State of Iowa
1928

SEVENTEENTH BIENNIAL RFPORT

of the

ATTORNEY GENERAL

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 1928

JOHN FLETCHER
Atorney General

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ATTORNEY GENERAL'S DEPARTMENT

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MAXWELL A. O'BRIEN	Assistant Attorney General
NEILL GARRETT	Assistant Attorney General
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REPORT OF THE ATTORNEY GENERAL

January 31, 1929.

HONORABLE JOHN HAMMILL,
Governor of Iowa,
Building.

Re: Biennial Report

My Dear Governor Hammill:

I beg leave to submit herewith the report of the Department of Justice for the years 1927 and 1928. In submitting a report at this time I can only submit to you a general report, which will be followed in the near future by a detailed report of all of the business transacted by this Department. Because of the press of work in this Department it is impossible to give every detail at this time as it requires the working out of statistics and I will submit to your Honor at a later period this detailed report.

TRIAL OF CIVIL CASES

An unusual number of cases in the district courts of the state have been tried by this Department during the biennium. The majority of cases tried in the district court have been highway cases, mostly involving appeals by claimants from awards made by condemnation juries in right of way matters. In many of these cases the Department has been assisted by local counsel, whom we were authorized to employ through the Executive Council. Details of some of these cases will be given in a more complete detailed report when statistics have been completed. The Department, however, at this time desires to state that after two years of experience in this class of cases some effort should be made to avoid so much litigation in these matters, as, under the present system of trying condemnation appeals juries are prone to award verdicts in an excessive amount and in practically all instances in amounts above those awarded by the condemnation jury. On this subject the Department will speak more in detail at a later time.

CRIMINAL CASES

During the biennium approximately two hundred appealed criminal cases have been handled by this Department in the Supreme

Court. A tabulated list of these cases will be given in our detailed report.

CIVIL CASES IN THE SUPREME COURT

A number of important civil cases have been presented by this Department in the Supreme Court, prominent among which was the case involving the validity and constitutionality of the Motor Carrier Law, and the Transmission Line cases, each of which were determined favorable to the state.

There is at this time pending the case involving the constitutionality of the Road Bond Act, which was begun during the biennium and which will be submitted on oral argument in the Supreme Court on the 8th day of February, 1929.

Perhaps the case of the greatest importance that has been decided by the Supreme Court was the case of Scott County v. Johnson, Treasurer, involving the constitutionality of what is known as the Brookhart-Lovrien Law. This was an important decision for the reason that the law makes available for use of counties, cities and towns, school districts and road districts funds to displace their funds which are tied up because of the closing of banks in which they were deposited. An adverse decision in this case would have adversely affected so many of the institutions of government that it would have been very demoralizing.

BANK RECEIVERSHIPS

There have been a number of banks closed in the state during the biennium. The Department of Justice, of course, has nothing to do with banks as going institutions, but, under the law, when a receiver is appointed, the Department acts as legal adviser to the Superintendent of Banking who, under the law, becomes the receiver of all state, and savings banks and loan and trust companies. There has been no outstanding litigation, however, during the biennium with reference to these closed institutions for the reason that the law governing bank receiverships has been pretty well settled by the courts and the closing of a bank is, therefore, now more of a legal formality than it was at the beginning of the financial trouble.

INHERITANCE TAX LITIGATION

During the two year period there has been a large volume of litigation in connection with inheritance tax matters, which has

been carried on through the Department in connection with the Treasurer of State's office.

A schedule of these cases will be given in a detailed report.

One case involving collateral inheritance tax was appealed to the Supreme Court of the United States and was argued by this Department in the Supreme Court. No decision, however, has yet been filed.

RAILROAD MERGER CASE

The Interstate Commerce Commission has had before it for some time the question of the merger of the Great Northern and Northern Pacific interests. This Department took part in the hearings conducted at various places throughout the United States by the Commission on the question of whether this merger should be permitted. Upon the termination of the hearing, after all of the facts had been developed, this Department on behalf of the people of the State of Iowa filed a brief protesting the merger, believing that such a merger, if consummated, would adversely affect the interests of the State of Iowa, and the matter was presented to the Interstate Commerce Commission in oral argument at the time of the completed submission of the case. This matter has not as yet been determined by the Interstate Commerce Commission.

BUREAU OF INVESTIGATION

The two year period just closed has been the most active period in the Bureau of Investigation since its establishment, and a detailed report will be submitted to you setting out the various activities of the Department. It is sufficient in this report to state that during the biennium over 700 complaints by letter from people in different parts of the state, complaining of law violations, have been received in the Department, and have been handled by it.

During that period 92 of the 99 sheriffs in the state have called upon the Department for assistance in connection with their work in their respective counties. Eighty-four county attorneys have called upon the Department to render them aid in the enforcement of the law in their counties, while some 40 delegations, consisting of three or more people, from different communities of the state have called upon the Department requesting aid in law enforcement in their communities.

During the same period of time the Bureau has made 2,249 in-

vestigations, caused the arrest of 461 persons, 453 of whom were convicted of crime. Three hundred district court injunctions for violation of the intoxicating liquor statutes have been obtained as a result of the investigations of the Department, and $113,750.00 have been collected by way of fines, besides the jail sentences that have been meted out in many of these cases. Twenty persons of the 461 arrested have been found guilty of contempt of court and punished accordingly.

During this biennium, in connection with the enforcement of the prohibitory law, 49 stills for the manufacture of liquor have been seized and destroyed, together with 12,800 pounds of sugar, 17,750 gallons of mash used for the making of liquor; and 41 automobiles have been confiscated that were used in the transporting thereof. The following liquors have been seized, condemned, and disposed of as provided by law in connection with the activities of the bureau:

Alcohol	1,437 gallons
Hootch	794 gallons
Wine	418 gallons
Brandy	50 gallons
Gin	2,125 gallons
Beer	53,195 bottles

The schedule of finger prints and other identification records made by the Department will be submitted in the detailed report.

During the biennium there was a total of 2,378 motor vehicles stolen, and so far as reported to the Department, 1,761 were recovered. It is perhaps safe to say that 200 additional cars were recovered but the recovery was not reported to the Department.

OTHER LAW ENFORCEMENT ACTIVITIES

In the year 1927, through the cooperation of your office and this department, there was held a school of instruction for the sheriffs of the state lasting a period of three days. Such good results followed in the matter of law enforcement for the state that in 1928 your office, and this department cooperating, called together all of the sheriffs and county attorneys of the state, together with certain chiefs of police from some of the cities of the state for a general conference and school of instruction. The conference lasted three days and many matters of importance were considered. The results were very satisfactory. These meetings undoubtedly created a better spirit of cooperation among all law enforcing officers and stimulated uniformity of service in law

enforcement work. We feel that these annual conferences should be continued to the end that there may be complete working accord among all of the peace officers of the state.

CONCLUSION

In closing this report I wish to express to you, as Governor of Iowa, and to all public officers of the state, and to the people of the state themselves, my appreciation of the cooperation which I have received during the two years in which I have acted as Attorney General.

I also desire to express in this public way my appreciation of the splendid and loyal cooperation of all persons employed in my Department.

Respectfully,

JOHN FLETCHER, *Attorney General.*

SCHEDULE "A"—CRIMINAL CASES SUBMITTED TO SUPREME COURT OF IOWA JANUARY TERM, 1927

Title of Case	County	Decision	Nature of Action
State vs. Anderson	Black Hawk	Affirmed	Maintaining a liquor nuisance.
State vs. Berry	Webster	Affirmed	Bootlegging.
State vs. Breen	Jones	Affirmed	Possession of intoxicating liquor.
State vs. Carlson	Dubuque	Affirmed	Murder.
State vs. Childers	Clarke	Reversed	Receiving deposits when bank was insolvent.
State vs. Delesio	Fayette	Affirmed	Murder.
State vs. Greiner	Keokuk	Reversed and remanded	Rape.
State vs. Hillman	Harrison	Reversed and remanded	Larceny of poultry.
State vs. Hollister	Webster	Dismissed	Bootlegging.
State vs. Jenkins	Poweshiek	Affirmed	Operating a motor vehicle while intoxicated.
State vs. McCumber	Lee	Reversed and remanded	Breaking and entering.
State vs. McIntyre	Boone	Reversed	Rape.
State vs. Melius	Black Hawk	Affirmed	Maintaining a liquor nuisance.
State vs. Metcalfe	Woodbury	Reversed	Disbarrment.
State (Appellant) vs. Meyers	Buena Vista	Reversed	Dispensing intoxicating liquor.
State vs. Miller (Peggy)	Polk	Affirmed	Prostitution.
State vs. Mills	Polk	Dismissed	Keeping a house of ill fame.
State vs. Moore (Minnie)	Butler	Affirmed	Bigamy.
State vs. Murphy (Richard)	Wapello	Affirmed	Operating a motor vehicle while intoxicated.
State vs. Pigman	Poweshiek	Dismissed	Operating a motor vehicle while intoxicated.
State vs. Tullar	Webster	Affirmed	Liquor nuisance.
State vs. Vandewater	Adair	Affirmed	Larceny.
State (Appellant) vs. York	Tama	Affirmed	Bootlegging.

Title of Case	County	Decision	Nature of Action
State vs. Archibald	Appanoose	Reversed and remanded	Breaking and entering.
State vs. Brundige	Jones	Reversed	Rape.
State vs. Cahalan (John C.)	Allamakee	Affirmed	Liquor nuisance.
State vs. Dial	Marion	Affirmed	Liquor nuisance.
State vs. Friar	Polk	Affirmed	Murder, 2nd degree.
State vs. Gasparia	Madison	Affirmed	Liquor nuisance.
State vs. Gibson	Union	Affirmed	Murder.
State vs. Harlan	Polk	Affirmed	Lewdness.
State vs. Johnson	Polk	Affirmed	Keeping a house of ill fame.
State vs. Kaufman	Plymouth	Affirmed	Maintaining a liquor nuisance.
State vs. Lauter	Hardin	Affirmed	Operating a motor vehicle while intoxicated.
State vs. Logli	Polk	Reversed	Liquor nuisance.
State vs. Mayer	Marshall	Reversed	Statutory rape.
State vs. McGinty	Calhoun	Affirmed	Maintaining a liquor nuisance.
State vs. Moore	Municipal Court of Council Bluffs	Affirmed	Assault and battery.
State vs. Murray	Floyd	Affirmed	Operating a motor vehicle while intoxicated.
State vs. Myrick	Webster	Affirmed	Illegal trans. of intoxicating liquor.
State vs. Price	Black Hawk	Affirmed	Liquor nuisance.
State vs. Pritchard	Winnebago	Reversed	Rape.
State vs. Taylor	Black Hawk	Affirmed	Bootlegging.
State vs. Tennant	Ringgold	Reversed	Rape.
State vs. Tilton	Jasper	Affirmed	Illegal trans. of intoxicating liquor.
State vs. Sweeney	Black Hawk	Reversed	Murder, 2nd degree.
State vs. Webb	Union	Affirmed	Bootlegging.
State vs. Webber	Jasper	Affirmed	Bootlegging.

SEPTEMBER TERM, 1927

Title of Case	County	Decision	Nature of Action
State vs. Arioso (Buck)	Woodbury	Affirmed	Rape.
State vs. Joe Banning and W. C. Stanton	Polk	Affirmed	Liquor nuisance.
State vs. Brennan	Johnson	Affirmed	Liquor nuisance.
State vs. Christensen	Butler	Affirmed	Illegal possession of intoxicating liquor.
State vs. Conklin	Humboldt	Affirmed	Operating a motor vehicle while intoxicated.
State vs. Davis (Arthur)	Pottawattamie	Affirmed	Contributing to the delinquency of a juvenile.
State vs. Debner	Iowa	Affirmed	Uttering a forged instrument.
State vs. Dexter (two cases)	Polk	Dismissed	Assault and battery.
State vs. Dillard	Mahaska	Affirmed	Bootlegging.
State vs. Dowling	Hamilton	Affirmed	Operating a motor vehicle while intoxicated.
State vs. Gardiner	Dallas	Affirmed	Embezzlement.
State vs. Garner	Black Hawk	Affirmed	Grand larceny.
State vs. Grigsby	Marshall	Affirmed	Illegal trans. of intoxicating liquor.
State vs. Grigsby	Marshall	Affirmed	Liquor nuisance.
State (Appellant) vs. J. W. Gregory, et al.	Polk	Affirmed in part reversed in part	Accepting deposits while bank insolvent.
State vs. Harding (Broy)	Harrison	Affirmed	Entering a bank with intent to rob.
State vs. Harding (David)	Harrison	Affirmed	Entering a bank with intent to rob.
State vs. Heuser	Mahaska	Affirmed	Engaging in practice of medicine without a license.
State vs. R. W. Hill and E. J. Schroeder	Pottawattamie	Affirmed	Illegal trans. of intoxicating liquor.
State vs. Huntley	Story	Reversed	Rape.
State vs. Knight	Boone	Affirmed	Malpractice.
State vs. Korth (Albert)	Woodbury	Reversed	Manslaughter.
State vs. Korth (Dorothy)	Woodbury	Affirmed	Illegal possession of narcotic drugs.

