it is too late for the committee in charge to withdraw the petition.

March 28, 1924.

Board of Supervisors, Mount Pleasant, Iowa: We have received your letter of March 22, 1924, asking this department for an opinion upon three questions relating to the primary and secondary road law of the state. We shall answer your questions in the order in which they appear in your letter.

The statute specifically provides that the Board of Supervisors of any County may on its own motion and shall, if petitioned by the voters in any county equal to ten per cent of the number of voting at the last general election, submit to the voters of the county at a general or special election the question as to whether hard surfacing shall be done on the primary road system or any portion thereof in said county. Therefore, your first question must be answered as follows: People have the right to petition for a special election to vote on the question of hard surfacing the roads of a county and bonding the county to pay for the same. Section 6, chapter 237, Acts 38th General Assembly.

So far as the issuance of bonds is concerned, the Board may submit the proposition upon its own motion or upon a petition of a number of the qualified voters of the county equal to 20 per cent of the total vote cast in the said county at the last preceding general election, Section 25, chapter 237, Acts 38th General Assembly.

If the general election will be held within a reasonable time after the petition is filed, both propositions may be submitted at the general election, but we believe that the proposition should be submitted by the Board to the electors within a reasonable time after the petition is filed in the office of the County Auditor and at a special election, if necessary.

It is also our opinion that after said Board has acted on the petition, it is then too late for the committee in charge thereof to withdraw the petition even though they may become dissatisfied with the action of the Board thereon.

RAILROAD COMMISSION. Has jurisdiction to determine dispute over grade crossings over railroads in certain cities and towns.

HIGHWAYS—GRADE CROSSINGS OVER RAILROADS. Dispute over crossings in certain cities and towns may be appealed to Railroad Commission for determination.

May 8, 1924.

State Highway Commission, Ames, Iowa. You have requested an opinion from this department on the following proposition:

"Do the provisions of Section 5002, Compiled Code, 1919, apply to a railroad crossing located upon a continuation of the primary road system as defined in the revised and modified section of the Supplement of the Compiled Code 2943 (Senate File No. 117, Special Session) as now in effect through publication."

Section 19 of Senate File No. 117 of the Acts of the Special Session of the 40th General Assembly provides that the Board of Supervisors shall have plenary jurisdiction subject to the approval of the council to purchase or condemn right of way therefor and grade, drain, gravel or hard surface any road or street which is a continuation of the primary road system of the county and which is located (1) within any town or (2) within any city including special charter cities having a population of less than 2500 and (3) within that part of any city including special charter cities where the houses or business houses average not less than two hundred feet apart. The question then is, does this provision of law affect or change the existing law as found in section 2017 of the Supplemental Supplement, Code 1915, (Section 5002, Compiled Code of 1919) so as to divest the jurisdiction of the Board of Railroad Commissioners of this state, in reference to railroad crossings located upon continuations of the primary road systems within cities and towns.

There is no question but what the provisions of Section 2017 of the Supplemental Supplement to the Code of 1915 give to the Railroad Commissioners authority to determine the matter of raising or lowering the grade to a street or road in a city or town in case of a dispute between the railroad company and the proper authorities relative thereto. *Morgan v Des Moines Union Railway Co.,* 113 Iowa, 561, 567. There is no question but what a railroad company has a right, under the statute last cited, to cross the streets of a municipality without the consent of the city authorities. Hence, there is no question but what the railroad commission does have jurisdiction over these matters unless the provisions referred to in Section 19 of Senate File No. 117 interfere therewith.

It is a well known rule of construction that all statutes and provisions of law must be construed together and force and effect given to each provision, if such is possible. This rule is particularly applicable to the situation presented. It will be observed that all the legislature did when it enacted Section 19 of Senate File No. 117 was to extend the jurisdiction of the Board of Supervisors over certain streets, in certain towns and cities, forming continuations of the primary road system of the county so that the primary roads may be properly conditioned and placed in the same shape and improved in the same manner as are the same roads outside of the limits of these cities and towns. The statute does not in any manner attempt to give the Board of Supervisors full supervision and power over these continuations of the primary road systems except for the purpose stated in the section itself. It is true that Section 19 authorizes the Board of Supervisors to grade such streets, but it does not necessarily say that this authority is superior to the right of a railroad company to build its tracks across a street in such city or town, and to raise or lower the grade of that street as established, so that its railroad might cross under or over the same, as the case may be, subject however, to the final determination of the Board of Railroad Commissioners of the state, in case there is a dispute.

Considering these two sections of the law together as they now stand, and the reasons for their enactment, we are led to the conclusion that neither the city nor the Board of Supervisors has the power to forbid the location and laying down of

railroad tracks across the streets in such cities and towns even though it is necessary to raise or lower the grade of said street, on account thereof. To hold otherwise might have the effect of prohibiting and barring a railroad from entering or passing through such a city or town to the prejudice of other parts of the country. Surely such a power was never intended.

In view of these observations, it is therefore the opinion of this department that the provisions of Section 2017 of the Supplemental Supplement to the Code of 1915, are not affected by the provisions of Section 19 of Senate File No. 117 and that the Railroad Commission still has the same appellate jurisdiction to determine disputes arising out of such matters as it had prior to the enactment by the Special Session of the 40th General Assembly of Senate File No. 117.

CROSSINGS. In case of disagreement between the Board of Supervisors and the railroad company, the matter should be submitted to the Railroad Commissioners under Section 5002, Compiled Code, 1919.

May 26, 1924.

Iowa State Highway Commission, Ames, Iowa: We wish to acknowledge receipt of your favor of the 21st requesting an opinion of this department. Your request is as follows:

"1. In the event of a disagreement between the county board of supervisors and Highway Commission, and the receivers of the Keokuk and Des Moines Railroad as to details of constructions and distribution of expense in making a proposed undergrade crossing improvement where Primary Road No. 7 now crosses their line at grade near Nobleton in Polk County, to whom and in what manner should the appeal be made?

2. Should the appeal be to the Federal Court, or to the Board of Railroad Commissioners of this state?

3. If the appeal is made to the Federal court, will your office be in position to represent us and present this case in the proper manner?"

"* * * Wherever a railroad now crosses an established highway or when a new railroad crosses an established highway, or when it is desired to locate a new highway across an established railroad, or when it is desired, by any citizen of or the board of supervisors of any county or by the township trustees of any township, or by any railroad company operating a railroad in this state, for the safety of the public using such highway, to change, alter, relocate, or vacate an established highway, where same crosses a railroad, and the railroad company and the board of supervisors of the county or township trustees of any township in which such highway crossing is located can not agree in respect thereto, the board of railroad commissioners of this state, upon application of either the board of supervisors or township trustees of any township or of twenty-five freeholders of said county, or the railroad company interested, are authorized and empowered, after hearing upon reasonable notice, to determine the necessity for such crossings, location thereof, whether the same shall be at a grade or otherwise, the manner in which the same shall be constructed, maintained, or changed, division of expense thereof, and generally to make such orders in respect thereto as are equitable and just, including the right to require condemnation proceedings to be instituted by the board of supervisors as may be necessary to carry out such order."

This statute provides for an appeal to the board of railroad commissioners in case of a disagreement between the board of supervisors and the railroad company. This remedy should be followed and not by an appeal to the Federal Court.

HIGHWAYS: Claims for damages—If in the opinion of the board of supervisors damages awarded by appraisers are excessive, the board has no other alternative than to dismiss the proceedings. The supervisors can not diminish the damages awarded by the appraisers. The supervisors also have the right on their own motion to dismiss proceedings for condemnation of right of way because of any irregularity or mistake therein.

May 26, 1924.

Iowa State Highway Commission, Ames, Iowa: We wish to acknowledge receipt of your favor of the 19th. requesting an opinion of this department as follows:

"I wish to have an opinion rendered in connection with Code Commissioners Bill No. 117, Section 14 'Hearing of Claims for damages.' I wish to ask in connection with this section, in the event of the appraisers turning in an award which in the opinion of the Board of Supervisors is entirely too high, and the Board feels that the road should be established in the location as indicated in the instructions to the appraisers, have the Board of Supervisors the right to reduce the award as turned in by the appraisers to a reasonable amount and then allow the property owner to appeal to the district court if he is not satisfied with the award?

Also, at the time of final hearing if it is found an error has been made in the width of right of way, or the degree of curve, or any other mistakes which might have crept in in the instructions to the appraisers, can the Board of Supervisors discontinue the proceeding and start over beginning a new condemnation proceeding?"

Section 14 of the Act entitled, "Code Commissioners Bill No. 117" is as follows:

"When objections to the proposed change are overruled, the board shall proceed to determine the damages to be awarded to each claimant. If the damages finally awarded are, in the opinion of the board, excessive, the proceedings shall be dismissed; if not excessive, the board may, by proper order establish such proposed change."

If the damages awarded by the appraisers are in the opinion of the Board of Supervisors excessive, the board has no other alternative than to dismiss the proceedings. The statute does not give the board authority to diminish the amount of damages awarded by the appraisers.

We are of the opinion that the board may on its own motion dismiss the proceedings for any irregularity or mistake made in the description of the proposed right of way or the tracts from which such right of way will be taken. The board having authority on their own motion to make the change contemplated have impliedly the correlative right to terminate the proceedings.

CONDEMNATION PROCEEDINGS: 1. A condemnation proceeding to change a county line road and bridge must be brought by the counties jointly.
2. The Board of Supervisors of one county may appropriate money to pay for the expense of such proceeding even though the road is located outside the county.

August 1, 1924.

County Attorney, Madison County, Winterset, Iowa: We have received your letter of July 23rd, 1923, asking for an opinion upon the proposition which you have stated as follows:

"The Board of Supervisors of Madison and Warren County have divided the bridges on the county line specifying which bridges Madison County should maintain.

One of the bridges assigned to Madison County, that is on the county line, has been destroyed.

The location of the old bridge is poor and if the road was moved over in Warren County a very short distance there would be a good location for the bridge.

It is the desire of the Board of Supervisors of Madison County that the road be changed the short distance so that it will throw the location of the proposed bridge in Warren County.

The owner of the land will not consent to the road being changed and if it is changed it will have to be condemned.

In the condemnation proceedings it is my idea that the Board of Supervisors of Madison County should take no part and that the Board of Supervisors of Warren County would have exclusive jurisdiction.

Please bear in mind that the proposed road will leave the county line a short distance above the old bridge and swing around in Warren County across the creek and then back on to the county line but that the bridge will be located in Warren County about twenty rods east of the county line.

In the condemnation proceedings do you agree with my view of the proper proceedings?

Can Madison County appropriate the money to pay for this condemnation proceedings when the road is outside of Madison County?"

Your question may be divided into two parts:

First, should the condemnation proceedings be brought in Warren County only; second, can Madison County appropriate the money to pay for the condemnation proceedings when the portion of the road to be condemned is outside of Madison County.

Section 2819 of the Compiled Code reads as follows:

"The establishment, vacation or alteration of a road, either along or across a county line, may be effected by the concurrent action of the respective boards of supervisors in the manner above prescribed. The commissioners in such cases must act in concert, and the road shall not be established, vacated or altered in either county until it is so ordered in both."

It is our opinion that Section 2819 just quoted applies to the situation, or state of facts, you have submitted to us, and that the condemnation of a portion of the right of way, which is occasioned by the change in the road, must be effected by the concurrent action of the respective boards of supervisors in Madison and Warren Counties. The fact that the road to be condemned lies entirely in one county, can not, in our opinion, make a difference in the application of the statute. Notwithstanding this fact it is a boundary line road and the boards of supervisors of both counties have jurisdiction thereof.

Section 42 of Chapter 25 of the Laws of the Extra Session of the Fortieth General Assembly reads as follows:

"Bridges on county line roads may, under joint agreement between the boards of the adjoining counties, be located, constructed, and maintained wholly within one (1) county in order to secure a proper site or in order to avoid unnecessary expense. The resulting work and expense shall be carried on and shared in such proportion as said boards may determine."

It will be noted that, under the provisions of the above section, agreements may be made between the boards of supervisors of adjoining counties, for the location, construction, and maintenance of bridges on county line roads, even though it is necessary to secure a proper site or to avoid unnecessary expense to locate and maintain a bridge or bridges wholly within one county. The work and expense thereof shall be carried on and shared in such proportion as said boards may determine.

It is our opinion that under the authority of this section, the board of supervisors of Madison County may appropriate the money to pay for the condemnation proceedings even though the road is located outside of Madison County. The agreement, specifying which bridge on the county line road that Madison County shall maintain, which is referred to in your letter, is valid and should be carried out and observed.

COUNTY BRIDGES—Alleys in cities and towns are highways within the meaning of Chap. 25, Acts Ex. Ses. 40 G. A. so that it is the duty of the county to maintain and construct bridges therein.

July 18, 1924.

County Attorney, Union County, Creston, Iowa: We have received your letter of July 15, 1924, asking this department for an opinion upon two propositions stated as follows:

1. "We have two propositions here which have been causing some trouble about which I would like to have your opinion. The first arises under the law in respect to the county bridge and culvert system, and especially as to the construction of 2877 which provides 'The duty of the construction and maintainance of all bridges and permanent culverts throughout the county is imposed upon the Board of Supervisors. All culverts and bridges are to be paid for out of the bridge fund.'

We have two bridges of about a twelve (12) foot span on alleys within the limits of the city of Creston; which bridges collapsed about two years ago and which have not been rebuilt for the reason that the Board of Supervisors refuse to build the same. We have called the attention of the county attorney and Board of Supervisors to the provisions of Section 2872 of the Compiled Code which provides: 'The system of bridge and culvert work herein provided for shall apply to all highways throughout the county outside of the limits of the cities of first class'. But they say that an alley is not a highway and is not included in the county bridge and culvert system. There is no way under which we can levy a bridge tax and to my knowledge there is no way in which we can procure the money to pay for these bridges unless to take it out of the county bridge fund or from the city general fund. This matter was referred by Mr. Carroll to the district engineer for opinion but it seemed to me that the question would ultimately come to you any way as is my understanding that you are the advisor of the highway commission.

2. The second proposition which I have in mind and on which I wish to have your opinion is in regard to the notice, certification, etc., of proposed special assessments under the budget law. Does this statute in your opinion require that all contemplated assessments for paving shall be included in the notice and certification at this time? It would seem to me that it would be very difficult for the engineer to figure out at this time even the approximate cost of the paving job to be completed next spring and furthermore such a requirement would necessitate a decision on the part of the council at this time as to the material to be used in construction of the same. We have always heretofore advertised for bids on all classes of standard construction work and then at the hearing have given the persons who would be required to be assessed, an opportunity to express themselves in respect to the particular kind of paving they wanted."

In determining the first question you have submitted to us, it will be necessary to consider and construe the provisions of the statute found in Chapter 25 of the Acts of the Extra Session of the Fortieth General Assembly. The third paragraph or subdivision of Section 1 of said statute reads as follows:

"A county bridge and culvert tax of not to exceed five (5) mills on all the property of the county, except on property within cities controlling their own bridge levy. In counties having a bonded indebtedness of ten thousand dollars ($10,000.00), the board may levy not to exceed seven (7) mills. *Said bridge fund shall be used to pay for all bridges and culverts constructed and maintained by the county and for culvert material furnished to the township trustees by the county.*"

Section 2 thereof reads in part as follows:

"The county road system:

1. * * * * * * * * * * * * *

2. Shall not embrace any highway within cities and towns except as herein provided.

3. * * * * * * * * * * * * *

4. May embrace a street or highway which is within the limits of a town when such highway is a direct continuation of the county road system outside said town,

provided the board of supervisors and the council can agree in writing as to the manner in which said street or highway is being improved, and provided such contract is approved by the state highway commission."

Sections 29 and 30 of said statute are as follows:

"The county bridge and culvert system *shall embrace all highways throughout the county,* except highways entirely within cities which control their own bridge funds."

"The county bridge and culvert system shall be constructed and maintained as follows:

1. Culverts which are thirty-six (36) inches, or less, in diameter, and located within a city or town, by the council thereof.
2. Temporary culverts thirty-six (36) inches or less, in diameter, located on the township road system, by the township, except that the county shall furnish the material therefor, and deliver the same at a railroad station to be designated by the supervisors.
3. All bridges and all other culverts within said system, by the county."

It will be noted that the county bridge and culvert system shall embrace all highways throughout the county, except such highways as are entirely within cities which control their own bridge funds. Under the provisions of the statute, all bridges and culverts within the county bridge and culvert system shall be constructed and maintained by the county with the following exceptions:

1. Culverts which are thirty-six inches, or less, in diameter, and located within a city or town.

2. Temporary culverts thirty-six inches, or less, in diameter, located on the township road system.

In the solution of the first question you have submitted, we are confronted with the problem of determining whether an alley in a city or town constitutes a highway within the meaning of the three provisions of the statute which we have quoted herein. We believe that this question is free from doubt. The Supreme Court of this state has several times passed upon this identical question. It must be assumed that the legislature, in using the word "highways" in the statute, had in mind the definition thereof as laid down by the Supreme Court. It is the general holding that the term "highways" is the generic term for all kinds of public ways including county and township roads, streets and alleys. *Chamberlain v Iowa Telephone Company,* 119 Iowa, 619; *Sachs v Sioux City,* 109 Iowa, 224; *State v Telephone Company,* 173 Iowa, 497.

We are therefore of the opinion that alleys in cities and towns are highways within the meaning of the provisions of the statute quoted herein, and that it is the duty of the county to construct and maintain the bridges, and also culverts on the alleys if such culverts are more than thirty-six inches in diameter.

Your second question has already been answered by an opinion prepared by the Attorney General on July 2, 1924, for Honorable Fred Maytag, Director of the budget. The opinion related to a special assessment for the construction of a ditch, but we are of the opinion that the same rule would apply to any special assessment. We quote the following portion of the former opinion:

"Without entering into a detailed brief of the budget law, may I suggest that any municipality including drainage districts desiring to levy special assessments should conform to the following:

1. It should comply with all of the provisions of the law as the same is without regard to the budget law.
2. After this has been done it should make up a complete estimate and publish it as required by the budget law and certify the tax.

3. The certification may be made at any time after the public hearing provided in the budget law."

Therefore, in levying special assessments, the municipality should comply with the rules laid down in the portion of the opinion of the Attorney General quoted above.

HIGHWAYS. The board of supervisors may not submit to the electors a proposition of drainage and grading the primary roads without at the same time submitting the question of hard surfacing the same.

July 7, 1924.

County Attorney, Audubon County, Audubon, Iowa: We desire to acknowledge receipt of your letter of March 29, 1924, asking this department for an opinion upon a question which is stated as follows:

"I am writing you as county attorney for an opinion in regard to the construction to be placed on Section 2933 of the Compiled Code of Iowa.

The question on which the people of our county desire an opinion is whether or not under said Section, the people through proper proceedings as set out in said Section, could authorize issuance of bonds for the purpose of completing the grading and drainage of the primary system without committing themselves on the proposiiton of hard surfacing the primary roads.

Is the language used in the question to be submitted, as set out in the statute, to be construed literally, or, is it to be construed so that it is in harmony with the preceding statements in the Section and can the word 'substantially' be interpreted in said Section in such a way that it would authorize the County acting through its Board of Supervisors, to change the words 'hard surfacing', for instance, to 'drainage and grading'?

I am inclined to think that this means something different than hard surfacing especially when it is construed together with Section 2936 of the Compiled Code.

The people in this County seem very anxious to submit this question to the voters in such a way that bonds could be issued to complete the drainage and the grading of the primary system but not to commit themselves to the hard surfacing at least not to include it in the bond issue."

Section 2914 of the Compiled Code reads in part as follows:

"Each county, acting through its board of supervisors, shall have three options in the expenditure of its allotments from the primary road fund:

First, it may elect to complete the grading or drainage of any part or all of the primary roads within the county before laying any hard surfacing; or

Second, it may hard surface in any one year, such portion of the roads in the primary system in its county as may be met by its allotted portion of the primary road fund for said year, plus any balance remaining to its credit from previous allotments, plus the special assessments on abutting and adjacent real estate as hereinafter provided; or it may proceed in any one year with draining and grading on one or more divisions of the primary system and with hard surfacing on other divisions of said system.

Third, it may proceed with said hard surfacing in a more rapid manner when authorized to do so by the voters of the county as herein after set forth, provided no hard surfacing shall be constructed on any division of the primary roads until the drainage and grading of said division shall have been fully completed.

It is hereby made the duty of the board of supervisors to proceed in the improvement of primary roads under this chapter as fast as the primary road fund is available, until the improvement of the primary system is completed; provided, however, that any county, after draining and grading its primary system, or any division thereof, shall have the right to surface same with gravel or oil or both if by resolution of the board of supervisors it elects so to do. Such graveling or oiling shall not be considered hard surfacing within the meaning of this chapter. Said surfacing shall be done in accordance with the plans and specifications of the highway commission applicable to such improvement and the cost of such

improvement when so done may be paid from the primary road fund. Vouchers therefor must be approved by the board of supervisors and forwarded to the highway commission for final audit, approval, and payment as provided in section twenty-nine hundred twenty one."

Section 2933 of the Compiled Code contains the following provisions:

"If any county desires to hasten the drainage and grading or the hard surfacing of the primary roads of its county at a more rapid rate than would be accomplished by merely employing each year its allotted portion of the primary road fund for said year, it may proceed as follows: The board may submit or upon petition of a number of the qualified voters of the county equal to twenty per cent of the total vote cast in said county at the last preceding general election, presented to the board in writing so to do, must submit to the voters of the county at a general election, or at a special election called by the board for such purpose, the question of issuing bonds for the purpose of raising funds to meet the cost of such work, and to provide for the retirement of such bonds and interest thereon. * * *

Special election shall be conducted in the same manner as general elections are conducted. Said question shall be set forth on the ballots substantially as follows: 'Shall the board of supervisors be authorized to issue bonds from year to year, in the aggregate amount not exceeding ——— dollars, for the purpose of providing the funds for hard surfacing the primary roads of the county, and to levy a tax on all the property in the county from year to year not exceeding ——— mills in any one year, for the payment of the principal and interest of said bonds, provided, however, that the annual allotments to the county of the primary road fund shall be used to retire said bonds as they mature, and only such portion of said tax shall be levied from year to year as may be necessary (1) to pay the interest annually, and (2) to meet any deficiency, if any, between the amount of the principal of the bonds and the said allotments from the primary road fund, together with assessments on benefited property provided by law.' Immediately to the right of said proposition shall appear two squares of appropriate size, one above the other. Immediately after the first square shall appear the word 'yes'. Immediately after the other square shall appear the word 'no'. The voter shall indicate his vote by a cross in the appropriate square. * * * *"

It is an elementary rule of law that all statutes in pari materia, or statutes on the same subject, must be read and construed as a whole and each of its parts considered in connection with all other parts thereof to determine the meaning of any portion of such statute.

It will be observed that, under Section 2914 of the Compiled Code, the board of supervisors have three options in the expenditure of its allotments from the primary road fund. First, it may elect to complete the grading and drainage of any part or all of the primary roads within the county before laying any hard surfacing. Second, it may hard surface in any one year such portion of the roads in the primary road system as may be met by its allotted portion of the primary road fund for said year, plus any balance remaining to its credit from previous allotments, plus the special assessments on abutting and adjacent real estate as hereinafter provided, or it may proceed in any one year with the grading and drainage on one or more divisions of the primary system and with hard surfacing on other divisions of said system. Third, it may proceed with said hard surfacing in a more rapid manner when authorized to do so by the voters of the county as set forth in other provisions of the statute, *provided no hard surfacing shall be constructed on any division of the primary roads until the drainage and grading of said division shall have been fully completed.*

It will be ovserved that the county may proceed in the manner provided in Section 2933 of the Compiled Code, when it desires to hasten the *drainage and grading or the hard surfacing of the primary roads of the county.*

Therefore, in the determination of the question you have submitted, we have to deal with the third option granted to the board of supervisors in Section 2914 of the Compiled Code.

Under the provisions of such section, the board of supervisors has the right to complete the grading and drainage of any part or all of the primary roads within the county, and may do so in the manner prescribed therein without a vote authorizing it to do so. It is only the hard surfacing of the highways in a more rapid manner than is provided in the portion thereof granting to the board the second option that must be authorized by the electors.

A consideration of the language of Section 2933 will aid us in solving the question you have submitted. It will be observed that the language of the statute is as follows: "If any county desires to hasten the drainage and grading of the hard surfacing of the primary roads of its county at a more rapid rate than would be accomplisehd by merely employing each year its allotted portion of the primary road fund for said year", it may proceed in the manner provided therein. Therefore, we must determine the meaning of the word "or", as used therein. Ordinarily, the word "or" marks an alternative, generally corresponding to "either", as either this, or that, a connective that marks an alternative; that is, one of two things may be done but not both. 29 Cyc. 1502.

Sometimes, however, it is given a different meaning, depending entirely upon the context of the statute in which it is used or its connection with what immediately precedes and what immediately follows it. The word "or", however, as used in statutes has been often construed and given the same meaning as though it were the word "and." 29 Cyc. 1505, and authorities cited in support thereof; *State v. Brandt,* 41 Iowa, 615; *State v. Myers,* 10 Iowa, 448; *State v Cooster,* 10 Iowa, 453; *State v. Smith,* 46 Iowa, 670; *Williams v Poor,* 65 Iowa, 415; *Eisfeld v. Kenworth,* 50 Iowa, 390; *Mitchell v. Charles City Western R. R.,* 169 Iowa, 251.

All of the authorities just cited support the rule that when necessary to harmonize the provisions of a statute or give effect to all of its provisions, the word "or" may be read as "and", and conversely.

As already stated, it is a well settled rule of law that in the construction of statutes the courts should consider and construe the statute as a whole and all of its parts together, and then arrive at the intention or purpose of the Legislature in enacting it. Giving to the primary and secondary road law and all of its parts, when read in connection with each other, such a construction as is consonant with public policy and with a view to carry out the purpose of the statute, we are cosstrained to hold that the word "or"as used in the statute must be construed as "and", and that a proposition to be submitted must include both the drainage and grading and the hard surfacing of the primary roads of the county.

If the word "or" as used in this connection should be given its ordinary meaning, then the statute would have to be construed as giving to the county the option of draining and grading or the hard surfacing of the primary roads of the county and that having exercised the right to do one of these things, it could not do the other.

Assuming that the county might vote on the proposition of hard surfacing without also submitting the question of drainage and grading could the roads be hard surfaced without drainage and grading? The drainage and grading of the highways are indispensable steps that must precede the hard surfacing. In fact, it is so provided in Section 2914. It certainly cannot be assumed that the legislature in-

tended to give to the statute in question an absurd contsruction, and to give to the county the right to submit the one question of hard surfacing without at the same time submitting the question of drainage and grading of the highways would have such an effect. The rules of construction of statutes and the evident purpose thereof demand the construction that we have placed thereon.

The form of the question to be set forth on the ballot as found in Section 2933 of the Code, manifestly supports the construction that we have just placed thereon, as the following phrase therefrom will show: "For the purpose of providing the funds for hard surfacing the primary roads of the county." It is the hard surfacing of the highways that is to be submitted to the electors, and grading and draining are only necessary incidents thereto.

We are, therefore, of the opinion that your question must be answered as follows: That the Board of Supervisors, under the statute, has no right to submit to the electors the authorization of the issuance of bonds for the purpose of completing the drainage and grading of the primary road system, without at the same time submitting to them the purpose of hard surfacing such highways.

HIGHWAYS—Extension of county highway into city or town. County is not obligated to maintain such a road within limits of city or town. HIGHWAYS—Contracts over $1,000 for culvert, bridge, grading, drainage and repair work, or materials requires approval of highway commission in case work is to be let at other than a public letting. HIGHWAYS—COUNTY GRAVEL PITS—may be purchased and paid for out of county road fund if major portion of gravel is to be used on primary roads or paid proportionately from each according to use of pit. HIGHWAYS—COUNTY GRAVEL PITS—surplus materials not usable on the highways may be sold by the county.

July 8, 1924.

Iowa State Highway Commission, Ames, Iowa: You have requested the opinion of this department upon several questions involving the interpretation of certain provisions of the law as contained in Chapter 25 of the Acts of the Extra Session of the 40th General Assembly.

1. Your first question relates to an interpretation to be given certain provisions of Section 2 of said chapter. Section 2, in so far as applicable, reads as follows:

"County road system. The county road system:

1. * * * * * * * * * * * *
2. * * * * * * * * * * * *
3. * * * * * * * * * * * *

4. May embrace a street or highway which is within the limits of a town when such highway is a direct continuation of the county road system outside said town, provided the board of supervisors and the council can agree in writing as to the manner in which said street or highway is being improved, and provided such contract is approved by the State Highway Commission.

Nothing in this paragraph shall take from such town the general municipal control and police regulation which it now has over such street or the right to further improve such street by paving the same.

Such writing shall contain a provision that the town shall use the funds returned to them under paragraph one of section 1 hereof in constructing and maintaining said county road.

5. * * * * * * * * * * * *"

Your question is whether or not a street located in a city or town, which is a direct continuation of and has by agreement been made a part of the county road system, is so connected with the county road system such that the county is there-

after under obligation to maintain this street in the same manner and to the same extent as the other portions of the county road system outside of cities and towns. In answer to this question your attention is called specifically to the language of subdivision 4 of Section 2 set out above. It will be noted that in the first paragraph of said subdivision it is provided that the county road system may embrace a street or highway within the limits of a town when such highway is a direct continuation of a county road system "provided the board of supervisors and the council can agree in writing *as to the manner in which said street or highway is being improved.* Thus, nothing is said in the statute relative to the maintenance or upkeep of the road. It is the original improvement only which is mentioned in the statute, and which is contemplated by the language used. This is especially true in view of the language employed in the next paragraph of subdivision 4, wherein it is specifically provided that nothing therein shall take from such city or town the general municipal control it has or the right to further improve by paving. In view of this situation, it is the opinion of this department that the county is not obligated to maintain such a portion of the county road system located within the limits of a city or town and that it is the duty of the city or town to maintain it after it is once improved and established. There could be no objection to the board of supervisors and the city council incorporating a provision in the written contract whereby the city or town undertakes to maintain the improvement located within its limits.

2. The next question involves an interpretation of certain provisions contained in Section 13 of said chapter. Section 13 reads as follows:

"Contracts exceeding one thousand dollars. All culvert and bridge construction, grading, drainage and repair work, or materials therefor, of which the engineer's estimated cost shall exceed one thousand dollars ($1,000.00) shall be advertised and let at a public letting. The board may reject all bids, in which event it may readvertise, or may let the work privately at a cost not exceeeding the lowest bid received, or build by day labor, subject to the approval of the state highway commission."

The question submitted is as to whether or not the clause "subject to the approval of the State Highway Commission" is to be construed as modifying the three preceding clauses or only the clause referring to the building by day labor. On a careful reading of the section referred to, it will be observed that the primary duty of the board is to advertise for bids and let a contract for the building of culverts and bridges, grading, draining and repair work at a public letting. However, the board is given authority to reject all bids submitted, in which event it may readvertise for new bids. In the event the board does not desire to let the work at a public letting, it may with the State Highway Commission approving, let the work privately at a cost not exceeding the lowest bid received or may build the improvement by day labor. It is the opinion of this department that the approval of the State Highway Commission is necessary only in case the board decides to let the work in a manner authorized, other than at a public letting.

3. Your third question submitted relates to the interpretation to be given Section 23 of said chapter. The section reads as follows:

"Gravel beds. The board of supervisors of any county may, within the limits of such county and without the limits of any city or town, purchase or condemn any lands for the purpose of obtaining gravel or other suitable material with which to improve the highways of such county, including a sufficient roadway to such land by the most reasonable route, and to pay for the same out of the primary or county

road funds, or the board may purchase such material outside the limits of their county."

Your question is as to whether or not the gravel pit referred to in said section, may be paid for out of the primary road fund if the major portion of the material to be taken from the pit is to be used on the primary roads, or should the pit be paid for out of the county road funds if the major portion of the materials is to be used on the secondary roads of the county. It is the opinion of this department that the language employed in the section just quoted permits the payment for a gravel pit to be made from either or both the primary or the county road funds. It would be perfectly proper in the event that the greater portion of the materials to be taken from the gravel pit are to be used on the primary road system that the primary road fund be made to bear the cost. Likewise, it would be proper if it is intended to use the greater portion of the materials on the roads of the county other than the primary road system that the county road fund be made to bear the expense. We can see no objection to paying for a gravel pit from both the primary and county road funds in substantially the proportions which each system of roads will be benefited by the purchase of such a pit.

4. Your last question is as to whether or not a board of supervisors, in view of the provisions of Section 24 of that chapter, may sell to builders, material concerns and others, sand and waste material contained in said gravel pits which are incapable of and unsuitable for use in the improvement of highways and streets, the proceeds therefrom to be used in defraying the operating costs of the gravel pit, and thereby reduce the net cost of the gravel used in road building.

Section 24 of said chapter reads as follows:

"Use of gravel beds. The township trustees of any township in the county, in order to improve their township roads, shall have the right to take material from any lands so acquired by the board of supervisors and the supervisors may permit private parties or municipal corporations to take materials from such acquired lands in order to improve any street or highway in the county, but it shall be a misdemeanor for any person to use or for the board of supervisors to dispose of any such material for any purpose other than for the improvement of such streets or highways."

It will be noted that the last portion of said section provides that it shall be a misdemeanor for any person to use or for the board of supervisors to dispose of any such material for any purpose other than for the improvement of such streets or highways. The language used by the legislature is not as clear as it might be. However, it is the opinion of this department that the legislature did not intend to prohibit the sale of materials contained in a gravel pit which could not practicably be used for the improvement of streets and highways. It is our opinion that it was only intended to prohibit the sale of those materials which might and could be used in the improvement of streets and highways, for the reason that the privilege is given to counties to buy these pits for the sole purpose of assisting and aiding with the improvement of highways and streets and not in order to permit any county to go into the gravel business. It would be unreasonable to hold that a county operating a gravel pit could not dispose of waste materials which were usable in some other enterprise and must permit such materials to be wasted.

I trust that the foregoing will assist in clarifying the language employed in the respective sections of the law so that the end attained will be practicable and reasonable in each particular case.

HIGHWAYS—APPRAISERS: Where three are selected to assess damages resulting from the establishment of a road, and one disagrees, the other two can file the report.

July 2, 1924.

Iowa State Highway Commission, Ames, Iowa: This department is in receipt of your letter dated July 1, 1924, in which you request an official opinion. Your letter is in words as follows:

"We desire an opinion upon the following proposition: Where three appraisers are appointed to assess the damages resulting from the establishment of a road, and one appraiser will not agree to the amount of damages assessed by the other two, may the two appraisers file a report, or must the report be unanimous?.

You can readily understand what the result would be in this case if we are required to have all three appraisers agree upon one sum of money. The one appraiser would block the appraisement so that it would be impossible to secure a fair proposition so far as the county is concerned."

You are advised that if the three appraisers cannot agree, but two do agree, the two can file the report with the same force and effect as though the same were filed by the three.

MOTOR CARRIERS—PRIMARY ROADS: Where an application has been granted to operate on a primary road designated by number and the road is in part relocated application should be made to correct the permit to conform with the facts.

September 13, 1924.

Railroad Commissioner: This department is in receipt of your letter dated September 9, 1924, in which you request an opinion. Your letter is in words as follows:

"We have a question before us upon which we desire as early an opinion as possible.

Many of the applicants for motor carrier service in the State have applied for service over a particular primary road such as, for instance, primary road No. 7, or primary road No. 15.

After their application has been granted the State Highway Commission relocates the primary road a mile or two or more miles distant from where such primary road is located at the time the application is made and granted. The motor carrier operator, of course, desires to operate upon the actual primary road, and the question arises whether, under the Certificate granted upon application as indicated in Section Four of the Motor Carrier Law, such change in operation can be made without making a new application covering the newly located road.

Would be pleased very much if we could have an opinion upon this question within a few days."

You are advised that the applicant in this case should apply to the Commission asking that the permit be corrected to conform to the actual facts. The Commission can then issue an order correcting the original permit.

PRIMARY ROADS: Culverts located within a city or town are constructed and maintained by the council thereof where such culverts are used for gaining access to private property.

October 20, 1924.

Iowa State Highway Commission, Ames, Iowa: You have requested the opinion of this department upon the following proposition:

"In the construction of the primary road system through incorporated cities and towns, it is often necessary to place culverts along the side of the roadway to serve as drainage structures for entrance into private property. These culverts are located within the highway right of way and are known as entrance culverts.

In view of the provisions of Section 30, Chapter 25, Laws of the Extra Session of the 40th General Assembly, can the county and Highway Commission legally pay for culverts of this character from the primary road fund, it being understood, of course, that such culverts are needed in connection with the construction work?"

Section 30, Chapter 25 of the Laws of the Extra Session of the 40th General Assembly provides as follows:

"The county bridge and culvert system shall be constructed and maintained as follows:

1. Culverts which are thirty-six (36) inches, or less, in diameter, and located within a city or town, by the council thereof.
2. Temporary culverts thirty-six (36) inches or less, in diameter, located on the township road system, by the township, except that the county shall furnish the material therefor, and deliver the same at a railroad station to be designated by the supervisors.
3. All bridges and all other culverts within said system, by the county."

Under paragraph one (1) quoted above, culverts located within a city or town are to be constructed and maintained by the council thereof. Under the provisions of the primary road law providing for the grading, draining and hard surfacing of primary roads through cities and towns, it is the duty of the highway commission to establish such road and they must grade and drain the road bed even though through a city. However, where the culvert is to be established beside the road for the convenience of a private individual in attaining access to his property, such culvert is not within the road bed proper, and therefore, it is our opinion that its construction and maintenance should be paid for by the city council and could not be legally paid for by the county and State Highway Commission.

HIGHWAYS: Discussion of duties and power of board of supervisors as to submission of question of a bond issue for road improvement.

December 20, 1924.

County Attorney, Plymouth County, Le Mars, Iowa: We desire to acknowledge receipt of your letter of October 16, 1924, asking this department for an opinion upon the question which you have stated as follows:

"Chapter 25, Page 115 of the 40th Extra Session concerning highways at Sec. 52 a petition is provided for, signed by 10% of voters, etc., then a notice of hearing on this program and meeting for objections, then at Sec. 55 you will find this: After the hearing the board may dismiss the proceedings or shall adopt a program for road improvements substantially as proposed.

Does this give the board discretionary power to turn this program down? Then in Sec. 56 you will find another petition submitting a bond issue to the voters. Is this discretionary with the board after they have turned down the program in Sec. 55, or must they proceed and submit it even if the other is voted down? This matter is up for hearing Oct. 21st and there is going to be a fight and want your opinion on this question to settle any controvesry."

Section 4757 of the Code, 1924, is in the following language:

"The board of supervisors may by resolution or upon petition of at least ten per cent of the legal voters, residents of the county, as shown by the poll books of the last preceding election, shall propose a program of highway improvement, specifying the portions of primary and [or] county roads proposed to be improved, the general nature of the improvements, the time within which it is proposed to complete said improvements, and the estimated cost of each of the roads included in said program."

Section 4758 of the Code, 1924, provides that the proposed program of improvement on primary roads shall be subject to the same approval by the highway com-

mission as is required in other improvements on such primary roads. The next section, 4759, provides for a notice of the hearing of such proposed program and contains the following provisions:

"At such hearing any citizen may appear and object and be heard. After the hearing *the board may dismiss the proceedings* or shall adopt a program for road improvements substantially as proposed."

Section 4757 permits the board to make a proposal or program of highway improvements and requires the board to do so upon a petition of at least ten per cent of the legal voters. This section, however, relates alone to the proposal of such a program and not its adoption.

It is our opinion that, under Section 4759, after the hearing the petition may be dismissed by the board if it is deemed advisable.

Section 4760 of the Code provides as follows:

"The board may, or upon petition of a number of qualified electors of the county equal to ten per cent of the total number of votes cast for governor in said county at the last preceding general election, must submit a program to the voters of the county at a general election or at a special election called for that purpose, the questions of issuing bonds from year to year to be designated as primary road bonds or county road bonds, as the case may be, and of raising funds with which to pay said bonds and the interest thereon as the same may become due."

Under the provisions of this section the board may on its own initiative, or upon petition of a number of qualified electors of the county equal to ten per cent of the total number of votes cast for Governor in the county at the last preceding election must submit to the electors the question of issuing either primary road or county road bonds, as the case may be, and of raising funds with which to pay said bonds and interest thereon.

We believe that it is obligatory upon the board to submit the question provided for in Section 4760, in the event such a petition has been filed regardless of the action of the board under the provisions of Section 4759. The board has no other alternative.

PRIMARY ROAD FUND—Cannot be used for construction of bridges within the limits of cities.

May 31, 1923.

Iowa State Highway Commission, Ames, Iowa: This department is in receipt of your letter dated May 29, 1923, in which you request an opinion. Your letter is in words as follows:

"We have a situation in a city having a population between 2,000 and 2,500, in this state, which necessitates the reconstruction of a bridge, and which will involve an expenditure of the neighborhood of $30,000. This bridge is located on an extension of the primary road system within this city.

In view of the legislation by the 40th General Assembly which relates to the construction of primary roads within cities having a population between 2,000 and 2,500, will it be legal to pay for the construction of this bridge from the county's allotment of the primary road fund?"

House File 268 of the acts of the 40th General Assembly is in words as follows:

"Section 1. That section thirty-five (35) of chapter two hundred thirty-seven (237) acts of the thirty-eighth general assembly (C. C. 2943) as amended by chapters fifty-six (56) and one hundred four (104) acts of the thirty-ninth general assembly be and the same is hereby repealed and the following enacted in lieu thereof: 'The board of supervisors is hereby given plenary jurisdiction subject to the approval of the council to purchase or condemn right of way therefor

and grade, drain, gravel or hard surface any road or street which is a continuation of the primary road system of the county, within any town or within any city including special charter, commission plan and manager plan cities having a population of less than twenty-five hundred (2500), and to make said hard surfacing the same width within the town as the hard surfacing outside of the town on the primary road system, but no hard surfacing shall be done except as authorized by a vote of the electors of the county. After the completion of such improvement the same shall be maintained by the city or town and such city or town shall rest under the same obligation of care as to such improvements as is now provided by law for roads and streets generally. Any such city or town through its council and each county of the state through its board of supervisors are hereby authorized to enter into written agreements subject to the approval of the state highway commission to determine the location of such improvements within such cities or towns. In case of disagreement the matter shall be referred to the state highway commission, whose decision shall be final. The board of supervisors shall not drain, grade, gravel, or hard surface any highway within the limits of cities other than those specified herein.'

Section 2. In the improvement of extensions of the primary road system within cities or towns hereunder, the board of supervisors shall have power to purchase or condemn the necessary right of way therefor, and such condemnation proceedings shall be under the same laws as now apply to the condemnation of right of way for roads outside of cities and towns on primary roads."

The statute authorizes the board of supervisors to use the primary road fund for the purpose of purchasing or condemning right of way for the primary road system and to grade, drain, gravel or hard surface any road or street which is a continuation of such system within certain cities and towns. It does not, however, refer to the construction of bridges and culverts. The primary road law to be found in Chapter 237 of the acts of the 38th General Assembly, provided for the use of the primary road fund in the grading, draining and hard surfacing of certain roads designated as primary roads. This statute was amended so as to include the payment of the cost of the construction of bridges and culverts. (39th General Assembly—Chapter 20.) It was later amended to include the cost of right of way. (40th General Assembly—H. F. 269.)

You will observe that the authority to use the primary road fund for the construction of bridges and culverts has not been extended to include cities. The statutes of this state specifically provide that bridges and culverts are to be constructed by the counties independently of the primary road fund and such statute will prevail in the absence of a specific provision to the contrary. There is a specific provision to the contrary as to the general construction of bridges and culverts on the primary road generally, but not as to extensions of the primary road within the limits of cities.

It is therefore impossible to use any portion of the primary road fund for the construction of bridges within the limits of cities.

BONDS—PRIMARY ROAD: Interest should be paid by levy made each year until primary system is completed. After system is completed interest may be paid from primary road fund.

September 5, 1923.

County Attorney, Marshall County, Marshalltown, Iowa: Your favor of the 3rd to the Attorney General requesting an opinion has been referred to me for reply. The request is as follows:

"I would appreciate at your earliest convenience an opinion from your office, as to the construction to be placed upon Chapter 89, Laws of the 40th G. A.

Section 27, Laws of the 38th G. A., provide for a tax levy to pay the interest on road bonds.

Paragraph "C", Section 2, Chapter 89, Laws of the 40th G. A., provides that the interest on primary road bonds shall be paid from the county's allotment of the primary road fund.

The phraseology of Section 2, Chapter 89, Laws of the 40th G. A., leads me to the opinion that the primary road system must be entirely completed by grading, draining and surfacing throughout the county before the interest on the bonds can be paid from the primary road. If this is the intent, what effect does it have on tax levy if voted on August 14? Will the levy be made each year to meet the interest on the bonds until the primary system is completed and then the payment of the interest on the bonds be made from the primary road fund?"

We are of the opinion that the sections above referred to should be interpreted as indicated by you in that the levy to meet the payment of the interest will have to be made each year under the provisions of Section 27, Chapter 237, Acts of the 38th G. A., until the primary road system is fully improved by grading, draining, and graveling or other surfacing approved by the Highway Commission. When the primary road system is fully improved as provided by Section 2, Chapter 89, Acts of the 40th G. A., then the primary road funds may be used as therein provided to pay the interest and maturing principle of the primary road bonds.

APPRAISERS—APPOINTMENT OF: When private lands are to be condemned and used for highway purposes, Board of Supervisors may appoint first two, who shall select third.

September 8, 1923.

County Attorney, Marion County, Knoxville, Iowa: We desire to acknowledge receipt of your communication of September 6, 1923, asking this department for an opinion upon a question relating to the establishment of highways. The proposition submitted is as follows:

"The Board of Supervisors of Marion County request that an opinion be furnished them relative to the following proposition:

Chapter 81, Laws of the Fortieth General Assembly, provides the machinery to be used where private lands are to be condemned and used for highway purposes. Under this Chapter the appraiser named by the County and also the appraiser named by the land owners, have been selected but they seem unable to get together and select the third man. What method shall be used in obtaining appraisers to act in such a case?

The above chapter makes provision for the case where the land owners cannot agree upon their man, by giving the Supervisors authority to appoint the second man, but the said chapter is silent as to the above matter. It is clearly not the intention of the Legislature that the matter of condemnation should be held up indefinitely pending the selection of the appraisers, this being evidenced by the provision that the Board may appoint the second man when the owners cannot get together; it is also clear that unless some such provision be read into the law, as to the selection of the third man, that the said chapter is useless. It is my opinion that after an honest effort to get together has been made by the two appraisers, and they fail so to do, then the third man should be selected by the Board and the condemnation proceed.

As delay in this matter means considerable expense to contractors now on the job, an early opinion by your office would be appreciated."

Chapter 81 of the Acts of the Fortieth General Assembly reads as follows:

"If for any reason, the board is unable to acquire such highway by agreement with the owner or owners, such owner or owners who are resident of the county shall be personally served in the manner original notices are required to be served, and such owner or owners who do not reside in said county shall be served by publishing a notice in some newspaper in the county, once each week for two

weeks, but personal service outside of the county but within the state in the manner original notices are required to be served, shall be deemed personal service and shall take the place of published service, and in addition, notice shall be served in the manner original notices are required to be served upon the actual occupant of the land, if said land be occupied, notifying interested parties that three disinterested freeholders will be selected as appraisers, one by the board of supervisors, one by the owner or owners of the property affected, where there are two or more tracts affected, and one by the two so appointed, said notice to fix a definite date upon which the interested party or parties may appear and name one appraiser, and in the event said owner or owners fail to appear, in person or by agent, or fail to agree upon the selection of an appraiser, the board of supervisors may appoint two of such appraisers who shall select a third appraiser, and such appraisers shall make a return of their doings within ten (10) days to the county auditor, and the board shall fix a day for a hearing, at which time it will consider the report of the appraisers and hear all objections to said change and claims for damages, and at which time it will determine all damages to each claimant by reason of such proposed change, and notice of such hearing shall be given to all interested parties in the manner as hereinbefore provided. The board, if it so desires, may fix dates for appointing appraisers and consideration of their report, objections and claims for damages in one notice."

It will be observed that this statute provides for the appointment of three disinterested freeholders as appraisers; one by the board of supervisors, one by the owner or owners of the property affected, and the third by the two so appointed. It also provides that in the event the owner or owners fail to appear in person or by agent, or fail to agree upon the selection of an appraiser, the board of supervisors may appoint two of such appraisers who shall select the third one. It is obvious that the legislature intended to provide for any possible contingencies that might arise at any time during the pendency of the proceedings for the condemnation of land for highway purposes.

In construing the statute, the object to be attained thereby is a material consideration, and such an interpretation should be adopted that will not result in defeating the purpose or aim of the statute. The true intent or purpose of the statute is to secure the condemnation of land for highway purposes and that this should be accomplished without delay when the machinery therefor is once set in motion.

In our opinion, the power to appoint the appraisers, when for any reason those who are originally vested with the authority to do so either fail or refuse to appoint them, or are unable to agree on the appointees, is, under the statute, vested in the board of supervisors. Obviously the statute vests this authority somewhere, and when properly construed, there can be no escape from the conclusion that the board of supervisors has such power under the conditions stated in your communication.

PRIMARY ROADS: A bond to release claims for highway work under section 6354 must have sureties thereon.

October 8, 1923.

State Highway Commission, Ames, Iowa: We have received your communication of September 25, 1923, asking this department for an opinion upon a question which you have stated as follows:

"The writer would appreciate your advice concerning the following:

Assume that a contract has been awarded on Primary Road work and a proper bond given in support of the contract, signed by a responsible surety company.

The contractor has numerous claims filed against him which he fails to pay and finally the surety company takes over the work for completion.

When claims have been filed under Sections 6532-34 C. C., estimates may be released for payment by contractors putting up indemnifying bond. The surety company having now taken over the job, desire all estimates paid to them and offer bond in ample form but signed merely by the surety company itself.

May we approve such a bond or should we insist upon there being a surety other than and in addition to the surety on the original contract bond?"

The sections of the code that must be considered in determining the question you have submitted are sections 6532, 6533 and 6534. The first section is as follows:

"Every mechanic, laborer or other person who, as subcontractor, shall perform labor upon or furnish materials for the construction of any public building, bridge or other improvement not belonging to the state, shall have a claim against the public corporation constructing such building, bridge or improvement for the value of such services and material, not in excess of the contract price to be paid for such building, bridge or improvement, nor shall such corporation be required to pay any such claim before or in any different manner from that provided in the principal contract. Such claim shall be made by filing with the public officer through whom the payment is to be made an itemized sworn statement of the demand, within sixty days after the completion of said public building, bridge or other improvement, and such claims shall have priority in the order in which they are filed."

Section 6534 is as follows:

"The contractor may at any time release such claim by filing with the treasurer of such corporation *a bond for the benefit of such claimant, in sufficient penalty and with sureties to be approved by such treasurer, conditioned for the payment of any sum which may be found due such claimant.* Such contractor may prevent the filing of such claims by filing in like manner a bond conditioned for the payment of persons who may be entitled to file such claims, and actions may be brought on any such bond by any claimant within two years after his cause of action accrues, and judgment shall be rendered on said bond for the amount due such claimant. No provisions of any bond or contract to the contrary shall affect any of the provisions of this and the two preceding sections."

It will be observed that under the above section, the contractor may at any time release a sub-contractor's claim by filing with the treasurer of the corporation making the improvement "a bond for the benefit of such claimant, in sufficient penalty and with sureties to be approved by such treasurer, conditioned for the payment of any sum which may be found due such claimant." The rule of law is stated as follows: in Ninth Corpus Juris, page 10, section 7:

"Unless sureties are required by statute, if the instrument is such as comes under the legal definition of a bond, the fact that it is without surety is immaterial."

This rule is also supported by authority: *Prat v. S. J. Langston Mercantile Co.,* 111 Mo. A. 96, (85 S. W. 134); *Hudson-Fulton Celebration Committee v. Hess,* 173 Federal, 797.

However, as the statute (section 6534) requires a bond with sureties, the case you have submitted comes within the exception stated in the rule above quoted. Therefore, it is our opinion that the surety company referred to in your communication should file a bond with sureties and that the bond tendered should not be approved in its present form.

HIGHWAYS: The county authorities have the right to enter upon property condemned under sections 1527-r1 to 1527-r7 as soon as the auditor issues warrants in favor of claimant.

October 15, 1923.

State Highway Commission, Ames, Iowa: We have received your communication of October 9, 1923, asking this department for an opinion upon the questions contained therein which you have stated as follows:

"You wrote an opinion recently for the County Attorney of Marion County with respect to the selection of appraisers for condemning certain land needed for highway purposes. We have rather a bad situation in this county due to the fact that on Primary Road Number 2 northwest of the town of Otley we relocated said road so as to follow along the south side of the Rock Island Railroad extending through certain lands belonging to a family named Vander Ploegh. The location of the road as it is being constructed is wholly unsatisfactory to the Vander Ploeghs. For instance, on a certain piece of their land which was condemned for highway purposes, there is a crop of corn. The land has been condemned, final order has been entered by the Board, and the Vander Ploeghs have appealed to the court. The contractor is now ready to proceed to the construction of this piece of road. The Vander Ploeghs are refusing to permit the construction forces to enter upon this condemned land until the corn crop has been harvested. If they can make good on this corn crop, they can hold us up until well along into the winter, as a great deal of corn is not harvested until well into the winter.

All of the above statement is preliminary to asking for an opinion on the following point:

Where right-of-way has been condemned, final order has been entered by the board of supervisors, and the property owner has appealed to the court, can the property owner prevent us from entering upon his land for the construction of the highway until the crop which may be on the said land, has been harvested?

Of course we do not wish to destroy anyone's corn crop without giving them just compensation. However, in the case of this corn crop, the corn can without damage at this time of year, be cut, and the shocks can be located so as to not interfere with the construction of this road. If, instead of cutting the corn as suggested above, these people would prefer to accept a cash payment for whatever damage we might do them, we would be perfectly willing to pay such damage. My thought in connection with this matter is to simply instruct the construction forces to proceed to enter upon this land, to cut the corn and carefully shock it in locations which will not be interfered with in the location of this road. However, before doing so, I wish your opinion on the above subject, and any information you may give us along this line would be greatly appreciated."

As we uderstand the facts stated in your communication, the board of supervisors proceeded to relocate the road in question pursuant to the provisions of senate file 98 of the Acts of the Thirty-sixth General Assembly, sections one to seven, the same being sections 1527-R1 to 1527-R7 of the Code Supplement, 1915, both inclusive. Section 1527-R2 of the Code Supplement, 1915, was repealed by the Fortieth General Assembly and a substitute therefor enacted. (Chapter 81 of the Acts of the Fortieth General Assembly.) The purpose of the statute is expressed in section 1527-R1 as follows:

"changing the course of any part of any road or stream within any county, in order to avoid unnecessarily expensive bridges, grades or railroad crossings, or to straighten any road, or to cut off dangerous corners on the highway or to widen any road above statutory width, or for the purpose of preventing the encroachment of a stream upon a public highway, specifying clearly the change recommended, and whether any part of any highway already established should be vacated and abadoned, and what part."

The statute prescribes the procedure that must be followed in making the change provided for therein which is not material in the consideration and determination of the question you have submitted to us. Section 1527-R3 of said Code Supplement contains the following provisions:

"At such final hearing, the board shall pass upon the objections filed. If the objections or any of them be sustained, the proceeding to effect the change shall be dismissed. If the objections be overruled, the board shall then proceed to a determination of the damages to be awarded to each claimant who has filed such claim. If the amount of damages so awarded are, in the opinion of the board, excessive,

the proceedings shall be dismissed. If such damages, in the opinion of the board, be not excessive, the board may, by proper order, establish such proposed change in the road or stream, as the case may be, and pay such damages as in case of right of way secured by agreement. Provided, however, that if by the change of any road herein contemplated, any part of the highway abandoned reverts to the owner of the land condemned, then and in that case, the owner, by reason of the relocation of such highway, shall be entitled to such damages for the locating of such new highway which exceeds the damages sustained by reason of the old highway, taking into consideration the value of the premises, immediately before and after such old road is abandoned and the new road established. *The board shall order the auditor to issue warrants in favor of each claimant for the amount of damages awarded, and in such case shall have the right to enter upon such right of way and improve the same.* The damages thus awarded shall be paid for out of the county road or bridge fund or out of both of said funds. Claimants for damages may appeal to the district court from the award of damages, in the manner and time for taking appeals from the establishment of highways generally. The acceptance at any time of the amount awarded shall constitute a waiver of the right to appeal. If possession of the right of way is not taken and improved prior to the determination of the amount of damages on appeal, the board may, on the appeal being determined, dismiss the proceeding to effect the change, if, in the opinion of the board, the damages finally awarded are excessive."

A reading of the underlined portion thereof will show that the county authorities have the right to enter upon the right of way condemned for the highway purposes and improve the same as soon as the auditor issues warrants in favor of claimant for the amount of damages awarded.

It is therefore our opinion that the board of supervisors has the right to order the construction forces to enter upon this land and make such improvements as it may deem advisable or as the law requires. Of course if the crop of corn now growing upon the premises belongs to the owner of the property so taken, damages to such crop should be awarded as a part of the damages for the taking thereof. However, if the crop belongs to a tenant, then damages should be allowed the tenant for the value of the crop so taken. We have not overlooked the fact that section 1505 is as follows:

"A reasonable time must be allowed to enable the owners of land to erect the necessary fences adjoining the new road; and when crops have been planted or sold before the road is finally established, the opening thereof shall be delayed until the crop is harvested."

This section, however, is found in the general statute relating to the establishment of highways and does not apply to the statute we have under consideration, which is a special statute enacted for a specific purpose which is expressed in said section 1527-R1. The underlined portion of section 1527-R3 is inconsistent with the provisions of section 1505 of the Code, and as a result, section 1505 could not apply to senate file 98 of the Acts of the Thirty-sixth General Assembly because the latter statute was enacted subsequent to the enactment of the former. It is our opinion, therefore, that the section 1505 of the Code is applicable only to the provisions of the general statute relating to the establishment of highways, and does not in any way apply to the special statute we have under consideration.

PRIMARY ROADS—Highways within city limits—Discussion of effect of apparent conflict in provisions of several statutes.

October 17, 1923.

County Attorney, Osceola County, Sibley, Iowa: We desire to acknowledge receipt of your letter of October 5, 1923, requesting this department to render an

opinion with reference to the statutes relating to primary roads. The propositions submitted as stated by you are as follows:

"I have been asked to procure your opinion relative to the statute of Section 35, Chapter 237, Acts of the 38th General Assembly, as amended by Chapters 39 and 104, Acts of the 39th General Assembly.

It appears that the said section 35, as amended, was repealed by Chapter 87, Acts of the 40th General Assembly, and that the said Chapter 87 was enacted in lieu of the said Section 35. Yet Chapter 88, Acts of the 40th General Assembly, purports to amend the said section 35, and these two chapters of the Acts of the 40th General Assembly (87th and 88th) went into effect concurrently.

The town of Ocheyedan, Iowa, contemplates hard surfacing one of its streets which is a continuation of a primary road, and therefore seeks to take advantage of either the said section 35 or the said chapter 87, but as section 35 limits such improvement to a width of 18 feet while chapter 87 provides that such improvement shall be the width of the hard-surfacing outside the town on the primary road, the question raised is as to which width the town is entitled to, and this question of course depends on whether section 35 is still in effect or repealed.

If section 35 has been repealed the initiative given the town council by the said chapter 88 which amends the said section 35, is lost, and this matter is of some concern to the parties interested.

Again Chapter 230, Acts of the 39th General Assembly as amended by Chapter 127, Acts of the 40th General Assembly, seems to relate only to continuations of primary roads within cities, and although this is quite apparent, I am asked to inquire if this section is to the exclusion of such improvements within towns."

The legislature, during the Fortieth General Assembly, enacted what is known as Chapter 87 of the Acts of the Fortieth General Assembly (House file 268) which repealed and enacted a substitute for section 35 of chapter 237 of the Acts of the Thirty-eighth General Assembly, as amended by chapters 56 and 104 of the Acts of the Thirty-ninth General Assembly. There was also passed at the same session chapter 88 (House file 437), which sought to amend section 35 of chapter 237 of the Acts of the Fortieth General Assembly, as amended. Both statutes were approved by the Governor on April 18, 1923, the day after the session of the legislature adjourned. Both statutes contain publication clauses and both were published in the Des Moines Register and the Des Moines Capital on April 21, 1923, as shown by the certificate of Hon. W. C. Ramsay, Secretary of State, appended to each statute as found in the Acts of the Fortieth General Assembly.

It therefore becomes our duty to determine whether either statute supersedes the other. To determine this question, resort must be had to the rules of construction relating to the enactment of statutes on the same subject by the same legislature and especially where two statutes have been approved and become effective on the same day. The law relative to such a situation is well settled. The fact that two laws were passed by the same legislature and so nearly together creates a strong presumption that no conflict was supposed to exist. Such statutes will be read together and both sustained, if possible, without doing violence to the language used. *State v. Duncan,* (Ala.) 50 Southern Reporter, 265; *City of Birmingham v. Southern Express Co.,* (Ala.) 51 Southern Reporter, 163; *City of Tampa v. Prince,* (Fla.) 58 Southern Reporter, 542; *State v. Hindson,* (Mont.) 106 Pacific Reporter, 362; *Southern Pacific Co. v. Sorey,* (Texas) 140 S. W. Reporter, 334.

The latter of two conflicting statutes passed at the same session of the legislature prevails over the earlier one and impliably repeals it. *Whitfield v. Davies,* (Wash.) 138 Pac. Reporter, 883; *Buck v. Board of Trustees,* (Idaho) 154 Pacific Reporter, 372.

Two acts which took effect on the same day, unless clearly irreconcilable, must be construed in part material and both given effect, if possible. *C. C. C. and S. L. Ry. Co. v. Bline,* (Ind.) 105 N. E. Reporter, 492.

Where there is a repugnancy in two laws enacted by the same legislature, the latter in point of time will prevail. *Shank v. State,* (Ind.) 108 N. E. Reporter, 522.

Two inconsistent acts approved by the Governor on the same day are presumed to have been approved in numerical order and the last one approved becomes the final operative statute. *Musgrove v. Baltimore & Ohio Ry.,* (Maryland) 75 Atlantic Rep. 245; *State v. Davis,* (Maryland) 16 Atlantic Reporter, 529; *Strauss v. Heiss,* 48 Maryland, 292.

This presumption, however, may be rebutted by the evidence of the Governor. The Executive Journal kept by Governor Kendall shows that chapter 87 of the Acts of the Fortieth General Assembly, being House file 268, was the first bill approved on April 18, 1923, and that there were five other statutes approved by the Governor on the same date after he approved chapter 87 and before he approved chapter 88, (House file 437).

It is therefore apparent that chapter 87 was the first one approved by the Governor. Also under the rule above stated, the presumption is that chapter 87 was the first approved because it bears House file 268, while chapter 88 bears House file 437, and because it is the first in numerical order, it is presumed to have been first approved. Therefore, if chapter 87 first became effective, section 35 of chapter 237 of the Acts of the Thirty-eighth General Assembly, as amended, had been repealed when chapter 88 became effective.

Under some conditions it has been held that an amendment to be valid must not relate to a statute which has been repealed or declared unconstitutional and where an entire act is void or no longer in existence there is nothing to amend. *Schamblin v. Means,* (Cal.) 91 Pac. 1020; *Lampkin v. Pike,* (Ga.) 42 S. E. 212; *Helt v. Helt,* (Ind.) 52 N. E. 699; *Smith v. McClain,* (Ind.) 45 N. E. 41; *Copeland v. Town of Sheridan,* (Ind.) 51 N. E. 474; 36 Cyc. 1055; *In re Terrett,* (Mont.) 86 Pac. 266; *City of Plattsmouth v. Murphy,* (Neb.) 105 N. W. 293.

However, a statute purporting to amend a repealed or void statute is valid where the provisions of the new statute are independent and complete in themselves. *Smith v. McClain,* (Ind.) 45 N. E. 41; *People v. Onahan,* (Ill.) 48 N. E. 1003; *Attorney General v. Stryker,* (Mich.) 104 N. W. 737; *People v. Board of County Canvassers,* (N. Y.) 37 N. E. 649.

If the validity of an amendatory statute depends upon the statute which it seeks to amend or must be read in connection therewith, then if the statute sought to be amended has been repealed the amendatory statute is void. A statute seeking to strike certain provisions from the original statute or to strike certain provisions therefrom and insert others or to add certain phrases thereto would, of course, be void if the original statute is no longer in existence. However, where the amendatory statute is complete in and of itself and its validity does not depend upon the provisions of the original statute, the amendatory statute will be valid regardless of the fact that the original statute has been repealed.

A reading of the two statutes in question will show that they are not inconsistent. The one (chapter 87) relates to the power of the Board of Supervisors subject to the approval of the city or town council to grade, drain, gravel or hard surface any road or street which is a continuation of the primary road system of the county while the other (chapter 88) deals with the right of any town, through

its council to make an application to the Board of Supervisors for the grading, draining or hard surfacing of any road or street in said town or along its limits which is a continuation of the primary road system of the county and prescribing the procedure therefor. It is apparent that when the two statutes are read together they form one complete statute on the same subject.

As there is no conflict in the provisions of the two statutes and as chapter 88 is a complete statute in and of itself, we are of the opinion that under the rules of construction hereinbefore referred to, both of the statutes are in full force and effect. Chapter 87, however, is subject to the limitations of chapter 88.

You are also advised that it is the opinion of this department that chapter 230 of the Acts of the Thirty-ninth General Assembly as amended by chapter 127 of the Acts of the Fortieth General Assembly relates only to primary roads within cities and that the statute is not applicable to towns.

HIGHWAY—There is no right of appeal from the refusal of the Board of Supervisors to allow claim for damages because of the vacation of a highway.

October 31, 1923.

County Attorney, Hardin County, Eldora, Iowa: I have your favor of the 19th at hand in which you request the opinion of this department upon the following proposition:

"Can a Board of Supervisors proceeding under the provisions of Section 1527-r1 of the Supplemental Supplement of the Code to change the course of a highway allow a claim for damages to one who has filed a claim for damages sustained by the vacation of part of the highway, the claimant being the owner of land abutting upon that part of the highway vacated but from whom no right of way was taken?"

We believe your question is fully answered by the recent case of *Yonota v. Modrachek,* 189 Iowa, 538, wherein our Supreme Court at page 541 stated:

"Only applicants 'for damages caused by the establishment or alteration of any road' are authorized to appeal, and, as plainly appears, claims for damages caused otherwise than by the establishment or alteration may not be filed. Evidently the statutes referred to proceed on the theory of Brady v Shinkle, supra, that injury distinct and apart from that suffered by the public generally is not caused by the vacation of a highway. Whether damages may be recovered by claimants in an independent action, as was sought in McCann v Clarke County, supra, we express no opinion. What we do say, is that the statutes do not authorize the filing of a claim for damages consequent on the vacation of a highway with the county, or, if filed, the allowance for such damages by the board of supervisors, or, if not allowed, appeal therefrom to the district court."

We are therefore of the opinion that no claim for damages should be allowed by the Board of Supervisors proceeding under Section 1527-r1 of the Supplemental Supplement Code 1915.

In *McCann v Clark County,* 149 Iowa 13, the Court allowed a claim for damages but in that case the action was brought against a county and not by appeal. Apparently, this case is still the law upon the procedure therein followed.

HIGHWAYS—PRIMARY ROAD FUND: Anticipation certificates must be sold in the manner provided by section 2931 C. C. for not less than par plus accrued interest. The county cannot enter into a contract with the bidder to pay a percentage for services. Actual cost of printing advertising and any other reasonable expense in connection with the issuance of the certificates may be paid from the proceeds of the sale. Ch. 14, Laws of the 40th General Assembly

being a penal statute is to be strictly construed and would not apply to anticipation certificates.

December 7, 1923.

County Attorney, Webster County, Fort Dodge, Iowa: I have your favor of the 5th to the Attorney General requesting an opinion which has been referred to me for reply. Your request is as follows:

"Our Board of Supervisors were notified some time ago by the State Highway Commission that they could anticipate their 1924 primary road fund in the sum of $41,000.00; our Board thereupon passed a resolution to sell the $41,000.00 primary road fund anticipation certificates and the county treasurer advertised the sale thereof but no bids for the same were received, bidders not being willing to bid 5 per cent and accrued interest. We can, however, get a bid of 5 per cent and accrued interest provided the Board can enter into a contract with them of approximately 1 per cent for service. This procedure, however, was condemned by the State checkers who were here last year but your opinion which is attached to their report does not, in my opinion, cover the question of the anticipation certificates. I would like to have your opinion as to whether or not these anticipation certificates comes in Chap. 170 of the 39th G. A. as to advertisement of bonds, and also whether they come under Chap. 14, of the 40th G. A. which provides for the sale of bonds. The distinction being that these provisions cover the sale of bonds while these anticipation certificates are not bonds but certificates only. Also would like to have your opinion as to whether the Board on the sale of these certificates could pay the buyer a per cent for service rendered in getting the bonds out. The auditor of the State Highway Commission seems to hold that this can be done."

Section 2932 Compiled Code, provides for the anticipation of annual allotments and the procedure in connection therewith for the grading, draining, and hard surfacing of the primary roads without the aid of a bond issue. After reciting the several conditions of the certificates this section reads:

"* * * The record of such certificate by the county auditor, the receipt, record, handling and disbursement of the same by the county treasurer, and the latter's responsibility therefore, shall be the same as provided herein for road certificates issued for special assessments on benefited property. * * * * * Said fund so received shall be used solely for the purpose of retiring said certificates. * * *"

Section 2931 is referred to in the preceding Section, and provides for the issuance of such certificates, the requirements thereof, and the method of selling the same. The pertinent part of said Section being as follows:

"* * * The treasurer may apply said certificates in payment of any warrants duly authorized and issued for hard surfacing the roads within said district, or he may sell the same for the best attainable price and for not less than par plus accrued interest and apply the proceeds in payment of such authorized warrants. * * *"

Chapter 170, Laws of the 39th General Assembly, referred to by you provides as follows:

"Section 1. Sale—advertisement. When any state, county, township, municipal, drainage, school, road, park, or other public bonds are issued and offered for sale in the sum of twenty-five thousand dollars ($25,000.00) or more, the official or officials in charge of such bond issue shall by advertisement, * * * give notice of the time and place of sale of said bonds, etc.

"Sec. 2. Sealed bids—record—open bids—record. Sealed bids may be received at any time prior to calling for open bids. At said time and place, the said official or officials shall open and publicly announce all sealed bids received and make a record of same in their minutes. After the sealed bids are announced, the official or officials shall call for open bids and shall make record in the minutes of the best open bid received.

"Sec. 3. Rejection of bids—private sale. Any or all bids may be rejected, and the sale may be advertised anew, in the same manner, or the bonds may thereafter be sold at private sale, provided that no bonds shall be disposed of for less than par value and accrued interest."

We are of the opinion that under Section 2932 Compiled Code, the provisions of which have been hereinbefore referred to, the County Treasurer must proceed to sell the certificates in the manner provided by the provisions of Section 2931 Compiled Code; that is for the best price obtainable, but in any event for not less than par, plus accrued interest. The County cannot legally enter into a contract with the bidder to pay the bidder approximately one per cent for services. Nowhere is there authorization to use any of the funds received from the sale of these certificates to pay a service charge in connection with their issuance and sale. The actual cost of the printing of said certificates, the cost of advertising the sale of the same, and any other reasonable and legitimate expense in connection therewith may be paid from the proceeds of their sale.

The provisions of Chapter 170, Laws of the 39th General Assembly, hereinbefore referred to, provide for the advertisement of the sale and the receipt of bids for public bonds.

From your request, we do not believe it necessary to determine whether or not the certificates provided for by Section 2932 of the Compiled Code fall within the provisions of this chapter. We believe, however, that it is by far the better practice to follow the provisions of the chapter just referred to in selling road certificates. Open competition for securities of this character is desirable and should be obtained whenever possible.

Chapter 14, Laws of the 40th General Assembly referred to by you in your request for an opinion is in effect a penal statute, and is consequently, under the well defined rules of statutory construction to be strictly construed. Consequently we doubt that this chapter would cover the situation suggested by you in your request. However, the courts are inclined to hold public officials to the strict performance of their duties and it is entirely possible that this chapter might be interpreted by the courts to cover the violation of the statutory requirements in regard to the procedure to be followed in issuing and selling road improvement certificates.

OPINIONS RELATING TO INSURANCE

INSURANCE-REBATING. Paying partial commissions to Legion men for new Insurance sold by them is not rebating in violation of Sec. 1782 of the code.

August 8, 1924.

Commissioner of Insurance: You have requested the opinion of this department as to whether or not the following state of facts constitutes a violation of Section 1782 of the Code prohibiting rebating and discrimination by insurance companies:

"The General Agent at Waverly, Mr. W. Merriam, together with about ten of the active members of the American Legion Post of that city, propose a sixty-day campaign among theAmerican boys for new business in the Medical Life Insurance Company, the ten American Legion members above referred to being licensed as soliciting agents for the company, and all commissions received by Mr. Merriam and

the American Legion boys so licensed, together with a division of the renewal commissions, being turned over to the American Legion Post of Waverly as a donation to apply upon the cost of erecting such Community Building."

We are of the opinion that under the above statement of facts the commissions paid to the American Legion Post would not amount to a rebating, and would not constitute a violation of the statute here in question.

Rebates have been defined as "deductions from stipulated premiums allowed in pursuance of antecedent contract", and as said by our Supreme Court, it is the act of the company or its agents in offering an outside inducement by way of rebate to a prospective applicant in order to secure his application for insurance that is prohibited by this statute.

Under the facts given, the commission is not to be paid to the applicants, but is to be paid to the American Legion Post. Therefore, it is more in the nature of a consideration for services rendered to the company, and is not paid to the applicants for the insurance. It does not in our opinion amount to rebate, and is not a violation of Section 1782 of the Code.

INSURANCE. Under Section 4, Chapter 9, Acts of the Extra Session of the 40th General Assembly a dividend can not be declared unless there is a surplus of 25 per cent. This section is retroactive in operation.

September 11, 1924.

Insurance Commissioner: This department is in receipt of your letter dated September 4, 1924 in which you request an official opinion. Your letter is in words as follows:

"I desire a written opinion from your Department upon the following state of facts:

"An insurance company other than life organized prior to 1921 with a paid-up capital stock of $500,000.00 and a contributed surplus of $500,000.00. In 1923, the capital stock was increased to $750,000.00 at which time the contribution made to surplus was $12,000.00. At the present time the Company has a surplus of $93,220.44.

"The opinion desired is whether or not an insurance company organized in this State other than life, keeping in mind the statement of facts above set out, may legally declare a dividend in any amount payable out of the surplus of said Company.

"In this connection, I desire your interpretation of Section 5625 of the Compiled Code 1919 and that portion of Section XI, Chapter IX, Acts of the Extra Session of the Fortieth General Assembly which reads as follows:

"'Such compnay shall be possessed of a surplus in cash or invested in securities authorized by law, equal to twenty-five per cent of such paid-up and outstanding capital at the time certificate of authority is first applied for and issued.'

"I desire you to state in your opinion whether or not the portion of Section XI, Chapter IX, above quoted, prohibits the company declaring a dividend unless said company has a surplus equal to twenty-five per cent of the paid-up and outstanding capital stock at the time the dividend is declared paid.

"I further desire your interpretation of that portion of Section IV, Chapter IX, Acts of the Extra Session of the Fortieth General Assembly which reads as follows:

"'Any amount paid to the company for stock above the par value of the stock, shall constitute a contributed surplus and shall not be used in the payment of dividends.'

"In the rendition of your opinion you shall take into consideration the following facts to-wit:

"The $500,000.00 and $12,000.00 contributions (being the excess the stock originally sold for over and above its par value) were placed in the surplus fund of the com-

pany and used with other funds created from the profits of the business in establishing and extending the business, and the present surplus of the company of $93,220.44 is what the company now has left of the amount originally contributed and the profits of the business mingled together.

"With this situation in mind, would the company be required to,—

"First: Have a surplus fund over and above the amount originally contributed before it could legally declare a dividend out of the $93,220.44?

"Second: Is that portion of Section IV, Chapter IX, above quoted, retroactive and does it apply to contributed surplus prior to the taking effect of said act or only to such surplus contributed thereafter?

"A situation has arisen which demands immediate action and I will appreciate it very much indeed if you will furnish me your written opinion at your very earliest convenience."

You are advised that after the enactment of the statute in question no dividend can be declared unless there is a surplus of twenty-five per cent. You are further advised that the section to which you refer is retroactive in operation. This is because of the constitutional and statutory provisions which provide in substance that the Legislature may from time to time enact statutory regulations of corporations and such statutes shall apply to all corporations, whether existent prior to the enactment of such subsequent regulations or afterward.

INSURANCE. A member of a fraternal insurance association can designate an unincorporated charitable institution as beneficiary if the said institution so consents and the member is an inmate of the institution at the time.

August 11, 1924.

Commissioner of Insurance: You have requested the opinion of this department as to the legality of the Modern Woodmen of America issuing a benefit certificate to G. W. Van Atten naming the Iowa Odd Fellows and Orphans home as beneficiary therein.

Section 1824 of the Code as amended provides as follows:

"No fraternal association created or organized under the provisions of this chapter shall issue any certificate of membership to any person under the age of fifteen years, nor over the age of sixty-five years, nor unless the beneficiary under said certificate shall be the wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, step-father, step-mother, step-children, children by legal adoption, legal representative or to a person or persons dependent upon the member; provided that if after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the governing body or board of the society, to make such institution his beneficiary.

"Within the above restrictions each member shall have the right to designate his beneficiary and from time to time have the same changed in accordance with the laws, rules and regulations of the society, and no beneficiary shall have or obtain any vested interest in said benefit until the same has become due and payable upon the death of said member, provided that any society may, by its laws, limit the scope of beneficiaries within the above classes; provided further, that any association or society, whose articles of incorporation, or constitution, or rules, or by-laws, provide that at the time of the admission to membership into such society, every member, when joining shall belong to one occupation or guild, may become a beneficiary as may be provided in its articles of incorporation, or constitution, or rules, or by-laws."

Under the provisions of the above section it is proper for the Iowa Odd Fellows home to be named as beneficiary, providing that Mr. Van Atten is an inmate of the institution, and the institution consents to be made the said beneficiary, and providing further that the institution is an incorporated charitable institution.

This department is not advised as to whether the articles of incorporation of the grand lodge of the Independent Order of Odd Fellows makes a provision for the establishment of homes such as the one in question. If the grand lodge is properly incorporated, and its articles of incorporation authorize the establishment of such homes, and the home in question is properly established in compliance therewith, we are of the opinion that there is no reason why the home cannot be named as a beneficiary if the other provisions therein named are complied with. The insurance company should make a showing as to the incorporation of the Independent Order of the Odd Fellows showing that it will be possible to ascertain whether or not the home comes within the terms of the statute.

INSURANCE—TRANSFER OF FUNDS. Held on statement of facts that the Modern Brotherhood of America could transfer $100,000 from its accident fund to its general fund.

December 30, 1924.

Commissioner of Insurance: You have requested the opinion of this department upon the following submitted question:

"Is the Modern Brotherhood of America by action of its Supreme Convention legally authorized to transfer $100,000 from its Accident Fund to its General Fund?"