State vs. Kress	Polk	Affirmed	Robbery with a deadly weapon.
State (Appellant) vs. Kronstadt	Buena Vista	Affirmed	Forgery.
State vs. Lambertti	Dallas	Affirmed	Possession of intoxicating liquor.
State vs. Mabon	Black Hawk	Affirmed	Liquor nuisance.
State vs. McElhinney	Wright	Dismissed	Receiving and accepting deposit while bank insolvent.
State vs. McKenzie	Washington	Reversed	Operating a motor vehicle while intoxicated.
State vs. McMakin	Palo Alto	Affirmed	Murder, 1st deg.
State vs. Mirkin	Woodbury	Affirmed	Receiving stolen property.
State vs. Mitchell	Emmet	Affirmed	Liquor nuisance.
State vs. Murphy	Allamakee	Affirmed	Having in possession false and forged promissory note.
State vs. Pierson	Union	Reversed	Fraudulent banking.
State (Appellant) vs. Ben Polzine and One Certain Automobile	Linn	Affirmed	Unlawful trans. of intoxicating liquor.
State vs. Reed (Ernest)	Harrison	Affirmed	Murder.
State vs. Reese	Hamilton	Affirmed	Possession of intoxicating liquor with intent to sell.
State vs. Ryan	Marshall	Affirmed	Illegal trans. of intoxicating liquor.
State vs. Talerico	Polk	Affirmed	Liquor nuisance.
State vs. Thomsen	Clinton	Reversed	Maintaining a liquor nuisance.
State (Appellant) vs. H. W. Wilhelm et al.	Butler	Dismissed	Fraudulent banking by renewing a certificate of deposit when the bank was insolvent.

JANUARY TERM, 1928

State vs. Ayles	Polk	Affirmed	Robbery with aggravation.
State vs. Boeding	Lee	Affirmed	Trans. of intoxicating liquor.
State vs. Bobzein	O'Brien	Affirmed	Unlawful possession of intoxicating liquor.
State vs. Bradford	Pottawattamie	Affirmed	Bootlegging.
State vs. Buck	Scott	Affirmed	Murder.
State vs. Cahalan (James D.)	Allamakee	Affirmed	Maintaining a liquor nuisance.

JANUARY TERM, 1928—Continued

Title of Case	County	Decision	Nature of Action
State vs. Cordaro	Polk	Affirmed	Uttering a forged instrument.
State vs. Corey	Black Hawk	Reversed	Illegal possession of intoxicating liquor.
State vs. DeSmet	Scott	Affirmed	Liquor nuisance.
State vs. Drain	Black Hawk	Affirmed	Illegal transportation of intoxicating liquor not properly marked.
State vs. Drake, et al	Polk	Affirmed	Breaking and entering.
State vs. Eastman and one certain automobile	Black Hawk	Affirmed	Transportation of intoxicating liquor.
State (Appellant) vs. Edwards	Black Hawk	Affirmed	Illegal possession of intoxicating liquor.
State vs. Glaser	Osceola	Affirmed	Liquor nuisance.
State vs. Glendening	Polk	Reversed	Forgery.
State vs. Hart	Ida	Affirmed	Breaking and entering.
State vs. Hays	Howard	Affirmed	Bootlegging.
State vs. Hester, et al	Harrison	Affirmed	Larceny of poultry.
State vs. Hixson	Jefferson	Reversed	Cheating by false pretenses.
State vs. Jackson	Polk	Affirmed	Breaking and entering.
State vs. Leitzke	Pottawattamie	Affirmed	Larceny.
State vs. Marshall	Louisa	Reversed	Larceny.
State vs. Mohler	Audubon	Dismissed	Gambling.
State vs. Mullenhoff	Pottawattamie	Affirmed	Illegal trans. of intoxicating liquor.
State vs. Nolta	Story	Affirmed	Liquor nuisance.
State vs. Owen	Cass	Affirmed	Keeping a house of ill fame.
State vs. Petrelli	Polk	Affirmed	Having possession of burglar tools.
State (Appellant) vs. Reed	Mahaska	Reversed	Manslaughter.
State vs. Reynard	Ringgold	Reversed and remanded	Seduction.
State (Appellant) vs. See	Municipal Court of Des Moines	Affirmed	Unlawful retention of an electric storage battery.
State vs. Thomas	Harrison	Affirmed	Bootlegging.
State vs. Wareham	Hardin	Affirmed	Bootlegging.
State vs. White	Jasper	Affirmed	Rape.

Title of Case	County	Decision	Nature of Action
State vs. Albertson & Lumsdon	Wapello	Reversed	Larceny.
State vs. Alexander	Pocahontas	Affirmed	Assault with intent to commit rape.
State vs. Bird	Clayton	Affirmed	Forgery.
State vs. Blair	Carroll	Affirmed	Rape.
State vs, Champlin	Winneshiek	Affirmed	Illegal trans. of intoxicating liquor.
State vs. Ciccio	Polk	Reversed	Liquor nuisance.
State (Appellant) vs. Deck	Mahaska	Affirmed	Liquor nuisance.
State vs. Dillon	Dallas	Affirmed	Operating a motor vehicle while intoxicated.
State vs. Dunham	Marshall	Affirmed	Maintaining liquor nuisance.
State vs. Duster	Plymouth	Affirmed	Maintaining liquor nuisance.
State vs. Duvall	Floyd	Affirmed	Liquor nuisance.
State vs. Friend	Marshall	Affirmed	Maintaining a liquor nuisance.
State vs. Gathercole	Lucas	Affirmed	Breaking and entering.
State vs. Hart, et al.	Plymouth	Dismissed	
State vs. Heathcoat	Des Moines Municipal Court	Affirmed	Intoxication.
State (Appellant) vs. Jennings	Marion	Reversed	Trans. of intoxicating liquor.
State vs. Kaufman	Plymouth	Affirmed	Illegal trans. of intoxicating liquor.
State (Appellant) vs. Kelsey	Marion	Reversed	Trans. of intoxicating liquor.
State (Appellant) vs. Kirkman	Mahaska	Reversed	Possession of intoxicating liquor.
State vs. Klass	Linn	Affirmed	Assault and battery.
State vs. Kuhlman	Monona	Reversed	Illegal manufacture of liquor.
State vs. Lawrence & McCook	Johnson	Reversed	Larceny.
State vs. Lazio, et al.	Jones	Affirmed	Control of slot machine.
State vs. McNary	Woodbury	Affirmed	Maintaining liquor nuisance.
State vs. Mack	Des Moines	Affirmed	Illegal use of license plates.
State vs. Moser	Pottawattamie	Affirmed	Maintaining a liquor nuisance.
State vs. Murphy	Allamakee	Affirmed	Fraudulent banking.
State vs. Neifert	Monroe	Reversed and remanded	Rape.

MAY TERM, 1928—Continued

Title of Case	County	Decision	Nature of Action
State vs. Nova	Webster	Affirmed	Keeping intoxicating liquor nuisance.
State vs. Parsons	Marshall	Reversed	Bootlegging.
State vs. Porter	Des Moines Municipal Court	Affirmed	Careless driving.
State (Appellant) vs. Purdin, Jr.	Mahaska	Affirmed	Illegal trans. of intoxicating liquor.
State vs. Randolph	Emmet	Affirmed	Bootlegging.
State vs. Shearer	Marshall	Reversed and remanded	Larceny.
State vs. A certain Studebaker C. C car	Marshall	Affirmed	Illegal trans. of liquor.
State vs. Tierney	Floyd	Affirmed	Burglary.
State vs. Troy, et al.	Dubuque	Affirmed	Murder.
State vs. Wyatt (38501)	Marshall	Reversed	Illegal trans. of intoxicating liquor.

SEPTEMBER TERM, 1928

State vs. Albaugh	Johnson	Affirmed	Operating motor vehicle while intoxicated.
State vs. Archibald (38499)	Appanoose	Reversed	Breaking and entering chicken house.
State vs. Beckwith	Council Bluffs Municipal Court	Affirmed	Assault and battery.
State vs. Bell	Monroe	Reversed	Bribery.
State vs. Blackburn	Plymouth	Affirmed	Maintaining liquor nuisance.
State vs. Blake	Plymouth	Affirmed	Larceny.
State vs. Bohall	Harrison	Affirmed	Larceny of hogs.
State vs. Brewster	Polk	Affirmed	Rape.
State vs. Briggs	Calhoun	Affirmed	Nuisance.
State vs. Brodie	Polk	Reversed and remanded	Child desertion.
State vs. Burzette	Cerro Gordo	Affirmed	Murder.
State vs. Canalle	Appanoose	Affirmed	Transportation of intoxicating liquor.

State vs. Catron	Marshall	Dismissed	Murder, second degree.
State vs. Chase	Buchanan	Affirmed	Bootlegging.
State vs. Dillard (39528)	Mahaska	Affirmed	Operating motor vehicle while intoxicated.
State vs. Dunklebarger	Lyon	Reversed	Miscarriage.
State vs. Evans	Calhoun	Affirmed	Nuisance.
State vs. Friend (39434)	Marshall	Reversed	Liquor nuisance.
State vs. George	Wapello	Reversed	Obtaining money by false pretenses.
State vs. Giffrow	Plymouth	Affirmed	Maintaining liquor nuisance.
State vs. Grimm	Jasper	Affirmed	Assault with intent to inflict great bodily injury.
State vs. Hamilton	Guthrie	Affirmed	Larceny in a building.
State vs. Hoaglin	Henry	Reversed	Rape.
State vs. Johnson	Plymouth	Affirmed	Maintaining liquor nuisance.
State vs. Kirby (39551)	Dubuque	Dismissed	Murder.
State vs. Lagomarcino-Grupe Co.	Des Moines	Affirmed	Unlawful sale of cigarettes and cigarette papers.
State vs. Laro	Wapello	Affirmed	Receiving and concealing stolen property.
State vs. Laurence	Woodbury	Affirmed	Liquor nuisance.
State vs. McGee	Cherokee	Affirmed	Maintaining liquor nuisance.
State vs. McHenry	Polk	Reversed	Possession burglar tools.
State vs. McNary	Woodbury	Affirmed	Liquor nuisance.
State vs. Madson	Dickinson	Reversed and remanded	Possession of intoxicating liquor.
State vs. Massingham	Buchanan	Affirmed	Larceny of a domestic animal.
State vs. Myers	Jefferson	Reversed	Operating a motor vehicle while intoxicated.
State (Appellant) vs. Patton	Story	Reversed	Larceny.
State vs. Rush	Madison	Affirmed	Uttering a forged instrument.
State vs. Sayre	Polk	Reversed and remanded	Child desertion.
State vs. Schroeder	Plymouth	Affirmed	Maintaining a liquor nuisance.
State vs. Strauss	Woodbury	Affirmed	Receiving stolen property.
State vs. Tibbits	Floyd	Affirmed	Liquor nuisance.
State vs. Wagner	Keokuk	Reversed	Larceny of poultry.
State vs. Waldon	Calhoun	Affirmed	Nuisance.
State vs. Wilshire, Jr.	Woodbury	Affirmed	Liquor nuisance.
State vs. Wyatt (39192)	Marshall	Reversed	Illegal trans. of intoxicating liquor.
State vs. Yarham	Jefferson	Reversed	Forgery.

SCHEDULE "B"—INHERITANCE TAX CASES—U. S. SUPREME COURT

Title of Case	County	Decision	Notation
In re Estate of Anders Anderson....	Plymouth	Reversed	Treasurer of State, Respondent.

SCHEDULE "C"—LIST OF INHERITANCE TAX CASES—SUPREME COURT OF IOWA

Title of Case	County	Decision	Notation
In re Estate of Alice L. Graham....	Pottawattamie	Affirmed	Treasurer of State, Appellant.
In re Estate of Fred G. Meinert.....	Plymouth	Affirmed	Treasurer of State, Appellant.
In re Estate of Archibald C. Smith (Foreign)	Polk	Pending	Treasurer of State, Appellee.
In re Estate of Adam Seibel	Poweshiek	Affirmed	Treasurer of State, Appellee.
In re Estate of Grada Leusink	Sioux	Dismissed	Treasurer of State, Appellant.
In re Estate of W. C. Halsey.....	Wright	Affirmed	Treasurer of State, Appellee.

SCHEDULE "D"—PARTIAL LIST OF INHERITANCE TAX CASES—DISTRICT COURT

Title of Case	County	Notation
In re Estate of Elizabeth Manning	Webster	Objection to appraisal sustained.
In re Estate of Charles H. Chappell.....	Scott	Court held that trust property in the possession of a trust company in Chicago passing under the terms of a will executed and probated in Iowa not subject to the inheritance tax of the state of Iowa.
In re Estate of Harriet E. P. Ballou.....	Wright	Action to recover tax dismissed by Treasurer of State.
In re Estate of Sarah A. Brown.....	Taylor	Involves right to levy a tax upon annuity contracts entered into with a foreign church corporation, and also the exemption statutes. Still pending.