You are advised that it is the opinion of this department that there is no provision in the laws of Iowa which would prevent such transfer, and that there is no policy in the law, in our opinion, under which a transfer should be prohibited. Of course, the Commissioner of Insurance under the powers and duties granted him by the statute in this state would be authorized to prevent such a transfer if he should find upon investigation that the said transfer would be seriously detrimental to existing and future policyholders, or that there is fraud or misconduct or other similar circumstances which he thinks would justify the refusal of his permission to the making of said transfer.

It is the desire of this department that this opinion be limited only to the legal question as to the transfer of funds which are held by a fraternal benefit life association in its Accident Fund. We do not wish to express an opinion as to the other funds held by an insurance company.

INSURANCE. State Mutual Associations Annual meeting must be held at principal place of business—cannot provide in Articles of Incorporation otherwise.

April 6, 1923.

Commissioner of Insurance: Your favor of the 6th to the Attorney General has been referred to me for reply. In this communication you ask for an opinion on the following propositions:

"Section 1759-o of Chapter V, Title IX, of the Code of Iowa, provides that such state mutual insurance associations as confine their membership to persons of one occupation, which persons maintain a state organization and hold annual meetings thereof may, for the purpose of electing directors and changing or amending their Articles of Incorporation and By-Laws, hold their annual meetings at the same time and place as the annual meeting of the members of the occupation to which the association confines its membership, provided the Articles of Incorporation of such association so provides. The above mentioned chapter of our law was repealed, and chapter 120, Acts of the 39th General Assembly enacted as a substitute therefor, so in the present law, there is no provision contained authorizing such associations to hold their annual meeting at a place other than the City in which is located their principal place of business.

"The association submitting this question was originally incorporated under the

provisions of Chapter V, Title IX, of the Code, for the statutory period of twenty years, which period is about to expire. It now desires to renew its Charter and transform the nature of its business to that of a mutual insurance company by re-incorporating under the provisions of Chapter IV, Title IX, of the Code and being an association which confined its membership to persons of one occupation who maintain a state organization, naturally prefers to retain the right to hold its annual meeting at the same place and time as the meeting of the state organization.

"First: In the event the association elects to renew its Charter and continue its business as a state mutual association under the provisions of Chapter 120, Acts of the 39th G. A., would it, in the absence of any express provision contained in the present law, be allowed to retain the provision with reference to the holding of its annual meeting, or would it be required to comply with the provisions of our general incorporation law and provide for the holding of its annual meetings at the principal place of business?

"Second: In the event it desires to renew and reincorporate under the provisions of Chapter IV, Title IX, of the Code, in the absence of any express provisions contained in that chapter, would it be permitted to include a provision in its Articles of Incorporation for holding its annual meetings at other than the principal place of business?"

In answer to your first inquiry, it is my opinion that this association could not hold its annual meeting at any place other than its principal place of business. This would also be true in answer to your second inquiry. The general law with which any corporation organized in this State must comply in the absence of specific statutory exceptions provides that the annual meeting shall be at the principal place of business. In view of the expressed statutory provision requiring the annual meeting to be at the principal place of business, the corporation would not have authority to provide in its Articles of Incorporation for the annual meeting to be at any other place.

INSURANCE. Pension fund voluntarily contributed to by employees and administered by employer without profit or charge, and to which the employer also contributed, is not insurance business.

June 6, 1923.

Commissioner of Insurance: You have recently referred to this Department a communication from John Morrell & Co., asking for an opinion as to whether or not the proposed plan of that Company for pensioning their employees would bring it under the jurisdiction of your Department, and subject to the insurance laws of this State. The plan as proposed by John Morrell & Company is as follows:

"John Morrell & Company will establish a fund by setting aside a certain amount of money at the start. The employees will be given the opportunity of coming into the pension scheme at their option. The plan is to have the scheme contributory; that is the employees will authorize them to hold out of their weekly pay checks a small sum each week, which will be paid into the pension fund. From time to time John Morrell & Co. will also add to this fund as may be required.

"After a stipulated number of years service the employee will have the option of retiring and drawing a pension until death, based on a percentage of the average weekly wage earned over a period of years.

"Pensions are for employees only. It is not the intention to include dependents in the scheme.

"Should an employee leave the service of the Company or be discharged before reaching the retirement age, he would be compensated in cash for the amounts he has paid in on some basis yet to be determined."

Insurance has been defined as a contract by which one party undertakes to indemnify another against loss, damage or liability arising from an unknown or

contingent event. It must be contingent upon duration of human life or the happening of some casualty; otherwise the contracts are not of life, endowment or casualty insurance, or in fact insurance of any kind. (Vol. I. Cooley's Briefs on Insurance, p. 4 and 21; *State vs Federal Investment Company,* 50 N. W. 1028, (Minn.)

In the case of *Beck vs Railroad Company,* 43 Atlantic 908 (N. J.), the Company had established a relief fund under regulations requiring the members of the association, all of whom were employees of the Company, to contribute certain sums out of their wages, out of which was made payments of certain specified benefits to sick or injured members, or in case of death to a beneficiary named by the member. If the fund was insufficient to make the payment the Company supplied the deficit. The court held that such a contract was not one of insurance, that the scheme of the relief department does not contemplate a business of that sort. It is limited to such of the employees of the Company as voluntarily apply for admission and are admitted. The contract of the Company is merely to take charge of the fund raised by voluntary contribution, to administer it at its own expense and to guarantee that it shall be sufficient to furnish the specified relief. Such a contract is not one of insurance, but has only the elements of a labor contract. The facts in the case just cited are very similar to the proposed pension plan of the John Morrell & Co., the pension plan being purely a voluntary arrangement on the part of the employees and voluntary contributions by the Company, the latter to administer the fund without cost or profit.

The general object or purpose of an insurance company is to afford indemnity or security against loss. Its engagement is not founded in any philanthropical, benevolent or charitable principle. It is merely a business venture, in which one for a stipulated consideration or premium engages to make up wholly or in part a certain agreed amount, any specific loss of property, to persons injured, or the loss of life. (*Commonwealth vs Equitable Benevolent Assn.,* 18 Atl. 1112 (Pa.)

The elements of the proposed pension plan have none of the features of insurance. The Company is not administering the fund for a profit and is not engaged in the business of writing insurance, and does not attempt to indemnify or secure against loss.

In the case of *Donald vs C., B. & Q. Ry. Co.,* 93 Iowa 284 at 295, the court said:

"There is a claim, also, that the relief department is an insurance company, or, at least, the question is considered. It seems to us not. It does not purport to be an insurance company. While the benefits are in the way of relief in the case of sickness, accident or death, the manifest intent is different. The benefit association of the Philadelphia & Reading R. R. Co. considered in *Johnson v R. R. Co.,* 29 Atl. 854 (Pa.), is in all essential particulars like the one in this case, and it is held not to be an insurance company, but a 'beneficial association'."

Comparing the proposed pension plan with the relief association organized by the employees and the C., B. & Q. Ry. Co., considered by the court in the case last cited, it would seem that the plan is very similar and that the facts of the proposed pension plan remove the Company even further from the insurance business than the railroad company in the Donald case. The court distinguishes between companies engaged in the insurance business and contracts of insurace.

The facts under consideration do not have any of the essential requirements of insurance, under the authorities herein cited, and it is therefore the opinion of this Department that such a plan would not subject the John Morrell & Co. to the

regulation and control of the Insurance Department, and require them to comply with the laws of this State regulating and controlling insurance companies.

As bearing upon this proposition see also the following authorities: *Pennie vs Reis,* 22 Pac. 176 (Cal.); *Maine vs C., B. & Q. Ry. Co.,* 109 Iowa 260; *State ex rel Sheets vs Pittsburg C. C. & St. L. Ry. Co.,* 67 N. E. 93 (Ohio), 14 R. C. L. p. 840.

INSURANCE—TAXATION. Insurance companies transacting business in this state must pay the tax provided by law and if any portion of the premium is subsequently returned to the policy holder, the company is not entitled to deduct the amount thereof in computing its tax.

June 14, 1924.

Commissioner of Insurance: This department is in receipt of your letter dated April 22, 1924 in which you request an official opinion. Your letter is in words as follows:

"Your opinion is requested on the following question relating to the taxation under Section 1333 of the Code, of the Iowa premium income of the foreign insurance companies licensed in the State.

"Section 1333 provides for a tax of two and one-half per cent to be levied upon the *gross amount of premiums received* by the Company for business done in this State. No deductions from gross premiums received are provided for in the law except that as regards fire insurance companies,

" 'May deduct from the gross amount of premiums received, the amount of premiums returned upon cancelled policies issued upon property situated in this state.'

"The Supreme Court of Iowa, however, *in re Continental Casualty Company, appeal of Great American Insurance Company, et al.,* 179 N. W. 185, held that as regards all companies, both fire and casualty, a deduction should be allowed for all premiums returned to policy holders upon cancelled policies, and a further deduction on account of reinsurance premiums received on Iowa risks, thus causing the tax to be levied only upon the direct writings retained by the companies. The Department has been following the above method in taxing foreign insurance companies.

"Another phase of the question of proper interpretation of Section 1333 and of the Supreme Court decision has presented itself in the form of a protest from one company against the requirement of the department that all companies in their report filed for taxation purposes shall include the entire premiums stated in the policies as being written during the period for which the report has been filed, thus causing the report to be filed and the taxes computed and paid on the written rather than the received basis.

The difference in the total amount of premiums written in the policies during a certain period and the premiums actually received by the company during the same period, consists entirely of premiums on policies issued by the company, the company having assumed the insurance risks as provided by the contracts, but the premiums on which have not been paid either to the company or to the agents of the company. It is this difference on which the entire question hinges.

"Query: Should the premium on policies so issued be included as premium income for taxation purposes *in the period in which the insurance contract went into effect or in the period in which the actual consideration was received by the company.* It should be kept in mind that any premiums reported as written which are not received and which are subsequently charged off the books, are allowed the companies as a deduction for the period for which the charge off is made."

As stated by you, it has been the policy of the Insurance Department from the very beginning to exact from insurance companies transacting business in this state the tax provided by law, the same to be computed upon the actual premiums due the company on outstanding policies of insurance. The Continental Casualty Company case provides that if a policy is for any reason cancelled and a portion

of the premium returned to the policy holder, that then the company would be entitled to deduct the amount of such returned premium. It is to be noted that in this instance there would be nothing due the company from the policy holder nor would there be any liability on the part of the company to the policy holder. This case further holds that if the insurance company reinsures the risk with another company that that portion of the premium going to the reinsuring company may be deducted in computing the tax as to the original insurer. In this instance it is to be noted that that portion of the premium which passes to the reinsuring company is and cannot be retained by the original insurer but is due however indirect to the reinsuring company.

In the query submitted by you we find that the insurance company carries a risk upon which there is due it a premium. It need not carry the risk without receiving the premium in advance. If it does carry the risk giving credit to the insurer it possesses at all times a claim and a right which it can assert in a court of law as against the insurer, namely, a suit to recover the amount of premium unpaid. In other words, there is a mutual agreement between the insured and the insurer whereby the insurer gives credit to the insured. Under such circumstances, the state is not to be defeated in collecting its tax because the insurer finds itself unable to collect from the insured. The insurer places itself in the position of extending the credit and it cannot be heard to complain because it must pay the tax due the state. There is a complete settlement so far as the state is concerned. We need not carry this discussion further. Any other rule would work a rank injustice to the state and would be contrary to every principal of law.

INSURANCE. An insurance company may legally issue bonds guaranteeing title to real estate.

June 16, 1924.

Commissioner of Insurance: This department is in receipt of your letter dated March 20, 1924 in which you request an official opinion. Your letter is in words as follows:

"This department would respectfully request that you give us a written opinion as to whether or not a company transacting business under Subdivision 2, Section 1709, of the Code (C. C. 5627), may legally issue bonds guaranteeing title to real estate."

The question submitted by you has already been determined by this department in an official opinion dated December 29, 1919. In this opinion it was held that insurance companies transacting business under Subdivision 2 of Section 1709 of the Code, as amended, may legally issue bonds guaranteeing the title to real estate.

Sub-section 2 of Section 5627 of the Compiled Code provides in words as follows:

"Insure the fidelity of persons holding places of private or public trust, or execute as surety any bond or other obligation required or permitted by law to be made, given or filed, except bonds required in criminal causes. None but stock companies shall engage in fidelity and surety business; and insure the maker, drawer, drawee or indorser of checks, drafts, bills of exchange or other commercial paper against loss by reason of any alteration of such instruments."

It is to be observed that under this Sub-section, companies doing business thereunder may execute "as surety any bond or other obligation required or permitted by law to be made, given or filed except bonds required in criminal causes." It is fundamental that one who conveys real estate may enter into a contract or

other obligation with the purchaser thereof, guaranteeing the title to such real estate. Such a contract would be perfectly legal and one which might be enforced by proper proceedings at law.

An insurance company operating under the provisions of sub-section of section 1709 of the Supplement to the Code, 1913 C. C. 5627 is authorized to sign as surety for any contract permitted by law to be made. It follows that such an insurance company may properly sign as surety a contract guaranteeing the title to real estate.

OPINIONS RELATING TO LEGISLATIVE MATTERS

LEGISLATURE. The Legislature may take action on a Joint Resolution of Congress proposing the child labor amendment to the Constitution at the Special Session to be held on July 22nd.

July 5, 1924.

Governor of Iowa: We have received your letter asking for an opinion upon the question which you have submitted as follows:

"I am in receipt of a letter from Honorable Charles E. Hughes, Secretary of State, as follows:

" 'I have the honor to transmit to you herewith a certified copy of a Joint Resolution passed on June 2, 1924, by the Senate and House of Representatives, proposing an amendment to the Constitution of the United States which shall give the Congress the power to limit, regulate and prohibit the labor of persons under eighteen years of age.

"It is requested that you cause this Joint Resolution to be submitted to the Legislature of your State for such action as the Legislature may be pleased to take with respect thereto, and that a certified statement of the result of such action be communicated to the Secretary of State of the United States, in accordance with Section 205, Revised Statutes of the United States.'

"As you are aware the special session of the 40th General Assembly of Iowa, heretofore convened by proclamation of the Executive, has not finally adjourned but is in recess until July 22, 1924. I wish you would advise me whether in your opinion it is competent to transmit the Resolution to which reference is made to the General Assembly on July 22nd for such action as it may deem expedient."

You are advised that it is the opinion of this department that the legislature may take such action as it deems advisable on the Joint Resolution of Congress proposing an amendment to the Constitution of the United States granting to Congress the power to limit, regulate and prohibit the labor of persons under eighteen years of age at the adjourned session to be held on July 22, 1924.

It has been held by the Supreme Court that where the business of the legislature at a special session convened by the governor is not restricted by some constitutional provision, it may enact any law at such special session that it might enact at a regular session. The powers of the General Assembly not being derived from the Governor's proclamation it is not confined to the special purposes for which it may have been convened by him. *Morford vs. Unger,* 8 Ia. 82. This opinion is determinative of the question you have submitted.

It is quite evident that the legislature may take any action at a special session that it may deem advisable. Its powers at a special session are as broad and comprehensive as it may exercise at a regular session.

GENERAL ASSEMBLY—MILEAGE. The members of the adjourned session of the 40th General Assembly are entitled to mileage in traveling to and returning from the place where this adjourned session is held.

July 25, 1924.

President of the Senate, Senate Chamber: The Senate has requested this department for an opinion upon the following proposition: "Are the members of the General Assembly entitled to mileage in traveling to and from the seat of government in attendance at this adjourned session of the General Assembly?"

You are advised that it is the opinion of this department that the members of the General Assembly are entitled to mileage in traveling to and returning from the place where this adjourned session of the General Assembly is held. In this connection you are advised that Section 25 of Article 3 of the Constitution of Iowa provides in words as follows:

"Section 25. Each member of the first general assembly under this constitution shall receive three dollars per diem while in session; and the further sum of three dollars for every twenty miles traveled, in going to and returning from the place where such session is held, by the nearest traveled route; after which they shall receive such compensation as shall be fixed by law; but no general assembly shall have power to increase the compensation of its own members. And when convened in extra session they shall receive the same mileage and per diem compensation, as fixed by law for the regular session, and one other."

Acting under and by authority of the constitutional provision, the General Assembly has heretofore provided compensation both for the regular and special sessions of the General Assembly. The law with relation thereto is found in Section 12 of the Supplement to the Code, 1913. This section is in words as follows:

"Section 12. Compensation of members. The compensation of the members of the general assembly shall be: To every member, for each full regular session, one thousand dollars, and for each extra session the same compensation per day while in session, to be ascertained by the rate per day of the compensation of the members of the general assembly at the preceding regular session; and in going to and returning from the place where the general assembly is held, five cents per mile, by the nearest traveled route; but in no case shall the compensation for any extra session exceed ten dollars per day, exclusive of mileage. When a vacancy occurs during the session of the general assembly, and by reason thereof the term of office of any member does not cover the entire session (,) such members shall be paid as follows: To members whose term of office covers fifteen session days, or less, three hundred dollars; to members whose term of office covers more than fifteen session days, and less than thirty-one such days, five hundred dollars; to members whose term of office covers more than thirty session days, and less than fifty-one such days, seven hundred dollars; and to members whose term of office covers more than fifty session days, one thousand dollars."

The constitutional provision to which we have referred was prepared by Mr. Wilson of the Sixth Senatorial District. The reasons underlying the preparation of the section are set out in the remarks of Mr. Wilson to be found on pages 528 and 529 of the Debates of the Constitutional Convention. Without quoting these remarks at length, may we state that the cause for the enactment of the provision as stated by him was that the legislature "at the expiration of the extra session held last summer voted themselves pay for a full session." Mr. Wilson says further in connection therewith: "I wish to obviate this difficulty. I do not think that there can be any difficulty in regard to this for if the compensation is fixed for a general session, that same compensation will be attached to the extra session."

There is a marked distinction between "compensation" and "mileage." Compensation is something which is paid to the individual by the state for service ren-

dered the state. Mileage is something which is not, in fact, compensation to the individual at all. It is simply returning to the individual that money which he has, in fact, paid for the state. For example, a member traveling from a county to the seat of government expends a certain amount for actual and necessary traveling expenses. Such money is expended not for individual but for state benefit. The state, by way of mileage, simply returns to him the amount so expended.

It is manifest that the intention of the Constitutional convention was to prevent an increase in compensation to an individual member. The allowance of mileage in returning to the adjourned session of this legislature will not be to allow the member any increased compensation but only to return to him what he has in fact expended for the benefit of the state itself.

It is to be observed further that under the statute to which we have referred, the individual member is allowed five cents per mile in going to and returning from the place where the General Assembly is held. Keeping this thought in mind, may we briefly refer to the history of this extra session. The extra session adjourned on the 26th day of April, 1924, to meet again on the 22nd day of July, 1924. The purpose of this adjournment was for the benefit of the state and to dispense with the expense incident to the continued session. During such period of time, the members would clearly not be entitled to compensation.

In listening to the debates in the Senate Chamber yesterday, we were impressed with the thought that one matter was overlooked, namely, that what the state pays to a member of the legislature is for service actually performed for the state. The compensation allowed by law is ten dollars per day. It is only for those days which the member actually spends in the service of the state for which this compensation is to be paid. Therefore, by no strained construction can it be held that the members of the legislature are entitled to compensation from the 26th day of April to the 22nd day of July. As pointed out in the opinion of this department dated December 12, 1923, there is a marked distinction between an adjournment, which is really an adjournment over a period of time, and during which adjournment the legislators are presumed to return to their homes and an ordinary recess, such as over the holidays or over the March first period. From the days of Blackstone (1 Blackstone's Commentaries, 186) it has been customary for legislative bodies to adjourn over the holidays and during certain customary periods. During such periods of time the legislature is not presumed to be adjourned, but to be actually in session, and during such period of time the members are entitled to compensation. During such period of time they are not presumed to return to their homes. They may do so, but it is their own voluntary act, and is not for the benefit of the state. The distinction between such a recess and an adjournment from April to July is at once manifest. In the latter instance, the state benefits because the legislators return to their homes in order that the work may be gathered together; then they may return and in a day or so close up the work of the session, which otherwise would take a long period of time.

We have searched the decisions with care and we find but two decisions of the courts of the United States on this proposition; both sustain the position here taken. In *Ex Parte Pickett,* 24 Ala. 91, the General Assembly by a joint resolution adjourned on the 20th day of December 1853 to meet again on the 9th day of January, 1854, the members returning to their homes. The question arose as to whether or not, for returning to the place where the General Assembly was held,

such members were entitled to mileage. The statute of Alabama with relation thereto is almost identical with the Iowa statute. That portion thereof applicable being in words as follows:

"and the other members four dollars, for each day's attendance; and are allowed four dollars for every twenty miles *traveling to and from* the general assembly; estimating the distance by the direct mail route, if any, and if not, by the land route usually travelled."

"With relation thereto the court says:

"We think it too clear to admit of any doubt that, if the intervening time (between the date of the adjournment and the reconvening) be so great as reasonably to require the dispersion of the members in going to and returning from such called or special session, whether convened by the governor, or by an act or a resolution of the legislature itself, they would be entitled to mileage. * * * The length of time between the adjournment and the cessation of the business of legislation and the time fixed for reconvening was so great, as to furnish a reasonable inference that it was contemplated the members should return to their respective homes and constituency. It may have been right and proper that they should so return, to be advised by their constituents respecting their will with regard to important measures before the general assembly. Be this, however, as it may, we are not permitted to go behind the adjournment, to investigate the causes which led to it. This is a political question which it was for the legislature to decide, and with which we have nothing to do. We must intend that the ground for adjournment was sufficient, and the period which intervened was of such duration as reasonably to require the members to return home. When, therefore, they were going and returning, they were *traveling to and from* the general assembly within the meaning of the 43rd section.

Our opinion in short is, that when an act of legislation involves the presumed necessity of the members returning to their constituents, they are entitled to their allowance for such travel within the meaning of the law. It follows from what we have said that the members are not entitled to per diem compensation, but are entitled to mileage."

In the opinion of the Justices, 69 Maine, 596, in construing the statute of Maine, the court reaches a like result. The decision in this case is against mileage, but the court bases its decision on the fact that the statute provides for mileage as follows: "Two dollars for every ten miles' travel from his place of abode *once* in each session." The statute thus expressly limits the mileage to once in a session. The Iowa statute does not so provide. The court bases its decision upon the use of the word "once" and impliedly holds that were the word "once" not used, then the members would be entitled to mileage.

There are members of this general assembly whose actual traveling expenses will be more than the per diem allowed for this adjourned session. The state of Iowa cannot be presumed to profit at the expense of the members of the legislature. Such a construction as would deprive the members of the legislature from mileage would, in our opinion, be strained and would result in a grave injustice which in government should not be allowed. It is therefore, the opinion of the department that for each mile traveled to and from the place where the general assembly is held, each member is entitled to mileage as provided by law.

This opinion must not be construed to the effect that the legislature would have power to increase the rate of mileage. Once the rate is established by statute, it cannot be changed during the term under the constitutional provision. The miles traveled, however, is always uncertain, and neither the constitution nor the statute is to be construed as depriving the member of the right to mileage at the rate provided by statute for each mile actually traveled.

It may be advisable for the legislature to adopt a statute which will expressly allow mileage, but in any event we hold, as stated, that each member of the General Assembly is entitled to mileage provided by law.

GENERAL ASSEMBLY—ADJOURNMENT. The House upon a concurrent resolution providing for the sine die adjournment of the General Assembly cannot vote in the absence of a quorum.

July 29, 1924.

House of Representatives: This department is in receipt of your letter dated July 29, 1924 in which you request an official opinion. Your letter is in words as follows:

"I am directed by the house of representatives to submit for your opinion the following question:

"Can the house vote upon a concurrent resolution providing for the sine die adjournment of the general assembly in the known absence of a quorum even though the point of the lack of a quorum be not raised? The question is submitted for fear that sometime in the future the time as to the taking effect of the new code might be questioned in the courts, and by affidavits the fact of a nonquorum be disclosed even though the records do not so show."

You are advised that the House should have a clear quorum present at the time of adjournment and I would suggest that the concurrent resolution relating to adjournment be passed by a record vote.

GENERAL ASSEMBLY AND MILEAGE. Under the provisions of Chapter 103, Acts of the 40th General Assembly, Extra Session, providing for the payment of mileage, must be passed by two-thirds majority vote.

December 22, 1924.

Auditor of State: We desire to acknowledge receipt of your letter of October 14, 1924, asking this department for an opinion upon a question which you have stated as follows:

"Under the provisions of Chapter 103, Acts of the 40th General Assembly, Extra provision is made for payment of mileage to certain officers of the 40th General Assembly, Extra Session.

"It is requested that you give me your opinion as to whether or not such payments come within the provisions of Section 31, Article 3 of the Constitution of Iowa, requiring that two-thirds majority vote for the payment of additional or extra compensation."

The material part of the statute referred to in your communication reads as follows:

"The officers of the Extra Session of the fortieth general assembly are to be allowed mileage to and from their respective homes, the amount of which to be determined by the committee on mileage of the house and senate."

Section 31 of Article 3 of the Constitution reads as follows:

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

You are advised that the subject matter of the act not having been provided by pre-existing laws and the service, if any, having been rendered prior to the enactment of the statute, the constitutional inhibition would apply. Therefore, the statute referred to must be passed by a two-thirds vote.

LEGISLATURE—SPECIAL SESSION MILEAGE OF MEMBERS. Members entitled to mileage under conditions under which they convened in the special session of 40th G. A.

December 12, 1923.

President of the Senate, Senate Chamber: You have submitted to this department the question as to whether or not members of the General Assembly may draw mileage for the special session.

The facts giving rise to the question are in substance there: The Governor issued his call for a special session, advising the members of the General Assembly of his desire that they meet on the day following the adjourning of the Fortieth General Assembly. The members did not return to their homes prior to the convening of the special session.

Section 25 of Article III of the Constitution provides in words as follows:

"Each member of the first general assembly under this constitution shall receive three dollars per diem while in session; and the further sum of three dollars for every twenty miles traveled in going to and returning from the place where such session is held, by the nearest traveled route; after while they shall receive such compensation as shall be fixed by law; but no general assembly shall have the power to increase the compensation of its members. And when convened in extra session *they shall receive the same mileage* and per diem compensation *as fixed by law for the regular session,* and none other."

Section 12 of the Supplement to the Code, 1913, provides as follows:

"The compensation of the members of the general assembly shall be: To every member, for each full regular session one thousand dollars, and for each extra session the same compensation per day while in session, to be ascertained by the rate per day of the compensation of the members of the general assembly at the preceding regular session; and in going to and returning from the place where the general assembly is held, five cents per mile, by the nearest traveled route; but in no case shall the *compensation for any extra session exceed ten dollars per day, exclusive of mileage.* When a vacancy occurs during the session of the general assembly, and by reason thereof the term of office of any member does not cover the entire session such members shall be paid as follows: To members whose term of office covers fifteen session days, or less, three hundred dollar; to members whose term of office covers more than fifteen session days, and less than thirty-one such days, five hundred dollars; to members whose term of office covers more than thirty session days, and less than fifty-one such days, seven hundred dollars; and to members whose term of office covers more than fifty session days, one thousand dollars."

The history of the convening of the extra session of the Fortieth General Assembly is of importance in determining the question submitted by you. This department is informed that the true purpose and intent of the Governor in calling the session was to have the session meet formally after the adjournment of the regular session for the purpose of determining the date when they should reconvene for the purpose of revising the code. It was the clear purpose that this should be the procedure. It was fully understood that the members would be required to return to their homes and return to the State Capitol for the purposes of the special session. It cannot be said, then, that the legislature did not, as a matter of fact, travel the same number of miles for the extra session as for the general session immediately preceding. It would seem therefore, without a construction of the statute or of the constitutional provision, that the members would be entitled to mileage. The expense has been actually incurred in good faith.

However, from a reading of the Debates of the Constitutional Convention, found on pages 30, 84, 528, and 551, it will be observed that the true intent of this con-

stitutional provision was to have the members receive the same per diem as for the preceding regular session, and the same mileage. The mileage being for the distance by the nearest traveled route from the home of the legislator to the State Capitol building.

LEGISLATURE—SPECIAL SESSION—Pay of Members During Recess—Where special recesses for a short period and in conformity to usual custom members receive pay for the recess.

December 29, 1923.

Chairman Appropriation Committee, Senate Chamber: This department is in receipt of your letter dated December 13, 1923, in which you request the opinion of this department. Your letter states the request in detail and is in words as follows:

"A joint Resolution which passed the Senate this morning provided for the vacation of this Extra Session of the Legislature beginning December 22nd and ending December 27th.

Will you please give me your opinion as to the question of the pay of the members of the legislature during the time of this recess? Are the members of the legislature entitled to pay for the four days intervening between the above dates, or not?"

Section 25 of Article III of the Constitution of Iowa provides as follows:

"Each member of the first general assembly under this constitution shall receive three dollars per diem while in session; and the further sum of three dollars for every twenty miles traveled in going to and returning from the place where such session is held, by the nearest traveled route; after which they shall receive such compensation as shall be fixed by law; but no general assembly shall have the power to increase the compensation of its members. And when convened in extra session they shall receive the same mileage and per diem compensation as fixed by law for the regular session, and none other."

Section 12 of the Code Supplement, 1913, provides as follows:

"The compensation of the members of the general assembly shall be: To every member, for each full regular session one thousand dollars, and for each extra session the same compensation per day while in session, to be ascertained by the rate per day of the compensation of the members of the general assembly at the preceding regular session; and in going to and returning from the place where the general assembly is held, five cents per mile, by the nearest traveled route; but in no case shall the compensation for any extra session exceed ten dollars per day, exclusive of mileage. When a vacancy occurs during the session of the general assembly, and by reason thereof the term of office of any member does not cover the entire session, such members shall be paid as follows: To members whose term of office covers fifteen session days, or less, three hundred dollars; to members whose term of office covers more than fifteen session days, and less than thirty-one such days, five hundred dollars; to members whose term of office covers more than thirty session days, and less than fifty-one such days, seven hundred dollars; and to members whose term of office covers more than fifty session days, one thousand dollars."

The recess to which you refer was the result of the adoption of Senate Concurrent Resolution No. 4. (Senate Journal 114.) This concurrent resolution as originally introduced provided for an adjournment from Friday, December 21, 1923, to Monday, January 7, 1924. It further provided, "Be it further resolved, that there be no per diem allowed members for the sixteen clear days of the vacation." The Senate (Senate Journal 114) finally adopted a substitute in words as follows:

"Resolved by the Senate, The House concurring, That this General Assembly adjourn Saturday, December 22, 1923, to reconvene on Thursday, December 27, 1923, at 10 A. M."

This substitute was acted upon by the House (House Journal 128-129) and finally adopted with an amendment substituting for the word "adjourned" the word "recess," so that when finally adopted the resolution provided simply for a recess from Saturday, December 22, 1923, to Thursday, December 27, 1923.

The constitutional provision referred to has never been construed by the Supreme Court of Iowa. We must, therefore, turn to the ordinary rules of constitutional construction to determine the true meaning of the constitutional provision in question. It is fundamental that if the meaning of the language used in the Constitution is doubtful, a legislative construction will be given serious if not controlling consideration by the courts. *McCulloch v. Maryland,* 4 Wheat (U. S.) 316; 4 L. Ed. 579; *People v. Olson,* 245 Ill. 288; 92 N. E. 157; *Smith v. Auditor,* 165 Mich. 140; 130 N. W. 557; *Cutance v. People,* 11 Wend. (N. Y.) 511; *Booth v. Miller,* 237 Pa. 297. This not alone as a matter of policy, but also because it is presumed to represent the true intent of the instrument. *Hovey v. State,* 119 Ind. 386; 21 N. E. 890; *Johnson v. Great Falls,* 38 Mont. 369; 16 Ann. Cases 974; *McPherson v. State,* 92 Mich. 377; 16 L. R. A. 475; *United States v. Realty Co.,* 163 U. S. 427. The rule is well stated in *Cook County v. Healy,* 222 Ill. 310, where the court says:

"Even if we assume, for the sake of argument, that the language of the amendment of 1908 is ambiguous, the construction of said amendment and the interpretation of the language thereof by the General Assembly, as shown by the terms of the act of 1915, are entitled to consideration. It was the legislative department that framed the language of the amendment and adopted the resolution providing for submitting it to a vote of the people. The amendment so framed and submitted was adopted by the vote of the people. The act in question was passed by the same department of the government that framed the amendment, and the language of the amendment was interpreted by that department in the passage of the act in question. The construction and interpretation of the legislature are entitled to weight."

It is likewise fundamental that where a constitutional provision is susceptible of two constructions the action of the legislature in adopting one of those constructions and in enacting a statute to carry it into effect as thus construed is almost, if not, conclusive. *Fargo v. Powers,* 220 Fed. 697. In this connection see the following decisions by the Supreme Court of Iowa: *State v. Fairmont Creamery Co.,* 153 Iowa 706; *City of Des Moines v. Manhattan Oil Co.* (Iowa) 184 U. S. 431.

In determining your question, we have caused to be made a search of the precedents as established by the legislature. We find that it has been a uniform practice from the very beginning for members of the General Assembly to receive a per diem for service during extra sessions, which per diem is determined by taking the total number of days, Sundays and recesses included, commencing with the day the regular session convenes and ending the day the regular session adjourns and dividing such number of days into the salary for such regular session.

We cannot bring ourselves to a conclusion which will result in using similar periods of time to determine the rate of compensation and not allow the compensation for like periods of time.

We further find that during all extra sessions of the General Assembly it has been the custom and practice to allow the regular per diem for ordinary and usual recesses and to deny it for arbitrary adjournments for long periods of time. This precedent cannot be more clearly pointed out than by calling attention to the short adjournment of March first by the extra session of the Twenty-sixth General Assembly for which the members received compensation and the long adjournment from May to July 1, 1897, when the members did not receive compensation.

The precedents thus established by the General Assembly of Iowa are in conformity to the general rule which is that where the legislature recesses in conformity to a usual practice and custom for a short period of time there is in fact no break in the session and such adjournment or recess is an adjournment or recess from day to day. Blackstone points out the distinction, 1 Blackstone's Commentaries, 186, wherein it is said that there is no discontinuance of the session when Parliament recesses for limited periods of time, "as at Christmas or Easter or upon other particular occasions." In this connection see also Jefferson's Manual 108; Cushing Law and Practice of Legislative Assemblies, 2nd Edition, 1866. See also *People v. Fancher,* 50 N. Y. 288. In this latter case the Court of Appeals of New York holds that where an adjournment is for a long period of time and is not a recess usual and customary with legislative bodies, the assembly cannot be considered as being in session. On the other hand, where the recess is for a limited period of time and in conformity to a time honored custom, the session continues adjourned from day to day. The language used by the court is ingenious and is submitted as representing the possibilities:

"While the session substantially continues adjourned from day to day, or over holidays, or with brief and usual recesses, so that the session is practically continuous, the body might possibly be regarded as practically in session during such recesses."

It is to be noted that the General Assembly has, by its own act, found that the members are entitled to a per diem for the period of time in question. This is shown by the act of the legislature in striking the provision in the resolution that no compensation is to be paid. This finding by the legislature is in conformity to every precedent and to the action of every General Assembly of this state. It is to be noted further that the recess is in conformity to a custom of legislative bodies existent from time immemorial and is not an unusual or arbitrary recess or adjournment for a long period of time.

Applying the rules of construction as laid down by the courts giving consideration to the precedents established by legislative bodies, we cannot reach any other conclusion than that the members of the General Assembly are entitled to compensation and per diem for the days of the recess in question.

OPINIONS RELATING TO MISCELLANEOUS MATTERS

July 11, 1923.

Adjutant General: We have received your communication of June 6, 1923, asking this department to give an opinion upon the following proposition:

"I am enclosing application for Widows pension under Chapter 225, Acts of the 39th General Assembly of Iowa. This department is in some doubt as to the status of the applicant, for the following reasons:

(a) She is the widow of William McCord, a veteran of the Northern Border Brigade, married him Jan. 6, 1861, lived with him as his wife until he died, Jan. 24, 1891.

(b) She re-married but claims to be a widow again. You will note she has been a widow the second time for the past 17 years. She does not say whether widowed by death or by divorce.

(c) The Pension Bureau of the Federal Government, rules that the pension of a widow ceases on her re-marriage, but on the death of her second husband, her pension is restored as of the date she became a widow the second time.

An opinion is desired from you on the following questions:

(a) Is this claimant entitled to the pension applied for?
(b) If so, from what date should it be paid?
(c) If the Government rulings were followed in cases such as the one referred to, from what date should she receive the pension?"

Section 164 of the acts of the 37th general assembly, as amended by chapter 225 of the acts of the 39th general assembly, providing for pensions for the survivors of the Northern Border Brigade, or their widows, provides as follows:

"That on and after the passage of this act, the survivors of the northern border brigade, as shown by the roster of Iowa soldiers, volume six (6), pages one hundred eighty-one (181) to two hundred seven (207) inclusive, or their widows, shall receive a monthly pension of twenty ($20.00) per month, during the lifetime of each such survivor, or their widows, to be paid from the state treasury on the proper voucher being made, and out of funds not otherwise appropriated. Provided that in cases where the said survivor or his widow or widows of the members of the Spirit Lake Expedition of 1857 are now receiving a pension from the federal government this act shall not apply."

The question for determination, under the state of facts above submitted, is whether the widow of a soldier of the Northern Border Brigade, after her remarriage and the death of her second husband, again becomes the widow of her first husband so as to entitle her to a pension as his widow.

We are of the opinion that she would not be, and shall briefly state our reasons therefor.

On June 8, 1923, the attorney general prepared an opinion construing certain sections of the soldiers bonus law, and in doing so, he had occasion to pass upon a question similar to the one we are now considering. He held therein that where the widow of a soldier remarries, she ceases to be a widow of the deceased soldier and that she could not be at the same time the wife of one man and the widow of another. In other words, that she cannot occupy a dual position. He based his opinion upon the following authorities:

In re: *Kerns Appeal,* 120 Pa. State, 523-528,
Commonwealth vs. Powell, 51 Pa. State 438-440,
In the Matter of Ray 13 Misc. (N. Y.) 480-481, 25 N. Y. Suppl. 481,
Rittenhouse vs. Hicks, 10 Ohio, Dec. 759,
Kunkle vs. Reeser, 5 Ohio, Dec. 422-425.

The words "wife" or "widow" are terms used to express the marital status or condition of a woman, one or the other term being used in accordance with the facts relating to such status. The first is used to express her present condition as a wife, the other that she has been a wife, but that her husband is dead. When she marries again, as held by all the courts, she ceases to be a widow and again becomes a wife. In that event the period of her widowhood is at an end. It is true that when her second husband dies, she again becomes a widow, and another period of her marital relations begins. But whose widow? Her first husband, whose name she no longer bears, or her last husband, whose decease made her a widow? Manifestly, the last husband. It is impossible for a woman to legally be the wife of two men at the same time. It is, in our opinion just as illogical to say that a woman may be the widow of two men at the same time. If both the first and second husbands were soldiers, would she be entitled to two pensions as the

widow of both men? She certainly would be the widow of her last husband, and if she is the widow of her first husband also, then it necessarily follows that she would be so entitled. Most of these statements are mere truisms, but sometimes it becomes necessary to resort to such to explain a truth or support an argument.

We are not unmindful of the fact that the courts have placed a liberal construction upon all pension laws (30th Cyc. 1378; *Walton vs. Colton,* 60 U. S. 356) but giving to said law the broad and liberal construction that the law requires, we do not believe it can be given such interpretation as to include the widow in question within its terms. A broad construction does not require the stretching of the meaning of words or the perversion of language so as to include persons or things not obviously included.

We have not overlooked the fact that under the federal law a widow under the conditions stated in your inquiry is entitled to a pension as the widow of her first husband, but this is because the federal statute specifically so provides. (U. S. Compiled Statutes, sec. 8993.)

It follows from what we have said that this department is of the opinion that Mrs. William McCord is not entitled to a pension under the statute quoted and that her application should be denied.

Our conclusion on the first question presented renders it unnecessary for us to give any opinion as to the last two questions.

MUNICIPAL COURT FEES—Unclaimed fees must be held by clerk of court in a special fund until called for by persons entitled to them.

December 27, 1923.

Auditor of State: You have requested an opinion from this department on the question of what disposition should be made of unclaimed witness and jurors' fees in the hands of the clerk of a municipal court. Section 694-c27 of the Supplemental Supplement to the Code, 1915, as amended, provides insofar as applicable as follows:

"All fees, fines, forfeitures, costs and expense paid to the clerk and bailiff shall be paid to the city treasurer on or before the 10th day of each succeeding month".

The foregoing is the only provision contained in the chapter relative to municipal courts concerning the disposition to be made of fees and moneys paid to the clerk of such a court. Nowhere in the chapter is there any provision, either directly or indirectly, providing for the disposition of any such fees belonging to individuals in the hands of the clerk except by payment of same by the clerk to the persons entitled thereto when properly claimed by them. In view of this situation in the law, fees which are to be paid to individuals and do not properly belong to the city or state, should be retained by the clerk of said court in a special fund and kept available for payment to any person entitled thereto. The clerk of a municipal court having any unclaimed witness or jurors' fees in his possession is responsible for same and liable on his bond for payment of any and all of such fees in his hands to the proper claimants therefor when application for their payment is made.

SOLDIERS' HOME: The wife of a veteran is entitled to admission into the Soldiers' Home at Marshalltown, Iowa, under the provisions of Chapter 2, title 9, Supplement to the Compiled Code of Iowa, provided she complies with the rules and regulations of the Board of Control.

December 7, 1923.

Board of Control of State Institutions: Your favor of the 6th instant to this

department requesting an opinion has been referred to me for reply. Your request is as follows:

"D. B. Greer is a Civil War soldier. He was at the Soldiers' Home at Marshalltown for about ten years. He got married about a year ago and has not been at the home since that time. The Commandant refused to accept his wife, claiming that under the law she could not be received. Has the Commandant or the Board of Control authority under the law to admit this soldier's wife?"

We are of the opinion that if the veteran make a new application for admission to the Soldiers' Home at Marshalltown, Iowa, under the provisions of Chapter 2, Title 9, Supplement to the Compiled Code of Iowa, in the absence of any rule or regulation of the Board of Control of State Institutions prohibiting the admission of the wife of a veteran, married under the circumstances related in your request, the Commandant of the Home, or the Board of Control would have authority to admit her. In the event the veteran files a new application for admission he could be admitted anew to the Home, providing he complies with the statutory provisions and the rules and regulations of the Board of Control of State Institutions. His wife at the time of such application for admission would be entitled to admission to the Home, providing she also complies with the statutory requirements and rules and regulations of the Board of Control. The admission of this veteran's wife, insofar as the statutes are concerned, would be permissible. Your request does not state whether there are any rules and regulations of the Board of Control covering this situation or not.

SENTENCES—Commutation of by Governor. Governor has no authority to substitute a fine for a jail sentence.

December 4, 1923.

Governor of Iowa: Under date of November 28th, you submitted to this department the following communication:

"Heretofore John Weller was convicted of the crime of maintaining a gambling house in Waterloo, and was sentenced to serve six months in the county jail. A very strong application has been presented to me to modify this sentence and order the defendant discharged upon payment of five hundred dollars fine and all the costs, both in the District and Supreme Courts.

Kindly advise me by return mail whether I have authority to enter such an order."

Replying to your communication, will say that under Section 16 of Article 4 of the Constitution, the Governor has the power to grant commutation of sentences and the power to remit fines and forfeitures, but we do not know of any constitutional or statutory authority giving the Governor the power to substitute a fine for a jail sentence imposed by court or vice versa.

Therefore, it is the view of this department that you do not have the authority to enter an order such as is proposed in the case submitted by you.

GIFTS—TO STATE UNIVERSITY. Particular gift held to be acceptable under Sec. 3, Chapter 239, Acts 40th G. A.

December 3, 1923.

President State University of Iowa: You have submitted to this department for an opinion the proposition of whether or not the proper officers of the state university may accept a gift to the university under the provisions of Section 3 of Chapter 239 of the Acts of the 40th General Assembly, said gift being directed as follows: "To the State of Iowa, for the use of the State University of Iowa."

The only question presented is whether the gift must be accepted under the provisions of Section 1 of Chapter 239 of the Acts of the 40th General Assembly rather than the provisions of Section 3 of said chapter.

Section one applies to gifts, devises and bequests of property made to the state for specific purposes generally. Section 3 reads as follows:

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

It will be observed from the language of Section 3, that its provisions were intended to apply to gifts, devises or bequests of property made to a state institution as such. The phrase as quoted from the writing making the gift clearly indicates that the gift is to be made to the State University for certain specified purposes. The State University is a state institution and such a gift, devise or bequest must necessarily come under the provisions of this section.

It is our opinion, therefore, that the proper officers of the State University of Iowa may accept the gift referred to, under the provisions of Section 3 of Chapter 239 of the Acts of the 40th General Assembly, provided all of the conditions named in said section are complied with.

FEES. Justices of the peace are entitled to retain and receive from cities and towns fees authorized by Sec. 691, Sup. Code, 1913, while taking a jurisdiction of criminal cases brought before the mayor.

December 1, 1923.

Auditor of State: Your favor of the 20th ult. requesting an opinion from this department has been referred to me for reply. Your request is as follows:

"A qualified justice of the peace acts as mayor in the absence of the qualified mayor, and while acting as mayor, he received fees amounting in the aggregate to about $200.00. Now this justice in his work in justice court alone receives fees in excess of what he is allowed to retain by statute.

"This being the case, will he be allowed to retain the fees that he received for services while acting as mayor?"

Section 691, Supplement to the Code of 1913, provides in part as follows:

"* * * * If the mayor or judge of the superior or police court is absent or unable to act, the nearest justice of the peace shall have jurisdiction and hold his court in criminal proceedings, and receive the statutory fees to be paid by the city or county, as the case may be. * * * * *"

Under this provision of the statute the justice of the peace would not only have jurisdiction but it would be his duty to try cases within the jurisdiction of the mayor in the latter's absence and he would be entitled to receive the statutory fees to be paid by the city. However, this would be when he is acting as justice of the peace and not as mayor.

Property owned and used exclusively for lodge purposes or a post of the American Legion and not used for profit making purposes is exempt from taxation under section 1304 of the Code Supplement, 1915, as amended.

November 22, 1923.

County Accounting Department, Office of Auditor of State: We have received several requests for opinions on questions relating to the exemption from taxation

of property belonging to lodges and also the American Legion. We have concluded to prepare an opinion covering these questions for the future guidance of the assessorial bodies in the state. The questions may be stated as follows:

First: Where a lodge owns property which is used exclusively for lodge purposes, is such property exempt from taxation under section 1304 of the Code Supplement, 1915, as amended?

Second: Where a lodge owns a building, a part of which is permanently rented for profit, is any part of said building exempt from taxation under such section, as amended?

Third: Where a building is built as a memorial to the men who died in the service of their country, and consists of club rooms for members of the legion and the auxiliary, with a large assembly room, and in order to pay for the upkeep alone, it is necessary to rent the assembly room for entertainments when not in use for the legion's activities, is any part of the property owned by the American Legion exempt from taxation under said section?

Section 1304 of the Code Supplement, 1915, as amended, provides in part as follows:

"The following classes of property are not to be taxed: All * * * grounds and buildings used for public libraries, including libraries owned and kept up by private individuals, associations or corporations for public use and not for private profit, for cemetery associations and societies, and for literary, scientific, charitable, benevolent, agricultural and religious institutions, and societies devoted solely to the appropriate objects of these institutions, not exceeding one hundred sixty acres in extent, and not leased or otherwise used with a view to pecuniary profit, but all deeds or leases by which such property is held shall be filed for record before the property above described shall be omitted from the assessment; * * *"

The solution of our problem depends upon whether a lodge or a post of the American Legion comes within the meaning of the words "charitable or benevolent" as used in the quoted section.

In the case of *Lacy v. Davis,* 112 Iowa, 106, the Supreme Court held that it is only when the property is directly used for charitable, benevolent or religious purposes that it is exempt from taxation.

The Supreme Court in the case of *Morrow v. Smith,* 145 Iowa, 514, held, that a Masonic lodge, all of the funds of which are used for the expenses of the order and for charity, and are dispensed through the medium of a committee of charity and whose members pay an initiation fee and assessments, but receive no benefits except as objects of charity, was a charitable institution within the meaning of the statute. In the opinion in this case we find the following significant language:

"Turning now to the facts under consideration in this case, they leave no room for doubt but that a very substantial part of the activity of this order is devoted to the help of those who are needy and in distress. Granted that its benevolence is principally confined to those within its immediate circle, it is nevertheless commendable as far as it goes, and in the interest of the public good. It could not, if it would, take care of all destitution. If it does all that it can, it does well; and, if it expends what it has upon those whose need it knows best, so be it. In some such wise must all ministry be done."

As to all lodges having the same purposes and based upon the same principles as the Masonic lodge, it is our opinion that all property used exclusively for such lodge purposes and not for profit is exempt from taxation.

As we understand the plan and purpose of the organization known as the American Legion it is also similar in character and purpose to the Masonic or any other lodge

of similar purposes and principles and property owned exclusively by any post thereof will also be exempt from taxation under the rule hereinbefore referred to.

We are, also of the opinion that if any part of such property be rented permanently for profit, the portion used for such profit making purpose would not be exempt from taxation. The fact, however, that property devoted to the exclusive use of a lodge or a post of the American Legion is occasionally rented for entertainment purposes will not bring the property owned by it within the taxation statutes, but the property will nevertheless be exempt therefrom.

The question as to whether a lodge is a charitable organization within the meaning of the statute and the question as to whether any portion of its property is subject to taxation because such portion is used for profit making purposes are questions of fact that must be determined by the assessorial bodies. The way to arrive at the value of the portion of the property to be taxed, where a part thereof is used for profit making purposes, is to first arrive at the value of the entire property, and then fix a value on the portion of the property that is exempt from taxation under the rule herein stated, and the difference will constitute the value of the portion of the property that is subject to taxation.

COURT EXPENSE FUND. Not limited by Tuck law.

October 31, 1923.

Auditor of State: I am in receipt of your letter dated October 16, 1923, in which you request an opinion from this department. Your request is in conformity to a letter from Mr. J. D. Glasgow, clerk of the District Court of Washington county. He states the facts as follows:

"Our Court Expense Fund is badly overdrawn, and has been for the past year. In fact the jurors and other officers of court have not been paid during the present year. I have been informed by Senator Brookhart that the Court Expense Fund was a direct exception to the other provisions of the Tuck bill, and that the treasurer was compelled to pay warrants on that fund. Our treasurer has taken the position that she should not pay them and has refused to accept them in payment of taxes. All this makes a situation which is rather hard on our court, and creates a feeling among the jurors that they do not want to serve."

You are advised that under the provisions of sub-section 1 of section 2 of chapter 104 of the Acts of the 40th General Assembly that the provisions of the chapter do not apply to "expenses incurred in connection with the operation of the courts." It follows, therefore, that the auditor may properly issue warrants against the court expense fund and such warrants may be presented to the treasurer who will pay the same if funds are available, otherwise will stamp the warrants "not paid for want of funds."

CLERK OF THE DISTRICT COURT. The clerk of the District Court is only authorized to collect and charge fees provided by statute. No provisions for fees for filing attested copies of bail bonds. The clerk is furthermore not authorized to charge fees in naturalization proceedings other than those fees provided under the provisions of the national law.

October 31, 1923.

County Attorney, Marshall County, Marshalltown, Iowa: I have your favor of the 18th at hand in which you request the opinion of this department upon the following proposition:

"Should a filing fee be paid by the clerk of the District Court in filing under Sec. 5514 attested copies of bonds in state cases following indictments, where the

sureties live in another county and the clerk files attested copies in the counties where the sureties live?"

We are of the opinion that the clerk should not collect the 50 cents filing fee as suggested by you under the provisions of paragraph 14, Section 6982, Compiled Code. The clerk of the district court is only authorized to collect and charge such fees as are expressly provided for by the statute. There is no provision made for a charge being made by the clerk for filing attested copies of bail bonds, and although the signing of such a bond may create a lien upon the property of the sureties, this does not make the bond a judgment, nor the certified copy of the same a "Transcript of Judgment" for which a filing fee of 50 cents is provided.

The second proposition submitted by you is as follows:

"Second, Section 13 of the Naturalization Laws and Regulations of the U. S. Department of Labor, Bureau of Naturalization, provides that $4.00 and $1.00 shall be the fees collected for services on naturalization of aliens. The Federal law further provides that a penalty shall be inflicted in case fees other than those provided for are exacted by county officials. Chapter 266, Acts of the 40th General Assembly, Section 4, Paragraphs 23 and 24, provide for the collection of 25 cents and 50 cents for services rendered aliens in becoming citizens. The question our clerk desires to know, would he be liable under the Federal act if he accepts the fees provided by the 40th General Assembly?"

This department rendered an official opinion to the Honorable Glenn C. Haynes, Auditor of State, on July 5, 1921, covering this proposition. That opinion will be found on page 292 of the report of the Attorney General for the year 1922. We there held that the provisions of the Iowa law specifying the fees to be charged by the clerks of the district court were merely intended to incorporate the provisions of the national law into the statutory law of this state for the convenience of the county clerks. We further concluded therein that it could not be held that double fees were to be charged under any reading of the law, especially in view of the provisions of the federal law making it unlawful for any clerk of any court in naturalization proceedings to demand, collect or receive any other or additional fees or moneys in naturalization proceedings save the fees and moneys therein specified.

COUNTY RECORDER. Where a real estate mortgage containing a receiver's clause is recorded and is also indexed in the chattel mortgage index, the county recorder may charge only the fee for recording and is not entitled to a fee of 25c for indexing the same in the chattel mortgage index.

October 27, 1923.

County Attorney, Louisa County, Wapello, Iowa: We desire to acknowledge receipt of your communication of September 7, 1923, asking this department for an opinion upon the question you have stated as follows:

"Under the provisions of Chapter 246, laws of the Thirty-ninth General Assembly, when a real estate mortgage with a receiver's clause is indexed by request in the chattel mortgage index should the recorder charge and receive the fee of twenty-five cents for such indexing?"

The original chattel mortgage statute is chapter 352 of the Acts of the Thirty-eighth General Assembly. Section 11 thereof is as follows:

"The fees to be collected by the county recorder under this act shall be as follows: For filing any mortgage, bill of sale, extension agreement, release of mortgage or other instrument affecting the title to or incumbrance of personal property twenty-five cents each. For certified copies of such instruments, fifty cents for the first four

hundred words and ten cents for each one hundred additional words or fraction thereof."

Chapter 246 of the Acts of the Thirty-ninth General Assembly is as follows:

"Where in a real estate mortgage there is any provision creating an encumbrance upon personal property or providing for a receivership in the event of foreclosure, the person, firm or corporation offering the same for record, may have the same recorded at length, and also indexed in the chattel mortgage index book provided for herein. In said index book the recorder shall show the book and page where said real estate mortgage is recorded and such recording shall have the same force and effect as though said real estate mortgages were retained by the county recorder in the manner provided for herein and such real estate mortgages shall not be required to be filed and kept in the office of the county recorder. When such real estate mortgage is released of record, the county recorder shall make entry thereof on the chattel mortgage index book."

It will be observed that the above section 11 provides a fee of twenty-five cents for filing any mortgage, bill of sale, extension agreement, release of mortgage or other instrument affecting the title to or encumbrance of any personal property. The said chapter 246 does not provide for any fee for indexing a real estate mortgage in the chattel mortgage index book where such real estate mortgage contains a provision creating an incumbrance upon personal property or providing for a receivership in the event of foreclosure.

It is our opinion that where a real estate mortgage containing the provision in question is recorded and also indexed in the chattel mortgage index book that the only fee that the law permits the county recorder to charge therefor is the recording fee, and that he is not entitled to any additional fee for indexing the same in the chattel mortgage index book.

PEDDLER. Required to pay license if he actually transports goods about country for sale.

HUCKSTER. Is not a huckster if he actually transports goods about country for sale and is not selling by sample and taking orders for future delivery.

October 2, 1923.

County Attorney, Winnebago County, Forest City, Iowa: This will acknowledge receipt of your letter of the 25th ult. in which you request an opinion of this department as to the provisions of Section 1347-a of the Supplement to the Code of Iowa, 1913, as amended by Chapter 52, Acts of the General Assembly, relating to the licensing of peddlers.

The facts stated by you are as follows:

"A merchant at Lake Mills who runs a general store runs a motor truck throughout the country. He has four regular routes, one in Worth county and three in Winnebago county. He claims he is running a huckster wagon. He sells groceries of all kinds. He also takes toweling, ginghams, and percale out by the bolt and sells underwear, overalls and shirts from the wagon. He tells the people he calls on that he will take eggs or butter in payment, but does accept cash and charges merchandise purchased."

Under the facts stated, it is our opinion that the person referred to is a peddler under the meaning of Section 1347-a and does not come within the exception made with reference to hucksters. To hold that such a person is a huckster would have the effect of entirely destroying the purposes of the statute, because in law a peddler has been defined to be a person who travels about the country with merchandise for the purpose of selling it.

The legislature must have had in mind in the enactment of the statute some definition of the term huckster and as distinguished from the term peddler. A huckster is a person commonly known as a person, who travels about selling produce, mostly such produce as is raised in the garden, in the orchard or the farm and the name is never associated with the seller of manufactured articles such as is carried about by the person referred to in your letter. If a huckster can be held to be anybody, who travels about the country, sells goods, wares and merchandise, then there is no such a person as a peddler to be licensed under this law.

We are satisfied that the person referred to by you should be required to pay a license, as he is actually transporting goods about the country for sale and is not selling by sample and taking orders for future delivery.

LIBRARY BOARD. A person cannot be appointed to life membership on this board.

September 28, 1923.

Executive Secretary, Library Commission: I am in receipt of your letter dated September 19, 1923, in which you request an opinion from this department. Your request is in words as follows:

"An inquiry has come to me as to the legality of appointing a person to life membership on a library board. The desire is to give honor for long library service.

"As I read the law regarding trustees it does not seem to me that this is possible but I should be glad to have your ruling on the subject."

You are advised that there is no provision whereby a person may be appointed to a life membership on a library board. Without additional legislation such an appointment would only be good for the period and time of service provided by law.

NEPOTISM. Employment by board is employment by individual members and the child of a member of a board cannot be employed.

September 26, 1923.

Acting Governor of Iowa: We have received your communication of September 25, 1923, asking this department for an opinion upon the following proposition:

"The enclosed application for the approval of appointment of stenographer was submitted to me by the Iowa Board of Parole. Please advise me your opinion with reference to Chapter 15, Acts of the 40th General Assembly, and whether or not in your judgment I have authority under the provisions of this act to approve this appointment; also whether or not it is my duty under this act to pass upon an appointment of this character. Also advise me whether or not in your judgment compensation could be paid this party under the act to which I have referred."

The application referred to in your communication is as follows:

"Application is hereby made for your approval of the appointment as stenographer for this board, of one Constance Jensen, who entered the employment of this board on the 20th day of July, 1923, and whose employment will continue until the 29th day of September, 1923.

"The employment of a stenographer was authorized by action of the Retrenchment and Reform Committee of the Fortieth General Assembly, taken on the 19th day of July, 1923.

"Compensation of such stenographer has been fixed by the Board of Parole under such authority at the rate of one hundred dollars per month.

"The said Constance Jensen is a daughter of L. A. Jensen, a member of said board.

"This application is made under provisions of Chapter 15 of the laws of the Fortieth General Assembly."

Chapter 15 of the Acts of the Fortieth General Assembly reads as follows:

"It shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of the state of Iowa or by virtue of the ordinance of any city or town in said state, to appoint as deputy, clerk or helper in said office or position to be paid from the public funds, any person related by consanguinity or affinity, within the third degree, to the person elected, appointed, or making said appointment. *unless such appointment shall first be approved by the officer, board, council, or commission whose duty it is to approve the bond of the principal.* Provided, this provision shall not apply in cases where such person appointed receives compensation at the rate of six hundred dollars ($600.00) per year or less, nor shall it apply to persons teaching in public schools.

"No person so unlawfully appointed or employed shall be paid or receive any compensation from the public money and such appointment shall be null and void and any person or persons so paying the same or any part thereof, together with his bondsmen, shall be liable for any and all moneys so paid."

It will be noted that Miss Constance Jensen, who was appointed stenographer for the Board of Parole, is the daughter of L. A. Jensen, a member of said board. This statute makes it unlawful for any person elected or appointed to any public office or position, under the laws of the state of Iowa, to appoint as deputy, clerk or helper in said office or position to be paid from the public funds, any person related by consanguinity or affinity within the third degree to the person elected, appointed or making said appointment. However, there are three exceptions contained therein, as follows:

First: Where such appointment is first approved by the officer, board, council or commission, whose duty it is to approve the bond of the principal.

Second: Where such person appointed receives compensation at the rate of six hundred dollars per year or less.

Third: It does not apply to persons teaching in the public schools.

It becomes necessary, therefore, for us to determine whether the situation we are considering comes within any of these excepted clauses. In our opinion, the first clause does not apply because the members of the Board of Parole who appointed the stenographer in question are not required, under the law, to give bonds, and as a consequence there is no officer, board, council or commission whose duty it is to approve bonds for the members thereof.

It is also the opinion of this department that the second clause does not apply because the stenographer in question is paid at the rate of $100.00 per month, which, of course, amounts to $1,200.00 per year. Of course, the third does not apply because she is not a teacher in the public schools. It therefore follows that the appointment of Miss Constance Jensen was illegal and unauthorized under the provisions of the statute we have quoted herein, and that she should not be paid the salary she is claiming.

We are also of the opinion that under the provisions of this statute no stenographer who comes within the provisions thereof should be employed until after such intended employment is approved by the officer, board, council or commission whose duty it is to approve the bond of the principal.

TOWNSHIP CLERK AND ASSESSOR. Offices not incompatible entitled to salary for both offices.

INCOMPATIBILITY OF OFFICES. Township clerk and assessor—offices not incompatible.

September 17, 1923.

County Attorney, Wayne County, Corydon, Iowa: We are in receipt of your

communication of August 16, 1923, asking this department for an opinion upon the following proposition:

"In Grand River township, Wayne county, a Mr. Foster is the township clerk and also the assessor of the town of Lineville, Iowa. As township clerk he attended the meeting of the trustees as a board of review in the afternoon, and the evening of the same day he attended as assessor of the town of Lineville a meeting of the town council as a board of review. He filed his claim for attendance at each meeting. The board of supervisors have held up the claim, and have requested me to get an opinion as to the allowance of the claim from the office of the Attorney General."

It is the opinion of this department that there is nothing incompatible in the duties of the office of township clerk and assessor of the town of Lineville, Iowa, and that the same party may hold both offices. If the same party performs the duties of both offices, he would clearly be entitled to the salary as township clerk for attending the meeting of the township trustees, as a board of review, in the afternoon, and also the salary of the assessor for attending a meeting of the town council, as a board of review, in the evening.

SALARY ACT. 1923—transfer of motor vehicle inspector and cigarette inspectors to attorney general—validity discussed.

September 15, 1923.

Treasurer of State: A careful consideration of the salary act enacted by the Fortieth General Assembly raises a very serious question as to whether or not that portion of the act transferring to this department the automobile inspectors and the cigarette inspectors is valid. The purpose and intent of the legislature, however, is clear that the Motor Vehicle Department, Cigarette Department and the Department of Justice should work in the utmost co-operation to secure the best results with a minimum of expense in this service.

In the attainment of the real purpose sought, I am sure we are in hearty accord. It is the desire of this department to co-operate to the greatest extent with the Cigarette Department which is under your jurisdiction. It is our desire also to, as nearly as possible under the law, carry out the real thought of the legislature. I am convinced that the transfer of power to this department as sought in the salary act must be held to be invalid because of the fact that it was not included in the title and for the further reason that it is in direct conflict with the provisions of the cigarette law which provisions are not repealed but remain in full force and effect.

In order to avoid this situation and to assume all of the burdens which the legislature intended to impose upon this department, and at the same time to secure results, I suggest that the Executive Council under the provisions of the cigarette law authorize the employment of the four inspectors authorized by the Retrenchment and Reform Committee at such salary as to the Executive Council may seem right, and that then these four inspectors be appointed by you and in your appointment I shall be glad to acquiesce, all to the end that there may be substantial compliance with the desire of the legislature.

In this connection I might say that the Peace Officers Department of this state is ready to co-operate in this work and I also assure you of the fact that it will afford me pleasure to call upon the local peace officers for co-operation likewise.

I feel that the matter should be submitted to the Executive Council at once and

that the authority sought be granted, all to the end that there may be no question as to the appointment or as to the right of the employees to compensation.

PAROLE. The time a prisoner is on parole is not to be counted in determining the length of time he is to be imprisoned upon the sentence.

January 4, 1924.

Board of Control of State Institutions: Referring to your favor of October 23, 1923, in which you request the opinion of this department as to whether or not the time a person is on parole is to be counted in determining the length of time he is to be imprisoned, we wish to say that the recent case of *Kirkpatrick v. Hollowell* decided by our Supreme Court December 14, 1923, determined that the time a prisoner is on parole shall not be included in fixing the time of his imprisonment.

DISCRIMINATION. In purchase of cream products. General opinion covering thirteen hypothetical cases.

November 27, 1923.

Secretary of Agriculture: You recently submitted to this department a request for an opinion construing Section 5028-b of the Supplement to the Code of Iowa, 1913, being the section designed to prohibit unfair discrimination in the purchasing of commodities of commerce.

This section, in so far as it is applicable to the question under consideration, reads as follows:

"Any person, firm, association, company or corporation, foreign or domestic, doing business in the state of Iowa, and engaged in the business of purchasing for manufacture, storage, sale or distribution, any commodity of commerce that shall, for the purpose of destroying the business of a competitor or creating a monopoly, discriminate between different sections, localities, communities, cities or towns, in this state, by purchasing such commodity at a higher rate or price in one section, locality, community, city or town, than is paid for such commodity by such party in another section, locality, community, city or town, after making due allowance for the difference, if any, in the grade or quality, and in the actual cost of transportation from the point of purchase, to the point of manufacture, sale, distribution or storage, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful; provided, however, that prices made to meet competition in such section, locality, community, city or town shall not be in violation of this act.

"Any person, firm, association, company or corporation, or any officer, agent or member of any such firm, company, association or corporation, found guilty of unfair discrimination as herein defined, shall be punished as provided in section five thousand and twenty-eight-c of the Supplement to the Code, 1907."

With your request, you have submitted many examples of situations and request our opinion as to whether there is a violation of this anti-discrimination statute in each of these examples. In formulating this opinion, we will first set out the example as outlined by you and follow that with our view upon the question involved.

EXAMPLE I.

"Will say that we have a small creamery located in Albert City which receives cream delivered by the farmer at the creamery, and which also operates routes and gathers cream by means of haulers, and is paying $.35 per pound butterfat on the routes and to the farmers delivering the cream to the creamery. A creamery located in Sioux City, 130 miles away, operates a cream station in Albert City, raises the price at that point to $.37 per pound, giving as the reason for doing so that they were meeting the competition of the routes which were being operated by the Albert

City Creamery, claiming that it cost $.02 per pound to gather cream; therefore, they felt that they were entitled to pay the farmer this $.02 rather than pay it to a hauler. This same creamery was not paying $.37 or even $.35 at any of their other stations at the same time.

"Another creamery located at Sioux City and also another one located at Des Moines also operate cream stations in Albert City, and after the first mentioned Sioux City creamery raised the price to $.37 they immediately followed suit, although they kept their price at all nearby points below the Albert City price. If the first mentioned Sioux City creamery violated the anti-discrimination law would these other creameries also be violating the law?"

The first mentioned Sioux City creamery is no doubt violating the provisions of Section 5028-b, above set out, as they are paying a higher price for the commodity purchased at Albert City than is being paid by them at other points in the surrounding territory at which they buy cream, nor can they claim that they are paying this price for the purpose of meeting competition. If they could pay $.02 per pound on the theory that it cost that much to gather cream, they could as well pay $.10 per pound for the same purpose provided the Albert City Creamery does not pay $.02 per pound more for cream brought to their creamery than is paid by them where they gather the cream themselves. The Des Moines concern, which follows the Sioux City concern is also violating the statute in that they are paying a higher price for cream at Albert City than is paid by them at other nearby points. The purpose of both being to over-bid the local creamery for the purpose of destroying it as a competitor.

EXAMPLE II.

At St. Charles, Iowa, a commission buyer for a Des Moines creamery had a station quotation of $.35; a buyer for a Council Bluffs creamery had a quotation of $.34. Is the buyer for the Council Bluffs concern violating the anti-discrimination law if he pays the same price as the price offered by the Des Moines concern?"

The buyer for the Council Bluffs concern, under the facts stated, is not violating the statute, but is simply meeting the price offered by the Des Moines concern, which I think the statute clearly authorizes him to do.

EXAMPLE III.

"A creamery located in State Center pays every two weeks. For the first two weeks in July they paid $.38. A station operated by a Marshalltown creamery at State Center paid for the first two weeks in July $.36. During the last two weeks in July the operator of this station estimated that the creamery at State Center would possibly pay $.40 for he last two weeks and, therefore, paid that price, which was $.04 above the regular quotation of the creamery that he was buying for. It later developed that the creamery at State Center could only pay $.38, the station operator having over-estimated what they would pay two cents a pound."

Your example does not show whether the Marshalltown creamery, at the end of the fourth week dropped its price to the price made by the State Center creamery. If they did, we would say there was no violation of the statute, as it could hardly be anticipated that the payment of the excess price for two weeks, only, under a mistaken apprehension as to the attitude of the local creamery, would be done for the purpose of injuring a competitor. If however, the practice was continued after they were apprized of the actual situation, then I would say a violation of the law occurred.

EXAMPLE IV.

"A commission buyer at State Center pays $.36 for cream and agrees that as soon as the State Center creamery issues its checks he will pay the difference between what he paid and what the State Center creamery paid, by issuing a bonus check. It developed that the State Center creamery paid $.38 for the period and the station operator issued a bonus check for the two cents difference."

The attitude of the commission buyer was simply to meet the price paid by the local creamery and in issuing a bonus check to meet that price, he did not violate the law.

EXAMPLE V.

"If a local creamery at Storm Lake is paying $.40 per pound and a creamery located at Sioux City operating a station at Storm Lake authorizes their station to meet the price of $.40 of the local creamery and this same Sioux City creamery is only paying $.35 at other stations, is it a violation for them to meet the price of the local creamery without first considering the cost of transportation from Storm Lake to Sioux City?

"To what extent, if any, does transportation have to be considered by a creamery in quoting prices at different points?"

It is our opinion that it is not a violation of the law for the Sioux City creamery to meet the price of $.40 made by the Storm Lake creamery. Our view is based on the theory that Storm Lake is not a market center, in the sense that any great quantity could be sold or distributed from Storm Lake. That the Storm Lake people in fixing the price must consider their distance from a distributing center the same as would a Sioux City creamery purchasing cream in Storm Lake. In the one case butter would be shipped to a market center while in the other the cream would be shipped. The course of transportation would, in practical effect, balance. If Storm Lake was a distributing center, then I would say that the Sioux City people would be required to consider the cost of transportation on goods purchased by them, which would have to be transported to another market center.

EXAMPLE VI.

"A creamery at Fort Dodge is buying according to grade paying $.40 for No. 1 cream and $.36 for No. 2. A creamery in Sioux City operating a station in Fort Dodge has a general station price of $.36. Can the Sioux City operator at Fort Dodge pay $.40 for all kinds of cream disregarding the grade?"

If the two classes of cream are generally recognized by the trade as being of different value, the Sioux City operator at Fort Dodge is violating the law in paying $.40 for cream, for which the local creamery is only paying $.36, especially in view of the fact that such Sioux City concern has a general station price of $.36. The law authorizes the taking into consideration of quality in fixing a price, and quality must be considered by the Sioux City concern if it seeks to avoid coming under the provision of the statute.

EXAMPLE VII.

"All station buyers at Truro are grading cream and paying for same according to grade, $.40 for No. 1 cream and $.36 for No. 2 cream. One of these buyers' customers on account of the buyer grading his cream as No. 2, became dissatisfied and took his No. 2 cream to one of the other buyers, who in order to coax the producer away from his competitor, gave him the No. 1 price. Would he be discriminating between his customers by doing this and would this law apply to this buyer?"

The second buyer would not be violating this particular provision of law, as his attitude would be simply competitive bidding for product provided he was not buying elsewhere and paying a lower price than was paid to this particular customer. He would, however, be discriminating as between customers for which the customers might find a remedy under a civil proceeding.

EXAMPLE VIII.

"A local creamery at Center Point pays $.40 per pound. A creamery located at Clinton operating a station at Center Point pays $.42. This Clinton creamery at all nearby stations only pays $.40. A creamery located at Cedar Rapids and buying only direct shipper cream was paying $.45 at Center Point for cream delivered by direct shipper to Cedar Rapids, this cream being delivered by rail. This was the price they paid for direct shipper cream from all nearby points. To what extent can the creamery located in Clinton claim that the direct shipper price paid by the Cedar Rapids creamery is competition for their station?"

Under the facts stated in this illustration, we believe that the Clinton creamery has a right to meet the price paid by the Cedar Rapids concern, the cost of transportation, etc., considered. Cedar Rapids would not be violating the statute in paying the same price at Center Point that they are paying elsewhere throughout the state and Clinton could bid to fairly meet the competition of Cedar Rapids although they had to pay more in this locality than they were paying elsewhere. This I believe the statute authorizes.

EXAMPLE IX.

"An Omaha creamery started a station at Denison, Iowa. This station began soliciting direct shippers from nearby towns, and paid the regular direct shipper price of the Omaha company on cream delivered to Omaha for all cream delivered to their station at Denison. Cream delivered to the door of their Denison station by local producers was paid for on the basis of the station quotation, which quotation was about $.05 less than the direct shipper quotation. The Omaha creamery then transported this cream purchased at their Denison station to Omaha at their own expense."

This would be a violation of the statute if the price paid to direct shippers from nearby towns was in excess of the amount paid by other concerns doing business in such towns so that it could be fairly said, that the price made was for the purpose of stifling competitors in those communities.

EXAMPLE X.

"A creamery at Creston paid $.40 for direct shippers. They also operated a station at Creston and paid a station quotation of $.35. An Omaha creamery operating a station in Creston paid the direct shipper price at their station. Which would be considered his competition the station price paid by the creamery at their station or the direct shipper price paid by the creamery at the creamery?"

Under such circumstances the station quotation would be considered the competitive price, if that price was equivalent of $.40 paid to direct shippers. If however, the freight or transportation charges on cream shipped is less than $.05 difference between the station price and direct shippers price, the difference might be added to the station price by the competitor.

EXAMPLE XI.

"A creamery at Denison is operating cream stations and is allowing them to pay $.36 for cream. This same creamery is paying direct shippers $.40. One hundred twenty miles away there is an independent buyer. The creamery at Denison pays him $.43 for the cream which he has bought. At the same time he paid the price as mentioned above at his stations and to direct shippers."

If the price of $.43 is paid for the purpose of meeting competition in the territory operated in by the independent buyer there would be no violation of the law. If on the other hand the price of $.43 is paid for the purpose of enabling the independent buyer to drive out competition in his locality, there might be a conspiracy between the creamery and the independent buyer, which could be reached under the law.

EXAMPLE XII.

"A creamery at Denison is operating cream stations and is allowing them to pay $.36 for cream. This same creamery is paying direct shippers $.40. One hundred twenty miles away there is an independent buyer. The creamery at Denison makes an agreement with this independent buyer that they will pay him $.03 per pound more than the price the independent buyer pays to the producers. This results in the situation at times where the creamery pays for this cream from $.39 to $.46. Thus you will note that under these circumstances the creamery may buy the cream at a cost to himself of less than he pays to the direct shippers, or on the other hand he may pay $.03 to $.06 more than he pays to direct shippers."

Our answer to example XI is in effect an answer to No. XII, as an agreement by the creamery to pay the independent buyer $.03 per pound more than such independent buyer pays to the producers would enable the independent dealer to drive out competition in his community regardless of the actual value of the commodity in that community.

I have, also, the communication of the department, dated October 13, 1923, in which a situation is outlined showing a discrimination in price and in response, will say, that in the question of discrimination, quality must be taken into consideration and where the price is raised over that of a competitor without regard to quality, there is a violation of the statute.

VETERINARIANS. Admission to practice. No reciprocity between Iowa and other states admitting veterinarians licensed in other states to be admitted to practice in Iowa without examination.

May 5, 1923.

State Veterinarian: You have submitted the proposition to this department for an opinion as to whether or not a person admitted to the veterinary practice in another state may be admitted to such practice in this state without examination under the provisions of Section 2538-i of the Supplement to the Code, 1913.

Section 2538-i Supplement to the Code, 1913, provides as follows:

"From and after January first, nineteen hundred and one, any person not authorized to practice veterinary medicine, surgery, and dentistry in this state, and desiring to enter upon such practice, shall be a graduate of a legally chartered and recognized veterinary college or veterinary department of a university or agricultural college, and shall pass the examination required by said board of veterinary medical examiners. The fee for such examination shall be fifteen dollars, payable in advance to the secretary of the board. The applicant shall be at least twenty-one years of age and of good moral character. Any person conforming to these requirements shall receive a license to practice veterinary medicine, surgery, or dentistry within this state, signed by the members of the board, which license shall be recorded in

the office of the recorder of the county in which said person resides, the recording fee to be paid by holder of certificate:

"(a) A certificate of registration showing that an examination has been made by the proper board of any state or foreign country, the holder thereof having been at the time of said examination a graduate of a legally chartered and authorized veterinary college, or veterinary department of any university or agricultural college, recognized as in good standing by the Iowa state board of veterinary medical examiners.

"(b) A certificate of registration or license issued by proper board of any state or foreign country, may be accepted as evidence of qualification for registration in this state, provided that the holder thereof was at the time of such registration the legal possessor of a diploma issued by a legally chartered and authorized veterinary college or veterinary department of any university or agricultural college in any state or foreign country, and that the date thereto was prior to the legal requirement of the examination test in this state. The fee for such registration shall be fifty dollars."

It is a fundamental rule of construction that a statute must be construed in such a way as to follow the intent of the legislature when it enacted the statute. In order to interpret the section under discussion, it will be necessary to consider it as a whole and to determine just what the purpose of the statute is. The first paragraph of the section provides that from and after January 1, 1901, persons desiring to practice veterinary medicine, surgery and dentistry in this state, shall, before entering upon such practice, pass an examination required by the State Board of Veterinary Medical Examiners. It is further provided that each such applicant must be a graduate of a legally chartered and recognized veterinary college, shall be at least twenty-one years of age, of good moral character and shall pay a fee of fifteen dollars in advance for such examination. Should such applicant pass the examination, it is provided that he shall be given a license to practice, which license must be recorded in the office of the recorder of the county in which the applicant resides.

It is provided further in this section that a person may be permitted to practice veterinary medicine, surgery and dentistry in this state without being required to take the examination, should such person present a certificate of registration or license regularly issued by the proper board of any other state or country, and provided that such person is also the possessor of a diploma issued by a legally chartered and authorized veterinary college or school in any state or country recognized by this state, and provided further that the date of such license to practice in a jurisdiction other than Iowa and the diploma from the school were issued prior to January 1, 1901. The fee for such registration is fifty dollars.

It is the opinion of this department that the section does not authorize the admission of persons to the veterinary practice in this state except on examination as stated or by permission should the applicant be qualified in the manner last stated above, prior to January 1, 1901. There appears to be no reciprocal relation between this state and other states relative to such admissions to the veterinary practice.

APPROPRIATIONS: PUBLIC PURPOSE. Construction of constitutional provision. House File No. 352 making an appropriation to state board of education for employment of teachers to instruct in normal training courses conducted in private institutions where the persons employed are under the control of the board of education has for its object a public purpose and a majority of each branch of legislature is sufficient to legally pass the bill.

May 3, 1923.

Governor of Iowa: I am in receipt of your communication of recent date in which you request an opinion as to whether House File No. 352 passed by both branches of the Fortieth General Assembly by majority vote, but by vote of less than two-thirds of the members of each branch, offends against the provisions of section thirty-one, article three of the Constitution of the state. This bill, copy of which you have transmitted with your communication, reads as follows:

"Section 1. The state board of education is hereby authorized to select and approve such privately owned colleges in the state as shall provide a two-year approved course, above a four-year high school course, for the training of teachers for the elementary schools, and such students as complete such two years' course of study shall be granted a five-year state certificate authorizing them to teach in any elementary school in the state for a period of five years, and such certificate shall be renewable. Students who complete one year's work of such a course may be granted, without examination, a temporary or provisional certificate good until July first following the date issued.

"Sec. 2. The state board of education shall supervise and inspect the training of teachers for elementary schools in such colleges and shall approve the normal courses taught therein. Said board is authorized and empowered to employ for the entire year not more than (1) normal training instructor for each of said colleges, and who shall act under the direction of said board.

"Sec. 3. Such instructor shall devote his entire time to assisting the faculty in conducting said teachers' training courses in the school to which he is assigned, and shall devote as much time as may be consistent with his other duties, to teaching or instructing such students as are enrolled in such courses in such branches as relate to the profession of teaching.

"Sec. 4. There is hereby appropriated out of money in the state treasury not otherwise appropriated, the sum of fifty thousand dollars ($50,000.00) annually to carry out the purpose of this act."

Sec. 5. Publication clause.

Section thirty-one of article three of the Constitution referred to by you reads as follows:

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

The question which you desire this department to pass upon is whether the bill, having passed each house by a majority vote but by less than a two-thirds vote of the members elected to each branch, will by your signature approving the same, become a valid enactment. The question, therefore to be determined is whether the appropriation which this bill carries is for a public or a private purpose. If for a public purpose a majority vote, which the bill received, is sufficient, and if it cannot be said to be for a public purpose, it could not then be said to have legally passed both branches of the legislature.

In determining this question, it is necessary for us to analyze the purposes of the act as a whole, because the appropriation is made to carry out the act in its entirety.

Section one of the act authorizes the State Board of Education, which is one of the departments of the state government, to select such privately owned colleges as they may determine, having an approved course in the training of teachers in the elementary schools, to whose graduates they may grant state certificates authorizing

them to teach in the elementary schools of the state. Section two places the supervision of the training of normal course students and the approval of the courses conducted by such privately owned schools in the Board of Education, and authorizes such board to employ not to exceed one normal training instructor for each of the colleges selected, which instructor is required to act under the direction of the board, and section three requires the instructor employed in any privately owned college selected by the board, to devote his entire time in conducting a teachers' training course in the particular school to which he is assigned.

Section twelve of article nine of the Constitution provides that the State Board of Education "shall provide for the education of all of the youths of the state through a system of common schools and such schools shall be organized and kept in each school district for at least three months in each year." Under the provisions of section fifteen of the same article the legislature has placed the control of the common school system under the state superintendent and provided for its perpetuation by various enactments. It will therefore be observed that the framers of our Constitution wisely provided that a common school system should always be maintained in the state. One of the essentials in the maintenance and operation of schools is the employment of the teachers. The state has also sought to establish and maintain certain standards of qualifications that must be attained by those who would act as teachers in the public schools. Having set the standard of educational qualifications, it is therefore a part of the duty of the state incidental to the maintenance of the school system to see that trained teachers, having the requisite qualifications, are available in order that the public school system may be properly and efficiently maintained.

The state has, at its own expense, established a state normal school at Cedar Falls for the avowed purpose of training teachers as instructors for the elementary schools. It has, therefore, as a governmental proposition, entered into the business of training teachers and has recognized in a governmental way the necessity of spending state funds for the education of teachers that the school system may be maintained as decreed by the Constitution. The education of people of the state has, by the custom of years, become one of the public functions that are generally recognized as vitally essential to the well-being of society and to the promotion of the general welfare of the public for which all government is maintained. No one would, at this day, question the appropriations that have been made annually for many years for the maintenance of the state normal school which has for its purpose, as we have hereinbefore stated, the training of teachers for work in the public schools, yet no contract is entered into by people entering the state normal school that is binding upon them to remain in the service of the state as an instructor for any particular length of time. The school is maintained only as a part of the program of maintaining the public school system and promoting the general welfare and happiness of the people of the state.

It is a matter of history which I think I am justified in referring to that there have been efforts made at various times through bills introduced in the legislature to establish additional normal schools such as the one maintained at Cedar Falls for the purpose of making more accessible to the inhabitants of different parts of the state schools for the training of teachers. These offered measures have been defeated largely because of the enormous expense that would be involved in the establishment and maintenance of separate and distinct institutions of this character,

but it is universally recognized throughout the state that greater facilities are needed for the training of teachers in some manner that will not impose too great a financial burden upon the state.

It was apparently the thought of the legislature in enacting the bill under discussion that the organizations of some of the various privately owned and managed educational institutions of the state could be utilized to advantage in the training of teachers and that such institutions would co-operate with the state government in establishing proper training courses in their institutions under the supervision and control of the Board of Education.

The state, having recognized that it is a public duty to train teachers for the public schools of the state, it seems clear then that it becomes a legislative function to determine what method shall be adopted to accomplish the purpose, insofar as there is no direct prohibition in the Constitution. There is but little distinction to be noted between the state maintaining its own institution to carry on a public purpose or the hiring of another institution to function for it. It is not a matter, however, in the instant case where it can be said that the law goes so far as to contract with a private institution to perform a public function, but it is simply a question of the state employing its own agents to conduct its own work under a shelter provided for that purpose by private organizations.

It will be observed that under the provisions of this law no part of the appropriation provided for in the bill is to be paid into the treasury of a private institution, either directly by way of rental or to defray the other expense of the course, or indirectly by way of paying tuition for pupils registered in such schools but the money is appropriated to the Board of Education for the purpose solely of paying the expense incurred by them in supervising the course given for the training of teachers by particular institutions selected by the state and the employment by the board of instructors to take charge of the normal training course in such schools. Therefore, no part of the funds are paid either directly or indirectly to the institution selected by the board and the fact that the institution may indirectly benefit by reason of a possible increased enrollment in the school does not change the character of the purpose of this act.

Many cases might be cited to show the attitude of the courts on matters of this character but a few cases will suffice. The legislature of Kentucky made an appropriation of fifteen thousand dollars annually to the Kentucky Children's Home Society, a private corporation organized under the laws of the state of Kentucky for purely charitable purposes, those purposes being to seek out, provide and care for destitute children. The Kentucky court of appeals held that it was the duty of the state to care for the indigent of the state and for its homeless children, and that the purpose of this appropriation being to perform a duty which the state owed to its people, it might find an asylum for such people in a private institution and appropriate state funds to care for them or it might maintain its own institution. The constitutionality of the act was upheld. *Hager vs. Kentucky Children's Home Society,* 67, L. R. A. 815.

The legislature in Missouri appropriated fifty thousand dollars to the St. Louis Insane Asylum, an institution owned and conducted by the city of St. Louis alone, the appropriation being for the support of the indigent insane in the insane asylum of St. Louis, who belonged to the state outside of the city of St. Louis. The payment of the appropriation was contested on the grounds that it was not for a public

purpose. The Supreme Court of Missouri upheld the appropriation, 123, Missouri, 424. Their holding was that the appropriation was for the indigent insane of the state and for their care and not for the institution itself.

To the same effect see the following cases: *Shepherd Fold of the Protestant Church vs. New York,* 96 N. Y. 137; *Norman vs. Board of Managers,* 93, Kentucky, 537; and *Boehm vs. Hertz,* 182, Illinois, 154.

The case last cited is a case involving an appropriation to a normal school, which had previously been held by the courts of Illinois to be a private institution, for the purpose of training teachers to teach in the public schools of the state. In passing upon the question the court held that there was no express or implied prohibition in the constitution that prevented the state from using such agencies for the advancement of public school education and the entire matter was one of legislative policy.

In view of the various holding of the courts in cases involving similar questions to that propounded by you, I am of the clear opinion that House File No. 352 adopted by both branches of the legislature by a majority vote, creates an appropriation for a public purpose and that therefore it does not require a two-thirds vote of each branch of the legislature to make it a valid enactment.

HOTEL INSPECTION. Hotel inspector has no authority to require persons operating hotels to operate them under the European plan rather than the American plan.

April 27, 1923.

State Hotel Inspector: You have submitted the proposition to this department for an opinion as to whether or not, under the provisions of law regulatory of hotels, you as hotel inspector, may require persons operating hotels in this state to operate such hotels under the so-called European plan rather than under the so-called American plan.

There seems to be some controversy relative to just what authority is given to the hotel inspector in regard to the rates charged for hotel service by hotels. Section 1 of Chapter 182 of the Acts of the Thirty-eighth General Assembly defines what is to be included within the provisions of the law relative to the regulation of hotels. It is there provided that

"Every building or structure kept, used, advertised as, or held out to the public to be an inn, hotel, or public lodging house, or place where sleeping accommodations are furnished for hire to transient guests, whether with or without meals, shall, for the purpose of this act be defined to be a hotel * * *."

It will be observed that hotels, as defined above, are subject to the provisions of the law regulating hotels under the direction of the state hotel inspector. The general provisions of the chapter relate principally to the sanitary condition of hotels and prescribe requirements and regulations of that nature. The chapter also provides for the licensing of hotels by the state hotel inspector and sets out the duties of the hotel inspector and his deputies relative to inspections.

The only provisions relative to rates are contained in section one (1) of the act under sub-section 2514-h1 and section two (2), sub-section 2514-m7. Section 2514-h1 of the law provides that all applications for a license to conduct a hotel shall be accompanied by a statement "showing the maximum rates to be charged for each room in such hotel" and that "the rate for each room shall be posted on a card on the inside of the entrance door to such room," and that a complete schedule

of rates for each room shall be kept posted in the lobby of the hotel, open to public inspection. There is no provision in the section which prescribes what must be included in the rate for each room or what should not be included. No reference whatever is made to rates which include both rooms and meals or any other service which might be rendered by a hotel. Section 2514-m7 provides also, that

"On the inside of the door of each lodging room, there shall be posted in a conspicuous place, a card, stating the price of said room per day, per person, and said posted price shall not be increased until the manager of said hotel shall have given the hotel inspector provided for in this act, sixty days' notice of his intention to so increase the said price and stating the amount he proposes to charge and receive permission from the said inspector to increase the rate."

It will be noted that there is nothing contained in the provisions just quoted relative to rates which include both rooms and meals. The only thing that the section quoted provides is that notice must be given to guests of the rate charged and that such rate cannot be increased until the hotel inspector has been given sixty days' notice and has granted permission therefor.

We have searched all through the chapter for language which would, in any manner, prohibit, directly or indirectly, any hotel management from charging a rate which would include both room and meals. Neither have we been able to find a provision which requires hotels which operate under the American plan, that is, a flat rate for room and meals for one day, to furnish rooms to guests applying therefor, without meals and at a less rate. The statutes are silent so far as any such provision is concerned. We must therefore conclude that there is nothing in the law which prohibits hotels from operating under the American plan, so-called.

The matters submitted for an opinion are matters subject to contract between the guests and the hotel management and are not subject to regulation under any provision of the law now in force. Hotels operated under the American plan are required, under the provisions of this act, to post rates in the same manner as are hotels operated under other plans. Such posted rates must, however, specify that meals are included therein.

In view of this situation, it is the opinion of this department that the state hotel inspector is not authorized by law to require the management of hotels operating under the so-called American plan to furnish rooms without meals and to prescribe a rate therefor different from the rate for rooms including meals.

BONDED WAREHOUSES. Authority of Board of Railroad Commissioners limited to issuing licenses for storage of agricultural commodities only.

April 28, 1923.

Board of Railroad Commissioners: I am in receipt of your letter dated April 27th, in which you request an opinion from this department. Your request is in words as follows:

"I am instructed to request your opinion as to whether or not Chapter 119, Laws of the 39th General Assembly, authorizes this board to issue licenses for the operation of bonded warehouses for the storage of commodities other than agricultural commodities.

"As you will note upon examination of the statute, the title reads 'An Act to provide for bonded warehouses for the storage of agricultural *and other commodities,*' whereas in the body of the act no reference whatever is made to any commodities but 'agricultural' commodities. A bill was introduced in the 40th General Assembly proposing to amend Chapter 119, Acts of the 39th General Assembly, by striking from the title the words, 'and other commodities' but it did not pass.

"There are pending before the board applications for licenses to operate bonded warehouses under this law for the storage of other than agricultural commodities and your opinion on this point is respectfully asked."

Chapter 119 of the acts of the 39th General Assembly does not relate to any warehouses except those for the storage of agricultural products. The term agricultural products is defined in section one of the act. It is immaterial that the title relates to other commodities, but if it be assumed that the title has any control over the act then the term "other commodities" would only relate to those products which are defined as agricultural products under section one of the act.

You would have no authority to grant a license for the operation of bonded warehouses as defined in this act except for the storage of commodities defined therein.

JUSTICES OF THE PEACE—EXPENSES. Board of supervisors may or may not allow expenses up to $500 out of civil fees collected in townships having a population of more than 12,000.

April 27, 1923.

County Attorney, Woodbury County, Sioux City, Iowa: You have submitted the proposition to this department for an opinion as to whether or not the board of supervisors is required to allow expenses to justices of the peace up to five hundred dollars ($500.00) in counties having a population of 12,000 and over, under the provisions of section 4600-a of the supplement to the code, 1913, as amended by chapter 216 of the Acts of the Thirty-eighth General Assembly.

The provision from the section which is applicable to the proposition submitted reads as follows:

"Justices and constables in all townships having a population of 12,000 and over, shall retain such civil fees as may be allowed by the board of supervisors, not to exceed five hundred dollars ($500.00) per annum, for expenses of their offices actually incurred, and shall pay in to the county treasury all the balance of the civil fees collected by them."

The question raised is as to the construction to be given to the word "may," underscored in the quotation above. The matter submitted is whether or not the language used confers a discretionary power upon the board of supervisors insofar as expenses, not exceeding five hundred dollars ($500.00) are concerned, or whether or not the provision is mandatory up to that limit. This question has been squarely determined by the supreme court of this state in the recent case of *Polk County v. Roe, et al.,* 164 Iowa, 302. It was there said

"A failure of the board of supervisors to make an allowance of the amount which he (the justice of the peace) might retain could not justify any withholding on his part of the fees collected or of the report due. In the absence of an allowance by the board of supervisors, the justice of peace was bound to pay over all the fees and report the same accordingly."

In view of the foregoing, it is the opinion of this department that the language used in the phrase first set out above gives discretionary power to the board of supervisors and that it may or may not allow expenses up to five hundred dollars ($500.00), same to be retained from the civil fees collected by the justice of the peace.

TREASURER OF STATE. Apportionment of Motor Vehicle Tax.

April 26, 1923.

Treasurer of State: I am in receipt of your letter dated April 24, 1923, in which you request an opinion from this department. For convenience, I quote your letter:

"As to the Motor Vehicle Law, I beg to submit the following for your consideration and opinion.

"Section 35 of chapter 275, Acts of the 38th General Assembly, provides first that 94% of all monies collected pursuant to the provisions of this act, except as otherwise provided by law and section 39 hereof, shall be credited to the primary road by the treasurer of state.

"The fees of 25 cents per car for county treasurers and '½ of 1% for refunds' do not come to me. Are they the items referred to above—'except as otherwise provided by law'?

"Should we certify to Highway Commission any information based on the report received from Motor Vehicle Department of collections made by county treasurers?

"If we are to certify to Highway Commission information based on report to us by Motor Vehicle Department, what information should be certified?

"We offer the following as being the intent.

The Motor Vehicle Department to certify to us.

1.	Amount received by county treasurers as license fee for 5 automobiles	$100.00
2.	Less—County treasurer's fee for collection to go to county fund	1.25
3.	Amount to be apportioned	$ 98.75
4.	Less—½ of 1% working fund to cover refunds necessary	.49
5.	Amount actually received by state after providing for refunds and county treasurer 25-cent fee	$ 98.26

Item No. 5 above to be apportioned by state treasurer on receipt of report from Motor Vehicle Department, and Highway Commission notified of the amount so collected by county treasurers as follows:

6.	To Primary Road	94%	$ 92.36
7.	Highway Commission maintenance	2½%	2.46
8.	M. V. D. maintenance	3½%	3.44
5.	Total amount		$ 98.26

Item No. 4, any surplus remaining to be accounted for and delivered to state treasurer at end of each fiscal year.

What account to receive the amount?

Is fiscal year for this purpose ended June 30?

Items No. 7 and 8, biennially at close of calendar year any unexpended balance to be apportioned to the counties in the same manner as the 94% of said funds is apportioned.

The result of one year would work out as follows (the figures are hypothetical, but approximately what the year 1923 will show):

1.	Received by all county treasurers as license fees on 600,000 automobiles		$9,000,000.00
2.	County treasurer's 25-cent fee paid to county fund		150,000.00
3.			$8,850,000.00
4.	½ of 1% to Secretary of State for refunds		44,250.00
5.	Amount to be apportioned		8,805,750.00
	Apportioned by Treasurer of State		
6.	Primary road fund	94%	$8,277,405.00
7.	Maintenance fund for State Highway Commission	2½%	220,143.75
8.	Motor Vehicle Department	3½%	208,201.25
5.	Amount apportioned		$8,805,750.00

Section 39 provides for further necessary funds for the Motor Vehicle Department over and above the 3½%.

There were substantial amounts left over from both the 2½% and 3½% provisions.

A second interpretation has been offered as follows:

Received by county treasurer as license fee on 600,000 automobiles			$9,000,000.00
Less—			
	to county treasurer 25-cent fee	$150,000.00	
.5%	to Secretary of State for refunds	45,000.00	
2.5%	maintenance for State Highway Commission	225,000.00	
3.5%	maintenance for M. V. D.	315,000.00	735,000.00
91.833%	to primary road		8,265,000.00

The net difference is not great, but under the first plan the treasurer can apportion the money he receives to

Primary Road	94%
Maintenance M. V. D.	3½%
Maintenance Highway Commission	2½%

Under the latter, he must apportion the amount received by him ($8,805,000.00) to

Highway Commission Maintenance	2.551— %	$ 225,000.00
M. V. D. maintenance	3.5775+%	315,000.00
Primary Road	93.8674 %	8,265,000.00
	100.	$8,805,000.00

This latter procedure seems to be impossible for practical use.

First: The county treasurer's fee is not a constant factor. The amount would be a different ratio to the total on each report.

Second: Credit is not given to the accounts until the money is received. The money could not be said to come from any definite report or reports. The base on which to divide the money appears impossible of determination.

"The present procedure with reference to the several above mentioned accounts is not clear. We wish to thank you in advance for your consideration of the foregoing and your written opinion as to which procedure is correct."

The situation presented by you is indeed difficult and this difficulty largely arises because of the fact that the several fees and percentages to which you refer have been added from time to time to the motor vehicle laws of the state. It is not for this department, however, to say what ought to be the law. It is only to state to you what the law actually is.

As you have carefully pointed out in your letter, all motor vehicle fees and penalties collected are divided and apportioned to the county treasurer, to the Secretary of State for refunds, to the Secretary of State for maintenance, to the Highway Commission for maintenance and to the Primary Road Fund.

For the purpose of this opinion, may we assume that a certain motor vehicle is to be registered in Polk county. The registration fee with penalties is $10.00. This money is paid to the county treasurer and the license is issued by the county treasurer. The county treasurer first takes from the fee collected by him 25 cents, all in accordance with the provisions of section 5 of the Motor Vehicle Act (Chap. 275, Acts of the 38th General Assembly as amended). The portion of the law relative thereto is in words as follows:

"Each county treasurer shall be allowed to retain twenty-five (25) cents for each motor vehicle license issued by him out of money collected in each year for the registration of such motor vehicles, the same to be deducted, and reported to the department, when the county treasurer transfers the money collected under the provisions of this chapter."

This leaves remaining to be accounted for to the state $9.75.

Section 16 of the Motor Vehicle Act provides as follows:

"The county treasurer shall each month during the year 1921 remit to the department one-half of one per cent of all fees and penalties collected for 1921 and as provided above each year thereafter, to be used as a working fund to cover refunds necessary to be made; any surplus remaining to be accounted for and delivered to the State Treasurer at the end of each fiscal year."

You will note that the amount to be remitted to the Secretary of State is one-half of one per cent of *all fees and penalties collected.* This means not one-half of one per cent of $9.75, but one-half of one per cent of $10.00, or five cents. This leaves remaining $9.70.

Note that the payment to the county of 25 cents and the payment of one-half of one per cent to the Secretary of State is to be made by the county treasurer, so that there remains in your account to the State Treasurer $9.70. This is the only part of the motor vehicle license fees and penalties that must be remitted into the state treasury. This sum is to be remitted in the manner provided in section 16 of the Motor Vehicle Act. There remains but one section of the law still necessary to consider, and that is section 35. This section in and so far as applicable provides as follows:

"Sec. 35. Ninety-four (94) per cent of all moneys collected pursuant to the provisions of this act, except as otherwise provided by law, and section 39 hereof shall be credited to the primary road fund by the treasurer of state and shall be apportioned among the several counties in the same ratio that the area of each county bears to the total area of the state, said apportionment to be made by the state highway commission. Two and one-half (2½) per cent of all moneys collected pursuant to the provisions of this act, shall be set aside and shall constitute a maintenance fund for the state highway commission, and three and one-half (3½) per cent of all said money collected pursuant to the provisions of this act, shall constitute a fund for the payment of salaries as provided by law for the motor vehicle department, the expenses for plates, certificates, containers, blanks, etc., and maintenance of the automobile department."

You will note that under this section two and one-half per cent *of all moneys collected* pursuant to the provisions of this act shall be set aside and shall constitute a maintenance fund for the State Highway Commission. This does not say two and one-half per cent of the balance remaining after the deduction of the 25-cent fee and the one-half of one per cent going to the Secretary of State, but is inclusive of all fees and penalties; therefore the two and one-half per cent must be figured on the basis of the entire collection, or as restricted to the example 25 cents.

This section further provides that three and one-half per cent of *all money collected* pursuant to the provisions of this act shall constitute a fund for the payment of salaries as provided by law for the Motor Vehicle Department. This percentage is also inclusive and must be figured on the basis of one hundred per cent, or in case of the example 35 cents. All of the remainder would be credited to the Primary Road Fund.

I realize the force of your argument, but the legislature having said what should be done with this money, its determination is final and must be carried out.

I would, however, suggest to you that you, in conjunction with the superintendent of the Motor Vehicle Department, work out a form of report to be made by the county treasurer, which will care for all of this difficulty encountered by you so that when the report is received by you it will show the net amount of the distribution to the several funds in question.

APPROPRIATION. To be paid on order of State Board of Education on July 1, 1923, and on July 1 each succeeding year for four years.

April 26, 1923.

Auditor of State: I am in receipt of your letter dated April 25, 1923, in which you request an opinion from this department. Your request is in words as follows:

"Senate File 453, acts of the 40th General Assembly, makes an appropriation of four hundred fifty thousand ($450,000) dollars annually for a period of five years beginning July 1, 1923.

"Section 2682-Y Supplement of 1913 (C. C. 2338) provides that all appropriations made payable annually to the educational institutions be paid in monthly installments.

"Your opinion is requested as to whether or not the latter provision covers payments to be made under the provisions of Senate File 453."

Your attention is called to section 5 of Senate File No. 453 to which you refer. This section provides in words as follows:

"Sec. 5. The appropriation provided for in this act shall be drawn on the order of the Iowa State Board of Education, beginning on July 1, 1923, and on July 1st of each of the four succeeding years."

You observe that the appropriation is to be paid under the provisions of this section on the order of the State Board of Education on July 1, 1923, and on July 1 of each of the four succeeding years. The legislature having specifically provided the time for the payment of this appropriation, such specific provision would govern against the general provision of section 2682-Y Supplement to the Code, 1913 (C. C. 2338).

SECRETARY OF AGRICULTURE. Relating to payment of salary and expenses of organization.

April 26, 1923.

Auditor of State: I am in receipt of your letter dated April 25, 1923, in which letter you request an opinion from this department. Your letter is in words as follows:

"Section 6, Senate File 745, Acts of the 40th General Assembly reads as follows: 'Section 6. To the Secretary of Agriculture for the purpose of paying expenses of organization and the salary of such officer from May 1, 1923, to July 1, 1923, the sum of twenty-five hundred ($2500) dollars.'

"Section 3, Senate File 594, Acts of the 40th General Assembly provides for the appointment of a Secretary of Agriculture 'who shall hold office from July 1, 1923.' Inasmuch as the office does not exist until July 1, 1923, your opinion is requested as to whether or not this department can properly pay the salary of such officer prior to that date.

"Your attention is invited to the fact that the Secretary of Agriculture has been appointed for the term beginning July 1, 1923."

It is true that this bill provides that the Secretary of Agriculture "shall hold office from July 1, 1923," but it also provides that "immediately after the passage of this act the Governor shall appoint a Secretary of Agriculture." It follows that while the officer does not take office until July 1, 1923, in and so far as to exercise authority under the provisions of this act, yet he is appointed and he is secretary from the date of his appointment and confirmation by the senate. The distinction lies in this, that, while he is appointed as Secretary of Agriculture and his appointment is confirmed by the senate as such, yet, he does not begin the performance of his duties as prescribed in Senate File No. 594 until July 1, 1923. Undoubtedly

the thought of the legislature was that the period of time between the enactment of the act and July 1, 1923, would be necessary for the formation of the department.

Section 6, Senate File 745, Acts of the 40th General Assembly, commonly known as the Omnibus Bill provides that there shall be paid "to the Secretary of Agriculture for the purpose of paying expenses of organization and the salary of such officer from May 1, 1923, to July 1, 1923, the sum of twenty-five hundred dollars ($2500)." In other words, by necessary implication, this section provides that this officer shall draw salary from May 1 and that he shall have authority to incur necessary expenses of organization and that the salary and the expenses of such organization are to be paid from the appropriation herein provided.

INTOXICATING LIQUORS. Sale of automobile used in transporting—jurisdiction of justice of the peace—justice may order sale by the sheriff.

July 7, 1923.

County Attorney, Mitchell County, Osage, Iowa: Your favor of the 3rd requesting an opinion from this department has been referred to me for reply. In this request you ask:

"I am in doubt under the provisions of Chapter 24 of the Acts of the 40th General Assembly whether the justice should order the sheriff to sell the car or whether he should transcript the matter to the district court and have the district court make such order. Will you kindly advise me on this matter?"

It is the opinion of this department that the "court" referred to in Chapter 24, Acts of the 40th General Assembly has reference to the justice of the peace, who is the court before whom the owner of the motor vehicle is tried for illegal transportation, and that it was within the contemplation of the legislature to give the justice authority to make the order directing the sheriff to sell at public auction the property seized.

There are no state forms of the bond provided for by this chapter.

OFFICER OF THE STATE. No legal liability on the part of state or county to compensate an officer for injury sustained by him.

July 6, 1923.

County Attorney, Lyon County, Rock Rapids, Iowa: Your favor of the 15th ult. requesting an opinion from this department has been referred to me for reply. In substance, you request an opinion as to whether or not the board of supervisors of your county has authority to compensate a man who is shot and permanently injured while acting as a deputy sheriff assisting in the arrest of a number of outlaws in your county.

This man at the time he was injured was acting as an officer of the state of Iowa, and although your letter does not so state it is to be inferred that he received his injury from the accidental discharge of a firearm in the hands of one of the other officers. There may be a moral obligation on the part of a state or county to compensate him, but under the well-established law of this state it would be impossible for him to enforce this moral obligation in any court of the state.

It is a familiar principle of law that the state or county cannot be made legally liable for damages because of personal injuries, unless the statutes of the state expressly provide for such liability. Neither is a state or county liable because of the negligent acts of any of its officers. (Dillon on Municipal Corporations, Vol. II, Sec. 762; Cooley on Municipal Corporations, pp. 498-522; 15 C. J. 663.)

Although there are no Iowa cases based upon facts such as recited in your request, the general principle of the county's liability has been often stated by our courts. (*Snethen vs. Harrison County,* 117 Iowa 82; *Lindley vs. Polk County,* 84 Iowa 308; *State vs. Billings,* 81 Iowa 566.)

It is therefore the opinion of this department that there is no legal liability on the part of the state or county to pay this man for the injury suffered by him. It may be that the legislature will recognize a moral obligation to compensate him at least in part. This, we believe, would be the only remedy.

CONDEMNATION PROCEEDINGS. By board of supervisors—records—how kept.

EMINENT DOMAIN. Condemnation of right of way and gravel pits—proceedings of board of supervisors—records—how kept.

July 6, 1923.

County Attorney, Tama County, Toledo, Iowa: Your favor of the 25th ult. to the Attorney General has been referred to me. In this letter you ask for an opinion upon the following proposition:

"We are having a number of condemnation proceedings to obtain right of ways and also to obtain gravel for road construction work. I have drawn resolutions for the board of supervisors in these matters and the descriptions necessarily make considerable record. The statute directing that the action of the board of supervisors shall be published in the official papers does not in my opinion require that the entire record in these condemnation proceedings be published. I would appreciate very much if you would advise whether or not a separate road record could be used for these proceedings and the minute book of the board used simply for the motions adopting the resolutions which would then be recorded in the road record. This or some other method would save the county hundreds of dollars in printing and it seems to me would be legal. * * *"

In reply I wish to say that Chapter 81, Acts of the 40th General Assembly provides for the procedure in condemnation proceedings had to obtain right of way for road purposes. You will see by an examination of this chapter, provision is made for the publishing and serving of notices upon the persons whose property abuts upon the proposed change and others interested. The legal description of the real estate concerned in the condemnation proceedings should, of course, be contained in the notice required by this chapter.

Section 442, Code of 1897, as amended by the acts of the 38th General Assembly, Chapter 317, specified the books that the board of supervisors are authorized and required to keep. This section as you will see provides for a "minute book," and a "highway record," together with other books and records mentioned therein, the county auditor being required to record all the proceedings of the board of supervisors in the proper books. (Section 470, Code of 1897.)

Section 441, Code of 1897, as amended by chapter 408, Acts of the 37th General Assembly, and chapter 82, Acts of the 38th General Assembly, is the section providing for the publication of the proceedings of the board of supervisors in official newspapers, and provides in substance all the proceedings of the board of supervisors, schedule of bills allowed, reports of county treasurer, schedule of receipts and expenditures, shall be published at the expense of the county, etc. The purpose of this enactment was undoubtedly to enable the citizens and taxpayers of a county to know the manner in which their affairs were being administered. In the case of

Hislet vs. Howard County, 58 Iowa 377, 378, it was said,

"The proceedings of the board are its official acts, resolutions and orders upon the various matters which may come before it."

so that the published proceedings should in fact contain substantially everything that is made a part of the record proceedings of the board. This does not, however, contemplate a word for word reproduction of the record, or does it contemplate setting forth the legal description in condemnation proceedings where a notice is otherwise provided for to those primarily interested, but it merely contemplates a statement of the action taken in such language that an ordinary layman would understand from reading the same just what proceedings were had by the supervisors in this connection.

SAND AND GRAVEL. Board of supervisors may sell surplus sand from gravel plant for commercial purposes.

BOARD OF SUPERVISORS. May sell surplus sand from gravel plant, for commercial purposes.

July 6, 1923.

County Attorney, Woodbury County, Sioux City, Iowa: Your favor of the 15th ult. requesting an opinion from this department has been referred to me for reply. Your request is stated as follows:

"Woodbury county, Iowa, owns and operates its own gravel, screening and washing plant for the purpose of screening sand and gravel for use in paving and graveling the highways of the county. The sand from the plant runs far in excess of the gravel that is usable in either paving or graveling roads so as to give a large surplus of sand (after the gravel has been used) that is not useful for any purpose to the county. This sand has a value, however, when used for other purposes and is in demand for commercial purposes.

"The board of supervisors has directed me to request your opinion as to their right to sell this surplus sand to private enterprises for use commercially. It is the desire of the board of supervisors to convert into money what they consider (so far as roads are concerned) a useless by-product of the pit so that the county may thus lessen the cost of operating this plant."

I presume this pit is operated by the county under authority of Section 2024-i, Supplement to the Code, 1913. The fact that the board of supervisors have authority to operate this pit for the purpose of taking material to be used upon the highways therefrom, necessarily implies the power and authority to dispose of any material as incident to the purpose for which the plant is operated. Especially this is true when the disposal of this material would reduce the cost of operating the plant.

It is therefore the opinion of this department that the board of supervisors could dispose of the sand you refer to to the best possible advantage.

SOLDIERS' BONUS. Eligibility of certain persons to receive bonus, discussed and defined.

June 8, 1923.

Iowa State Bonus Board: This department is in receipt of your letter dated February 9, 1923, in which you request an opinion from this department. This opinion has been delayed by reason of circumstances which have arisen due to the desire on the part of certain parties affected to present arguments. The immediate necessity for an opinion, however, is now present and the questions will be determined.

Your request is in words as follows:

"1. Eligibility of members of the first and second officers' training camps.

"The War Department has ruled that the first and second training camps were civilian camps, that the members thereof were considered as civilians, paid as such and were not held for further service in the event they were not commissioned.

"Under section 4 of the Iowa Bonus Law would the members of those two camps be entitled to the Iowa bonus for the period they served at these camps?

"2. Section 4 of the Iowa law states, 'No person shall be entitled to such payment or allowance whose only service was in the students' army training corps.' Assuming that a man spent three months in the students' training corps and was then transferred to a regular branch of the service and served honorably and unqualifiedly, is this man entitled to the bonus for the period that he served in the S. A. T. C.?

"3. Section 4 also states, 'That those men who being in the military service received civilian pay for civilian work.' Assuming that a man while in service worked at civilian employment for forty days, receiving payment at the rate of $4.00 per day or a total of $160. He spent 600 days in the service. The Iowa bonus figured at 50 cents per day for this period would be $300. Should this amount be reduced $160, the amount he received for his civilian work, or should it be reduced $20, figuring forty days at 50 cents per day?

"4. Section 4 states, 'The husband or wife, etc., of any person as defined in this section who died in service, etc., shall be paid the sum that such deceased person would be entitled to hereunder if such deceased person had lived.' Assuming that the widow of a deceased ex-service man has remarried does she cease to be a widow within the definition of Section 4 and therefore, ineligible to participate in the bonus in preference to a mother or child?"

You first ask as to the eligibility of members of the First and Second Officers' Training Camps. This question involves the right of the Bonus Board to make allowance for the time spent by the applicants as students in the First and Second Officers' Training Camps which were held commencing May 15 and May 25, 1917, respectively. You are advised that the question as to whether or not candidates at these two officers' training camps were in the military service has been determined by the United States government. The Adjutant General of the Army states:

"In reply to your communication of the 20th instant, making inquiry as to the regulations governing the attendance of candidates at the Officers' Training Camp in 1917, I have the honor to advise you as follows:

"I regret that no general instructions were published and are available that would serve your purpose. In the main, however, it may be stated that candidates at the Officers' Training Camps held from May 15, 1917, to August 15, 1917, and from August 25, 1917, to November 26, 1917 (unless otherwise enlisted) were not in the military service of the United States. These camps were held under the provisions of section 54 of the National Defense Act of June 3.

"I am enclosing a copy of an opinion of the Judge Advocate General of the Army, dated October 10, 1919, relative to the status of these men. This opinion was approved by the Secretary of War and sets forth the Department's views relative to their status. I am also enclosing a copy of the National Defense Act of June 3, 1916 (War Department Bulletin No. 16). If there seems to be a doubt as to the status of individual cases the department would be glad to make a report in such cases."

Chapter 332 of the Acts of the Thirty-ninth General Assembly (The Soldiers' Bonus Law) provides only for the payment of the bonus for the time actually spent in the military service of the United States. It necessarily follows that your first question must be answered in the negative and it must be held that the time spent in the two first training camps cannot be taken into consideration in determining the allowance to an applicant for the bonus.

You are advised, however, that as to soldiers of the National Guard ordered into federal service or as to officers of the reserve corps ordered into federal service or, as to soldiers of the regular military establishment, that they would receive pay for the time actually spent in the military service whether they were in attendance at such camp or not. I make this reference in order that there may be no error or misunderstanding.

Without repetition, you are advised that the second question must be answered in the affirmative. Section 4 of chapter 332 of the acts of the Thirty-ninth General Assembly clearly states that where the soldier serves both in the students' army training corps and in the regular military service that he will be entitled to the bonus for the entire period.

Without repetition you are advised that the third question submitted by you is to be answered as follows: "The bonus is to be paid to the soldier for the number of days spent in the military service and for which he did not receive civilian pay for civilian work. The number of days spent in civilian work for which civilian pay was received is deducted from the total number of days in the military service and the result multiplied by fifty cents. The result is the amount to be paid the soldier.

The fourth question submitted by you involves the payment of the bonus where the person primarily entitled to the same is deceased. Section 4 of chapter 332 of the Acts of the Thirty-ninth General Assembly (The Bonus Law), among other things, provides:

"* * * The husband or wife, child or children, mother, father, sisters or brothers, in the order named and none other, of any person as defined in this section, who dies while in the service or who has deceased before receiving the benefits of this act, shall be paid the sum that such deceased person would be entitled to hereunder if such deceased person had lived."

Section 7 of said chapter 332 provides among other things as follows:

"* * * No assignment of any right or claim to benefits hereunder made prior to the issuance of the state auditor's warrant herein provided for, shall be valid, and any transfer or attempt to transfer any such right or claim or any part thereof by any beneficiary prior to the issuance of such warrant and the acquiring of or attempting to acquire by any other person of any interest in or title to such claim prior to the issuance of such warrant, shall be a misdemeanor and punishable as such."

It will be observed that the bonus does not vest until it is actually received by the person entitled to it. If the soldier dies prior to the actual receipt of the money, then, the personal representative of such soldier will not be entitled to receive the bonus. Under such circumstances, the right to receive passes directly to the husband or wife, child or children, mother, father, sisters or brothers, in the order named and none other. The right to receive is a personal right and dies with the person. The exact status, then, at the very time the bonus is to be paid, governs. The use of the word "wife" in this section is unfortunate. A wife is the spouse of a live person. What the legislature really intended was that the widow should receive after the soldier. It has been uniformly held by the courts that a woman cannot be the widow of one person and the wife of another at the same time. Therefore, where the widow re-marries she ceases to be either the widow of the deceased soldier or his wife. She cannot occupy a dual position.

In Re: Kerns Appeal, 120 Pa. State, 523-528,
Commonwealth vs. Powell, 51 Pa. State, 438-440,

In the Matter of Ray, 13 Misc. (N. Y.) 480-484, 35 N. Y. Suppl. 481,
Rittenhouse vs. Hicks, 10 Ohio, Deceased, 759,
Kunkle vs. Reeser, 5 Ohio, Deceased, 422-425.

It would seem to the writer, however, that it is unnecessary to question the general doctrine as laid down by the courts. If this act be taken by its four corners and read carefully, it will be observed that it is a beneficial right for the benefit of certain persons who are not only deserving by reason of service but who are to be benefited by the money paid. The instant the wife of a deceased soldier re-marries she is no longer dependent upon his bonus for a livelihood nor is she connected with the soldier by marital ties. She has become the wife of another person and the marriage relation does not exist between the soldier and the woman. This is the rule adopted by the Federal government in all grants of pension and has been uniformly followed in the administration of the service pension acts of the United States. It follows that where the husband or wife re-marries, the right to the bonus is lost and vests next in the child or children, mother, father, sisters or brothers in the order named.

APPLICATION FOR PAROLE. County attorney must sign application under section 5718-a18, Supplement of 1913. Signature of assistant county attorney is not sufficient.

June 2, 1923.

Chairman, Board of Parole: Your favor of the 28th to this department at hand, in which you ask for an opinion upon the following proposition:

"Applicant has made a written application for parole before commitment under the provisions of Section 5718-a18, Supplement 1913, and has filed with his application a recommendation of the trial judge for parole. He has not filed with his application a recommendation of the county attorney who was in office at the time of conviction but who has since been succeeded by another. Applicant does, however, file recommendation of the assistant county attorney at the time of trial and who prosecuted the case."

Section 5718-a18, Supplement of 1913 to the Code, provides:

"* * * It may on the recommendation of the trial judge and county attorney, and when it shall appear that the good of society will not suffer thereby, * * *"

Section 303, Code of 1897, provides:

"Deputies—Assistants—Compensation. He may appoint deputies, who shall act without any compensation from the county, to assist him in the discharge of his duties. With the approval of the district court he may procure such assistance in the trial of a person charged with the crime of felony as he shall deem necessary, * * *".

Section 303-a, Supplement of 1913, as amended by Chapter 21, Acts of the 37th General Assembly, Section 1, provides:

"Assistants—Compensation. The county attorney may in writing, with the consent of the board of supervisors, appoint one or more practicing attorneys, who are residents of his county, as his assistants. The compensation of such assistants shall be fixed by the board of supervisors, and be paid out of the county treasury, and shall not exceed the following amounts: * * *. In any county with the approval of the judge of the district court, he may procure such assistants in the trial of a person charged with felony as he shall deem necessary. * * *"

It will be noted from reading the above statute that the legislature provided for assistants to county attorneys, but it has not attempted to define or describe the powers and duties of the assistants. If the legislature had intended to authorize

the assistants to do and perform such acts as the county attorney is authorized to do as independent officers, it seems strange they did not say so, especially in view of Section 304, Code of 1897, that authorizes the appointment of a substitute for the county attorney in case of sickness or disability, that in part is as follows:

"* * * and while acting under said appointment, he shall have all the authority and be subject to all responsibility herein conferred upon county attorneys * * *".

The deputies appointed under Section 304 of the Code of 1897 are given all the authority and responsibility of the county attorney.

The county attorney is an officer in whom official discretion and powers of the office are vested, and may when authorized by law perform the functions of his office through the services of assistants acting under his direction and supervision, but he cannot delegate to them where such assistants are not by law given the authority, the power to perform his official duties independent of any control or direction by him, and in accordance with their own individual judgment and discretion. An assistant is one who stands by and aids or helps another in the performance of the latter's duties, and unless there is a clear expression in the statute to the contrary, it will be presumed that the legislature intended that public duties, which require the exercise of discretion, should be performed by the public officers themselves and not by their assistants. (*Lower vs. State,* 184 N. W. 174 (Neb.); *Commonwealth vs. Smith,* 141 Mass. 135, 6 N. E. 89; 18 C. J. 1346.)

It is of the highest importance to the public that this discretionary power vested in the county attorney should be carefully exercised, and that the responsibility should rest upon the officer to whom it is confided. (*McGarrah vs. State,* 133 Pac. 260 (Okla.).) It is directly contrary to public policy to allow any general delegation of a prosecutor's powers, and unless it clearly appears that the legislature intended to make the assistant county attorney an independent official and clothe him with power to act in his own name, he cannot exercise the discretionary powers lodged in the county attorney.

It is quite clear that the legislature did not make the assistant county attorney an independent officer and clothe him with the power to act in his own name. At best he is a mere agent of the county attorney, and as such must perform official acts in the name of his principal.

It is therefore the opinion of this department that the recommendation provided for in Section 5718-a18, Supplement of 1913, should be signed by the county attorney.

GOVERNOR. Temporary absence from state—authority of Lieutenant Governor to act. Constitution provision discussed. Held—Governor may determine necessity for calling upon Lieutenant Governor to act.

August 23, 1923.

Governor of Iowa: You have called to the attention of this department the fact that your physicians have advised that your health is such as to demand an extended vacation on your part. That during such time you should abstain from the performance of all official duties. In the advice of your physicians you personally agree, believing that your physical condition is such as to disable you for the time being from the full performance of your duties as governor.

As we understand, it is your desire that the duties of the chief executive should be fully performed at all times and that during the temporary period of your absence, it is your desire that Lieutenant Governor Hammill act for you. As we

understand it, the period of your absence is indefinite, but will probably be for a period of two or three months.

The sole question for our determination is as to whether or not the Lieutenant Governor can, during your temporary absence, perform the duties of Governor.

Section 17 of Article 4 of the Constitution of Iowa provides as follows:

"Section 17. In case of the death, impeachment, resignation, removal from office, *or other disability of the governor,* the powers and duties of the office for the residue of the term, or until he shall be acquitted, or the disability removed, shall devolve upon the lieutenant governor."

This section is a re-wording of section 18 of Article 4 of the old Constitution of Iowa. The clause "or other disability of the governor" was not included in the old constitution. Constitutional Debates, Vol. 2, 1080. We are firmly of the opinion that during the temporary disability of the governor, that the lieutenant governor may act as governor. Our conclusions are reached only after careful thought and consideration.

From a consideration of this article it will be observed that in case of death, resignation or removal from office of the governor, that the lieutenant governor succeeds him as governor of the state for the residue of the term. It will further appear that when there is a temporary disability of the governor, the lieutenant governor acts in his stead during the period of time such disability continues. In the first instance, the lieutenant governor becomes governor. In the second instance he simply acts as governor during the temporary disability of his chief.

A study of the history of this section (Constitutional Debates, Vol. 2, 1080) will disclose the fact that the clause "or other disability of the governor" was not included in the old Constitution. That it was inserted in the new Constitution for a specific purpose is obvious. What was that purpose? A careful study of section 18 of Article 4 of the old Constitution will disclose the fact that there was no means provided whereby the duties of the chief executive might be performed during the disability of the governor.

For example, if the governor was so disabled as to render him either physically or mentally incapable of performing the duties of his office, there was no provision whereby anyone could act as chief executive. This presented an intolerable condition. The chief executive of the state is the head of the executive branch of the government. For that branch of the government to cease to function for any extended period of time can only result in paralyzing and dislocating the functioning of the entire structure.

It is obvious then, that the purpose and object sought to be accomplished by the insertion of this clause was to insure that during all future time the state should have an executive department continuously functioning.

Not only is this conclusion reached from study of the history of the constitution, but it is also reached without difficulty by the application of the simple rules of constitutional construction. It is fundamental that the words and terms of a constitution, like those of a statute, are always to be given their natural and obvious meaning. That is, the meaning in which they are commonly and ordinarily understood. *Gibbons v. Ogden,* 6 L. E. (U. S.) 23; *Halsey v. Belle Plaine,* 128 Iowa, 467; *People v. May,* 3 Mich., 598; *Manley v. State,* 7 Maryland, 135; *Miller v. Dunn,* 72 Calif. 462.

The clause "or other disability of the governor" has a common and ordinary meaning. As stated in *Hill v. Insurance Company,* 146 Iowa, 133:

"The word 'disability' does not express the same meaning as the word 'death'; nor is it ordinarily used as signifying the same thing. 'Disability' is defined as a want of competent power, strength, or physical ability; sickness; incapacity; impotence."

Similar meaning has been given to the actual words as they are used in the Iowa Constitution. The Supreme Court of Nebraska in *State v. Boyd,* 48, N. W. (Neb.) 739, says:

"Under the provisions of section 16 noted above, the duties of the office of governor devolve upon the lieutenant governor in certain contingencies, among which are the failure of the governor-elect to qualify, and disability of the governor. The words 'other disability,' as used in the section, have no reference to the ineligibility of the person to be elected to the office, but were intended by the framers of the constitution to cover any disability of the governor not specifically enumerated in the section, after the commencement of his term of office."

The Supreme Court of West Virginia, in *Carr v. Wilson,* L. R. A. (W. Va.) 64, says:

"Again; I do not think the non-declaration of the result of the election is a disability of the governor such as is intended by the constitution. It is simply non-action, or incomplete action, by the agencies of the laws assigned to vest the title in the candidate. It is not like insanity, continued absence or other disability connected with the person of the governor. Death, conviction or impeachment, failure to qualify or resignation would produce vacancy; and it would seem that language 'or other disability' meant something of a different character from those cases named—*something attaching to the person of the governor and disabling him;* and this construction seems confirmed by the after language of the section providing that the president of the senate shall act as governor until the vacancy is filled or the disability is removed, thus using the words 'vacancy' and 'disability' as meaning different things—'vacancy' referring to death, conviction, failing to qualify or resignation, *but 'disability' referring to something relating to the person, and for the time being disabling him, notwithstanding the use of the word 'other.'*"

An identical situation to that presented by you was presented in *Barnard v. Taggert,* 29 Atl. (N. H.) 1027. The facts in this case were substantially as follows: The governor of New Hampshire became ill and his physicians advised that it was necessary that he take a vacation of some length. He was informed that his health was impaired to such an extent as to render it necessary to the best interests not only of the state, but of the governor, individually, that such a vacation be taken. Thereupon the governor wrote to the attorney general as follows:

"Antrim, Mar. 31, 1890.

"Daniel Barnard, Esq.,
"Attorney General.

"Dear Sir: Please take such steps as you think necessary to cause the president of the senate to exercise the powers of the office of governor during the vacancy caused by my illness. I am not able to perform the duties of the office, and the public service should not suffer from my inability.

"Very truly yours,
"D. H. Goodell."

The attorney general at once demanded that the president of the senate, during such temporary absence of the governor, act as governor. He refused, and the attorney general brought an action in mandamus to compel him to act. The court held that during the temporary disability of the governor, the president of the senate should perform the duties of the executive and that the governor was to determine the commencement and ending of such disability. Among other things, the court says:

"The mischief designed to be prevented was the suspension of executive government by the governor's death, absence from the state, or disability. 9 Cong. Rec. pt. 1, 46th Con. 1st. Sess. pp. 184-189, 273-285, 287-298, 312-325, 341-355; Opinion of the Court, 60 N. H. 585. The prescribed remedy is the duty of a substitute to act in cases of necessity. The services of a substitute may be necessary when the governor's absence or disability is temporary as well as when it is permanent. When there is an office to which no one has a title, and which is in fact held by no one, there is a vacancy. *Johnston v. Wilson,* 2 N. H. 202, 203; Mechem, Pub. Off. 127. But, in article 49, 'vacant, by reason of his death, absence from the state, or otherwise,' has a broader signification if due weight is given to the evidential force of the primary and leading purpose that the executive work shall go on without interruption. An intermittent vacancy, such as occurred in the time of Governor Weare, may occur again; and the evils of an interregnum, which article 49 was intended to prevent, are not to be introduced by technical reasoning or arbitrary rules. 'If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, * * * the objects for which it was given * * should have great influence in the construction.' *Gibbons v. Ogden,* 9 Wheat. 1, 189. The general object of article 49 forbids a construction that would sometimes cripple the government, and render it powerless in a department in which the public safety requires constant readiness for action."

Without extending this opinion further, it is obvious that whenever the governor shall determine his physical condition to be such as to disable him from fully and completely performing the duties of his office, he may call upon the lieutenant governor to act in his stead, until the removal of the disability. In cases of physical disability, there is no doubt but that the governor is to determine the time when such disability begins and the time when it ends. During such period of time the lieutenant governor does not become governor, but remains lieutenant governor performing the duties of the office of governor during the period of time as decided by the governor himself.

Finally may we suggest that you should enter in the executive journal of the governor a statement of the fact that you find your physical condition to be such as to temporarily disable you from the performance of your duties as governor, and that you have asked the lieutenant governor to act in your stead during your temporary absence from the office. You should note that the lieutenant governor is to act as governor only until your return to the capitol. You should note that your absence from the office is only temporary and that you will return when, in your opinion, your health is such as to permit of your doing so. Your record should be clear to the effect that there is no resignation or permanent abandonment of the office of governor, and that the lieutenant governor is to act for you only during your pleasure.

PAROLE. The time a convict is on parole is not to be computed in determining the length of time he shall serve under sentence.

August 23, 1923.

Warden, Men's Reformatory: Your favor of the 13th to the Attorney General requesting an opinion from this department has been referred to me for reply. Your request is as follows:

"This man was sentenced on August 4, 1920, for five years and received a parole from the bench and said parole was revoked on June 1, 1921, and he was received at this institution on June 3, 1921.

"The question of the expiration of his time has now arisen 'Should this man receive credit for the time he was on parole?' as the court's order states or 'should his time be computed from the time he was received at this institution?'"

The court's order in this case dated August 5, 1920, provides that the defendant should be confined in the Reformatory for a period of five years after that date and then suspended the sentence during his good behavior. On June 1, 1921, the court in this same cause conducted a hearing on the matter of the parole of this defendant, and found after hearing the evidence that the parole had been violated, and thereupon annulled the suspension of sentence, and ordered that the defendant be remanded and sentenced to imprisonment in the Reformatory "for the remainder of an indeterminate period of five years from and after the 5th day of August, 1920, the same as though the defendant had never been paroled in this cause."

It has been uniformly held that the time a man is on parole is not to be computed in determining the time he shall serve.

In re Ridley, 106 Pac. 549,
26 L. R. A., New Series, 110, 115,
Scott v. Chichester, 16 L. R. A., New Series, 304 (note),
State v. Horne, 42 Southern 388,
7 L. R. A., New Series, 719,
Arthur v. Craig, 48 Iowa 264.

Under our indeterminate sentence statute the court, in a case such as the one under consideration, wherein the defendant was found guilty of the crime of grand larceny, has no discretion in fixing the time that the defendant shall serve. The statute makes it the court's duty to fix the maximum time, and the cause is thereafter referred to the Board of Parole for their consideration.

In the case under consideration the court in his judgment in effect reduces the maximum term of the sentence by the period of from August 5, 1920, to June 1, 1921, thus fixing a less time than the maximum provided by the statute.

For the above reasons, we are of the opinion that the defendant should not receive credit for the time he was on parole, and that his time should be computed from the time he was received at the Reformatory.

STATE LANDS. Correction of mistake in issuing patent. Error can only be corrected by legislature. Governor and Secretary of State have no authority to issue new patent.

July 26, 1923.

Governor of Iowa: We desire to acknowledge receipt of your communication of July 18, 1923, submitting to this department, for an opinion, the following questions:

"I am just in receipt of a letter from Hon. A. A. Arnold, of Prairie City, submitting to me the following inquiries:

"First: Where the state of Iowa, by its proper officials, the Governor and Secretary of State in 1866 made a mistake in the legal description of the land to be conveyed when issuing a patent for the same, have the present state officials the right to correct the mistake by issuing a supplemental patent or other instrument, giving the correct, legal description of the land and stating the reasons for issuing it after the matter has been called to their attention and they have satisfied themselves by examining the records in the office of the state of Iowa that the mistake was only a clerical error?

"Second: If the present state officials have not the authority or power to correct the mistake, what steps must be taken by the present owner or owners of the land to have the mistake corrected? The following is the case in question:

"On the 29th day of October, 1866, the state of Iowa issued a patent to Thomas Logan for the north one-half of section four, township seventy-eight, range twenty, west of the Fifth P. M., Jasper county, Iowa, see volume one, page 21, Records

of Patents and Agricultural College Lands in the office of the Secretary of State. This section number four being just south of the correction line running east and west across the state of Iowa, is an over-sized section, containing nearly 960 acres and is sub-divided as follows: The north part which contains nearly 640 acres is divided into lots numbered one to eight inclusive and no part of it is called or known as the north one-half of the section. The tract intended to be conveyed being Lots 5-6-7 and 8 or that part of the section that would have been known as the north one-half if the section had been of regular size.

"I shall be glad if you will advise me concerning the matter at your early convenience, and I beg you to believe me, always with personal regard."

We have given to the questions you have submitted the careful consideration that their importance demands, and we are of the opinion that your first question must be answered in the negative. We believe that, under the present state of the law, the Governor and Secretary of State do not have the right or authority to execute and deliver a patent to correct a mistake in the description of the property conveyed by the state in 1866.

The statutes of the state relating to the issuance of patents, including special laws, when read as a whole, as they must be, indicate an intent on the part of the legislature that no patent shall be issued unless specific authority so to do is granted. We find, however, no statute specifically vesting authority in the Governor and Secretary of State, or any other state officials, to issue a supplemental patent, or other instrument, to correct a mistake in legal description of land in a patent issued in 1866, and stating the reasons for issuing it.

There is, however, a statute which may properly be termed the Public Land Law of the state, which is embodied in Sections 72 to 88, both inclusive, of the Code. In this statute are found two sections that relate to the correction of errors in deeds or patents. We refer to Sections 78 and 81 of the Code. In our opinion, Section 77 is not applicable because it is manifest that the authority therein granted is to correct all clerical errors on the records in the office of the Secretary of State. Said section grants said officer authority "to correct all clerical errors of his office in name of grantee and description of tract of land conveyed by the state, *found upon the records of such office.*" meaning, no doubt, only such mistakes as appear upon the records therein. This section does not, in our opinion, vest any authority in the Secretary of State to issue a patent under the facts stated in your letter.

Section 81 grants to the Governor the right and authority to issue a patent conveying to the United States Government land that was deeded by said government to the state of Iowa when such land was not intended to be so conveyed. Obviously, this does not meet the situation we are now considering.

The legislative history of Iowa, in relation to the issuance of state patents, seems to indicate conclusively that it was not the intention of the legislature to vest in any of the state officials full and complete authority to execute and deliver patents in the absence of a statute specifically authorizing them to do so. Ordinarily, patents have only been issued when the legislature granted to the Governor and Secretary of State, the authority to do so in each particular case. In the last three sessions of the General Assembly, many special statutes were enacted granting authority to issue such patents, some of which were issued for the purpose of correcting mistakes in the description of property contained in patents that were executed many years ago. The legislature, during the session of the Thirty-eighth General Assembly, enacted five of such statutes—Chapters 137, 154, 157, 195 and 323. Chapters 403, 404, and 405 of the Thirty-ninth General Assembly also authorize

the execution and delivery of patents. The legislature, at its last session, the Fortieth General Assembly, enacted three of such statutes—Chapters 314, 317 and 339.

Therefore, we are of the opinion that the Governor and Secretary of State have no authority to issue a patent such as you describe in your communication.

Our answer to your second inquiry is that the matter should be submitted to the legislature at the special session to be held in December. No doubt, the legislature will authorize the execution and delivery of a patent correcting the mistake in the former one so that the title to said property may be perfected in the present owner. This should be done as a mere matter of justice and right.

TOWNSHIPS. Division of—duty of supervisors in passing upon petition and remonstrance.

July 14, 1923.

Hon. Fred S. Himebauch, House of Representatives: We have received your communication dated June 9, 1923, asking this department for an opinion upon the following questions:

"I am enclosing a copy of the petition to divide the township of Estherville about which I corresponded with you of recent date.

"You declined to give an opinion of whether an affidavit signed after a party had signed a remonstrance would count because you didn't know what the dates of signing were.

"This is the case: Harry Jones signed the petition say May 10, 1923, then signed the remonstrance May 25, and again signed an affidavit asking the board not to count his name on the remonstrance as he had signed it while under false impressions given by the man circulating it, on June 2. On what side will he count?"

The provisions of the statute relating to the question you have submitted are embraced in sections 3430, 3431, 3432 and 3433 of the compiled code (code section 554, code supplement, 1913, 555, code, 556, and code 557). Section 3430 contains the following provision:

"Remonstrances signed by such legal voters may also be presented at the hearing before the board of supervisors hereinafter provided for, and if the same persons petition and remonstrate, they shall be counted on the remonstrance only."

As the latter part of the above section seems to be a complete answer to your question, it would, under ordinary circumstances, be the end of our inquiry, but your letter contains a statement that seems to indicate that the elector, Harry Jones, signed the remonstrance because of "false impressions given by the men circulating it." In other words, that he was induced to sign the remonstrance because of the fraudulent representations of the men circulating the remonstrance.

We are of the opinion that, when an elector actually signs the remonstrance, he cannot secure his withdrawal therefrom on the ground that he was defrauded into signing it. A board of supervisors, in passing upon a petition to divide a township, which has within its limits a city or town with a population exceeding 1,500 inhabitants, acts in a judicial capacity and its action thereon is final until set aside by some appropriate judicial proceeding.

Baker vs. Board of Supervisors, 40 Iowa, 226,
Bennett vs. Heatherington, 41 Iowa, 142,
Herrick vs. Carpenter, et al., 54 Iowa, 340.

It does not follow from this conclusion, however, that there is open to the board of supervisors, in passing upon said petition, the entire field of judicial inquiry. We

believe that in passing upon said petition, the board of supervisors must, of necessity, determine the following questions of fact:

1. That the petition is sufficient in form and substance.
2. That it has been signed by a majority of the electors after deducting the names of all electors who signed both the petition and the remonstrance.
3. That all of the signers are qualified electors residing within the township or district.

Most, if not all, of the above questions inhere in the question that the board of supervisors must determine in making a division of the township, as prayed for in the petition, and can be determined by a mere examination of the petition and the affidavits attached thereto, or may be within the personal knowledge of the board. It seems to be the rule that the jurisdiction of the board is limited, in determining the question submitted, to the evidence specified in the statute, and that the members thereof have no power or right to consider extrinsic evidence to show what were the motives of the electors in signing either the petition, or the remonstrance.

Herrick vs. Carpenter, 54, Iowa, 340.

If the members of the board of supervisors were, under the statute, permitted to determine the question as to why any particular voter, or group of voters, had signed either the petition or the remonstrance, and should then determine the sufficiency of their reasons in so doing, it would open up a field of litigation that would seem to have no ending. We do not believe that the law contemplates such a hearing, nor that it has granted to the board such powers.

It has been held by the Supreme Court that the board of supervisors in passing upon the sufficiency of the petition asking for the relocation of county seat does not have the power to investigate fully issues of fraud that may be raised.

Luce vs. Fensler, 85, Iowa, 596.

We can see no reason why the case we are considering should, or can be distinguished, from the cited case and, if the board did not have such power in the case cited, then the board would not have such power under the facts you have submitted. It is clear from the authority cited that, in the absence of constitutional restrictions, and there appear to be none in this state, the legislature has full power to provide a tribunal with exclusive right to determine the questions that must be determined by the board in exercising the power granted under the statutes we have cited. *Luce vs. Fensler, supra.*

We believe that it necessarily follows from what we have hereinbefore stated that the affidavit of the elector, Harry Jones, would not have the effect of removing his name from the remonstrance and that if he actually signed it, he is bound thereby. Therefore he should be counted with the names on the remonstrance.

HISTORICAL DEPARTMENT—EXPENDITURES. Interpretation of Section 7 of Chapter 307, Acts of 40th General Assembly. Appropriation for biennial period commencing July 1, 1923, and ending June 30, 1925, not available for expenses incurred in April, 1923.

July 24, 1923.

Auditor of State: I am in receipt of your letter dated July 20, 1923, in which you request an opinion from this department. Your request is in words as follows:

"Request is made that you furnish this department with an opinion as to whether

or not expenses incurred during the month of April, 1923, would be properly payable from the appropriation made by chapter 307, section 7-b, laws of the Fortieth General Assembly."

You are advised that the appropriation of five hundred dollars referred to in this section and paragraph is for the two years commencing June 30, 1923, and ending June 30, 1925. This being true, it would not be available for the payment of expenses incurred during the month of April, 1923.

INVESTIGATION OF STATE OFFICERS.

March 29, 1923.

Governor of Iowa: I am in receipt of your letter dated March 22, 1923, in which you request an official opinion from this department on the following proposition:

"Where misconduct, not involving the misappropriation of public funds, is alleged against an elective state officer, which if established would authorize his removal by impeachment proceedings, does the statute invest the Governor or the Executive Council with authority to investigate such alleged misconduct, summon witnesses, compel their attendance, etc.? Or is that authority reposed in the General Assembly, to be exercised through its regularly constituted committees?"

Under the statute certain powers are vested in the Executive Council to make investigations relative to the conduct of each of the several departments of the state government. The law relating thereto is to be found in section 161 of the code as amended in section 161-a of the supplement to the code, 1913, and chapter 409 of the acts of the 38th General Assembly. The law as thus amended is in words as follows:

"The executive council shall, annually, and oftener in its discretion, make a full statement between the state of Iowa and all state officers, commissions, boards, association, societies, organizations, departments and all persons receiving, handling or expending state funds.

"For that purpose an expert accountant and assistants, the number to be fixed by the executive council, at such annual salaries as shall be fixed by law, shall be employed to examine the methods of accounting, the books and accounts, of all state officers, commissions, boards, associations, societies, organizations, persons and departments.

"The expert accountant so appointed shall report in writing, to the executive council, the facts and conditions found, with his suggestions and recommendations, as to improvements in methods of conducting the business of the department, the improvements in the method of bookkeeping and any other change which, in his judgment, would tend to lessen the costs of operation, or increase the efficiency of the department, and shall also report the facts as to any practices in administration not authorized by statute, or contrary to good business methods.

For the purpose of ascertaining the best methods of conducting the business of any department, should a change be deemed expedient, the expert accountant may, with the consent of and authority of the executive council, call to his assistance a specialist in the methods sought to be established in any department. The expert accountant and specialist shall report in writing, to the executive council, their findings and recommendations, which, if approved by the executive council, shall be adopted by such department, officer, board, association, society, organization, or commission, at such time as fixed by the executive council, and provided further, that should the executive council deem it advisable, it shall send the expert accountant to examine the records and methods of conducting the business in other states, or business institutions. The executive council shall have, at all times, authority to direct the methods of accounting, the manner in which the records and accounts of state departments shall be kept, when the statute does not specifically prescribe the same; to require a compliance with their orders and the provisions of law when the statute prescribes duties as to methods and accounts, and to require the

keeping of the necessary records and accounts to enable said officers to make all reports required of them by law.

"Provided that nothing herein shall be construed so as to interfere with the system of taking care and management of the institutions under the charge of the board of control or the state board of education."

Under this statute the Executive Council has heretofore employed Mr. Paul as an expert accountant for the purpose of making settlements with each of the several departments and officers. In addition to the employment of the expert accountant this statute authorized the Executive Council to employ additional accountants or specialists for the purpose of making particular investigations as to the records and business of each of the departments of state government. The authority thus vested, however, has relation only to the manner and method of conducting the business of the office in and so far as accounts are concerned.

However, should the investigation by such accountant or accountants disclose the fact that there has been a misappropriation of funds or other misconduct such as would justify a further investigation of the matters so referred to, the Executive Council would undoubtedly be authorized to make such further investigation and for that purpose might well proceed under the provisions of chapter 158 of the acts of the 39th General Assembly. This statute further provides that the accountant so employed shall report in writing to the Executive Council and in such written report state the facts and conditions found with suggestions and recommendations as to improvements in the method of bookkeeping and any other change which in his judgment would tend to lessen the cost of operation or tend to increase the efficiency of the department, "and shall also report the facts as to any practices in administration not authorized by statute, or contrary to good business methods."

It follows that under this statute the procedure which should be followed by the Executive Council is to appoint an expert accountant to make the investigation and report. If the facts should then warrant the Executive Council might proceed under chapter 158 of the acts of the 39th General Assembly to assemble facts and evidence which in conjunction with the report of the accountant would form the basis of such recommendations or action as the council might deem right and proper.

Chapter 158 of the acts of the 39th General Assembly does not, however, authorize any investigations. What this statute does is to provide that where an investigation is in fact directed by the General Assembly or authorized by law that then the Executive Council shall have authority to subpoena witnesses and take evidence.

The Governor under the provisions of sections 1259, 1260, 1261, 1262, 1263 and 1264 of the code is also vested with certain authority and control over each and all of the several departments of the state government. This statute is in words as follows:

Sec. 1259. The governor shall, when of the opinion the public service requires it, appoint a commission of three competent accountants, who shall examine the books, papers, vouchers, moneys, securities and other documents in the possession or under the control of any state officer. Such accountants shall make out a full, complete and specific statement of the transactions of said officer with, for or on behalf of the state, showing the true balances in each case, and report the same to the governor, with such suggestions as they may think proper.

Sec. 1260. Said commission shall have power, when in session, to issue subpoenas, call any person to testify in reference to any fact connected with their investigation, and require such person to produce any papers or books which the district court might require to be produced.

Sec. 1261. If it shall report that any officer has been guilty of any defalcation or misappropriation of public money, or that his accounts, papers, books are improperly or unsafely kept, the governor shall forthwith suspend such officer from the exercise of his office, and require him to deliver all the moneys, books, papers and other property of the state to him, to be disposed of as hereinafter provided, and thereafter it shall be unlawful for such officer to exercise or attempt to exercise any of the functions of his office until such suspension shall be revoked; and any attempt to exercise such office by the suspended officer shall be punished by imprisonment in the county jail not more than one year, or by a fine not exceeding one thousand dollars, or by both fine and imprisonment.

Sec. 1262. In every such case, the governor shall appoint some suitable person to temporarily fill the office, who, having qualified as required by law, shall perform all the duties and enjoy all the rights belonging to the said office, until the removal of the suspension of his predecessor, or the appointment or election of a successor.

Sec. 1263. When the governor shall suspend any public officer, he shall direct the proper legal steps to be taken to indemnify the state from loss.

Sec. 1264. The commissioners provided for in this chapter shall each receive the sum of three dollars per day for the time actually employed in the performance of their duties.

You will observe that under these sections the Governor, when of the opinion that the public service requires it, may appoint a commission of three competent accountants to make an investigation as to the books, papers, etc., of any official. The authority vested in the Executive Council as heretofore stated seems to be an almost duplication of the power vested in the Governor under these statutes. Under the provisions of the latter statutes, however, the Governor is authorized to temporarily suspend any officer, whether the office held be provided by the constitution or by legislative enactment. This power in the Governor has been sustained by the Supreme Court in the case of *Brown vs. Duffus*, 66 Iowa 193. It would seem, therefore, that if either the Governor or Executive Council should desire to make an investigation of any office or officer that the proper procedure to follow would be to either appoint an expert accountant under the statute relating to the Executive Council or under the statutes relating to the powers of the Governor. If the commission or the expert accountant should report conditions which would require further investigation, then the council might proceed under the provisions of chapter 158 of the acts of the 39th General Assembly.

If facts should come to the attention of the Executive Council or the Governor with relation to any officer during the time in which the General Assembly is in session it would be the instant duty of such body or officer to report such facts to the proper committee of the General Assembly for such action as might be deemed proper. During the time in which the General Assembly is in session the legislative and the executive branches of the government should, in my opinion, work in the utmost harmony to secure the true facts relative to any investigation.

Should the General Assembly desire the Executive Council to make any particular investigation, then such investigation should be made under the power and authority provided in chapter 158 of the acts of the 39th General Assembly.

COURT (DISTRICT). Has no jurisdiction to commute sentence after committment.

March 5, 1923.

County Attorney, Linn County, Cedar Rapids, Iowa: Your favor of the 1st directed to the Attorney General has been referred to me for attention. You ask for an opinion upon the following proposition:

"A member of the local district court asked me for an opinion relative to the court's power in commuting a sentence after committment to jail. I advised the court that I thought that the court had lost jurisdiction of the case after committment had once taken place, and that the only recourse would be an application to the Governor direct, for a pardon."

It is the opinion of this department that in the case you have stated the district court has no jurisdiction to commute a sentence, and that the only remedy would be by an application to the Governor.

COURT (TRIAL). Has authority to suspend execution of sentence under Section 5447-a, S. 1913, at any time prior to issuance of an execution.

March 15, 1923.

Chairman, Board of Parole: Your letter of March 8th to the Attorney General has been referred to me for reply. In this letter you ask for an opinion upon the following proposition:

"Your opinion is requested upon the following statement of facts in relation to Section 5447-a, 1913 Supplement of the Iowa Code, which we understand has not been amended so as to affect the subject matter of this inquiry.

"A man has been convicted in the district court of Iowa, of the crime of larceny, the conviction being the first, and he has been sentenced thereon and judgment entry made without suspension of sentence.

"Upon appeal to the Supreme Court, the case has been affirmed and procedendo issued and received by the clerk of the trial court.

"First, has the trial judge authority to suspend execution of sentence thereafter and before actual committment? Second, when does the authority of the trial judge to suspend a sentence under the provision of Section 5447-a cease?"

Section 5447-a, 1913 Supplement of the Code does not provide for the suspension of sentence but provides in language that is clear and explicit for the suspension of execution of sentence. There is a very clear distinction between the suspension of sentence and the suspension of execution of sentence. In connection with this section there should be taken into consideration Section 5443, Code of 1897, that provides for the execution of sentence and Section 5466, Code of 1897, that provides for the decision of the Supreme Court upon affirmance and for the return of the cause to the district court.

It is my opinion that the trial judge has authority to suspend the execution of sentence under Section 5447-a, Supplement of 1913 of the Iowa Code, at any time prior to the issuance of an execution under Sections 5443 and 5466, Code of 1897, above referred to. As bearing upon this proposition see also the case of *State vs. Voss,* 80 Iowa 467.

SHERIFF. Entitled to fees in foreclosure proceedings.

March 19, 1923.

County Attorney, Buena Vista County, Storm Lake, Iowa: I have your favor of the 14th at hand in which you ask for an opinion upon the following proposition:

"Foreclosure proceedings were started against certain real estate in this county. Judgment was obtained and execution issued and put into the hands of the sheriff. The sheriff advertised the premises for sale according to law, but a day or two before the sale was to take place a certain party furnished the money necessary to the mortgagor and costs were paid and proceedings stopped under the foreclosure. Everything was done except that the premises were not sold nor a sheriff certificate issued. Among the costs that were paid was a percentage which would have been accruing to the county or state if the premises had been sold and which percentage the sheriff will have to account for. The sheriff charged this percentage

up and same was collected and has been turned over to the county by the sheriff.

"Attorney for the mortgagor now claims the sheriff had no right to charge the percentage and has made demand upon him for its return."

It is my opinion that when you advised the sheriff that he should collect this percentage, your advice was correct. He, the sheriff, is entitled to his fee or commission on the sale of land where the sale fails of completion by reason of an arrangement between the plaintiff and purchaser at the sale, or even where the sale has been quashed. 35 Cyc. 1582.

In the case of *Litchfield vs. Ashford,* 70 Iowa 393 at 395, the court there states, "We think the legislative intent was to allow a percentage in all cases where the act of the sheriff amounted in effect to a collection."

TRANSFER OF FUNDS. County road drainage fund cannot be transferred to the county road fund.

March 3, 1923.

County Attorney, Mitchell County, Osage, Iowa: Your favor of the 21st to the Attorney General has been referred to me. In this letter you ask for an opinion upon the following proposition:

"Our county auditor asks whether the county road drainage fund referred to in Section 1530, Supplement, 1913, can be transferred to the county road fund; or, if not, may this county road drainage fund be used for blade grading.

"At last half of Section 63 on page 80 'Recent Road Legislation of Iowa' issued September, 1915, it is stated that this county road drainage fund becomes a part of the road fund."

It is my opinion that the county road drainage fund cannot be transferred to the county road fund.

The county road drainage fund, however, may be used for blade grading providing the grading is in connection with the drainage of the road.

MOTOR VEHICLE FUNDS. Treasurer of state has no authority to make sight draft for motor vehicle funds in the absence of a certified statement as to the amount of funds on hands with the county treasurer, said statement to be made by the motor vehicle department.

January 26, 1923.

Treasurer of State: We have your letter of January 24th requesting this department to advise you as to whether or not you have authority to make sight drafts upon county treasurers for motor vehicle funds in their possession under the provisions of chapter one hundred fifty-five (155), Acts of the Thirty-ninth General Assembly when no report has been made to you by the Motor Vehicle Department as to the amount of funds on hand on the 15th day of either December, 1922, or January, 1923.

A review of this chapter shows without any question that the only basis for you to follow in making a uniform draft for funds is the statement certified to you by the Motor Vehicle Department. In the absence of any statement thus certified there is no way of determining the percentage of the drafts and hence, none should be made. If any warrants are presented to you and you do not have funds you should mark the same "not paid for want of funds" as provided for by statute.

COUNTY HOSPITAL—TRUSTEES—APPOINTMENT—ELECTIONS. In the first instance the board cannot appoint more than four from the city or town in which the hospital is located. In an election there is no such restriction.

February 13, 1923.

County Attorney, Mahaska County, Oskaloosa, Iowa: Your letter of the 8th to the Attorney General has been considered by this department in which you ask for an opinion upon the following proposition:

"Under Section 3311, C. C., it is provided that in establishing a county hospital, and in the appointment of seven trustees, that not more than four of said trustees shall be residents of the city, town or village, in which said hospital is to be located. That part of Section 3311 beginning on line eight provides for the election of trustees to succeed those holding office by appointment. The question which has been brought to my attention is whether or not under the latter provision it is mandatory that not to exceed four of the seven trustees shall be residents of the city, town or village in which the said hospital is located. Or whether this provision applies merely to the appointment of the trustees in the establishment of the county public hospital, and not to the election of the same."

It is my opinion that the provisions of this section in reference to the election of trustees does not require that not to exceed four of the seven trustees shall be residents of the city, town or village, in which the hospital is to be located, it being the intention of the legislature to leave the matter of the selection of trustees to the voters who may select trustees from any part of the county. The appointment of trustees by the board of supervisors, and the provision that not to exceed four of the seven trustees shall be residents of the city, town or village when appointed by the supervisors is merely a precautionary measure before the election.

This opinion meets with the approval of the Attorney General.

BOARD OF CONTROL. Parents of delinquent children committed to state juvenile or training schools must pay expenses of keep if able.

January 22, 1923.

Board of Control of State Institutions: I am directed to answer your letter of the 5th inst. in which you ask:

"Does section 254-a25 of the Supplement to the Code of 1913 legally obligate the parents to pay the cost of the support of the boys and girls committed to the training schools at Eldora and Mitchellville and at the juvenile homes in Toledo and Davenport when committed under the dependent, neglected and delinquent children statutes of this state?"

If the children are committed to either of the above named institutions under the provisions of chapter five (5)-B, title three (3) of the Supplement to the Code of 1913, and their parents are financially able to support them, then, I am of the opinion that section 254-a25 is ample authority for requiring such parents to pay for such support.

However, children voluntarily committed to the juvenile homes under chapter one hundred sixty-five (165) of the Acts of the Thirty-eighth General Assembly become wards of the state and I entertain some doubt under the present statutes whether or not the parents are obligated to pay for their support. Section eight (8) of said chapter makes such children the wards of the state and no provision is made in the act for requiring parents to support them but the act contemplates their support at the expense of the state.

WORKMEN'S COMPENSATION. Industrial commissioner has legal power to order body disinterred and autopsy held.

January 3, 1923.

Iowa Industrial Commissioner: You have submitted to this department for opinion, the following question:

"I desire you to inform me as to whether or not the Iowa Industrial Commissioner possesses the legal authority to order the disinterment, for the purpose of forming an autopsy, the body of a person claimed to have been accidentally killed, arising out of and in course of his employment while an employe of an employer subject to the provisions of the Iowa Workmen's Compensation Act."

I have carefully examined the statutes of this state and can find no specific authority for disinterring a body and performing an autopsy thereon, except the statutes defining the powers and duties of the county coroner. Under the statutes defining the powers and duties of the county coroner, such officer may order the disinterrment of the body and the performance of an autopsy thereon only when such person met death under such circumstances as to cause the belief that such person met death through foul play or the wrongful act of another. Except as mentioned under the coroner's statutes, the statutes and Supreme Court decisions of this state are silent with reference to the powers and duties of public officials as to the procedure incident to the disinterment of dead bodies and the performance of an autopsy thereon. However, from an early date the courts, not only of this state but of other states, have uniformly held that the control over the remains of the dead after burial remains in the next of kin, which includes either the husband or wife of the deceased. (*Thompson vs. Deeds,* 93 Iowa 228.)

The Supreme Court of Iowa in the Thompson case, supra, has further announced the following rule:

"A proper appreciation of the duty we owe to the dead, and a due regard for the feelings of their friends who survive, and the promotion of the public health and welfare, all require that the bodies of the dead should not be exhumed, except under circumstances of extreme exigency."