In re Estate of Wm. Thomas	Decatur	Involves right to reduce the tax on account of a bank failure and depreciation of certain assets. Settled by compromise.
In re Estate of Margaret Foley	Fayette	Action to recover tax from administratrix and sureties on her bond. Dismissed on payment of tax and interest in full.
In re Estate of Emma Smith	Van Buren	Action to recover tax and enforce lien. Settled by compromise.
In re Estate of Emma Cosgrove	Hardin	Action to recover tax and enforce lien. Dismissed on payment of tax and interest in full.
In re Estate of Mary Langshadle	Cerro Gordo	Objection to appraisal. Settled by stipulation and compromise with costs paid by estate.
In re Estate of John Hartling	Calhoun	Involved tax on property transferred prior to death. Dismissed and compromise settlement.
In re Estate of H. L. Aldridge	Harrison	Action to collect tax and enforce lien. Dismissed under compromise settlement.
In re Estate of Sandusky S. Dilenbeck	Dallas	Objection to claim of $96,646.24 in estate. Reduced by court to $17,814, with interest and tax paid.
In re Estate of Jacob Carbiener	Floyd	Objection to appraisal. Settled by compromise and dismissed.
In re Estate of Henry Benfort	Carroll	Action to recover tax on property conveyed in contemplation of death. Settled by compromise and case dismissed.
In re Estate of Samuel G. Armstrong	Linn	Court sustained contention of Treasurer of State as to manner of computation of inheritance tax.
In re Estate of Frank Faffle	Buchanan	Involved taxability of War Risk Insurance. Court held that the beneficiary in class named took by virtue of contract and that the proceeds of insurance did not become part of the estate and administrator was only to determine what beneficiaries in class named took the property.
In re Estate of Addie Grace Wordle	Linn	Case involved property held in joint tenancy. Court held survivor took same subject to inheritance tax since the transfer was one in contemplation of and to take effect at death.

SCHEDULE "D"—Continued

Title of Case	County	Notation
In re Estate of Marion E. Taylor.....	Clayton	Involved taxability of property passing to nonresident charitable organizations. Court held no tax due on such property to state of Iowa.
In re Estate of Margaret Wright	Crawford	Action to remove lien for tax. Settled under compromise and case dismissed.

NOTE: In addition to the above cases there were numerous petitions filed in the district courts for the purpose of forcing the filing of reports or to collect taxes which petitions were dismissed under compliance with the statute. Also there were 104 compromise settlements made with the approval of the court, the Attorney General having investigated and advised settlement. Total value of compromises, $42,897.92.

SCHEDULE "E"—OTHER CIVIL CASES—SUPREME COURT OF IOWA

Case	County	Notation
Iowa Motor Vehicle Association, Appellant, vs. Board of Railroad Commissioners.....	Polk	Affirmed and appealed to Sup. Ct. of U. S.
E. L. Long et al., Appellants, vs. Highway Commission, Board of Supervisors of Clarke County, et al.	Clarke	Affirmed.
C. A. Furey vs. T. P. Hollowell, Appellant.....	Lee	Reversed. Habeas corpus.
Jack Munson vs. T. P. Hollowell, Appellant.....	Lee	Reversed. Habeas corpus.
M. A. Schnepf vs. T. P. Hollowell, Appellant.....	Lee	Reversed. Habeas corpus.
Neil Hofstetter vs T. P. Hollowell, Appellant....	Lee	Reversed. Habeas corpus.
T. E. Humphrey vs. T. P. Hollowell, Appellant....	Lee	Reversed. Habeas corpus.
F. H. Murphy vs. T. P. Hollowell, Appellant.....	Lee	Reversed. Habeas corpus.
Clarence Schufeldt vs. T. P. Hollowell, Appellant.	Lee	Reversed. Habeas corpus.
S. E. Bennett vs. T. P. Hollowell, Appellant.....	Lee	Reversed. Habeas corpus.
Joe Marshall vs T. P. Hollowell, Appellant.....	Lee	Reversed. Habeas corpus.
H. Smith vs. T. P. Hollowell, Appellant.....	Lee	Reversed. Habeas corpus.

Thomas Lusk Woods vs. T. P. Hollowell, Appellant	Lee	Reversed. Habeas corpus.
Anton Pedersen vs. T. P. Hollowell, Appellant	Lee	Reversed. Habeas corpus.
J. Conkling vs. T. P. Hollowell, Appellant	Lee	Reversed. Habeas corpus.
Roger Winfield vs. T. P. Hollowell, Appellant	Lee	Reversed. Habeas corpus.
Harold Benny vs. T. P. Hollowell, Appellant	Lee	Reversed. Habeas corpus.
Ed. D. Plants vs. T. P. Hollowell, Appellant	Lee	Reversed. Habeas corpus.
Christian vs. T. P. Hollowell, Appellant	Lee	Reversed. Habeas corpus.
Incorporated Town of Casey vs. Hogue	Greene	Reversed. Habeas corpus.
H. D. Ludeman, Appellant, vs. Cerro Gordo Co. et al.	Cerro Gordo	Affirmed.
State vs. Glenn Bobst, Appellant	Franklin	Affirmed.
Aetna Casualty & Surety Co. vs. L. O. Kimball	Floyd	Affirmed.
State ex rel. vs. D. W. Hamilton	Mahaska	Reversed.
C., B. & Q. Railway Co. vs. Board of Supervisors.	Appanoose	Held emergency tax statute unconstitutional on grounds of defective title.
State ex rel. Fletcher et al., Appellants, vs. Executive Council et al.	Polk	Reversed. Road Bond Act, 42nd G. A. Extra Session held unconstitutional.
Interstate Commerce Commission, Finance Docket 6409-6410		Involved merger Great Northern, Northern Pacific Railways.
Peverill, Appellant, vs. Board of Supervisors, and Thornburg, Secretary of Agriculture	Black Hawk	Affirmed. Involved constitutionality tuberculosis law.
Fevold, Appellant, vs. Board of Supervisors, and Thornburg, Secretary of Agriculture	Webster	Affirmed. Involved constitutionality tuberculosis law.
Lausen vs. Board of Supervisors and Thornburg, Secretary of Agriculture	Harrison	Affirmed. Involved constitutionality tuberculosis law.
Phelps, Appellant, vs. Thornburg, Secretary of Agriculture et al.	Muscatine	Reversed. Held enrollment Muscatine County void on account of defective publication notice.

SCHEDULE "E"—Continued

Case	County	Notation
Thede, Appellant, vs. Thornburg, Secretary of Agriculture et al.	Cedar	Held Cedar County enrollment accredited area void on account of conduct of hearing by state veterinarian instead of Secretary of Agriculture.
State ex rel. Fletcher vs. Story-Jasper Counties, Appellant. Wm. Robinson, Insane	Story	Affirmed. Involved settlement of insane person.
Junkin vs. Knapp et al	Guthrie	Involved construction of the term "orchard." Note: See S. F. 415 Acts 43rd G. A.
Hoover vs. State Highway Commission	Mahaska	Involved construction of orchard. Note: See S. F. 415 Acts 43rd G. A.
State of Iowa and R. E. Johnson, Treasurer of State, Appellants, vs. E. F. Bartlett et al.	Palo Alto	Affirmed in Supreme Court. Involves right of Treasurer of State to sue individuals-sureties on depository bonds.
Henry Hop vs. Henry G. Brink et al., Appellants.	Sioux	Reversed by Supreme Court. Held that a township does not come within the provisions of the Workmen's Compensation Law and was not liable for injuries to township employees.
William D. Jenkins vs. Iowa State Highway Commission, Appellant	Boone	District Court granted writ of certiorari, denying the right of the Highway Commission to relocate a road. Reversed by Supreme Court.
Andrew, Superintendent, Appellant, vs. Citizens State Bank, City of Eagle Grove, Intervener	Wright	Affirmed. Held city library funds on the record entitled to protection under Brookhart-Lovrien Act.
Andrew, Superintendent, Appellant, vs. Iowa Savings Bank, City of Estherville, Intervener	Emmet	Affirmed. Held City of Estherville on record entitled to protection of Brookhart-Lovrien Act.

Andrew, Superintendent, Appellant, vs. Iowa Savings Bank, Hanson, County Treasurer, Intervener	Emmet	Reversed. Held Emmet County not entitled to protection of Brookhart-Lovrien Act on account of resolution reducing authorization below present deposit.
Andrew, Superintendent, Appellant, vs. Iowa Savings Bank, City of Oelwein, Intervener	Fayette	Affirmed. Involved embezzlement by vice president, city treasurer. Held embezzlement not definitely shown by record.
Andrew, Superintendent, vs. Stuart Savings Bank, Bailey School District, Intervener, Appellant	Guthrie	Affirmed. Held that school board can act only in meeting and that receipt of interest by Treasurer of State would not estop him from defense that bank was not properly designated.
Zellmer vs. Smith, Secretary of State, Appellant	Polk	Affirmed. Held county convention may nominate to fill vacancies even where no candidate in primary.

SCHEDULE "F"—CIVIL CASES PENDING—SUPREME COURT OF IOWA

Case	County	Notation
State of Iowa, and Iowa State Highway Commission vs. Central States Electric Company, Appellant	Kossuth	Affirmed by the Supreme Court pending on petition for rehearing in the Supreme Court of Iowa involves right of Highway Commission to locate poles of transmission lines on the public highways.
Central States Electric Company, Appellant, vs. Pocahontas County, Iowa, and Board of Supervisors	Pocahontas	Affirmed by the Supreme Court of Iowa, now pending on rehearing. Involves right of Highway Commission to locate poles of transmission lines on the public highways.

SCHEDULE "F"—Continued

Case	County	Notation
Iowa Railway & Light Corporation, Appellant, vs. Lindsey, Engineer of Greene County	Greene	Pending in the Supreme Court of Iowa. Involves right of the Highway Commission to locate poles of transmission lines, on the public highways.
Hoover, H. S., Appellant, vs. Iowa State Highway Commission	Mahaska	Lower court reversed as to jurisdiction. Pending on merits.
Carl Humphrey vs. Iowa State Highway Commission et al., Appellants	Kossuth	Mandamus action. Involves right of property owner to compel the Highway Commission to condemn land for road purposes.
County of Scott et al., Appellants, vs. Ray E. Johnson, Treasurer of State	Scott	Pending on petition for rehearing. Involves constitutionality of State Sinking Fund for public deposits. Affirmed by the Supreme Court of Iowa.
New York Life Insurance Company, Appellant, vs. W. J. Burbank, Treasurer of State	Polk	Pending on petition for rehearing. Affirmed by the Supreme Court. Involves taxation of foreign life insurance companies.
C. F. Kinney et al., Appellants, vs. Bank of Plymouth et al.	Cerro Gordo	Involves liability of the individuals composing a private banking institution as partners, for deposits.
Peoples Savings Bank, Appellant, vs. J. M. Stewart, Members of the Board of Supervisors	Polk	Involves constitutionality of the bank taxation statutes.
Iowa National Bank, Appellant, vs. J. M. Stewart, Members of the Board of Supervisors	Polk	Involves constitutionality of the bank taxation statutes.

Central State Bank, Appellant, vs. J. M. Stewart, Members of the Board of Supervisors.....	Polk	Involves constitutionality of the bank taxation statutes.
Central Trust Company, Appellant, vs. J. M. Stewart, Members of the Board of Supervisors.....	Polk	Involves constitutionality of the bank taxation statutes.
Valley Savings Bank, Appellant, vs. J. M. Stewart, Members of the Board of Supervisors.....	Polk	Involves constitutionality of the bank taxation statutes.
Valley National Bank, Appellant, vs. J. M. Stewart, Members of the Board of Supervisors.....	Polk	Involves constitutionality of the bank taxation statutes.
Iowa Motor Vehicle Association et al., Appellants, vs. Board of Railroad Commission.....	Polk	Pending on appeal to Supreme Court of U. S. Supreme Court of Iowa sustained the constitutionality of the Motor Carrier Statute.
Des Moines Sav. Bank & Trust Company, Appellants, vs. Fred H. Hunter et al.....	Polk	Involves constitutionality of the bank taxation statutes.
State ex rel. John Fletcher, Attorney General, Appellant vs. Webster-Wright Counties, John Voog, Insane	Webster	Involves settlement of insane person.
In the Matter of Vera Gage, Minor.....	Harrison	Involves right of legislature to limit use of trust fund created by state.
Liberty Center Consolidated School District vs. Liberty Center Bank and Johnson, Treasurer of State	Warren	Involves application of public sinking fund statute to deposit embezzled by cashier-treasurer.