Pursuant to the rule announced in the Thompson case, it is necessary to procure the consent of next of kin as a prerequisite to disinterment of a body and the performance of an autopsy thereon, except in matters coming within the proper jurisdiction of the county coroner. In the absence of such consent by the next of kin, the authorities are not clear as to the proper procedure, but I am of the opinion that the courts would have jurisdiction to order the disinterment of a body and the performance of an autopsy thereon in a case pending before the court where such procedure is necessary to determine the substantial rights of litigants.

In proceedings under the Iowa Workmen's Compensation Act the courts do not have jurisdiction in the first instance. Action pertaining to the awarding of compensation to an injured employe must first be instituted in the manner prescribed in the Workmen's Compensation Act, and the procedure prescribed therein must be followed prior to the court taking jurisdiction thereof. In the first instance the claim for compensation must be presented to a board of arbitration. If either party is dissatisfied with the finding of the court, then the matter may be reviewed before the Industrial Commissioner, and if the parties are dissatisfied with the decision of the Industrial Commissioner then, and then only, may either party appeal to the courts.

In the hearings before the board of arbitration or the industrial commission, the legislature has conferred extremely broad powers upon the Industrial Commis-

sioner. By reference to Section 2477-m 24 of the Supplement to the Code, 1913, we find the following provision:

"Process and procedure under this act shall be as summary as reasonably may be. While sitting as an arbitration committee, or when conducting a hearing upon review, or in the making of any investigation or inquiry, neither the commissioner nor the arbitration committee shall be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, but may hold such arbitrations or conduct such hearings and make such investigations and inquiries in the manner best suited to ascertain the substantial rights of the parties."

It will, therefore, be observed that the legislature has conferred practically unlimited power upon the Industrial Commissioner in hearings before either himself or the board of arbitration in making investigations and inquiries into causes of injuries, to the end that the substantial rights of the parties may be preserved and obtained. Inasmuch as all proceedings in claims arising under the Workmen's Compensation Act is exclusively within the jurisdiction of the Industrial Commissioner in the first instance, and further, inasmuch as the cause of the death may be an essential question in such hearing, and further, inasmuch as the legislature has conferred upon the Industrial Commissioner power to make such investigation and inquiries in the manner best suited to ascertain the substantial rights of the parties, it necessarily follows that when it becomes absolutely necessary to disinter a body and hold an autopsy thereon, that the Industrial Commissioner has the power to order the disinterment of such body and the holding of an autopsy; but as stated in the Thompson case, supra, such power on the part of the Industrial Commissioner should be exercised only under circumstances of extreme exigency.

However, before any body can be disinterred, it is necessary to first procure the consent of the State Board of Health in the manner provided by law.

SPECIAL FUNDS. Soldiers' bonus—capitol extension—levying tax for.

May 29, 1923.

Auditor of State: You have orally requested an opinion from this department as to the proper interpretation to be given Senate File 309 of the acts of the 40th General Assembly. Senate File 309 is in words as follows:

"Section 1. That section one thousand four hundred fifty-nine (1459) of the Code, 1897 (C. C. 4769) be and the same is hereby repealed and the following enacted in lieu thereof: 'The treasurer of each county shall, on or before the 15th day of each month, prepare sworn statements of the amount of money in his hands on the last day of the preceding month belonging to the state treasury, and forward by mail, one such statement to the auditor of state, and one such statement to the treasurer of state. The treasurer of each county shall also, at any time when directed by the treasurer of state, forthwith pay into the state treasury according to the provisions of this act, any or all of the money due the state and remaining in his hands, and the treasurer of state is hereby required to receive on all such payments the same kind of money and notes which the county treasurer is authorized and required by law to receive in payment of taxes. The treasurer of state shall maintain in the state treasury a cash balance of the money belonging to the state and collected by the respective county treasurers including all funds and moneys received by him from other sources and property a part of the general fund, of not more than three million dollars ($3,000,000). When such cash balance shall become less than two million dollars ($2,000,000) he may draw upon the treasurer of each county of the state in proportion to the amount in their possession respectively, a sum sufficient in the aggregate to restore said cash balance to a sum not exceeding said maximum. Such drafts shall be honored by the treasurer of each county upon presentation.

"Sec. 2. The treasurer of state shall also credit to said general balance fund all funds and moneys received by him from other sources and properly a part of the general fund. The treasurer of state shall keep proper books of account for the purposes herein specified.

"Sec. 3. In case the treasurer of any county shall fail to prepare and forward the statements required in this act or shall fail to promptly honor any draft by the treasurer of state as provided in this act he shall forfeit and pay for each and every failure a sum not less than one hundred dollars ($100) or more than five hundred dollars ($500), to be recovered in an action brought in the name of the state auditor or the treasurer of the state against him and his bondsman.

"Sec. 4. The provisions of this act shall not be so construed as to include any of the primary road funds."

Your request is in substance as follows: Does this act apply to what are commonly known as "special funds" among which are to be included the following: the insane fund provided in section 2292 of the supplement to the code, 1913 (C. C. 3087); the clothing fund provided for the blind, section 2716 of the code, 1897 (C. C. 2439); the clothing fund for the feeble-minded, section 2697 of the code, 1897 (C. C. 1948); the clothing fund provided for the deaf, section 2726 of the supplement to the code, 1913 (C. C. 2445); the support fund for soldiers' orphans, section 1-6, chapter 37, acts of the 38th General assembly (C. C. 2457); the support fund for the Oakdale Sanatorium, section 2727-a86 of the supplement to the code, 1913 (C. C. 1937); the support fund for the Juvenile Home, section 12, chapter 165, acts of the 38th general assembly (C. C. 2470); the support fund for the epileptic colony, section 10, chapter 37, acts of the 38th general assembly (C. C. 1984).

It is a well settled rule of law that each county is liable for the maintenance and support of such of its citizens having a legal residence or settlement in the county, who are inmates of the several institutions of the state. The sections of the law to which you refer as providing special funds, detail the procedure to be followed in the payment to the state of the amount due from the county for such maintenance and support.

It is a matter of common knowledge that the number of patients or inmates of such institutions from each of the counties varies from day to day and from year to year, depending entirely upon conditions over which no one has control. There is and there can be no uniformity as between counties or as between periods of time.

The board of supervisors is authorized to levy a tax for the purpose of creating a fund from which the expense due from the county to the state for such purposes can be paid. This fund is the property of the county and not the property of the state. It is, however, the duty of the county to pay from such funds the amount certified by the superintendent of each of the institutions referred to in the manner provided by law. The statute which requires the remittance of such amount to the treasurer of state with the next remittance of taxes is directory only and not mandatory. The counties, being under the obligation imposed by the law must pay the amount due the state within a reasonable time after the receipt of the certificate. It is therefore the duty of the county treasurer to remit to the state treasurer from time to time as he receives the account from the state, the amount due. I would suggest in this respect that you promulgate a uniform ruling and form for remittance, such as will obtain the results necessary and will render the method of remittance uniform throughout the state.

The soldiers' bonus fund is collected uniformly throughout the state and is to be remitted to the state treasurer in the same manner as other state taxes. Therefore the treasurer will be required to draw on the several counties of the state for such funds as necessities require in the manner provided in S. F. 309 of the acts of the 40th General Assembly.

The capitol extension fund should be drawn by uniform draft throughout the state. The amount due from the entire state is not of such size as to require splitting into parts.

LAND TITLES COMMISSION. Appropriation for expenses. Chapter 326, Acts of 40th General Assembly construed as an appropriation for the expense of the Land Titles Commission.

May 29, 1923.

Auditor of State: I am in receipt of your letter dated May 11, 1923, in which you request an opinion from this department. Your request is in words as follows:

"Chapter 326 Acts of the 40th General Assembly (H. F. 818) provides for the appointment of a commission on land titles. Section 1 thereof provides that the actual necessary traveling expenses of the members of the commission shall be paid upon the approval of the executive council in the manner provided by law 'from the same appropriation as the expenses of other state officers and employees.'

"Section 4 thereof provides that the executive council may furnish clerical help to this commission 'such clerical help to receive compensation as shall be fixed by the executive council to be paid as other salaries and compensation of employees of the state government.'

"Your opinion is respectfully requested as to what fund or appropriation is available to meet these expenditures."

Upon the authority of *Prime v. McCarthy,* 92 Iowa, 578, you are advised that the clear intention of the legislature was to make an appropriation in Chapter 326, Acts of the 40th General Assembly.

Therefore, the expenses of the Commission on Land Titles should be paid from the general fund of the state treasury.

SECRETARY OF AGRICULTURE. Appropriations. Weather and Crop Service paid from Chapter 178, 39th G. A. Dairy and Food, expenses from Chapter 284, 38th G. A., salaries from budget of 40th G. A. Animal Health, assistants and inspectors paid from Chapter 284, 38th G. A. State Veterinarians, paid from budget. Oil Inspectors, expenses paid from Chapter 209, Acts 39th G. A., as amended, salaries paid from budget. Hotel Inspectors, paid from appropriation provided in "Salary Act."

May 25, 1923.

Secretary of Agriculture: You have requested an opinion from this department with reference to certain provisions of Senate File 594 of the Acts of the 40th General Assembly.

You first ask as to your powers and duties under the consolidation with your department of the State Weather and Crop Service Department. The Weather and Crop Service Department referred to is the Weather and Crop Service Bureau provided in Chapter 178 of the Acts of the 39th General Assembly, and acts amendatory thereto. Under Senate File 594, to which I have referred and which will hereafter be referred to in this opinion as Senate File 594, you are vested with general supervisory control over this entire service. Not only do you have supervisory power and control over the service generally, as provided in section two,

but you also have supervision over the expenditure of the appropriation of $7,500 provided in section seven of the act.

You ask particularly as to this appropriation, and as to the uses to which it may be put. This question arises from a consideration of three separate provisions of law.

Section seven to which we have just referred is in words as follows:

"There is hereby appropriated, out of any money in the state treasury not otherwise appropriated, the sum of seventy-five hundred dollars ($7,500.00) annually, to be drawn and expended upon the order of the director, approved by the secretary of the department of agriculture for the service provided in this act, including the salary of the director, which shall not exceed twenty-five hundred and twenty dollars ($2,520.00) per annum.

Senate File 754 of the Acts of the 40th General Assembly is commonly known as the "Salary Act," and will be so referred to in this opinion. Section thirty-two of the act is in words as follows:

"For the Department of Agriculture.
"Secretary of Agriculture.....$ 4,000.00
"Salary budget per year..... 150,000.00

"The list of employees with salaries shall be prepared by the secretary of agriculture and approved by the retrenchment and reform committee. The total salaries, exclusive of that of the secretary of agriculture, not to be in excess of the budget of $150,000.00 provided. In addition the employees of the department shall receive their actual and necessary traveling expenses. All employees to be paid out of the appropriation provided in this act, and all fees collected as provided by law shall be paid into the general fund of the state treasury; provided, that the salary and expenses of all veterinarians working under the provisions of Chapter 287, Acts of the 38th General Assembly shall be paid out of the appropriation therein provided.

"Providing, further, that any association or corporation now receiving aid from the state or from any county of the state shall be required to furnish the secretary of agriculture with such information and reports as he shall from time to time require. Failure to furnish such information and reports shall forfeit the state or county aid provided for such association or corporation.

"Local peace officers may be required to make inspections by the secretary of agriculture and to report the result thereof to him. All expenses connected with such inspections to be borne by the county or city, as the case may be."

Section thirty-seven of the "Salary Act" is in words as follows:

"There is hereby appropriated out of any funds in the treasury not otherwise appropriated, sufficient funds to pay the salaries, per diem and expenses as herein provided: Provided, however, that nothing in this section shall be construed as an appropriation of money herein mentioned that is provided for by existing appropriations for any department."

It has been contended that the salaries of the office help necessary under the provisions of Chapter 178, Acts of the 39th General Assembly, should be paid from the appropriation provided in section thirty-seven of the "Salary Act." This contention arises by reason of the provision in section thirty-two of the "Salary Act," which directs that all employees of the Department of Agriculture be paid out of the appropriation therein provided. It will be observed, however, that section seven, quoted, is a specific appropriation for a specific and certain purpose and can be used for no other purpose. This purpose is to pay the expenses and salaries necessary in carrying into effect the provisions of the law relating to the Weather and Crop Service Bureau. Not only is this true, but section thirty-seven, of the "Salary Act," contains a specific provision that the appropriation therein provided shall not

be construed to be, "An appropriation of money that is provided for by existing appropriations for any department." It follows that the salaries and expenses connected with the Weather and Crop Service Bureau must be paid from the appropriation of $7,500.00 as provided in section seven of Chapter 178 of the Acts of the 39th General Assembly.

You next ask as to your powers and duties under the provisions of sub-paragraph three of section one of Senate File 594. Under this section there is consolidated in the Department of Agriculture the existing Dairy and Food Department, embracing all the administrative agencies under the control and management of the State Dairy and Food Commissioner. The only question that you submit in connection with this consolidation relates to the appropriation of $40,000 provided in section four of Chapter 284 of the Acts of the 38th General Assembly (C. C. 1443). This section is in words as follows:

"For the purpose of enabling the commissioner to enforce the provisions of the various laws, the enforcement of which is vested with the state dairy and food commissioner, for the making of such analysis for other state departments as may be authorized by the executive council, for necessary traveling and miscellaneous expenses of assistants and experts and for all other expenses herein provided, the sum of forty thousand dollars annually, or so much thereof as may be necessary, is hereby appropriated from any funds in the treasury not otherwise appropriated."

This appropriation is for a certain specific purpose and must be expended for such purpose. You will note that it does not provide that the payment of the salaries of the inspectors and employees necessary in carrying into effect the provisions of the laws of the state relating to the Dairy and Food Department be made from this fund, but only that the actual and necessary expenses of such employees be paid therefrom. Therefore, the salaries of the employees will be paid from the appropriation provided in section thirty-seven of the "Salary Act." However, the expenses of such employees will be paid from the appropriation provided in section four of Chapter 284 of the Acts of the 38th General Assembly.

As we understand, it is your intention to consolidate all of the inspection service. That is, to have the same inspectors perform the work now performed by the inspectors of each of the several departments consolidated. This being true, it will be necessary that you indicate on each claim for expenses the amount thereof to be charged to the appropriation of $40,000.

You next ask as to the appropriation of $2,000 provided in Senate File 749 of the Acts of the 40th General Assembly.

"Sec. 12. Food and Dairy Commissioner. For the office of the state food and dairy commissioner as contingent fund the sum of two thousand dollars ($2,000.00)."

As to this, you are advised that this appropriation is a contingent appropriation, and is to be used for no other purpose than to meet contingent expenses which will arise from time to time in your department, and for which there is no other appropriation available. Your attention is called to the opinion of this department, written to Governor Kendall under date of November 22, 1922.

You next ask as to your duties in connection with the consolidation authorized under sub-paragraph five of section one of Senate File 594. This sub-paragraph consolidates with the Department of Agriculture the State Veterinarian Department. Section eleven of the same act abolishes the office of State Veterinarian, and section twelve confers the duties and powers of the State Veterinarian upon the Secretary of Agriculture.

Therefore, under this consolidation you will exercise all of the powers conferred by law upon the State Veterinarian, and will be charged with the duties of such office.

In connection therewith your attention is called to the fact that this act consolidates in the Department of Agriculture the Commission of Animal Health, and also imposes the duties and confers the powers formerly exercised by this commission upon the Secretary of Agriculture. Therefore, under the consolidation you will exercise such powers and perform such duties as have heretofore been imposed upon the Commission of Animal Health.

The question has arisen as to the fund from which the tuberculosis inspectors and the assistant state veterinarians are to be paid. Such inspectors and assistant state veterinarians are to be paid from the appropriation provided in Chapter 287 of the Acts of the 38th General Assembly and laws amendatory thereto, and not from the appropriation provided in the salary act. However, if you should appoint a state veterinarian to act under your directions, it would be necessary that his salary and the salaries of the office help be paid from the appropriation provided in the "Salary Act."

You next ask as to the fund from which the salaries and expenses of employees engaged in the enforcement of the laws of the state relating to the petroleum oil inspection service. Under the provisions of Senate File 594, there is consolidated in your department this service. Formerly the expenses of this service have been paid from the appropriation provided in section thirty-five of Chapter 209 of the Acts of the 39th General Assembly. This section has been amended by the 40th General Assembly so that the appropriation for the ensuing and succeeding years will be $17,500. This section as amended is in words as follows:

"For the purpose of enabling the chief inspector and the other officials charged with the enforcement of this chapter to enforce the same, of paying the expenses herein provided for, the sum of *seventeen thousand five hundred dollars* annually, or so much thereof as may be necessary, is hereby appropriated out of any money in the state treasury not otherwise appropriated. He shall be furnished an office at the seat of government.

"Inspectors shall be allowed such other sums necessary and actually expended in the discharge of their official duties and for necessary expenses incurred for prosecution of violations of the provisions of this chapter and for necessary help in branding barrels. All moneys collected for each month shall on or before the fifteenth day of the following month be paid to the chief oil inspector of the state, who shall receipt to the individual inspectors and by him not later than the twentieth day of the month turned over to the treasurer of state, who shall receipt him therefor."

What has been said with reference to the Weather and Crop Service, and the Dairy and Food Commissioner, applies with like force to this service. The expenses of the inspectors will be cared for in the same manner as the inspectors assigned to the enforcement of the dairy and food laws, and will be paid from this appropriation of $17,500. The salaries of such inspectors will be paid from the appropriation provided in the "Salary Act."

You next ask as to the payment of the salaries and expenses of the employees necessary in the enforcement of the laws relating to hotel and restaurant license and inspection service, and to the expenditure made necessary by reason thereof. Section five of Chapter 182 of the Acts of the 38th General Assembly is in words as follows:

"The inspector of hotels shall receive a salary of twenty-four hundred dollars per annum and necessary expenses payable monthly out of the hotel inspection fund.

"Each deputy inspector shall receive an annual salary of eighteen hundred dollars and necessary expenses, payable monthly out of the hotel inspection fund. All salaries, compensation, printing, stationery, postage and other contingent expenses necessarily incurred under the provisions of this chapter shall be paid from said fund. All bills and claims for compensation and necessary expenses shall be itemized, verified and shall be approved and certified by the state board of audit before warrants in payment of same are drawn by the auditor of state; but no salaries, compensation or expenses shall be paid in excess of the license fees received."

Section one of Chapter 182 of the Acts of the 38th General Assembly is in words as follows:

"The fee for license to conduct a hotel in this state shall be for every hotel containing fifteen rooms, or less, for the accommodation of guests, four dollars; for more than fifteen and less than thirty-one rooms, six dollars; for more than thirty and less than seventy-six rooms, eight dollars; for more than seventy-five rooms and less than one hundred fifty rooms, ten dollars; for one hundred fifty rooms and upward, fifteen dollars. In all hotels within the meaning of this chapter the office, parlors, dining room and kitchen and all sleeping rooms, whether for hire to transient or permanent guests, shall be construed to mean guest rooms.

"All fees received for licenses shall be forthwith paid over to the state treasurer and his receipt taken and kept on file in the office of the inspector of hotels. Such fees shall be by the treasurer kept as a separate fund to be known as a hotel inspection fund and only paid out for bills or claims approved by the inspector of hotels and the state board of audit."

It will be observed that under section thirty-two of the "Salary Act" all fees collected are to be paid into the general fund in the state treasury, and that the salaries and expenses of employees are to be paid from the appropriation provided therein. Note that under the law relating to the hotel and restaurant inspection service there is no appropriation. Heretofore, as provided in section one of Chapter 182 of the Acts of the 38th General Assembly all salaries and expenses were paid from the trust fund created under the provisions of section five of Chapter 182 of the Acts of the 38th General Assembly. This trust fund will no longer be existent for the simple reason that the fees collected, as provided by law, will be paid into the general fund and not into the special hotel inspection fund. There being no special appropriation available for the purpose of paying the salaries and expenses, such salaries and expenses must be paid from the appropriation provided in the "Salary Act."

TREASURER OF STATE—FUNDS. State Treasurer can pay no money from treasury except on auditor's warrant.

May 16, 1923.

Auditor of State: I am in receipt of your letter dated April 25, 1923, in which you request an opinion from this department. Your request is in words as follows:

"House File 340, Acts of the 40th General Assembly, provides in part, 'Section 4. That the state treasurer is hereby appointed as custodian of funds * * * * and he is charged with the duty and responsibility of receiving and providing for the proper custody and disbursement of vouchers drawn by such state board of education, of moneys paid to the state from the appropriations made under the provisions of such act, and of such funds as are appropriated by the state to secure such appropriations from the state government.'

"Your opinion is requested as to whether or not the foregoing is sufficient authority to authorize the treasurer of state to make disbursements from the state appropriation otherwise than on an auditor's warrant."

By the provisions of House File 340, Acts of the 40th General Assembly, the Treasurer of State is created the trustee in charge of a trust fund composed of the federal aid provided by the federal government and the appropriation provided in the act. This trust fund is to be expended for certain definite purposes and under the direction of the State Board of Education. Section 4 to which you refer, obviously means what it says and says what it means, namely, that the State Treasurer is charged with the custody and disbursement of vouchers drawn by the Board of Education. There is nothing in this statute, however, which modifies, save as has been stated in the general provisions of the law. Section 89 of the Supplement to the Code, 1913, provides as follows:

"The auditor shall keep his office at the seat of government. He is the general accountant of the state, and it is his duty:

"1. To keep and state all accounts between the state and the United States, or any other state, or any public officer of the state, or person indebted to the state or intrusted with the collection, disbursement or management of funds belonging to the same, when they are payable to or from the state treasury;

* * * * * *

"3. To keep fair, clear and separate accounts of all revenues, funds and incomes of the state payable into the state treasury, and of all disbursements and investments thereof, showing the particulars of the same:

* * * * * *."

Section 104 of the supplement to the code, 1913, provides as follows:

The treasurer of state shall "pay no money from the treasury but upon the warrants of the auditor and only in the order of their presentation."

These statutes must be construed together and be given full force and effect if possible.

A construction can be placed upon House File No. 340 which will not annul either of the general statutes to which I have referred. That construction is this: that the State Treasurer and the Board of Education should prepare and file with you a claim in the regular order for the total amount of this appropriation and you should draw a warrant in favor of the State Treasurer in accordance with the appropriation provided for the purpose of paying into the trust fund the state's portion thereof. This will keep your books in conformity to the general law and at the same time will permit the carrying into effect of each and all of the provisions of House File No. 340 to which you have referred.

APPROPRIATIONS—ANNUAL. Unexpended balance remaining June 30th can be used for expenditures incurred during period for which the appropriation.

May 21, 1923.

Auditor of State: In a letter dated May 19, 1923, you have requested an opinion from this department. Your request is in words as follows:

"It is requested that you furnish this department with an opinion as to whether or not the unexpended balance remaining on June 30, in any annual appropriation may be used by the department concerned for expenses incurred on or after July 1, of any year."

In the absence of a special provision, you are advised that an annual appropriation provided by the General Assembly for the use of a given department for a given period of time can only be used for expenditures incurred during such period of time. Expenditures incurred either prior to the beginning of the period or after its expiration cannot be paid from such appropriation.

This opinion must not be construed as to prevent the payment of expenditures incurred during the period, even though actual payment be made after the expiration of the period.

BOARD OF CONTROL. Under the provisions of Section 205 of the Code, the support funds provided therein should be determined at the end of each month and then certified to the Auditor of State.

November 12, 1924.

Secretary, Board of Control: You have requested an opinion from this department upon the question as to when your board should certify to the Auditor of State the amount of the support funds necessary for the support of the hospital for epileptics and school for feeble-minded for November under the provisions of Section 205 of the Board of Control Act passed by the 40th General Assembly.

Section 205 of said act reads as follows:

"Sec. 205. Support. For the support of the hospital for epileptics and school for feeble-minded, there is appropriated until July 1, 1925, out of any unappropriated money in the state treasury, or so much thereof as may be needed, the sum of twenty-one dollars ($21.00) monthly for each inmate supported by the state, counting the actual time such person is an inmate and so supported. The superintendent on the first day of each month shall certify to the board of control the average number of inmates supported by the state in the hospital and school for the preceding month. Upon receipt of such certificate the board shall certify to the auditor and treasurer of state the total amount payable by the state for the support of the hospital and school for the preceding month, and the auditor and treasurer of state shall credit the hospital and school with said amount. The amount so credited shall be drawn from the state treasury in the manner provided in chapter two (2) of this title."

It will be observed that on the first day of each month the superintendent of the hospital is required to certify to the Board of Control the average number of inmates supported by the state in the hospital and school for and during the preceding month. Upon receipt of this certificate it is then made the duty of the board to compute the amount of the support funds to which said hospital and school is entitled for its support during that month and certify the same to the Auditor of State. It is perfectly evident that the law intends that the amount of support funds necessary shall be determined at the close of the month rather than in advance. Therefore, it is the opinion of this department that the support funds for November cannot be determined until the superintendent of the institution makes his report to the board on the first day of December. Then it will be the duty of your board to compute the amount of funds to which the institution is entitled for the month of November and certify the same to the Auditor of State and Treasurer of State.

WORKMEN'S COMPENSATION. A special police officer appointed by the mayor is entitled to workmen's compensation and medical care for injury received while in employment as such officer.

November 26, 1924.

Industrial Commissioner of Iowa: This will acknowledge receipt of your files in the matter of compensation to Harry C. Reel who was a special peace officer appointed by the mayor of Missouri Valley and while performing his duties as such police officer was shot and mortally wounded, on the grounds of the Harrison County Agricultural Society of Missouri Valley on September 12, 1924.

The particular question presented by you is whether this party or his representative is entitled to medical care and attention under the provisions of the Workmen's Compensation Law. Section 1422 of the law reads as follows:

"Any policeman (except those pensioned under the policemen's pension fund created by law), any sheriff, marshal, constable, and any and all of their deputies, and any and all other such legally appointed or elected law-enforcing officers, who shall, while in line of duty or from causes arising out of or sustained while in the course of their official employment, meaning while in the act of making or attempting to make an arrest or giving pursuit, or while performing such official duties where there is peril or hazard peculiar to the work of their office, be killed outright, or become temporarily or permanently physically disabled, or if said disability result in death, shall be entitled to compensation, the same to be paid out of the general funds of the state for all such injuries or disability.

"Where death occurs, compensation shall be paid to the dependents of the officer, as in other compensation cases. Such compensation shall be the maximum allowed in compensation cases. The industrial commissioner shall have jurisdiction as in other cases."

While there is nothing in this section that expressly provides for medical treatment rendered to an officer injured or killed in the performance of his duties, yet a reading of the whole section justifies the conclusion that the legislature intended to give to this class all of the benefits of the compensation law, and you will note that the legislature has provided that "such compensation shall be the maximum allowed in compensation cases." This, we feel, would include medical care and attention in addition to the amount which he would be entitled to receive under the terms of his employment. It is our view, therefore, that such officers would be entitled to all of the benefits of the Workmen's Compensation Law, including medical care.

I am returning herewith your files in this matter which you submitted to the department.

BOARD OF CONTROL—JUVENILE COURT. Provisions of Section 3650 of the Code of 1924 apply to all juvenile cases and not to cases of special consideration.

December 1, 1924.

Board of Control of State Institutions: We wish to acknowledge receipt of your favor of the 29th ult. requesting the opinion of this department upon the following proposition:

"This board would like you to give an opinion on the construction of Section 3650, Chapter 180, Code of Iowa, 1924.

"Does this section apply to paroles or discharges made by this board according to the rules and regulations adopted, or does it apply only to cases where special consideration is asked by 'application or otherwise'?

"What institutions would this section apply to?

In case the committing judge was not on the bench, should the notice be served on the judge presiding?

Commitments are made by district courts, not sitting as a juvenile court. In this case, should notice be served the same as in an organized juvenile court?"

We are of the opinion that Section 3650, Code of Iowa, 1924, referred to by you should not be restricted in its interpretation to only include cases requiring "special consideration," but should be so interpreted as to include all juvenile cases under the jurisdiction of the Board of Control where a release or discharge is contemplated. This should include cases not only where "special consideration" is asked,

but all cases arising under the rules and regulations of the Board of Control. Such an interpretation would not only be more logical and reasonable under the statute, but would also protect the interests of society and the future of the child.

This section applies to all institutions under the jurisdiction of the Board of Control receiving juvenile cases.

In case the committing judge was not on the bench at the time the action is desired to be taken by the Board of Control, notice should be served "to the judge of the juvenile court which made the commitment"; the judge presiding is merely an officer of the juvenile court.

The statute provides for notice in the event of action by the Board of Control for the release or discharge of any delinquent child under twenty-one years of age "who has been committed by a juvenile court to any state institution * * *." The statute therefore, by its express terms includes only juvenile courts and the section would not apply to commitments made by other courts of the state.

BOARD OF CONTROL. The Board of Control should employ a superintendent of construction for work at the penitentiary instead of the warden.

December 6, 1924.

Board of Control of State Institutions: This department is in receipt of your letter dated September 26, 1924, in which you request an official opinion. Your letter is in words as follows:

"The Board of Control is erecting a cell house at the state penitentiary at Fort Madison.

"The work is being done by the inmates of said institution, under the direction of a superintendent of construction employed by the Board of Control. The Board of Control purchasing all materials used at the institution on said cell house, and the superintendent of construction supervising this work.

"Has the Board of Control authority, under the law, to employ such a supervisor of construction, or should such supervisor of construction be employed by the warden?"

You are advised that under the law relating to the Board of Control the power to employ a superintendent of construction rests in the board. Of course, you should consult with the warden in order that there may be no conflict between the warden, as an employee of the board, and the board itself.

STATE BOARD OF CHIROPRACTIC EXAMINERS. There is nothing incompatible in a person being a member of the State Board of Chiropractic Examiners and being employed as clerical assistant, concurrently.

December 13, 1924.

Executive Council: This department is in receipt of your letter dated December 11, 1924, which letter is in words as follows:

"Enclosed you will find a letter from the secretary of the Iowa State Board of Chiropractic Examiners.

"You will note from the letter that the Chiropractors' Association recommend that Dr. Long be appointed as a member of the State Board of Chiropractic Examiners and that she be retained as a clerical assistant in the office of the board.

"The council desire an opinion as to whether or not Dr. Long can act as a member of the board and fill the position of clerical assistant concurrently, and if so, on what basis should compensation be allowed for her services."

The enclosure to which you refer is in words as follows:

"As your Honorable Body well knows Dr. Long has been serving in the capacity of clerical assistant to the Board of the Chiropractic Examiners under the old law

and is still fulfilling those duties since the new code went into effect, her office being in the State House Building.

"It is the desire, as expressed at the annual convention of the Iowa Chiropractors' Association that she be appointed to fill the unexpired term of Dr. J. W. Daugherty of Mason City, resigned, and such notification has been sent to the Governor for his consideration.

"She is also desired as the clerical assistant under the new code and this board respectfully recommends her in that capacity. Her work has been satisfactory and she has been in the employ of the board approximately a year.

"It is our request that the Executive Council approve or designate as the case may be, Dr. Long as the clerical assistant as provided in the revised act of the new code and would further recommend that she be granted such additional salary as can be granted not inconsistent with the law or the policies of the state.

"The board has been in consultation with the Commissioner of Public Health and very satisfactory arrangements can be made for carrying on the work, either in the present location or at some other place, if deemed expedient. However, the board prefers, and we believe Dr. Fagen will concur, that the work can be carried on as effectively and without any additional expense to the state where the office is now located.

"The board desires to express its thanks for the kind co-operation given it by your Honorable Body."

As I understand, it is proposed that Dr. Long act as a member of the State Board of Chiropractic Examiners and that during the period of time not so acting she be employed as a clerical assistant. In other words, that she be employed to perform clerical services for a part of a year and for the remainder of the year that she act as a member of the State Board of Chiropractic Examiners. There is nothing conflicting between the two positions—they are not incompatible. They must not, however, overlap, that is to say, Dr. Long cannot be paid as a member of the board and as a clerical assistant for the same period of time.

CONCEALED WEAPONS. Permits to carry concealed weapons may not be recorded and there is no provision for charging a record fee.

December 19, 1924.

Auditor of State: You have requested the opinion of this department upon the question of whether or not sheriffs are permitted to charge a recording fee for permits issued by them to carry concealed weapons, and to sell firearms. Section 12948 of the Code, 1924, provides that the sheriff of each county shall keep a record showing the names and addresses of all persons to whom permits have been issued, together with the dates of issuance and expiration thereof. There is nothing contanied in the law requiring the keeping of any other record. It is not required that permits to carry concealed weapons be recorded with the county recorder.

Section 12952 of the Code, 1924, relates to the recording of permits to sell firearms. It provides that the chief of police, sheriff or mayor shall keep a correct list of all persons to whom permits to sell are issued, together with the number of such permits and the date each is revoked, and shall "furnish the county recorder a copy of all such permits issued and revocation made." It will be observed that this section does not require that permits to sell be recorded with the county recorder. It merely provides that the officer issuing such a permit shall furnish the county recorder with copies of these permits that are issued and revocations thereof when made. Hence it is not required that permits to sell firearms or dangerous weapons be recorded with the county recorder.

Section 12953 of the Code, 1924, provides that any person selling any of the firearms described in said section shall within twenty-four hours thereafter report to the county recorder the sale of the firearm or billy as the case may be, giving complete information as specified in said section, and it is required that the recorder on receipt of such information shall make a permanent record of the same in a book specially kept for that purpose. Nowhere is the county recorder directed to "record" these reports of sales, but is required only to keep and prepare for himself a record thereof. Neither is there any provision contained anywhere in the law which directs the recorder to charge a filing fee. These provisions vest in the recorder additional duties apart from the recording of instruments and are not to be considered in the same category.

It is therefore the opinion of this department that it is not required that permits to carry concealed weapons or permits to sell firearms and other dangerous weapons be recorded and that there is no fee provided for the duties required of the sheriff and the recorder in regard to these matters.

SPECIAL ASSESSMENTS. Question of the effect of the charges made in the special assessment law of the Code, 1924, discussed.

December 30, 1924.

County Attorney, Woodbury County, Sioux City, Iowa: We have received your letter of November 13, 1924, asking this department for an opinion upon three questions stated therein as follows:

"I desire to submit a question to you regarding the effect of the changes made in the special assessment law by the Code of 1924. For the sake of convenience and shorter citations, will refer to the Compiled Code, rather than the Code of 1897, its Supplements, and the session laws.

"In this case a contract was let in September, 1924, under the old law. The work was accepted in November, after the 1924 Code became effective.

"C. C. S. Section 3889 provides that a waiver must be signed and filed by the property owner in order to obtain the right to pay in installments. Section 6032 of the Code of 1924 gives the right to pay in installments unless objections are filed, but makes no provision as to whether the owner may so pay after filing objections, nor does there seem to be any provision fixing time and manner of payment after objections are filed.

"The case of *Benshoof v. Iowa Falls,* 175 Ia. 30, holds that where the law is changed after a contract has been let, the assessment must be made under the statute in force at the time the contract is executed. This holding seems in principle to be correct, as legal rights were directly involved, but under the facts above stated, the change in the law applies to procedure only, and I take it the legislature may change procedural matters during the progress of a proceeding, and that subsequent proceedings should be had under the new law.

"Therefore, I submit the following questions:

"1. Under the facts stated, should waivers be required to be signed by property owners in order to obtain the right to pay in installments?

"2. Should the street improvement bonds to be issued by the town in anticipation of the assessments be issued under C. C. Section 3957 or of Section 6113 and 6114 of the Code of 1924?

"3. If it be held that further proceedings must be conducted under the provisions of the Code of 1924, then at what time and in what manner must assessments be paid, when the property owner has filed objections thereto?"

Section 6026 of the Code of 1924 provides that all objections to the assessments or to the prior proceedings on account of errors, irregularities or any qualities, must be made in writing and filed with the clerk within twenty days after the first publication of the notice of the assessment.

Section 6029 of said Code reads as follows:

"All objections to errors, irregularities, or inequalities in the making of said special assessments, or in any of the prior proceedings or notices, not made before the council at the time and in the manner provided in section 6026, shall be waived except where fraud is shown."

Section 6032 of said Code is in the following language:

"Unless the owner of any lot or railway or street railway, the assessment against which is embraced in any bond or certificate provided for by law, shall, within thirty days from the date of such assessment, file written objections to the legality or regularity of the assessment or levy of such tax upon and against his property, such owner shall be deemed to have waived objection on these grounds and shall have the right to pay said assessment, with interest thereon not exceeding six per cent per annum, in ten equal annual installments. In no case shall the owner of any lot be liable for more than the value of the property included in such assessment. The cost of oiling the streets may not be paid in installments."

It is quite apparent, we think, from a reading of these statutes that an innovation has been made in the special assessment statutes. It is our opinion that it is not now necessary for the owner of property against which a special assessment is made to file a waiver of all objections to errors, irregularities or inequalities, in the making of said special assessment, or in any of the prior proceedings or notices. A failure to file such objections within the time prescribed in Section 6026 amounts to a waiver of such obections under the provisions of Section 6029.

Sections 6112, 6113, and 6114, embrace substantially the same provisions as were found in Section 3957 of the Compiled Code.

While the sections we have quoted in this opinion are in some respects procedural in their nature, nevertheless they involve substantial rights not only of the property owner but also of the contractor and the holders of bonds, and also of the cities in which such special assessments are being constructed.

We are, therefore, of the opinion that in the case you submitted to us, the old law with respect to waivers and the issuance of improvement bonds should prevail because of the fact that the resolution of necessity was adopted and the contract entered into before the new statutes became effective.

The rights of all parties who may be concerned or interested in the improvement become fixed so far as the improvement is concerned at the time the resolution of necessity is adopted and the contract entered into, with the exception of such rights as are merely procedural in their nature. However, a change in the law cannot in any way effect the substantial rights of the parties. We believe this rule applies to the law as to waivers and the rights growing out of the same.

We are, therefore, of the opinion that waivers should be required of all property owners in order to entitle them to the right to pay the assessments in installments as provided by the old law. It is also our opinion that the street improvement bonds should be issued under the provisions of the old law.

We are also of the opinion that the determination of the time and manner of payment of such special assessments when the property owner has filed objections thereto, must be determined under the provisions of the old law. This manifestly involves the rate of interest and the date when such interest becomes due. Under the old statute, interest was computed from the date of acceptance of the work. Section 3889 of the Compiled Code. Under the new law, interest is computed on such assessment from the date of levy by the council. This involves a substantial

right of the contractor and the property owner and no change in the law can interfere therewith.

The case of *Benshoof v. City of Iowa Falls,* 175 Iowa, 30, bears out our construction of this statute. No change in the law can in any way affect or interfere with any rights that the property owner, the city, the contractor, or any one interested in the improvement, may have by virtue of the resolution of necessity, the contract and the proceedings in general. The change in the law can affect only matters of procedure that do not involve substantial vested rights.

INTOXICATING LIQUOR. A person transporting intoxicating liquor in the state of Iowa without complying with the provisions of the statutes thereof is guilty of illegal transportation whether the liquor is for his own personal use or not. A peace officer may search and seize a vehicle suspected of transporting intoxicating liquor without a search warrant.

September 12, 1924.

County Attorney, Wayne County, Corydon, Iowa: We wish to acknowledge receipt of your favor of the 10th instant, requesting the opinion of this department upon the following propositions:

"Does the possession of intoxicating liquor, the package or vessel containing such liquor being unlabeled as directed by Section 2421 of the Code, 1897, render the person in possession of such intoxicating liquor liable to the penalty prescribed in Section 2419? In other words, is the fellow who buys 'bootleg booze' liable under the sections mentioned?

"Is a person who transports intoxicating liquor purchased from a bootlegger liable under Section 1, Chapter 24, laws of the 40th General Assembly, even though the intoxicating liquor is intended for his own use; and does the quantity of intoxicating liquor so purchased and transported have any bearing on the question? In other words, does the fellow who buys a half pint of intoxicating liquor from a bootlegger and transports such intoxicating liquor in his own vehicle, intending to use such intoxicating liquor himself, violate Section 1 above mentioned to the extent of rendering such vehicle liable to seizure and sale by the sheriff?

"Has an officer who has reasonable grounds for believing that intoxicating liquor is being transported in violation of law a right under Section 1, above mentioned, to search such vehicle without a search warrant?"

Answering your first question, we wish to call your attention to the fact that Section 2421 of the Code of 1897 has been broadened in its scope by the additions of Sections 2421a and 2421b, Supplemental Supplement to the Code of 1915. A recent decision of our Supreme Court construing these sections we believe answers this question. The case referred to is *Stajcar v. Dickinson,* 185 Iowa 49. At page 55 the court says:

"Section 2419, supra, makes the transportation of liquor by common carriers within this state a misdemeanor, except to permit holders who have previously furnished such carrier with a certificate from the clerk of the court of the county issuing the permit to which shipment is made, showing the consignee to be a permit holder. It provides further, however, that, if the defendant in a prosecution for the violation of this section shows, by a preponderance of the evidence, that the character, circumstances, and contents of the shipment were not known to him, or that the person to whom the shipment was made had complied with the provisions of the mulct law, same will operate as a complete defense to such prosecution. It will be observed that this statute does not, in terms, prohibit the common carrier from transporting liquor into this state, but makes it a misdemeanor for it to do so. The effect, however, of the statute is none the less prohibitive.

"Section 2421-a, supra, supplements section 2419, and makes it unlawful for any common carrier or person to carry intoxicating liquors into the state, or from one

point to another within the state, for the purpose of delivering same to any person, company, or corporation therein except for lawful purposes."

At page 58 it is said:

"Section 2419, as above stated, makes it a misdemeanor for a common carrier to transport liquor within this state and deliver same to a person not coming within one of the exceptions contained therein. This statute must be held to apply to all shipments, to whomsoever made, or for whatever purpose. A common carrier charged with its violation would not be permitted to say in defense that the shipment challenged by the prosecution was to a person desiring the liquor for private consumption. The statute makes every shipment a misdemeanor, except those to certain persons specifically named and designated therein."

The court in the cited case at page 58 also quotes with approval the language used in *Hamm Brewing Company v. Chicago, Rock Island & Pacific Railway Company,* 243 Federal 143, wherein it is said:

"What, then, is the sound construction of Section 2419? In express terms, it prohibits only the transportation or conveyance to any person of intoxicants; it does not expressly prohibit their possession or receipt by him. But such a receipt necessarily implies a conveyance to and delivery by another. And while the recipient, as such, may not be a violator of the law, his receipt of the liquor from the carrier necessarily involves a violation of the law by the carrier that illegally conveys it to him. The receipt, then, should fairly be deemed to be in violation of the law of Iowa, whether the carrier alone or the recipient as well be punishable therefor. And while the West Virginia act, considered in the Clark Distilling Co. case, supra, expressly forbade the receipt or possession of liquor, irrespective of the use to which it was to be put, the Iowa act, in our judgment, no less effectually covers the same ground."

Section 2421 of the Code of 1897 makes it unlawful for any person to transport or convey by any means within this state any intoxicating liquor unless properly labeled, etc. A person may have liquor in his possession lawfully in this state only when he has complied strictly with the statutes authorizing the sale and purchase of the same. This would be for medical or manufacturing purposes and when such liquor is properly labeled under the provisions of the sections hereinbefore referred to. Anyone transporting liquor not legally in his possession, and that is not properly labeled, as provided by law, is clearly transporting it unlawfully and the burden of proof is upon him to show that its possession is lawful and that he is lawfully entitled to transport the same. The amount of liquor in the possession of a person thus engaged in the transportation thereof is immaterial. The statute fixes no limit, but says "any intoxicating liquor." If a person is engaged in the unlawful transportation of intoxicating liquor, then the provisions of Section 1, Chapter 24, laws of the 40th General Assembly apply to him and the vehicle used by him in the transportation is subject to seizure and sale, as provided in said chapter. The section just referred to, in addition to the unlawful transportation provides that the vehicle may be seized and sold whenever the intoxicating liquors are "possessed illegally." Intoxicating liquor cannot be possessed legally until the statutory requirements have been strictly complied with including the labeling of the container. As bearing upon this further proposition see *United States v. Simpson,* 252 U. S. 465, 466. The court therein considers the interpretation of what is known as the Reed Amendment, c. 162, 39 Stat. 1069. The opinion in part reads:

"At all events, we perceive no reason for rejecting the natural import of its words and holding that it was confined to transportation for hire or by public carriers.

"The published decisions show that a number of the federal courts have regarded the statute as embracing transportation by automobile, and have applied it in cases

where the transportation was personal and private, as here. Ex parte Westbrook, 250 Fed. Rep. 636; *Malcolm v. United States,* 256 Fed. Rep. 363, *Jones v. United States,* 259 Fed. Rep. 104; *Berryman v. United States,* 259 Fed. Rep. 208.

"That the liquor was intended for the personal use of the person transporting it is not material, so long as it was not for any of the purposes specially excepted. *United States v. Hill, supra.*"

Chapter 24, Acts of the 40th General Assembly is a verbatim copy of Section 26, National Prohibition Law (Public Laws No. 66, 66th Congress). And the Federal Decisions interpreting the National Prohibition Act are thus in fact, interpretations of Chapter 24, Acts of the 40th General Assembly.

It is therefore, the opinion of this department that there can be no legal transportation of intoxicating liquor in this state unless the provisions of the statutes hereinbefore referred to have been strictly complied with, and if the statutes have not thus been complied with, the fact that it is claimed the liquor is for personal use of a person engaged in its transportation is immaterial. Any person transporting intoxicating liquor in a vehicle without having strictly complied with the provisions of the Iowa statute is "transporting it in violation of the law," for in any event, the liquor is "possessed illegally," and the provisions of Chapter 24, Acts of the 40th General Assembly are applicable. Neither is it necessary that the person, found illegally in possession of or transporting the intoxicating liquor, be found to be a bootlegger before his conduct brings him within the provisions of this chapter.

Answering your second proposition we take into consideration the provisions of Section 2461-a, Supplement to the Code of 1913, that makes it unlawful for any person to keep or carry around on his person or in a vehicle "any intoxicating liquor." It is also to be remembered that Chapter 24, laws of the 40th General Assembly, is taken bodily from paragraph 26 of the National Prohibition Act (Chapter 85 U. S. Statutes at large, 1919). It has repeatedly been held by the federal courts that it is not unlawful to search an automobile suspected of violating the federal statutes, just referred to, without a search warrant. (*United States v. Bateman,* 278 Fed. Rep. 231; *United States v. Fenton,* 268 Fed. Rep. 221; *United States v. Welsh,* 247 Fed. Rep. 239; 18th Amendment to Const. of United States). Most certainly under the decisions of our Supreme Court evidence thus obtained may be used in the prosecution whether it is held that the evidence is obtained lawfully or otherwise. *State v. Tonn,* 191 N. W. Rep. (Iowa) 530; *State v. Rowley,* 125 N. W. Rep. (Iowa) 881. Furthermore, our Supreme Court has held in a prosecution for maintaining a liquor nuisance that a person may not manufacture liquor in this state even though it be for his own personal use. *State v. Ohman,* 189 Iowa 992.

We are, therefore, of the opinion that any peace officer who has reasonable and probable cause to believe that intoxicating liquor is being transported in violation of the laws of this state has a right to search and seize such vehicle without a search warrant.

MOTOR CARRIERS. Where a change is made in a permit of a carrier a hearing and notice is required. However, if the change is only minor in character no notice and hearing is necessary.

September 18, 1924.

Railroad Commissioner: This department is in receipt of your letter dated

September 16, 1924, in which you request an opinion. Your letter is in words as follows:

"I am just in receipt of your letter of September 13th answering mine of September 9th with reference to the right of a motor carrier operator to change his route when the State Highway Commission changes the location of the primary road upon which he is operating.

"I note what you say, that the applicant should apply to the commission, asking that permit be granted to conform to the actual facts. Is it your opinion that it would be necessary to make publication and hold hearing in such an event, as provided for in section four of the law?

"Would appreciate your further reply as soon as you can conveniently reach the matter."

You are advised that in my judgment a hearing should be had before a permit is corrected or changed as stated. You are advised, however, that if the change in the record is minor in character, that is, if there is no substantial change that then and in our judgment no notice is necessary. Notice is, however, necessary where the change is material.

BOARD OF OPTOMETRY EXAMINERS. An applicant who has studied only in the office of a registered physician is not qualified to take the examination for admission to practice optometry. The statute requires that such applicant must study in the office of a registered *optometrist.*

September 18, 1924.

Board of Optometry Examiners: This department is in receipt of your letter dated September 17, 1924. This letter is in words as follows:

"The Iowa Optometry Law provides that applicants to be eligible to examination must have studied three years in the office of a *Registered Optometrist.* The courts have held that the fitting of glasses is a part of the practice of medicine, and therefore all legally registered physicians were not required to obtain a certificate from the State Board of Optometry Examiners when that law was enacted.

"Will you therefore kindly give this office your written opinion as to whether or not an applicant who studied three years in the office of a registered physician who is not registered as an optometrist would be eligible to examination before this board, provided he complies with all of the other requirements.

"We have an examination soon and therefore we desire this information as soon as possible so that the applicants can make arrangements to appear for said examination, which will be the last one given under the old law."

You are advised that three years' study in the office of a physician is not sufficient to comply with the statute in question. The term "Registered Optometrist" applies to those optometrists who are registered. Physicians practice optometry not by reason of the fact that they are registered optometrists but rather because of the fact that they are registered physicians.

SOLDIERS' BONUS. A man who enlisted or was inducted into the service of the U. S. Government and was assigned to an S. A. T. C. unit for service is not within the exception of Section 4, Chapter 332, Laws of the 39th G. A. and is entitled to a bonus.

September 18, 1924.

Executive Secretary, Bonus Board: We wish to acknowledge receipt of your favor of the 17th requesting the opinion of this department on the following question:

"Section four of the Iowa Soldiers' Bonus Law, under the caption, 'Who Entitled,' reads in part as follows:

" 'No person shall be entitled to such payment or allowance, whose only service was in the students' army training corps,—'

"It is the writer's understanding that the majority of the personnel of the Students' Army Training Corps at various colleges and universities was composed of men who were under the legal draft age but over the legal age for voluntary enlistment in the military forces and that these men were regularly enrolled students of their respective schools, receiving civilian education in connection with and in addition to their training corps duties.

"Numerous applications have been filed with this department by men who state that they did not serve in the Students' Army Training Corps and they have submitted honorable discharges from the United States Army. However, these discharges in the majority of cases carry the notation or remarks that the man's only service was in the S. A. T. C. Evidence requested from the War Department in nearly all these cases indicates that the federal records show only S. A. T. C. service.

"In view of the fact that nearly all of the men referred to in the paragraph above were farmers or mechanics at the time of their enlistment or induction and not students at the particular college to whose S. A. T. C. unit they were assigned for training along mechanical lines, chiefly motor transport. It would appear that they were not, strictly speaking, Student Army Training Corps men, and that they would therefore, be entitled to compensation under the Iowa Bonus Act. On the other hand if the War Department records are taken as correct their only service was in the S. A. T. C., and under the law they would be disqualified."

When a man was drafted or inducted into the military service of the United States, or when he enlisted in such service for the purpose of giving unqualified military or naval service, he then became immediately subject to the orders and authority of the war or naval departments. He was also subject to be assigned for training to any one of a number of the various cantonments, camps or schools, or he might immediately upon his enlistment or induction into service be assigned to an organized unit of the army, and in some instances he was immediately transported for overseas duty, and in some cases he would remain in the unit to which he was assigned for duty in this country. In any event, he was subject to the control of the United States government without any choice on his part. The question, then, is whether a man who enlisted or was inducted into the service of the United States government, as aforesaid, and was by the government assigned for training with the Students' Army Training Corps, falls within the exception of Section 4, Chapter 332, Laws of the Thirty-ninth General Assembly that in part provides:

"No person shall be entitled to payment or allowance, whose only service was in the students' army training corps. * * * *"

Was the service of such man "in the S. A. T. C." or was his service in the army or navy of the United States? We are of the opinion that he was in the service of the United States, and is not within the exception to those entitled to the bonus "whose only service was in the Students' Army Training Corps." We are of the opinion that the exception just referred to includes those men who, as you state, were attending school at various colleges or universities in the state and who were under the legal draft age but of the legal age for voluntary enlistment. These men were enrolled as students and received civilian education in connection with and in addition to their duties in the Students' Army Training Corps. The man who unqualifiedly enlisted or was inducted into the service of the United States was not enrolled at the college or university and took no civilian school work at such place. He was merely assigned for training at these institutions and devoted

his whole time to his military duties. He was subject at any time to be transferred to another organization or into another branch of the service, and the mere fact that his training while in the service of the United States was received with the Students' Army Training Corps does not prevent him from being entitled to the bonus provided by Chapter 332, Laws of the Thirty-ninth General Assembly.

SECRETARY OF AGRICULTURE—STATE MONEY—The allocation of state money to counties is within the discretion of the Secretary of Agriculture. He may re-apportion such money when he deems it necessary for the best interests of the State.

September 19, 1924.

Secretary of Agriculture: This department is in receipt of your letter dated September 18, 1924, in which you request an opinion from the department. You are advised that the allocation of state money to counties is one within the sound discretion of the Secretary of Agriculture.

In the first instance the allocation is to be proportioned to all counties, but the Secretary of Agriculture is vested with power to re-apportion whenever, in the exercise of his judgment, he may deem the same for the best interests of the state. The statute relating to such re-apportionment is found in Section 31 of Chapter 23 of the Laws of the Extra Session of the Fortieth General Assembly. It is in words as follows:

"Sec. 31. Transfer of funds. The amount of state funds allotted to each county shall be expended therein, but the department, whenever it deems it necessary for the welfare of the state, or whenever such moneys are not needed in any county, may transfer the same to any other county."

This being true, if in the exercise of your sound judgment you may deem it best for the welfare of this state to re-apportion for the benefit of Appanoose County you have a right to do so.

IOWA STATE COLLEGE—TUITION—Iowa State College cannot charge a blanket tuition fee to cover non-curriculum activities such as musical concerts, debates, etc. Sec. 2649 provides that tuition shall be free at such schools.

September 19, 1924.

President State College of Agriculture & Mechanic Arts: A committee, composed of Messrs. Herman Knapp, J. E. Foster and F. M. Reck, representing the college, have submitted the following request for an opinion.

"Iowa State College is considering a blanket fee to cover a number, perhaps all non-curriculum activities such as athletic games, lectures, musical concerts, debates, declamatory contests, etc. This blanket fee would be paid every quarter of the year. To a few needy students, this fee might be rebated by action of proper authorities. In your opinion, is it legal for the college authorities to collect this fee?"

The provisions of law applicable to charges and tuition in your college are contained in Section 2649 of the Code 1897, which reads as follows:

"Tuition—admission. Tuition in the college herein established shall be forever free to pupils from the state over sixteen years of age, who have been residents of this state six months previous to their admission. Each county in this state shall have a prior right to tuition for three scholars from such county; the remainder, equal to the capacity of the college, shall be by the trustees distributed among the counties in proportion to the population, subject to the above rule. Transient scholars otherwise qualified, may at all times receive tuition."

It will be observed that tuition to qualified residents of the state of Iowa shall be free, but that transients may be required to pay tuition. This section of course does not provide that an institution may not charge additional fees for additional or outside activities. The tuition referred to in this section applies only to the regular college courses which are a part of the regular work of the school. There is no question but what your institution may charge an additional fee to cover athletic games, lectures, musical concerts, debates, declamatory contests, etc. which are not a part of the regular school curriculum, but we are of the opinion, however, that the students in the college cannot be required, as an incident necessary to their attendance at the college, to pay a fee to cover the cost of such activities, whether they desire to attend them or not. These matters must be left entirely optional with each student.

The law does not in any manner prohibit the selling by the proper authorities, of season or general activity tickets which would admit the students purchasing them to all outside activities sponsored by the college. We are of the opinion, however, that it would not be contrary to law for the authorities to require each student to purchase such a blanket ticket as a pre-requisite to his entering the school, regardless of his desires in the matter.

FISH AND GAME—Use of blinds in the open waters of the Mississippi River is prohibited.

November 10, 1924.

State Fish & Game Warden: You have submitted the following proposition to this department for an opinion:

"Kindly give us an opinion on the use of blinds in the open waters of the Mississippi River. Refer your attention to section 1770, Code 1924, which states that artificial ambushes may be erected and used on land.

"Is there any question but what blinds built on the open water is a violation of this law and, as such, should be destroyed?"

Section 1770 of the Code, 1924, reads as follows:

"Sec. 1770. Regulations on killing game birds. No person shall kill or attempt to kill any bird named in this chapter with the aid or use of any sneak boat or sink box, or from any sailboat, gasoline, or electric launch or steamboat, or any other water conveyance except as propelled by oar or paddle, or any other device used for concealment in the open water; nor pursue, for the purpose of killing or capture, any such bird by motor vehicle or aircraft; nor use any artificial light, battery, or deception, contrivance or device with intent to attract or deceive such bird, except that in hunting wild ducks and geese, decoys and duck or goose calls may be used and artificial ambushes erected and used on land. No person shall at any time hunt or shoot any game bird between sunset and thirty minutes before sunrise of the following morning."

It appears to us that the language contained in the foregoing section is very clear and it is unnecessary for us to elaborate thereon.

It is the opinion of this department that Section 1770 provides specifically that blinds cannot be used in open waters. The statute provides that artificial ambushes may be erected and used on land for hunting wild ducks and geese.

CONSTABLE FEES—The constable should not be paid civil fees out of the county fund but should retain the amount collected.

November 10, 1924.

Auditor of State: You have requested an opinion from this department upon the following proposition:

"Constables in Davenport are on a salary basis. They turn all the money they collect to the county and then file bills with the county for all mileage earned by them. In this way the county is made to pay claims for mileage where there has been no collection, the mileage being earned but uncollected.

"The question submitted is whether or not the Board should pay this mileage to constables which has been earned but remains uncollected."

Section 10639 provides that in townships having a population of more than 12,000, constables shall pay into the county treasury all criminal fees collected. It is also provided that in townships having a population of 10,000 or more, constables shall receive, in full, compensation for their services performed in criminal cases during the year the following sums, which shall be paid quarterly out of the county treasury: (1) In townships having a population of 40,000 or more, $1,500.00; (2) In townships having a population of 28,000 or more, $1,200.00; (3) In townships having a population of 20,000 and under 28,000, $1,000.00, and (4) In townships having a population of 10,000 and under 20,000, $800.00.

Thus it will be observed that constables in such counties should be paid the compensation enumerated in the foregoing schedule.

The last paragraph of Section 10639 provides that constables in all townships having a population of 10,000 and over, shall retain only such civil fees as may be allowed by the Board of Supervisors, the amount thereof in any event not to exceed $500.00 per annum, for expenses of their offices actually incurred. This section requires that the constable shall pay the civil fees collected in excess of the amount authorized by the Board of Supervisors to be retained, into the county treasury, and in the event the Board does not by proper action authorize any such fees to be retained, the constable is required to pay all such fees collected by him into the county treasury.

It is, therefore, the opinion of this department that in the case of civil fees the constable should not be paid by the county any fees, but should be permitted to retain only that amount collected by them as permitted by the Board of Supervisors under the provisions just referred to.

RIVER BED—OWNERSHIP—Rights of Riparian owners—Status of title and control of Islands in Miss. River caused by Keokuk dam discussed.

April 22, 1924.

Honorable E. W. Romkey, Senate Chamber: This department is in receipt of your letter dated April 4, 1924 in which you request an official opinion upon the following propositions:

"As a matter of having intelligent information regarding the rights of citizens on the waters of the Mississippi river as raised to the present levels by the Keokuk dam:

"First, do the owners of the land as existed previous to the raising of this water own this same land at the present time and are they legally owners of this same territory as is now covered by water to the extent that they may control or lease this territory or rather, the surface of the water above this territory as it now is.

"Second, do accretions in the form of islands or sand bars adjacent to the property owned by individuals become the property of such individuals although these accretions or bars are under water the largest part of the year?

"Third, are accretions forming from the main land or on island property, formerly owned by individuals but now covered by water most of the time, still the property of the individual or is it now the property of the state?

"Fourth, on the leasing of an island by the state to individuals does the lessee have possession and control at all times the boundaries of this island to the water's edge or does his exclusive rights extend beyond the water's edge and to what extent?

"Fifth, have individual citizens a right to create at any place a blind or shooting lodge by the placing of willows or other material through the water into the sand allowing same to extend above the surface of the water for the purposes described provided that they are not violating the game laws of the state and have they a right to hold possession of such as their individual property or location?"

According to the facts submitted to us, the Keokuk dam is a permanent structure spanning the Mississippi river. It was constructed more than ten years ago. The effect of its construction was to raise the water level and consequently extend the high water mark of the Mississippi river for some sixty or seventy miles above the dam.

The first question submitted by you raises the issue as to the control of the bed of the Mississippi river as it now exists in its altered state, that is, the control of that land which is covered by water permanently between the old and natural high water mark and the present permanent artificial high water mark. The rule will be the same whether the land so covered by water was a part of an island privately owned or was a part of the main land. The question at issue is not entirely free from doubt, but we are convinced that the great weight of authority is to the effect that where the high water mark of a navigable stream is permanently, though artificially raised, that control will shift to the new high water mark and that the public will control the bed below such mark.

It is a fundamental rule of law that the high water mark of navigable waters is the dividing line between private property and the property of the Government. The bed below being the property of the Government and the land above the high water mark being the property of riparian owners. *Barney vs. Keokuk,* 94 U. S. 324; *Prosser vs. Northern Pacific Railway Company,* 152 U. S. 64; *Lowndes vs. Huntington,* 153 U. S. 283; *St. Anthony Falls Water Power Company vs. Water Commissioners,* 168 U. S. 365; *Scranton vs. Wheeler,* 179 U. S. 178; *McMannis vs. Carmichael,* 3 Iowa 1; *Wenig vs. Cedar Rapids,* 187 Iowa 40; *Shortell vs. Des Moines Electric Company,* 186 Iowa 469.

The courts of this state do not appear to have passed upon the question as to the ownership of the bed where the high water mark is artificially, though permanently raised by artificial means. It is fair, therefore, to state as a proposition of law in Iowa that the matter has not been determined by the highest court of the state.

These fundamental facts appear in the case submitted by you: The Keokuk dam is a permanent structure. It has existed beyond the period of time necessary to raise rights by prescription. It was erected voluntarily by the company which owned the lands overflowed. It occurs to us that there are two reasons why the control of the bed of the stream as it now exists is in the Government. The first of these is that the structure is permanent in character and has existed as stated for more than ten years. This being true, we find an artificial condition of flowing water made lawful by prescription which in the very nature of things has become a substitute for the original condition necessary raising a right both in the public and in riparian owners to have the new condition maintained. *Johnson vs. Boorman,* 63 Wis. 268; *Belknap vs. Trimble,* 3 Paige, 577; *Lampman vs. Milks,* 21 N. Y. 505; *Roberts vs. Roberts,* 55 N. Y. 277; *Huntington vs. Asher,* 96 N. Y. 604; *Prescott vs. White,* 21 Pick, 341.

In *Smith vs. Youmans,* 37 L. R. A. (Wis.) 285 the court says:

"The relative relations and interests of the parties which have thus originated, grown up, and become fixed by prescription, would seem to impose upon the parties

reciprocal rights and duties, at least to the extent that, so long as such relative rights exist and are asserted, each party is bound in equity to abstain from doing anything to the prejudice of the other's rights, founded upon the relations thus created between them, and that they are equitably bound to deal fairly, reasonably, and justly with each other in respect thereto. It has long been settled that the artificial state or condition of flowing water, founded upon prescription, becomes a substitute of a natural condition previously existing, and from which a right arises on the part of those interested to have a new condition maintained. The water course, though artificial, may have originated under such circumstances as to give rise to all the rights that riparian proprietors have in a natural and permanent stream, or have been so long used as to become a natural water course prescriptively; and 'when a riparian owner has diverted the water into an artificial channel, and continued such change for more than twenty years, he cannot restore it to its natural channel, to the injury of other proprietors along such channel, who have erected works or cultivated their lands with reference to the changed condition of the stream or to the injury of those upon the artificial watercourse who have acquired by long use the right to enjoy the water there flowing'. Gould, Waters, Par. 225, and cases there cited. It is upon this ground that when the natural outlet of Lake Beulah was closed, and so remained for over twenty years, the artificial outlet at that time opened, and since maintained during that period, became the natural outlet, with all its legal incidents and consequences."

The court in *Taggart vs. Jaffrey,* 28 L. R. A. (N. S.) 1050, 76 Atl. 123 says:

"The rule is universal that riparian rights may be acquired along the artificial channel of a natural stream. Upon any of the grounds suggested, this plaintiff could maintain his position. There was a dedication. The stream had been changed in a manner to indicate that the alteration was permanent. There are prescriptive rights. It ran in this way for more than twice the period necessary to the presumption of a grant, before the plaintiff purchased his tract of land. There is an estoppel. He relied upon the apparently permanent conditions when he made his purchase; and since that time, and acting upon conditions as they were, he has openly made the improvements which he says are now interfered with. That he has the rights of a riparian proprietor upon a natural water-course cannot be open to serious question."

The court in *Kray vs. Muggli,* 86 N. W. (Minn.) says:

"Passing the question as to comparative equities, we come directly to the main controversy in the case, namely, what right in law or equity has the plaintiff to insist upon the continued maintenance of the dam? The right to maintain it on the part of the mill company was acquired by prescription. The mill company, in erecting it, obtained no express grant to do so from the riparian owners; but the erection and maintenance thereof for more than forty years created a prescriptive right to continue its maintenance perpetually. The inquiry is, what right, if any, accrued to the plaintiff and his grantors, and the other owners of property bordering on the river and the lakes formed thereby, as a result from the acts of the mill company and the acquisition by it of the prescriptive right to maintain the dam? The riparian owners improved their property, erected their buildings and fences with reference to the artificial stage of the water as made by the erection of the dam, and acquiesced in its maintenance during the time necessary to create and establish in the mill company and its successors the perpetual right to do so. It is contended on the part of plaintiff that there grew out of the relations between the parties, with respect to the construction and maintenance of the dam, reciprocal rights and privileges,—the right on the part of the defendants to maintain it, and the right on the part of plaintiff to insist that it be maintained; while it is contended on the part of defendants that the only rights or privileges resulting from such relations accrued to them, that they may maintain the dam so long as they feel inclined to do so and then destroy it, regardless of the consequences to plaintiff and other riparian owners, and that the only right or benefit which accrued to plaintiff is the very valuable privileges of quietly submitting to the wishes and pleasure of defendants. We adopt the contention of plaintiff as most in consonance with the equity and justice of the case. If plaintiff and his grantors acquired a

reciprocal right to have the dam maintained, it is not material that its removal will result in less injury and damage to them than to defendants. Prescriptive rights find no support in pecuniary considerations. It is a right or privilege apurtenant and incident to reality, and passes with the title thereto."

The court in *Diana Shooting Club vs. Lamoreaux,* 89 N. W. (Wis.) 880, says:

"True, also, if an artificial lake is created, or artificial level of a natural lake is caused by the erection of a dam, and such condition is allowed to exist adversely for the full statutory period necessary to change the ownership of the land affected thereby, the former owner thereof cannot thereafter object to a continuance of such condition. By operation of the statute of limitations the artificial condition is thus stamped with the character of a natural condition, and the title to the lands covered by the waters of the lake is deemed to have passed from private ownership to the same trust as that of lands covered by the waters of natural navigable lakes. The state, and private owners, as well, of lands affected by the artificial condition, may enforce the maintenance of that condition. No one can enforce its discontinuance. *Smith vs. Youmans,* 96 Wis. 103, 70 N. W. 1115, 37 L. R. A. 285, 65 Am. St. Rep. 30; *Mendota Club vs. Anderson,* 101 Wis. 479, 78 N. W. 185; *Village of Pewaukee vs. Savoy,* 103 Wis. 271, 276, 79 N. W. 436, 50 L. R. A. 836, 74 Am. St. Rep. 859."

We have been unable to discover any cases to the contrary. It would seem, therefore, that the rule is well established that where the artificial condition has been maintained beyond the prescriptive length of time, in this state ten years, that the rights of the parties and of the public will be determined by the new and artificial condition in lieu of the former natural condition.

There is another reason upon which the courts base the ruling that the control shifts, and that is upon the doctrine of estoppel. This seems to us to be sound. As noted, the dam was erected by the company with full knowledge of the fact that it was raising the high water mark. It held out to the public the fact that it was creating a permanent structure which would have the effect of permanently raising such high water mark. The public and all interested changed position by reason thereof. The result would seem to us to raise a great estoppel. In this respect, attention is called to the decision of the court in *Taggart vs. Jaffrey,* supra, says:

" 'There is a much more impregnable foundation (than prescription) upon which to put such decisions, and that is upon the ground of estoppel. If a landowner makes a change in the course of the stream which to all appearances is permanent, and holds out to the world the representation that such condition is permanent, he will be bound by his acts; and after other persons have acquired rights by changing their positions, upon the faith of such representations, he will not be permitted to deny that they were true, or claim that the stream is not flowing in its true channel.' 3 Farnham, Waters, Par. 827 c; *Woodbury vs. Short,* 28 L. R. A. (N. S.) 17 Vt. 387, 44 Am. Dec. 344; *Lampman vs Milks,* 21 N. Y. 505; *Lammott vs. Ewers,* 106 Ind. 310, 55 Am. Rep. 746, 6 N. E. 636."

It would seem, therefore, that the rights of the public and of the riparian owners along the line of the Mississippi river above the Keokuk dam are to be determined by the present condition as distinguished from the former or natural condition.

The second question submitted by you is determined by the rules of law to which we have referred. The doctrine of accretions will, in our opinion, prevail as to the artificial conditions existing to the same extent as they would apply to natural conditions. This is also true and will answer the third question submitted by you. In this connection you are advised that it is fundamental that where an island arises in a navigable stream, the title to such island vests in the state. You are further advised that where additions are made to property by reason of accretions that such additions belong to the owner of the property.

In answer to your fourth question, you are advised that the state has no right to lease an island except under the express condition that the rights of the public to

enter upon it for any lawful purpose be maintained. The exclusive rights to which you refer do not, therefore, exist.

In answer to your fifth question, you are advised that each and every citizen would have the same rights as to the land beneath the surface of the water below high water mark, and no exclusive right could be granted by way of lease on the part of the state.

PRISON CONTRACT LABOR—Discussion of amendment proposed to House File No. 84, Special Session.

April 24, 1924.

Hon. George B. Perkins, Senate Chamber, and Hon. Frank C. Lake, Chm. Conference Committee, House of Representatives: The Conference Committee of the General Assembly to whom was referred House File No. 84 has requested this department for an opinion relative to the interpretation which will be given by this department to the amendment proposed by such committee to Section 461 of the Bill. You have particularly asked as to whether or not the Board of Control may under this amended section enter into contracts such as those now existing between the Board of Control and certain manufacturing corporations for the manufacture of shirts and aprons at the State Penitentiary and the Men's Reformatory.

You are advised that after giving this matter the most careful consideration, we have reached the conclusion that under this proposed amendment the Board of Control may enter into contracts similar in character to those referred to. In making such contracts, the Board is required to secure a consideration for the state which is fair and reasonable. The amendment contains the provision that "Such contracts shall not be entered into upon a less basis or price than a basis or price approximately equal to the wages paid free labor of like character for a like service or its equivalent. In arriving at said basis or price, the board may take into consideration the approximate value of such prison labor and the approximate value of the product of such prison labor on the market as compared with the price of free labor and the product of free labor."

The Board is required under this paragraph to fix the consideration to be received by the state and in fixing such consideration, the Board shall fix it at an amount which will secure for the labor performed a price approximately equal to the wages paid free labor of like character for a like service or its equivalent. The Board is not, however, required under this paragraph to secure for prison labor the price of free labor, but in the exercise of its discretion it may take into consideration the approximate value of prison labor as such, as well as the approximate value of the product of prison labor as such.

We are, therefore, firmly of the opinion that this amendment in the law means that the Board of Control shall honestly and fairly determine the question of the consideration to be received by the state, giving consideration to the limitations referred to and we are further of the opinion that, if the Board exercises its discretion honestly, that its determination is final.

There is another limitation on the right of the Board which perhaps should be mentioned in this letter, and that is that the Board in determining the number of prisoners to be employed on a contract shall make the contract subject to the provision that in the exercise of its discretion the Board may reduce the number so employed to the end that there may be ample prison labor to carry out and put into effect the state use plan as otherwise provided in the act.

In consultation with the Committee, I was impressed with the thought that this

was the purpose and thought of the Committee itself in drafting and adopting the amendment referred to.

PHARMACY—Applicants for examination—School requirements discussed.

May 8, 1924.

Secretary Board of Pharmacy: I am in receipt of your letter of recent date requesting an opinion upon the question of whether or not an applicant for examination before the Pharmacy Board must be a graduate of a recognized school or college of pharmacy before he can take the examination, even though he has over 1,200 hours of credit in said school or college.

It will be observed that Section 2589b of the Supplement to the Code of 1913 as amended by Chapter 430, Acts of the 37th General Assembly, provides that a person to be eligible to take the examination for registration as a pharmacist must be twenty-one years of age and must have "successfully completed the work of two college years in a reputable school or college of pharmacy" as defined in the section. The section defines a reputable school or college of pharmacy as one "whose entrance and graduation requirements are equivalent to those prescribed by the American Conference of Pharmaceutical Faculties for the year 1917." We are advised that one of the requirements of the American Conference of Pharmaceutical Faculties for the year 1917 is that said school or college of pharmacy must have 1,200 hours of school work spread over a period of two years in the manner prescribed by the Conference. The question you evidently have in mind is whether or not an applicant, who has completed 1,200 hours of study in a reputable school or college of pharmacy, as defined, is eligible to take the examination provided he has the other qualifications.

On a careful reading of the section referred to, it will be observed that a school or college of pharmacy, to be reputable in the eyes of the law in this state, must require as a minimum, among other things, 1,200 hours of work. There is no objection in the law to said college having 1,600, or 2,000 hours of work, but in order to be a reputable school or college it must require at least 1,200 hours as prescribed by the American Conference of Pharmaceutical Faculties for the year 1917.

It will be noted that the first portion of the section requires that the applicant must have successfully completed the "work of two college years" in such a school or college. A given reputable school might require 700 hours of work each year for two years. Therefore, in order to have successfully completed the work of two college years, an applicant who has been a student in said school or college must have completed the 1,400 hours required by said school or college. Hence, the law does not say that an applicant who has had the number of hours of work required as a minimum for recognition of a school or college as reputable, is eligible to take the examination. He must have completed the prescribed two years' course in the reputable school or college which he has attended whether it be 1,200, 1,400 or 2,000 hours.

We are advised that in some schools and colleges a student may successfully pass and complete the work offered, but owing to the system of grading in vogue, might not have acquired sufficient grade points to entitle him to a diploma of graduation from that particular school or college. It is the opinion of this department that a student, who has not been graduated from a reputable school or college but who has successfully passed and completed the full work of two college years offered by such school or college, may on certificate to that effect by the

proper authorities of said school or college, be permitted by your Board to take the examination.

I trust that the foregoing exposition of this section will sufficiently clarify the matters inquired about.

OFFICE—Eligibility of Member of Legislature to position with Code Commission —Such position being clerical is not prohibited by the constitutional provision.

April 12, 1924.

Code Editor: This department is in receipt of your letter dated March 27, 1924 in which you request an opinion. Your letter is in words as follows:

"I very much desire your opinion on the following question:

"Is a member of the present House of Representatives disqualified, under section 21 of article 3, of the Constitution of Iowa, from accepting employment in the office of the Code Editor as a proof reader on the new code which will be issued this coming summer and fall?

"Probably I have no legal right to ask for this opinion but if I make this employment, the legality of payment will necessarily depend upon your opinion."

Evidently the section to which you refer is not section 21, but section 22 of Article 3 of the Constitution. This section is in words as follows:

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

This section relates only to officers or persons holding an office. It does not apply to mere clerical service. Therefore, a member of the Legislature may accept a clerical position with the Code Commission and receive compensation for such work without forfeiting his seat in the General Assembly. This has been the ruling of this department for years and we quite agree with our predecessors.

PEDDLERS—LICENSE—Person who takes oils and greases in a truck and travels through country selling to public and delivering such products immediately upon sale, is a peddler and subject to license tax as provided in Section 1347-A, Sup. 1913 as amended by Ch. 52, Acts of the 39th G. A.

April 14, 1924.

County Attorney, Mitchell County, Osage, Iowa: You have requested an opinion of this department upon the following proposition:

"Is a party required to pay state or county peddlers license who keeps a stock of oils and greases in a warehouse and sells same from a truck in the city or in the country?"

It will be observed that the word "peddlers" as defined by section 1347-a of the Supplement to the Code, 1913 as amended by chapter 52 of the Acts of the 39th General Assembly includes and applies to "all transient merchants and itinerant vendors selling by sample or by taking orders, whether for immediate or future delivery."

The language which we have just quoted indicates that the legislature intended that every person following the trade of a peddler should be included in the provisions of the section and without regard to the mode of delivery or kind of conveyance used. It is quite clear that a person who takes a stock of oils and greases in a truck and travels through the country, selling such products to the public and delivering them immediately upon sale, is "taking orders" and that such orders are necessarily "for immediate" delivery. It makes no difference whether the person

selling through the country in this manner takes the order and goes to his conveyance and obtains the product sold or whether he takes the order and returns to town and then delivers the goods so ordered to the purchaser. Hence, any person who is a peddler as thus defined, must pay the license tax unless he comes within the exceptions contained in the last paragraph of the section of law referred to.

It will be observed that the forepart of the section provides that each such peddler shall pay an annual county tax of $75.00 for each automobile or any motor vehicle used by him having attached thereto or made a part thereof a conveyance for merchandise or samples. It is the opinion of this department that a motor truck so used falls within this class.

DOG LICENSE—Discussion of collection of delinquent license, costs and penalties.

April 15, 1924.

Auditor of State: You have requested the opinion of this department on the interpretation to be given section 4 of chapter 90 of the Acts of the 40th General Assembly relative to the collection of the delinquent dog tax, penalty and publication fees. That section reads as follows:

You have requested the opinion of this department on the interpretation to be given section 4 of chapter 99 of the Acts of the 40th General Assembly relative to the collection of the delinquent dog tax, penalty and publication fees. That section reads as follows:

"All license fees shall become delinquent on the first day of June of the year in which they are due and payable and a penalty of one ($1.00) dollar shall be added to each unpaid license on and after June first. Between the first and the twentieth day of May, the county auditor shall cause to be published once in each of the official papers of the county a list of the names of all persons owning dogs reported by the assessor upon which the tax has not been paid. If the license is paid upon any dog after publication and before June first there shall be collected in addition to the license fee the costs of publication. If such license is collected on or after June first, in addition to the license fee the auditor shall cause to be spread upon the tax books of the county any delinquent license tax together with the penalty and costs of publication, which tax, penalty and costs shall be collectible in the same manner and in the same way as any other delinquent tax. Should such tax, penalty or costs be uncollectible, the costs of publication and collection shall be paid from the domestic animal fund."

There seems to be confusion relative to just when under the provisions set out above a dog tax becomes delinquent and just how the entries relative thereto should be handled on the tax books. It will be observed that the license fees become delinquent on the first day of June in the year in which they are due and payable, but that the penalty of $1.00 provided shall not be added to each unpaid license until on and after June first. However, the law specifically enjoins upon the county auditor the duty of publishing once in each of the official newspapers of the county a list of the names of all persons owning dogs reported by the assessor upon which the tax has not been paid, said publication to occur after the first day of May and before the twentieth day of May. It is then provided that if the license is paid after the publication and before June first, there shall be collected in addition to the license fee, the costs of publication, but no penalty. But if the license is not paid until on or after June first, the auditor or treasurer, as the case may be, is charged with the collection of the fee, the publication costs and the penalty of $1.00.

There seems to be confusion surrounding the entry of the delinquent license tax on the tax books by the county auditor. The provisions of law applicable thereto provide that:

"Not later than May first the county auditor shall cause to be spread upon the tax books of the county any delinquent license tax together with the penalty and costs of publication which tax, penalty and costs shall be collectible in the same manner and in the same way as any other delinquent tax."

It is a fundamental rule of statutory construction that all parts of the law are to be given effect if possible to the end that the true purpose and intention of the Legislature may be carried out. Applying this fundamental rule of statutory construction to this proposition, we find no other result can be reached than the following: On May first the county auditor will spread upon the tax books of the county the license tax. Thereafter and at once upon publishing the list he will add to the license tax thus spread, the cost of publication. Thereafter and on June first he will add the penalty. This rule will result in the carrying out of the true purpose of the Legislature.

We realize that some difficulties may be encountered by local officers as between offices, but in matters of this kind no simple inconveniences or seeming conflict should interfere with the clear duty of administrative officers, namely, to carry out the plain provisions of the law.

INTOXICATING LIQUOR—MULCT TAX—Discussion of law relating to listing for and collection of Mulct Tax.

April 16, 1924.

County Attorney, Hardin County, Eldora, Iowa: You have requested an opinion from this department upon the proposition of whether or not the county treasurer is authorized to assess a mulct tax of $600.00 when but one return by the assessor has been made under the provisions of Section 2432 of the Code and Section 2433 of the Supplement to the Code, 1913.

In answering this proposition, it will be of material assistance to review several of the provisions of law applicable to the mulct tax. Section 2432 provides specifically that "every person, partnership or corporation, except persons holding permits, carrying on the business of selling or keeping for sale intoxicating liquors, or maintaining a place where intoxicating liquors are sold or kept with intent to sell, shall pay an annual tax, to be called a 'mulct tax' of six hundred dollars, in quarterly installments" as provided in a later section of the law.

Section 2436 of the Code provides that said tax may be paid in quarterly installments, said installments being due on the first day of January, of April, of July and of October of each year. It is further provided in said section that if the installments of taxes due and payable in said manner are not paid within one month after the same become due and payable, then a penalty of 20% shall be added thereto together with 1% per month thereafter until paid. It is further provided that whoever is assessed under the provisions of the chapter "shall be liable at least for one quarterly installment of the tax * * * notwithstanding any such person may discontinue the business when so assessed, and notwithstanding the fact he may have been in the business for a less period than three months."

Section 2433 of the Supplement to the Code, 1913, directs the assessor of each township, town or city to "Return to the county auditor a list of persons who are, or since the last quarterly return have been, engaged in carrying on within said township, town, city or assessment district the business of selling or keeping for sale intoxicating liquors, or maintaining any place where such liquors are sold or kept for sale," together with the description of the real property wherein or whereon such business is carried on or such business is maintained with name of the occupant or tenant or owner or agent. These provisions relative to the assessor have nothing

to do with the liability for the tax. They merely provide a means of discovering persons liable therefor and of furnishing the names to the auditor against whom the tax should be assessed. It will be observed that the section specifically provides that the return shall contain "a list of persons who are, or since the last quarterly return have been, engaged in carrying on" such a business within the assessment district. The law requires the assessor to make the return quarterly so as to insure obtaining the names of all persons who ought to pay the tax and who have commenced selling or conducting such a business since the last quarterly return. This, we believe, is the purpose of the quarterly return by the assessor. Hence it makes no difference whether the assessor returns the name of a person more than once in the year insofar as liability for the whole tax of $600.00 is concerned. The law itself provides a way by which a person against whom the tax is assessed may secure the abatement of the tax if he is entitled thereto.

You have also inquired as to whether or not a person who has once been assessed and who fails to make application for a remission of the remaining portion of the mulct tax due, at the next meeting of the board of supervisors following the listing of said person for said tax, thereby forfeits his right to make application for a remission of said tax. It must be kept in mind in considering this proposition that taxation is the rule and that all statutes must be construed in favor of the tax if possible. A person claiming exemption therefrom must bring himself clearly within the terms of the exemption in order to secure the benefit thereof.

It will be observed from a reading of Section 2737 of the Supplement to the Code, 1913, that the auditor is required to list with the treasurer a complete list of the names returned to him by the assessors or entered on the sworn statements made to him by citizens in the manner provided by law together with a description in each case of the real property wherein or whereon the business is conducted, together with the names of the persons concerned. This is the only "listing" referred to in the law, thus on the last day of January, of March, of June and of September in each year the "listing" referred to in Section 2441 occurs and that act itself is independent of the return made by the assessor. Hence, after each such "listing" as provided in Section 2437, a person concerned may make application to the board of supervisors at their next meeting for a remission of the remaining installments of the mulct tax. In other words, the effect of the law is a continuing affair from quarter to quarter and the "listing" with the treasurer occurs at every such quarter. Thus after the first quarterly installment has been paid and the person concerned fails to make application for a remission of the tax as the meeting of the board of supervisors next following the "listing" as just described, he will be required to pay the next quarterly installment and will then have the right to make application for a remission of the remaining portion of the tax at the next meeting of the board of supervisors following that quarterly listing. This is true especially in view of the provisions of the last part of Section 2436 of the Code, which provides that every person so assessed must pay at least one quarterly installment of the tax, notwithstanding any such person may discontinue the business when so assessed and notwithstanding the fact he may have been in the business for a less period than three months, and if he shall continue therein for a longer period than three months, he shall be liable for an additional quarterly installment, subject to abatement on account of discontinuance of the business before the expiration of such second or subsequent quarter. Hence, construing all of these provisions together, the presumption prevails that a person having once been returned and listed is still continuing in said business for the full year, at least until he avails himself

of the provisions of the law relative to the remission of the mulct tax in the manner provided by law, and until his application is favorably acted upon by the board and the courts, if appeal is taken thereto.

It is, therefore, the opinion of this department that the mulct tax having once been assessed against a person, he is liable for the full amount of $600.00, payable in quarterly installments of $150.00 each, but subject to abatement in the manner prescribed by law.

MINORITY—Under Chapter 198 Acts of the 40th General Assembly a girl who has reached the age of eighteen prior to July 4, 1923, is not affected by provisions thereof.

April 8, 1924.

Governor of Iowa: This department is in receipt of your letter dated April 7, 1924 in which you request an official opinion. Your letter is in words as follows:

"I enclose herewith copy of letter just received from Miss Elso F. Nieland, of Preston, Iowa.

"Section 3188 of the Code provides:

" 'The period of minority extends in males to the age of twenty-one years, and in females to that of eighteen years; but all minors attain their majority by marriage.'

"This section remained the law for many years until it was repealed by Chapter 198, Acts of the 40th General Assembly, which enacted in lieu thereof:

" 'The period of minority extends to the age of twenty-one years; but females may contract marriage as adults after the age of eighteen years, and all minors attain their majority by marriage.'

" 'This act shall not apply to unmarried females who shall have attained the age of eighteen on or prior to July 4, 1923.'

"It is obvious from Miss Nieland's letter that she had attained the age of eighteen years prior to July 4, 1923; and if so, an act of the 40th General Assembly had no application to her. I wish you would furnish me your opinion without delay as to whether in the circumstances a commission should issue to Miss Nieland, as she requests."

Obviously this statute means what it says and says what it means. All females who attain the age of eighteen prior to July 4, 1923 are adults for all purposes save that of voting.

PRISON LABOR—Interpretation of Section 461 of Code Bill No. 84 as amended.

April 11, 1924.

Honorable E. A. Grimwood, House of Representatives: This department is in receipt of your letter dated April 11, 1924, in which you request an official opinion. Your letter is in words as follows:

"Section four hundred sixty-one (461) of Code Bill Number 84, as amended by the Senate will read as follows:

" 'Sec. 461. Employment of Prisoners.

" 'Prisoners in the penitentiary or men's reformatory shall be employed only on state account in the maintenance of the institutions, in the erection, repair, or operation of buildings and works used in connection with said institutions, and in such industries as may be established and maintained in connection therewith by the board of control. The employment of prisoners on work of any character which the state contracts to do for any person, firm or corporation on State premises, where the work and prisoners employed thereon are both under the supervision, direction and control of the Warden, shall not be construed as contracting or leasing the labor of prisoners to such person, firm or corporation. The board shall not permit such services to be rendered to a private party at a less wage than is paid free labor for a like service or its equivalent.'

"What effect will this have on the situation as to the right of the Board of Control to enter into new contract similar to those now in force?"

This amendment with the last sentence attached places the law, in my judgment, as it was before, and the provisions of the opinion rendered by this department on January 16, 1924, a copy of which is attached hereto, will govern.

PARDONS—Governor has power to pardon boys convicted of crime who are inmates of industrial school.

Governor of Iowa: This department is in receipt of your letter dated April 10, 1924, in which you request an official opinion. Your letter is in words as follows:

"In November, 1921, Howard E. Dewees, a boy sixteen years of age was convicted of the crime of grand larceny by the Carroll County Court, sentenced to the Industrial School at Eldora and paroled from the bench to C. H. Hall. Since the date of the conviction young Dewees has conducted himself admirably, and the Court who presided and the County Attorney who prosecuted both unite in the recommendation that he be absolutely pardoned.

"The circumstances are a little peculiar, and I shall be glad if you will advise me at your earliest possible convenience whether the Executive has the power to extend the relief requestd.

"The matter was presented to Governor Hammill during my absence, and he held that the statute did not contemplate any such proceeding."

In addition to the letter, we have before us the file in this case as it appears of record in your office. It seems that this matter was presented to Acting Governor Hammill, but was not disposed of by him for the reason, as I understand, that some doubt arose in his mind as to the right of the Governor under such circumstances.

Section 16 of Article 4 of the Constitution provides in words as follows:

"The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the general assembly at its next meeting, when the general assembly shall either grant a pardon, commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law; and shall report to the general assembly, at its next meeting, each case of reprieve, commutation, or pardon granted, and the reasons therefor; and also all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted."

As I understand this case, Howard E. Dewees, a boy of the age of sixteen years was tried and convicted of the crime of grand larceny. Being only sixteen years of age, he was committed, as provided by law, to the Industrial School at Eldora. The constitution does not distinguish between those who are convicted of crime under the age of twenty-one years and those over the age of twenty-one years. This being true, the power of the Governor to grant a pardon in this case cannot be questioned.

DRAINAGE ASSESSMENTS—Collection of—County Treasurer should collect at March semi-annual tax paying date, only such portion of assessment as is necessary to meet interest and maturing bonds and certificates prior to the regular time for payment of second installment.

March 26, 1924.

Honorable A. G. Rassler, House Chamber: You have called the attention of

this department to a letter which you have received from one of your constituents. The body of this letter is in words as follows:

"In reference to the payment of drainage taxes in this county there seems to be a difference of opinion as to how this is affected by the amendment which I understand you were instrumental in having passed. The county treasurer maintains that it is optional with her as to whether she will allow them to pay in two installments, but if the first installment is not paid on April that it will be subject to penalty the same as other taxes. I have not had the opportunity to read the text of this law and I wish you would kindly give me your interpretation of it as to the liability of the land owner to pay 1% per month penalty in case the first installment is not paid April 1st. I got the impression that the whole tax could run until October 1st, at 6% the same as paving, sewer and other special taxes."

In connection therewith you have asked this department to render you an official opinion as to the matters referred to therein.

Chapter 157 of the Acts of the 40th General Assembly in and so far as applicable, is in words as follows:

"Provided, however, that the county treasurer, shall, at the March semi-annual tax paying date, require only the payment of a sufficient portion of the assessments to meet the interest and the amount maturing on bonds or certificates prior to the regular time for the payment of the second installment of taxes, and the balance shall be collected with such second installment and without penalty."

It is obvious that this provision means what it says and says what it means. The difficulties to be encountered by the county treasurer cannot be considered in determining the legality of the measure. It is for the legislature to determine what the duties of a county official are, and its determination is final. It is the duty of the county treasurer to collect at the March semi-annual tax paying date, only such portion of the assessments due as shall be necessary to meet the interest and amount maturing on bonds and certificates prior to the regular time for the payment of the second installment.

The county treasurer should compute the amount necessary to retire the outstanding bonds and certificates and interest due prior to the time of the payment of the second installment of taxes, and should pro-rate the same as among the tax payers liable therefor, adding thereto a reasonable margin of safety, and should collect such sum at the March semi-annual tax paying date and the balance should be collected with the second installment of taxes.

Where the tax payers have waived there is no liability for penalties. See *Sisson v. Board of Supervisors,* 128 Iowa, 442.

TAX EXEMPTIONS. S. A. T. C. Discussion of law relating to soldiers' tax exemption as it affects member of the S. A. T. C.

April 7, 1924.

The Board of Supervisors, Dubuque, Iowa: I am in receipt of your letter dated April 3, 1924, which letter is in words as follows:

"I take the liberty of referring you to the following opinion as submitted by your office to the county attorney of Dubuque county and his recommendations thereon, in regard to petition presented to the Dubuque county board of supervisors by Warren Kintzinger, requesting tax exemption as a member of the S. A. T. C. during the war with Germany.

Abstract and substance of opinion.

" 'You are advised that soldiers who served in the S. A. T. C. were soldiers

within the meaning of the statute relating to tax exemptions. They were specifically excluded from the Bonus Act, but are not excluded from the tax exemption statute.'

Recommendation of county attorney.

" 'I am therefore advising that this application for tax exemption be allowed and any other application for tax exemption of soldiers who served in the S. A. T. C. should be allowed in the future.'

"It is not the desire of the writer or the Dubuque county board in taking this matter to you direct, to deviate from precedent or ethics established between your office and our county attorney's office. It is essential that we place directly before you certain facts, assuming that these facts might persuade you to announce a reversal of this opinion, as follows:

"Inasmuch as both exemption law or bonus act specify that applicants shall be honorably discharged soldiers, etc., it should be correct to assume that the applicant would be entitled to both bonus and tax exemption or neither. It seems inconsistent, that after it has been definitely established that members of the S. A. T. C. could qualify as honorably discharged soldiers and were refused the state bonus, that you should establish a precedent that seems illogical.

"One fact pertaining to the establishing of this precedent which you should be appraised of is: Dubuque county, one of ninety-nine counties, had an enlistment of very near 2,000 students in the S. A. T. C. Does it seem fair to you to assume that these boys of all ages should be entitled to a tax exemption? The board of this county does not, and it can be safely assumed that the citizens of this community and of the state, or our representatives in the legislature would not.

"Inasmuch as your opinion is undoubtedly based upon bare technicalities that might be interpreted pro or con, it seems as a matter of fairness to our citizens that they at least be protected from this gross injustice by you as their Attorney General. This burden, especially in years to come, will be great, too large for any conscientious official to assume by laying down without a struggle. Let the burden of proof in this case rest with the S. A. T. C."

You are advised that the distinction between the bonus and the exemption acts lies in this—that as to the Bonus Act the statute specifically provides as follows: "No person shall be entitled to such payment or allowance whose only service was in the Students' Army Training Corps." The tax exemption statute does not contain such a provision.

May I state that as I understand, some of the members of the S. A. T. C. did not receive an honorable discharge from the United States Army, but rather a release from that service. As to this I am not personally informed. May I say that if they possess an honorable discharge from the United States Army, they will be entitled to the exemption.

I cannot enter into a question as to the advisability of the exemption. The legislature is in session, and I am referring a copy of your letter to that body with a copy of my answer so that if it is desired, they can very readily correct the law.

TOWNSHIPS—DIVISION BY BOARD OF SUPERVISORS. A township having within its limits a city or town having 1,500 population, and also rural territory, which township also happens to constitute one school district, cannot be divided except by petition by a majority of all the voters residing in the whole school district, unless the division made follows congressional township lines previously adopted.

SCHOOL DISTRICTS—DIVISIONS OF. (Same as above.)

March 19, 1924.

Hon. Fred Himebaugh, House of Representatives: You have requested an opinion from this department concerning the division of a school township which also

divides a school district, the township in question including a city and rural territory. Your questions are in words as follows:

"(1) Can this rural section outside the city limits which is today in one independent school district with the city of Estherville be set off as a civil township by the board of supervisors which will at the same time separate it into two independent school districts?

"(2) If this can be done can the rural section set off as an independent district require the city to give them their share in the equity of the school property?

"(3) If so, could it be collected in cash or what manner would be followed in the distribution of said school property?"

In answering your questions, reference must be made to the provisions of Sections 551 and 554, Code, 1897. Section 551 reads as follows:

"The board of supervisors of each county shall divide the same into townships, as convenience may require, defining the boundaries thereof, and may from time to time make such alterations in the number and boundaries of a township as it may deem proper; but if the congressional township lines are not adopted and followed, the board shall not change the lines of any civil township so as to divide any school township or district, unless a majority of the voters of said school township or district shall petition therefor."

It will be observed that the board of supervisors of the county has power under this section to divide townships and define the boundaries thereof, but such authority is restricted and made dependent upon the will of a majority of the voters of the entire township if the alteration or division of said township will change the lines so as to divide a school township or district unless the change adopted follows the original congressional township lines.

Section 554 reads as follows:

"When any township has within its limits a city or town with a population exceeding 1,500 inhabitants, the electors of such townships residing without the limits of such cities or towns may, at the January, April, or June session of the board of supervisors of the county, petition to have such townships divided into two townships; the one to embrace the territory without, and the other the territory within, such corporate limits; which petition shall be accompanied by the affidavit of three individuals, to the effect that all the signatures to such petition are genuine, and that the signers thereof are all legal voters of said township, residing outside said corporate limits. Remonstrances signed by such legal voters may also be presented at the hearing before the board of supervisors hereinafter provided for, and if the same persons petitioned and remonstrate, they shall be counted on the remonstrance only."

It will be noted that in a township having within its limits a city or town having a population exceeding fifteen hundred inhabitants, the electors of such township residing without the limits of such city or town, may by a petition signed by more than fifty per cent of the legal voters in said district outside of the city or town, secure a division of the township. Thus, it will be observed that in cases where the division does not affect a school district or township there would be no question but what such a division could be made on compliance with the provisions of said section, and of the two following sections. It will be observed that these two sections which we have quoted appear in the same chapter and that section 554 is separated from section 551 by but two sections which relate to changing the names of townships. It is a rule of construction that all the provisions of law pertaining to a subject matter should be considered together and force given to each and every provision, insofar as it is possible. The legislature has provided a number of different ways for changing the boundary lines of school districts and unless a

method fixed is declared to be an exclusive one, other ways provided may also be lawfully exercised, unless there is a clear repugnancy or conflict between them. Thus it will be observed that Code Section 551 in providing for township and city boundaries confers upon the board of supervisors certain powers, limiting them to such acts as will not disturb school district boundaries unless petitioned to do so. Code Section 2743 authorized the creation of school corporations giving to them exclusive jurisdiction in all school matters over the territory contained in their respective districts. Section 2793-a, Supplement to the Code provides among other things for the change of school boundaries by the concurrence of the board of directors of the affected districts. Section 2794 of the Supplement to the Code provides the means for forming an independent district including a city or town and contiguous territory upon proper petition. We refer to these sections as illustrative of the fact that the legislation upon the subject of the organization and boundaries of school districts is varied to meet conditions, each provision intended to meet a situation not provided for by other sections, and in some of them as in the present case, made to depend upon the petition of the legal voters within certain described districts.

So, giving both of these sections full force and effect, it is the opinion of this department that a township which includes within its limits both a city or town, having a population of fifteen hundred inhabitants or more, and rural territory, which township also happens to constitute one school district, no division thereof can be accomplished except such division follows the congressional township lines previously adopted, unless a majority of the voters of said school district shall petition therefor as provided in Section 551. In other words, where a school district is affected, no division can be made except along congressional township lines unless the names of a majority of the voters of said whole school district is contained on the petition therefor.

In answer to your second and third questions, you are advised that where any division of a school district is affected, the assets and the liabilities thereof should be equitably divided as provided in Section 2802 of the Supplement to the Code, 1913. The manner of division is a question for the arbitrators appointed to determine.

PHARMACY. Reputable school of—measures of, defined by section 2, chapter 430, Acts of the 37th General Assembly. Board may determine whether any school meets those requirements.

March 20, 1924.

Chairman, Board of Pharmacy: You have requested an opinion from this department upon the question of whether or not the Board of Pharmacy may determine if a college or school of pharmacy is a reputable school, and whether the decision of the board is final, in the light of the provisions of Section 2, Chapter 430, Acts of the Thirty-seventh General Assembly.

The section referred to is in words as follows:

"No person shall be eligible to examination for registration as a pharmacist until he has passed his twenty-first birthday and shall have successfully completed the work of two college years in a reputable school or college of pharmacy as herein defined and has presented to the commission of pharmacy his own affidavit and that of his employer or employers affirming that he has had not less than two years of practical experience as clerk under the supervision of a registered pharmacist in a drug store of pharmacy in which physicians' prescriptions are compounded. Pro-

vided, however, that if an applicant of college work, an additional year or more, so successfully completed shall be the equivalent of one year of such practical experience. A reputable school or college of pharmacy shall be such school or college of pharmacy whose entrance and graduation requirements are equivalent to those prescribed by the American Conference of Pharmaceutical Faculties for the year 1917."

Upon careful reading of the foregoing provisions of law, it will be noted that they provide that a person to be eligible to take the examination for registration as a pharmacist, must among other things, have successfully completed the work of two college years in a reputable school or college of pharmacy, whose entrance and graduation requirements are equivalent to those prescribed by the American Conference of Pharmaceutical Faculties for the year 1917. In order for your board to determine whether or not a school or college of pharmacy is reputable, it should first determine whether or not the entrance and graduation requirements of such a school or college are equivalent to those prescribed by the American Conference of Pharmaceutical Faculties for the year 1917. This department has no means of determining what those requirements are. The statute itself, defines a reputable school specifically as one whose entrance and graduation requirements are equivalent to those prescribed by the American Conference of Pharmaceutical Faculties for the year 1917. Hence, it is a matter for your board to determine those requirements. There is no prescribed method for you to follow in arriving at such a determination and therefore your board should make a full and complete investigation of any school or college under consideration to the end that your decision, in regard thereto will be fair and just.

A decision by your board, made in accordance with the foregoing statements, in good faith, upon full investigation and without fraud either actual or constructive, will be sustained by the courts, should an appeal thereto be made by any party aggrieved by your decision.

STATE HOSPITAL FOR THE INSANE. A father is legally liable for the support of his minor son at the state hospital for the insane, but not for the support of an adult son.

January 7, 1924.

County Attorney, Mitchell County, Osage, Iowa: We desire to acknowledge receipt of your communication of recent date asking this department for an opinion upon the following question:

"Our board of supervisors asks me to submit to you the following question:
"Is a man liable for the care and keeping of a son at the State Hospital for the Insane, where patient has no unexempt property, and where the father is financially able?"

You do not state in your letter whether the son who is now confined at the state hospital for the insane is a minor or an adult. Section 2297 of the Code provides in part as follows:

"The provisions herein made for the support of the insane at public charge shall not be construed to release * * * their relatives from liability for their support; and the auditors of the several counties, subject to the direction of the board of supervisors are authorized and empowered to collect * * * from any person legally bound for their support, any sums paid by the county in their behalf as herein provided."

It will be observed that the provisions of this section relate to any person legally bound for their support. It has been held by the Supreme Court that the term

"relatives" as used in this section means only those who are bound by law to support such insane persons.

Monroe County v. Teller, 51 Iowa, 670.

In the case of *Guthrie County v. Conrad,* 133 Iowa, 171, it was held that a father is liable to the county for the care and support of his minor son at the hospital for the insane. So, if the son referred to in your communication is a minor, the father would clearly be liable for his support at the hospital, otherwise not.

We do not, however, pass upon the liability of the father for the support of his son at the hospital after his son attains his majority if he were committed to the asylum when a minor.

It may be proper for us to say that there is no claim against the father for the support of his minor insane son at an asylum unless the county has already expended something for his support at such institution.

State v. Cole, 155 Iowa, 654.

POULTRY SHOWS—STATE AID. Question of fact as to whether or not aid be given in a particular case.

January 7, 1924.

Auditor of State: I am in receipt of your letter dated December 26, 1923, in which you request an opinion from this department. Your request is in words as follows:

"It is requested that you give this office an official opinion as to whether or not the state aid provided for by chapter 363, laws of the Thirty-seventh General Assembly, as amended by chapter 279, laws of the Thirty-eighth General Assembly, can be paid to one association for both the state poultry show and the county poultry show.

"The shows in question are being conducted by one association in the same building and on the same dates. The association has indicated that claim for the amount of six hundred dollars will be filed."

You are advised that the sole question is one of fact. Both the state poultry show and the county poultry show might be held at the same time and under such circumstances, each subject to the limitations provided by law, would entitle the associations interested to state aid. I would suggest that you take the matter up with the Secretary of Agriculture and he will advise you as to the true status of the matter.

BOARD OF EDUCATION. Sewage system at School for Blind at Vinton. Board has no authority to lease system but may sell it to city of Vinton.

January 9, 1924.

Secretary, Iowa State Board of Education: The Attorney General has referred to me for answer your communication of recent date requesting an opinion from this department on the proposition of whether or not your board has the legal right and authority to make a contract with the city council of Vinton to permit that city to make connection with the sewage system of the Iowa College for the Blind; and also as to whether or not your board has the right to sell the sewage system of that institution to the city of Vinton provided such an act would not interfere with the welfare of said institution.

The questions submitted involve both a consideration of the authority of the city of Vinton as well as the authority of your board to do the things mentioned in the

preceding paragraph. This department knows of no provision of law which will permit any city to lease a sewage system and in view of that situation, it is our opinion that your board may not lease the sewage system of the Iowa College for the Blind to the city of Vinton.

Your second question is relative to whether or not the board has a right to sell the sewage system to the city of Vinton provided such sale would not interfere with the welfare of the institution. While there is no provision of law directly giving your board authority to negotiate such a sale, it is the opinion of this department that such a sale is authorized under your general powers, provided the city of Vinton follows the statutory procedure relative to the establishment of a sewage district and complies in every way with the law relative to such matters. When such procedure is legally completed your board may contract with the city of Vinton for the sale of the sewage plant.

I trust that the foregoing will sufficiently indicate to you our view of the law on these propositions.

BOARD OF CONTROL. Contract for sale of certain products made at state penal institution discussed as to whether they violate Section 5718-a11 of the Code, 1913.

January 16, 1924.

Board of Control of State Institutions: You have orally called my attention to two contracts entered into by the Board of Control of State Institutions. One of these contracts is between the Board of Control and the Reliance Manufacturing Company, and is dated December 5, 1921. This contract provides in substance that the company is to install certain machinery in the penitentiary at Fort Madison, and also to furnish certain raw materials for the use of the warden, and the board agrees to manufacture such raw materials into the finished product for a given price. The other contract is dated November 9, 1921, and is in substance the same except that it applies to the reformatory at Anamosa and to the manufacture of aprons.

You have also called my attention to the fact that these two contracts have excited certain criticism throughout the state, it being contended that they are in violation of the laws of this state. You have also informed me of the desire of the board to do that which they ought to do under the circumstances, and to under no circumstances, either impliedly or otherwise, violate any of the laws of this state. In this connection you have called my attention to an opinion of this department dated November 8, 1921, relating to the right to enter into such contracts as these.

The laws of this state relating to convict labor which are peculiarly applicable to the question at hand are contained in section 5707 of the code supplement, 1913, and section 5718 all of the supplement to the code, 1915. These two sections are in words as follows:

"Sec. 5707. Work in stone quarries. Able-bodied male persons sentenced to imprisonment in the penitentiary may be taken to that at Anamosa, or to that at Fort Madison, there confined and worked in places and buildings owned or leased by the state outside of the penitentiary inclosures; but the labor of such convicts shall not be leased, and the warden shall keep a regular time table of the convict labor and record thereof in a book provided for that purpose, and shall also keep a record of all business under his control, returning to the clerk at the close of each day an account thereof, together with that of convict labor. He shall also have all

stone which is not used for building purposes by the state, together with all refuse stone at the quarries, broken to be used for the improvement and macadamizing of streets and highways, this work to be done by convict labor when not otherwise employed, but the warden may in his discretion make such disposition of any surplus refuse stone at the quarries as may be for the best interest of the state."

"Sec. 5718-a11. Employment of inmates—establishment of industries—wages to be equal to wages of free labor—escape—punishment. That the law as it appears in section fifty-seven hundred eighteen a-eleven supplement to the code, 1913, be and the same is hereby repealed and the following enacted in lieu thereof:

"The inmates of the penitentiary and other reformatory shall be employed only on state accounts and for state use and on any public works; provided, however, that none of said employment for state account or state use shall be exercised or performed within the corporate limits of the city of Fort Madison or the city of Anamosa, unless performed on state premises, and excepting such employment as pertains to existing contracts or exclusively for the benefit of the state. Said employment shall be conducive to the teaching of useful trades and callings so far as practicable, and the intellectual and moral development of such inmates; provided, however, such inmates may be employed to complete any contracts now existing for prison labor to be performed in such penitentiary or reformatory but such contracts shall not be extended nor renewals thereof entered into nor like contracts made unless by this act otherwise provided. The board of control is hereby authorized and empowered to establish such industries as it may deem advisable at said penitentiary, and at said reformatory, and at or in connection with any other penal, reformatory or other institutions under its jurisdiction, and the inmates may render service as herein limited and defined, at or away from any of said institutions with the consent of said board of control, but no service shall be rendered by any such inmate for any person, firm or corporation at a less wage than is paid free labor for a like service or its equivalent, and when so rendering service they shall be held to be under the jurisdiction of the warden or superintendent of the institution to which they are committed, and any escape shall be punished as provided in section forty-eight hundred ninety-seven-a, supplement to the code, 1913, even though said inmate is at the time working under the honor system."

I have gone over these contracts with care and have also given consideration to the statutes to which you refer and to the decisions of the courts relative to the employment of prison labor as a general provision.

The question of the employment of prison labor is at best difficult. Under the laws of Iowa, prisoners confined in the penal institutions of this state are confined at hard labor, and it is the duty of the Board of Control to see that such convicts are employed at hard labor. On the other hand, as time has gone on and free industry has grown in the nation there has been a gradual demand on the part of free labor and free industry that prison labor shall not be employed in unfair competition with free labor and free industry. That is the situation confronting the Board of Control and I realize the difficulties under which the board has labored.

During the past two years the prison population of Iowa has practically doubled. This has imposed an unusual burden upon the Board of Control. To meet this great increase in the prison population and to find employment, as the board must find employment for the prisoners, is a problem requiring the utmost skill and executive ability. The board is, in my judgment, entitled to commendation for the success which they have achieved in keeping this greatly increased number of prisoners at hard labor as required by law.

You have informed me that it is your desire that I give to you my opinion as to the validity of these contracts and in connection with your request you have suggested that it is the desire of the Board of Control, without exception, to cancel these contracts if there is any reason why they may be considered as unfair or

illegal. You have informed me further that at the time of the establishment of these industries you made an investigation to determine whether or not the price received was equivalent to the price received in other penal institutions throughout the country. At that time, you submitted to Mr. Fletcher of this department, a request for an opinion which request was granted to you on November 8, 1921. This opinion is not inconsistent with the opinion which I am now rendering you, nor can I see anything inconsistent in the acts of the board. The situation presented is one which arises in the very nature of all business and one which must be brought home in order to realize the significance of the very question involved. I am frank in saying, therefore, that this opinion must not be construed as critical, but rather as suggestive of what ought to be done under a given circumstance.

Section 5707 of the Supplement to the Code, 1913, and 5718-a11 of the Supplement to the Code, 1915, were both designed for the purpose of protecting free industry and free labor from that unfair competition to which we have referred and at the same time, sought to authorize the establishment within the institutions of industries which could be conducted in such a manner as to reduce this competition to the minimum.

Turning directly to the contracts presented by you, I am frank in saying that if the price for which the board has agreed to manufacture aprons or shirts is grossly unfair, and if that price is such that the service rendered will be rendered at a lower rate than like service or its equivalent by free labor or free industry, then the contracts would be void. I do not know what like service would cost and it would be my suggestion to you that you make an investigation, and if you determine that the price provided in these contracts is unfair within the meaning of section 5718-a11, then you should, in my judgment, cancel these contracts.

As you will have observed I have reached the firm conclusion that these two statutes should be clarified so that in truth, he who runs may read. May I suggest to you, therefore, that at this time, while the legislature is engaged in the revision of the code, that you submit to the joint committee of the house and senate this problem of securing suitable employment for the prison population of Iowa. In this connection you are advised that under the law the power to contract and to engage in industry is a power which must be conferred by law. Therefore the legislature should provide specifically in just what way and manner you may employ convict labor.

I am convinced that if the investigation is made as suggested, that your action will meet with the approval of the people of this state.

DRAINAGE DISTRICTS. Notice of proposed levy should be in the names of individual record title owners of the land within the proposed district. Also "to all other persons whom it may concern"; also the actual occupants of this land without naming them. Notice may be by publication except in the case where a person leaves his name and address with the auditor; or a non-resident or corporation or railroad company, or other persons having land within the proposed district may leave the name of its agent upon whom service may be made, in that event the auditor is to mail a copy of the notice to this address. Notice by publication may be had upon a non-resident property owner if he does not leave his name and address with the county auditor. It is the better practice, however, to secure personal service upon all the owners of the land within the proposed district if possible.

January 18, 1924.

County Attorney, Tama County, Toledo, Iowa: I have your favor of the 14th

at hand in which you request the opinion of this department upon the following propositions:

"1. Under Section 4838 of the Compiled Code it states notice shall be given property owners (without naming individuals) and my question is whether the notice should be to whom it may concern, owners, incumbrance holders and occupants without names."

Under the plain provisions of the section above referred to, the notice provided for must be given to the owner of each tract of land or lot or parcel within the proposed levy or drainage district, as shown by the transfer books in the auditor's office; also to each lien holder or incumbrancer. This means in the names of the individuals. The notice should also be "to all other persons whom it may concern," including the actual occupants of the land in the proposed district without naming the occupants.

Your request further states:

"2. Under the above section should the owners be served with personal notice of the notice or is publication sufficient?"

The statute provides in this respect:

"which notice shall be served, except as otherwise hereinafter provided, by publication thereof once each week for two consecutive weeks, etc."

It is further provided in this section that in case a person leaves his name and address with the auditor; or a non-resident or corporation or railway company, or other persons having land within the proposed district may leave the name of its agent upon whom service may be made, in that event the auditor is to mail a copy of the notice.

You further inquire:

"3. Is the publication of the notice without names sufficient for all purposes without notices served on resident property owners?"

We believe this question is answered by the answer to number one of your inquiry.

You further inquire:

"4. A resident property owner is in California at present and there is no way to serve him personally. Is it necessary for the case to be adjourned on that account?"

Unless this non-resident has left his name and address with the county auditor as provided in the section of the code hereinbefore referred to, a notice by publication would be good in his case.

We believe, however, it is better practice to secure personal service of the notice upon any land owners residing in the county.

CONTINGENT FUND—STATE TREASURER. The treasurer's contingent fund provided in Chapter 307, Acts of the 40th General Assembly may be used to meet accounting expense and the employment of extra help to make such accounting.

February 26, 1924.

Auditor of State: This department is in receipt of your letter dated January 5, 1924, in which you request an official opinion. Your request is in words as follows:

"It is requested that you give this department your opinion as to whether or not a salary extending over a period of eight months is properly payable from a contingent fund, in view of the provisions of the salary bill providing for the authorization of additional employees by the retrenchment and reform committee.

"The treasurer of state has filed claims for the salary of an accountant employed in his office for the periods March 19, to June 30, 1923, and July 1, 1923, to December 31, 1924, at the rate of $300.00 per month, and has certified such claims as payable from the contingent funds appropriated for his office."

The contingent fund referred to in your letter is provided by Chapter 307 of the Acts of the Fortieth General Assembly of Iowa. Sections 1 and 10 are applicable. These sections are in words as follows:

"There is hereby appropriated from the state treasury for a term of two years, ending June 30, 1925, the following sums, or so much thereof as shall be necessary, provided that on the first day of July, succeeding the meeting of the regular session of the general assembly, all moneys appropriated in this act and remaining unexpended shall be and are hereby covered into the state treasury. Section 1.

"For the office of the treasurer of state as contingent fund the sum of ten thousand dollars ($10,000.00)." Section 10.

It is to be noted that there are no conditions set out whereby the expenditure of the contingent fund thus appropriated is limited. The sole question then is as to whether or not the treasurer of state can pay the compensation of an accountant, especially employed by him, from this fund.

The question, as to just what expenditures may be paid from a contingent fund, has been defined by the Attorneys General of the state of Iowa through a long line of opinions. These opinions, while worded somewhat differently, all reach the same conclusion. We have heretofore covered this matter in an official opinion dated November 20, 1922, to be found in the Report of the Attorney General for Iowa for the year 1922. That part of this opinion applicable is in words as follows:

"We have examined the statutes of this state with care in order that there might be no misunderstanding with reference thereto, and the only other section of the law which we have been able to discover which might in any way relate to the question at hand is section 178 of the Code of 1897. This section is in words as follows:

" 'Any contingent fund set apart to any office or officer to be expended for the state shall, as used, be entered in a proper book showing when, to whom and for what purpose it was devoted, and receipt shall be taken therefor, preserved and filed with the report hereinafter required. On or before the first day of November preceding each regular session of the general assembly, the officer or person having charge of the fund shall make report to the state auditor in writing, showing, in detail, each item of expenditure made, and he shall not be credited with any sum not paid out in the manner contemplated by the law making the appropriation, nor unless the report shall be accompanied with the proper vouchers and receipts. All funds not thus accounted for may be recovered by the state from the proper officer or person, with fifty per cent damages thereon, and the state auditor shall, in his report to the governor, make a detailed statement of the condition of each appropriation contemplated by this section.'

"This section, however, does not limit the uses to which the contingent fund may be put. It does require a report to be made in the manner and method provided by this statute. The legislature might have defined what is intended to be covered by the term 'contingent fund,' but in its wisdom it has not deemed it necessary to do so. The question naturally arises for what purposes can the contingent fund be used. That it is to be used for some purpose goes without further comment. For what purposes it may be used raises, however, a more difficult question.

"A contingency has been defined as 'an event which may or may not occur; that which is possible or probable; a fortuitious event; a chance.' The term contingent has been defined as 'something possible or liable but not certain to occur; incidental; casual; fortuitious.'

"It is a matter of common knowledge that in the operation of any department of the state government that conditions will arise from time to time which could

not have been foreseen by the legislature, and yet which in the interests of the state must be met and met properly. Such conditions oftentimes require the expenditure of public funds in order to properly protect the interests of the state. It is for the purpose of meeting just such conditions that there has been from time immemorial provided for various departments of the state government a contingent fund. This fund is not given for the purpose of being expended for the ordinary purposes of a department, but is provided to meet conditions and contingencies which in the very nature of things could not be foreseen or anticipated by the legislature. That the provision for such a fund, at least for some of the departments of the state government, is the part of wisdom needs no comment. It follows that the contingent fund given to any department of the state government, and not otherwise limited, is to be used by the head of such department in the interests of the state to meet those conditions and contingencies which from time to time may arise during the biennium.

"In this connection and before leaving the question as to what this fund can be used for, it must be remembered that the legislature, representing the people, has placed at the disposal of a certain public officer a certain definite sum of money to be used to meet those contingencies to which we have referred. It is not for some one other than such public officer to determine whether or not such contingencies have arisen, because the legislature has designated the officer who shall so determine. It follows that if the officer to whom the authority over a certain contingent fund is given acts in good faith and expends the contingent fund provided for his department for the benefit of the state, that his act cannot be questioned save by the legislature itself. That this was in the mind of the legislature is to be readily determined by a reference to section 178 to which we have referred. Not that this section provides for a report to the state auditor on or before November 1 immediately preceding the convening of the legislature."

The salary act to which you have referred is not applicable to this situation. The salary act relates to the salaries of the regular state employees. It provides their number and compensation. There is nothing in such act that in any way conflicts with the statute providing for the contingent fund of the treasurer of state. It is fundamental that both statutes are to be given effect if possible, and both can be given effect in accordance with the opinion which we here express.

It follows that if the treasurer of state, in good faith, determines upon the expenditure of a portion of his contingent fund to meet the necessary accounting expense to which you refer, then he is responsible for his acts only to the legislature May I suggest that the use of the word "salary" is improper. What the treasurer does is to pay for services rendered and necessary to meet a contingency.

It may be stated in conclusion that the Board of Audit may well, in the exercise of its discretion, inquire into and require the necessary information from the officer expending the fund. This was what this department required in the so-called Havner investigation, our remarks with reference thereto being as follows:

"It is of course true that the contingent fund given to each department of the state government must be used in the interests of the state and in order to fulfill the duties which are imposed upon the officer or department in question. There is no doubt but that in this instance the contingent fund was used for state purposes, and in order to accomplish the fulfillment of the duties imposed upon the department of justice.

"The attorney general, Mr. Havner, and Mr. Davidson, who was the ultimate recipient of the money expended, both present this matter as one in which they exercised good faith and did that which they believed was for the best interests of the state, and that their action was necessary in order to meet a contingency which could not have been foreseen. This being true, and there being no evidence to the contrary, the conclusion is unavoidable that to engage in litigation over such fund would be to invite certain defeat."

ISLANDS. Islands caused by backing water because of the erection of a dam would remain the property of the riparian owner when the land does not lose its identity.

February 28, 1924.

Secretary Executive Council: We wish to acknowledge the receipt of your favor of the 13th requesting the opinion of this department upon the following proposition:

"We are enclosing a section of a map showing the mouth of the Skunk river entering into the Mississippi river. Through information received from Burlington, Iowa, the islands marked in red are claimed by the Keokuk Dam Company on account of their having had to purchase this land, and water has now surrounded same.

"Will you kindly render this office an opinion as to whether or not the Iowa Power Company, or the Keokuk Dam Company, owns these islands, as we received requests from parties who desire to lease same."

From your request and the map it is impossible to determine whether or not these islands were at one time part of the mainland at this point. This is one of the important factors in determining the question submitted. For the purpose of this opinion, it will be assumed that the islands you inquire about were part of the mainland and were deeded to the Mississippi Power Company by the owners of the land abutting the river at this point. As originally surveyed by the government, the land in question belonged to the riparian owner and formed no part of the river bed. By reason of the construction of the dam at Keokuk, the water in the Mississippi river was backed up so as to completely surround parts of the land bought by the power company abutting upon the river, thus forming islands. The high ground that now forms the islands was not covered by the river and did not lose its identity as the particular land conveyed.

It is fundamental that if the course of the river changes and cuts off a point of land on one side making an island, such island still belongs to the original owner.

Farnhan on Water and Water Rights, Vol. 1, p. 276;
Hopkins v. Dickinson, 9 Cush. (Mass.) 544.

Although your request does not state the manner in which the islands were formed, it is possible that the law of avulsion might apply, that is if the action of the water in cutting off this land was perceptible at the time it took place, and the land retained its identity, the title to the soil so removed remains in the owner thereof as of the time it became separated from the mainland.

Neb. v. Iowa, 143 U. S. 359, 366.

It is apparent throughout all the decisions upon questions of this nature that the courts generally look to determine whether or not the identity of the particular soil is preserved. A gradual washing away of the soil in a manner that is not perceptible, and the deposit of this soil in some other location by accretion, divests the title of the former owner in the soil, its identity being lost by this gradual process.

We are unable to find any authorities in the United States exactly in point, but the cases cited in this opinion indicate what the opinion of the court would be.

We are of the opinion that the Mississippi River Power Company is the owner of the title to the islands in question.

WIDOW'S PENSION. Widow's pension should be paid from the poor fund in the first instance and may be paid from the juvenile fund if necessary.

March 4, 1924.

Auditor of State: You have requested the opinion of this department as to whether or not the so-called "widow's pension" authorized by the provisions of section 254-a20 of the Code as amended may be paid from either the county poor fund or the juvenile court fund. This statute insofar as applicable is as follows:

"If the court finds that the mother of such dependent or neglected child is a widow and has been for more than one year preceding the filing of the application a resident of the county where aid is applied for, and if the court further finds that such mother is poor and unable to properly care for said child, but is otherwise a proper guardian, and that it is for the welfare of such child to remain at home, the court may enter an order finding such fact and fixing an amount of money necessary to enable such mother to properly care for such child, not to exceed the sum of $2.50 per week for each child under the age of sixteen years; provided, however, that no such allowance to a widowed mother shall be made until after ten days' written notice of application for such order shall have been given to the board of supervisors of the county, during which time said board of supervisors may appear and show cause why such order should not enter.

"Upon the allowance of such application, it shall be the duty of the county board of supervisors, through its overseer of the poor or otherwise, to pay such mother at such times as said order may designate the amount so specified for the care of such dependent or neglected child until further order of the court. The amount to be paid for the care of any such child shall not exceed the sum of two dollars and fifty cents per week. * * * * *

"At any time after such allowance is made the overseer of the poor, or the board of supervisors, may make objections to the continuance of such allowance."

It is quite apparent from the reading of this statute that the fund for the care of the dependent or neglected children may be paid from the county poor fund.

Section 254-a30, Supplement Code, 1913, provides:

"For the purpose of providing for the enforcement of this act in all its parts the board of supervisors may levy a tax each year in the counties of this state to which this act is applicable, not to exceed one mill on the dollar in any year, in addition to the taxes which they are now authorized to levy."

It must be always remembered that the purpose of the so-called widow's pension is not for the support of the widow, but for the care and support of her dependent or neglected child or children, so that in truth the payment of the sum authorized is merely made to the widow for the children. Therefore, in order for this law to be effective insofar as the aid provided for dependent or neglected children when left with their widowed mother is concerned, it is essential that the payment authorized by the court be made as therein provided.

The question is then, whether the language of section 254-a30, Supplement Code, 1913, authorizes the payment of this money from the juvenile court fund. In construing this section, it is necessary to determine what is meant by the phrase "for the enforcement" as used in the quoted section. Webster as one of his definitions of enforcement interprets it to mean "to give effect." In other words, the enforcement of the act providing for the payment of this money for the benefit of dependent or neglected children means the giving effect of the court's order directing the payment. This being true, the "pensions" may be paid from the juvenile court fund as well as the county poor fund.

CONVICTS. Restoration to citizenship by governor restores right to vote.
May 8, 1924.

County Attorney, Woodbury County, Sioux City, Iowa: You have requested an opinion from this department upon the following proposition:

"I have been asked for an opinion as to whether or not a person who has been convicted of a felony, served his time and to whom a certificate of restoration has been issued by the Governor under the provisions of Section 2261 of the Compiled Code of Iowa, is entitled to vote. It occurred to me at first that such a person would be entitled to vote under the circumstances stated, but on reading Section 5, Article II, Constitution of Iowa, I thought possibly there might be some question as to this. Said section of the Constitution reads as follows:

" 'No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector.' "

In answering your inquiry, we wish to make reference first to Section 16 of Article IV of the Constitution of Iowa which provides among other things that "the governor shall have power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law."

The weight of authority seems to be that a pardon by the governor releases the person pardoned from the disabilities imposed by the conviction; thus a general absolute pardon relieves the person to whom it is granted not only from imprisonment, but from all the consequential disabilities of the judgment of conviction and restores such person to the full enjoyment of his civil rights. Although the right to a pardon may exist, yet until it has been issued, it seems that the disability still remains. American & English Encyclopedia of Law, 2nd Edition, page 610 and cases following the decisions there cited.

After a person convicted of an infamous crime has served his sentence in a penal institution and has therefore satisfied the demand of the public in that respect, the legislature in its goodness has seen fit, pursuant to the authority given it by Section 16 of Article IV of the Constitution above referred to, to authorize the governor of the state to restore by proper order such person to all of the rights of citizenship, if he deems it proper. Those provisions of the law are contained in Section 5706, Code, 1897, and read as follows:

"Restoration to citizenship. The governor shall have the right to grant any convict who has been confined in the penitentiaries, whom he shall think worthy thereof, a certificate of restoration to all his rights of citizenship, although such convict may have been guilty of an infraction of the rules and regulations of the penitentiary. The warden, upon request of the governor, shall, in case of application for such restoration, furnish him with a statement of the convict's deportment during his imprisonment, and may at all times make such recommendations to the governor as he shall think proper respecting his restoration thereto."

This provision of law, coupled with the constitutional provision on the authority of which it was enacted, in effect, authorizes the governor to restore a person who has been a convict and confined in the penitentiaries of this state to whom he shall think worthy thereof "a certificate of restoration to all his rights of citizenship." Such a certificate would then have the effect of a pardon, although it is not in terms called a pardon. In other words, such a certificate has the effect of removing the disabilities referred to in Stction 5 of Article II of the Constitution which you quoted in the proposition which you submit, and which is set out at the beginning of this opinion. This constitutional provision applies equally to idiots and insane persons, but no one will contend but that when a person ceases to be an idiot or insane that he would then again be entitled to the privileges of an

elector. The same reasoning is applicable to the case presented in your proposition. So when the disability of having been convicted of an infamous crime has been removed by expiration of sentence in a penal institution, coupled with a certificate of restoration to all the rights of citizenship by the governor, such a person is in effect pardoned by the act of the governor. In view of the foregoing, it is the opinion of this department that a person who has been convicted of an infamous crime other than treason and cases of impeachment, and who has been finally discharged from a penal institution where he was sentenced on account of such conviction, and who has been given a certificate of restoration to all of the rights of citizenship by the governor, is restored to the same position in which he was before his conviction and is therefore, restored to the privileges of an elector.

HOTEL INSPECTION FUND. $10,000 trust fund in treasury on July 4, 1923, should be transferred to general fund.

May 9, 1924.

State Accountant: You have requested the opinion of this department as to the disposition to be made of the $10,000 on hand in the state treasury, the balance of the hotel inspection fund collected under the provisions of Chapter 199, Acts of the 39th General Assembly.

It will be observed under Section 32 of the Salary Act of the 40th General Assembly that all fees collected by the inspectors operating under the direction of the Department of Agriculture including hotel inspections, are to be paid into the general fund in the state treasury, and that the salaries and expenses of employees are to be paid from the appropriation provided therein. It will be noted under the provisions of the former law relating to hotel inspections that there was no specific appropriation to pay the expenses of such inspections but that all salaries and expenses were to be paid from the trust fund created under the provisions of Section 5 of Chapter 182, Acts of the 38th General Assembly. This trust fund is made up from the fees collected by the hotel inspector. Under the provisions of the Salary Act above referred to, this trust fund is no longer existent for the reason that the fees collected as provided by law are to be paid into the general fund and not into the special hotel inspection fund. Therefore, there is now no occasion to maintain the special hotel inspection fund, and there are no expenditures authorized by law which can be paid from such a fund.

There being a balance of $10,000 in said special hotel inspection fund on hand when the Department of Agriculture took over the duties of the hotel inspection, which fund was made up entirely from fees collected as provided by law, and inasmuch as Section 32 of the Salary Act provides specifically that all fees collected as provided by law shall be paid into the general fund of the state treasury, it is the opinion of this department that the $10,000 referred to should be paid into the general fund of the state treasury. This is so for the reason that the legislature having removed any necessity for the maintenance of such a fund, and having otherwise provided for the disposition of fees which had previously gone to make up such fund, it necessarily follows that the legislature intended that these fees making up this fund and remaining on hand when the transfer of the department was accomplished, should also be paid into the general fund.

MINE EXAMINERS. Eligibility for appointment. Holder of stock in mining corporation not eligible. Statute contemplates appointmtnt of either a practical miner or actual operator.

May 10, 1924.

Governor of Iowa: This department is in receipt of your letter dated May 7, 1924, in which you request an official opinion. Your request is in words as follows:

"Section 728 of the Compiled Code respecting the Board of Mine Examiners, provides that the Executive Council 'shall appoint a board of five examiners consisting of two practical miners and two mine operators,' etc.

"I shall be grateful if you will furnish me your official opinion as to whether one not engaged in the management of a coal company but merely the holder of stock in a corporation owning it, is eligible under this section."

You are advised that in our opinion one who is merely the holder of stock in a corporation operating a mine is not eligible for appointmtnt to the Board of Mining Examiners. This statute clearly contemplates the appointment either of a practical miner or of one actually engaged in operating a mine.

FARM IMPROVEMENT ASSOCIATIONS. Required to raise yearly the sum provided by Chapter 90, Acts of the 37th General Assembly as amended, and the board of supervisors base the amount paid such association upon the amount raised, but not for each particular year. New subscriptions each year are not necessary.

May 10, 1924.

County Attorney, Emmet County, Estherville, Iowa: We wish to acknowledge the receipt of your favor of tht 26th ultimo requesting our opinion upon the following proposition:

"A question has arisen in regard to the construction to be placed upon the language of Section 2, Chapter 90, Acts of the 37th General Assembly as amended by Chapter 36 of the 38th General Assembly.

"You will notice that this section as amended provides for appropriation by the board of supervisors for the payment of certain sums to farm improvement associations.

"Section 2 of said acts as amended provides among other things that when such organizations have raised from among its members a yearly subscription of not less than $1,000.00 the board of supervisors shall appropriate certain sums and the question has arisen as follows:

"Can the board of supervisors pay to such organizations in the year 1924 any sum of money based upon the subscription raised for the year of 1923; or in other words must the subscription be raised each year and the money paid by the supervisors in that year be based upon such subscriptions and not based upon the subscription raised in any other year or any previous year?"

We are of the opinion that the wording of the statute referred to by you is clear and unambiguous. The statute as amended provides in part:

"* * * * * and that said organization has raised from among its members a *yearly subscription* of not less than one thousand dollars, the board of supervisors shall appropriate * * * * *."

It is clearly the intention of this statute to require the Farm Improvement Association to raise yearly the sum required and the board of supervisors must base the money to be paid such associations upon the amount raised by it for each particular year. We do not believe it necessary that the association be required to secure new subscriptions each year. The association must have paid in for the particular year in which it is desired that the board of supervisors should contribute a sum of not less than $1,000.00. This sum may be paid in by the members of the association prior to the year that it is desired that the board of supervisors contribute, but the money must be raised for the year in question.

COURT HOUSE. Erection of at a cost exceeding bonds voted—Greene county court house proposition discussed.

May 12, 1924.

Governor of Iowa: This department is in receipt of a request from you for an opinion as to what action, if any, might be taken with reference to expenditures

made by the board of supervisors of Greene county in connection with the erection of a court house in that county.

Accompanying your request is a communication signed by certain citizens of Greene county, from which we gather the facts upon which our opinion is based. The communication discloses that on May 18, 1915, the following proposition was submitted to a vote of the people of Greene county:

"Shall the board of supervisors of the county of Greene, state of Iowa, erect a new court house on the present site, and for such purposes issue bonds of said county in the sum of one hundred fifty thousand dollars ($150,000), and levy an annual tax to pay said bonds and the interest thereon at a rate not to exceed two and five tenths (2.5) mills on the dollar, of taxable property within said county, said tax to be levied each year until said bonds and the interest thereon are entirely paid?"

Tht communication further shows that the proposition carried by a vote of almost two for, to one against the proposition. The Board of Supervisors then let a contract for the erection of the court house, the general contract together with "extras" was let for $127,894.55, heating and plumbing contract in the sum of $10,490.00, electric wiring in the sum of $1,932.30, the architects' fees were in the sum of $8,638.00, making a total which could be considered as part of the building of the court house proper or $148,954.85.

In addition to the expenditure of this amount, the Board expended for electric light fixtures, vacuum cleaner system, linoleum for floors, shades and blinds, decorating, clock, steel and wood furniture, meter and ash hoist, a total of $29,745.81. They also expended for hardware extras, and conduit for light and phone wires the sum of $1,193.50, which may properly be considered as a part of the erection of the building and added to the contract price makes a total of $150,148.35, which would properly be considered as the cost of the building, or $148.35 in excess of the amount of bonds which the people voted to issue. The total amount, however, expended for the building and furnishings is $179,752.66. There were also some expenditures made for the removal of the old court house, grading and extra work and expense on fixtures, approximately $9,000.00, which is set out in detail in Exhibit "B" on page two attached to the communication addressed to you by the citizens of Greene County.

Section 423 of the Code as amended, prohibits the erection of a court house or other building when the probable cost will exceed $10,000 unless a proposition therefor shall first be submitted to the voters of the county. This statute, however, applies only to the erection of the building and does not place a limitation upon the authority of the Board to equip and furnish the building with what is necessary to fit it for occupancy for the purposes for which it is erected.

You will observe from the figures we have quoted that the Board only expended $148.35 in excess of the amount voted by the people, in the erection of the court house itself. It is stated in the communication addressed to you that during the campaign preceding the special election at which the bond issue was voted upon, the Board of Supervisors published an article in one of the papers of Greene County over their signature in which they stated that the court house would be built and completely equipped and furnished within the sum of $150,000. This representation if made by the Board of Supervisors, was not carried out, since the figures show that there was expended in the erection of the building and its furnishings, at least $29,000 in excess of the amount voted by the people. The matter of good faith on the part of the Board should have impelled them to keep the expenditure

within the amount of the bond issue, in view of these alleged representations, but their failure to do so constituted a moral rather than a legal wrong. However, in view of the fact that $150,000 was voted by the people for the erection of the court house alone, the only illegal expenditure would be the amount expended in its erection in excess of such sum of $150,000, which we have shown was approximately $148.35.

Your communication further shows that the court house was completed and furnished and payment completed during the year of 1918.

Concluding that the communication shows there was some illegal expenditure of money by the Board in connection with the erection and furnishing of this court house, yet the statute of limitations, both civil and criminal, would bar any action against the members of the Board, and we know of no recourse which the taxpayers of Greene County would have in the premises.

OSTEOPATHS—Administering Morphia and other narcotics—Law does not prohibit osteopaths from administering hypodermics but only prohibits them from administering "internal curative medicines."

May 14, 1924.

Secretary, Dept. of Health: This will acknowledge receipt of your letters of April 18th and February 13th in which you requested the opinion of this department as to whether Osteopathic Physicians and Surgeons regularly licensed in accordance with Chapter 77, Laws of the 39th General Assembly, are authorized to administer Morphia or other narcotics in their practice, or are limited to the use of external medicine only. In response to your request will say that the language of Section 15, of Chapter 77, Laws of the 39th General Assembly, is not very determinative in character as to just what medicine may be prescribed by an osteopath. The statute prohibits them from prescribing "internal curative medicines". You will at once recognize the fact that Morphia and the ordinary narcotics administered by physicians are not curative, and are not so intended. These are usually administered by way of hypodermic and are to give temporary relief or stimulation. Just what the legislature had in mind as a curative medicine is difficult of determination, and what particular kinds of medicine might be administered, should be more particularly defined by legislative enactment. Hypodermics can neither be classed as internal nor curative.

Therefore it is my view that you should not attempt to preclude osteopaths from administering so-called hypodermics under the statute as it now stands.

REAL ESTATE—CHATTEL INDEX BOOK—Mortgages recorded prior to enactment of Ch. 246—39 G. A. may be recorded in Chattel index book on request of owner and payment of fee. It will be a lien thereon only from date of recording therein.

August 2, 1924.

Auditor of State: You have requested an opinion from this department upon the proposition of whether or not a county recorder is required to index real estate mortgages in the chattel index book as provided in Chapter 246 of the Acts of the 39th General Assembly, said mortgages being old mortgages recorded prior to the taking effect of this Act.

You are advised that it is the opinion of this department that any person owning a real estate mortgage which has not been satisfied is entitled under the law to have it indexed in the chattel index book, even though the mortgage is an old mortgage and has been recorded in the mortgage records prior to the taking effect of this Act.

The mortgage so recorded in the chattel index book will be a lien only from the date of its entry in the index book and when indexed should be dated as of the date when so indexed.

SOLDIER'S BONUS—The fact that a soldier's widow is the common law wife of another does not disqualify her from claiming his bonus.

October 4, 1924.

Executive Secretary, Iowa Bonus Board: You have requested the opinion of this department on the question of whether or not the fact that the widow of a soldier has entered into a common law marriage will disqualify her as a beneficiary, under the provisions of Section 4 of the Iowa Bonus Act, to the recovery of the bonus to which her deceased husband would have been entitled.

We are of the opinion that this fact is not a disqualification. The widow was at one time married and bound by the marital bond to her deceased husband whereupon she became his wife. From that time she has not entered into any new marital contract and therefore she has not become the wife of another. The fact that she may be living in a common law marriage is insuffcient to change her status as the widow of her deceased husband.

Therefore, we are of the opinion that the fact that a common law marriage exists is not a disqualification and would not prevent the widow from recovering the bonus to which her deceased husband would be entitled.

MINORS—Effect of (1) Divorce and (2) annulment of marriage upon status of a minor who has attained his majority through marriage, discussed.

October 6, 1924.

Commissioner of Labor: You have requested the opinion of this department upon a question which may be propounded as follows: What is the effect of, (1), annulment of marriage and (2), divorce, upon the status of a minor who has attained his majority by marriage, as provided under Section 3188 of the Code of 1897.

In determining the effect upon the status of a minor it is necessary to first draw a distinction between a divorce and an annulment. The term "divorce" denotes a dissolution or suspension by law of the marital relations. It means a dissolution of the bond of matrimony. When a marriage is dissolved, the action of the court proceeds upon proof that a valid marriage existed and created rights and liability. The decree of divorce places the party in a new status of relationship and does not restore them to their former status.

On the other hand, the decree of annulment declares in effect that no valid marriage ever existed and restores the party to their former position. The decree of divorce operates from the time it is rendered, but the decree of annulment relates back to the time the void marriage was entered into.

It results from this distinction that the operation and effect of the two decrees is not the same and the legal status of the parties as a result of the said decrees will necessarily differ. Therefore, it is my opinion that in the case of divorce, the decree for a divorce has no retroactive effect per se, that is, it does not of itself restore the status quo of the parties before marriage. The legal operation and effect of a decree of annulment is to render the marriage contract nullity, and consequently the status of the parties is restored the same as though the marriage had never been consummated.

With this distinction in the relative relations of the parties under the decree of

divorce and the decree of annulment, I believe you will be able to determine for yourself the effect on the rights of the parties upon the particular state of facts to which you wish to have them applied.

You have further requested an opinion upon the following question:

"The public school age ends at 21 years. Can a married person under the age of 21 attend a public school if he so selects."

We are of the opinion that under the provisions of the Code making the school whether or not they are married.

INTOXICATING LIQUOR—Anyone transporting liquor not legally in his possession, and that is not properly labeled, as provided by law is transporting unlawfully and the burden of proof is upon him to show the possession and transportation lawful. age between 5 and 21 years, includes all persons within this age limit, regardless of

October 7, 1924.

County Attorney, Wayne County, Corydon, Iowa: We wish to acknowledge receipt of your favor of the 2nd requesting the opinion of this department on the following proposition:

"Does the possession of intoxicating liquor, the package or vessel containing such liquor being unlabeled as directed by Section 2421 of the Code, 1897, render the person in possession of such intoxicating liquor liable to the penalty prescribed in Section 2419? In other words, is the fellow who buys 'bootleg booze' liable under the sections mentioned?"

Answering your question, wish to call your attention to the fact that Section 2421 of the Code of 1897 has been broadened in its scope by the additions of Sections 2421a and 2421b, Supplemental Supplement to the Code of 1915. A recent decision of our Supreme Court construing these sections we believe answers this question. The case referred to is *Stajcar v. Dickinson,* 185 Iowa 49. At page 55 the court says:

"Section 2419, supra, makes the transportation of liquor by common carriers within this state a misdemeanor, except to permit holders who have previously furnished such carrier with a certificate from the clerk of the court of the county issuing the permit to which shipment is made, showing the consignee to be a permit holder. It provides further, however, that, if the defendant in a prosecution for the violation of this section shows, by a preponderance of the evidence, that the character, circumstances, and contents of the shipment were not known to him, or that the person to whom the shipment was made had complied with the provisions of the mulct law, same will operate as a complete defense of such prosecution. It will be observed that this statute does not, in terms, prohibit the common carriers from transporting liquor into this state, but makes it a misdemeanor for it to do so. The effect, however, of the statute is none the less prohibitive.

"Section 2421a, supra, supplements section 2419, and makes it unlawful for any common carrier or person to carry intoxicating liquors into the state, or from one point to another within the state, for the purpose of delivering same to any person, company, or corporation therein except for lawful purposes."

At page 58 it is said:

"Section 2419, as above stated, makes it a misdemeanor for a common carrier to transport liquor within this state and deliver same to a person not coming within one of the exceptions contained therein. This statute must be held to apply to all shipments, to whomsoever made, or for whatever purpose. A common carrier charged with its violation would not be permitted to say in defense that the shipment challenged by the prosecution was to a person desiring the liquor for private consumption. The statute makes every shipment a misdemeanor, except those to certain persons specifically named and designated therein."

The court in the cited case at page 58 also quotes with approval the language used in *Hamm Brewing Company v. Chicago, Rock Island & Pacific Railway Company,* 243 Federal 143, wherein it is said:

"What, then, is the sound construction of Section 2419? In express terms, it prohibits only the transportation or conveyance to any person of intoxicants; it does not expressly prohibit their possession or receipt by him. But such a receipt necessarily implied a conveyance to and delivery by another. And while the recipient, as such, may not be a violator of the law, his receipt of the liquor from the carrier necessarily involves a violation of the law by the carrier that illegally conveys it to him. The receipt, then, should fairly be deemed to be in violation of the law of Iowa, whether the carrier alone or the recipient as well be punishable therefor. And while the West Virginia act, considered in the Clark Distilling Co. case, supra, expressly forbade the receipt or possession of liquor, irrespective of the use to which it was to be put, the Iowa act, in our judgment, no less effectually covers the same ground."

Section 2421 of the Code of 1897 makes it unlawful for any person to transport or convey by any means within this state any intoxicating liquor unless properly labeled, etc. A person may have liquor in his possession lawfully in this state only when he has complied strictly with the statutes authorizing the sale and purchase of the same. This would be for medical or manufacturing purposes and when such liquor is properly labeled under the provisions of the sections hereinbefore referred to. Anyone transporting liquor not legally in his possession, and that is not properly labeled, as provided by law, is clearly transporting it unlawfully and the burden of proof is upon him to show that its possession is lawful and that he is lawfully entitled to transport the same.

ROAD WARRANT: (1) Warrants for road work whether regular or emergency work must be paid for in the order in which they are received.
(2) In determining whether the warrants issued exceed the amount available no consideration need be given to the warrants issued for the emergency work.

October 10, 1924.

Auditor of State: This will acknowledge receipt of your communication of the 6th instant in which you state the situation in a certain county with reference to the condition of the road fund, and state that there is a small balance in such fund which will be needed in connection with the regular road work during the remainder of the year, and that considerable emergency work has been required on account of damages done by floods. On that situation you propound the following inquiries:

"First: Must the warrants for this emergency payment be paid in order by the treasurer or can they be stamped "Not paid for want of funds"?
"Second: If the warrants are to be paid in regular order as presented, in determining the limitations in expenditures, can the sum of the warrants issued for emergency work be added to the collectible revenue in determining whether the expenditures exceed the amount allowable under the provisions of the Tuck Law."

In reply to your first inquiry, will say that warrants for all road work, whether regular or emergency work, must be paid in the order in which they are received.

Replying to your second question, will say that in determining whether the warrants issued exceed the amount available, no consideration need be given to the warrants issued for emergency work.

CITIZENSHIP—A woman who has lost her citizenship by marriage to a foreigner does not regain her citizenship by the taking effect of Chapter 411, Acts of the 67th Congress.

October 17, 1924.

County Attorney, Lee County, Keokuk, Iowa: I wish to acknowledge receipt of your favor of the 3d requesting the opinion of this department on the following proposition:

"A question has been submitted to me with reference to the citizenship of a woman born in and a life-long resident of the United States, who, on October 1st, 1921, married an alien, the husband being an Englishman, unnaturalized. The woman and her husband continue to reside in the State of Iowa. The last Federal Statute which I can find covering the matter is 42 Stat., L. 1022, Act of September 22, 1922, Chapter 411, providing as follows:

" 'That a woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage *after the passage of this Act.*'

"I do not know whether this is the last Act of Congress on the subject or not, but perhaps you will be able to tell me what the law is at present, and when the above statute took effect. I shall appreciate an early response."

Chapter 311, Acts of the 67th Congress referred to by you, is the last statute enacted upon this question. This act took effect subsequent to the marriage of the woman you refer to. Prior to the taking effect of this act, the statute read as follows:

"That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen, within one year, with the consul of the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein." (Section 3, Act of March 2, 1907, 34 U. S. Stat. L. 1228).

That an American born woman forfeits her American citizenship by marrying a foreigner is also held in *Mackenzie v. Hare,* 239 U. S. 299.

Section 4 of Chapter 411, Acts of the 67th Congress provides as follows:

"That a woman who, before the passage of this Act, has lost her United States citizenship by reason of her marriage to an alien eligible for citizenship, may be naturalized as provided by section 2 of this Act; Provided, that no certificate of arrival shall be required to be filed with her petition if during the continuance of the marital status she shall have resided within the United States. After her naturalization she shall have the same citizenship status as if her marriage had taken place after the passage of this Act."

Section 6 of said Act, also provides:

"That section 1994 of the Revised Statutes and section 4 of the Expatriation Act of 1907 are repealed. Such repeal shall not terminate citizenship acquired or retained under either of such sections nor restore citizenship lost under section 4 of the Expatriation Act of 1907."

It will therefore be apparent that the woman, having lost her American citizenship by her marriage to an alien does not gain her citizenship by the taking effect of Chapter 411, Acts of the 67th Congress, but such citizenship must be obtained as provided in section 4 of said Act, hereinbefore quoted.

FISH & GAME: Under the provisions of Chapter 1727, Code of 1924, a license issued prior to October 28th permits a licensee to enjoy the privilege of hunting and fishing until the end of the license year, July 1, 1925.

October 17, 1924.

State Fish & Game Warden: We wish to acknowledge receipt of your favor of the 15th instant requesting an opinion on the following proposition:

"On October 28th our new law goes into effect providing for a combination hunt-

ing and fishing license. Hunting licenses being issued at this time are good until next July 1st.

"Our question is, would the hunting licence issued prior to October 28th, permit the licensee to enjoy the privilege of both hunting and fishing until the end of the license year, or would an additional license have to be purchased by them after October 28th to cover fishing?"

The fee required under the law, as it becomes effective October 28, 1924, is the same as that under the old law for a hunting license. The license to be issued after October 28, 1924, includes both a license to hunt and fish for the same price that is now charged for the hunting license. By the provisions of Section 1727, Code of 1924, it is provided that the license shall expire upon the first day of July next succeeding the issuance thereof. Under the provisions of the prior statute governing hunting licenses the license expired the first day of July. It is therefore, apparent that the legislature intended to include an additional privilege in the license that has heretofore been issued, to-wit: that of fishing in the waters of this state. No additional fee is charged for this privilege and we are of the opinion that the license issued prior to October 28, 1924, will authorize the licensee to fish as well as hunt under the provisions of the statutes of Iowa governing such matters. The procurement of an additional license after October 28, 1924, is therefore, unnecessary.

BONUS BOARD: One must refuse to render service in order not to receive bonus. Conscientious objection is not refusal.

November 4, 1924.

Executive Secretary, Bonus Board: We wish to acknowledge receipt of your favor of the 31st ult. in regard to the claim of Rudolph Pecher, No. 67797, disapproved by your board. You request our opinion on a state of facts submitted as to whether or not this man rendered unqualified service within the meaning of the provisions of Section 4 of the Bonus Act. The facts submitted by you are as follows:

"Sworn statements made by Rudolph Pecher in his application filed for the Iowa bonus show that he registered for draft at Amana, Iowa, and was inducted into service at Marengo, Iowa, on August 6, 1918, and was honorably discharged December 18, 1918.

His answer to question nineteen shows that he did not seek to evade the military service on any of the following grounds, conscientious objections, political or any other grounds because he was an alien. His answer to question twenty shows he never claimed exemption from service and his answer to question twenty-one shows that he rendered unqualified service, did not request to be excused from service overseas, did not request to be relieved from service with combat troops and did not request to be excused from service at the front.

"In answer to an inquiry from this department as to whether or not he was a member of the Amana Society at the time of his induction, his answer reads, 'Yes, I was, but I was no non-combatant and was in the infantry from start to finish and am no member of the Amana Society ever since.'

"Additional evidence received from the War Department reads as follows: 'Rudolph Pecher registered with Local Board for Iowa County, Iowa, June 5, 1917, on December 22, 1917 and again on February 12, 1918, he claimed exemption on the grounds of dependents and of being a member of a religious organization whose creed forbade participation in warfare. He was inducted August 6, 1918, accepted at camp August 9, 1918, and was assigned to Company B, 13 Replacement Battalion, Infantry Replacement and training camp, Camp MacArthur, Texas, was transferred October 29, 1918, to the October Automatic Replacement Draft, Camp MacArthur, Texas, was transferred December 10, 1918, to Camp Dodge, Iowa, and honorably discharged December 18, 1918.'"

That part of Section 4, Chapter 332, Laws of the 39th General Assembly, known as the Bonus Law, concerning the matter in question reads as follows:

"No person shall be entitled to such payment or allowance who being in the military or naval service of the United States, subsequent to April 6, 1917, refused on conscientious, political or other grounds to subject himself to military discipline or to render unqualified service."

As will be noted, there must be a refusal to render unqualified service. Under the facts submitted by you it is apparent that although the claimant had religious scruples and conscientious objections to war, he nevertheless rendered unqualified service and did not receive any special dispensation while in the service because of his religious scruples or conscientious objections, but served the same as any other man in the army.

We are, therefore, of the opinion that his claim should be allowed.

BOARD OF PAROLE—Has no jurisdiction to parole prior to commitment to jail.

May 23, 1924.

Iowa State Board of Parole: This department is in receipt of your communication dated May 10, 1924, in which you request an official opinion from this department. Your request is in words as follows:

"This department is in receipt of a letter from Governor N. E. Kendall, which is as follows:

"'I transmit herewith such record as I have in the case of State of Iowa v. Aaron Waxman. The Attorney General advises me that primary jurisdiction is with your body, and that under the statute you are not controlled by the fact that the defendant has not yet been committed to jail.'

"Attached to this letter is correspondence with the Governor and Don G. Mullan, and also George G. Yeaman. This correspondence is relative to Aaron Waxman, committed from Woodbury County on a charge of bigamy to an indeterminate sentence of five years.

"The defendant it seems had appealed his case to the Supreme Court, which tribunal on determination of the case modified the sentence to provide for imprisonment in the County jail for six months.

The defendant is not in custody but under bond and has never been committed, neither has the County Attorney or the Presiding Judge recommended to this Board a parole before commitment.

"This department would be pleased to have you cite the statute or any decision of the Supreme Court wherein this department has primary jurisdiction over this matter."

It is a matter of some regret to me that I must under the law, change the opinion which we have apparently given to the governor. This department assumes the blame for the error which has apparently crept into this matter. Our thought was that we were referring to the power of the Board of Parole to make investigations and recommendations rather than the primary jurisdiction to parole the prisoner.

In any event, we were wrong.

Sections 2247, 2252, 2253, 2258 and 2259 of the Compiled Code provide for the powers of the Board of Parole relative to the paroling of prisoners. These sections apply only to prisoners confined within the penitentiary or men's reformatory or who stands committed thereto.

Section 2247 provides in part as follows:

"The Board of Parole shall have power to establish rules and regulations under which it may allow prisoners within the penitentiary or men's reformatory, other

than prisoners serving life terms, to go upon parole outside of the penitentiary or men's reformatory buildings, inclosures and appurtenances, but to remain while on parole in the legal custody of the warden of the penitentiary or men's reformatory and under the control of the said board of parole and subject, at any time, to be taken back and confined within the penitentiary or men's reformatory; it may, on the recommendation of the trial judge, and county attorney, and when it shall appear that the good of society will not suffer thereby, parole, after conviction and before commitment, persons not previously convicted of a felony; and the board shall have full power to enforce such rules and regulations and to retake and reimprison any such paroled convict."

It is to be observed that this section clearly relates only to persons sentenced to the state penitentiary or the men's reformatory and not to prisoners committed to the county jail.

However, under the law relating to pardons and commutations of sentence, the governor has the right to call upon the Board of Parole to make such investigations as he may deem necessary. Section 2258, et seq.

Again, the district court has the power to suspend prior to commitment, under section 2254 of the compiled code.

INSANE PATIENTS—COLLECTION OF EXPENSE BY COUNTY—STATUTE OF LIMITATION—Statute of Limitation runs against county for insane fees but where quarterly charges are made by the county the account becomes an open continuous account within the meaning of the statute and may be collected within five years from date of last charge.

May 27, 1924.

Auditor of State: This will acknowledge receipt of your letter of the 23rd instant in which you propounded the following inquiries:

"1. An insane or other state hospital patient is admitted to one of the state institutions. Charges are made quarterly for the care of these patients. If no settlement is made for this care, will the account outlaw? If so, when?

"2. Will this account be kept alive by being added to each quarter? Would a parole of the patient during a long period of time for which charges were being made, change the status of the matter?

"3. Would the situation be changed in regard to these accounts if the guardian was notified of the charge and payment demanded from time to time by the County Auditor?"

In answer to your first inquiry will say that the statute of limitations runs against an account of this character the same as any other account. The account is not a charge by the state to the individual, but a charge by the county and the statute of limitations runs against the county the same as against individuals.

In response to your second inquiry, will say that the Supreme Court of this state has held that where the charges made by a state asylum are paid quarterly by the county from the time of commitment until the death of the patient and a charge is made against the person liable for the patient's support that such an account was a continuous, open, current account within the meaning of the statute of limitations. See *Buena Vista County v. Woodbury County,* 163 Iowa, 626; *Scott County v. Townsley,* 174 Iowa, 192 and *Cedar County v. Sager,* 90 Iowa, 11.

In response to your third inquiry will say that this question is taken care of in our answer to your second inquiry.

SHERIFF'S SALE: Property redeemed. If the time for redemption has not expired and application is made under the provisions of chapter 102, Laws of the 40th General Assembly for refund of said fee by the holder of the certificate, a refund should be made at the time the exemption period expires.

May 27, 1924.

County Attorney, Black Hawk County, Waterloo, Iowa: We wish to acknowledge receipt of your favor of the 23rd concerning the interpretation of Chapter 102, Laws of the 40th General Assembly.

Referring to our opinion addressed to you under date of May 14, 1924, concerning the Chapter just referred to, you ask the following question: "Would not the rule be the same where no redemption is made and the grantee in the sheriff's deed pursuant to such sale applies for the refund?"

The statute under consideration provides as follows:

"Where property has heretofore been sold at sheriff's sale and the time of redemption has not yet expired and the debtor, or other lien holder, redeems from the sale, the county shall refund to the debtor, or whoever redeems, the fees collected by the sheriff at the time of sale under the law repealed by section 1 of this act, or if the property is not redeemed, then the county shall refund said fee to the holder of the certificate of sale at the time the redemption period expires."

You are advised that we are of the opinion that if the time for redemption has not expired and application is made for refund of said fee by the holder of the certificate of sale then the refund should be made at the time the redemption period expires.

POLICEMEN'S PENSIONS—Policemen not entitled to compensation except where injury is sustained while performing some duty where there is peril and within the scope of his official duty.

June 9, 1924.

Iowa Industrial Commission: This department is in receipt of your letter of May 28, 1924, in which you request an official opinion. Your letter follows:

"One J. J. Petersen, town marshal of Battle Creek, Iowa, sustained an injury on December 7, 1923. The injury resulted from the accidental discharge of his revolver which dropped from its holster to the floor and was discharged while he was cleaning out the city jail. The shot passed through the calf of his left leg but seems not to have caused a serious wounds as he was back at work in 3 weeks.