SCHEDULE "G"—PARTIAL LIST CIVIL CASES—DISTRICT COURT

Case	County	Notation
State of Iowa ex rel. John Fletcher, Atty. Gen., Plaintiff, vs. L. H. Benadom, Defendant	Jones	Court granted injunction for practicing medicine without a license.
Wm. D. Jenkins vs. Iowa State Highway Commission	Boone	Appeal. Condemnation award.
Axel Nelson vs. Iowa State Highway Commission	Pottawattamie	Appeal. Condemnation jury award.
Anton Paulson vs. Iowa State Highway Commission	Boone	Appeal. Condemnation jury award.
David Conn vs. Iowa State Highway Commission.	Boone	Appeal. Condemnation award.
Robert Heaps vs. Iowa State Highway Commission	Boone	Appeal. Condemnation jury award.
Jane Ward vs. Iowa State Highway Commission..	Harrison	Appeal. Condemnation award.
State of Iowa vs. Wm. Lovell	Keokuk	Permanent injunction granted enjoining defendant from practice of medicine in state of Iowa.
State of Iowa vs. J. W. Barnett	Keokuk	Permanent injunction granted enjoining defendant from practice of medicine in state of Iowa.
Chester Bailey vs. Iowa State Highway Commission	Marion	Appeal. Condemnation award.
S. L. Austin vs. Iowa State Highway Commission.	O'Brien	Appeal. Condemnation award.
State of Iowa vs. W. L. Swainson	Polk	Court revoked license of defendant to practice medicine in state of Iowa.
C. A. Shimerda vs. Iowa State Highway Commission	Ida	Appeal condemnation award.
Minnie Spotts Beal et al. vs. Iowa State Highway Commission	Ida	Appeal condemnation award.
C. R. Garrett vs. Iowa State Highway Commission	Poweshiek	Appeal condemnation award.
Edward Dixon vs. Iowa State Highway Commission	Worth	Appeal condemnation award.
Roy Welton vs. Iowa State Highway Commission.	Mahaska	Injunction proceeding; lower court found it had no jurisdiction.

H. S. Hoover vs. Iowa State Highway Commission	Mahaska	Injunction proceeding; lower court found it had no jurisdiction.
Bochart vs. Iowa State Highway Commission....	Adair	Certiorari action in which lower court dismissed writ for lack of jurisdiction.
State of Iowa and R. E. Johnson, Treasurer, vs. Millheim Oil Company	Fayette	Writ of attachment issued for gasoline tax; judgment secured and finally paid.
State of Iowa vs. W. F. Hughey.....	Story	Injunction granted for practicing medicine without license.
State of Iowa ex rel. John Fletcher, Atty. Gen., vs. Balfour Company	Polk	Action brought for damages of failure to secure permit to operate within the state; settlement made.
Bailey vs. Smith, Secretary of State.....	U. S. So. District...	Held soldiers at Fort Des Moines subject to motor vehicle license fee.
Melo Kallus, Plaintiff, vs. Iowa State Highway Commission, Defendant	Washington	Appeal. Condemnation award.
State of Iowa, Plaintiff, vs. Eden Oil Company, Defendant	Washington	Writ of attachment issued; payment of gasoline tax secured.
State of Iowa ex rel. John Fletcher, Plaintiff, vs. Schmuck Oil Company, Defendant.....	Union	Writ of attachment issued; payment of gasoline tax secured.
State of Iowa ex rel. John Fletcher, Plaintiff, vs. Michel Oil Company, Defendant.....	Pottawattamie	Writ of attachment issued; payment of gasoline tax secured.
State of Iowa ex rel. John Fletcher, Atty. Gen., vs. Polk-Jasper Counties, Mrs. Maude Dunn, Insane	Jasper	Settlement of insane person.
Incorporated Town of Janesville vs. State Highway Commission	Bremer	Held State Highway Commission could not change location of primary road in cities and towns without approval of council.

SCHEDULE "G"—Continued

Case	County	Notation
Incorporated Town of Earlville vs. State Highway Commission	Bremer	Held State Highway Commission could not change location of primary road in cities and towns without approval of council. Note: See S. F. 283, Acts 43rd G. A.
Randall vs. State Highway Commission	Mahaska	Injunction to restrain Highway Commission from relocating primary road. Dismissed.
Okoboji Steamship Company vs. State Highway Commission	Dickinson	Held that steamship company had no vested right in waterway across highway.
Kirchoff vs. Thornburg et al	Humboldt	Injunction to restrain enforcement tuberculosis law on unconstitutionality of title. Dismissed.
State ex rel. Fletcher vs. Wapello-Linn Counties	Wapello	Settlement of insane patient.
City of Rock Rapids vs. Johnson, Treasurer of State	Lyon	Held proprietary funds of city deposited in bank under Brookhart-Lovrien Law.
Smith vs. Board of Supervisors	Guthrie	
Hunt vs. Board of Supervisors	Greene	
Heikens vs. Thornburg et al	Clay	
Mississippi River Power Company vs. City of Keokuk	Lee	Involved taxation of Keokuk dam.
State Board of Conservation vs. Pack	Dickinson	Involved ownership of lake beds.

NOTE: In addition to the above cases, a large number of suits on depository bonds and of claims against the state sinking fund for public deposits were handled by the department as well as numerous appeals from condemnation awards which were settled. The department has also assisted the local attorneys for the receiver of closed banks in a large number of cases both in the district court and in the supreme court. None of these matters are contained in the foregoing schedule.

SCHEDULE "H"—PARTIAL LIST CIVIL CASES PENDING—DISTRICT COURT

Case	County	Notation
B. L. Johnson vs. Iowa State Highway Commission	Boone	Appeal from award of condemnation commission.
Wm. Ades vs. Iowa State Highway Commission	Boone	Appeal from award of condemnation commission.
B. E. Lincoln vs. Board of Supervisors	Mills	Appeal from order of Board of Supervisors denying construction of a drainage ditch. Intervention on behalf of the Board of Control to protect water supply of institution at Glenwood.
Chris Christianson vs. W. E. Agan et al., Board of Supervisors	Mills	Appeal from order of Board of Supervisors denying construction of a drainage ditch. Intervention on behalf of the Board of Control to protect water supply of institution at Glenwood.
C., B. & Q. Railway Co. vs. W. E. Agan et al., Board of Supervisors	Mills	Appeal from order of Board of Supervisors denying construction of a drainage ditch. Intervention on behalf of the Board of Control to protect water supply of institution at Glenwood.
State of Iowa vs. Independent Oil & Gas Co.	Carroll	Writ of attachment for delinquent gasoline tax.
Iowa State Highway Commission vs. Board of Supervisors, Drainage District No. 7	Cass	Appeal from drainage assessment.
John C. Goodenow vs. State of Iowa and State Highway Commission	Ida	Appeal from award of condemnation commission.
O. O. Spotts vs. State of Iowa and State Highway Commission	Ida	Appeal from award of condemnation commission.
N. Nelson vs. State of Iowa and State Highway Commission	Audubon	Appeal from award of condemnation commission.
Arthur B. Case vs. State of Iowa and State Highway Commission	Montgomery	Appeal from award of condemnation commission.
Louis Rohwedder vs. State of Iowa and State Highway Commission	Jones	Appeal from award of condemnation commission.
Chester Kisor vs. State of Iowa and State Highway Commission	Mahaska	Appeal from award of condemnation commission.

SCHEDULE "H"—Continued

Case	County	Notation
H. S. Hoover vs. State of Iowa and State Highway Commission	Mahaska	Appeal from award of condemnation commission.
John Edgren vs. State of Iowa and State Highway Commission	Mahaska	Appeal from award of condemnation commission.
E. L. Anderson vs. State of Iowa and State Highway Commission	Mahaska	Appeal from award of condemnation commission.
R. M. Welton vs. State of Iowa and State Highway Commission	Mahaska	Appeal from award of condemnation commission.
A. B. Doles vs. State of Iowa and State Highway Commission	Mahaska	Appeal from award of condemnation commission.
Penn College vs. State of Iowa and State Highway Commission	Mahaska	Appeal from award of condemnation commission.
J. A. McGee vs. State of Iowa and State Highway Commission	Lucas	Appeal from award of condemnation commission.
C. F. Brady and D. W. McAuley vs. State of Iowa and State Highway Commission	Howard	Appeal from award of condemnation commission.
Frick & Katz vs. State of Iowa and State Highway Commission	Clayton	Appeal from award of condemnation commission.
Schneider & Price vs. State of Iowa and State Highway Commission	Clayton	Appeal from award of condemnation commission.
W. W. Cherry vs. State of Iowa and State Highway Commission	Clayton	Appeal from award of condemnation commission.
F. E. Palmer vs. State of Iowa and State Highway Commission	Clayton	Appeal from award of condemnation commission.
State of Iowa vs. Lester Tilton	Clinton	Action for injunction to prohibit practicing medicine without a license.
W. A. Anderson vs. State of Iowa and State Highway Commission	Monroe	Suit for damages.
State of Iowa vs. R. F. Knipfer	Polk	Action for injunction to restrain from practicing medicine without a license.
State of Iowa vs. Walter R. McCray	Floyd	Action to revoke license to practice medicine.

State ex rel. Fletcher vs. Polk-Guthrie Counties, Ida Mae Russell, Insane	Polk	Involves settlement of insane person.
State ex rel. Fletcher vs. Polk-Wayne Counties, Appellant, Josephine Bills, Insane	Appanoose	Involves settlement of insane person.
Frost et al. vs. Thornburg et al	Black Hawk	Injunction to restrain enforcement tuberculosis law on account of alleged unconstitutionality.
Rovine, City of Keokuk, vs. R. E. Johnson, Treasurer of State	Lee	Involves constitutionality of state sinking fund as applied to special charter cities.
Boyd and Independent School District of Keokuk vs. R. E. Johnson, Treasurer of State	Lee	Involves constitutionality of state sinking fund for public deposits, as applied to school districts.
Thompson, Receiver, Citizens National Bank, Albert Lea, vs. Larson Construction Company, Iowa State Highway Commission	Jasper	Involves right to garnishee Highway Commission.
Campbell vs. Executive Council	Polk	Involves Soldier Preference Act.

SCHEDULE "I"—REPORT OF BUREAU OF INVESTIGATION—JAMES E. RISDEN, CHIEF

The agents of this bureau have assisted local authorities in investigation of law violations and suspected law violation which, together with other data in connection with the bureau, is set out in the following schedule:

Crime	Number	Arrests	Convictions	Remarks
Abortion	4	1	1	
Arson	9	6	6	First half 1927.
Adultery	4	4	4	
Assault to do great bodily injury	20	8	4	
Auto accidents	4	2	2	
Autos confiscated	41			
Bad checks passed (in addition to forgery)	6			
Breaking and entering	72	25	20	
Burglary tools passed	2	2	2	
Cigarette wagon confiscated with 94,000 pkgs.	1			
Concealing stolen property	6	4	3	
Confidence game	2			
Dead persons	8			
Desertion—wife—child	3			
Disappearance (women)	2			
Disorderly conduct	7	7	7	
Doctors checked	10	3		
Drug stores checked	19	2	2	
Drunks	35	35	35	
Embezzlement	21	7	5	1 fine $500. 1 returned $2,500.
Escape from Ft. Madison	2			
Escape from jail	2			
False pretense	25	5		
Failed to report accident	4			
Fight pictures	3			
Forgery	18	10	10	
Fraud (bond cases)	5	3		
Gamblers	118	101	101	Fines paid $15,500.

Larceny (grand)	28	18	18	
Letters, blackhand	5	3	3	
Letters, threatening	2			
Lottery cases	22	22	22	
Murder	23	10	9	
Murder (attempt)	11	3	2	
Murder (suspect)	4			
Narcotic peddler	2			$800 seized.
Operating motor vehicle while intoxicated	11	6	6	
Perjury	2	1	1	
Pick pocket	2			
Poison cases	4			
Pool hall violations	4	4	4	
Punchboards seized	85			
Rape	10	5	5	
Removed from office	6			Returned $7,600.
Robbery—banks	19	9	9	Loss $114,707.34. Recovered $2,017.50.
Robbery and burglary	57	33	26	
Robbery highway	8	4	4	
Shooting into house	7			
Sodomy	2			
Soliciting prostitution	5	5	5	
Slot machines seized	12			Valued at $1,000.
Theft of chickens	12	6	6	
Theft of stock	20	11		
Theft of autos	15	11	11	
Miscellaneous cases	30			
(Liquor cases on separate sheet)				

LIST OF PERSONS COMMITTED TO FT. MADISON FOR MURDER IN 1927-8

	Degree	County	
Bittner, Frank	1	Webster	Oct., '27
Cook, Dr. Jess L.	2	Linn	Feb., '28
Davis, Geo.	2	Scott	Dec., '28
Cota, Leonard	1	Dubuque	Jan., '28
Freeman, Clarence	1	Linn	Feb., '28
Harvey, Jess	2	Polk	Sept., '28
Inman, Ollie	2	Cedar	April, '27
Johnson, Walter	2	Pottawattamie	May, '28
Jones, John W.	1	Des Moines	May, '27
Kramer, Howard	1	Dubuque	Jan., '28
Lukenhard, Clarence	1	Pottawattamie	Oct., '28
McMackin, Blake	1	Palo Alto	April, '27
Navin, Casey	2	Webster	Oct., '27
Raymond, Josiah	?	Story	Feb., '28
Troy, Clark	1	Dubuque	Jan., '28
White, Dewey	2	Polk	June, '28
White, Robert	2	Scott	Dec., '28

FOR MANSLAUGHTER

Arndt, J. W.	Pocahontas	Oct., '28
Ash, Jess	Wapello	Oct., '27
Bostic, James	Black Hawk	Nov., '27
Fortney, Frank	Bremer	Feb., '27
Osgood, Wm.	Polk	Dec., '27
Rasmussen, John	Pottawattamie	Nov., '27
Rosenthal, Peter	Dubuque	Feb., '28
Rittenhour, Alvin	Wapello	Nov., '28
Wood, Carlton	Hardin	Nov., '28
VanKirk, J. P.	Appanoose	Sept., '27
Covey, Roy	Webster	Nov., '28
Deering, Levi	Black Hawk	Dec., '27

AT ANAMOSA FOR MURDER

Burzett, Melvin	Cerro Gordo	Jan., '27
Lewis, Everett	Wapello	June, '28
Maybee, Earl	Polk	Sept., '28
Raymond, Josiah	Story	Feb., '28

FOR MANSLAUGHTER

Friar, Wm.	Polk	Nov., '27
Hayward, Eugene	Henry	Dec., '27
Pogue, Harrold	Polk	Oct., '28

RECORDS OF STATE INSTITUTIONS

Fort Madison, Anamosa and Rockwell City, showing the number of persons received for various crimes committed during 1927 and 1928.