"Is it your opinion that this is a case to be handled under Senate File 372, which was enacted by the 40th General Assembly? The department will very much appreciate your advice."

Chapter 17 of the Acts of the 40th General Assembly provides as follows:

"That henceforth any policeman (except those pensioned under the policemen's pension fund created by law), any sheriff, marshal, constable and any and all of their deputies, and any and all other such legally appointed or elected law enforcing officers, who shall, while in line of duty or from causes arising out of or sustained while in the course of their official employment, meaning while in the act or making or attempting to make an arrest or giving pursuit, or while performing such official duties where there is peril or hazard peculiar to the work of their office, be killed outright, or become temporarily or permanently physically disabled or if said disability result in death, shall be entitled to compensation, the same to be paid out of the general funds of the state for all said injuries or disability.

"Where death occurs, said compensation shall be paid to the dependents of the officer, as defined in workmen's compensation law. Said compensation shall be fixed by and based on the maximum allowed and designated in the schedule of compensation for injuries and death allowable under the compensation act.

"The handling and adjudication of all of said cases on behalf of the state shall be performed by the industrial commissioner, or thru his office, as he may direct."

You will observe that the legislature has specifically provided that compensation shall only be paid where injuries are sustained "while in the act or making or attempting to make an arrest or giving pursuit, or while performing such official duties where there is peril or hazard peculiar to the work of their office."

It cannot be said that cleaning out a city jail is either hazardous or perilous. It follows that this man would not be entitled to compensation as provided in this act.

VOCATIONAL EDUCATION—The Board for Vocational Education may use the appropriation made by the 40th G. A. regardless of no federal appropriation by the 68th Congress.

June 13, 1924.

Board for Vocational Education: This department is in receipt of your letter dated June 12th, 1924, in which you request an official opinion. That portion of your letter necessary to a determination of the questions involved is in words as follows:

"In the light of the attached brief relating to National Civilian Rehabilitation Legislation, and in view of the fact that the session of Congress convening in December is a continuation of the Sixty-eighth Congress, the Deficiency Bill will not have to be reintroduced, but will be a privileged measure, and will be presented immediately and should pass within the first few days of the session, and whereas the appropriation will be available for the entire fiscal year ending June 30, 1925, may the Board of Vocational Education, in order to carry on its work and meet the present contingency, use the $22,836.45 allotted by the Fortieth General Assembly?"

Section 1, Chapter 295, Acts of the 40th General Assembly provides in words as follows:

"That there shall be appropriated a sum of money available for each fiscal year not less than the maximum sum, which may be allotted the state for the purposes set forth in said federal act, and that there is hereby appropriated for such purposes out of any money in the state treasury, not otherwise appropriated, for the fiscal year ending June 30, 1924, the sum of twenty-two thousand eight hundred and thirty-six dollars and forty-five cents ($22,836.45) and for the fiscal year ending June 30, 1925, the sum of twenty-two thousand eight hundred and thirty-six dollars forty-five cents ($22,836.45)."

It is to be observed that the legislature in this section first declares its intention to appropriate a sum of money for each fiscal year *not less* than *the maximum sum* which may be allotted the state by the federal government.

After declaring the legislative purpose, the legislature proceeds to make a flat appropriation of $22,836.45 for the fiscal year ending June 30, 1924, and a like sum for the fiscal year ending June 30, 1925.

It is to be noted then that the state, while it agrees to appropriate a sum of money equal to the federal appropriation, does not limit itself at all. It may appropriate more. Obviously, not less than the maximum sum appropriated by the federal government means what it says and says what it means.

It follows therefore that there being a flat appropriation of $22,836.45 for the purposes of the act, the Board is authorized to proceed with this appropriation without regard to the failure of the federal government to appropriate any sum whatsoever.

The other information contained in your pamphlet shows the clear intention of the federal government to continue this work. The federal government says that it is going to proceed with the work and authorize the continuance of the work for the next three years. The only failure is in the appropriation. It is fair to assume that the federal government will carry out its obligations and having asserted

its intention to continue the work the state is in a position to see that the federal government will meet its just obligations as provided in the act recently passed by the Congress.

IMPORT DUTY—Liability of state where articles are imported for state use. —Federal Government cannot collect import duty on articles imported by an arm or agency of the state for state use.

June 26, 1924.

Iowa State Board of Education: This will acknowledge receipt of your letter of the 20th instant in which you request a reply to your letter dated January 8th of this year, with reference to the liability of the State of Iowa for import duty on scientific apparatus, books, publications, etc. purchased in foreign countries for the use of the state institutions of learning which consist of the State University, State College of Agriculture and Mechanic Arts and the State Teachers College. You enclose with your letter a memorandum submitted by the State University of Minnesota to the collector of customs at the St. Paul Customs House.

In response to your inquiry, I will say that the position taken by the State University of Minnesota with reference to the payment of these claims is, in my opinion, proper and the Brief submitted by the Comptroller correctly states the law as it has been announced by the Supreme Court of the United States on the subject under consideration for it has been well settled by many decisions of the United States Supreme Court that the Federal Government cannot tax the powers, properties, operations or instrumentalities of the states, nor the means by which they carry their powers into execution any more than a state can tax the operations, instrumentalities or the property of the Federal Government, and no rule is better settled than that the Federal Government cannot by taxation or otherwise retard, impede, burden or impair or in any manner control the operation of valid laws that have been enacted by state legislation for the purpose of carrying into execution the powers vested in the state government.

It being conceded therefor, that by the uniform decisions of the highest court in the land states have a right to administer their governmental affairs and to employ their own means and agency to carry out their valid legislative enactments without interference by the Federal Government, the only question left to be determined by the state courts is whether these institutions for whom the documents are received, upon which the Federal Government seeks to impose a duty are arms or agencies of the state government and on this proposition no citation of authorities is here necessary for the state maintains and operates these institutions of learning for the benefit of the people of the state and as a part of its governmental functions.

Although the tariff act of 1922 does not provide for exemption from duty articles that are imported by a state, it is the view of this department that the collection of the tax as against the state cannot be enforced for the reasons which we have above set out because if the import duty would be paid by the state of Iowa there would be a direct contribution by the state of Iowa and a direct tax upon the state of Iowa by the Federal Government. In addition to the authorities cited in the Brief of the Comptroller of the University of Minnesota, we would cite the case of *Ambrosini v. U. S.*, 187 U. S. 1. It follows therefore, that it is the view of this department that the State Board of Education would be justified in refusing to pay the import duty on the articles referred to.

BOARD OF CONTROL—Veterans Bureau—Checks tendered in payment of the claim of the Board of Control may be accepted without being a satisfaction of the full claim of the Board against the Government.

August 21, 1924.

Secretary Board of Control of State Institutions: I wish to acknowledge receipt of your favor of the 21st requesting the opinion of this department upon the following proposition:

"For several years past we have entered into contracts with the U. S. Veterans Bureau for the care of war risk beneficiaries in our insane hospitals. All such contracts entered into previous to June 30, 1923, were for $45.00 per month for each beneficiary so cared for at our institutions.

"On June 30, 1923, new contracts were submitted by the Veterans Bureau at the regular rate previously charged, which amount as stated above, was $45.00 per month. These contracts were approved by this Board and the Superintendents of our Hospitals and returned to the Veterans Bureau for their approval, but were not accepted by the Bureau for the reason that they felt that the government should not pay more for the care of these patients than the regular per capita allowance authorized by the General Assembly for the care of patients residing in this state.

"Notwithstanding that these contracts were not approved by the Veterans Bureau, all such war risk beneficiaries were cared for by the State of Iowa up until the time they were transferred to the U. S. Veterans Bureau at Knoxville. We therefore have claims against the government at this time totaling approximately $19,053.23.

"A representative of the Veterans Bureau of St. Louis, called at this office today and tendered to this board checks totaling $7,189.41 which settlement is on a basis of $20.00 per month, which leaves an unpaid balance, figuring the cost under the old contract at $45.00 per month, of $11,863.82.

"What the members of this board wish to know is whether or not, if an acceptance by them of the checks tendered by the Veterans Bureau in the sum of $7,189.41 would be an acknowledgment as full settlement of our claim, or whether if we accepted this amount we would be privileged to file a reclaim for the balance still due under the contracts which expired June 30, 1923."

We are of the opinion that the Board of Control may accept the checks in question, and at the time acknowledge the acceptance of the same with the understanding that the acceptance is not in full settlement of your claim, and with the further statement and understanding that a claim for the balance due under the contract would be filed by the Board of Control with the Veterans Bureau.

We understand from our conversation with the representative of the Veterans Bureau and your board this morning that the checks in question are not tendered as full settlement, but merely as a payment upon your claim, being the amount the Veterans Bureau admits that it should pay to the Board of Control. With this understanding and acceptance by your board, as above stated, we are of the opinion that the Board of Control would still be in a position to file a claim for the balance claimed under contract, and acceptance of these checks would not bar such claim.

OPINIONS RELATING TO SCHOOLS AND SCHOOL DISTRICTS

SCHOOLS—May be kept open when average daily attendance during preceding year was not less than five, or if there are more than ten resident children of school age who will be enrolled in school it may be opened.

January 5, 1924.

Superintendent of Public Instruction—You have requested an opinion from this department upon the following proposition submitted to you by Mr. W. H. Simons, County Superintendent of Fremont County:

"A part of section 2773 states that 'no contract shall be entered into with any teacher to teach any school in the school corporation, when the average daily attendance in said school the last preceding term therein was less than five pupils, unless, etc.'. In some of our rural schools the directors allow pupils who do not live in the district to attend school, either with or without tuition. The directors in one township have asked me whether or not this average of five pupils must be made by pupils who live in the district or whether the attendance of all whose names appear on the register shall be counted."

Section 2773 of the Supplement to the Code, 1913, as amended, provides that the board of any school district shall not contract with any teacher to teach school in the school corporation when the average attendance in said school for the last preceding term therein was less than five pupils, unless a showing is made to the county superintendent that the number of children of school age in said school district has increased so that ten or more will be enrolled in such school and will attend therein, in which case the county superintendent may consent to maintaining a school for the ensuing term. The language of the provision specifically states that the measure is based on "the average attendance in said school the last preceding term." This language does not require that the pupils be residents in the district. It is the number of pupils attending the school that is important and where there were five or more pupils in attendance, whether resident or non-resident in the district, for the last preceding term, it is our opinion that the school board may contract with the teacher to teach such school and may maintain a school for the ensuing term.

In cases where a showing is made to the county superintendent that a number of children of school age "in said school district" has increased so that ten or more will be enrolled and will attend school therein, the county superintendent may permit a school to be maintained. The language indicates that the count of ten must be based upon those resident in the school district.

COUNTY SUPERINTENDENT—Deputy—salary—Salary and qualifications of deputy governed by minimum wage law.

July 12, 1923.

Superintendent Public Instruction: We have your request for an opinion upon the question as to the salary and qualifications of a deputy county superintendent of schools.

In answering this inquiry, we desire to direct your attention to the provisions of section fourteen of chapter 250, Acts of the 40th General Assembly, which provides as follows:

"Each deputy county superintendent shall receive such annual salary as shall be allowed by the county board of education, and which said board shall fix each year in accordance with the provisions of the teachers' minimum wage law."

You will observe from the foregoing that so far as the compensation is concerned, it is to be determined in accordance with the provisions of the minimum wage law, which you will find set forth in the Compiled Code, 1919, beginning at section 2619.

You have also made inquiry as to the qualifications of the deputy. This, in a large part is governed by the teachers' minimum wage law, which fixes the wages according to the character of certificate held by the deputy. It is evident from a reading of this provision of the 40th General Assembly that if the deputy is not possessed of a certificate, he is not entitled to any compensation, as you will find the minimum wage law expressly provides that no person shall be employed as a

teacher in any common school, which is to receive its share of the school fund, without having the certificate of qualification, or certificate or diploma issued by some officer authorized so to do by law, and that no compensation shall be recovered by a teacher for services rendered while without such certificate or diploma. It is therefore evident that, as the salary of the deputy is to be determined in accordance with the minimum wage law, unless such deputy holds a certificate of some character recognized by law that such deputy is not entitled to any compensation whatsoever.

MINING CAMP FUND—When site for a school is paid for out of Mining camp fund, the deed may be taken out in the name of the State of Iowa.

September 25, 1923.

Superintendent of Public Instruction: We have received your communication of September 19, 1923, asking this department for an opinion upon the following question:

"Will you please give us your opinion on the following:

"Is there any objection to taking a deed for a school site in the name of the state of Iowa instead of in the name of the school district when the site is paid for out of the mining camp fund?

"Our reason for doing this is that should the mine be abandoned after a number of years the property could be sold and the money revert to the state instead of the school district.

"An early reply would be appreciated as we desire to start work on the building the first of next week."

The statutes appropriating money for the purpose of improving school conditions existing in the mining camps of the state of Iowa are chapter 295 of the Acts of the Thirty-ninth General Assembly and chapter 286 of the Acts of the Fortieth General Assembly. The statutes are identical in language, although each statute makes an appropriation for a particular biennium. Section 1 of chapter 286 reads as follows:

"There is hereby appropriated from the state treasury out of funds not otherwise appropriated the sum of fifty thousand dollars ($50,000.00) annually, or so much thereof as may be necessary to be used by the state superintendent of public instruction during the next biennium *for the purpose of improving school conditions existing in the mining camps in the state of Iowa.*"

It will be observed that the purpose of the appropriation provided for therein is stated in the following language:

"for the improving school conditions existing in the mining camps in the state of Iowa."

The meaning of said phrase depends upon the definition of the word "improving." The word to "improve" has been defined: to make good use of; to employ advantageously; to increase, to augment, or to enhance; to advance in value; to use or employ to a good purpose; to make productive or to turn to profitable account; to use to advantage. 21st Cyc. page 1743. It will be observed that the funds appropriated thereunder are to be used by the state superintendent of public instruction with the approval, and under the direction of, the Executive Council. There is no provision therein giving to the superintendent of public instruction the authority to buy a site for a school building or to erect such a building thereon. However, we are of the opinion that this authority is necessarily implied from the express authority granted. The evident purpose of the statute is to give to children of

school age, residing in mining camps, full and complete school facilities and the statutes should not be strictly construed so as to deprive them thereof. The word "improve" implies something more than the repairing of property already belonging to the school district or to make better the facilities already owned by it. Undoubtedly, the superintendent of public instruction, with the approval of the Executive Council, has full and complete authority to adopt any method or to purchase any property for the purpose of giving to such school district better and improved school facilities. (Opinions of the Attorney General, 1922, page 273.)

If, in his judgment, it is necessary to purchase a site for a school building, and erect a building thereon, or to erect a building on a site already owned by one of the school districts, this right can be clearly exercised by him under the plain provisions of the statute. If the superintendent deems it advisable to buy a site for a school building out of the appropriation for the improvement of schools in mining camps, it follows, in our opinion, as a necessary corollary that the title thereto may be taken in the state of Iowa. It is well known that mining camps are not usually of a permanent character, and the time may come when the school will be abandoned. Under such conditions the title should remain in the state so that the property can be sold and proceeds thereof become a part of the state funds. Statutes should be liberally construed so as to carry out the purpose or intent in the enactment thereof.

TEACHER. Holding certificate issued under Chapter 280, 38th General Assembly, is eligible to hold office of county superintendent.

November 21, 1923.

Superintendent of Public Instruction: This department is in receipt of your request dated November 8, 1923, in which you ask in substance as to whether or not a teacher to whom a certificate has been issued under the provisions of Chapter 280 of the Acts of the 38th General Assembly is eligible to hold the office of county superintendent of schools.

This chapter is amendatory of Section 2629 of the Supplement to the Code, 1913. This section of the code, as amended, is in words as follows:

"The board shall meet for the transaction of business at such times and places as the president may direct, and shall annually hold at least two public examinations of teachers, to be conducted by a member or the secretary of the board or by such qualified person or persons as the board may select. All examinations shall be conducted in accordance with rules and regulations adopted by the board, not inconsistent with the laws of the state, and a record shall be kept of all of its proceedings. It may issue state certificates and state diplomas to such teachers as are found upon examination to possess a good moral character, thorough scholarship and knowledge of didactics, with successful experience in teaching, or with such other training and qualifications as the board may require, *or to those possessing satisfactory qualifications by reason of training and teaching experience of not less than fifteen years as the board in its discretion may determine.* The examination for certificates and diplomas shall cover orthography, reading, writing, arithmetic, geography, English grammar, bookkeeping, physiology, history of the United States, algebra, botany, natural philosophy, drawing, civil government, constitution and laws of the state, and didactics; those for diplomas, in addition to the foregoing, geometry, trigonometry, chemistry, zoology, geology, astronomy, political economy, rhetoric, English literature, general history, and such other studies as the board may require."

We have underscored the amendment provided in the chapter. Section 2631 of the Supplement to the Code, 1913, provides in words as follows:

"A state certificate shall authorize the holder to teach in any public school in the state for five years thereafter, and a diploma shall confer such authority for life; but any certificate or diploma may be revoked by the board for sufficient cause, or such cause as would, if known at the time, have prevented issuance thereof, provided the holder of such certificate or diploma shall have due notice, and shall be allowed to be present and make his defense. For each certificate issued the applicant shall pay two dollars, and for each diploma five dollars, which may be required before the examination is commenced. All moneys obtained from this source shall be paid into the state treasury."

It will thus be observed that the certificates issued under the provisions of Section 2629 are to be state certificates authorizing the holder to teach in any public school in the state for five years thereafter.

Section 1072 of the Supplement to the Code, 1913, provides the qualifications for the office of county superintendent. That portion of this section applicable is in words as follows:

"Said convention shall organize by the selection of a chairman and when so organized, shall elect a county superintendent of schools, who shall possess the qualifications required by law."

Section 2734-b relates to the qualifications of the county superintendent and provides with reference thereto as follows:

"The county superintendent, who may be of either sex, shall be the holder of a regular five-year state certificate or a life diploma, and shall have had at least five years' experience in teaching or superintending."

The coupling of these several sections of the law together leave no doubt as to the fact that when a teacher secures a certificate in accordance with the provisions of chapter 280 of the Acts of the 38th General Assembly, that he or she is eligible to hold the office of county superintendent of schools. The legislature does not distinguish between a teacher who secures a five-year certificate upon an examination and one securing a certificate upon satisfactory showing of training and teaching experience as provided in this chapter. Both secure the regular state certificate as provided.

SCHOOL FUNDS. The general fund of a school district cannot be used for the purpose of building a school house or for purchasing sites or equipment.

November 28, 1923.

County Attorney, Lee County, Keokuk, Iowa: Your favor of the 21st concerning an opinion requested by you of this department has been referred to me. I find your request as follows:

"* * * The question is, whether or not the general fund of a school district may be drawn on for the purpose of paying the expenses of building and equipping schools."

In reply I wish to say that we are of the opinion that the school district cannot use the general fund for the purpose of building school houses or purchasing sites or equipment for new school houses.

CONSOLIDATED SCHOOL DISTRICTS. The board of directors of a consolidated school district must submit the proposition of whether or not the board shall secure a site to build or equip the school house in the district without reference to the cost thereof.

Repairs upon a school house may be made when the cost thereof will not exceed $2,000 without submitting the proposition to the electors.

November 30, 1923.

County Attorney, Mahaska County, Oskaloosa, Iowa: I have your favor of the 9th at hand in which you ask an opinion from this department upon the following proposition:

"Have the board of directors of a consolidated school district legal authority to erect or repair an additional room where the cost of the repair or construction will be in the neighborhood of $1,000.00 without submitting the proposition to a vote of the electors of the school district, there being sufficient money in the school house fund without levying an additional tax."

We wish to call your attention to Section 2524-a23, Supplement to the Compiled Code of Iowa, that provides as follows:

"The board of each school corporation organized for the purpose of establishing a central school, shall provide a suitable building for such school in that district and may at the regular or special meeting, call a special election to submit to the qualified electors of the district the question of voting a tax or authorizing the board to issue bonds, or both, for any or all of the following purposes: To secure a site, build or equip a school house, or to repair or improve any school building or grounds when the cost will exceed $2,000.00. * * *"

It will be seen that the above section requires the electors to vote as to whether or not the board shall secure a site, build or equip a school house without reference to the cost thereof. In case of the repair or improvement of any school building or grounds, the board would have authority to make the repair or improvement when the cost does not exceed $2,000.00 without submitting the question to the electors. We are therefore of the opinion that the board of directors of a consolidated school district would not have legal authority to erect an additional room without submitting the question to a vote of the electors and that the board of directors does have authority to make repairs or improvements upon the school building or grounds without submitting the question to a vote of the electors, when the proposed repair or improvement will not exceed $2,000.00.

FREE TEXTBOOKS. School districts of an independent school district have authority to make reasonable rules and regulations protecting against damage, loss or failure to return free textbooks.

December 3, 1923.

County Attorney, Page County, Clarinda, Iowa: I wish to acknowledge receipt of your favor of the 9th requesting an opinion from this department upon the following proposition:

"Some few years ago the district voted for free textbooks. This year the board purchased the books but in order to protect itself against loss of property and damage to same adopted the following regulations: For all grades up to and including the 6th a deposit of $1.00 per pupil is required. For the 6th and 7th grades a deposit of $1.50 is required. For the high school a deposit of $2.00 per pupil is required. If the books are returned in good shape, due allowance being made for ordinary wear and tear, the deposit money is returned in full. If the books are damaged the deposit is returned less the damage or loss. The board has received a letter objecting to the deposit, claiming that it violates the mandate of the people for free textbooks and that the board has no legal right to make the regulation."

As we understand your request, the above situation arises in the independent school district of Shenandoah, Iowa, where the electors voted to have free text-

books under the provisions of Section 2706 and 2707, Compiled Code, 1919. Section 2707, Compiled Code, 1919, contains the following language:

"* * * The board shall hold pupils responsible for any damage to, loss of, or failure to return any such books, and shall adopt such rules and regulations as may be reasonable and necessary for the keeping and preserving thereof. * * *"

We believe, under the provisions of this section just quoted, that the school board would have authority to adopt the regulation requiring pupils to make a deposit as security for "damage to, loss of, or failure to return any such books," such a regulation in our opinion not being unreasonable and being necessary for the keeping and preserving of the textbooks.

TEACHERS' CERTIFICATES. Fee should be charged for preparation, execution and delivery of duplicate teachers' certificates.

December 4, 1923.

Superintendent Public Instruction: You have submitted to this department the question as to your right as state superintendent to charge for a fee for the preparation, execution and delivery of duplicate teachers' certificates. You are advised that there is no provision of the law for the issuance of duplicate certificates. However, there is a provision of the law which provides for the issuance of certified copies. In all such cases it is your duty to charge the fee provided in Section 1291 of the Code, 1897.

SCHOOL DISTRICTS. Tax to pay interest and principal on bonded indebtedness, maximum is 7 mills per dollar of actual value of taxable property in district. Maximum allowance for each pupil for general fund is $80.00 per pupil. In corporations of 50,000 or over $90.00 per pupil.

December 4, 1923.

Superintendent of Public Instruction: You have requested from this department an opinion upon two propositions submitted by Mr. B. F. Wescoat, superintendent of the Buckeye public schools, stated as follows:

1. What is the maximum allowance per pupil of school age that can be levied by each school corporation, and

2. What is the maximum amount that can be levied by each school corporation to pay principal and interest on the bonded indebtedness of the district.

Section 2806 of the Supplement to the Code, 1913, as amended by Section 9 of Chapter 386 of the Acts of the 37th General Assembly; Section 1, Chapter 77, Acts of the 38th General Assembly; and Section 2, Chapter 93 of the Acts of the 39th General Assembly contains the provision relative to the maximum allowance that may be made for each pupil for the general fund of each school corporation. It is there provided that the board at its regular meeting in July, or at a special meeting called for that purpose at any time between the July meeting and the third Monday in August following, shall estimate the amount required for the general fund, not exceeding $80.00 for each pupil of school age. It further provides that in any school corporation having a population of 50,000 or more the maximum levy may be increased to $90.00 for each person of school age in said district.

Section 2813 of the Supplement to the Code, 1913, as amended by Chapter 65 of the Acts of the 39th General Assembly, provides that the board of each school corporation shall, when estimating and certifying the amount of money required for general purposes, estimate and certify to the board of supervisors the amount

required to pay interest due or that may become due for the year beginning January 1st thereafter upon lawful bonded indebtedness, and in addition thereto such amount as the board may deem necessary to apply on the principal. It is further provided that the amount estimated and certified to apply on principal and interest for any one year shall not exceed seven mills on the dollar of the actual valuation of the taxable property of the school corporation.

SCHOOL ELECTION. Form of nomination petition for directors of independent consolidated school—jurisdiction of school board over—county superintendent cannot set aside election on ground that school board exceeded its jurisdiction.

March 30, 1923.

County Attorney, Marion County, Knoxville, Iowa: Your letter of recent date requesting an opinion upon several school matters has been received. We will endeavor to pass upon these propositions in the order in which submitted to us.

Your first inquiry was,

"What form of nomination petition is required in order to place in nomination the name of a party desiring to be a candidate for election as a director in an independent consolidated school district?"

In answering this inquiry we find that Section 2754 of the Supplement of 1913 provides that, "At the annual meeting in all independent districts members of the board shall be chosen by ballot." Further provision is made fixing the number of members of the board in the various districts according to the population of the same. Provision is then made that, "the names of all persons nominated as candidates for office in all independent city or town districts shall be filed with the secretary of the school board not later than seven days previous to the day on which the annual school election is to be held, each candidate to be nominated by a petition filed by not less than ten qualified electors of the district." No reference whatever is made to an independent consolidated school district, but it is evident that an independent consolidated school district should be governed by precisely the same rules so far as nomination is concerned as an independent city or town district for the reason that the election of directors in an independent consolidated district must be by ballot. In connection with this portion of your inquiry you have also asked whether it is necessary that the nomination petition be acknowledged before a notary. We find no provision in the statute that makes any such requirement so far as the nominating of members for a school board is concerned.

Your second question is as follows:

"Is the order of a school board directing the secretary to reject nomination papers, signed by ten qualified electors and filed within the prescribed seven days, because not acknowledged before a notary public, and the subsequent refusal of the board and secretary to print the names of the rejected nominees on the ballot, such an order as to bring it within the scope of Section 2590, C. C. 1919, under appeal to county superintendent?"

Section 2590 of the C. C. 1919 to which you refer is identical with Section 2818 of the Code, which provides in part as follows, "Any person aggrieved by any decision or order of the board of directors of any school corporation in a matter of law or fact may, within thirty days after the rendition of such decision or the making of such order, appeal therefrom to the county superintendent of the proper county; * * ." This is an unusual provision to find in the statute as it gives the county superintendent the right to review the finding of the school board not

only on a question of fact but also on a question of law. In your letter you state that you believe that the appeal would be of no value as the election is over and that you do not believe that it is within the power of the county superintendent to declare the election illegal. This raises an interesting question and one that is not altogether free from doubt. In the case of *State v. Rowe,* 187 Iowa, 1116, an action in the nature of quo warranto was brought to test the right of the defendant to hold the office of school director of a certain consolidated school district, and in discussing this matter this language was used, "The rule that, where jurisdiction to call an election has once attached, subsequent mistakes and irregularities in the manner and method of the call made and election held do not oust the jurisdiction, and that errors so committed are to be corrected by appeal, if an appeal has been provided for, is too thoroughly established to justify further discussion along the line. *Ryan v. Varga,* 37 Iowa 78; *Dishon v. Smith,* 10 Iowa 212, 217; *Page County v. American Emigrant Co.,* 41 Iowa 115; *Farrington v. Turner,* 53 Mich. 27 (18 N. W. 544); *Baker v. Board,* 40 Iowa 226; *Bennett v. Hetherington,* 41 Iowa 142; *Munn v. School Twp.,* 110 Iowa 652; *Oliver v. Monona County,* 117 Iowa 43; and other cases already cited." On the other hand the Supreme Court has also held in the estate of *Valentine v. Independent School District,* 187 Iowa 555, where writ of mandamus was sought to require the defendants to issue a certificate to the plaintiff that, "The rule is thoroughly well settled that, while the discretion granted by statute to the board of directors can be reviewed only by appeal to the county superintendent, yet, where it 'acts without jurisdiction, or has exceeded its powers, and by some act in an official capacity has done, or attempted to do, that which it has not a right to do, the courts have jurisdiction to set aside the unauthorized act.'" (p. 568.)

It has furthermore been held that relief from a void act of a school board may be had by direct appeal to the courts, *Peterson v. Pratt,* 183 Iowa 462. If as a matter of fact that school board did exceed its jurisdiction in rejecting the nomination papers presented to it, then we believe the matter could be taken directly to the court for review. The county superintendent certainly would not have authority to set aside an election on the grounds that the school board had exceeded its jurisdiction. This is purely a judicial question.

Your third question is as follows,

"In case a contest of a school election is desired, what time is allowed before the notice of such appeal must be served; upon whom must it be served and before whom shall the contest be held?"

In view of the fact that we do not believe the county superintendent has jurisdiction to set aside an election in a case such as outlined in your previous questions, we have not attempted to answer this inquiry.

COUNTY SUPERINTENDENT. May attend conference authorized to be held by law, on call of state superintendent on county's expense. Senate File No. 636 does not apply.

April 19, 1923.

Superintendent of Public Instruction: You have submitted the proposition to this department for an opinion of whether or not Senate File No. 636, as enacted by the Fortieth General Assembly, prohibits the boards of supervisors of the respective counties from authorizing the issuance of warrants in payment of necessary

expenses incurred by county superintendents of schools in attendance upon meetings called by the state superintendent of public instruction.

Section 2 of Chapter 112 of the Acts of the Thirty-ninth General Assembly, provides as follows:

"That in addition to the foregoing compensation such superintendent shall receive the expenses of necessary office stationery and postage and *those incurred in attending upon meetings called by the superintendent of public instruction;* claims therefor to be made by verified statement filed with the county auditor, who shall draw his warrant upon the county treasurer therefor."

Senate File No. 636, enacted by the Fortieth General Assembly and which was effective on publication, provides as follows:

"It shall be unlawful for the county board of supervisors to allow any claim or authorize the issue of any warrant for the purpose of defraying the expense of any county official to any state convention of county officials or of any such group meetings of county officials of a portion of the state of Iowa less than the entire state."

It will be observed that the provisions above quoted from Senate File No. 636 refers to state conventions of county officials and to group meetings of county officials of a portion of the state less than the entire state. It does not in any manner refer to official meetings called under specific provisions of the law by an officer authorized to call such official meeting. It is the evident purpose of this statute to prohibit counties from paying the expenses of county officials incurred in attending state and district conventions of such officials which are not recognized by law as a part of the duties of such county officials. It is our opinion that it does not apply to expenses incurred in attendance upon meetings called by the superintendent of public instruction, which meetings the law makes it the duty of county superintendents to attend. In other words, we are of the opinion that the provisions of Senate File No. 636 do not repeal specific authorization of the payment of expenses incurred by county officials in attending meetings authorized by law.

COUNTY SUPERINTENDENTS. Compensation of while instructing in county institutes in other counties.

April 24, 1923.

Superintendent of Public Instruction: You have requested an opinion from this department relative to the duties and compensation of county superintendents. Your request is in substance as follows: It seems that in a number of county institutes the county superintendents of other counties have been selected as instructors and have acted as such drawing compensation from the county in which such institutes have been held. This raises the question as to whether or not the county superintendent can draw such compensation from such county and if so, whether or not he or she can, at the same time, draw compensation as county superintendent.

It is a general rule of law that where the duties of an offcier are fixed by statute, that when such duties are performed, the public officer is not required to do more in order to be entitled to the salary paid. See *Polk County v. Parker,* 178 Iowa 936. Our Supreme Court has further held that where a service is performed and not required of the officer by law, then such officer is entitled to receive individual compensation for such service. *Burlingame v. Hardin County,* 180 Iowa 919.

The statutes of this state nowhere impose upon the county superintendent the duty of instructing in teachers' institutes held in another county. Section 2758 of

the Supplement to the Code, 1913, prescribes the time and the manner of holding such institutes and provides for the employment of instructors and payment for their services. Therefore, I am of the opinion that a county superintendent is legally authorized to accept such employment and receive pay therefor. This finding, however, must be construed with the remainder of this opinion.

Having determined that there is nothing in the statute which will interfere with the county superintendent of one county acting as an instructor in an institute held in another county and receiving compensation therefor, the question then arises as to what effect, if any, this has on the compensation to be paid such officer as county superintendent of his or her own county. The law requires that each public officer must perform all the duties required by law in order to be entitled to compensation or salary as such officer. The law specifically prescribes the salary of the county superintendent of public instruction. The law relative thereto is to be found in Code Commissioners' Bill, No. 137, enacted by the Fortieth General Assembly and now the law by publication. This statute prescribes an annual salary of eighteen hundred dollars ($1,800.00) per year and such additional compensation as may be allowed by the board of supervisors, not exceeding in all three thousand dollars ($3,000.00). If the duties required of such county superintendent acting as an instructor in a teacher's institute in another county interfere with his or her duties as county superintendent and take time which belongs to the county, then such county superintendent cannot receive compensation as county superintendent for the period of time lost. It occurs to me that under all circumstances an arrangement should be made between the county superintendent and the board of supervisors of the county so that no question may arise as to interference with the duties of the county superintendent as prescribed by law. Under no circumstances should salary be paid an officer who neglects his duty to perform a service private in its nature.

COUNTY SUPERINTENDENT. Not entitled to salary in home county while drawing compensation for services rendered at county institutes in other counties.

April 26, 1923.

Superintendent of Public Instruction: Since the issuance of the opinion of this department dated April 24, 1923, relative to the right of a county superintendent to draw compensation from another county for services as instructor in a teachers' institute held in such county, you have orally requested this department to inform you as to the right of a county to pay a county superintendent a salary as such where such county superintendent is absent from the county for a period of six weeks or more instructing in summer school.

The law requires that such officers shall devote their time to the service of the public. When an officer is absent on private business for unusual lengths of time he should not be paid his salary as such officer.

This opinion must not be construed as depriving county officers of the right to a reasonable vacation as has been the custom throughout the state, nor to those temporary absences necessary in all public life but is to be construed only as affecting those instances in which an officer wilfully accepts service which will take such officer from the performance of his duty for unusual lengths of time thus resulting in neglect of duty for such period of time.

SCHOOLS—MEMBERS OF SCHOOL BOARDS. Appointments by county superintendent hold until next election and no longer.

May 30, 1923.

Superintendent of Public Instruction: This department is in receipt of your letter dated April 20, 1923, in which you request an opinion. For convenience I quote your letter. It is as follows:

"Kindly give me an opinion as to whether the county superintendent has the legal right to appoint members to serve on a school board for a longer term than would fill the unexpired period preceding the next annual election.

"There seems to be a little ambiguity on this point under Section 2550 Compiled Code, 1919. It has always been our belief from other sections as 2545 that for all other vacancies that may occur in offices filled at popular election that the matter of appointing any officer can extend only until the next regular election.

"Your opinion on this case will be very much appreciated."

Section 1276 of the Code, 1897 (C. C. Section 674) provides as follows:

"Successor chosen. An officer filling a vacancy in an office which is filled by election of the people shall continue to hold until the next regular election at which such vacancy can be filled, and until a successor is elected and qualified. Appointments to all other offices, made under this chapter, shall continue for the remainder of the term of each office, and until a successor is appointed and qualified; except that, when the office is one to be filled by the general assembly, the appointee shall hold only until the general assembly elects."

There is nothing in the statute to which you refer which would set aside the plain provisions of this general statute relating to officers. The county superintendent, however, should designate which director is to act for the short term and which for the long term so that when the succeeding election arrives the people will have information as to the officer at that time filling each of the several term positions.

SCHOOL DIRECTORS. Effect of Chapter 67, Acts 40th General Assembly on terms of school directors.

June 1, 1923.

Superintendent of Public Instruction: You have requested an opinion from this department as to the proper interpretation to be given Chapter 67 of the Acts of the 40th General Assembly. The facts submitted by you are in substance as follows:

In March, 1923, each of the rural districts of the state elected directors who, under the terms and provisions of the law, would assume office on July 1, 1923. The board of directors of such rural districts organize as a board by the election of officers on such date. It has been contended that by this act the terms of office of the old directors whose terms would otherwise expire on July 1, 1923, have been extended to the third Monday in March, 1924. It has been contended further that the board, instead of organizing in July, 1923, will not organize until the third Monday in March, 1924.

Your request requires an opinion from this department as to the interpretation to be given this act in and so far as it affects the situations referred to. Chapter 67 of the Acts of the 40th General Assembly revises the law so that the board of directors of all school districts will organize on the third Monday of March of each year. It further directs that the term of office of each director, whose term would otherwise expire on July 1st, shall be extended to the third day of March following. This section of the chapter is in words as follows:

"Sec. 4. Any member of the board or the county superintendent may administer the oath of qualifications to any member-elect of the board, the president of the

board, the secretary or the treasurer. Each director elected shall qualify on or before the date of the organization of the board of the corporation in which he is elected, by taking an oath to support the constitution of the United States and that of the state of Iowa and that he will faithfully discharge the duties of his office. Such person shall hold the office for the term for which he is elected and until a successor is elected and qualified. The term of office of such members of any school corporation as would expire on the first day of July is hereby extended to the third Monday in March following the expiration of the term for which such person has been elected. In case of a vacancy, the office shall be filled by appointment by the board until the next annual meeting."

You will observe that the year is not mentioned. Therefore the term of office of each director whose term would otherwise expire on the first day of July after the taking effect of the act will be extended to the third Monday in March following the date of such expiration.

This statute does not take effect until July 4, 1923. It is not operative for any purpose prior to that date. (Constitution, Sec. 26, Art. 3.) It has been uniformly held that until the time arrives when a statute is to take effect and be in force such statute, notwithstanding the fact that it has been passed by both houses of the legislature and approved by the executive, has no force whatever for any purpose. (36 Cyc. 1192; *Rice v. Rudiman,* 10 Mich. 125; *State v. Northern Pacific Ry. Co.,* 36 Mont. 582; *Witney v. Haggard,* 60 Calif. 513.)

That it was not the intention of the legislature that this act should be in effect prior to July 4, 1923, is manifest from the fact that no publication clause or other direction to that effect is contained in the act. The Constitution of this state specifically authorizes the legislature to place an act in effect prior to July 4th, and where this authorization is not exercised, it is at once presumed that it was not the intention that it should become effective prior to such date.

It follows that up to the time that this act becomes effective the old law remains in full force and effect. Therefore, the board of directors of each of the rural districts of this state will organize on July 1st as is provided by law.

It further follows that the term of office of those directors whose term will expire on July 1, 1923, will not be extended because the law, as stated, not being effective on such date will not effect the term of office of such directors.

The law will be effective on the third Monday in March, 1924, and on such date the board of directors of all school districts will organize, notwithstanding the fact that some of them will have previously organized on July 1st. In other words, the organization on July 1st will hold and will be effective until the third Monday in March, 1924, at which time the directors will re-organize.

There will be no directors elected in 1924 in rural districts because of the fact that the term of office of the directors elected in 1923 and which expire on July 1, 1924, will be extended to the third Monday in March, 1925, at which time the new boards elected in March, 1925, will meet and organize.

TEACHERS—EXAMINATION. Board of examiners can credit applicants on examinations in accredited schools where such examinations are conducted by suitable persons appointed by you even though they are members of faculty of the school.

June 25, 1923.

Superintendent of Public Instruction: We have your request for an opinion as to the authority of the Educational Board of Examiners to accept the grades earned

during two years of college work in accredited colleges of Iowa in lieu of any further examination for the granting of third grade state certificates.

I think this question is fully answered by the provisions of Section 2296 of the Compiled Code, 1919, which provides in part as follows:

"The board shall meet for the transaction of business at such times and places as the president may direct, and shall annually hold at least two public examinations of teachers, to be conducted by a member or the secretary of the board, or by such qualified person or persons as the board may select. * * *"

As I understand, you are not doing away with your two public examinations of teachers. This will still continue. You are, however, taking the grades made by daily recitation and examination as certified to you by the accredited colleges of the state as the basis for granting the third grade certificate. Unquestionably, under the provisions of this section, you have authority to appoint such a qualified person or persons to conduct these examinations as may in the judgment of the board be proper. You certainly have authority to designate the faculty or faculties of the accredited colleges of Iowa as persons suitable to conduct these examinations, and to certify the grades earned.

SCHOOLS AND SCHOOL DISTRICTS—PAYMENT OF TREASURER. A school board cannot pay a compensation to its treasurer directly or indirectly. Payment to him as "Finance Clerk" is improper.

September 16, 1924.

Superintendent of Public Instruction: Under date of the 15th instant you requested the opinion of this department as to whether it is legal for a school board to pay a school treasurer a salary "not as treasurer, but as finance clerk." Section 2780 of the Code of 1897 provided that the board of the district should fix the compensation to be paid to the secretary and treasurer. This statute, however, was amended by the 35th General Assembly, and as amended, provides that the board should fix the salary of the secretary and expressly provides that no member of the board or the treasurer should receive compensation for official service. There is no provision in the statute for the appointment of a "finance clerk" and no provision for the payment of the salary for such services. It is entirely illegal for a school board to pay its treasurer any compensation, either directly or indirectly, in connection with his official duties in acting as an officer of the district.

SCHOOLS AND SCHOOL DISTRICTS. Board of directors may transfer funds from the general fund to the school house fund under the provisions of Section 4241 of the Code of 1924, effective October 28, 1924.

October 18, 1924.

County Attorney, Cass County, Atlantic, Iowa: You have requested the opinion of this department upon the following proposition:

"The board of directors of Grant township, district No. 2, called to see me on the following proposition. Their school house was burned on October 8th and they are desirous of building a new school house at once. They have in their general fund enough money to build the school house, but have no money in their school house fund. They would like to know if it is possible for them to loan money from this one fund to the other until they have time to raise the necessary money by taxes, and in that way, save borrowing money and paying a larger per cent interest than they are getting on the general fund in the bank."

Section 4240 of the Code of 1924 provides as follows:

"On the first secular day in July, the board of each school township and with

it the members of the board who retired in the preceding March, and the board of each independent school corporation, shall meet, examine the books of and settle with the secretary and treasurer for the year ending on the thirtieth day of June preceding, and transact such other business as may properly come before it. Should the secretary or treasurer fail to make proper reports for such settlement, the board shall take action to secure the same."

Section 4241 of the Code provides as follows:

"If after the annual settlement it shall appear that there is a surplus in the general fund, the board may, in its discretion, transfer any or all of such surplus to the school house fund."

It is the opinion of this department that the transfer can be made from the general fund to the schoolhouse fund, under Section 4241, quoted above, after the annual settlement has been made.

The Code becomes effective October 28th and this section will be in full force and effect at that time.

I believe it will be possible for your board of directors to proceed under it to make a transfer from the general fund to the school house fund in order that they may proceed to build a school house.

May I also call your attention to the fact that the building of the school house should be approved by a vote of the people of the district, and that the plans should be approved by the county superintendent.

SCHOOLS AND SCHOOL DISTRICTS—INSURANCE PREMIUMS. A board of education cannot deduct insurance premiums from the amount of teachers' warrants, but should issue the warrant for the full amount of compensation.

October 27, 1924.

Superintendent of Public Instruction: This department is in receipt of your letter dated October 25, 1924, in which you request an opinion. Your letter is in words as follows:

"We are quoting, herewith, section of a letter received from Mr. J. E. Baumgartner, secretary board of education, Davenport, Iowa.

"Will you kindly give us your opinion on this question as submitted at your earliest convenience.

" 'In your judgment is there anything illegal for a school district to permit an insurance company to insure its teachers and have the premiums taken out of the monthly check that is issued on them on their contract?

" 'There is nothing in the law that I can find that prohibits this, neither is there anything that says that it may be done. In other words, an insurance company has a proposition whereby they will insure our teachers on the annuity policy, a policy that is an insurance of income in old age. The point that is troubling us is have we authority to deduct premiums from the teachers' pay if they give us a written consent to do so.' "

You are advised that the school district must issue the warrant to the school teacher for the full amount of compensation. The board of education cannot act as a collecting agency for an insurance company.

SCHOOLS AND SCHOOL DISTRICTS. Tuition of a high school pupil attending high school in another district because of no accredited high school course does not come under the provisions of Section 4269, Code of 1924.

November 1, 1924.

County Attorney, Mahaska County, Oskaloosa, Iowa: I wish to acknowledge receipt of your favor of the 25th, requesting the opinion of this department on the following proposition:

"Section 4269, Code of 1924, provides that the parent or guardian whose child or ward attends school in any independent district of which he is not a resident, shall be allowed to deduct the amount of school tax paid by him in said district from the amount of the tuition required to be paid.

"I would like for your office to give me an opinion on the proposition as to whether or not this law applies to non-resident pupils under 21 years of age attending high school. In other words, as to whether or not the amount of school tax paid by a non-resident may be legally deducted from the amount of tuition required to be paid by a non-resident high school pupil."

Section 4269 above referred to, provides for the deduction from the tuition of the school tax when the tuition is paid by the parent or guardian.

Section 4275, Code of Iowa, 1924, authorizes a pupil to attend a high school outside of the district in which he is a resident, providing certain requirements set forth in Section 4276, Code of Iowa, 1924, are met. Section 4277, Code of Iowa, 1924, provides for the tuition of such non-resident high school pupil. This section in part reads as follows:

"The school corporation in which such student resides shall pay from the genenral fund to the secretary of the corporation in which he shall be permitted to enter a tuition fee * * *."

It will be noted, therefore, that the tuition for a high school pupil is to be paid by the district of his residence and not by the parent or guardian. Therefore, in the case of a pupil under twenty-one years of age, resident of a school corporation that does not have an accredited high school course, attending high school in another district, the tuition is to be paid by the district of his residence and not by the parent or guardian of the pupil, so that Section 4269, Code of Iowa, 1924, does not apply.

SCHOOLS AND SCHOOL DISTRICTS. Children between the ages of 14 and 16 who have completed the 8th grade must attend the part-time school if not in high school.

November 17, 1924.

Director, Board for Vocational Education: You have requested the opinion of this department upon the following proposition submitted to you by the school authorities of Marshalltown:

"Are children between the ages of 14 and 16 who have completed the 8th grade and who are not attending the regular full time day school within the part-time school law? Must these children attend part-time school for eight hours a week when such part-time schools have been established?"

The law pertaining to part-time schools is contained in Sections 4291 to 4297 of the Code, 1924. Section 4291 provides:

"Authorization. The board of directors in any independent school district situated in whole or in part in any city having a population of twelve thousand or over, in which there shall reside or be employed, or both, fifteen or more children over fourteen years of age and under sixteen years of age, who are not in regular attendance in a full-time day school, shall establish and maintian part-time schools, departments, or classes for such children. In districts situated in whole or in part in cities having less than twelve thousand population, the board may establish and maintain such schools. *When such part-time schools have been established, all persons having custody of such children shall cause them to attend the same.*"

The sole question presented is whether it is compulsory for the children described in the statement set out above to attend part-time schools when they have been

established. Attention is called particularly to that portion of Section 4291 which is underscored. It will be noted that the language used is mandatory and in no uncertain terms enjoins upon all persons having the custody of such children as are described in the section, the duty to cause them to attend such schools.

It is therefore, the opinion of this department that the children described in the statement submitted must attend the part-time school which has been established in the district in which such children reside or are employed.

Your attention is further called to the provisions of Sections 4296 and 4297 which provide penalties for failure to comply with the provisions of Section 4291, and which enjoins the duty of enforcing these provisions, upon the school board of the district and empowers the state department of public instruction, through its inspectors, and the board for vocational education, through its supervisors, in conjunction with the county superintendent of schools, to require enforcement.

SCHOOLS AND SCHOOL DISTRICTS—NIGHT SCHOOLS. 1. If the school board refuses to establish an evening school when sufficient number have petitioned, a mandamus proceeding may be brought to compel the same. 2. The expenses of such school should be paid from the general school fund. 3. Persons over twenty-one years of age attending such school should be required to pay tuition.

November 24, 1924.

Superintendent of Public Instruction: You have requested an opinion from this department upon the following proposition relating to evening schools:

"1. What is the penalty for failure to establish a night school as provided in Section 4289 of the Revised Code, when more than 10 people over 16 years of age have expressed written desire for such a school?

"2. Have the board of education a right to expend money from the general fund for the education in night schools of the resident members of the community who are over 21 years of age?

"3. Have the board of education the right to establish a night school in compliance with Section 4289 of the Revised Code and make the tuition free to those members of the community who are under 21 years of age and charge those members who are over 21 years of age the cost of instruction?"

Section 4288 of the Code of 1924 provides that the board of any school corporation may establish and maintain public evening schools as a branch of the public schools when deemed advisable for the public convenience and welfare. Section 4289 of the Code reads as follows:

"When ten or more persons over sixteen years of age residing in any school corporation shall, in writing, express a desire for instruction in the common branches at an evening school, the school board shall establish and maintain an evening school for such instruction for not less than two hours each evening for at least two evenings each week during the period of not less than three months of each school year."

Thus it will be observed that when ten or more persons over sixteen years of age, who are residents of any school corporation, petition for an evening school such as is described in the section, it is mandatory for the board to establish such a school. So in answer to the first proposition submitted, you are advised that there is no penalty provided in the law for failing to establish this school under the provisions of Section 4289. However, should a school board refuse to establish an evening school when the required petition has been filed, any person aggrieved

may bring a mandamus proceeding in court to force the board to establish such a school.

In answer to the second proposition you are advised that the expense of said school, regardless of the age of the persons attending, should be paid from the general school fund.

In answer to the third proposition, namely, whether or not a school board where an evening school has been established should charge persons who attend such school, who are over twenty-one years of age, tuition, you are advised that Section 4273 of the Code of 1924 provides that every school shall be free of tuition to all actual residents between the ages of five (5) and twenty-one (21) years and to resident honorably discharged soldiers, sailors, and marines, as many months after becoming twenty-one (21) years of age as they have spent in the military or naval service of the United States before they became twenty-one (21). These provisions in Section 4273 are applicable to persons who attend evening school, and it is therefore, the opinion of this department that all persons over the age of twenty-one (21) years who attend evening school should be required to pay tuition, therefor.

COUNTY SUPERINTENDENTS' EXPENSES. County superintendents cannot be allowed expenses incurred in attending meetings called by the state superintendent.

December 6, 1924.

Superintendent of Public Instruction: Under date of November 12th and 13th you submitted two inquiries to this department, both relative to the rights of boards of supervisors to allow expenses incurred by county superintendents in attending meetings called by the State Superintendent of Public Instruction, and you call our attention to Section 5260 of the Code, 1924, which reads as follows:

"No claim shall be allowed or warrant issued or paid for the expense incurred by any county officer in attending any convention of county officials."

Originally, under Section 2 of Chapter 112, Acts of the 39th General Assembly, there was express authority for the payment of expenses incurred by superintendents in attending upon meetings called by the Superintendent of Public Instruction.

I find upon investigation that this part of the law authorizing the payment of expenses incurred in attending meetings called by the Superintendent of Public Instruction was stricken from the bill covering county superintendents at the extra session of the 40th General Assembly. There is, therefore, now no law authorizing the payment of such expense and I do not find any provision in the law which makes it a part of the official duties of county superintendents to attend meetings or conferences called by the Superintendent of Public Instruction.

Again, you will observe that under the provisions of Section 5233, which is the only section of the law covering the expenses of a county superintendent, such officer is limited to the allowance of expenses incurred in the performance of his official duties "within his county."

In view of the statute, it is the opinion of this department that county superintendents cannot be allowed their expenses incurred in attending upon meetings called by the State Superintendent of Public Instruction, if such meetings are called outside of the county superintendent's residence.

PHYSICAL EDUCATION PAMPHLETS. Superintendent of Public Instruction. The fact that physical education is taught from reference works derived from

others than the Superintendent of Public Instruction is not an infringement upon her authority.

December 12, 1924.

Governor of Iowa: We wish to acknowledge receipt of your favor of October 20th enclosing a copy of a letter directed to you from Miss May E. Francis, Superintendent of Public Instruction. The letter from Miss Francis requests an opinion upon the following propositions:

"In compliance with the provisions of Chapter 68, Acts of the 40th General Assembly; this department has prepared and distributed to the county superintendents and superintendents and teachers of public schools throughout the state a bulletin or outline on the teaching of physical education as directed in said section, copy of which is enclosed.

"My attention has just been called to the fact that there is a great deal of confusion in the minds of many of the superintendents occasioned by the enclosed letter, copy of which has gone forward from Mr. Hart of the Teachers' College at Cedar Falls, to all county superintendents in the state.

"Is it lawful for the Teachers' College to infringe upon the duties of the Department of Public Instruction, and also have they a legal right to print bulletins at public expense and sell the same to the school officers and teachers, as outlined in the enclosed letter?

"It is my thought that no one has a legal right to sell documents which are printed at state expense. Am I right in this?"

Chapter 68, Acts of the 40th General Assembly referred to in the request, and now Section 4263, Code of Iowa, 1924, reads as follows:

"The teachings of physical education including effective health supervision and health instruction of both sexes, shall be required in every public elementary and secondary school of the state. Modified courses of instruction shall be provided for those pupils physically or mentally unable to take the course provided for normal children. Said subject shall be taught in the manner prescribed by the State Superintendent of Public Instruction."

The bulletin enclosed by Miss Francis referred to in her communication is entitled "Physical Education Bulletin." This bulletin contains, among other valuable information, outlines for courses of study in high schools and elementary grade schools, a chapter on playground supervision, and other matters pertaining to physical education. The bulletin referred to by Miss Francis, published by the State Teachers' College is entitled "Physical Education for Elementary Schools," and is devoted almost entirely to games, folk dances and other types of exercises that might be employed in elementary grades.

In considering the matters referred to by Miss Francis, we have called upon Mr. W. H. Gemmill, Secretary of the State Board of Education, for information concerning the publication of the bulletin in question by the Iowa State Teachers' College. We are informed by Mr. Gemmill that the bulletin was authorized by the Board of Education, and is in fact a compilation of mimeographed exercises published from time to time by instructors at the State Teachers' College for use in their classes and in connection with their work. This bulletin was published from funds in the hands of the institution obtained from the sale of textbooks and other school supplies at a small profit. The funds necessary to pay for the publication did not come from the state treasury, under the authority of the provisions of Section 3921, Code of Iowa, 1924.

Mr. Gemmill further explained to us that the State College at Ames, the State University at Iowa City and the State Teachers' College at Cedar Falls, all, had

for a number of years, and with the approval of the State Board of Education, sold to anyone desiring to purchase, not only various bulletins published by them, but also products of the institution: in the case of the Iowa State College at Ames, the sale of cattle, hogs, butter and other products produced at the instituion. These funds are retained by the institution and expended under the supervision of the State Board of Education. Thus the bulletin published by the State Teachers' College was not paid for from funds derived from the Treasurer of State, but from funds belonging to the institution and expended under the direction of the State Board of Education. We fail to see how this bulletin in any way infringes upon the authority of the Superintendent of Public Instruction. She has authority under the statute hereinbefore quoted to prescribe the manner in which the subject of physical education shall be taught. As long as the method prescribed by the State Superintendent is followed by the instructors, the requirements of the statutes are fully met; and the fact that they use reference works derived from sources other than the State Superintendent does not infringe upon her authority. The State Superintendent and the Iowa State Teachers' College are both acting within the scope of their authority in this matter, and such actions do not conflict with the authority of the State Superintendent or the requirements of the statute.

SCHOOLS; ATHLETICS. There is no authority for a school district to rent a room for basket ball purposes only, or a field for football purposes only.

December 12, 1924.

County Attorney, Mills County, Glenwood, Iowa: You have requested the opinion of this department on the question of whether or not the board of a school district may rent a room in which the pupils of a district may play basket ball only, and also, a tract of ground on which said pupils may play football only.

You are advised that there is no provision in the law requiring the pupils of a school district to play basket ball or football, or is either game recognized as belonging to the curriculum of public schools. Neither is there any provision in the law under which a school board may rent a room, a building or a tract of ground for these specific purposes only.

You are advised, however, that if the board desires to rent a room in which, or additional ground on which physical training and education may be taught to all of the pupils of the district, it might be that there is authority therefor. However, you are advised that there is no authority for the board to rent either a room for basket ball only, or a field for football purposes, only.

SCHOOLS AND SCHOOL DISTRICTS. School districts are not liable for torts, nor is there any liability on the part of school officers for injuries sustained by pupils being transported to school. Discussion of liability.

December 20, 1924.

Superintendent of Public Instruction: You recently submitted to this department the following questions upon which you desire an opinion:

"To what extent, if any, are school board members individually liable for injury to scholars while being transported to and from school in school busses?

"To what extent is the school district liable for injury to scholars while being transported to and from school in school busses?

"To what extent are the bus drivers liable for injury to school children while being transported to and from school in school busses?

"If the responsibility for injury to school children riding in school busses does

not rest on the school board members individually, on the school district or on the drivers, what protection does the law give to said school children?

"To what extent is the school board or school district liable for injuries received by school bus drivers while driving school busses?

"To what extent is the school board or school district liable for damages or injuries to others caused by school bus drivers?"

The conduct and management of the public schools of this state are provided for by the Constitution and are regulated entirely by statute, and under the statute school districts and school boards are treated as quasi corporations; and in law have much the same responsibility with respect to the school system of the state as the county organization and management have with respect to county matters.

Such corporations are ordinarily not liable for torts and there is no liability unless it is expressly, or at least clearly, impliedly imposed by statute. The court of last resort of this state has not often been called upon to pass upon the question of liability of a school district, or its officers, on matters involving the question of their liability in cases of negligence; but in an early case, the case of *Lane v. Woodbury District,* 58 Iowa 462, the court held that the school district was not liable for injuries resulting to a pupil where such injuries were the direct result of the defective conditions of the school building. Many cases, however, have been determined by the courts of other states, and without exception these cases hold that neither the school district nor its managing board are liable in damages for injuries caused by defective construction of a school house, or because of the failure to keep the school buildings or premises in proper repair and condition.

There are but few cases involving the question of the liability of school boards or the school district for injuries sustained by a pupil because of the furnishing of unsafe and unsuitable means for conveying or transporting pupils to and from school. The leading case, however, is the case of *Harris v. Salem School District,* a New Hampshire case, reported in 72 New Hampshire Reports at page 424, and in passing upon the question the Supreme Court of New Hampshire said:

"If it is the duty of the defendants to provide the plaintiff with transportation to and from school, it was a public duty from which the district derived no benefit or advantage, and the right of the plaintiff to be transported was one he enjoyed in common with other scholars in the district and was also public. But it has long been the recognized law of this state that an action cannot be maintained against a municipality for the infringement of such a right in the absence of a statute making it responsible."

The opinion of the New Hampshire court is in exact harmony with the opinions of the courts of other states in which this, or a similar question involving the same elements, has been raised.

It is, therefore, the opinion of this department that since there is no statute in this state making school districts or school boards liable in damages for tort, there is no liability on the part of such districts or school officers because of injuries sustained by a pupil in being transported to and from the school property in a conveyance provided by the board, so long as the board representing the district acts in good faith.

For the same reasons as are set out above, neither the school district nor its board of directors are liable for an injury resulting to a person from the negligence of a person who is necessarily employed by them to perform a service for the district. In such a case the doctrine of respondeat superior has no application. If, however, the directors of a school district should employ a person to drive a

school bus whom they knew was not a safe driver, but whom they knew to be reckless and careless in the operation of the bus and failed to use due care to guard against the consequences of his carelessness and negligence, there might be a liability upon the board but this could only be true where they had personal knowledge of the actual conditions and took no action to remedy such conditions or to prevent the consequences that might follow from such employment. There would not be, however, in this instance, any liability on the part of the school district itself.

In what precedes I have covered all of the questions presented by you without referring to each question specifically, except the question of the liability of the driver himself for injuries which might result from his negligence. The rule of law on this matter is familiar, and the driver of a school bus is himself liable for damages which are the direct result of his own negligent acts.

As to liability of the district for injuries received by school bus drivers in the performance of their duties, this matter is covered by the Workmen's Compensation Law, and they would be entitled to the benefits of its provisions.

SCHOOLS—TUITION. Tenant residing in a district whose children attend in an adjoining school district must pay tuition. If tenant pays school taxes in adjoining district he may have amount of taxes so paid deducted from tuition.

February 10, 1923.

Superintendent of Public Instruction: We have your request for an opinion as to whether a tenant residing in one school district and who sends his children to school in another district in which latter district he also rents property, is entitled to send his children to school in such district without being obliged to pay tuition.

We think this matter is governed in part by the provisions of Section 2804 of the code, which provides as follows:

"Persons between five and twenty-one years of age shall be of school age. Nonresident children and those sojourning temporarily in any school corporation may attend school therein upon such terms as the board may determine. The parent or guardian whose child or ward attends school in any independent district of which he is not a resident shall be allowed to deduct the amount of school tax paid by him in said district from the amount of the tuition required to be paid."

If the tenant pays any school tax in the district in which his children are attending school he is entitled to deduct such school tax from the amount of tuition that would otherwise be required of him. If he pays no taxes in such school district then he must pay in behalf of his children such tuition as may be exacted by such independent district as authorized by law.

The statute gives just as clear rights to a tenant who pays school taxes in the district as to a freeholder who pays such tax. On the other hand, a tenant who pays no taxes is not entitled to send his children to school free from the imposition of lawful tuition in a district other than that of his residence.

MINING CAMP. What is a mining camp under the statute is solely a question of fact to be determined by the Superintendent of Public Instruction with the approval of the Executive Council.

February 22, 1923.

Superintendent of Public Instruction: You have asked that we render you an opinion upon what constitutes a mining camp within the meaning of Chapter 295, Acts of the Thirty-ninth General Assembly.

This chapter provides as follows:

"An act to provide for an appropriation of $50,000.00 annually during the next biennial, improving school conditions in coal mining camps.

"Be it enacted by the General Assembly of the State of Iowa:

"Section 1. There is hereby appropriated from the state treasury out of funds not otherwise appropriated the sum of fifty thousand dollars ($50,000.00) annually, or so much thereof as may be necessary to be used by the state superintendent of public instruction, with the approval of the executive council, and under his direction during the next biennium for the purpose of improving school conditions existing in the mining camps in the state of Iowa."

You will observe that the legislature has in no manner attempted to define what constitutes a mining camp. The expenditure of the appropriation therein provided for is to be made by the State Superintendent of Public Instruction with the approval of the Executive Council, and is to be expended under your direction. We, therefore, believe that the question of determining what constitutes a mining camp is one solely of fact and is to be determined by you with the approval of the Executive Council. The facts and circumstances in each case should be considered by you in determining whether or not such school district is in fact one in a mining camp, and when you find it to be such, then you are authorized to expend such of the appropriation as may be necessary to improve school conditions existing in such school district comprised in whole or in part of a mining camp.

SCHOOLS. A school district at its annual meeting has no authority to provide that the school property shall be turned over for use in giving religious instruction for a period of one month in each year.

March 6, 1923.

County Attorney, Worth County, Northwood, Iowa: We have your letter of February 24th in which you state:

"The following is a copy of a petition which has been handed to the school board of the school township of Hartland, Worth county, Iowa:

" 'Request of voters to board of school corporation to submit proposition to voters at annual meeting under Section 2749 of the Code.

" 'To the honorable board of the school township of Hartland, in the county of Worth, state of Iowa:

" 'The undersigned voters of the school township of Hartland in the county of Worth, state of Iowa, hereby respectfully request that at the annual meeting of the voters of said corporation to be held on the second Monday of March, 1923, there be provided for in the notice of said meeting and at said meeting the submitting of the following proposition, to-wit:

" 'Shall the board of directors of the school township of Hartland, in the county of Worth, state of Iowa, be authorized and directed to provide that there shall be an interval of one month in the school year in the several districts, where demand in writing therefor signed by a majority of the voters of the subdistrict is presented to the directors of the subdistricts, which interval of one month may be devoted to religious instruction and for which the school house may be used but without cost, expense or damage to the corporation or the subdistrict, or any of the property of either, and without interfering with the progress of or lessening the time of the regular public school?

" 'Wherefor they ask that said board and officers of said school corporation proceed in the matter as provided by law.'

"There are fifteen signers to this petition. I assume that this petition is made in accordance with paragraph 3 of Section 2749 which provides that the voters assembled at annual meeting shall have the power 'to determine upon added branches that shall be taught, but instruction in all branches but foreign languages shall be in English.'

"The idea in the minds of the petitioners is this, according to my understanding, that they are going to hire a teacher of parochial school for the year, and that the said teacher shall be able to go into each one of the schools in turn, and so be kept busy during the year.

"The school board has asked my opinion in this matter, and I am inclined to the following belief:

"1. That the proposition, if carried, would not be 'authorized by law' because the words 'branches' as used in the above section is meant common school branches and not religious instruction.

"2. That the proposition, if carried, would interfere with the enforcement of the compulsory attendance law in that the said law provides for attendance during consecutive months.

"3. That the proposition, if carried, would make it doubtful as to whether or not the schools affected could retain their classification as standard schools, and if not, then and in that case, the state aid to said schools would be lost."

It is the view of this department that the conclusion you have set forth as to your belief with reference to the legality of this proposition is absolutely correct. Section 2823-a, Supplement to the Code of 1913 relative to compulsory education would be virtually nullified by permitting the school board to adojurn school whenever they saw fit and turn the school property over for religious instruction for a period of one month.

While our court has recognized that a school house may be used on Sunday for the holding of a Sabbath school, yet it apparently approved such use on the ground that the use would be "occasional and temporary," *Davis v. Boget,* 50 Iowa 15.

If the proposition, outlined by the petitioners, was carried out to its end, the use of the property of the school district would not be occasional and temporary, but exclusive for a period of one month. This would not be in keeping with the spirit of our constitution or statute. See case of *Knowlton v. Baumhover,* 182 Iowa 691.

SCHOOLS—When a school board finds that children are required to travel an unreasonable distance to attend school it *shall* allow the parents compensation for transporting them to such school.

March 24, 1923.

County Attorney, Hardin County, Eldora, Iowa: We have your letter of March 21st in which you ask for an opinion from this department upon the following proposition:

"Mr. A. lives about three-fourths of a mile from a public highway and assuming that this is an unreasonable distance under his circumstances is the School Board obligated to allow him a reasonable compensation for the transportation of his children to connect with the school bus?"

Section twenty-seven (27) of chapter one hundred seventy-five (175) to which you refer provides as follows:

"The school board may require that children living an unreasonable distance from school shall be transported by the parent, or guardian a distance of not more than two (2) miles to connect with any vehicle of transportation to and from school or may contract with an adjoining school corporation for the instruction of any child living an unreasonable distance from school. *It shall allow a reasonable compensation* for the transportation of children to and from their homes to connect with such vehicle of transportation, or for transporting them to an adjoining district. In determining what an unreasonable distance would be, consideration shall be given to the number and age of the children, the condition of the roads, and the number of miles to be traveled in going to and from school."

It is the view of this department that if the school board finds that the children live an unreasonable distance from the public highway, then, it is the duty of the

school board to "allow a reasonable compensation for the transportation of children to and from their homes to connect" with the transportation provided on the main highway. We think the word "shall" should be construed as mandatory as used in this provision. This, of course, is on the assumption that the school board has already found that the children live an unreasonable distance from the public highway on which regular transportation to the public school is afforded.

SCHOOLS—CONSOLIDATED—STATE AID FOR NORMAL TRAINING—If amount is not sufficient to pay all $750.00 each then an equal proportionate amount will be paid each school. Legislature will have to make up difference.

June 10, 1924.

Superintendent of Public Instruction: This department is in receipt of your letter dated June 7, 1924, in which you request an official opinion. Your letter is in words as follows:

"Section 44-a, Laws of the extra session Fortieth General Assembly, deals with the question of state aid to schools. Will you kindly give me an opinion regarding this.

"It seems that there is not a sufficient fund to give all Normal Training Schools, including the Consolidated Schools, offering Normal Training work, the flat rate of $750.00 each as provided by law.

"I wish to know if the Consolidated Normal Training Schools may receive their pro-rata share from the Consolidated fund and have the balance taken from the Normal Training fund to bring them up to the same total as other Normal Training Schools, i. e. $750.00. Or, second, would the Normal Training fund be pro-rated after the necessary amount of money has been deducted to provide for inspection and supervision as provided by law.'

You are advised that the section to which you refer is in words as follows:

"Sec. 44-a. State Aid. No consolidated school shall receive state aid under the last preceding section and also additional aid for maintaining a normal training course in high school as provided in chapter 5 of this title. But every consolidated school may maintain a normal training course, in which case it shall receive state aid therefor in the same amount and upon the same terms, conditions and regulations as other schools which maintain such a course."

This section simply places consolidated schools within the class entitled to state aid for normal training schools. Such consolidated schools will share equally with all other schools in the state aid for such work. If there is an insufficient appropriation to pay each school the flat rate of $750.00, then an equal proportionate amount will be paid each school. The Legislature will then have to make up the difference by subsequent appropriation, if it should so determine.

You are further advised that prior to the distribution, the expenses necessarily incurred under the chapter relating to state aid for normal training schools should be paid. It follows that the state aid provided for normal training schools is to be used as follows:

1. Toward the payment of necessary expenses as in the chapter relating thereto is provided;
2. An equal amount to each school entitled to the aid.

SCHOOLS AND SCHOOL DISTRICTS—A rural independent school district cannot build additions to the school building to be paid for by issuance of warrants in anticipation of tax due the succeeding year—It is necessary that the proposition be authorized by a vote of the voters of the district.

June 30, 1924.

Superintendent of Public Instruction: You have submitted a request for an opinion upon a proposition presented to you by Mr. J. L. Parkison of Percival,

Iowa, relative to whether or not the school board of a rural independent district can build additions to a school building and buy equipment so that the school will meet the requirements for a full twelve year course, by the expenditure of $4,000.00 therefor, without a vote of the people, and by paying for the improvement by the issuance of warrants in anticipation of the tax due next year, said warrants to draw interest at 6%.

You are advised that upon careful consideration of the statutes relative to these matters, it is the opinion of this department that the proposition referred to should be first authorized by the voters of the district by submitting the question of voting bonds to pay the cost of the improvement to them, and if the voters approve of the proposition, that the bonds be issued in accordance with the provisions of Section 2660 of the Compiled Code, 1919, and the succeeding sections. It will be observed that Section 2650 of the Compiled Code provides that the board of directors shall apportion any tax voted by the annual meeting for the school house fund among the several subdistricts in such manner as justice and equity may require, thus making it a prerequisite to apportioning the tax that the same be approved by the voters at the annual meeting.

Your attention is further called to the provisions of Section 2643 of the Compiled Code which provide that no such improvement, the cost of which will exceed $300.00, shall be made until after the county superintendent has approved the plan. Also, there should be no expenditure authorized which will exceed the limits provided in Sections 2634 and 2635 of the Compiled Code.

SUPERINTENDENT OF PUBLIC INSTRUCTION: Authority of—Over transportation of pupils. Teaching experience of Superintendent and deputy. Authority over course of study in schools. Legislative inquiry matter.

July 3, 1924.

Chairman House Judiciary Committee: You have requested this department to furnish you an official opinion upon the following propositions:

"1. What if any control do the statutes of Iowa give the State Department of Public Instruction over the question of the means and method of transportation in consolidated schools, including the form of conveyances used, or age of drivers?

"2. What if any authority do the statutes of this state give the State Department of Public Instruction to promulgate or enforce regulations relative to transportation in consolidated school districts, including the character of conveyances and age of drivers?

"3. What if any authority do the statutes of this state give the State Department of Public Instruction to base the approval of approved schools or the right to state aid of consolidated schools upon the means or method of transportation or the kind of conveyances used or the age of the drivers employed?

"4. What actual time must a teacher or school superintendent spend in teaching to acquire five years' experience as defined in C. C. Section 2266?

"5. Does the Superintendent of Public Instruction have any authority or control over the approval of any approved schools other than the authority to approve the courses of study provided for therein?

"6. Does the Superintendent of Public Instruction have any authority to approve the qualifications of teachers who have been accepted by boards of directors in schools otherwise approved.

"7. Does the Superintendent of Public Instruction have any authority to provide the standards or requirements for equipment in schools that are otherwise subject to her approval?"

In answer to the first three questions submitted by you, you are advised that the power of the Superintendent of Public Instruction over the means of transportation

of pupils is supervisory in character. In this connection attention is called to Section 2627-c, Code Supplement, 1913, which provides in words as follows:

"General supervision—duties. The superintendent of public instruction shall have general supervision and control over the rural, graded and high schools of the state, and over such other state and public schools as are not under the control of the state board of education, or board of control of state institutions, and his office shall be known as the department of public instruction."

Under this section of the Code, the Superintendent of Public Instruction may advise, recommend and suggest suitable means of transportation, to the end that each school district of the state may be at all times informed as to the best means of transportation available.

You are further advised that Sections 25, 26, 27, 28 and 29 of Chapter 175 of the Acts of the 39th General Assembly provide in words as follows:

"Sec. 25. Transportation of pupils. The school board of any independent school district or any school corporation maintaining a central school or any school corporation organized under this act for that purpose shall provide suitable transportation to and from school for every child of school age living within said district, and outside the limits of any city, town, or village, but the board shall not be required to cause the vehicle of transportation to leave the public highway to receive or discharge pupils.

"Sec. 26. Transportation routes—suspension. The board shall designate the routes to be traveled by each conveyance in transporting children to and from school. The board shall have the right on account of inclemency of the weather to suspend the transportation on any route upon any day or days when in its judgment it would be a hardship on the children or when the roads to be traveled are unfit or impassable.

"Sec. 27. Transportation by parent—instruction in another school. The school board may require that children living an unreasonable distance from school shall be transported by the parent or guardian a distance of not more than (2) miles to connect with any vehicle of transportation to and from school or may contract with an adjoining school corporation for the instruction of any child living an unreasonable distance from school. It shall allow a reasonable compensation for the transportation of children to and from their homes to connect with such vehicle of transportation, or for transporting them to an adjoining district. In determining what an unreasonable distance would be, consideration shall be given to the number and age of the children, the condition of the roads, and the number of miles to be traveled in going to and from school.

"Sec. 28. Contracts in re transportation. The school board of any school corporation maintaining a central school shall contract with as many suitable persons as it deems necessary for the transportation of children of school age to and from school. Such contract shall be in writing and shall state the route, the length of time contracted for, the compensation to be allowed per week of five (5) school days, or per month of four (4) school weeks, and may provide that two (2) weeks' salary be retained by the board pending full compliance therewith by the party contracted with, and shall always provide that any party or parties to said contract, and every person in charge of vehicles conveying children to and from school, shall be at all times subject to any rules said board shall adopt for the protection of the children, or to govern the conduct of the person in charge of said conveyances.

"Sec. 29. Violation of rules. Any person driving, managing, or in charge of any vehicle used in transporting children to and from school, who shall be found guilty of violating any of the rules adopted by the board of said school for the guidance of such person shall be guilty of a misdemeanor, and for the first offense shall be fined not less than five dollars ($5.00) nor more than ten dollars ($10.00) and for a subsequent offense shall be fined not less than twenty-five dollars ($25.00) nor more than fifty dollars ($50.00) and shall be dismissed from the service."

The law as thus provided relates to the transportation of pupils to and from school in consolidated school districts and in independent or other school districts

maintaining a central school. As will be observed, the school boards of such districts are directed to provide suitable transportation for school children. It is to be observed then that as to transportation, the primary power rests in the school board, which is directed to furnish the suitable transportation subject to the provisions of these laws. The State Superintendent of Public Instruction may and should advise relative to transportation so that the school board may be enlightened at the time of taking its action, but as stated, the power and authority to provide transportation, and to determine with reference thereto, rests in the school board.

It is of course to be understood that in connection therewith the matter may be subject to review by the superintendent of Public Instruction upon appeal as is otherwise provided by law.

Referring to the fourth question submitted by you, you are advised that we have searched the books with care to find an interpretation of the term "five years' experience as a teacher or school superintendent", but have been unable to find a decision thereon. The question must, therefore, be determined as an original proposition and in determining it reference is made to previous decisions of this department relative to the term "five years experience". In an opinion of this department rendered April 15, 1921, we defined the term "five years experience". For your information, we quote this opinion at length. It is in words as follows:

"Hon. P. E. McClenahan, Superintendent of Public Instruction: You have requested an opinion from this department upon the question as to the meaning of the term 'five years' experience' as used in Section 2434-b, supplemental supplement to the code, 1915.

"This section has relation to the qualifications of the county superintendent. It requires that the county superintendent shall have five years' experience in teaching. In determining what constitutes five years' experience in teaching it is necessary to determine first what is meant by the term 'year' as used in this section.

"Section 2773 of the code as amended is more or less applicable in determining this question. This section in so far as applicable is as follows:

" 'Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years and each school regularly established shall continue for at least thirty-two weeks of five school days each in each school year commencing the first of July.'

"Under this section it will be observed that a school year commences on the first day of July and extends for twelve calendar months. Of such calendar year the law formerly provided that twenty-four weeks should be devoted to actual school work. By the acts of the 38th general assembly, chapter 143, this was amended so as to be thirty-two weeks. With this brief statement of these two sections the question naturally arises as to the meaning to be given the word 'year' in speaking of years' experience in teaching. It has been uniformly held in connection with cases involving contracts between teachers and districts, that the word 'year' means the school year, or that portion of the calendar year devoted to actual school work. See: *Brookfield v. Drury College,* 123 S. W., 86; *Williams v. Bagnelle,* 138 Cal. 699; 72 Pac. 408; *Barthel v. San Jose Bd. of Education,* 153 Cal. 376; *Golden v. New Orleans Public School Directors,* 34 La Ann. 354; *Dennison Tp. School Dist. v. Padden,* 89 Pa. St. 395; *Burkhead v. Ind. School Dist.,* 107 Ia. 29, 77 N. W. 491.

"Under the laws of this state then the term 'year' as used in speaking of teaching would mean under the law as it formerly stood, twenty-four weeks, and under the law as it now stands, thirty-two weeks of five days each. In speaking of five years' experience as used in connection with the section relating to the qualifications of county superintendent, it must be held that this rule applies. To hold otherwise would compel a teacher teaching in Iowa schools under ordinary circumstances to teach ten years of six months each in order to qualify. This certainly could not have been intended by the legislature and it certainly would not be in conformity to the decisions of the courts or the custom in connection with cases of this kind.

"In your inquiry, however, you present the question as to whether or not a

teacher can secure five years' experience in teaching short of five calendar years. You submit a state of facts in which a teacher has, so far as the requisite number of months' experience is concerned, fulfilled the requirements. That is to say if the number of months were spread over five calendar years, there would be no question as to her qualifications. However, the same has been spread over less than five calendar years. The question is, does this meet the requirements of the statute relative to qualifications ? Section 2773 of the code as amended provides that the school year commences on the first day of July and by implication extends to the first day of July of the succeeding year. Under this statute, as has been stated, a certain number of months must be devoted to actual school work. However, the school year remains the same. We have reached a conclusion that five years' experience in teaching as contemplated in the law cannot be acquired short of five calendar years. There are many reasons upon which we base this conclusion. In the first place, as stated, there can only be five school years in five calendar years under the laws of this state. It is true that the teacher is not required to teach the full school year in order to acquire a year's experience in teaching. Still the fact remains that there is but one school year in such calendar year. There is a further reason which seems to us to determine this matter and that is this. While a teacher is only required to teach a certain number of months in a school year, yet there are many other things which she is required to do. She is required to attend a certain number of teachers' institutes. She is required to devote a certain amount of time to study. In truth it is assumed that all that portion of the school year which is not devoted to teaching is by the teacher devoted to preparing herself for the profession in which she is engaged. That the legislature contemplated these things cannot be doubted when we remember the statute relative to qualifications of teachers and when we remember the law relative to teachers' institutes. Can it be said that the teacher can gain this experience, devote this time to the performance of the duties she owes to her profession and which the statute requires in less than five school years? It occurs to us that this cannot be done. It follows, therefore, that under the law five years' experience within the contemplation of the law cannot be gained short of five calendar years.

"You again submit the question as to whether or not the teacher can be given credit where she teaches less than the period required in one calendar year. That is to say, shall she be given credit for say three months' teaching in one calendar year when that is all that she teaches during that year. In our opinion she must be given credit for this and it must be considered in connection with the determination of her qualifications. It will be observed that there is a marked distinction between the cases in which she teaches less than the period required in a school year and those in which she teaches more. Where she teaches less than the required time she still secures the experience required in connection with teachers' institutes and in preparation. Whereas, where she teaches more she does not, as has been seen, secure this experience. We are firmly of the opinion that the teacher must not be deprived of the credit which she would thus gain. To so deprive her would be unfair and unjust.

"In this opinion, then, we must hold as stated first, that there must be actually spent five calendar years in the profession of teaching. However, where the teacher has actually been in the profession more than five calendar years and has the reqirued experience in number of months she must be held to be qualified."

There is no distinction between the term "five years' experience" as used in connection with the statute relating to the qualifications of the county superintendent and with relation to the qualifications of the deputy superintendent of public instruction. The term is identical. Therefore, it follows that five years' experience in teaching cannot be gained short of five calendar years, but it may be gained by teaching a period of time equal, as the law formerly was, to twenty-four weeks in each calendar year, and as the law now stands, thirty-two weeks in each calendar year of five days each.

In answer to the fifth question submitted by you, may I advise that Chapter 5 of Title X of the Compiled Code, provides with reference to normal courses in

certain high schools, as well as with reference to certain standard schools. It is to be observed in connection therewith that the Superintendent of Public Instruction prescribes the minimum requirements of teaching, general equipment, heating, ventilation, lighting, seating, water supply, library, care of grounds, fire protection, and "such other requirements as he may deem necessary". It is further provided in this chapter that teachers in standard schools must be holders of first-class county certificates or their equivalent and have contracted to teach for the entire school year. It is thus to be observed as to these schools the Superintendent of Public Instruction is given general supervisory and plenary power.

In this connection you are further advised that Section 2578 of the Compiled Code provides that "any person of school age who is a resident of a school corporation which does not offer a four year high school course and who has completed the course as approved by the Department of Public Instruction for such corporation, shall be permitted to attend any public high school or county high school in the state approved in like manner that will receive him." Under this section you will observe that the State Superintendent of Public Instruction provides the course of instruction for the approved high schools. Therefore, as to this class of schools the same broad power as that referred to does not exist. However, we assume that it is perfectly proper for the State Superintendent of Public Instruction to prescribe in connection with the course of study, methods of instructions and requirements with relation to teaching. Under this section the question is, does the high school in question comply with the requirements as laid down by the Superintendent. If so, the school is an approved school and upon application, the certificate of the Superintendent of Public Instruction would of course be granted.

You are further advised in this connection that this extra session of the General Assembly has enacted a statute relating to approved schools. We quote this section at length. It is in words as follows:

"Section 1. Orders not retroactive. That no regulations or orders by the state superintendent of public instruction or the board of educational examiners with reference to the qualifications of teachers in regard to having taken certain high school or collegiate courses or teacher's training courses, shall be retroactive so as to apply to any teacher who has had at least three years' successful experience in teaching; and no teacher once approved for teaching in any kind of school shall be prevented by such regulations or orders from continuing to teach in the same kind of school for which he has previously been approved; provided, however, that this section shall not be construed as limiting the duties or powers of any school board in the selection of teachers, or in the dismissal of teachers for inefficiency or for any legal cause.

"Sec. 2. State aid. No school shall be deprived of its right to be approved for state aid or approved for tuition by reason of the employment of any teacher as authorized under the preceding section.

"Sec. 3. Publication. This resolution being deemed of immediate importance shall be in effect from and after its passage and publication in the Des Moines Register and Des Moines Capital, newspapers published in Des Moines, Iowa."

Questions six and seven submitted by you are fully answered in what has been said. The same general rules would apply.

SUPERINTENDENT OF PUBLIC INSTRUCTION—Deputy—1. Qualifications of deputy is a matter for the Superintendent and the Governor but their approval is subject to be set aside by proper proceeding for proper cause. 2. Legislature has right to investigate any department of state government.

July 5, 1924.

Superintendent of Public Instruction: This department is in receipt of your

letter dated June 27, 1924 in which you request an opinion. Your letter is in words as follows:

"Will you please give me your opinion upon the following propositions:

"1. Under Section 2627-g of the 1913 Supplement to the Code, and Section 2276 of the Compiled Code, is the appointment of a deputy by the Superintendent of Public Instruction, with the approval of the Governor of the State, conclusive upon the question of qualifications of such deputy?

"2. Does the law of this state, relating to the appointment of the Deputy Superintendent of Public Instruction, anywhere provide that such appointment is subject to review by the legislature, or any other board or tribunal, using the word "review" in its legal sense?"

You are advised that the approval of the qualifications of the deputy superintendent of public instruction is vested in the superintendent of public instruction and the Governor. You are advised, however, that such approval may be set aside as any other approval through proper proceedings. However, until that the approval stands.

You are further advised that the legislature has a perfect right to investigate any department of the state government and it may by proper act, dispense with any state office except those offices provided by the constitution. It would therefore have the right to dispense entirely with the office of deputy superintendent of public instruction, should it so desire.

SCHOOL AND SCHOOL DISTRICTS—An unexpended balance of a first year appropriation may be expended during the second year of the biennium.

August 6, 1924.

Superintendent of Public Instruction: Replying to your letter of the 3rd ultimo in which you request to be advised as to whether any balance of the annual appropriation provided for in Chapter 286 of the Fortieth General Assembly would revert back into the treasury at the end of the year if not used during the year, or whether both annual appropriations may be expended at any time during the biennium.

It is my view, because of the language of Section one of this act quoted in your letter, that you have a right to have carried over from the first year appropriation any unexpected balance and expend such balance during the second year of the biennium.

SCHOOL AND SCHOOL DISTRICTS—School House Sites—Where school house sites are unused for two years they shall revert to the then owner of the tract from which the site was taken upon payment of the value thereof. If said owner refuses to buy, it shall be sold at public auction or private sale.

August 23, 1924.

Superintendent of Public Instruction: Under date of the 21st instant you submitted to this department a request for an opinion as to whether a school district holding the title to a school house site may upon a vote of the electors direct the sale of the site to the highest bidder. You accompany your request with copy of an opinion given by you to Mr. George Lane under date of August 20, 1924. In your opinion to Mr. Lane you state that the question of giving the board authority to sell the old school house site should be submitted to a vote of the people. Nothing is said in that opinion as to how the property is to be disposed of after authority is given by the voters to the board. Chapter 183, Acts of the 39th General Assembly, which is now codified in Sections 2649-a1, 2649-a2 and 2649-a3 of the Supplement to the Compiled Code of Iowa, of 1923, provides the method of sale of all

school house sites where there is a non-user for a period of two years or more. This statute provides that the site shall revert to the then owner of the tract from which the site was taken, upon the payment by him of the value thereof, and further provides that in case the school corporation and the owner of the tract from which the same was taken cannot agree upon the value, appraisers shall be appointed. If the owner refuses to pay the price fixed by the appraisers then the board has the option of selling the land either at private sale or at public auction, but in either event, it must be sold for not less than its appraised value. There is no conflict between Section 2537 of the Compiled Code to which you refer in your letter, and Chapter 183, Acts of the 39th General Assembly. Section 2537 simply provides for the authorization of the sale and the Act of the 39th General Assembly provides the method.

SCHOOLS AND SCHOOL DISTRICTS * * * STATE AID. Where the appropriation for state aid to schools is insufficient the appropriation should be prorated and the legislature should make an additional appropriation to cover any deficiency.

September 11, 1924.

Superintendent of Public Instruction: This department is in receipt of your letter dated September 5, 1924, in which you request an opinion. Your letter is in words as follows:

"Sections 2618 and 2614 of the Compiled Code are as follows:

" 'For the purpose of carrying out the provisions of this chapter there is hereby appropriated out of the money in the state treasury not otherwise appropriated the sum of one hundred thousand dollars annually, which fund, if not all used, shall be allowed to accumulate, and shall not be turned back into the state treasury nor used for any other purpose other than herein provided.'

" 'State aid shall be given to rural districts maintaining one or more standard schools to the amount of six dollars ($6.00) for each pupil who has attended said schools in said district at least six months of the previous year.'

"Because of the large number of schools which have met the requirements for standardization this year, the appropriation will be insufficient to allow the sum of six dollars per pupil as provided by this law.

"Kindly advise me if this appropriation may be prorated and the sum of five dollars per pupil allowed, so that each school entitled to aid will receive an equal amount and there will be a balance for the purchase of door plates."

You are advised that if the money in the fund created by these sections is insufficient to pay the full amount to all schools entitled thereto, that then and in that event the amount is to be prorated. It will be up to the Legislature to provide an additional appropriation for the deficiency, if any. In this connection my advice to you would be that both in connection with such schools and in connection with the normal training schools you should call the matter to the attention of the Legislature, pointing out the facts of the deficit.

SCHOOLS—INSPECTORS. Expenses of two inspectors appointed by the Superintendent of Public Instruction are provided for by Chapter 334, Acts of the 40th General Assembly. A third inspector must be paid for under Section 2317, Compiled Code of 1919.

September 5, 1924.

Superintendent of Public Instruction: Under date of September 4th you submitted to this department the following request for an opinion:

"Section 2312 of the Compiled Code provides as follows:

" 'The appropriation provided by this chapter for the instruction of pupils in high school in the science and practice of rural school teaching and the teaching of

elementary agriculture and home economics, may be expended in part for inspection and supervision of such instruction by the superintendent of public instruction and by such person as he may designate, and the expense of such inspection and supervision shall be paid out of said appropriation on vouchers certified by the superintendent of public instruction.'

"Please advise me if the salary and expense of Miss Avis Grawe, Inspector of these schools, may be paid out of this fund as stated in this section."

In response to your request will say that under Section 2276 of the Compiled Code, you are authorized to appoint not to exceed three (3) inspectors. The salaries and expenses are provided for two of these inspectors, under the provisions of Chapter 334, Acts of the 40th General Assembly. This would leave one remaining inspector or supervisor, which you might appoint and whose compensation and expense might be paid from the appropriation provided for by Section 2317 of the Compiled Code, under the provisions of Section 2312, above stated.

SCHOOLS: Directors—Members of the board of directors of a school district cannot contract with the district to furnish labor, material or supplies. If the district pays for such service or supplies and there is no showing of fraud, bad faith or inadequacy of consideration, the district cannot recover the money paid.

September 15, 1924.

County Attorney, Monona County, Onawa, Iowa: We wish to acknowledge receipt of your favor of the 11th requesting the opinion of this department on the following proposition:

"In one of our school townships some of the patrons had some trouble with members of the school board and it came to a stage where they have made formal complaint that the members of the Board have been taking pay for services rendered the school district. That they, (the school directors) have hauled the coal for the school and have taken pay therefor, have cleaned the building, mowed the weeds, etc., and have paid themselves for this work. * * * * * * * * * * * * * * * It is evident that they did the work cheaply, probably at a considerable saving to the district, but the question has now come up in such a way that it cannot be ignored and must be met.

"If they are entitled to retain the money for services so performed, and they will not return it to the school district treasury upon demand, whose duty, if anyone's, is it to commence an action to recover back this money, and what would be the procedure?

* * * * * * * It is only a question, as I see it, whether or not they are entitled to retain this money, and if not who must attend to seeing that it is returned."

It has long been the law of this state that school directors cannot contract with the school district through the board of directors whereby such directors are employed to do work or to furnish labor or material to the district. *Weitz v. Independent District of Des Moines,* 78 Iowa, 37. In the cited case at page 39 this court says:

"The district was entitled to have the disinterested judgment and vote of each member of its board of directors in the transaction in question. In our opinion, it would be most unwise and contrary to public policy to permit a board of directors to contract with one of its members in the name of the district. Such an agreement would in fact be between a portion of the members of the board on one side, and a director as contractor on the other, and the contract might be determined by his own vote. Such a practice would give opportunity for the grossest frauds. * * * It is said that no fraud is charged in this case, and that at most the district only has an election to avoid the contract, and that a citizen cannot be heard to complain. * * * * * Nor do we think a resident taxpayer should be compelled to show actual fraud in the contract in order to have it annulled. * * * In this

case the agreement may have been fair, and for the benefit of the district, but we are of the opinion that a sound public policy demands that agreements of the class to which it belongs be held to be invalid.

We believe this language squarely covers the propositions submitted by you as to the legality of contracts made by the board of directors of a school district with one of its members. There is a large number of cases reaffirming this doctrine. A few of the more important ones are: *Kagy v. Independent District of West Des Moines,* 117 Iowa, 694; *Bay v. Davidson,* 133 Iowa, 688; *James v. the City of Hamburg,* 174 Iowa, 301; *Peet v. Leinbaugh,* 180 Iowa, 937.

The next question arising is whether or not the money thus unlawfully paid by the school district for services rendered by a director may be recovered in an action against him. We understand from your statement that the contracts have been fully executed and the consideration paid for the services rendered. This being true, the facts are quite similar to those in *Kagy v. The Independent District of West Des Moines,* 117 Iowa, 694. The court in the cited case at page 697 says:

"The dealings of which he complains have been fully consummated. The district has received and accepted the buildings, materials, labor and supplies contracted for, and has paid the stipulated consideration. The things furnished and the expenses incurred are in each instance (unless we except the expenses of the Bacon litigation) such as the board could have rightfully contracted for if the preliminary steps had been properly observed. It is not claimed, nor is it shown, that in any instance (with the one exception above noted) the district did not receive full and fair value for its money. Under these circumstances, does the fact that the directors, by mistake or design, made certain improvements or additions to a school house, as 'repairs,' when they should properly have submitted the question to the electors, or that in procuring necessary supplies they dealt with a member of the board, or with some relative of a member, afford any sufficient ground for an action to enforce a repayment of the money so expended? We think it does not. We agree with the appellant that the policy of the law forbids a member of the board of directors becoming a party to, or the beneficiary of, any contract made by such board; and had the plaintiff, or any other citizen of the district, seen fit to sue out an injunction in due season, at least a part of the expenditures complained of would have been promptly restrained. But as we have already said, the school buildings, the plumbing, the repairs, the furniture, the printing have been received, and paid for, at prices not shown to be excessive. An injunction to forbid an act already accomplished would be an idle form. Shall the district, then, while keeping and enjoying the fruit of the contracts which it says were illegal and void, have judgment requiring the money paid upon such contracts to be returned to its treasury, and that, too, without any suggestion of a willingness to place the other parties in *statu quo?* There are cases which hold that money paid upon a contract entered into by public officers in violation of an express statute, or where the money is paid for a purpose that is in itself illegal or immoral, may be recovered, without returning the consideration received; but we think that no such recovery has ever been sustained where the contract is assailable only as against public policy, because of having been made with one who stood in a fiduciary or official relation to the corporation with which he contracted, and the corporation retains the fruits of the contract sought to be repudiated. This doctrine is expressly recognized in *Berka v. Woodward,* 125 Cal., 119 (57 Pac. Rep. 778, 779, 45 L. R. A. 420, 73 Am. St. Rep. 31); *City of Concordia v Hagaman,* 1 Kan App., 35 (41 Pac. Rep. 134); *Gardner v. Butler,* 30 N. J. Eq. 702; *Currie v. School Dist.,* 35 Minn., 163 (27 N. W. Rep. 922); *Pickett v. School Dist.,* 25 Wis., 558 (3 Am. Rep. 105); and many other authorities referred to in these cases."

On page 699 after discussing the general equitable principles the court continues:

"There is nothing morally wrong or inequitable in saying to a school district that it must pay a fair consideration for benefits received, before it will be permitted to repudiate an executed contract by virtue of which it has obtained, and continues to hold, something of substantial value. It is held even in courts of law

that a school district receiving, accepting, and using the benefits of an unauthorized contract for the building of a school house will be held to have ratified it, and thereby to have bound itself to make due payment. *Bellows v. District Tp.*, 70 Iowa 320; *Dubuque Female College v. District Tp. of City of Dubuque,* 13 Iowa, 555. See, also, *Argenti v. City of San Francisco,* 16 Cal. 255; *Allegheny City v. McClurkan,* 14 Pa. St. 81. It must be borne in mind, however, that the principles and authorities approved in the foregoing discussion are to be considered with especial reference to contracts and transactions which are fully executed and not as in any manner casting doubt upon the right of the individual taxpayer to sue out an injunction to prevent the performance of an unlawful contract by a municipality, or the unlawful expenditure of its funds."

The cited case holds that the money thus paid by the school district could not be recovered. The court distinguishes the case of *Weitz v. Independent District,* 87 Iowa, 81, wherein an action was brought to recover back money for services rendered by a school director based upon a contract with the school district. The court in distinguishing this case points out that the payment in the Weitz case was made in violation of an injunction duly issued, and that case is therefore not in point. We do not find any case contrary to the holding of this court in *Kagy v. Independent District,* supra.

An action might be brought by any taxpayer for himself, and those similarly situated representing the district, whose interests are alleged to be jeopardized.

We believe the authorities cited herein fully answer your inquiry and hold that the directors of a school district may not contract with the school district through its board of directors to render services or sell material or supplies. In the absence of fraud, and upon a showing of value received and reasonableness of the consideration after the services have been rendered and the district received the benefits therefrom, a recovery cannot be had of the money thus paid by the district. This does not prevent a taxpayer resident of the district from enjoining the payment for services of a member of the board of directors upon an unlawful contract with the district when the contract remains executory. In case of fraud or excessive payment to the director by the school board, then there could be a recovery of the amount paid in excess of a fair compensation or consideration.

SCHOOL ELECTION—Right of persons to vote may be challenged by any elector.

January 17, 1924.

Supt. of Public Instruction: This department is in receipt of your letter dated January 9, 1924, in which you request an opinion. Your request is in words as follows:

"We have been asked if challengers are allowed at school elections.
"Will you please give me your opinion on this question?"

You are advised that while the general statute relating to challengers does not apply to school elections, yet any elector has a right to raise the question as to the right of another to vote, in which event it is clearly the duty of the Board to determine the question.

SCHOOLS—CONSOLIDATED—Under Section 2794-a, S. S. 1915, as amended by Ch. 175, 39th G. A. District cannot operate schools in addition to central school.

January 23, 1924.

Supt. of Public Instruction: You have submitted a request for an opinion from this department on the proposition of whether or not a consolidated school district may in addition to operating the central school operate certain rural schools in the

outlying corners of the district. The provisions of law relating to consolidated school districts are contained in Section 2794-a, Supplemental Supplement to the Code of 1915 as amended by chapter 175 of the Acts of the Thirty-ninth General Assembly. As we understand the purpose of the law, it was the intention to authorize the establishment of consolidated districts so that several smaller districts could join and unite their recources and thus be enabled to build a modern, up to date school building with modern equipment which should serve the consolidated district to the end that the school pupils residing in such consolidated district might receive a better education. It is provided in said law that transportation shall be furnished the pupils so that the inconvenience of traveling any considerable distance to the consolidated school building would be minimized.

It is contemplated in said law that when a consolidated school district has been formed that a central school building should immediately be erected and that all of the pupils residing in said district should attend this central school. It was also intended that when such school building had been completed and was ready for use all other school buildings in the consolidated district should be abandoned. In view of this evident purpose and intent in the law and especially as expressed by the language employed therein, and the further fact that there is no provision contained anywhere in this law authorizing the establishment or building of school buildings other than the central school building, it is the opinion of this department that it would not be legal for a consolidated school district, having a central school, to operate and use for school purposes other school buildings within the consolidated district.

TEACHERS' CERTIFICATES—REVOCATION—No power to revoke by county superintendent when person holding same is not *employed* in county.

February 7, 1924.

Superintendent of Public Instruction: This department is in receipt of your letter dated February 7, 1924, in which you request an opinion. Your request is in words as follows:

"Can a certificate be revoked when the party holding the same is not teaching or using the said certificate?

"May I have a written opinion on this today?"

Section 2499 of the Compiled Code of Iowa provides in words as follows:

"When in the judgment of the county superintendent there is probable cause for the revocation of a certificate or diploma held by any teacher employed in his county, or when charges are preferred, supported by affidavits charging incompetency, immorality, intemperance, cruelty or general neglect of the business of the school, the county superintendent shall within ten days transmit to such person a written statement of the charges preferred and set the time and place for the hearing of the same, at which trial the teacher shall be privileged to be present and make defense. If in the judgment of the county superintendent there is sufficient grounds for the revocation of the certificate or diploma, he shall at once issue in duplicate an order revoking the certificate or diploma, and the same shall become operative and of full force and effect ten days after the date of its issue, one copy of the order to be mailed to the holder of the certificate and the other to be mailed to the superintendent of public instruction. Provided that the person aggrieved by such order shall have the right of appeal to the superintendent of public instruction within ten days from the date of such mailing and in case of appeal the revocation shall not be effective until the same is affirmed, after full hearing, by the superintendent of public instruction; provided further, that in the case of life diplomas or state certificates of whatever class, the revocation shall not be effective until affirmed by the educational board of examiners after full review by said board."

Clearly, this statute provides for the revocation of a certificate held by any teacher *employed* in his county. The district courts of the state have repeatedly held that this means that the right to revoke exists only during the period of the actual employment as a teacher. I quite agree with the precedents as thus established by the district courts.

SCHOOL FUNDS—INSURANCE PROCEEDS. Any surplus from the proceeds of insurance received on account of fire damage to a school house, after repairs are made is a part of school house funds and should not be expended except on direction of voters at annual meeting.

February 26, 1924.

Hon. J. S. Garber, House of Representatives: You have requested this department to furnish you an opinion upon the following proposition:

"About one year ago the consolidated school house at Marble Rock, Iowa, was partly destroyed by fire. The building was insured, the insurance has been paid, and the building has been repaired and placed in perhaps better condition than it was before the fire. After all bills were paid there was some four thousand dollars of the insurance money left on hand. The school board would like to use the four thousand dollars for the purpose of building a new gymnasium or assembly hall, and the question has been brought up as to whether or not they can do this without submitting the proposition to the voters. The district is out of debt and it does not propose to expend more than the amount of money on hand in the school house fund."

There is no express provision in the law relative to the disposition to be made of the balance remaining on hand from the proceeds of insurance after the school building damaged by fire has been fully repaired and paid for. We find, however, in Section 2749 of the Code, 1897, that it is provided that the voters of a school district assembled at the annual meeting shall have power among other things to direct the sale or make other disposition of any school house or site or other property belonging to the corporation, and the application to be made of the proceeds of such sale. It is further provided in said section that said voters shall have power to direct the transfer of any surplus in the school house fund to the general fund. After considering the other powers enumerated in the section, which the voters assembled at the annual meeting have, it is our opinion that it is for such voters to determine the policy of the district in such matters as are suggested in the proposition set out above.

Any funds received as the proceeds of insurance on buildings would undoubtedly be classed as belonging to the school house fund. The voters ought to be permitted to determine whether they desire to transfer any surplus, such as is described in the proposition submitted, to the general fund or to determine what other disposition they desire to make of such funds. In view of this situation we are of the opinion that the matters referred to should be submitted to the voters at the annual meeting for their consideration.

DEPUTY COUNTY SUPERINTENDENT—SCHOOLS: The Board of Education fixes the salary of the Deputy County Superintendent conforming to the Teacher's Minimum Wage Law. The Board of Supervisors has nothing to do with the fixing of the salary.

March 14, 1924.

County Attorney, Mahaska County, Oskaloosa, Iowa: I wish to acknowledge the receipt of your favor of the 10th to this department requesting an opinion upon the following proposition:

"Chapter 250, Section 14 of the 40th G. A., provides that each deputy county superintendent shall receive such annual salary as shall be allowed by the County Board of Education, and which said Board shall fix each year in accordance with the provisions of the Teacher's Minimum Wage Law.

"Our deputy superintendent resigned after the above law went into effect, and the county superintendent appointed a new deputy, there being nothing said prior to the time of appointment as to what compensation the new deputy should receive. The County Board of Education fixed her compensation at $90.00 per month in accordance with the provisions of the Teacher's Minimum Wage Law. The Board of Supervisors refused to comply with the order of the County Board of Education as to the amount of compensation allowed the new deputy superintendent, and have been allowing her $75.00 per month. The County Auditor refused to recognize the compensation fixed by the County Board of Education without the approval of the Board of Supervisors.

Kindly inform me whether or not the Board of Supervisors are legally bound to recognize the order of the Board of Education, and whether or not the County Auditor is legally bound to issue the warrant to the deputy superintendent in amount as fixed by the County Board of Education, without the same being first approved by the County Board of Education."

Section 2734-b, Supplemental Supplement Code, 1915 as amended provides for the appointment of a deputy county superintendent, and provides that the appointment shall be with the approval of the Board of Supervisors. As originally enacted, this section provided that the deputy's salary should be fixed by the Board of Supervisors. Chapter 250, Laws of the Fortieth General Assembly, section 14, provides:

"Each deputy county superintendent shall receive such annual salary as shall be allowed by the county board of education, and which said board shall fix each year in accordance with the provisions of the teachers' minimum wage law."

By necessary implication this latter section repealed that part of section 2734-b, Supplemental Supplement, 1915 insofar as the salary of the deputy county superintendent was concerned.

The teachers' minimum wage law is provided for by sections 2778-a, 2778-c and 2778-d, Supplement Code, 1913, as amended, and expressly provides the rate of pay for those holding certificates of various grades and prohibits any contract for other than the minimum wage therein provided for.

We are therefore of the opinion that the Board of Education fixes the amount of salary to be received by the deputy county superintendent, such salary to conform to the provisions of the teachers' minimum wage law. If the County Board of Education followed the provisions of the statutes hereinbefore quoted and fixed the compensation of the deputy county superintendent as provided by the teachers' minimum wage law, then this salary is legal and should be paid by warrants issued by the County Auditor. The board of supervisors has nothing to do with the fixing of the deputy county superintendent's salary and its approval is not necessary before the County Auditor should issue the county's warrant to the deputy for the amount legally fixed by the County Board of Education.

COUNTY SUPERINTENDENT—Convention to select—

1. A majority of those authorized to attend convention constitutes a quorum.
2. A majority of the voters present at convention may elect a superintendent.

March 27, 1924.

Superintendent of Public Instruction: You have requested the opinion of this department on how many representatives are necessary to constitute a quorum in the convention provided by law for the election of a county superintendent, and how many votes of such convention are necessary to elect a county superintendent.

In answer to your first proposition, your attention is called to the last sentence of Section 1072, Supplement to the Code, 1913, as amended by Chapter 317, Acts of the 37th General Assembly and Chapter 56, Acts of the 38th General Assembly, which provides that "a majority of representatives herein provided shall constitute a quorum, such representatives to receive ten cents per mile one way for the distance necessarily traveled in attending such convention, to be paid from the county treasury." Thus, it will be observed that the law specifically provides that a majority of those representatives which by law make up the convention shall constitute a quorum. When a majority is present they may organize and will constitute the convention.

Your second question inquires as to how many votes a person must have before he can be declared elected county superintendent by the convention. It is a rule of parliamentary law that a majority vote of any meeting or body is all that is necessary to carry any proposition in the absence of a provision either in the law, the constitution or by-laws to the contrary. There is no provision in the law requiring that more than a majority of the votes in the convention shall be required to elect a county superintendent. Therefore, it is the opinion of this department that a majority of the votes in a regularly constituted convention is all that is necessary to elect a county superintendent. Your attention is called to the special provision contained in the section referred to, providing that the convention may delegate the selection of a county superintendent to a committee of five to be elected by the convention by a three-fourths vote of said convention. Attention is called to this special provision so that there may be no misunderstanding as to the scope of this opinion.

SCHOOLS—TUITION—High school—Resident district of pupil which has no approved high schools must pay tuition of pupil to district where pupil attends approved high school.

April 15, 1924.

Superintendent Public Instruction: You have submitted a request for an opinion to this department on the question of whether or not a rural school board is required to pay the tuition of pupils going from their district to a high school in another district if said high school is not approved by the Department of Public Instruction.

The provisions of law applicable to the situation are contained in section 2578 of the Supplement to the Compiled Code. The first paragraph of said section provides:

"Any person of school age who is a resident of a school corporation which does not offer a four year high school course, and who has completed the course as approved by the Department of Public Instruction for such corporation, shall be permitted to attend any public high school in the state approved in like manner, that will receive him."

Thus it will be observed that any person coming within the provisions of this paragraph may attend any approved high school in the state. It is then provided in the third paragraph of this section that:

"The school corporation in which such student resides shall pay to the Secretary of the corporation in which such student shall be permitted to enter a tuition fee of not to exceed twelve dollars per month but in districts in which there is a city of the first class a tuition fee of twelve dollars per month may be charged in the high school department in the latter corporation during the time he so attends, not exceeding, however, a total period of four school years;"

Thus it will be observed from reading the two provisions set out above that the resident school corporation can be compelled to pay the tuition of a person attending high school in another district only when said person and said high school comes within the provisions of the section, namely, that said high school has been approved by the State Superintendent of Public Instruction.

What we have said will not interfere with a pupil attending school in any other corporation if proper arrangement is made therefor as provided by law but a resident school corporation cannot be compelled to pay tuition unless the requirements as set out above are complied with.

SCHOOLS—PART TIME—Discussion of to whom the law applies.

April 16, 1924.

Director Board for Vocational Education: You have submitted a request for the opinion of this department upon the following proposition:

"We are enclosing with this, the copy of a letter which we received from Superintendent Blackmar of Ottumwa, which raises the following question:

" 'Are children between the age of 14 and 16, who have completed the 8th grade and who are employed either with or without work permits, within the provisions of the part-time school law, Chapter 94, laws of the 38th General Assembly, so that they should attend part-time schools or classes when established?' "

Section 1 of the chapter of the Acts of the 38th General Assembly, to which you refer in your statement, provides as follows:

"That the board of directors of any organized school district may establish and maintain part-time schools, departments, or classes in aid of vocational and other education for minors between the ages of fourteen (14) and sixteen (16) years (1) holding work certificates, or (2) who have not completed the eighth grade and are employed in a 'store or mercantile establishment,' where eight (8) or a less number of persons are employed, or in 'establishments or occupations which are owned or operated by their own parents,' or (3) who have completed the eighth grade and are not engaged in some useful occupation; and such board of directors shall organize such a part-time school, department, or class whenever there are fifteen (15) minors as defined above resident in the district. The courses of study of such part-time schools, departments, or classes may include, 'any subject given to enlarge the civic or vocational intelligence,' of the pupils attending."

Your proposition is whether or not children between the ages of fourteen and sixteen, who have completed the eighth grade and who are employed with or without work permits, are within the purview of the act. You will note that there are three distinct classes described in the section quoted above to which the part-time school law is intended to apply. They are those children within the specified ages, (1) holding work certificates, (2) those who have not completed the eighth grade and are employed as specified under that sub-division of the section and (3) those who have completed the eighth grade and are not engaged in some useful occupation. If the child in question holds a work certificate and has completed the eighth grade, he would fall within the first classification and the law would apply to him. If the child has completed the eighth grade and does not have a work certificate, but is "engaged in some useful occupation," then he is excepted from the provisions of the law.

In view of this statement, it is for the authorities to determine each case as it arises according to the facts of that particular case and apply the measure as prescribed in the law and determine therefrom whether or not the child falls within any of the classifications there described. The question of whether or not the

child is engaged in a "useful occupation" is one of fact dependent upon the nature of such occupation.

I trust that the foregoing will sufficiently answer your inquiry.

SCHOOLS—TUITION. District not offering a prescribed four-year high school course must furnish such a course to every resident pupil qualified to take it.

April 17, 1924.

County Attorney, Appanoose County, Centerville, Iowa: You have requested the opinion of this department upon the following proposition:

"A question has arisen between the local high school authorities and the school board of the town of Numa, based on the following facts:

"The town of Numa has a two-year high school, which was not, at the time under consideration, approved by the Department of Public Instruction. Two student residents of the district, after completing the two-year high school course, offered by the Numa district, enrolled in the Centerville high school and completed the four-year course in three years. The school board of the Numa district, after first agreeing to pay the tuition for these two girls for the year 1924, now refuse to do so on the ground that they had furnished these girls with two years high school work in their own school and that they would pay tuition for them in the Centerville high school for only two additional years, thus making, as they claim, the four years high school, provided in Section 2733-a1, Supplement of 1915. The local high school authorities maintain that the two-year high school course offered by the Numa district is not taken into consideration by said section and that the four years attendance in a high school refers only to the time they are allowed to attend in the high school outside the home district, and not to the combined time spent in the two high schools. The local high school authorities also point to the fact that the Numa high school was not approved at that time. In other words, the two girls have had, when they finish the present year, five years of high school work, two in the Numa high school and three in the Centerville high school, and the Numa board, after first agreeing to pay for 1924, the fifth year, now claim that they cannot under the law, do so.

"Will you kindly give me your construction of the law as to whether the Numa district should pay the tuition for the year 1924, under the circumstances as outlined above."

Section 2731-1a of the Supplemental Supplement to the Code, 1915, as amended (S. C. C. 1923, Section 2578) contains the provisions of law applicable to the question presented. It is provided in the first paragraph thereof that "any person of school age who is a resident of a school corporation which does not offer a four-year high school course, and who has completed the course as approved by the Department of Public Instruction for such corporation, shall be permitted to attend any public high school or county high school in the state approved in like manner, that will receive him." Thus it will be observed that under your statement of facts, the Numa district did not furnish a four-year high school course approved by the Department of Public Instruction and, therefore, the pupils referred to by you were entitled on account thereof to attend high school in any approved high school that would receive them.

The section of law referred to then provides that "the school corporation in which such student resides shall pay to the secretary of the corporation in which such student shall be permitted to enter a tuition fee of not to exceed twelve dollars per month, but in districts where there is a city of the first class a tuition of twelve dollars per month may be charged," etc. It is also provided that such arrangement shall not extend for more than a period of four school years.

It is the purpose and intent of the law to afford every person of school age the greatest possible school advantages. The law guarantees to each such person the right to an approved four-year high school course, and in the absence of any provisions to the contrary, such person may insist upon his resident district furnishing him with such an education.

In view of these observations, it is the opinion of this department that under the state of facts as given by you, the two girls concerned are entitled to the benefits of an approved four-year high school course at the expense of their resident district.

In other words, it is provided in the law that a resident student must attend the school in the district of his residence as far as its course is approved, and if it offers a full four-year course as prescribed by the Department of Public Instruction, even though it has not yet been formally approved, he cannot attend an approved high school elsewhere and expect his resident district to pay his tuition.

SCHOOLS—STATE AID—REVIEW BY STATE SUPERINTENDENT. No limit as to time in which superintendent may pass upon controverted question. Appropriation continuous.

April 26, 1924.

Superintendent of Public Instruction: This department is in receipt of your letter dated April 26, 1924, in which you request an official opinion from this department. Your request is in words as follows:

"Will you please give me your opinion as to the power and authority of the Superintendent of Public Instruction to adjust controversies between the department and applicants for state aid under Chapter 364, Acts of the Thirty-eighth General Assembly after the year in which the application for aid was filed, and to pay whatever may be rightfully due the applicant district out of the appropriation made for such purpose."

The law to which you refer is now found in Chapter 25 of Title X of the Compiled Code. This chapter relates to the standard schools and to state aid for such schools.

Sections 2617 and 2618 of this chapter provide in words as follows:

"Upon receiving from the county superintendent a satisfactory report showing that any rural school has fulfilled the requirements of a standard school, the superintendent of public instruction shall issue a requisition upon the auditor of state for the amount due any rural school district entitled to state aid for the school year just past; whereupon the auditor of state shall draw a warrant on the treasurer of state payable to the secretary of the school corporation entitled thereto and forward to the secretary of said school corporation, who shall cause the same to be deposited with the other funds of the district. The money shall be expended in the district or districts maintaining standard schools in amounts proportionate to the number of pupils upon which state aid was granted. The secretary shall issue a warrant in favor of the teacher to the amount of one-half the subsidy due each such school, and the school board shall, with the assistance of the county superintendent, expend the remainder in improvements and necessary apparatus. If more than one teacher is employed in a school the amount shall be apportioned between them according to the time of their employment." Section 2617.

"For the purpose of carrying out the provisions of this chapter there is hereby appropriated out of any money in the state treasury not otherwise appropriated the sum of one hundred thousand dollars annually, which fund, if not all used, shall be allowed to accumulate, and shall not be turned back into the state treasury nor used for any purpose other than herein provided." Section 2618.

From a reading of these two sections it is to be observed that the county super-

intendent files with the state superintendent a report of the schools which, in his judgment, are entitled to state aid in his county. The matter then is before the Superintendent of Public Instruction for approval or disapproval. If the school is finally approved, it is entitled to state aid. There is no limitation of the time within which the state superintendent may pass upon the matter nor within which he is authorized to reopen the matter to set aside obvious errors in his ruling or mistakes due to an improper ruling on his part. Neither is there any limitation on the time within which he may reopen a case, upon additional showing, or where there is a controversy.

The appropriation is a continuing appropriation. It is not covered back into the state treasury as ordinary appropriations are covered back. The appropriation stands and that portion of it remaining on July first of the succeeding year will be added to that year's appropriation. The method in which this works out is as follows: On July first of the given year there is available the appropriation. Such appropriation is to pay the state aid for the standard schools for the year just passed. Thereafter, and until July first of the next year there exists a period during which the state superintendent approves and orders state aid paid for the preceding year. The balance remaining on July first is added to the appropriation then becoming available, and so on indefinitely.

SCHOOLS. Board of education must be elected outside of the members of the convention assembled to elect a county superintendent.

May 14, 1924.

Superintendent of Public Instruction: We wish to acknowledge the receipt of your favor of the 9th requesting the opinion of this department upon the following proposition:

"Will you please give me an opinion as to whether any member of the county board of education may be chosen from the list of delegates assembled in convention to elect a county superintendent of schools, or if members of said board of education must be chosen from outside the membership of the said convention."

Section 2478, Compiled Code, 1919, providing for a convention for the election of the county superintendent and county board of education provides in part as follows:

"* * * There shall also be held one of such conventions on the first Monday of April, nineteen hundred nineteen, at which there shall be elected six persons outside the membership of such convention, who with the county superintendent, ex officio, shall costitute the county board of education."

It is our opinion that the section above quoted clearly requires that the six persons to be elected as a county board of education shall be persons outside the membership of such convention, it being the intention to prohibit the delegates to this convention from electing their own members to the county board of education.

SCHOOLS—TUITION IN HIGH SCHOOLS. A resident pupil must attend school in district of his residence as far as course is approved and if it offers a full four-year course as prescribed by the Department of Public Instruction, though not yet formally approved, resident district cannot be compelled to pay tuition in a school which has been approved.

May 15, 1924.

Superintendent of Public Instruction: You have requested an opinion from this department on the question of whether or not a school district which has a four-

year high school course, the twelfth grade of which was not formally approved by your department at the beginning of the school year, may be compelled to pay tuition of students resident within said district in an approved high school offering the four-year course under the provisions of Section 2578 of the Supplement to the Compiled Code, 1923. The first paragraph of said section reads as follows:

"Any person of school age who is a resident of a school corporation which does not offer a four-year high school course, and who has completed the course as approved by the Department of Public Instruction for such corporation, shall be permitted to attend any public high school in the state approved in like manner, that will receive him."

It will be observed that any person of school age who is a resident of a school corporation, which does not offer a four-year high school course, is entitled to be afforded the privilege of attending a public high school for four years. If the corporation offers a four-year high school course such as is prescribed by the Department of Public Instruction, a resident student cannot attend another high school which is approved, and compel the resident district to pay his tuition. If the resident district offers any part of a high school course which has been approved by the Department of Public Instruction, he must first have completed said course before he can be permitted to attend an approved high school in another district at the expense of his resident district.

In other words, it is provided in the law that a resident student must attend the school in the district of his residence as far as its course is approved, and if it offers a full four-year course as prescribed by the Department of Public Instruction, even though it has not yet been formally approved, he cannot attend an approved high school elsewhere and expect his resident district to pay his tuition.

SCHOOLS—TEXTBOOKS. Sale of to district by member of board of education where he is a manager of corporation making the sale constitutes a violation of Section 2704, Compiled Code.

May 15, 1924.

Superintendent of Public Instruction: In your letter of April 18th you propound the following inquiry:

"Is it legal for a member of the county board of education to handle the school books for his community through a corporation of which he is manager and stockholder."

I call your attention to Section 2704 of the Compiled Code, which reads as follows:

"It shall be unlawful for any school director, teacher or member of the county board of education to act as agent for any school textbooks or school supplies during such term of office or employment, and any school director, officer, teacher or member of the county board of education who shall act as agent or dealer in school textbooks or school supplies, during the term of such office or employment, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined not less than ten dollars nor more than one hundred dollars, and pay the costs of prosecution."

This section is a complete answer, in my opinion, to your inquiry, and under the facts stated above, the officer would violate this section by selling school books for his own corporation to school districts in the county in which he acts as a member of the board of education.

SCHOOLS. It is the mandatory duty of the president of each school board to draw upon the county treasurer for funds due the school district, and the school treasurer must receive such funds belonging to the corporation and care for the same. This is also true of the township clerk in regard to funds belonging to the township. The township clerk and the school treasurer cannot refuse to receive the funds due their respective corporations by refusing to cash the order or warrant issued by the county treasurer. However, the county treasurer is not relieved from responsibility or reliability for the care of such funds.

May 16, 1924.

County Attorney, Cass County, Atlantic, Iowa: We wish to acknowledge receipt of your favor of the 12th, in which you request the opinion of this department upon an enclosure from the county treasurer of your county. The questions submitted are as follows:

"There are several of the township and school treasurers and clerks that are having trouble in finding banks where they can deposit their funds and obtain bonds from the banks which it is required by law that they must do. Some of them have asked the question of this office if it would not be all right for them not to cash their orders and leave the money here.

"I wish you would obtain a written opinion from the Attorney General for this office on this question, also as to the length of time this office would be responsible for the funds after the taxing districts have been sent their orders."

Section 2604, Compiled Code of 1919, providing the duties of the treasurer of school districts, in part reads as follows:

"The treasurer shall receive all moneys belonging to the corporation, pay the same out only upon the order of the president countersigned by the secretary, keeping an accurate account of all receipts and expenditures in a book provided for that purpose. * * * *"

Section 2654, Compiled Code of 1919, provides for the paying over of school taxes and reads as follows:

"Before the third Monday of January, April, July and October in each year, the county treasurer shall give notice to the president of the board of each school corporation in the county of the amount collected for each fund to the first day of such month, and the president of each board shall draw his draft therefor, countersigned by the secretary, upon the county treasurer, who shall pay such taxes to the treasurers of the several school boards only on such draft. He shall also keep the amount of tax levied for school house purposes separate in each subdistrict where such levy has been made directly upon the property of the subdistrict, and shall pay over the same quarterly to the treasurer of the school township for the benefit of such subdistricts."

It will therefore be seen that the county treasurer at the times provided by the statute last quoted, is required to pay over to the proper township officers the funds due the township at that time, and it is the duty of the president of each school board to draw upon the county treasurer for these funds at the time specified. These duties are made mandatory by the statute.

The statute first quoted makes it the mandatory duty of the treasurer of the school corporations to receive all moneys belonging to the corporation and to care for the same as provided further in that statute.

Section 2972, Compiled Code of 1919, reads as follows:

"The county treasurer shall, on the last Monday in April and October in each year, pay to the township clerk all the road taxes belonging to his township which are at such time in his hands, taking the duplicate receipts of such clerk therefor,

one of which shall be delivered by the treasurer to the trustees on or before the first Monday in May and November in each year."

It will be seen that this statute is also mandatory and requires the county treasurer to pay over to the township clerk the funds due the township at the times therein specified.

Section 3450, Compiled Code of 1919, providing for the duties of the township clerk in handling funds, in part is as follows:

"* * * It shall be the duty of each township clerk to receive, collect, preserve, and disburse, under the orders of the township trustees, all funds belonging to his township, * * * *"

This statute is also mandatory, and makes it the duty of the township clerk to receive, collect and preserve as thereinafter provided, all funds due the township.

We are therefore of the opinion that the taxes for school purposes must be paid over by the county treasurer to the school districts and that the school treasurer must receive and preserve these funds as provided by the statute. Furthermore, it is the mandatory duty of the county treasurer to pay over to the several townships the funds due them at the time specified by statute, and the township clerk must receive these funds and preserve the same as provided by statute. The township clerk and school treasurer cannot refuse to receive the funds due their respective corporations from the county treasurer, and the county treasurer must pay these funds over to them as provided by statute. The township clerk and school treasurer cannot refuse to cash the draft, order or warrant issued by the county treasurer to them for funds due their respective corporations, thus leaving the funds in the hands of the county treasurer after the time provided in the statute when these funds must be paid over. However, the county treasurer is never relieved from responsibility or liability on his bond for funds paid over to him and remaining in his care and possession, even after he has tendered the same to the corporations entitled thereto and after the time when these funds should have been turned over in the statutory manner.

OPINIONS RELATING TO TAXATION

TAXES—SALE OF REAL ESTATE. Land cannot be sold for taxes which were delinquent prior to a tax sale at which all of the land affected was sold.

January 5, 1924.

County Attorney, Delaware County, Manchester, Iowa: This department is in receipt of your letter dated January 3, 1924, in which you request an opinion from this department. Your request is in words as follows:

"Yours of the 28th received, and contents fully noted in regard to the matter of the county treasurer of Delaware county selling land for taxes and failing to include tax on land for previous year.

"He has not issued a certificate in this matter, and I would like to inquire as to whether or not, if the party who purchased same would refuse to pay for the land, and thus let both year taxes run for another year, can the county treasurer sell the land next year for the three years' taxes?"

You are advised that it is the duty of the county treasurer to sell real estate for all delinquent taxes as is provided by the statutes. By this is meant, all those taxes which have accrued and become delinquent subsequent to a preceding sale

of the same land. If the purchaser does not pay the subsequent taxes, such taxes will become delinquent and the land will be sold for such taxes.

It is our opinion, however, that such sale cannot include taxes delinquent prior to the last preceding sale, providing always that the land was sold as a whole.

TAXATION. Under Section 3, Chapter 343, Acts 37th General Assembly as amended, the board of supervisors may levy the additional 5% tax only to make up the deficit in the amount originally certified because of shrinkage due to exemptions or other cause.

January 5, 1924.

County Attorney, Pottawattamie County, Council Bluffs, Iowa: We have received your letter asking for an opinion upon the following proposition:

"A question has arisen in this city with reference to the interpretation of Section 3, Chapter 343, Acts of the Thirty-seventh General Assembly, as amended by Chapter 57, Acts of the Thirty-eighth General Assembly in the matter of the authority conferred upon the board of supervisors and county auditor to provide for an excess in the amount to be raised for city taxes, not exceeding five per cent of the amount of the tax, for the purpose of meeting possible shrinkage due to exemptions or other cause.

"The section in question, in part, reads as follows:

" 'When the valuations for the several taxing districts shall have been adjusted by the several boards, as provided by law, for the current year, the county auditor shall thereupon compute and spread upon the records such a rate, not exceeding the rate authorized by law, on said adjusted taxable valuations for the current year * * * * as shall raise the amount required for each taxing district within the county, as theretofore determined under the provisions of this act, and no larger amount; provided, *however, that in fixing such rate the auditor with the approval of the board of supervisors, may provide for an excess in the amount to be raised not exceeding five per cent on the amount of the tax, for the purpose of meeting possible shrinkage due to exemptions or other cause.* * * * *.'

"Presenting the particular contentions concretely; it appears, that the valuations in Council Bluffs for the year 1922, (upon which the askings of the city for 1923 were required by law to be based) were $6,021,494 and for the year 1923 the property valuation was increased to $6,299,777.00. It further appears that the city in its general fund asked for the maximum, i. e., $60,214.00. That reducing this amount to mills upon the basis of the 1923 valuation, but 9.58 mills will be required to raise the same.

"The city contends that the authority granted in the section above quoted contemplates these circumstances exactly, and that the board and auditor may increase this $60,214.00 asked in its general fund by five per cent of such amount if the 1923 valuation will permit; and in any event by such fraction of the five per cent as that the total amount will not require more than the ten mills, maximum, upon the said 1923 valuation.

"In other words, where the property valuations for the year in which the levy is made will permit it, the auditor and the board may increase the askings of the city by an amount equal to five per cent of the tax provided that such increase will not require more than the maximum number of mills permitted in the particular fund.

"I would respectfully ask that you let us have your opinion upon the proposition."

In order to answer your question it becomes necessary to construe the *italicized* portion of the statute quoted above. It is apparent that the purpose of the latter portion of the statute is to permit the auditor, with the approval of the board of supervisors, to levy an additional amount not exceeding 5% of the amount of the tax for the purpose of meeting possible shrinkage due to exemptions or other cause. Under the statute, the amount to be raised by taxation is certified in

amounts and not in millage, and it is clearly the purpose of the statute to provide a method whereby such sums may be raised by taxation notwithstanding the shrinkage due to exemptions or other cause.

Therefore, we are of the opinion that the levy of 5% of the amount of the tax may be levied only in the event the amount to be raised thereby is reduced by such shrinkage. In other words, that the levy authorized by the italicized portion of the statute must be such a levy as to make up the deficit in the amount originally certified because of such shrinkage, but in no event to exceed 5% of the amount of the tax. The purpose of the statute seems to be evident and it is not difficult to construe.

It is not, however, within the province of the city to ask for a 5% increase. This matter rests wholly within the discretion of the county auditor and the board of supervisors.

FOREST RESERVATIONS. The local assessor must assess forest reservations and where the property owner does not appear before the trustees and object thereto or appeal from action on the part of the board of trustees, he waives the right to object to such assessment.

February 7, 1924.

County Attorney, Delaware County, Manchester, Iowa: We have received your letter of January 26, 1924, asking this department to render an opinion upon the following proposition:

"The township trustees, of Delhi township, instructed their assessor to refuse and not to return any land in the township as forest reserve. There has been considerable of this land in the township, and the assessor in accordance with his instructions assessed all of the land that had previously been assessed as forest reserve as farm land, telling the parties that a state man, a forest reserve man, would decide whether or not the land was to be taxed as forest reserve. Some of the parties appeared before the trustees and objected to the assessment of the lands as farm land instead of forest reserve, but the trustees took no action in the matter, and the land has been returned to the county auditor subject to taxation.

"I would like to ask whether or not under this state of facts the parties have any course, by which to have this tax set aside, and their timber land assessed as forest reserve."

Chapter 11, Title VIII of the Compiled Code deals with the subject of fruit tree and forest reservations. It will not be necessary to consider this entire chapter in the determination of your question. The sections material in the determination of your inquiry are as follows:

"On any tract of land in the state of Iowa, the owner or owners may select a permanent forest reservation not less than two acres in continuous area, or a fruit-tree reservation not less than one nor more than ten acres in area, or both, and upon compliance with the provisions of this chapter, such owner or owners shall be entitled to the benefits hereinafter set forth." Section 1700, Compiled Code.

"A forest reservation shall contain not less than two hundred growing forest trees on each acre. If the area selected is an original forest containing the required number of growing forest trees, it shall be accepted as a forest reservation under the provisions of this chapter. If the area selected is an original forest containing less than two hundred forest trees to the acre, or if it is an artificial grove, the owner or owners thereof shall have planted, cultivated and otherwise properly cared for the number of forest trees necessary to bring the total number of growing trees to not less than two hundred on each acre, during a period of not less than two years, before it can be accepted as a forest reservation within the meaning of

this chapter, provided that no ground upon which any farm buildings stand shall be recognized as part of any such reservation." Section 1701, Compiled Code.

"It shall be the duty of the assessor to secure the facts relative to fruit and forest reservations by taking the sworn statement, or affirmation, of the owner or owners making application under this chapter; and to make special report to the county auditor of all reservations made in the county under the provisions of this chapter." Section 1710, Compiled Code.

"It shall be the duty of the county auditor in every county to keep a record of all forest and fruit-tree reservations within his county; and to make report of the same to the secretary of the state horticultural society on or before November fifteenth of each year." Section 1711, Compiled Code.

It will be noted that it is the duty of the assessor to secure the facts relative to fruit and forest reservations and to make a special report to the county auditor of all reservations made in the county under the provisions of Chapter 11. It is the duty of the county auditor to keep a record of all such reservations within his county and to make a report of the same to the secretary of the State Horticultural Society on or before November 15 of each year. There is no provision in this chapter relating to the assessment of forest reservations for the purpose of taxation. To determine the method of assessment for such purpose we must turn to other provisions of the statute. Section 4585 forms a part of Chapter 13, Title XIV of the Compiled Code which relates entirely to the duties of the local assessor with reference to the listing and valuation of property. Section 4585 is as follows:

"Forest reservations fulfilling the conditions of sections sixteen hundred ninety-nine to seventeen hundred eleven, inclusive, shall be assessed on a taxable valuation of one dollar per acre. Fruit-tree reservations shall be assessed on a taxable valuation of one dollar per acre for a period of eight years from the time of planting. In all other cases where trees are planted upon any tract of land, without regard to area, for forest, fruit, shade or ornamental purposes, or for windbreaks, the assessor shall not increase the valuation of such property because of such improvements."

It will be observed that under the provisions of this section, fruit-tree reservations shall be assessed on a taxable valuation of one dollar per acre for a period of eight years from the time of planting. Under this chapter, it is apparent that it is the duty of the local assessor to determine what lands constitute forest reservations and in the absence of objections before the township trustees, his action thereon is final.

In our opinion, the parties referred to in your letter, having appeared before the trustees and objected to the assessment of the land in question as farm land instead of forest reservation, should have appealed to the district court of the county from the assessment thereof made by the township trustees, and, having failed to do so have waived their right to object thereto and they now have no remedy or right to have said assessment set aside. The statutes provide the manner of taking an appeal from the action of the local assessing bodies and, in our opinion, this remedy is exclusive under the facts stated in your letter.

Where the property owner did not appear before the township trustees and file objections to such assessment at the proper time he is now precluded from raising the question that his land should be assessed as a forest reserve and not as farm land.

TAXATION—BANK STOCK. Assessment against bank stock that has been fully paid cannot thereafter be corrected by increasing the amount of the assessment. The assessments not fully paid upon bank stock may be corrected.

February 13, 1924.

Auditor of State: You have requested the opinion of this department upon the following state of facts submitted to you by the county auditor of Hamilton county, Iowa:

"The Farmers National Bank of this city, in paying their taxes for the year on which the additional assessment was placed, paid the tax as individual stockholders. A number of the stockholders paid their tax in full before the additional assessment was placed on the tax list.

"The county attorney has an opinion dated December 21, 1923, from Assistant Attorney General Maxwell A. O'Brien, to the effect that where the bank tax has been paid as a whole before this additional assessment was spread the additional cannot be collected. The stockholders who paid in full hold that this ruling would apply to individual stockholders who had paid in full, and are asking that the additional assessment be cancelled that now shows against them. * * *

"When answering this letter, I wish you would also advise me as to the disposition of any taxes consisting of these additional assessments, that are still due from the banks. I find that there are several banks in Hamilton county that still have not paid these. * * *

"In case the board should cancel the tax (additional assessment) against the parties who paid in full, the members wish to know if it would be necessary to make these parties furnish bond, so in case there was any come-back against them personally."

Considering the first proposition: We are of the opinion that the additional or corrected assessment should be cancelled as to those who have paid the assessment in full. Those who have not paid in full would be liable for the payment of the assessment as corrected.

The second proposition should be referred to the county attorney of Hamilton county and steps taken to collect the amount of these assessments remaining unpaid, unless the validity of their assessments are being contested and litigation is pending in court involving the same.

It will not be necessary for the board of supervisors or the members thereof to require bond from the parties whose assessments are cancelled.

TAXES—PAYMENT BY CHECK. A worthless check given in payment of taxes does not satisfy the tax and sale should be made to satisfy the tax.

February 14, 1924.

County Treasurer, Story County, Nevada, Iowa: I wish to acknowledge the receipt of your favor of the 13th in which you request the opinion of this department upon the following proposition:

"When a county treasurer takes a check in payment of taxes and the check is protested for want of funds. The check is no good, property being in name of his wife. Can the tax be charged back on the books and if not paid offered for sale."

The tax is not paid until the county receives the money for the same. A worthless check is not payment of the tax and the property can be sold if the taxes are not paid.

TAXATION—RELIGIOUS INSTITUTIONS. Land owned by a church and rented for profit, the net income from the same being devoted to the benefit of a religious institution, is subject to taxation.

March 8, 1924.

County Attorney, Clay County, Spencer, Iowa: We wish to acknowledge receipt

of your favor of the 6th in which you request the opinion of this department upon the following proposition, to-wit:

"The Sacred Heart Catholic Church of Ayrshire, Iowa, by deed acquired title to the SE¼ of Section 15, Twp. 95, Range 35, Clay county, Iowa, containing the following clause:

" 'The net income and profits from said real estate is to be used for the benefit of the Sacred Heart Catholic Church and School of Ayrshire, Iowa, and not otherwise; and if any portion of said rents and profits and income be devoted to any other purpose the title to said real estate shall revert to the grantor, or her heirs. Should said premises be sold, the income from the proceeds thereof shall be devoted to the purposes herein stated.'

"The sole and only question for determination is whether or not this land is subject to taxation, under Section 4482 of the Compiled Code, as amended."

The section referred to by you provides in part as follows:

"All grounds and buildings used for public libraries * * * * charitable, benevolent, agricultural and religious institutions and societies devoted solely to the appropriate objects of these institutions, not exceeding one hundred sixty acres in extent, and not leased or otherwise used with a view to pecuniary profit, but all deeds or leases by which such property is held shall be filed for record before the property above described shall be omitted from the assessment. * * * *"

The question, therefore, to be determined under this section of the statute is whether or not the land in question is exempt from taxation because of the fact that the income derived therefrom is to be used for religious purposes. We believe that the Supreme Court of Iowa in *Neugent v. Dilworth,* 95 Iowa, 49, determines this question. The court therein said at page 53:

"It ill be seen, by referring to the section cited, that it would not permit the plaintiff to lease or otherwise use these lots with a view to obtain money for their use, even though the money should be used for the appropriate objects of the church; or, in other words, the church could not use them for pecuniary profit, and apply the profits to its appropriate object, and claim the exemption. The devotion of the objects of the church, within the meaning of the law, is limited, and not general."

The money obtained from the rents and proceeds of this real estate, if invested in the church property, would then become exempt from the money itself, and not the real estate from use of which the money was derived is devoted to the church purpose and not the real estate. As was said by the court in the case cited at page 52:

"The plaintiff invests the money in an edifice and devotes it to religious purposes. That move has taken the money, or the property that stands for it, out of the list of assessable property, but it has made no change with the lots. That is the kind of devotion the law contemplates. It means that the property is to be used in the way of occupancy for the appropriate objects of the institution or church, and not as the means of securing funds for the erection of a church."

The statute under consideration in the cited case was almost identical with the statute under consideration in this opinion insofar as it applied to exemptions for religious and charitable purposes.

As bearing further on this proposition, see the following cases: *Lacy v Davis,* 112 Iowa, 106; *Kirk v St. Thomas Church,* 70 Iowa, 287; *First Christian Church v Beatrice,* 58 N. W. (Neb.) 166; 17 A. L. R. 1039-n.

It is the opinion of this department that under the provisions of Section 1304, Supplemental Supplement, 1915, as amended, and the decisions of the Supreme Court of Iowa the land in question is subject to taxation.

TAXATION—SOLDIER'S EXEMPTION. The exemption for world war veterans from taxation applied to men who served in the S. A. T. C. forces.

March 7, 1924.

County Attorney, Dubuque County, Dubuque, Iowa: I am in receipt of your letter dated February 29, 1924, which is in words as follows:

"You will find enclosed in this communication a certified copy of the discharge of one, John W. Kintzinger, Jr., of Dubuque, Iowa. The discharge states that he was a private in the S. A. T. C. The question arises here as to whether or not this man is entitled to the regular exemption allowed to soldiers, sailors or marines, as provided by law. Under the law relative to the bonus the men who served in the 'S. A. T. C.' are excluded from the benefits of the bonus. It occurs to me that if these men who served in the S. A. T. C. do not come under the general heading of soldiers, sailors or marines so as to entitle them to the benefits of the bonus, they would not come under the same general provisions which would entitle them to the benefits of the soldiers' exemption from taxation which is the matter involved in this case. I do not, however, desire to prevent any man from securing the exemption which he is entitled to as a soldier.

"The chairman of the board of supervisors feels that this discharge indicates that this man was an S. A. T. C. and consequently is not entitled to this exemption, whereas, petitioner claims that this is a regular discharge from the United States Army and that he is entitled to it. The matter is somewhat far-reaching, because there were a large number of S. A. T. C. men here in this county owing to the fact that there are two colleges here in the city of Dubuque.

"At the request of the chairman of the board of supervisors I am asking that your office give an opinion on this matter and the certified copy of the discharge is enclosed so that you will have before you the facts in the case."

You are advised that soldiers who served in the S. A. T. C. were soldiers within the meaning of the statute relating to tax exemption. They were specifically excluded from the bonus act, but are not excluded from the tax exemption statute.

TAXATION. Crops and produce harvested by the owner are not subject to taxation when placed with warehousemen for storage. The warehousemen should report the same giving the name of the owner and the fact that the produce was harvested by the person named and exempt. The question of title to the produce is controlling as to its exemption from taxation. It might be handled by a co-operative marketing association and still be exempt.

March 10, 1924.

Auditor of State: We wish to acknowledge the receipt of your favor of the 6th requesting the opinion of this department upon the following propositions:

"We are confronted with complaints, concerning the manner in which merchandise in the hands of warehousemen is being assessed. The condition is created by the enactment of Chapter 147, 40th General Assembly, which provides for taxing warehouse stocks. By the practice of assessors in many cases this results in evident injustice to owners of fruit and vegetables, who place these articles in storage but retain ownership; that is, all stocks reported by warehousemen are listed without consideration of the facts in regard to ownership.

"Section 1304, S. S., 1915, provides for exemption in paragraph 3 thereof, as follows: 'the farm produce of persons assessed, harvested by or for him, and all wool shorn from his sheep, within one year previous to the listings * * * *.'

"(1) Would such articles as fruit and vegetables, belonging to the one who produced them, but placed in the warehouse, be entitled to exemption?

"(2) If the produce was being handled by a co-operative marketing association, would the status for taxation be changed?

"(3) If the owners of such articles are entitled to exemption, should the assessor list them when found in warehouse storage?

"(4) Would the fact that these articles are not always stored in the county where they are produced make any difference in regard to exemption?

In answer to your first question, it is our opinion that the fruit and vegetables harvested by the owner and placed in a warehouse are entitled to exemption.

Answering your second question, we wish to say that it would be immaterial how this produce was handled whether by co-operative marketing associations or otherwise, providing the title to the produce remained in the person that harvested the same. This is a matter of contract.

The warehousemen should list this property with the assessor as being the property of a certain named person, the one who harvested the produce, and the assessor should exempt the produce on his list.

It is not material whether the produce is stored in the county where it is raised or elsewhere in the state as long as the title remains in the person who harvested it. The question of title is controlling.

TAXATION. Personal tax a lien on real estate even though real estate reverts to seller.

April 10, 1924.

Auditor of State: This department is in receipt of your letter dated March 24, 1924, which is in words as follows:

"Our examiner, Mr. A. S. Lawrence, submits a question in regard to tax payment which is stated as follows:

"'A sells a farm to B in 1922. This farm is assessed January 1, 1923, together with certain personal property belonging to B. B fails to pay for the farm, and it reverts back to A in 1924. The tax on both land and personal property are now due. A offers to pay the tax on the land, but refuses to pay the tax on the personal property. Can he do so? If so, from whom can the tax on the personal property be collected, said personal property not being in existence at this time?'

"Mr. Lawrence suggests that it is important that he have a prompt reply in regard to this matter because there are numerous cases of like nature pending."

You are advised that if the actual title was in B so that the personal property taxes will attach as a lien, such taxes will be a lien on the real estate even though it subsequently reverts to A. I am unable to tell from your letter whether actual title was in B or not, and for that reason I make the qualifications.

TAXATION—BANK STOCK. Owner thereof liable when bank becomes insolvent and fails to pay.

April 15, 1924.

County Attorney, Washington County, Washington, Iowa: You have submitted to this department for an opinion a proposition relative to the taxation of certain bank stock. Your request is in words as follows:

"A guardian of a ward under disability, was the owner and still is, of ten shares of stock in the Citizens Savings Bank, of Riverside, Iowa. Following a custom that has been practiced for years here, the stock of said corporation was assessed to said institution as of January 1, 1923. Sometime during the month of September, 1923, said Citizens Savings Bank was ordered closed by the State Banking Department of Iowa, and in a settlement of its affairs, it was found that ninety per cent of the stock holders were unable to meet with a statutory assessment. The stock of the old organization was declared forfeited and a new organization, known as the First State Bank, was effected, which took over the assets of the old institution, and guaranteed the depositors seventy-five per cent of their deposits.

"After the said bank was officially closed, the county auditor of Washington county, Iowa, made a transfer upon the tax books, of the tax assessed against said bank upon its stock, and taxed same against the individual owners of same.

"Said stock was of no greater value on January 1, 1923, when assessment was made to the bank, than at the closing of said institution. It is a complete loss and no recovery can ever be made of said stock.

"Now said ward, nor her guardian never had any chance to appear before any board of equalization, to protest against said assessment, and the question now is, shall we cancel the taxes against said stock which our auditor seeks to collect, from the individual members, from the books. Both in the case of the ward and the guardian, and other former stockholders, claim is now made that this tax should not be collected, for the reason that when assessment was made that the stock was absolutely worthless.

"In my first paragraph, I state that the ward is still the owner of said stock, this is not correct, but same has been forfeited to the new bank.

"Should you be of the opinion that this guardian, as well as the other former stockholders of said Citizens Savings Bank, should go before the board of equalization in April, trust that I may hear from you at an early date, in order that this may be done."

You will observe at the outset that Section 1322 of the Code provides that the shares of stock of national banks and state and savings banks located in this state shall be assessed to the individual stockholders at the place where the bank is located. This section also provides that the bank shall furnish the assessor with lists of all the stockholders and the number of shares owned by each and it is then made the duty of the assessor to list to each stockholder under the head of "corporation stock" the total value of such shares. It is then provided that to aid the assessor in fixing the value of such shares the said corporation shall furnish him a verified statement of all the matter provided in Section 1321 of the Supplement to the Code, 1913, which taken with the other facts required to be shown, enables the assessor to arrive at the total value of the shares of stock of such corporations.

Section 1323 of the Code, 1897, provides that the stock of every corporation shall be valued on the first day of January in each year. Thus it will be observed that the stock of this bank was assessed under this statute to the individual stockholder at the place where the bank is located on the first day of January, 1923. As is the custom with banks, the Riverside Bank evidently paid the taxes for its stockholders in the years past. It did so as agent for the stockholders only, and not because it was liable as a bank for the tax. The individual stockholders at all times were liable individually for the payment of the tax against their stock. If the bank representing its stockholders, or any individual stockholder for that matter, had any objection to the valuation placed upon the shares of stock of the bank as of January 1, 1923, the only remedy available was that provided in the law, namely, to appear before the local board of review of the township, city or town in which the bank was located which met on the first Monday of April following the assessment, and there present their claims. Then if the local board of review failed to adjust the assessment satisfactorily to the parties aggrieved, they then had their remedy by complaint to the county board of supervisors sitting as a county board of review at their regular meeting in June, 1923. Then if the stockholders were still aggrieved, they should appeal to the courts for relief. Having failed to follow the procedure provided by law for the correction or adjustment of assessments, the parties aggrieved are foreclosed from thereafter complaining.

You state that the bank was not closed until September, 1923, and that the stock was not worth any more on January first than it was in September when it closed.

If that is the case, the stockholders should have objected at the time and in the manner just detailed.

You state that if the former stockholders of said bank are liable for the tax, that they desire to go before the board of review in April of this year to secure an adjustment of the tax. The bank having been assessed in January, 1923, all objections thereto should have been made at the April, 1923, meeting of the local board of review. Hence the parties are now too late to avail themselves of any relief from the assessment made over a year ago.

TAXES. Collection of delinquent taxes. Delinquent tax collector not entitled to receive 15% for collection of delinquent taxes. If the tax collected was designated by the board of supervisors, the collector shall receive in full compensation 10% of the amount collected and must collect 5% from the taxpayer, the 5% being paid to the county and not to the collector.

May 9, 1924.

Auditor of State: You have requested the opinion of this department upon the following proposition:

"In a recent examination of Iowa county, our examiner, Mr. Lawrence, sets out in his report as an infringement of the law the payment of fifteen per cent for the collection of delinquent personal taxes.

"The delinquent tax collector now explains the facts to us as follows: He has held the position of delinquent tax collector since 1909. At present he collects five per cent additional from each delinquent under the provisions of Code Section 1407. The amount collected on this additional five per cent is paid along with the regular tax and penalty collections into the county treasury. A bill for this amount collected as five per cent penalty and also for ten per cent of the regular tax collected is filed with the board of supervisors, the two items being shown separately on the bill. The bill is allowed and payment made in the amount claimed. The delinquent tax collector informs us that the county attorney thinks this is all right.

"The question we are to determine is, is it proper to collect and pay in this way and in this amount under the provisions of Code Section 1407?"

Section 1407, Supplement to the Code, 1913, as amended, provides for two methods of payment for the collection of certain delinquent personal taxes. The first part of the section provides for the appointment of a collector by the county treasurer, this collector to receive for his services and expenses "the sum of five per cent from the amount of all taxes collected and paid over by him, which percentage he shall collect from the delinquent together with the whole amount of the delinquent taxes and interest; * * * *."

The next paragraph of this section provides that the board of supervisors may in its discretion authorize the appointment by the county treasurer of one or more collectors to assist in the collection of delinquent personal taxes, and the collectors thus appointed are to be paid as follows:

"* * * * and may pay such collector as full compensation for all services rendered and expenses incurred a sum not to exceed ten per cent of the amount collected which sum shall in no event be paid or allowed until all such taxes collected have been paid over to the county treasurer by such collector."

The collectors provided for in the latter part of this section are to collect only such delinquent personal taxes "as the board may designate," the purpose of this provision being to enable the treasurer to appoint men of special ability to collect taxes that are particularly hard to collect. It is provided, however, that when the collectors authorized by the board of supervisors collect personal taxes designated

by the board, then the ten per cent of the amount collected that these men receive as compensation is to be in full and for all services rendered and expenses incurred. It was, therefore, clearly the intention of the legislature that the delinquent tax collectors should not have double compensation for the same service. Double compensation is always to be avoided. Our courts have held that in the absence of a clear expression on the part of the legislature showing that such payment was intended, it will be presumed that double compensation for the same service was not intended.

We are, therefore, of the opinion that the delinquent tax collector referred to in your request would not be entitled to receive fifteen per cent for the collection of delinquent taxes. If such collector collects and there has been paid over to him the amount of the delinquent taxes and interest, he should also collect from the taxpayer the sum of five per cent as provided in the first part of Section 1407, and the sum collected together with the five per cent should be turned over by the collector to the county treasurer.

If the tax collector has been designated by the board of supervisors as one to be collected, then the collector is to receive a full compensation for his services and expenses the sum of ten per cent on the amount collected, the five per cent collected from the taxpayer going to the county and not to the collector.

For opinions in accord with the foregoing, see Opinions of the Attorney General, 1913-1914, page 187.

TAXATION. Assessment of transmission lines outside of cities and towns—such lines should be assessed as real estate.

May 15, 1924.

Auditor of State: Under date of March 20th you submitted to this department a request for an opinion, which request is as follows:

"We are in receipt of a request for the rule to be followed in the matter of the assessment of transmission lines that are entirely within town or city limits.

"The question is, should they be assessed as personal property or as real estate? The answer to this question will of course determine the fact as to whether they shall be listed each year or only in the regular year for listing real estate."

After a careful reading of the law relating to the assessment of transmission lines, we reach the conclusion that it was the plain intent of the legislature to make the property of a transmission company, such as its poles, wires, conduits, etc., assessable as real estate. You will notice by reading Section 4574 of the Compiled Code that after the legislature has specified certain proceedings by the board of supervisors with reference to the assessment of these transmission lines, the section closes as follows:

"The taxes on said property when collected by the county treasurer shall be disposed of as other taxes on real estate."

I also call your attention to certain language used by the legislature in Section 4576 of the Compiled Code which provides for the assessment of buildings, machinery, poles, towers, wires, station and sub-station equipment and other construction owned or operated by a company, and then recites as follows:

"All personal property of every company owning or operating any such transmission line referred to in Section 4570, used or purchased by it for the purpose of such transmission lines shall be listed and assessed, etc."

From these statements gathered from the law relating to assessment of these

lines, it is clear that the legislature intended that everything except what can be strictly construed to be personal property should be assessed as real estate.

TAXATION—BANKS—DEDUCTIONS OF REAL ESTATE. May only deduct the amount actually invested and carried on the books as invested in real estate.

May 26, 1924.

Auditor of State: Sometime ago you called my attention to the complaint of the Bankers Trust Company of Des Moines, as to the failure to deduct for taxation purposes from the total amount of capital, surplus and undivided profits, the total book value of a certain building, commonly known as the Gibson Block in Des Moines. The facts of the case are these, as I understand them: The Bankers Trust Company of Des Moines, Iowa, purchased the Gibson Block, taking the same subject to a certain mortgage indebtedness. The amount of cash paid on the building was $17,000. The books of the bank do not carry as a liability the mortgage indebtedness so that, so far as the books of the bank are concerned, the only thing shown is a capital investment of $17,000 in real estate. As a basis for these facts, I quote at length the letter of Mr. John J. Halloran, Corporation Counsel of Des Moines, which is in words as follows:

"By Roll Call No. 652, passed May 5, 1924, there was referred to the legal department the protest of the Bankers Trust Company against assessment on the corporation stock of said company for the year 1924.

"It appears from the specifications as filed that the Bankers Trust Company, on December 7, 1922, purchased Lot 2, Block "B," Commissioners Addition, known as the Gibson Block, for the sum of $252,000, paying, in said transaction, the sum of $17,000 in cash and taking a deed subject to a mortgage of $235,000.

"It is the contention of the Trust Company that it is entitled to deduct from the value of its capital stock the amount represented by this mortgage in this real estate transaction, on the theory that in order to protect its equity in the property, for which it has paid the $17,000 in cash, it will be required to pay this mortgage.

"The statutes of Iowa provide that in connection with the assessment of national and state banks, said assessment shall be upon the value of the corporation stock, the stock being assessed to the stockholders, the bank being liable for the payment in the first instance, and the statute provides, among other things:

" 'In ariving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them and in the shares of stock of corporations owning only the real estate (inclusive of leasehold interests, if any) on or in which the bank or trust company is located, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed.'

"It will be observed that it is the 'capital actually invested in real estate owned by them,' which is to be deducted. On the showing of the Trust Company, all that it shows of its capital actually invested in the complained of transaction is $17,000. The contention that it may be necessary for it to pay off the existing mortgage in order to protect its equity of $17,000, does not, in my judgment, affect the situation, because it must be apparent that it is also within the range of possibilities for the Trust Company to sell its equity for what it has invested from its capital in the real estate, and if such transaction occurs after the deduction, such as is demanded, had been granted, the Trust Company and the stockholders therein would profit to the extent of the deduction in a saving on their taxes.

"It is also within the range of possibilities that the Trust Company would permit the equity which it has in this real estate to be lost under foreclosure of the mortgage, and on the showing under the specifications, there is no personal obligation on the company to pay the mortgage, the deed being taken subject thereto, and under such circumstances, a like result would be attained, which would be a benefit to the stockholder of the Trust Company in his assessment on his shares of stock.

"To my mind, the statute contemplates that a deduction shall be allowed to the stockholder when he can show that a specific amount of the actual capital of the corporation has been actually invested in real estate, and upon the showing of the Trust Company, the only amount of an actual investment of capital is $17,000. This amount has been allowed by the assessor by way of deduction, and is all that the Trust Company is entitled to under the statute, in my judgment."

Section 1322 of the Supplement to the Code of 1913 provides that "In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them and in the shares of stock of corporations owning only the real estate (inclusive of leasehold interests, if any,) on or in which the bank or trust company is located shall be deducted from the real value of such shares".

The books of the Bankers Trust Company show that there is only invested in this building in capital stock, surplus and undivided profits, the sum of $17,000. This being true, there is no escape from the mandatory provisions of the statute. In connection therewith our attention has been called to the case of *State of Missouri v. Buder,* 242 S. W. (Mo.) 979. This case is not identical. The distinction lies in the fact that in the Buder case the bank actually carried as an outstanding indebtedness of the bank, the total mortgage indebtedness and showed on its assets side of the ledger, the total value of the building. Under such circumstances, the court held that the total investment in real estate was the total value at which the real estate was carried on the books of the bank, the theory being that if the bank carried on its books the real estate at its full value and carried as a liability the mortgage indebtedness, that the law would consider that done which would be done, namely, that the indebtedness would be paid and that there was in fact and law an actual investment of the capital to the full value of the building. In this case, this is not the situation. The Bankers Trust Company does not carry this real estate at its full value, it only carries the $17,000. We are therefore forced to the conclusion that the Corporation Counsel is correct in his conclusions.

TAXATION—CHATTEL LOAN COMPANIES—Small loan companies operating under Chapter 35 of 39th G. A. must comply with Chapter 151 of 38th G. A. in every detail before entitled to benefits thereof. Question whether they are in competition with banks one of fact.

July 1, 1924.

Auditor of State: This department is in receipt of your letter dated June 27, 1924 in which you request an official opinion. Your request is in words as follows:

"We have an inquiry raised by the work of our examiners in connection with bank assessments that does not seem clear and on which we would like your opinion.

"Chapter 35 of the 39th General Assembly provides for chattel loans under certain regulations and it seems to us that in the exercise of the function provided by this act, that the organization doing the business is in competition with banks and therefore should be regularly assessed under the provisions of the bank assessment laws. Are we right in this conclusion? Chapter 151 of the Acts of the 39th G. A. makes provisions for loans and loan corporations and provides for showings to the State Auditor in the form of reports and also provides for examination of the books and records of the institution by the State Auditor, and further provides that the State Auditor shall then issue a certificate and that the organization will be taxable at the rate of five mills on the dollar if these conditions are complied with. Now providing none of these showings are made by the institution and it functions under the provisions of this act but fails to make the reports and receive the certificate from the State Auditor, the question then of course is, how should they be assessed and taxed?"

You are advised that if the provisions of the law are not complied with that then the exemption provided would not apply. The Legislature clearly contemplates that these small loan companies shall be assessed upon the same basis as moneyed capital, unless compliance with the statute is had. Of course there is also the question of fact as to whether or not there is competition, but the assessor should be careful to see that he does not assess these companies as moneys and credits when they should be assessed as moneyed capital.

COUNTY TREASURER—TAXES—A collector of taxes has no right to accept a check in payment of taxes and its acceptance does not discharge the lien unless such instrument is in fact paid and the issuance of a receipt does not operate to release or satisfy the taxes for which the check is given.

August 7, 1924.

County Attorney, Lyon County, Rock Rapids, Iowa: We have received your letter of July 28, 1924, asking this department to render an opinion upon the proposition which you have stated therein as follows:

"On July 3, 1924, one John Boomgarden issued a check in favor of C. S. Smock, County Treasurer, in the sum of $114.54, being the last payment of the 1923 tax due by Mr. Boomgarden. Practically all of this tax is assessed on farm lands situated in this county, and is in the form of general tax, and does not include assessments of any kind.