FORT MADISON

Breaking and entering	62	Rape	22
Burglary	3	Robbery	34
Liquor violations	24	Theft of autos	22
Opr. M. V. intoxicated	51	Theft of chickens	26

ANAMOSA

Breaking and entering	145	Rape	21
Burglary	9	Robbery	52
Liquor violations	2	Theft of autos	98
Opr. M. V. intoxicated	25	Theft of chickens	64

ROCKWELL CITY

Forgery	13	Opr. M. V. intoxicated	3
Liquor violations	19	Theft of autos	2
Manslaughter	2	Theft of chickens	3
Murder—Second degree	2		

RESUME, LIQUOR CASES

Investigations	Arrests	Convictions	Injunctions	Fines	Contempt
2,378	475	463	300	$113,750	20

SCHEDULE "J"

Activities of the Bureau of Investigation, County Sheriffs, Iowa Bankers Association, County Bankers Association and Board of Supervisors Covering Vigilante Work Throughout the State of Iowa.

There are eighty-one counties organized and a move is being made by the other counties to organize and provide some form of entertainment and instruction to equip and arm a large number of special deputy sheriffs to act on any major crime.

During the last six months of 1928, nine banks were held up in broad daylight with loss of $80,000.

Vigilante organizations have spent $14,000 for guns and ammunition and have practically eliminated the night bank robberies. And with the added alarms and protective devices being installed will no doubt stop the daylight robberies.

State of Iowa
1928

SEVENTEENTH BIENNIAL RFPORT

of the

ATTORNEY GENERAL

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 1928

JOHN FLETCHER
Atorney General

Published by
THE STATE OF IOWA
Des Moines

ATTORNEY GENERAL'S DEPARTMENT

JOHN FLETCHER	Attorney General
MAXWELL A. O'BRIEN	Assistant Attorney General
NEILL GARRETT	Assistant Attorney General
EARL F. WISDOM	Assistant Attorney General
C. J. STEPHENS	Assistant Attorney General
GERALD O. BLAKE	Assistant Attorney General
HAZEL E. WEBSTER	Secretary to Attorney General
MARY WARD	Stenographer
LEONA NEWQUIST	Stenographer
MYRTLE OSBRINK	Stenographer
LOIS GRIMM	Stenographer
EMMA CARLSON	Stenographer

SOME OF THE

IMPORTANT OPINIONS

OF THE

ATTORNEY GENERAL

FOR

Biennial Period

1927-1928

OPINIONS OF THE ATTORNEY GENERAL

JAILS: Sheriff is required to furnish soap and water used in the laundry of prisoners' clothing.

PRISONERS: Board of supervisors cannot allow more than the amount fixed by statute to pay for prisoners' meals.

EMERGENCY FUND—BOARD OF SUPERVISORS: Emergency fund may be used by the board of supervisors by issuing warrants anticipating the fund.

January 3, 1927. *Page County Attorney, Clarinda, Iowa:* We wish to acknowledge receipt of your favor of December 31, in which you request our opinion as follows:

"First. In this County, there is a house for the Sheriff, which is next to the County Jail and is connected with the jail. They want to know if they must furnish heat for the Sheriff's house, food, soap, etc., for the deputy sheriff's family, who occupy this house. The deputy sheriff feeds the prisoners and is paid what the law allows. He does their washing and is paid what the law allows. Does he have to furnish the soap and water for their washing or should that be furnished by the County?

"Second. The prisoners are worked on the roads in this County and are out on the roads during the noon hour. The Board of Supervisors think that they should have a good meal at noon and have made them an allowance of 35 cts. for this meal. Do they have authority to do this? * * *

"Third. We had very severe rains in this County and many bridges were washed out this fall. In their budget for next year, the Board of Supervisors have levied a tax for an emergency fund. This fall, inasmuch as they did not have the money in the County Bridge Fund to build and repair bridges that were washed out and damaged, they have used emergency warrants. Only a part of the bridges that were washed out and damaged have been repaired in the year 1926 and if the County Board uses the County Bridge Fund it will all be used up on these bridges. Can they go ahead and use emergency warrants in 1927 for the bridges that were washed out on account of the floods, even although in 1927, there will be money in the County Bridge Fund that can be used, but will soon deplete the fund?"

We are enclosing herewith a copy of an opinion given by this Department concerning the right of the Board of Supervisors to furnish the sheriff with fuel, light, heat, etc., in his residence. * * *

There is no express statutory provision providing that soap and water shall be furnished for this purpose. The sheriff is allowed a regular fee for performing this duty and we are of the opinion that this fee must include the cost of the materials used.

Section 5191, Code of 1924, provides in paragraph 11 thereof, that the sheriff shall be entitled to collect a compensation of 20c for each meal not exceeding three meals in twenty-four consecutive hours served to prisoners. There is no other provision in the statute providing for a larger allowance in the case of prisoners engaged in hard labor and we are of the opinion that the Board would not be authorized in allowing a claim for a larger amount than that prescribed by the statute.

The facts as related in your third question clearly disclose that an emergency within the contemplation of Section 373, Code of Iowa 1924, exists. We have held that it is proper for the Board, under such circumstances, to anticipate by issuance of warrants, the emergency fund. We are also of the opinion that the Board may properly continue to use this fund for the completion of

the bridges destroyed by the floods you refer to, this clearly being an emergency for which the fund may be used.

TAXATION: 1—The treasurer should include in the sale of real estate for delinquent taxes, the delinquent personal tax which is a lien thereon, 2—The lien of a prior mortgage upon the real estate is superior to the lien of the state for delinquent personal property tax, 3—The holder of a mortgage where real property has been sold at tax sale for delinquent real estate tax and delinquent personal property tax must pay the full amount of said tax sale if he redeems in the regular way, 4—The purchaser at tax sale is not entitled to recover any amount from the county treasurer after having paid the purchase price if the tax was a lien upon the property at the time of sale.

January 5, 1927. *Auditor of State:* You have requested an opinion of this department upon the following propositions:

"In case certain property goes to tax sale and the owner also has personal property, should the amount of the personal property be deducted before the property is listed for tax sale, or should the personal be included in the tax sale?

"A man here has bought a piece of property at tax sale which included personal property tax, and has been paying subsequent taxes on same and has now advertised for tax deed, where the mortgagee comes in and objects to his getting a tax deed and also objects to paying the full amount of personal tax that was listed against the property, in redeeming it. So, the person who bought at tax sale is filing a claim against the county for a part of the personal tax, which he claims he is entitled to recover. The mortgagee holds the mortgage on the real estate to be a prior claim, it having been made before the listing of the property for tax sale."

It is provided by statute, Section 7192 of the Code of Iowa, 1924, as follows:

"Personal tax entered on delinquent personal tax list, as provided in the two preceding sections, shall constitute a lien on any real estate owned or acquired by any such delinquent, and so remain until the same has been paid or legally canceled, and taxes not so entered for each year shall cease to be a lien * * *."

Giving consideration to the second question first, we are of the opinion that the delinquent personal property tax is not a prior lien upon the real estate superior to lien of the mortgage which existed prior to the attachment of the lien of the said delinquent personal property tax.

Such a lien was enforced in the case of *Garretson vs. Scofield*, 44 Iowa 35, but the court indicated that the lien of the personal property tax would not be a prior lien superior to the lien of a pre-existing mortgage. The language of the court speaking through Mr. Justice Rothrock is as follows:

"This lien is not a mere personal claim against the owner as contended by appellee's counsel, but it is a charge upon the land. *It will be observed that the personal property tax was a lien prior to the execution of plaintiff's mortgage. It was a lien upon the land to the extent of Whitstine's interest, before the mortgage was made.*"

The matter was before the court in *Bibbins vs. Clark*, 90 Iowa, 230, and *Bibbins vs. Polk County*, 100 Iowa 393, where the court said: (90 Iowa 230 at 238)

"The mortgage lien of plaintiff, having attached to the lots prior to the time the taxes on the personalty became a lien thereon, must be held to be superior to the tax lien."

This opinion was adhered to in the later citation (100 Iowa, 497) overruling

Trust Company vs. Young, 81 Iowa, 732. We have searched the Digests and citator and have found nothing to indicate that the rule laid down there has been overruled or modified.

However, we are of the opinion that if the mortgagee redeems the real estate from tax sale by payment to the County Treasurer, he must pay the amount of the tax sale certificate with penalties and accrued interest thereon. See Section 7272, Code of Iowa, 1924; *Long vs. Smith*, 67 Iowa, 22. This disposes of your inquiry set out in number 3 hereof.*

Replying to question 1 hereof, we are of the opinion that it is the duty of the county treasurer to include in the tax sale the total amount of taxes, interest, and costs due and unpaid thereon, including delinquent personal property tax. You are referred to Section 7244 of the Code of Iowa, 1924, in this regard.

BANKS AND BANKING: Stockholders of a State bank engaged in branch banking are liable for debts of the branch bank. The State bank is also liable for the debts of the branch bank and the Superintendent of Banking should require the discontinuance of the practice of branch banking.

January 8, 1927. *Superintendent of Banking:* We wish to acknowledge receipt of several inquiries from you concerning the Traer State Bank, and the Bank of Buckingham and the Farmers' Bank of Voorhies. The facts as set out in these communications and the documents attached disclose the following situation.

The Traer State Bank of Traer, Iowa, is organized under the State Banking Law of Iowa, and on August 28, 1903, the Board of Directors of the Traer State Bank, by resolution authorized the establishment of a branch bank at the town of Buckingham, Iowa,

"to be closely associated with this bank and for the benefit of this bank", and on January 12, 1904, the directors provided that the officers of the Traer State Bank should act as trustees of the Buckingham Bank, and in that meeting adopted a plan for the operation of the Buckingham Bank. * * *

On December 30, 1904, the directors transferred $1,500.00 to the trustees of the Bank of Buckingham, for use as its capital, and their statement as of January 10, 1905, shows that they had invested in the capital of the Bank of Buckingham $7,500.00 with $500.00 surplus, subsequently in various meetings, the directors of the Traer State Bank closed the capital of the Buckingham Bank and provided the means of carrying the capital account.

On January 14, 1908, the directors of the Traer State Bank, by resolution, appropriated the sum of $8,000.00 surplus accumulated in the Traer State Bank and the Bank of Buckingham for the purpose of establishing a bank at Voorhies under the same plan as that at Buckingham and, subsequently, the capital of the Voorhies Bank was increased in the same manner as the Buckingham Bank. After January 12, 1909, there are no records concerning either the Buckingham Bank or Voorhies Bank in the books of the Traer State Bank. July 1, 1926, the Traer State Bank published a semi-annual statement, at the bottom of which was the following:

"Bank of Buckingham—Associated under same management—Farmers Bank of Voorhies.

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*District Court has held that mortgagee can compel redemption by paying delinquent real estate tax.

"Conservative Banks for Conservative People."

It now appears that the Farmers Bank of Voorhies has deposits of approximately $80,000.00 and the Bank of Buckingham deposits of about $100,000.00.

The Cashier of the Traer State Bank supervises and passes on all loans of any size made in the private banks and the Board of Trustees established by the directors of the Traer State Bank select the officers and employees of the private banks.

The stock of the private banks is all owned, * * * by the stockholders in the Traer State Bank and the profits from the private banks are distributed pro rata to the stockholders of the Traer State Bank.

It further appears that the private banks hold themselves out to the public in general as being affiliated with the Traer State Bank and as branches thereof. The Traer State Bank advertises them as branches in the Bankers' Directory and on the semi-annual statement which we have above referred to.

In some instances notes are taken by the private banks on forms of the Traer State Bank and renewals also made in this manner. The private banks also take notes on their own forms. * * *

The directors of the Traer State Bank at the time of the organization of the two private banks owned 374 of the 600 shares of the stock in the Traer State Bank. * * *

With this state of facts presented, you submit the following questions:

"(1). To what extent, if any, does a liability exist against the Traer State Bank to the depositors or other creditors of the two private banks?

"(2). In what position are the stockholders of the Traer State Bank as to liability against them in these private banks, both considering the directors who own 374 of the 600 shares of the capital stock (and who authorized the capitalization of the private banks from the surplus of the Traer State Bank), and the rest of the shareholders, who may or may not have knowledge of the source of the capital used in these private banks?

"(3). If there is a liability against the Traer State Bank, as might be shown under question No. 1 above, what remedial action can be attempted to relieve the bank from such liability?"