"On that date the county treasurer issued a tax receipt to Mr. Boomgarden. There being very few payments of taxes about this time of the year, the County Treasurer did not present the check for payment until on July 8th, on which date it was deposited to the County's credit with other checks in the First National Bank of Rock Rapids.

"The check in question was issued and drawn upon the Iowa Savings Bank of Rock Rapids, Iowa. On July 9th the check was presented by the First National Bank to the Iowa Savings Bank for clearance, and payment thereon was refused because of the condition of the bank at that time, and as we understand no checks were honored by the officials of the bank on that day.

"On the morning of July 10th the Iowa Savings Bank was closed by action of the Board of Directors. As we understand Mr. Boomgarden has ample funds on deposit to cover the check in question, but the same has not been paid for the reasons stated.

"The County Treasurer has asked me for an opinion in this matter, and in addition thereto is anxious to procure an opinion from your Department, hence this letter.

"The negotiable instrument law requires a check to be presented within a reasonable time, and a check of course does not constitute an assignment of a portion of a maker's deposit until the same has been presented and paid.

"It occurs to me that the check was presented within a reasonable time, and it further seems to me that it could be said that the same was not presented within a reasonable time, and that the county and state could not and is not bound under the circumstances.

"This further question presents itself whether or not a County Treasurer should cancel a tax receipt so far as his office record is concerned (the maker of the check of course has possession of his tax receipt and refuses to return it) and then proceed to advertise the land on tax sale in default of payment on or before October 1st, or on or before the date fixed for the payment of the taxes, to avoid tax sale, or if an action should be commenced the Treasurer asking for such cancellation of the tax receipt in question.

"The County Treasurer anticipates trouble on the proposition, and of course in any event I can not see that the county would be materially interested in the matter, because if the delivery and acceptance of the check and retention by the treasurer of the check for an unreasonable period of time constitutes payment of the taxes, then the County Treasurer would be personally liable to the county for the loss, but it seems to me that the delivery and acceptance of the check under all the cir-

cumstances does not amount to the payment of the tax, and that the real question for determination is the course to pursue with relation to the cancellation of the receipt record and cancelling the payment of the tax, or in bringing an action either for the payment of the check or for the cancellation of the receipt in the hands of the maker of the check."

The question you have submitted involves the following propositions: First: Under the laws of this state, what kind of funds may be used in the payment of taxes? Second: May a check be used in the payment thereof? Third: When a check is delivered to the treasurer in ostensible payment of taxes, does the delivery thereof to the treasurer amount to a payment of the taxes, or are the taxes paid only when the check is presented to and paid by the bank on which it is drawn? Fourth: What is the effect of the issuance of a receipt by the county treasurer before the taxes have actually been paid?

I.

The general rule with reference to the medium for the payment of taxes is stated in Cyc as follows:

"The legislature has power to prescribe the kind of funds in which taxes shall be payable, and may declare that only gold and silver coin shall be receivable for this purpose. But in the absence of such a restriction, taxes may be paid in any lawful current money, although the collector has no authority to accept anything else, unless specially allowed by law." 37 Cyc, 1162.

Numerous authorities are cited therein in support of the text, among which are the following: *Prescott v. McNamara,* 73 Calif., 236; *Hagar v. Reclamation District,* 111 U. S. 701; *Lane County v. Oregon,* 74 U. S. 71; *Staley v. Columbus Township,* 36 Mich., 38; *Figures v. State,* 99 S. W. Reporter, 412; *Skinner v. Mitchell* (Kans.) 197 Pac. Rep., 569.

It is a well known proposition of law that the acceptance of a check on a bank for the payment of taxes is at most only a conditional payment; that is, the taxes are not paid and satisfied until the check is paid by the bank on which it is drawn, and if it is never presented to the bank, or is dishonored thereby, the taxes remain a charge against the taxpayer The collector of taxes has no legal right whatever to accept a check, and if he does so his act cannot prejudice the public in the collection of the revenue. 37 Cyc, 1164; *Koones v. District of Columbia,* 54 Am. Rep., 278; *Houghton v. Boston,* 159 Mass. 138; *Moore v. Auditor General,* 122 Mich. Rep., 599; *Richards v. John D. Hatfield,* Appellant, 40 Nebr., 879; *Skinner v. Mitchell* (Kans.) 197 Pac. Rep., 569; *Seward v. Fisken* (Wash.) 210 Pac. Rep., 378.

The rule is stated in 27 American and English Encyclopedia of Law, on pages 750 and 751, as follows:

"The payment or tender of taxes must be absolute and unconditional. *The taxpayer and the collector can make no arrangement whereby the taxpayer is discharged from liability for his taxes by anything except the absolute payment of them.* In some states, however, the collector is permitted to satisfy the tax by payment to the treasurer and to enforce his claim for the payment so made against the person taxable."

"The receipt of a *check, draft,* or note, the marking of the taxes paid on the books, and the delivering of a receipt will not constitute payment nor conclude the public in a controversy between the taxpayer and the authorities. *The check or draft given to a collector as payment does not discharge the lien unless such instrument be in fact paid."*

In Ruling Case Law, in 26th Volume, 376, the rule is stated in the following language:

"A check is not payment of a tax, until the check is paid, even if received by the collector as payment, and if the collector neglects to present the check for payment for several days and in the meantime the bank on which it was drawn becomes insolvent, the tax may still be collected from the taxpayer."

To determine the question as to whether or not the tender of a check and the receipt thereof by the county treasurer in payment of taxes will pay or satisfy the same, we must resort to the statutes of the state.

Section 1401 and 1402 of the Code read as follows:

"Auditor's warrants shall be received by the county treasurer in full payment of state taxes, and county warrants shall be received by the treasurer of the proper county for ordinary county taxes, but money only shall be received for the school tax. Road taxes, except the portion payable in money, may be discharged and road certificates of work done received, as provided by law."

"The treasurer is authorized and required to receive in payment of all taxes by him collected, together with the interest and principal of the school fund, the circulating notes of national banking associations organized under and in accordance with the conditions of the act of the congress of thte United States, entitled 'An act to provide a national currency secured by the pledge of the United States stocks, and to provide for the redemption thereof,' approved February 25, 1863, and acts amendatory thereto, United States legal tender notes, and other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency."

A reading of these sections will disclose the fact that taxes may be paid aside from ordinary legal tender in the following ways: First: Auditor's warrants shall be received in payment of state taxes. Second: County warrants for ordinary county taxes with the exception of school taxes, which must be paid in money. Third: Road taxes, except the portion payable in money, may be discharged and road certificates of road work done received as provided by law. Fourth: Circulating notes of national banking associations organized under and in accordance with the conditions of the act of the congress of the United States, and acts amendatory thereto. Fifth: United States legal tender notes. Sixth: Other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency.

These provisions manifestly exclude the use of any other medium for the payment of taxes with the exception of such coin or other medium as comes within the designation of legal tender. We are, therefore, of the opinion that the county treasurer has no authority under the laws of this state to accept a check in payment of taxes, and that the receipt of a check in payment thereof will not operate as such payment until the check has been paid by the bank on which it is drawn.

The taxpayer, in dealing with the county treasurer, in attempting to pay his taxes, must at his peril know the limits of the official's authority, and no act of such official can prejudice, or in any way affect, the right of the county to collect the taxes that may be due from him.

II.

The statute requiring the treasurer to issue a receipt for the payment of taxes is section 1405 of the Code, and reads as follows:

"The treasurer shall in all cases make out and deliver to the taxpayer a receipt, stating the time of payment, the description and assessed value of each parcel of land, and the assessed value of personal property, the amount of each kind of tax, the interest on each and costs if any, giving a separate receipt for each year; and he shall make the proper entries of such payments on the books of his office. Such

receipt shall be in full of the first or second half or all of such person's taxes for that year, but the treasurer shall receive the full amount of any county, state or school tax whenever the same is tendered, and give a separate receipt therefor."

While the receipt is prima facie evidence of payment, it does not estop the municipal corporation collecting the tax, from showing that the tax was in fact not paid, or that it was not paid "in full", as stated in the receipt. 37 Cyc, 1169; *State v. Waldo,* 20 Maine, 471; *State v. Union Trust Company,* 92 Mo. 157, (6 S. W. 867); *Graves v. Bullen* (Mo.) 115 S. W. Rep. 1177; *Seward v. Fisken* (Wash.) 210 Pac. Rep. 378; *Richards v. Hatfield,* 40 Neb. 879; *Marco v. Fond du Lac County,* 63 Wisc. 212; *Ambler v. Clayton,* 23 Iowa, 173; *Barthell v. Hermanson,* 158 Iowa, 329.

We are, therefore, of the opinion that the issuance of the receipt by the county treasurer, as detailed in your communication, would not operate to release or satisfy the taxes for which the check was given, and that it is the duty of your county treasurer to cancel said receipt and the satisfaction of the taxes, for which it was given, upon the records in his office, and that such official may proceed to collect the tax involved in your inquiry by any of the methods prescribed in the statute.

EXEMPTION—OFFICERS RESERVE CORP—Officers of the reserve corps are not entitled to an exemption of $10,000 under Chapter 380, Acts of the 37th General Assembly since the cessation of the war.

September 13, 1924.

Auditor of State: This department is in receipt of your oral request for an opinion. This request has to do with the right of an officer in the Reserve Corps to the $10,000.00 exemption provided by Chapter 380, Acts of the 37th General Assembly.

You are advised that officers in the Reserve Corps are not entitled to the $10,000.00 exemption provided in this act nor is any soldier at this time. The question arose at the time of the adoption of the resolution of peace by Congress some three years ago, but from that time to this there has been no doubt about the matter at all. The simplicity of this will be apparent to you if you realize that Chapter 380 dealt with a situation during which there was an actual state of war with Germany.

Under this Chapter a moratorium was declared wihch would still be in existence if the contention made by the officers of Calhoun County is correct. So also would the provision relating to continuance of causes, so also would the provision relating to the tolling of the statute of limitations. It would be absurd to even contend that officers of the Reserve Corps are entitled to this exemption or to any other of the rights provided in this chapter.

You are instructed to direct the county auditor of Calhoun County to correct the records of his county, to the end that any exemptions now shown on the books under this Chapter are removed. The question as to a recovery for refunds is a question of fact, but in my judgment these refunds can be recovered and should be by the county. In this connection you are advised that this is the only county in the state in which this situation is present and we trust that you may be able to correct it without any serious difficulty or trouble.

COUNTY TAXES—Board of Supervisors cannot correct irregularities in valuations for tax assessments. Board of Review has sole jurisdiction and once it has determined the matter if there is no appeal, then there is no remedy.

September 16, 1924.

County Attorney, Monroe County, Albia, Iowa: This department is in receipt of your letter dated September 12, 1924, in which you request an opinion. Your letter is in words as follows:

"In Guilford Township in this, Monroe County, for the year 1923, an assessment of general taxes to many persons owning property within the district of the township has worked great inequality and actual injustice upon them. The matter relates to valuations. No appeals to the district court were taken. The parties were all actually ignorant of the changes in valuation made by the assessor and the trustees as a board of equalization, until the time when they came to pay their taxes in 1924. These parties beseech the board of supervisors and myself, crying for relief, and not understanding why injustice can be worked upon them in the name of the law. The work of the assessor and board of equalization was indeed very bad. I feel sorry for these people and would like to point out relief for them if I knew but how.

"Of course I know that the board of supervisors could not at any time equalize taxes between persons, and can not now. They may refund erroneous taxes; but I do not believe there is any irregularity which would warrant, or make advisable, the setting aside of the whole work of the assessor and board of equalization, nor is there any particular instance of irregularity. It seems only that in a lawful way the assessor and board of equalization have caused a great inequality in valuations.

"If any suggestion can be made of a lawful method affording relief, I certainly shall welcome it."

You are advised that the board of supervisors has no power or authority to make the corrections referred to. This question has been so often determined by the Supreme Court of this state to be almost, if not, fundamental. This is not a case of an erroneous or void tax, but is simply a case involving the valuation of property for assessment purposes. The board of review has sole jurisdiction and once it has determined the matter and there is no appeal, there is no remedy.

TAXATION—CITY AND COUNTY—AGRICULTURAL LANDS—Agricultural lands within the limits of a town not subject to city taxes except for town road purposes and library purposes, but are subject to all county and township taxes.

November 7, 1924.

County Attorney, Black Hawk County, Waterloo, Iowa: You have requested the opinion of this department upon the proposition of whether or not Agricultural lands described under the provisions of Section 6210 of the Code of Iowa, 1924, are taxable for (a) city bridge purposes, (b) county bridge purposes, (c) county drainage purposes and (d) township drainage purposes.

Section 6210 of the Code of Iowa, 1924, provides as follows:

"6210. Agricultural lands. No land included within the limits of any city or town which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less by the extension of streets and alleys, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, shall be taxable for any city or town purpose, except that said lands and all personal property necessary to the use and cultivation of said agricultural or horticultural lands shall be liable to taxation for city and town road purposes, at not exceeding five mills, and for library purposes."

It will be observed that if the lands are of the class described in the section just

quoted that they are not taxable for any city or town purpose except that they shall be liable to taxation for city and town road purposes at not exceeding five mills for library purposes.

It is the opinion of this department that the foregoing language is plain and clearly provides that real estate of the class described therein shall not be taxed for any city or town purpose except those two purposes specified. It follows, however, that said property is liable for all county and township taxes and would therefore be liable for the county bridge and drainage taxes and any township drainage tax for the township in which the real estate is located.

ASSESSMENT OF AGRICULTURAL PRODUCE—REVENUE LAWS—Where inconsistent statutes, the latter enactment prevails. Held under Subsection 13 of Section 6944 and Subsection 3 of Section 6953 that sheep and swine under nine months of age will not be taxed.

November 20, 1924.

Auditor of State: This department is in receipt of your letter dated November 17, 1924, in which you request an opinion. Your letter is in words as follows:

"In preparing our Revenue Laws for the use of assessors, we find a discrepancy between the law as outlined in Code 1924, Section 6944, paragraph 13, and Section 6953, paragraph 3.

"In the former section you will note that sheep and swine under nine months of age are to be exempt from taxation, and under the latter section in the list of taxable property, sheep and swine over six months of age are subject to taxation.

"Kindly inform us as soon as possible what construction should be placed upon these conflicting statutes."

Subsection 13 of Section 6944 of the Code, 1924, provides in words as follows:

"Agricultural Produce. The agriculaural produce harvested by or for the person assessed within one year previous to the listing, all wool shorn from his sheep within such time, all poultry, ten stands of bees, all swine and sheep under nine months of age, and all other domestic animals under one year of age."

Subsection 3 of Section 6953 of the Code, 1924, provides in words as follows:

"Sheep and swine over six months of age."

Under the law, as it existed prior to the Extra Session of the 40th General Assembly, the age limit of both sheep and swine was the same under both sections. The legislature, however, saw fit to change the age limit under Section 6944, of the Code 1924, raising such age limit from six to nine months. It is a fundamental rule of statutory construction that the later enactment will prevail.

Therefore, sheep and swine under nine months of age will not be taxed.

SPECIAL ASSESSMENTS: The charges for underground water connections made by the city are special assessments.

December 5, 1924.

County Attorney, Black Hawk County, Waterloo, Iowa: We have received your letter of November 7, 1924, asking this department for an opinion upon a question which may be stated as follows:

"Are charges of underground water connections made by the city special assessments, and if they are special assessments, should such charges bear interest from the date of the acceptance of the work by the city."

Section 5981 of the Code, 1924, which empowers cities and towns to require the property owners to make connections for gas, water, steam heating pipes, sewers and underground electric constructions, is a part of Chapter 308 relating to street improvements, sewers and special assessments, and reads as follows:

"They shall have power to require the connections from gas, water, and steam-heating pipes, sewers, and underground electric construction, to the curb line of ad-

jacent property, to be made before the permanent improvement of the street and, if such improvements have already been made, to regulate the making of such connections, fix the charges therefor, and make all needful rules in relation thereto, and the use thereof. If the owners of property on such streets fail to make such connections in the manner and within the time fixed by the council, it may cause the same to be made, and assess the cost thereof against the property for which they are made."

It will be observed that in the event the owners of property fail to make such connections in the manner and within the time fixed by the council, it may cause the same to be made, and assess the cost thereof against the property for which they are made.

We are confronted at the outset with the question as to whether or not the cost of making such connections is a special assessment within the meaning of the term as found in the statutes. While the right to levy special assessments is derived from the general power to tax, yet a special assessment is somewhat different from an ordinary tax. The distinction has been pointed out by the Supreme Court of this State in the following language.

"* * * a clear distinction is everywhere recognized between a tax in the proper sense of the word and a special assessment. The former may be said to be a contribution or levy imposed upon property for general public purposes, without regard to the question of special benefits conferred, while the latter is imposed only as payment for special benefits conferred upon the property charged, by an improvement the expense of which is thus to be met." *Cornelius v. Kromminga,* 179 Iowa, 715.

Among the many authorities so holding are the following: *Munn v. Board of Supervisors,* 161 Iowa, 26; *Ittner v Robinson* (Neb.) 52 N. W. Rep. 846; *Daly v. Morgan,* 16 Atl. Rep. 287; *Pettit v. Duke* (Utah) 37 Pac. Rep. 568; *City of Raleigh v. Peace* (N. C.) 14 S. E. Rep. 521; *Wilson v. City of Auburn* (Neb.) 43 N. W. Rep. 257; *Sargent v. Tuttle* (Conn.) 34 Atl. Rep. 1028; *Herrman v. Guttenberg* (N. J.) 43 Atl. 703; *Shurtleff v. Chicago* (Ill.) 60 N. E. Rep. 870; *Illinois Central R. R. Co. v. City of Decatur,* 147 U. S. 190; *Peake v. New Orleans,* 139 U. S. 342.

It is quite apparent, we think, that the charges for underground water connections are special assessments as defined by the courts and are in no sense ordinary or general taxes.

On August 20, 1924, we prepared an opinion for Honorable E. L. Hogue, Director of the Budget, in which we held that assessments for removing snow from sidewalks, cutting weeds and delinquent water rentals, were special assessments within the meaning of the Budget Law.

Sections 5982 and 5983 of the Code of 1924 relate to the making of water connections when street improvements are ordered in any city or town. The reading of these sections will show that the procedure with relation thereto is specified therein. However, these sections apply to only cities having a board of waterworks trustees.

Section 5981, hereinbefore quoted, which grants to cities and towns power to require gas, water and other connections before the permanent improvement of a street is made, does not prescribe the procedure to be followed in requiring the making of such connections. We are of the opinion that the exercise of this power must be regulated by ordinance and the procedure should be prescribed therein. We are not advised as to whether or not the city of Waterloo has such an ordinance. If so, the provisions of the ordinance should be followed in every detail.

We desire to call your attention to the fact that under the new law special assessments will draw interest from the date of the levy by the city or town council. Section 6033, Code of 1924. Under the old law such assessments drew interest from the date of acceptance of the work by the city council. Section 825 of the Code Supplement, 1913.

All special assessments that are levied after the taking effect of the new law, in cases where the proceedings were instituted and the contract let under the old law, should be governed by the old and not by the new law.

TAXATION—Board of Supervisors may remit taxes on land or personal property, for either landlord or tenant, when crops are destroyed by hail.

January 22, 1923.

County Attorney, Delaware County, Manchester, Iowa: You have requested an opinion from this department as to whether section thirteen hundred and seven (1307) of the Code authorizes boards of supervisors to remit the taxes under the following conditions.

"1. There was considerable damage to crops by hail in this county last spring and the parties interested have asked the board of supervisors to remit their taxes.

"2. Does the board of supervisors have authority to remit all of a man's taxes on both his real and personal property?

"3. Where the farm is rented for cash, what tax can the board remit, the tenant's or landlord's, or both?"

Section thirteen hundred and seven (1307) to which you refer reads as follows:

"The board of supervisors shall have power to remit in whole or in part the taxes of any person whose buildings, crops, stock or other property has been destroyed by fire, tornado or other unavoidable casualty, if said property has not been sold for taxes, or if said taxes have not been delinquent for thirty days at the time of the destruction. But the loss for which such remission is allowed shall be such only as is not covered by insurance."

Pursuant to the provisions of section thirteen hundred and seven (1307) I am of the opinion that it is entirely discretionary with the board of supervisors to remit such taxes as the board considers just and equitable when the taxpayers' buildings, crops, stock and other property have been destroyed by fire, tornado or other unavoidable casualty. This would apply to both the real and personal property of the taxpayers.

As to whether the board of supervisors would be authorized to remit the taxes of the landlord when his farm is rented for cash, it would depend entirely upon whether or not the landlord cancelled all obligations on the part of the tenant to pay the rent. If the landlord still held the tenant liable for the rent the board of supervisors would certainly not be justified in remitting taxes of the landlord.

However, in this connection the board of supervisors should exercise caution in remitting taxes and should remit only such taxes as the equity of the case requires.

TAX EXEMPTIONS—POOR PERSONS—Amendment changing law but not effective till after exemption had been granted under old law, does not annul exemptions already granted.

April 27, 1923.

Auditor of State: You have submitted to this department for an opinion several propositions arising out of the action taken by the Thirty-ninth General Assembly in repealing the provisions of paragraph four (4) of section thirteen hundred four

(1304) of the supplemental supplement to the code, 1915, and the enactment of a substitute therefor relating to the method of allowing exemptions from taxation to persons who are unable to contribute to the public revenue by reason of age and infirmity.

Under the provisions of the original statute, the assessor was empowered to determine whether or not persons were eligible to an exemption from taxation because of inability to contribute to the public revenue due to age or infirmity. If the assessor determined that the property of any person should be exempt from taxation, under the provisions of this paragraph, the only power that could reverse such finding was the Board of Review.

Chapter two hundred eighty-one (281) of the Acts of the Thirty-ninth General Assembly repealed this statute and enacted a substitute which became effective July 4, 1921.

Under the provisions of the substitute it is obligatory upon any person claiming an exemption from taxation for the reasons therein set out to file an application with the Board of Supervisors therefor in the manner prescribed. As stated, this paragraph superseded the former provision of the law on July 4, 1921. The question then arises out of the effect of this later provision upon exemptions granted by the assessor under the original provisions and not reversed by the Board of Review.

We now reach the first proposition submitted for an opinion which is as follows:

"Would the exemptions made by the local Boards of Review in April, 1921, stand for the taxes for the year 1921, or should there have been a new petition filed with the Board of Supervisors under the provisions of chapter 281, Acts of the Thirty-ninth General Assembly?"

Under the general provisions of the law, property is assessed for taxation for any year during the first three months of that year. Under the provisions of the original paragraph four, exemptions granted to property under such paragraph for the year 1921, were completed several months before July 4, 1921. All that the law required to be done in order that the exemption it provided might attach, was completed. Up and until July 4, 1921, such exemptions were unquestionably valid. The question presented then resolves into the question of whether or not the provisions of chapter 281 of the Acts of the Thirty-ninth General Assembly which did not become the law until July 4, 1921, have a retrospective effect and thus repeal the exemption granted under the provisions of the old law? It has been the universal rule in this state, and we have both statutory and case law as authority therefor, that unless there are express provisions providing therefor, statutes which repeal other statutes do not have a retrospective effect. Section forty-eight (48) of the code prescribes certain rules that shall be observed in construing statutes. Paragraph one (1) of said section provides that

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

The foregoing is the statutory rule of construction relative to the retrospective effect of the repeal of a statute. In the opinion in the case of *State v. Iowa Telephone Co.*, reported in 175 Iowa, page 607, the question is discussed beginning with page 622. It is there said among other things that

"Another well-settled canon of construction is that statutes should be construed

prospectively, and not retrospectively; and this is true although there be no constitutional impediment," citing a number of cases.

"It is also a well-settled rule of the courts to construe all statutes as having only a prospective operation unless the legislature expressly declare, or otherwise show a clear intent that it shall have a retroactive effect."

There is no provision in chapter 281 referred to above which in any manner indicates that the provisions thereof are retrospective or are to have a retrospective effect. It is customary and usual for legislative bodies, when they wish enactments to have a retroactive effect to specifically so state. The rule is well-settled in the opinion in the case of *Cameron v. The United States,* 231 U. S. 710, where it is said that

"A retrospective operation of statutes is not to be given except in clear cases, unequivocally evidencing the legislative intent to that effect. * * * In the absence of a clearly expressed legislative intent to the contrary the court will prescribe that the law-making power is acting for the future and does not intend to impair obligations incurred and rights realized upon the past conduct of men when the legislation was in force * * *."

Following the authorities mentioned, it is clear that the provisions of chapter 281 of the Acts of the Thirty-ninth General Assembly operate prospectively only. The allowance of the exemptions under the original statute had already been completed, in the manner prescribed by law, before the substitute took effect and the provisions of the substitute not being retroactive, it could not therefor be held to annul such exemptions. In view of the observations hereinbefore made we are of the opinion that the exemptions allowed by the assessors and the Boards of Review on property for the year 1921, under the provisions of the original paragraph should remain effective and that the provisions of the later statute should not apply until a new assessment is made.

The second proposition submitted is as follows:

"In case the exemptions made by the local boards should hold good for the taxes for the year 1921, would you consider the taxation erroneously or illegally exacted, and would the Board of Supervisors, under the provisions of section 1417 of the code, 1907, be authorized to issue a refund warrant for the amount necessary to redeem the property from tax sale so that each fund will bear its proper proportionate share of the refund?"

We are informed that in the case in question the county auditor did not allow the exemptions made by the local Boards of Review and that he entered the taxes against the property which had been so exempted. Neither did the persons who were exempted under the provisions of the former statute file applications with the Board of Supervisors for exemption under the provisions of the later statute. In December, 1922, the county treasurer sold the property in question at tax sale.

Having determined that the exemptions made by the local Boards of Review in April, 1921, were not annulled by reason of the provisions of chapter 281 of the Acts of the Thirty-ninth General Assembly going into effect on July 4, 1921, it must necessarily follow that taxes assessed and entered against property so exempted were erroneous and illegal. As said in the opinion in the case of *Commercial National Bank v. Board of Supervisors,* reported in 150 N. W., page 704:

"The manifest design of this statute is that the Board of Supervisors first ascertain whether the taxpayer is entitled to be reimbursed for taxes illegally or erroneously exacted, and if so, the treasurer be directed to repay the same from the several funds to which these have passed."

It is further said in the opinion that

"It is the duty of the treasurer only, to repay from the particular funds into which the taxes have gone, and, when necessary, to ascertain by computation the amount to be taken from each. * * * The result obtained is the restoration of the moneys illegally and erroneously paid by the taxpayer and each fund continues as though these had never been collected. The remedy is perfect."

It will therefore follow that the person who purchased the property at tax sale should be refunded the amount of tax paid by him at the tax sale. See *Scott v. Chickasaw County,* 53 Iowa, 47, 51. Neither does it matter that the taxes were voluntarily paid. *Commercial National Bank v. Board of Supervisors,* 150 N. W., 704, 705.

It is therefore the ruling of this department that such taxes were erroneously and illegally exacted and that they are recoverable under section 1417 of the code, even though paid by another person at tax sale.

In view of the rulings on the first two propositions submitted, it will not be necessary to rule on the third and fourth propositions.

TAXATION—TRANSMISSION LINES. Physical property is taxed as a minimum. Excess value of capital stock over value of physical property is taxable.

April 28, 1923.

County Auditor, Hancock County, Garner, Iowa: You have submitted the proposition to this department for an opinion as to whether or not electric transmission lines may be assessed for taxation upon their property and also the owners of the shares of capital stock assessed for such stock. Sections 1346-k, 1346-l, 1346-m of the supplemental supplement to the code, 1915, provides for the assessment for taxation of electric transmission lines located outside the limits of cities and towns by the Executive Council. Section 1346-q of the supplemental supplement to the code, 1915, provides that every transmission line or part thereof, which the Executive Council is required to assess for taxation purposes, shall be exempt from other assessment or taxation either under section 1343 of the code, 1897, or under any other law except as provided in the chapter of which said section is a part and also except as provided in section 1346-s of the supplemental supplement to the code, 1915.

Section 1346-s of the supplemental supplement to the code, 1915, provides as follows:

"The owner of the capital stock in any company owning or operating any transmission line or lines referred to in this act shall not be assessed for taxation upon such capital stock."

Section 1346-r of the supplemental supplement to the code, 1915, defines what shall be included and considered as an electrical transmission line company. In view of the provision in section 1346-s, supplemental supplement to the code, set out above, it is clearly evident that the capital stock of such companies is not to be assessed for taxation by the Executive Council.

Section 1343 of the code, 1897, prescribes the method in which the property belonging to electric transmission lines and plants shall be assessed within cities and towns. It is there provided that all the physical property of such companies situated within the limits of a city or town shall be assessed separately from those portions located without the limits of said city or town in the same manner as other property.

It is further provided that if the actual value of the capital stock of any such company exceeds the value of the physical property listed and assessed, in that event the excess shall be assessed as prescribed in section 1323 of the code, 1897. It will be noted that by this procedure the physical property is assessed as a minimum and if the assessed value of the capital stock exceeds the assessed value of the physical properties, then only such excess value of the capital stock is taxable as such.

In view of what we have just said it is the evident purpose of the law to tax physical properties as a minimum and if the value of the capital stock should exceed the total value of the physical elements, then such capital stock may be taxed for such excess. This being true, there is no double taxation.

TAXATION—Assessment of private banks—Deduction of debts—Correction of assessments. Private banks cannot deduct the amount owing for borrowed money or for mortgages assumed. County Auditor can only correct errors for current year.

May 16, 1923.

Auditor of State: I am in receipt of your letter dated May 10, 1923, requesting an opinion from this Department. Your request is in words as follows:

"We are in receipt of a request for information from one of our examiners on certain points concerning the assessment of private banks, which we sum up as follows:

1. In arriving at the proper valuation of private bank stock, can the bank deduct 'amount owing for borrowed money', which by our form of bank statement is made to include bills payable, rediscounts, due clearing houses, and bank overdrafts?
2. Can the private bank in making deduction for other investments and securities deduct for mortgages assumed?
3. If the assessment of the private bank is erroneous on account of deductions allowed in matters covered by questions No. 1 and No. 2, and the practice has existed for years past, how far back shall the auditor go in making corrections on the tax list?"

Your first question must be answered in the negative. Section 1321 of the Supplement to the Code, 1913, provides for the assessment of private bankers. This section is in words as follows:

"Sec. 1321. Private banks or bankers, or any persons other than corporations hereinafter specified, a part of whose business is the receiving of deposits subject to check, on certificates, receipts or otherwise, or the selling of exchange, shall prepare and furnish to the assessor a sworn statement, showing the assets, aside from real estate, and liabilities of such bank or banker on January first of the current year, as follows:

1. The amount of moneys, specifying separately the amount of moneys on hand or in transit, the funds in the hands of other banks, bankers, brokers or other persons or corporations, and the amount of checks or other cash items not included in either of the preceding items;
2. The actual value of credits, consisting of bills receivable owned by them, and other credits due or to become due;
3. The amount of all deposits made with them by others, and also the amount of bills payable;
4. The actual value of bonds and stocks of every kind and shares of capital stock or joint stock of other corporations or companies held as an investment, or in any way representing assets, and the specific kinds and description thereof exempt from taxation;
5. All other property pertaining to said business, including real estate, which shall be specially listed and valued by the usual description thereof; the aggregate

actual value of moneys and credits, after deducting therefrom the amount of deposits, and the aggregate actual value of bonds and stocks, after deducting the portion thereof otherwise taxed in this state, and also the other property pertaining to the business, shall be assessed as provided by section thirteen hundred and five of this chapter, not including real estate, which shall be listed and assessed as other real estate."

The last paragraph of this section as it was contained in the Supplement to the Code, 1907, was in words as follows:

"The aggregate actual value of moneys and credits, after deducting therefrom the amount of deposits *and of debts owing by such bank as provided in this chapter,* and the aggregate actual value of bonds and stock, after deducting the portion thereof *exempt, or* otherwise taxed in this state, and also the other property pertaining to the business, shall be assessed as provided by section thirteen hundred and five (1305) of this chapter, not including real estate, which shall be listed and assessed as other real estate."

The provision relating to the deduction of debts from the total assets was stricken at the time of the enactment of the present moneys and credits acts, 34th General Assembly, Chapter 63.

Section 3 of this Chapter provides in words as follows:

"Sec. 3. The law as it appears in section thirteen hundred and twenty-one (1321), of the supplement to the code, 1907, is hereby amended by striking from lines four and five of sub-division five, thereof the words 'and of debts owing by such bank, as provided in this chapter', and by also striking from line six of said sub-division five words 'exempt, or'."

That it was the legislative intention that there were to be no deductions for debts, except as to moneys and credits is more clearly shown by section 2 of this Chapter, which provides in words as follows:

"Sec. 2. Section thirteen hundred and eleven (1311), of the code, is hereby amended by adding thereto the following words: 'Provided, however, that no deduction for debts shall be allowed from the shares of stock of any state, savings or national bank or loan and trust company, nor from moneyed capital used in competition with banks, within the meaning of section five thousand two hundred and nineteen (5219) of the revised statutes of the United States' ".

It follows that no deduction from the total assets of private bankers can be made for debts owing by such private banks as a part of the business.

Your second question must be answered in the negative. There is no provision for the deduction of mortgages assumed by the bank. (See Section 1321, Code of 1913.)

In answering your third question, you are advised that the auditor can only correct for the current year, that is, up to the time the tax is actually paid.

TAXATION—LOAN AND TRUST COMPANIES—Investments in real estate. Such investments cannot be deducted from capital, surplus and undivided earnings.

August 18, 1923.

Auditor of State: I am in receipt of your letter dated August 8, 1923, in which you request an opinion from this department, which request is in words as follows:

"I am sending you herewith a statement of facts concerning the assessment of the Iowa Loan & Trust Company. Our examiner desires to know whether the investment of this company in real estate can be deducted from the capital, surplus and undivided earnings in making the assessment."

The investment of the Iowa Loan & Trust Company in lands sold under real estate contract cannot be deducted from the capital, surplus and undivided earnings. (See: *In Re Estate of Bernhard,* 134 Iowa 603, and cases there cited.)

TAXATION—Assessment of Banks—Deductions—Joint Stock Land Banks. National, State and Savings Banks may deduct amount invested building on leased land. May not deduct value of real estate sold on contracts to individuals. Joint stock land bank stock, if not in competition with other bank stock, is assessed as other investment companies and if in competition assessed as monied capital.

August 23, 1923.

Auditor of State: You have requested this department for an opinion upon the following propositions:

1. Is a national, state or savings bank in making its return for taxation entitled to deduct from its capital, surplus and undivided profits, the value of permanent buildings erected on leased land?
2. Is a national, state or savings bank in making its return for taxation entitled to deduct from the amount of its capital stock, surplus and undivided profits, the value of real estate sold on real estate contracts to individuals, and on which real estate the individuals to whom the same has been sold are paying taxes?
3. Is a joint stock land bank organized under the joint stock land bank law of the United States to be considered as a national, state or savings bank within the meaning of the Iowa laws relating to the taxation of bank stock, and if not, are the shares of stock in such a bank to be taxed under the provisions of Section 1310 of the Supplement to the Code, 1913?

You are advised that a national, state or savings bank is entitled to deduct from the total amount of its capital, surplus and undivided profits the amount thereof invested in permanent buildings erected on leased lands; Chapter 146, Acts of the 40th General Assembly.

You are advised that a national, state or savings bank is not entitled to deduct from the amount of its capital stock, surplus and undivided profits, the value of real estate which it has sold on real estate contracts to individuals. Such real estate is not included within the term as used in the statute providing for the deduction of real estate. When such real estate is sold on a real estate contract there is a conversion. *In re Estate of Bernhard,* 134 Iowa 603; *Farrar v. Winterton,* 5 Beaver 1; *Stevenson v. Polk,* 71 Iowa 278; Story's Eq. Jur., Sec. 786; 1 Pom. Eq. Jur. (2nd Ed.), Sec. 368.

A joint stock land bank is not a national, state or savings bank. It does not possess the rights and powers of such a bank, nor is it to be considered in the same class of property. A joint stock land bank is an institution, organized under the Federal laws, for the purpose of making farm loans. It is really an investment company, and is to be assessed as other investment companies. If its business is in competition with the stock of national, state and savings banks it should be assessed as monied capital. If not, it is to be assessed under the provisions of Section 1310 of the Supplement to the Code, 1913. The question is one of fact to be determined by the assessing body and should be determined honestly and fairly, so that there can be no claim of unjust discrimination.

TAXATION—Interest is figured from the date the tax is suspended under Chapter 281, Acts of the 39th General Assembly. A purchaser at tax sale could not pay the subsequent tax that has been suspended.

September 13, 1923.

Auditor of State: Your favor of the 18th ult., requesting an opinion from this department has been referred to me for reply. Your request is as follows:

"One of our examiners submits the following questions in regard to the application of the Suspended Tax Law, Chapter 281 of the 39th General Assembly.

First. If tax of current year's collection is suspended in January, should the 6% interest be figured from the time of suspension or would it be figured from April 1st?

Second. If a piece of property was sold at the December, 1922, tax sale, and the tax for the next year was suspended in January, 1923, could the tax sale purchaser pay the subsequent tax which had been suspended after April 1, 1923?"

The statute above referred to is plain in its terms and provides clearly that the interest shall be payable "from the date of such suspension."

We are of the opinion that the tax sale purchaser could not pay the tax suspended for the year subsequent to the year at which he purchased on tax sale; if the purchaser could pay the suspended tax, it would have the effect of nullifying the very purpose of the suspension thereof and the owner in order to redeem, would of necessity have to pay the tax that was suspended under the provisions of this chapter.

TAXATION—Agricultural lands in cities of over 5,000 inhabitants—Held that such lands are exempt from taxation for city purposes.

September 18, 1923.

County Attorney, Black Hawk County, Waterloo, Iowa: We have received your letter of August 24, 1923, asking this department for an opinion upon the proposition which you stated therein as follows:

"The County Auditor of Black Hawk County has asked me to obtain an opinion from your office as to the meaning of Section No. 3485 of the 1919 Compiled Code as amended by Chapter 114 of the Laws of the General Assembly.

The County Auditor wants to know if lands included in the corporate limits of over 5,000 inhabitants is subject to the corporation tax of the city."

Section 3485 of the Compiled Code as amended by chapter 114 of the Fortieth General Assembly reads as follows:

"No lands included within *the limits of any city or town having a population of 5,000 or less or within* said extended limits which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less by the extension of streets and alleys, and which shall also in good faith be occupied and used for agricultural or horticultural purposes shall be taxable for any city or town purpose, except that they may be subjected to a road tax to the same extent as though they were outside of the city or town limits, which tax shall be paid into the city or town treasury. Said lands shall not be exempt from taxation for library purposes as provided by section thirty-seven hundred fifty-eight."

The italicized portion of said statute was added thereto by the passage of the said chapter 114. The preceding section 3484 of the Compiled Code prescribes the procedure for the extension of the limits of cities or towns. Your inquiry is as follows:

"Are lands included in the corporate limits of over 5,000 inhabitants subject to the corporation tax of the city?"

Before stating our opinion as to the meaning of this section as amended, it may be of value to refer to certain rules for the construction of statutes.

First: That all statutes in pari materia must be construed as one statute.

Second: Unless a contrary intent is clearly indicated, the amended statute is to be construed as though the original statute had been repealed and a new and independent act in the amended form had been adopted.

Third: Under the rule known as the doctrine of the last antecedent, relative and qualifying words refer to the last phrase or word in the statute to which they can apply, unless a contrary intent is clearly expressed in the statute.

Fourth: The fundamental rule in construing a statute is to ascertain and give effect to the intention of the legislature.

Fifth: The condition to be remedied, or the object to be attained, is a material consideration. 36 Cyc., 1106; *Hoard v. Emmet County,* 140 Iowa, 527; *Dubuque District Township v. Dubuque,* 7 Iowa, 262; *Great Western Accident Insurance Company v. Martin,* 183 Iowa, 1009; *McGuire v. The Chicago, Burlington and Quincy Railway Company,* 131 Iowa, 340; 36 Cyc., 1123.

With these rules of construction in mind, we will now analyze the provisions of the statute as amended. It was originally held by the Supreme Court that section 3485, (section 616 of the Code Supplement, 1913) before the act was amended by the Fortieth General Assembly, did not exempt lands in the original plat of a town or city from taxation for city purposes even though the same were used exclusively for agricultural or horticultural projects, but that it referred only to lands, used exclusively for such purposes, which were embraced within the extended limits thereof. *Perkins v. the City of Burlington,* 77 Iowa, 553.

Such lands, however, to be entitled to such exemption must in good faith be occupied and used for agricultural or horticultural purposes, and not alone for the purpose of securing such exemption. *Allen v. City of Davenport,* 107 Iowa, 90; *Windsor v. Polk County,* 109 Iowa, 156; *La Grange v. Skiff,* 171 Iowa, 143.

The evident purpose of amending the statute was to modify to a limited extent the construction adopted by the Supreme Court in limiting the provisions thereof to lands used exclusively for such purposes within the extended limits thereof. By using the phrase "within the limits of any city or town having a population of 5,000 or less" the legislature certainly intended to bring within the exemption of the statute all lands used exclusively for agricultural or horticultural purposes within the limits of cities or towns having a population of 5,000 or less regardless of whether such lands were within the extended limits or not. The phrase "within said extended limits" undoubtedly refers, under the last antecedent doctrine, to the lands that are brought within the limits of cities under the provisions of section 3484 of the Compiled Code, so that in cities of over 5,000 inhabitants, the lands of ten acres or more, used exclusively for agricultural or horticultural purposes, to be entitled to the exemption, must be within the extended limits and not within the limits of the original plat thereof. Such a construction gives to each clause thereof a meaning that we believe is consistent with the language used, and the aim or purpose thereof.

It is therefore our opinion that so far as cities of over 5,000 inhabitants are concerned, the tracts of land of ten acres or more occupied and used for agricultural or horticultural purposes only, shall be exempt from taxation for city purposes

only when they are within the extended limits of such cities and that such exemption does not extend to such lands within the original plat thereof.

TAXATION: Bank stock. When the tax first entered against bank stock has been fully paid, an additional amount cannot be added by the county auditor or assessed by the county treasurer as "omitted property" or property "withheld or overlooked."

December 21, 1923.

County Attorney, Hamilton County, Webster City, Iowa: I wish to acknowledge receipt of your favor of the 15th in which you request an opinion of this department upon the following proposition:

"The question is whether or not where a stockholder or a bank has paid tax in full for the year 1920, on bank stock as the books then stood in the Treasurer's Office, and then after such payment in full the auditor corrects the assessment and adds an additional amount, whether such additional re-assessment can be collected. The facts being that certain stockholders paid all of the tax in full before the re-assessment and the correction of the books by the County Auditor."

We wish to call your attention to the case of *Langhout v. First National Bank,* 191 Iowa, 957. We believe the decision in this case rules the question submitted by you. According to the decision in the cited case, bonds owned by the bank or other property that should be taken into consideration by the assessor in fixing the value of the bank stock, if in fact such property is not considered by the assessor, does not then become "omitted property" within the meaning of Section 1385-b, Supplement to the Code, 1913, nor is the property "withheld or overlooked" as contemplated by Section 1374, Code 1897. Especially is this true when the tax as it was first entered has been paid. It is our opinion, therefore, that an additional amount cannot be added by the County Auditor nor assessed by the County Treasurer to the value of bank stock after the assessment as first entered has been paid and receipt issued.

TAXATION—Power plants located without cities and towns are assessable under Sec. 1343 of Code. Value of stock over value of physical property is assessable under Sec. 1323 of Code.

December 21, 1923.

Auditor of State: We are in receipt of your request for an opinion upon the following statement of facts as furnished by Mr. H. O. Hansen, one of your county examiners:

"On April 6, 1922, Articles of Incorporation of the 'Maquoketa Hydro Electric Power Company' were filed and recorded on book No. 1, page 395, showing an authorized capital stock of One Hundred Thousand Dollars ($100,000.00).

Amendment filed June 14, 1922, changing authorized capital stock to Three Hundred Thousand ($300,000.00), $150,000.00 common and $150,000.00 preferred. This corporation has not been assessed for the year 1923. Should not this stock be assessed in accordance with code Sec. 1323 and, if so, would there be any deduction made for land leased on flood rights, in case we ask for statement of Jan. 1, 1923, from this corporation and compute the taxes from same, would it not be necessary to notify them in accordance with Sec. 1385b S-1913?

They are claiming this stock non-taxable under 1346-r and 1346-s SS-1915. This is the situation: They are building a large dam across the Maquoketa river about two (2) miles up the river from this city, which they expect to have completed before winter sets in, that is to say, it will be in operation furnishing electricity for the 'Iowa Electric Company'. The only line that the former company owns is

the connection line between their power site and the 'Iowa Electric Company's' switchboard here in Maquoketa, which is about two (2) miles long.

When they were selling stock in this corporation it was sold as being non-taxable. I had a talk with Mr. Keck, the secretary, today and he said that was the point on which they base their opinion. (The two mile connecting line to switchboard.) I told him I questioned very much whether that would exempt their stock from taxation, as it was not a commercial line, being only a connection line to the switchboard of the power company who really owned the transmission lines of distribution to the consumers.

He said it would not make very much difference in the taxes for the year 1923 in case they were in error, but it would mean a great deal of difference in the year 1924 in case the stock were taxable. Question: Should the stock of the above corporation be exempt from taxation under the sections stated when they are only furnishing power for the 'Iowa Electric Company' and receive pay directly from them for same and own only the connecting line to the other company's switchboard?"

The proposition submitted involves the determination of questions of both law and fact. In order to ascertain the provisions of law applicable, it is necessary to first determine whether the property described is a transmission line or an electric power plant. If the property is a transmission line it should be assessed for taxation by the Executive Council under the provisions of Sections 1346-k to 1346-r of the Supplemental Supplement to the Code, 1915, while on the other hand, if the property is an electric power plant it should be assessed locally under the provisions of Section 1343 of the Code, 1897.

As we understand the law, a transmission line company is one which dispenses electric power and energy generally as distinguished from a power plant which furnishes power to the transmission lines. Under the facts submitted, it is clear to us that the property of the company in question is not transmission line property. It appears that the plant generates electric power or energy for the Iowa Electric Company and delivers that power or energy to the Iowa Electric Company which dispenses it over its transmission lines. The Maquoketa company delivers this power and energy over its own line extending approximately two miles to the point where it connects with the transmission line of the Iowa Electric Company.

It is, therefore, our opinion that the property in question should be assessed for taxation under the provisions of law relative to the assessment of electric power plants. Section 1343 of the Code, 1897, provides for the assessment of electric power plants and other similar properties, and provides that the physical property of any such power plant shall be listed and assessed in the assessment district where the same is situated, making a division of that portion located within the limits of any city or town and without such limits. It is further provided in said section that the actual value of the capital stock of such a corporation, over and above that of the physical property listed as provided in the section, shall be listed and assessed as prescribed in Section 1323 of the Code, which is the section of the law relative to the assessment of corporation stock.

It is suggested in your letter that the property in question was not assessed for taxation in the year 1923. Having determined that said property is assessable locally under the provisions of Section 1343 of the Code, 1897, the county auditor should list and assess for taxation this property for the year 1923 under the provisions of Section 1385-b of the Supplement to the Code, 1913, which section authorizes the county auditor to enter the assessment by first giving the company

ten days' notice by registered letter, and giving the company an opportunity to be heard.

OPINIONS RELATING TO TUBERCULOSIS ERADICATION

TUBERCULOSIS ERADICATION—County area petition. A petition containing 51% of names filed in a county that has not been annulled may be added to for the purpose of getting a 75% petition.

May 19, 1924.

Secretary of Agriculture: Under date of March 13th you requested an opinion from this department upon the following question:

"After a county board of supervisors has checked a petition for the enrollment of said county under the county area plan, found such petition to contain 51% of the names of owners of breeding cattle in the county, sent said petition and statement showing the count to be the required 51% to the Secretary of Agriculture, but at their annual meeting for making levies refused to make a levy for the eradication work—is this petition, which is still filed in our department, alive and may it be used as a basis for securing more signatures, this year?

In other words, the petition was found to be sufficient and sent to this department prior to the annual meeting of the board. At the annual meeting, the board refused to make a levy. Can this petition be used as a basis for securing 75% of signatures?"

In response to your inquiry will say that it is the opinion of this department that, under the facts stated, the petition as filed can be added to for the purpose of securing 75% of the owners of breeding cattle within the county.

PETITIONS: A petition not having been presented to the Board of Supervisors and not having been acted upon does not become void because of the change in the law not affecting the petition itself. The petition thereafter may be added to and presented to the Board of Supervisors. SERUM: A county agent may act as agent for any person desiring to purchase serum, and if he does so without profit to himself, he is not a "dealer" within the meaning of Chapter 17, title 8, Supplement to the Compiled Code, 1923, and is not required to put up bond.

May 20, 1924.

Secretary of Agriculture: Your favor of the 15th to the Attorney General requesting the opinion of this department has been referred to me for reply. Your request is as follows:

"1. Is it possible for county agents to handle serum on a non-profit basis without putting up bond?

2. Can counties where petitions were circulated last year under the old law—these petitions not having been presented to the board of supervisors—continue to circulate the same petitions and legally present them this year to the board, under the new law?"

We are of the opinion that any person may designate the county agent to act for him as his agent in the purchase of serum. If the county agent does act for the person desiring to purchase the serum without profit to himself he is not to be classed as a "dealer", within the meaning of Chapter 17, Title 8, Supplement to the Compiled Code, 1923.

The county agent acting for the person who desires to purchase the serum with-

out profit is not required to put up a bond as provided by Section 1783-a6, Supplement to the Compiled Code, 1923.

The latter section requires a bond only by a "dealer" as defined in this act.

Answering your second proposition, we are of the opinion that the petition not having been presented to the board of supervisors, and not having been acted upon, does not become void or of no effect because of some changes in the law that do not affect the petition itself, and that the petition may be added to this year, and presented to the board of supervisors under the existing law.

TUBERCULOSIS—Steps necessary for a county to become accredited under the accredited area plan.

July 5, 1924.

Secretary of Agriculture: This department is in receipt of your letter dated June 30, 1924, in which you request an official opinion. Your letter is in words as follows:

"The following question has arisen in the tuberculosis eradication work in Adams County, upon which I would like to have your written opinion:

Can the petition, under which Adams County was enrolled under the county area plan, be legally used as the basis for obtaining 75% of signatures and can another county tax be levied upon the strength of this petition? As you know, the tax fund was enjoined in Adams County but after the legalizing act was passed by the legislature, the state continued the work in Adams County, considering that the original petition stood.

Is it necessary, under the circumstances, that a new petition be circulated in order to secure the 75%."

Sections 25 and 26 of Chapter 23, Acts of the 40th General Assembly, Extra Session, provide as follows:

"Accredited counties. Whenever seventy-five per cent (75%) of the owners of breeding cattle in any county operating under the county area plan, shall have signed agreements with the department of agriculture, the department shall enroll the county under the accredited area plan and notify the board of supervisors of such county accordingly. The board shall cause to be published a notice of such enrollment once in two official newspapers of the county and thereafter every owner of breeding cattle within the county shall cause his cattle to be tested for tuberculosis as provided in this act and shall comply with all the requirements for the establishment and maintenance of a tuberculosis-free accredited herd."

Sec. 26. "Certification of number of owners in county. For the purpose of determining the number of owners of breeding cattle in the county constituting the per cent required by the preceding section, the county auditor of each county which has been enrolled under the county area eradication plan, shall certify to the department after each assessment in the county, the number of owners of breeding cattle in such county as shown by the last assessors' rolls."

You will therefore observe that before a county can become accredited the following must occur:

1. There must be actually filed with the secretary of agriculture the written agreements of 75% of the owners of breeding cattle of the county. The agreements referred to being the agreements provided in this chapter. These agreements must be live agreements, that is, at the very time the county is accredited by the Secretary of Agriculture the signers of such agreements must be bona fide owners of breeding cattle within the county and they must not have cancelled or withdrawn or otherwise set aside such agreements. From this you will observe that it is not a question as to whether or not a man signed an agreement for peti-

tion which, with other similar petitions and agreements formed the basis for the establishment of a county area because, while a man might be the owner of breeding cattle at the time of signing the original petition for the county area, he might not be at the time of the establishment of the accredited area. Again, he may, after the establishment of the county area, have withdrawn his consent and agreement and it would under such circumstances not be effective in determining the number of agreements under the accredited area plan, although, so far as the county area plan is concerned, it would be final and binding. The primary thought always to be kept in mind is that at the very time of the establishment of accredited area plan by the Secretary of Agriculture the required number of agreements must be on file and such agreements must be live and valid agreements.

2. The county must be already enrolled under the county area plan.

COUNTY FUNDS—TUBERCULOSIS ERADICATION. The county may use the county eradication fund whenever the allotment from the state and federal government has been expended.

July 26, 1924.

Secretary of Agriculture: You have requested an opinion from this department upon the question of whether or not the county funds, raised under the provisions of Section 21 of Chapter 23 of the Acts of the Extra Session of the Fortieth General Assembly, are available, when the amount allotted to the county from the federal and state funds has been expended, as a substitute for both the state and federal funds for such county.

Section 22 of said chapter, insofar as applicable, reads as follows:

"After the amount allotted in any year by the department to any county enrolled under the county area plan has been expended in said county, or at any time that there ceases to be available for such county any federal funds for the eradication of bovine tuberculosis, the county eradication fund provided in this act shall become available as a substitute for either or *both* such funds for the payment of materials, indemnities, inspectors, and assistants as herein provided."

It is the opinion of this department that the foregoing language expressly permits the use of the county eradication fund whenever the allotment from the state and federal government has been expended. In other words, after both the state and federal allotments have been spent, this county fund can be used as a substitute for both and can be used to pay the two-thirds indemnity previously paid by the state and federal government together.

TUBERCULOSIS ERADICATION—COUNTY FUND. Levy made by Board of Supervisors any time in 1924 for county eradication fund is legal regardless of budget law.

1. Board of Supervisors should levy a sufficient tax not exceeding 3 mills on the dollar to pay the cost of work to be done in the county during the year.

August 6, 1924.

Secretary of Agriculture: You have requested the opinion of this department upon the following propositions:

"Clarke County made a levy, last year, of .2 mill, raising a total of $1,098.37 of county funds to carry on the county area tuberculosis eradication work.

This fund was insufficient to carry on the work and the work was consequently stopped the first of May, 1924.

The board of supervisors have made the same levy in their budget for 1925.

Can this department refuse to start the work, if we feel that the levy is insufficient?

Also, can the board of supervisors raise their levy after the estimate has been placed in the budget?"

Your attention is called to the provisions of Section 21 of Chapter 23 of the Acts of the Extra Session of the 40th General Assembly which provides that in each county enrolled under either of the plans for the eradication of bovine tuberculosis, the board of supervisors shall each year when it makes the levy for taxes, "levy a tax sufficient to provide a fund to pay the indemnity and other expenses provided in this act", provided, however, that such levy shall not exceed 3 mills in any one year upon the taxable value of all the property in the county.

This fund is to be available after the expenditure of the state and federal aid allotted to the county. It will be noted that the law provides that the board shall levy a tax *sufficient* to provide a fund to pay for the necessary costs incurred under the chapter. This does not mean that the board can make a levy so small as to raise a negligible amount as compared to the requirements in that particular county. It is intended that the board shall make a levy up to 3 mills such that the work can be satisfactorily and adequately carried on during the year.

While the Secretary of Agriculure can refuse to start the work in any county where he feels that the funds available therefor are grossly insufficient, he should nevertheless co-operate in every possible way with every county, to the end that bovine tuberculosis can be speedily eradicated. This is a matter for the closest co-operation between the county officials and the Department of Agriculture, and this department feels that the Secretary of Agriculture should carefully advise the county officials as to their duties and the requirements of the law, to the end that all may work harmoniously in attaining the results desired.

Your second question is as to whether or not the board of supervisors can raise their levy for the purposes referred to herein in the year 1924 over the amount already included in the budget estimate, provided of course that it does not exceed the 3-mill limit. You are advised that at the adjourned meeting of the Extra Session of the 40th General Assembly which met on July 22 there was enacted a statute specifically providing that all levies made during the year 1924 would be legal regardless of the provisions of the so-called budget law. Therefore, any levy made under the provisions of Section 21, above referred to, in the year 1924 will be legal regardless of the provisions of the budget law.

COUNTY AREA PLAN—BOVINE TUBERCULOSIS: A county once enrolled and so declared by the Secretary of Agriculture cannot have a recount to determine if 51% have enrolled. 1. In counting those enrolled a man who has died since signing should be counted. 2. A man must be the owner of the breeding cattle at the time of signing. 3. A man's name signed by another with authority is to be counted. 4. A husband may sign for his wife where she owns the cattle.

September 16, 1924.

Secretary of Agriculture: This department is in receipt of your letter dated September 16, 1924. This letter is in words as follows:

"I would be pleased to receive your written opinion on the following question, at your earliest convenience.

"One of the county boards of supervisors that have made application to the secretary of agriculture for enrollment under the county area plan, this fall, and been enrolled, has become uncertain that the petition, to which they certified as

containing 51% of the owners of breeding cattle, is in reality a 51% petition. They would like to recanvass the petition and if on recount, they find the same is insufficient, they would like to withdraw their application for enrollment and ask that the enrollment be cancelled. They have not made a levy, as yet, and will not, pending your opinion.

"Can the department accept a request for withdrawal of application for enrollment, under the above conditions?

"They have asked us the following questions, upon which I would like to have your opinion, also:

"A man, who signed the petition has died. Can his name be counted in determining the sufficiency of the petition?

"A man, who signed the petition a year ago, owned breeding cattle at the time he signed but since has disposed of his herd. Can his name be counted?

"The husband of a woman, who owns cattle, signs the petition. Can his name be counted, when the ownership of the cattle appears in his wife's name?

"Can a man's name be counted, who has not signed but given his permission that his name be signed by another party, said permission being given over the telephone?"

You are advised that once a county has been enrolled and declared by the Secretary of Agriculture the board of supervisors loses supervision of the petition.

You are further advised that where a man has signed the petition and since died his name would be continued to be counted. This is on the theory that his estate is a mere continuation of his ownership.

You are advised that the person signing the petition must be the owner of the breeding cattle at the very time the petition is acted upon by the board of supervisors.

You are advised that the husband of the woman who owns cattle may sign the petition for her. The only question which arises under such circumstances is as to whether or not he has authority to use her name. If he has such authority then the name is to be counted, if not, then not so.

You are advised that where a man's name is signed by another with full authority it is to be counted. The question is one of authority under such circumstances.

You are advised that these practices are not to be commended, rather they are to be condemned, but the fact that they are not what they ought to be does not in any sense render them illegal. This criticism applies only to the last two situations.

BOVINE ERADICATION—COUNTY AREA PLAN—In determining whether or not 51% has signed a petition the exact condition of the petition at the time it is acted upon by the board is the time that governs in determining names on the petition, and withdrawals and additional agreements.

September 29, 1924.

County Attorney, Plymouth County, Le Mars, Iowa: This department is in receipt of your letter of September 26, 1924, in which you request an official opinion. Your letter is in words as follows:

"Petition was filed with Board of supervisors of this county on September 9th containing 51% of cattle breeders under Bovine Tubercular law, etc. Notice was given as required by law and date of hearing set for September 25th. At this hearing a petition was presented to the board, before they had acted on the other petition, and on this petition were names of signers of the original petition asking that their names be withdrawn. The number of withdrawals brought the original petition down to less than 51% if withdrawals are lawful. The board did not act on the matter but adjourned the meeting of the board until October 2nd for the purpose of looking into this matter. Now then can there be other names

added to the petition in order to bring it up to the 51% again. Please give me an opinion on this before the 2nd of October as we are afraid we are getting in trouble on the same. There is considerable opposition to the measure in this county. The board has also held up their levy of taxes waiting for this to be decided. Also give me whatever you have on the law in regard to what discretion the board has in the matter, if any, and what they must do at the time it is acted upon."

You are advised that it is the exact condition of the petition at the very time that it is acted upon by the board of supervisors that determines the matter. In other words, it makes no difference whether names have been withdrawn or added, or withdrawn again and added. The last word of the signer determines whether or not he shall be counted or not counted.

BOVINE ERADICATION—COUNTY AREA PLAN—In determining whether or not 51% has signed a petition the exact condition of the petition at the time it is acted upon by the board is the time that governs in determining names on the petition, and withdrawals and additional agreements.

September 29, 1924.

Secretary of Agriculture: This department is in receipt of your letter dated September 27th, 1924, in which you request an official opinion. Your letter is in words as follows:

"On the date of hearing on the tuberculosis eradication petition, the board of supervisors of Plymouth County were presented with a remonstrance petition, which contained signatures of those, who had previously signed the original petition, asking that the board of supervisors make application for the work.

"At the hearing, the work was explained with the result that some of those, who had signed the original petition and then the remonstrance petition, wished to reinstate their names on the original petition. The board of supervisors have adjourned until October 2, when they will take the matter under further advisement.

"Can the signatures of these men be reinstated on the original petition, if they sign the following petition:

" 'To the Honorable Board of Supervisors of Plymouth County, Iowa.

" 'We, the undersigned, owners of breeding cattle in Plymouth County, having previously signed a petition to place Plymouth County on the county area basis for tuberculosis eradication, and having later signed a withdrawal from said petition, do now hereby withdraw our names from said withdrawal and do hereby cancel our names thereon and request your Honorable Board to disregard said signature on the withdrawal.' "

You are advised that up to the very time that the board of supervisors passes upon the petition, either withdrawals may be made or additional names added. So also may additional agreements be added, whether the agreements so added be agreements which have been withdrawn previously or not. In other words, it is the exact situation as it appears before the board at the very time the board passes upon the issue, which determines the question.

BOVINE TUBERCULOSIS: The Department of Agriculture may proceed under provisions of Section 2675 of the Code of 1924 to test a herd even though the owner refuses consent.

December 10, 1924.

Secretary of Agriculture: You have requested an opinion upon the question of whether or not your department may test herds under the provisions of Section 2675 of the Code of 1924, as a part of the program of the eradication of bovine tuberculosis in any county, although the owners of such herds refuse to consent to having their herds tested.

Section 2675 of the Code of 1924 reads as follows:

"The department may at any time, on its own motion, make an examination of any herd, and in case animals are destroyed, the appraisement and payment shall be made as provided in this chapter."

You are advised that it is the opinion of this department that you may proceed under the provisions of the section of law just quoted, and may test even though the owners of the herds refuse to consent thereto.

TUBERCULOSIS—COUNTY AREA PLAN—Assessor's reports are to be used simply for determining the total number of owners of breeding cattle within the county.

COUNTY AREA PLAN—Assessor's reports are to be used simply for determining the total number of owners of breeding cattle within the county.

September 17, 1923.

Secretary of Agriculture: You have today, through the Chief of the Division of Animal Industry requested an interpretation by this department of Section 10-b, Chapter 48, Acts of the 40th General Assembly relating to the County Area Plan. Your particular inquiry is whether 51% of the particular owners of breeding cattle in the county, as such owners are shown by the assessor's reports, must sign the petition or whether the assessor's reports are to be used simply as a basis for determining the number of owners of breeding cattle residing within the county.

It is the opinion of this department that the assessor's reports are to be used simply for determining the total number of owners of breeding cattle within the county and when this figure is established, it shall be used as a basis for determining whether or not 51% of the actual owners of breeding cattle in the county have signed the petition regardless of whether or not such owners are listed upon the assessor's books or not. As an illustration we will say: That an assessor's books of a county shows there are two thousand (2,000) owners of separate herds of breeding cattle. When the petition is circulated for the County Area Plan, only nine hundred (900) of the individuals, whose names appear upon the assessment rolls, as owners of breeding cattle, sign the petition, but in addition to these nine hundred (900), two hundred (200) other bona fide owners of breeding cattle at the time the petition is circulated, sign the same, such a petition is sufficient.

TUBERCULOSIS ERADICATION—County Area Plan, Filing petition—Petition may be filed any time prior to the making of the levy.

September 24, 1923.

Secretary of Agriculture: In response to your inquiry of September 24 relative to the construction to be placed on Section 10-B and 10-D of Chapter 48 of the Acts of the 40 General Assembly, beg to advise that the law does not require the petition required in Section 10-B to be filed with the board of supervisors any specified time prior to the time when it makes its next regular levy for taxation purposes. All that is required is that the petition be filed with the board of supervisors at a time prior to the time it makes its regular levy for taxation purposes.

TUBERCULOSIS ERADICATION—COUNTY AREA PLAN—Board of Supervisors must act either upon sufficient petition or favorable vote.

September 27, 1923.

County Attorney, Palo Alto County: This department is in receipt of your letter dated September 17, 1923 in which you request an opinion. Your request is in substance as follows:

"Section 10-b, Chapter 48, Acts 40th General Assembly provides that, 'Whenever a petition signed by fifty-one per cent of the owners of breeding cattle within the county, as shown by the assessor's reports, together with agreements as provided in section ten (10) hereof, shall be presented to the board of supervisors, the board shall make application to the commission of animal health of the state for the enrollment of said county under the county area plan and shall, at the same time forward to the commission of animal health the agreements signed as provided herein. The commission of animal health shall, when it receives agreements signed by fifty-one per cent of the owners of breeding cattle within such county, designate such county as a county area testing unit and it shall forthwith proceed with the eradication of bovine tuberculosis in such county under the county area plan as provided herein.' The followig section 10-c provides in substance that on petition of 15% of voters of any county, the board of supervisors shall submit the matter of levy of a tax of not to exceed (3) mills for the purpose of establishing a county area tuberculosis eradication fund and entering the county area plan.

The above sections seem somewhat conflicting to me and I would like your opinion as to whether or not the board of supervisors could make a levy of not to exceed (3) mills when provisions of Section 10-b have been complied with, without having first submitted the matter of levy to the people of the county at a general election."

You are advised that whenever a county is enrolled under the county area plan, either by vote of the people or by petition signed by fifty-one per cent of the owners, that then the board of supervisors are required to make the levy. The amount of the levy, however, is to be determined by the board.

TUBERCULOSIS ERADICATION—COUNTY AREA PLAN—Adoption of Plan. Two Methods are prescribed by Chap. 48, Acts of 40th G. A. for adopting the plan. Petition by 51% of owners or a successful election authorizes Board of Supervisors to make levy.

October 18, 1923.

County Attorney, Lee County, Keokuk, Iowa: This will acknowledge receipt of your letter of the 16th in which you request an interpretation of Chapter 48, Acts of the Fortieth General Assembly relating to the eradication of bovine tuberculosis.

The particular question propounded is whether the Board of Supervisors may make a levy not exceeding three mills when a petition has been signed by 51% of the owners of breeding cattle under the provisions of Section 10-b of the Statute or whether they can only make a levy when the provisions of Section 10-c have been complied with and the voters of the county have voted in favor of the levy. This department has held that the Statute in question provides two separate and distinct methods of procedure.

First: Under Section 10-b, the legislature has provided for the establishment of the County Area Plan by petition of 51% of the owners of breeding cattle.

Second: Under Section 10-c, the legislature has provided for the establishment of the County Area Plan by vote of the people.

These two methods are prescribed to determine solely the question of whether the plan shall be adopted.

The use of the word "or" at the beginning of Section 10-c is evidence that the legislature intended to prescribe the two methods and because the two methods are prescribed the words "such county" as used in Section 10-c refer to a county, which has adopted the county area plan by either of the methods prescribed.

It is therefore, the duty of the Board of Supervisors of a county which has adopted the county area plan by either method of adoption to make the levy prescribed in Section 10-d for the purpose of carrying on the work of eradication under the county area plan.

TUBERCULOSIS ERADICATION—County Area Plan—Validity of law—The provision authorizing the board to make a levy upon filing a petition is valid. Funds raised by levy in a county are county funds. It is obligatory upon the board to make a levy in case sufficient petition is filed or election on the proposition carries.

October 20, 1923.

County Attorney, Boone County, Iowa: Under date of October 13, you forwarded to this department the following questions, upon which you request our opinion:

"1. Can 51% of the owners of breeding cattle in any county force a tax for the testing and cleaning up of their herds and receive indemnity therefor upon all people of the county?

"2. Can the legislature pass a law forcing a tax levy by the board of supervisors of a county of funds to be expended exclusively by state officers?

"3. If under this law, namely, Chapter 48, Acts of the 40th General Assembly, the board of supervisors shall make a levy for the eradication of bovine tuberculosis, what amount shall the board levy—that is to say, is the levy compulsory or obligatory on the part of the board and if so, at what rate, or amount?"

In response to your first question, will say that as we view the law, the legislature has authorized the board of supervisors of a county to make a levy when 51% of the owners of breeding cattle petition for the establishment of the county area plan. In making such a petition, the basis for action by the board of supervisors, the legislature exercised a legislative prerogative, as they do in many matters which ultimately result in taxation. The legislature could have made a petition by a less number the basis for action by the board, or they could have left it entirely to the board, either as an optional matter or a compulsory one. In other words, the levy is not authorized by the persons signing the petition but by the legislature, which is the body having to do with all matters of taxation, and the petition is simply the means designated by the legislature to set in motion the taxing machinery, which finally results in the levy being made by the board.

It must not be overlooked in this connection that a law of this character is not for the benefit of the people alone whose animals are tested but it is a law enacted for the general welfare of all the people. It is a matter of utmost concern with all people in a community whether tuberculosis exists in the herds of cattle and hogs which form the basis of so large a part of the food supply of the community, or such herds are free from a disease which endangers human health and lives. Such a law, as the one in question, promotes the general welfare of the people of the state and the legislature has unquestioned authority to provide for taxing the people for such a purpose.

In response to your second question, will say that a careful reading of the law will, we believe, dispel the thought that the taxes raised under the law are to be expended by state officers.

Section 10-e of Chapter 48 reads as follows:

"Disbursement of fund. The county tuberculosis eradication fund shall be expended only on the order of the board of supervisors on warrants drawn by the county auditor and in payment for the purchase of materials, for compensation of employees and expenses of tuberculosis inspectors as hereinafter provided, and for indemnity for cattle slaughtered as provided herein."

and Section 10-f of the chapter reads in part as follows:

"Such claims shall be first certified by the executive officers of the commission of animal health and filed with the county auditor. The county auditor shall present same to the board of supervisors and same shall be allowed and paid in the same manner as are other claims against the county."

You will note from a reading of the parts of the law, above set out, that the funds raised by the levy become county funds and are paid out only upon order of the board of supervisors through the proper disbursing officers of the county for the purpose specified in the law. The county has control over the fund to the same extent that it has over any other county fund, raised and expended as provided by legislative enactment. It may refuse to pay a claim, unless it is for an expenditure authorized under the law and is properly filed, or it may inquire into the correctness of the amount of any claim, taking into consideration, as in every other act it does, the law governing its action.

The fact that the machinery for making tests is under state control is not determinative of the question as to who controls the expenditure of the funds, nor would the law be invalid even though no discretion was left to the board of supervisors, for the legislature might provide that all local expenditures be made upon the approval of a central body, should it deem it the part of wisdom to do so. We are, however, clearly of the opinion that the expenditure, under this law, cannot be said to be made by the state but by the county, itself, after the requirements of the state and Federal Government are met as to testing, appraisal, etc., and the board has determined that the expenditure is such as is authorized by the law.

In answering your third inquiry, will state that it is our view of the law that when a petition has been filed, which the board finds contains the names of 51% of the owners of herds of breeding cattle in the county, it is obligatory upon the board of supervisors to make the levy and in this matter their duty is no different than it is in any other matter where a duty is enjoined upon them by law.

As to the amount of the levy, a discretion is vested in the board but in the exercise of that discretion, it must act in the utmost good faith. In other words, the board should consider the number of herds in the county, the probable cost of inspection, the probable number of reactors, etc., and as against this expense, they should figure the amount allotted to the county from the Federal and State funds, and then make such a levy, not exceeding three mills, as in their best judgment will be sufficient to meet the expense that will necessarily fall upon the county in operating under the county area plan.

BOVINE TUBERCULOSIS—County Area Plan—General opinion construing many provisions.

December 11, 1923.

Secretary of Agriculture: In a series of communications, you have submitted to this department a number of questions as to the proper interpretation to be given Chapter 48 of the Acts of the Fortieth General Assembly.

At the very beginning of this opinion, we desire to state that this opinion must not be construed beyond the determination of the very question submitted. We make this general observation because in the determination of the questions submitted we do not enter into a detailed statement of the reasons upon which the conclusions are reached. The first question submitted by you is in words as follows:

"After the petition has been presented to the board of supervisors and turned down, can it be used again the following year with additional names?"

In answer to this question you are advised that it is fundamental that when the board of supervisors has once rejected a petition it is for all purposes annulled. It follows that this question must be answered in the negative.

The second question submitted by you is in words as follows:

"Can a petition which was put into circulation in the summer of 1923 be added to during the balance of that year and 1924 and be presented to the board of supervisors in September, 1924? Understand that this petition was not presented to the board in 1923."

The law does not state the period of time during which a petition may be in circulation. The essential question is, does the petition at the very time it is presented to the board of supervisors for action contain the necessary percentage of names as required by the law.

The third question submitted by you is as follows:

"Can a petition, which has been filed with the county board and which has been found by the county board to carry less than 51% be added to after the same has been filed with the board and can the board delay action on this petition until such time as the necessary 51% has been secured?"

The petition may be added to up to the time it is acted upon by the board. Once it has been acted upon it cannot be added to.

The fourth question submitted by you is in words as follows:

"Do the signers of the petition have to be men, whose names appear on the assessor's rolls?"

The assessor's roll is used to determine the number of owners of breeding cattle within the county. If the number of names on the petition is equal to 51% of the number of names on the assessment roll, the petition is sufficient. An owner of breeding cattle is to be counted whether his name is on the assessment roll or not, if in truth, he is an owner as stated.

The fifth question submitted by you is in words as follows:

"In case of Jones & Smith, for instance, being equal owners of a herd of dairy cattle and wishing to have their county come under the area plan, can either one, or both of them legally sign the petition?"

You are advised that the firm of Jones & Smith as a partnership may sign the petition. They could not sign individually when the only ownership is in the partnership.

The sixth question submitted by you is in words as follows:

"In case a county asked to have a petition returned for the purpose of making a copy of the names of signers and were willing to furnish the department with a receipt for the said petition, would we have the privilege of returning it to them?"

There is no doubt as to your right to return the petition to the board for any legitimate purpose. As a matter of fact, the petition should remain with the board of supervisors and a duplicate filed in your office, all to the end that what is filed with you is identical with what is filed with the board of supervisors.

The seventh question submitted by you is in words as follows:

"After a petition, containing 51% of signers, has been presented to the board of supervisors, is there anything in the law which would indicate what part of the three mill levy should be made by the county? In other words, would the law seem to mean that the levy should be, as near as possible, sufficient for either cleaning up the county or carrying the work on over a period of one year, when another levy could be made?"

The board of supervisors is to determine the amount of the levy. The board should act in good faith, giving consideration to the funds available from the

federal and state apportionment, the number of cattle probably to be tested and such other facts as bear upon the question. When the board has all of the facts before it, it should then determine the amount of the levy, which in no event shall exceed three mills.

The eighth question submitted by you is in words as follows:

"Is the owner of a single cow, kept for milking purposes by a man in a city, or small town, entitled to sign the eradication petition?"

The law does not provide as to the number of breeding animals which an owner must possess in order to be entitled to sign the petition. An owner of breeding cattle is an owner whether he possesses one or more animals.

The ninth question submitted by you is in words as follows:

"Does the law make it necessary that the state department of agriculture engage the inspectors, who are to do the eradication work?"

The department of agriculture should designate the inspectors as by law provided.

The tenth question submitted by you is in words as follows:

"Where a petition, containing 51% of signers, has been presented to a board of supervisors and acted upon favorably, can signatures be added to said petition from that time on until the same contains 75%?"

The original petition may be added to for the purpose of making the county an accredited area as is contemplated by section 10-m of the act. The question always is as to whether or not 75% of the owners of breeding cattle have in fact signed agreements.

The eleventh question submitted by you is in words as follows:

"After the 75% has been secured, will the remaining 25% have to sign the petition in order to receive indemnities?"

No person is entitled to receive indemnity unless he shall have signed the agreement contemplated under the law.

The twelfth question submitted by you is in words as follows:

"Where 75% of signers has been secured and a cattle owner refuses to allow his cattle to be tested, what action can be taken?"

Section 10-n provides that when a county shall come under the county area accredited plan, it shall be the duty of every owner to apply for the test and if he fails to do so, shall be guilty of a misdemeanor. Your agents in charge of a county should call the matter to the attention of the county attorney in each case of failure to comply.

The thirteenth question submitted by you is in words as follows:

"Whose duty it is to certify that the 75% of signers has been secured?"

The board of supervisors should certify to the secretary of agriculture when the 75% has been secured and forward the agreements to the secretary of agriculture who will check the same and notify the board of supervisors by proper certificate of such fact.

The fourteenth question submitted by you is in words as follows:

"Where reactors are found on the retest, is 5% of the value of the herd deducted the same as in the first test?"

Each test is governed by the 5% provision.

The fifteenth question submitted by you is in words as follows:

"Does the county area law take care of all herds, where the first test had been made previous to the county coming under the county area plan? In other words would the county area inspector give the subsequent tests?"

The county area law covers all herds whether previously tested or not. In our opinion, it would be advisable to complete the inspections with the general inspectors, but this would not prohibit the subsequent inspections being made by the county area inspectors.

The sixteenth question submitted by you is in words as follows:

"Is it necessary that the petition, containing 51% of signers, or more, be filed with the county board of supervisors previous to the opening of the September meeting? In one county after the board had accepted the petition and made their levy at an adjourned meeting, they withdrew the levy on the advice of the county attorney, who gave them the opinion that such levy was contrary to the provisions of 1-b and 10-d, combined."

The petition may be signed at any time up to the time of the completion of the tax levy by the board of supervisors. It is our judgment that the board of supervisors may change the levy at any time up to the final adjournment.

The seventeenth question submitted by you is in words as follows:

"The county attorney in this same county gave an opinion that it was necessary that the petition, containing signatures of 51% of the owners of breeding cattle, which have been filed with the board of supervisors and forwarded by them to the secretary of agriculture, be acknowledged by the secretary of agriculture before the board of supervisors could legally make their levy in September. Is this correct?"

In our judgment, the board of supervisors should await the certificate from the secretary of agriculture prior to the making of its levy. However, if all acts contemplated by the law are completed prior to the actual completion of the levy by the board, there would be nothing illegally done.

The eighteenth question submitted by you is in words as follows:

"Is it necessary that the original petition, containing the names of all signers, be forwarded to the department of agriculture at the time the request to be enrolled under the county area plan is sent in?"

We have already advised you that, in our opinion, where the agreements are a part of the petition, the petition should be signed in duplicate, one copy filed with the board of supervisors and one with the department of agriculture.

The nineteenth question submitted by you is in words as follows:

"In some cases, the signatures were taken on cards, which were not headed by the petition. Are these signatures legal?"

Signatures taken on cards are not legal. The signature must be to the agreement and petition.

The twentieth question submitted by you is in words as follows:

"When a county comes under the accredited area plan and a certain percentage of cattle owners in the county had previously signed agreements, should those herds be tested by the county inspector, or should the department of agriculture and federal governmentt take care of them with the old set of inspectors, as if they had not come under the county area plan?"

We have already expressed the opinion that the old agreements should be carried out and inspections made by the general inspectors, but this does not prevent the work being handled by the county area inspectors.

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