This Department has held in an opinion to your predecessor in office, Robert L. Leach, dated May 26, 1923, that branch banking in this State is not permissible. Subsequent to this opinion, the Supreme Court of the United States had occasion to pass upon this very question which, however, arose under the laws of the State of Missouri. This case is the *First National Bank in St. Louis, Mo., vs. State of Missouri*, 68 L. ed. (U. S.) 486. The Supreme Court of the United States holding in the opinion referred to that branch banking may not be carried on as an incidental power to carrying on the general banking business and that express statutory permission must be granted before branch banking may be carried on. This opinion, together with those cited in the opinion of this Department referred to, we believe conclusively determines that branch banking may not be carried on in the State of Iowa.

Under the facts as we have set them out herein, it cannot be disputed but that the Bank of Buckingham and Farmers' Bank of Voorhies are branches of the Traer State Bank. Conducting the branch bank is, therefore, an illegal act on the part of the Traer State Bank.

Section 9235, Code of Iowa, 1924, part of the Banking Code of this State, provides as follows:

"When it shall appear to the superintendent of banking that any savings or

state bank has refused to pay its deposits in accordance with the terms on which such deposits were received, or has become insolvent, or that its capital has become impaired, or it has violated the law, or is conducting its business in an unsafe manner he shall, by an order addressed to such bank, direct a discontinuance of such illegal or unsafe practices, and require conformity with the law."

Section 9238, Code of Iowa, 1924, provides in substance that should the bank fail or refuse to comply with the order of the Superintendent of Banking, that the Superintendent may take charge of the bank for the purpose of liquidation and distribution.

We believe, therefore, that you should direct an order to the Traer State Bank requiring it to cease the practice of branch banking and to completely adjust its affairs in reference to the two branch banks operated by it, in accordance with such plan as, in your opinion, will best protect the interests of the depositors and creditors. Should the Traer State Bank fail or refuse to comply with this order, you should close the bank and take possession thereof as provided by law.

Turning to your second question in regard to the liability of the stockholders and directors of the Traer State Bank, we wish to say that we have examined the decisions of the Supreme Court of Iowa and fail to find that this point has ever been passed upon. However, the Supreme Court of Colorado in the case of *Kipp v. Miller*, 108 Pac. (Colo.) 164, decided in 1910, had occasion to pass upon a very similar situation. It appears that in the cited case, the State bank established branch banks without capital except as furnished by the State bank. Notes were taken by the branch banks, some of which were payable to the State bank and all moneys deposited in the branch banks were used by the State bank as its own. From the profits of the State bank and the branch banks, dividends were declared. This course of business continued for about eight years, the depositors and borrowers in the branch banks knew of the relationship of these banks to the State bank. Action was brought by creditors against the stockholders in the State bank for an assessment under the statutes of Colorado and it was claimed by the stockholders that they were not liable for the indebtedness of the branch banks in that the action of the State bank in organizing the branch banks was ultra vires. The Supreme Court of Colorado held that though the act of the State bank in establishing branch banks was ultra vires, the stockholders of the State bank who shared in the profits of the branch banks with knowledge of the relations, could not escape liability to creditors who in good faith dealt with the branch banks as a part of the State bank. * * *

In regard to the liability of the State Banking Corporation itself, the Supreme Court of Colorado said:

"It is too clear to require discussion that the corporation itself, under these conditions, ought not, and may not be permitted to avail itself of the defense of ultra vires."

A number of cases are cited in the opinion of the Colorado case supporting this proposition, including the case of *Thompson v. Lambert*, 44 Iowa, 239. (See also 7 C. J. 508.)

We are, therefore, of the opinion that the stockholders of the Traer State Bank are liable to the creditors of the branch banks as well as to the credi-

tors of the State bank and that the State Banking Corporation itself is also liable to the creditors of the branch banks.

In your third question you inquire what remedial action should be attempted. We believe we have answered this inquiry in the first division of our opinion.

LEGISLATURE: 1. Where a candidate is elected Representative and dies before he assumes office, there is no vacancy in such office, and the former Representative will hold over for the full term. 2. The House of Representatives, however, may declare a vacancy in such office, and if it does, it then becomes the duty of the Governor to call a special election.

January 10, 1927. *Honorable L. B. Forsling, House of Representatives:* I am in receipt of your request for an opinion relative to the situation as to representation from Appanoose County caused by the death of Representative-elect Scott. An opinion has been given heretofore by former Attorney General Ben J. Gibson to Honorable John Hammill, Governor, a copy of which I attach hereto. In this opinion of Mr. Gibson's I concur.

You request, however, an additional opinion as to the authority of the House of Representatives to act upon the situation created by the death of Representative-elect Scott from Appanoose County. Section 7 of Article III of the Constitution reads, so far as is pertinent to the question propounded, as follows:

"Each house shall choose its own officers, and judge of the qualification, election and return of its own members."

There is no doubt as to the power of the House, under this provision of the Constitution, to itself pass upon the question of whether a vacancy exists in the office of Representative of the 4th Representative District, and if it finds that a vacancy does exist it should so declare by proper resolution, and in that event it would be the duty of the Governor to call a special election to fill such vacancy.

TAXATION: 1—Shares of stock in a bank which surrenders its charter prior to January 1st are not taxable under the capital stock tax, 2—Bank stock is taxed upon the basis of real value less the actual value of real estate legally invested out of the capital stock.

January 11, 1927. *Auditor of State:* This will acknowledge receipt of your favor of January 5th in which you request an opinion of this department upon the following questions:

"1. If the directors of a bank legally vote to liquidate; publish notice to depositors and others having claims against the bank to present same for payment and all depositors and claims are paid in full, and charter sent in for cancellation: is the capital stock liable to assessment for taxes January 1st?

"2. Should the shares of such bank if assessable, be assessed at par value, or at an impaired value if losses have occurred that were not anticipated at time of liquidation?"

If this bank were dissolved and charter cancelled prior to January 1st there would be no assessment of its capital stock as of the date of January 1st as for any one year. Its property would have been distributed to the stockholders and the same would be subject to tax as their individual property.

If the charter has not been cancelled the capital stock would be taxable in accordance with the provisions of Chapter 7002 and 7003 of the Code of Iowa, 1924, which provides that the capital actually invested in real estate owned

by such corporations shall be deducted from the real value of such shares.* In arriving at this real value the elements to be taken into consideration are the matters provided in Section 6997 of the Code of Iowa, 1924, as provided by Section 7001 of the said code, and not the par value of the shares of stock.

COUNTY ATTORNEY—OATHS: County attorney does not have authority under the statute to administer oaths to informations.

January 11, 1927. *County Attorney, Mt. Pleasant, Iowa:* We wish to acknowledge receipt of your favor of the 6th, in which you request our opinion as follows:

"I would like to know whether or not, in your opinion, a county attorney has authority under the law to swear the complainant to the information in Justice Court, by virtue of his office."

The statutes of this State do not specifically authorize the County Attorney to administer oaths to one signing and swearing to an information before a Justice of the Peace. Section 1216, Code of Iowa, 1924, gives limited authority in any matter pertaining to the business of their respective office to all county officers.

Informations of the kind inquired about by you are to be filed before a Justice of the Peace and it is his duty to administer the oaths or affirmation. The information is not to be filed before you and we do not believe it is a part of your official business or the business pertaining to your office to administer oaths or affirmations of this kind.

HIGHWAYS—CONDEMNATION: 1. The appraisers in a highway condemnation proceeding must be residents of the County. 2. It is not necessary that the land owned by said appraisers be located in the county where the condemnation proceedings are had.

January 11, 1927. *Iowa State Highway Commission:* We have received your letter of January 10, 1927, in which you submit to this department, the following inquiry:

"Under the provisions of Section 4610 of the Code of 1924, must the appraisers be residents of and own land in the county in which the land to be appraised is situated?"

Section 4610, reads in part as follows:

"If the Board is unable, by agreement with the owner, to acquire the necessary right of way to effect such change, three freeholders shall be selected to appraise the damages consequent on the taking of the right of way."

So far as we have been able to discover, the Supreme Court has never had occasion to pass upon this exact question, or to determine just what is the meaning of the term "freeholders" as it appears therein.

We are clearly of the opinion that the appraisers must be residents in the county in which the land to be appraised is situated. It could not have been the intention of the legislature that appraisers from other counties should be selected. It is presumed that appraisers residing in the county will be familiar with the values of real estate therein, while appraisers residing elsewhere may or may not be.

It is also our opinion that one owning real estate either in or out of the county may be appointed appraisers under the provisions of the statute in question.

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*See Ch. 23 H. F. 402 Acts 43rd G. A.

The term "freeholder" of course, means one who owns real estate, and as the statute does not limit such freeholder to those who own land in the county in which the land to be taken is situated, we clearly believe that one owning real estate outside of the county may be selected as one of the appraisers, provided of course, he is a resident of the county in which the land to be taken is situated.*

SHERIFF—PRISONERS: Sheriff is entitled to his expenses while conveying prisoners to and from the penitentiary including his meals.

EXTRADITION PROCEEDINGS: The governor does not need to appoint the sheriff as his agent in extradition proceedings.

January 12, 1927. *County Attorney, Sidney, Iowa:* We wish to acknowledge receipt of your favor of the 7th, in which you request our opinion on two questions.

The first question submitted is, in substance, whether or not an agent appointed by the Governor to demand a fugitive from justice from the executive of another state need be the sheriff of the county in which the complaint or indictment is filed, or whether or not the fact that the sheriff was appointed and subsequently went out of office would affect the appointment.

You are advised that the statute does not require the governor to appoint the sheriff or any other particular officer and the appointment made by the governor in the case presented by you would be good even though the appointee subsequently left the office of sheriff.

You next inquire whether or not the Board of Supervisors should allow the county attorney and sheriff expenses for their meals while away from the seat of government on official business. An instance suggested by you is that of conveying prisoners to the penitentiary at Fort Madison.

You are advised that the Board of Supervisors should allow the necessary and actual expenses incurred by the person required to convey prisoners to the penitentiary at Fort Madison, including meals. This is also true of necessary and actual expense incurred by the county attorney while engaged in the performance of his official duties outside of the county.

STATE OFFICIALS—SALARY: State officials receive no additional compensation for January 1, 2 and 3.

January 12, 1927. *Auditor of State:* We wish to acknowledge receipt of your favor of recent date, in which you request our opinion as follows:

"It has been the custom in former administrations of this office to pay from the salary account the auditor and deputy going out of office for January first and second, if the second came on Sunday, and the incoming officers received the balance of the salary for the first month, or one-half month, as the case might have been. * * *"

We find that this question has been passed upon by the Department of Justice in an opinion given February 6, 1922, to Hon. Glenn C. Haynes, who was then Auditor of State. The opinion referred to concerns county officers. However, the statutory provisions upon which the opinion was based are identical with the provisions governing the answer to your request.

Section 512, Code of 1924, provides in substance that the Auditor of State

*See Sec. 4755b-27, Code of 1927, as to primary roads.

shall hold office for a term of two years and Section 1145, Code of 1924, reads as follows:

"Except when otherwise provided, every officer elected or appointed for a fixed term, shall hold office until his successor is elected and qualified, unless he resigns, or is removed or suspended, as provided by law."

These two sections are in substance the same as Section 1072, Supplement to the Code of 1913, referred to in the opinion from this Department to Mr. Haynes.

Sections 1060 and 1177, Supplement to the Code of 1913, referred to in the opinion, are in substance the same as Section 1045, Code of Iowa, 1924. The opinion refers to Section 1289, Code of 1897, which provides for the payment of salaries in monthly installments. This statute is identical with the provisions of Section 1218, Code of 1924.

The Budget Law is found in Chapter 218, Laws of the 41st General Assembly; Section 6 provides in substance that the salaries of the Auditor of State and the various employees of his department shall be at a fixed sum per annum.

Haxing pointed out the fact that the statutes involved are similar, if not identical, we reaffirm the conclusion reached in the opinion of Mr. Haynes, a copy of which is in your files, and hold that the officers in question shall receive no additional compensation and that the officers qualifying on January 3, shall receive the full salaries provided by statute for that particular office and term.

HIGHWAYS: Where freight bills in connection with Federal Aid projects were paid from primary road and primary road bond funds, the amount refunded as excessive payment should have been credited to the funds from which taken.

January 12, 1927. *Iowa State Highway Commission:* This department is in receipt of your communication of the 5th instant in which you state a situation wherein freight bills in connection with Federal Aid Project No. 2, Woodbury County, were paid from primary road and primary road bond funds. It was later found that these bills were overpaid and the railroads refunded the overcharges to Woodbury County, the refund being credited by Woodbury County to county funds.

You request to be advised as to whether these refunds were properly credited or whether they should have been credited to the primary road funds from which they were taken in the first instance. It is the opinion of this department that under the law the money being paid in the first instance from the primary road funds should have been credited back to those funds when received.

COUNTY ATTORNEY—ESCAPE CASES: County attorney is not entitled to additional compensation for the prosecution of escape cases.

January 13, 1927. *Calhoun County Attorney, Manson, Iowa:* We wish to acknowledge receipt of your favor of the 11th, in which you request our opinion in substance as to whether or not the county attorney is entitled to additional fees for prosecution of escape cases.

The statutes provide in substance that prosecutions for escape shall be in the county in which is located the penitentiary, or reformatory, to which the person charged with such escape has been committed or in the county in which is located the building, camp, etc., in which the prisoner is placed. The offense

is an indictable one and under our statutes may be prosecuted by a county attorney's information. In either case, it is the duty of the county attorney in the county where an indictment is returned or the information filed, to appear and represent the State in the prosecution.

There is no provision in the statutes relating to escapes and their prosecution, authorizing an additional fee to the county attorney for the prosecution of such cases. It is clearly one of the duties of the county attorney for which he is paid and we are of the opinion that he is not entitled to additional compensation.

BONDS—DEPOSITORY: 1—Resolution of the county board of supervisors naming a depository bank may be shown by parol, 2—Where such resolution is not made a matter of record the surety on the bond given to secure the deposit is estopped to set up as a defense such irregularity.

January 14, 1927. *County Attorney, Logan, Iowa:* You have requested an opinion of this department upon the following question:

Are the provisions of Section 7404 of the Code of Iowa, 1924, in reference to designation of depository and fixing the maximum amount to be deposited therein enacted for the benefit of the treasurer or the banks and the sureties on their deposit bonds; and whether such designation not made of record may be shown by parol evidence?

It appears that your county board of supervisors in 1923 failed to make a matter of record the resolution designating the bank as a depository and to fix the amount of such maximum deposit though the resolution was in fact made.

We are of the opinion that the resolution may be shown by parol evidence in an action on the depository bond.

We are further of the opinion that the sureties upon suit to enforce the depository bond are estopped to set up as a defense the irregularities you describe. Since by executing and delivering the depository bonds and becoming a party thereto guaranteeing and indemnifying the county, they have waived any irregularities in such manner. Supporting this contention we cite you the following cases:

State vs. U. S. F. & G. Co., 106 Pac. (Kan.) 1040;
Snattinger vs. Topeka, 102 Pac. (Kan.) 508;
Hennepin County Commr. vs. State Bank, 66 N. W. (Minn.) 143;
Myers vs. Board of Commrs., 56 Pac. (Kan.) 11;
Barnes vs. Cushing, 61 N. E. 902;
Fremont County vs. Fremont Bank, 145 Iowa, 8;
Sawyer vs. Stilson, 146 Iowa, 707.

COUNTY ATTORNEY and SHERIFF are entitled to expenses including meals while attending to official business away from the county seat.

January 17, 1927. *Fremont County Attorney, Sidney, Iowa:* We wish to acknowledge receipt of your favor of the 14th, in which you request our opinion in substance as to whether or not the county attorney or sheriff are entitled to be compensated by the county for meals while either or both of such officers are away from their homes engaged in official business, particularly when they are in the county but away from their place of residence.

Section 5228, Code of 1924, fixing the compensation of the county attorney in part reads as follows:

"The county attorney shall also receive his necessary and actual expenses in-

curred in attending upon his official duties at a place other than his residence and the county seat, which shall be audited and allowed by the board of supervisors of the county."

Under the provisions of the statute just quoted, we are clearly of the opinion that the county attorney would be entitled to be compensated for meals while he is engaged in the official business of the county at a place other than his residence and the county seat whether this place be in the county or outside of the county.

You do not state what duties the sheriff is engaged in when he claims the right to be compensated for meals. If it is while engaged in an investigation at the direction of the county attorney or in taking a prisoner to and from prison, he would be entitled to be paid for his meals as well as the other necessary and actual expenses incurred by him for himself and the prisoner.

CITIES AND TOWNS: A city or town council cannot build a storm sewer out of moneys raised by taxation by day labor but must let contract therefor after due notice is given.

January 22, 1927. *Director of the Budget:* You have submitted to this department for an opinion the following question:

May a city or town construct a storm sewer by day labor when the storm sewer is paid by means of a general tax; and is there any minimum limit within which such city may construct such improvement without advertising for bids?

It is provided by statute, Section 6001 of the Code of Iowa, 1924, that whenever the construction or repair of any such street improvement or sewer is ordered the council shall contract for furnishing labor and material for such construction.

It is further provided in Section 10299 of said code that a public improvement is one the cost of which is payable from taxes or other funds under the control of the public corporation except drainage and levee improvements.

We are, therefore, of the opinion that no such improvement may be made without letting the contract with notice as prescribed by statute. Inasmuch as the statute is all inclusive there is no minimum limit for such improvement by day labor.

We are returning herewith your correspondence consisting of two letters from Mr. William J. Higgins and copy of your letter to him of January 14, 1927.

IOWA SOLDIERS' ORPHANS' HOME—PROPERTY OF INMATES COMMITTED TO ORPHANS' HOME: Commitment to State Institution of minor does not supersede guardianship made by District Court.

January 25, 1927. *Board of Control:* I wish to acknowledge receipt of your favor of January 21st, 1927, requesting an opinion of this department upon the following proposition:

"Where children have previously had a guardian of their property appointed by the District Court of their residence and were later committed to the Iowa Soldiers Orphans Home, does the fact that they become wards of the State so operate that the Institution to which they are committed, supersedes the regularly appointed guardian in regard to any property owned by said minors?"

We are of the opinion that Section 3706 wherein the object of the Iowa Soldiers' Orphans' Home is set out and the reason given for same being maintained, would warrant the opinion that in becoming a ward of the State the custody of the person only is given to the Institution.

We are therefore of the opinion that where the guardian has been appointed previous to commitment, by the District Court, the custody of the property remains in the guardian appointed by the District Court and is not superseded by the children being committed to the Soldiers' Orphans' Home.

CLERK OF DISTRICT COURT—BOND OF ADMINISTRATOR: The Clerk of the District Court must approve bonds of administrators and executors and is not relieved from this duty by an approval by the judge.

January 28, 1927. *County Attorney, Cedar Rapids, Iowa:* We wish to acknowledge receipt of your favor of the 25th, in which you inquire in substance whether or not the District Court or a Judge thereof acting in probate matters has power to approve bonds of administrators and executors.

Section 11828 of the Code, 1924, provides as follows:

"All bonds relating to probate matters shall be filed in the office of the clerk of said court, and shall not be sufficient until examined by him, and his approval indorsed thereon."

Section 11832 of the Code, 1924, in part reads as follows:

"The clerk of the district court shall have and exercise within his county all the powers and jurisdiction of the court and of the judge thereof, in the following matters:

1. The appointment, when not contested, * * * and the approval of any and all bonds given by administrators, executors, trustees, and guardians in the discharge of their several trusts."

Section 11887 of the Code, 1924, requires that every executor or administrator, except as otherwise provided shall give a bond before entering upon the discharge of his duties which bond is to be approved by the clerk.

There is no statutory provision authorizing or directing the probate court or judge thereof to approve bonds of this nature. We believe, however, that the judge or court might approve such bonds but that this approval would not relieve the clerk from his duty of also approving the bonds. In other words, the Legislature has seen fit to impose the duty of approving this class of bonds upon the clerk of the court, and we do not believe he can escape or relieve himself of this liability and duty even though the bond is approved by a judge or court.

COST OF TRANSFERRING INMATES—PSYCOPATHIC HOSPITAL: Transfer of inmate of State Reformatory to State Psychopathic Hospital for purpose of parole. Costs not to be taxed to the State.

January 28, 1927. *Board of Control:* In reply to your inquiry made this morning relative to one William Moehle, who is now confined in the State Reformatory at Anamosa and in whose behalf a request has been made to the Board of Control for transfer to the psychopathic hospital at Iowa City, I desire to say that under Chapter 197 of the Code of 1924 there are listed four classes of patients subject to admittance in the State Hospital:

First. Voluntary private patients,
Second. Committed private patients,
Third. Voluntary public patients,
Fourth. Committed public patients.

As I understand it the transfer from Anamosa to Iowa City, if made, is purely a favor on the part of the Board of Control to assist this young man in securing a parole and I believe under those facts that this young man

would fall under class One, voluntary private patient and Section 3963 of the Code of 1924 specifically states that such patients may be admitted in accordance with the regulations but that all charges shall be without expense to the state.

Therefore it is our opinion that at the time an order is made by the Board of Control transferring this party from the Reformatory to the Psycopathic Hospital, that arrangements be made by those interested in his behalf guaranteeing payment of all expense.

LIBRARIES: Library Building Fund may not be used for repairs or additions, but the cost thereof must be paid out of the maintenance fund.

February 1, 1927. *Iowa Library Commission:* We have your letter of January 29, 1927, in which you submit to this department an inquiry submitted to you by the President of the Ames Library Board. The facts were stated by the President of the Board as follows:

"The Ames Public Library finds itself somewhat involved as a result of extensive but necessary repairs and improvements during the last few months.

"The Library law makes no provisions for repairs, but the Library Commission assures us that in other places under similar difficulties the building tax of three mills has been construed to cover repairs also * * *."

Section 6211 of the Code, 1924, as amended provides in part as follows:

"Any city or town shall have power to levy annually, the following special taxes. * * *. 20. Library Building Fund. When the establishment of a public library has been authorized, not exceeding three mills, which shall be used only to purchase real estate *and to erect thereon a building or buildings for a public library*, or to pay the interest on any indebtedness incurred for that purpose and to create a sinking fund for the extinguishment of such indebtedness. * * *."

We think that it clearly appears from the language quoted from the above statute that the taxes therein provided for may be used only for the erection of a library building and may not be used for making necessary repairs and improvements thereon. We think this conclusion is rendered certain by the use of the following language therein:

"When a library building has been fully completed and paid for no further levy shall be made for that purpose. Any balance remaining in the building fund may be transferred to the maintenance fund."

* * * It is clear, therefore, we think, that the cost of making such repairs and improvements must be paid from the maintenance fund.

TAXES: There is no provision for refund of delinquent personal property taxes though the lien thereof is junior to the lien of a pre-existing mortgage.

February 5, 1927. *Auditor of State:* You have requested from this department an opinion on the following question:

"January 6, 1921, a mortgage was given to a certain party encumbering certain property in Lake Mills, Iowa. Subsequent to the execution of said mortgage, personal taxes were levied against owner of said property and same was sold for taxes by the treasurer at tax sale for both real estate and personal taxes. Mortgage was foreclosed and sheriff's deed issued. The mortgagee has redeemed from tax sale to protect his interest.

"Can the mortgagee now claim refund from county for personal taxes included in taxes for which property was sold?"

Since the county had a lien upon the real estate in question for the personal property taxes the treasurer had a right to sell the real estate at tax

sale and was by statute required to sell same for the full amount of delinquent taxes against the owner. Code of Iowa, 1924, Section 7244.

The sale was, therefore, proper and legal. There is no provision for refund of delinquent personal property tax though the lien thereof is junior to the lien of a pre-existing mortgage.

HIGHWAY COMMISSION: Vacancy appointments when General Assembly is not in session terminate thirty days after the convening of next General Assembly.

February 9, 1927. *Governor of Iowa:* You have requested the opinion of this department upon the question of when the vacancy appointments to the State Highway Commission when the General Assembly is not in session and which appointments have not been confirmed, will terminate under the provisions of Section 4624 of the Code, 1924, as applied to the interim appointments made by you prior to the convening of the Forty-second General Assembly.

Section 4624 of the Code, insofar as applicable to the proposition submitted, reads as follows:

"Vacancies occurring while the General Assembly is not in session shall be filled by the Governor, but such appointments shall terminate at the end of thirty days after the convening of the next General Assembly."

The Forty-second General Assembly convened on the tenth day of January, 1927. The rule for the computing of time existing in this state is contained in subdivision twenty-three of Section Sixty-four of the Code. That provision states that in computing time, "the first day shall be excluded and the last day included." It will be noted also that the language in question of Section 4624 of the Code, states that the terms of such appointees shall terminate at the end of thirty days *after the convening of the next General Assembly.* We have carefully reviewed the decisions of the Supreme Courts of this state and other states and find that the rule is well settled that the first day should be excluded in computing time under similar provisions to that in question.

It is therefore the opinion of this department that the interim appointments referred to made under the provisions of Section 4624 will terminate at midnight on the tenth day of February, 1927, as the law now exists.

IOWA STATE BOARD OF EDUCATION: The State Board of Education has the right, with the approval of the Executive Council, to sell five acres of the college land as a site for a memorial building.

February 14, 1927. *Secretary, State Board of Education:* I wish to acknowledge receipt of your communication of the 12th instant in which you request the opinion of this department upon the following proposition:

"Has the Iowa State Board of Education legal authority to sell to the Iowa State College Memorial Union of Ames, Iowa, a piece of land containing not to exceed five acres as a site for the Memorial Building, with the understanding that the said piece of real estate involved in the transaction is not necessary for the educational purposes of the said Iowa State College?"

It is the judgment of this department that under the provisions of Section 3921 of the Code, the Board of Education, with the approval of the Executive Council, would have the right to sell the piece of land in question provided it is first determined by both bodies that the real estate to be sold is not re-

quired to be held by the State College of Agriculture and Mechanic Arts for educational purposes.

TAXATION: Where a part of a farm is located in a school district and the taxes for that purpose was levied against all of said land, the property owner is entitled to a refund of the tax paid on the land which is not located in said school district.

February 17, 1927. *Auditor of State:* We desire to acknowledge receipt of your letter of February 11, 1927, in which you submit to this department the following inquiry:

"A owns a farm a part of which is in consolidated school district and 80 acres of same lays in an independent school district. Commencing with the payment of the 1921 tax paid in 1922 the tax on this entire farm was listed in the consolidated school district. In checking up the current tax for 'A' this error was discovered and the records show that tax was paid each year under the above conditions. The County Auditor has made a correction on the current tax list correcting this error for the 1925 tax.

"Can 'A' claim and collect a refund in the amount of the difference in the tax paid, when same was paid without protest; and the correct tax computed on the levy made for the independent district? In case this refund is allowed should the county treasurer charge the consolidated district with the total amount of tax collected and credit the independent district with the amount of tax that should have been collected?

It is quite apparent that the error described in your letter was not one that could have been corrected by the Board of Review. It did not relate in any way to the value of the property that was assessed, but consisted of the levying of the tax upon the entire acreage owned by the property owner when it should have been levied only upon the 80 acres that was located within the independent school district.

It is the opinion of this department that the taxes levied on the acreage that was not embraced in the independent school district was erroneous, illegal and without any authority of the law, and that such sum should be refunded under the provisions of Section 7235, of the Code, 1924, which reads 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."

The case of *Griswold Land & Credit Co. vs. County of Calhoun*, 198 Iowa, 1240, is ample authority for the rule herein announced. The taxpayer is not now making any complaint about the value of his property, but he is complaining of the levying of a tax upon a portion of his property which was not subject to taxation for school purposes. This matter could not have been remedied by appealing to the Board of Review. The fact that he paid the taxes in ignorance of the fact that the school tax was levied on all of his property will not affect his right to secure a refund. However, the amount refunded should be paid out of the funds belonging to the school district and not any other fund.

See:

Stone vs. Woodbury Co., 51 Iowa, 522;
District Township vs. District Township, 56 Iowa, 85;
Iowa Railroad Land Co. vs. Woodbury County, 64 Iowa, 212;
Dickey vs. Polk Co., 58 Iowa, 287.

TAXATION: A non-resident soldier is entitled to the exemption provided in the taxation statute.

February 17, 1927. *County Attorney, Vinton, Iowa:* We desire to acknowledge receipt of your letter of January 26, 1927, in which you submit to this department the following inquiry:

"Is a non-resident of the state entitled to a soldier's exemption from taxation of property owned by said non-resident in the state? * * *"

The question for our determination is whether or not the soldiers' exemption statute is applicable to a non-resident who owns property in the state. Section 6946 of the Code, 1924, as amended by Chapter 147 of the Laws of the 41st G. A. determines this question. * * *

It will be observed that there is no provision in the above section which limits the application thereof to citizens or residents of the state. The statute is comprehensive in its nature, and was evidently intended by the legislature to cover property in the state owned by ex-soldiers, sailors, or marines as therein described regardless of their residence. We are therefore of the opinion that the exemption therein provided for may be claimed by a non-resident of the state.

All other opinions of this department in conflict with the rule herein announced are hereby overruled by this department.

DELINQUENT TAX LIST PUBLICATION: Publication of delinquent tax list publishing the name of the owner and the description of the property once by the tax for the years 1921-22-23-24 amounts to four publications and is entitled to a fee of 40c for each publication.

February 18, 1927. *Auditor of State:* I am in receipt of your request for an opinion as to the amount which should be paid by the county for the publication of certain items in the delinquent tax list. You specifically request to be advised as to how much the newspaper publishing the following schedule of property would be entitled to receive for the publication:

"Elizabeth Russell, se se ad 6 Lot 1, 14, 72, 18,

1921	.30	.54	.84
1922	.90	.81	1.71
1923	.20	.44	.64
1924	.22	.02	
		.40	.64"

You enclose with your letter a copy of an opinion heretofore given by this Department under former Attorney General Ben J. Gibson.

This Department cannot concur in the opinion of Mr. Gibson. The law provides that 40c shall be paid for each description published in the delinquent tax list. In the instance cited by you it is true that the description of the property itself is only given once but each particular year is set out, the amount of tax, the penalty and the cost of publication, separately, and this constitutes a description, in my opinion, under the statutes in question. In other words, no purpose would be served by a repetition of the description of the same piece of property preceding the year and the amount of tax for each year. The one description of the property serves all of the purposes, both to the county and to the reader, and a repetition of that description for each of the years involved would be a useless setting of type and mechanical work.

In my opinion, therefore, the setting out of each year, the tax therefor, constitutes a separate description within the meaning of the statute and should be paid for at the rate of 40c, or a total of $1.60 for the 4 descriptions which were, in fact, given in the case cited by you.

DENTAL PRACTICE: A corporation can not operate a dental establishment in this state under a name other than that of the owner of the company.

February 22, 1927. *Commissioner of Health:* We wish to acknowledge receipt of your favor of the 10th, in which you request our opinion on the follow-in proposition:

"Complaint has been filed against the Bailey Dental Company of Des Moines, Iowa, as practicing contrary to the provision of Section 2570 Code of Iowa, 1924. The complainants affirms that no company has a right to practice as such. * * * Dr. G. D. Shipherd, President of the Company, called this morning. He informs me that although he is president of the company, he did not practice in Iowa, nor did he have any license to practice dentistry in Iowa. His home is in Omaha, Nebraska, where he does practice and according to his card. * * *

"Dr. Shipherd told me that the work of the local office is done by four dentists, all of whom are registered to practice dentistry in Iowa, and whose names are on the door of the establishment. Dr. Shipherd also told me that this company was incorporated in 1913 under the laws of Iowa, as the Bailey Dental Company of Iowa. * * *

"I should like to have an opinion from you as to whether or not a firm can go under the name of a given dental company and practice dentistry in Iowa. * * *"

Section 2570, Code 1924, to which you refer is contained in Chapter 121, concerning the practice of dentistry. This statute reads as follows:

"No person shall operate any place in which dentistry is practiced under any other name than his own, or display, in connection with his practice, on any advertising matter any other than his own name; but two or more licensed dentists who are associated in the practice may use all of their names, and a widow, heir, or any legal representative of a deceased dentist, may operate such office for a reasonable time for the purpose of disposing of the same."

As suggested by you, this section contained different language in its original enactment as Section 1 of Chapter 309, Laws of the 37th General Assembly. The pertinent part of Section 1 just referred to was as follows:

"It shall hereafter be unlawful for any licensed dentist to operate or conduct, * * *."

It is under the statute last referred to that the prosecution was had in Woodbury County. The Court directed a verdict for the defendant for the reason that the defendant was not a "licensed dentist" within the State of Iowa, but was, in fact, a non-resident of the State and not licensed herein. This statute was changed perhaps in view of the decision of the District Court just referred to, so as to read as we have hereinbefore quoted. It is, therefore, at this time not necessary in order to violate the provisions of Section 2570 of the Code, 1924, that the person operating the place in which dentistry is practiced under any other than his own name be licensed in this State and we are, therefore of the opinion that the dental office referred to in your letter may not be operated under a name other than that of the company or person who in fact operates the same.

The fact that the dental office referred to has been operated under a name other than that of the corporation that in fact operates the same for some time prior to the change in the statutes we have referred to would be immaterial. There is no vested right to practice any profession and the license to do so and its conditions may be subsequently changed without impairing vested rights. It has been held in this State that the right to practice medicine is a mere privilege on the exercise of which the State may impose such conditions as it deems advisable. *State vs. Edmunds*, 127 Iowa, 333. The fact that the con-

cern in question is a corporation does not change the situation. All corporations in this State take their charter with the condition that the Legislature may change or alter the law in respect thereto.

CLERK OF THE DISTRICT COURT is not liable nor are his bondsmen liable for funds deposited by him in a bank that subsequently failed, if the treasurer exercised due care in making the deposit.

February 22, 1927. *County Attorney, Leon, Iowa:* We wish to acknowledge receipt of your favor of the 17th, in which you request the opinion of this Department as follows:

"The matter has been presented to me through the Board of Supervisors of this county as to the liability of the Clerk whose term of office expired January 1, 1927. It seems there is considerable amount of money that has been deposited by the Clerk as Clerk in several banks of this County. That while during his term of office several banks were closed and they are now in the course of liquidation and naturally will not pay but a small percentage of the original deposits. * * *

"There is no provision of the law that authorizes or justifies the Clerk to deposit these funds with the Treasurer of the county so that they would come under the protection of the insurance that is privileged to the Treasurer of the county."

Section 1065, Code 1924, requires that the Clerk of the District Court shall give an official bond. Section 1059 of the Code, 1924, sets out the terms of the bond he is required to give. The terms contained in this section are in part as follows:

"* * * ; that he will exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers, securities, or other property appertaining to his said office, * * *."

Chapter 479 of the Code, 1924, contains the provisions of law regarding the duties of the Clerk of the District Court. Nowhere in the provisions of this Chapter or elsewhere in the Code is there any statute authorizing the Clerk of the District Court to deposit money coming into his hands by virtue of his office in banks.

The authorities in this State are in conflict upon the question of the Clerk's liability and the liability of the sureties on his official bond for funds deposited in banks. The early authorities indicated that the Clerk should be held absolutely responsible for a failure to turn over all funds that came into his hands by virtue of his office. The later authorities and those following the greater weight in this country hold that if an officer charged with the care of public funds deposits such funds in a bank using reasonable care and diligence in selecting the depository, that he would not be liable for the loss of these funds in the event of their theft from the bank or the bank's failure. We have not found any case dealing directly with a Clerk of the District Court. There are a number of cases dealing with city and town treasurers and treasurers of school districts. In the case of *Incorporated Town of Conway vs. Conway*, 190 Iowa, 563, the Court had before it for consideration, the liability of the sureties upon the official bond of the town treasurer. It appeared that the treasurer had deposited funds coming into his hands by virtue of his office in a bank which subsequently became insolvent. The Court at page 565 of the cited case said:

"Were the sureties (on the treasurer's official bond) entitled to preference in payment of the amount owed by the bank to the incorporated town? Sec-

tion 660 of the Code defines the duties of the treasurer of an incorporated town, but contains no provision for depositing in a bank, for safe-keeping, the funds coming into his hands. * * *.

"Notwithstanding such omission, the treasurer had the right to deposit the funds of the town in some bank believed by him, acting as a person of ordinary prudence, to be reasonably safe and trustworthy. (Citing a number of cases.) Negligence in leaving the money with this particular bank is not charged. The contention is that depositing at all was contrary to law, as was held in *District Twp. of Eureka vs. Farmers' Bank of Fontanelle*, 88 Iowa, 194; *Independent District vs. King*, 80 Iowa, 497; and other like decisions. These have been overruled by the cases previously cited. * * *. The deposit was not wrongful; and therefore the bank took the funds, not as trustee, but as money due on demand. (Citing cases)."

In the case of *School Township vs. Henry Stevens*, 158 Iowa, 119, the school treasurer deposited funds coming into his hands by virtue of his office in a bank that failed. The holding of the Court is aptly stated in the syllabus, which is as follows:

"There is no liability on the bond of a township treasurer providing that he shall 'exercise all reasonable diligence and care in the preservation and lawful disposal of all money,' for the loss of funds occurring through the failure of a bank in which they were deposited, in the absence of a showing of negligence of the treasurer in selecting the depository."

The treasurer's bond in the last cited case contained the provisions now required in the bond of the Clerk of the District Court, to-wit:

"That he will hereafter exercise all reasonable diligence and care in the preservation and lawful disposal of all money," etc. (Section 1059, *supra.*)

In the case of *Hunt v. Hopley*, 120 Iowa, 695, it was held that a school treasurer had authority to deposit school funds in a bank for safe keeping. The Court reviews at length the former decisions in this State and the decisions in other states but arrives at the conclusion that the treasurer and his bondsman would not be liable except in the event of negligence on his part in making the deposit. See also *Sawyer vs. Stilson*, 146 Iowa, 707.

Under the provisions of the bond required to be given by the Clerk of the District Court and the decisions of this Court to which we have called attentention, we are of the opinion that the Clerk and the sureties on his official bond would not be liable for the loss of funds which came into his hands by virtue of his office and that were deposited by him in the exercise of ordinary diligence and care in a bank which subsequently failed.

STATE INSTITUTIONS: The State Board of Education has the power under Chapter 93 of the Acts of the Forty-first General Assembly of Iowa to erect a dining hall in connection with dormitories at state institutions under its control and to borrow money for such purpose.

February 25, 1927. *Iowa State Board of Education:* You have requested an opinion of this department upon the following question:

"Has the State Board of Education legal authority under the provisions of chapter 93 to borrow money for the construction of a dining hall for the use of students who live in the dormitories, the said building to be located on the campus and in close proximity to each part of the dormitory group?"

It has long been the practice in this state to erect dormitories for housing students of the various state institutions and to include therein dining halls or cafeterias for furnishing meals to students.

With full knowledge of this practice and policy the Forty-first General As-

sembly authorized the Board of Education to erect such dormitories as may be required for the good of the institutions under its control. Such dormitories under this practice have included dining halls or cafeterias.

The Forty-first General Assembly through Chapter 93, also authorized the Board of Education to borrow the money for the purpose of erecting such dormitories. We are, therefore, of the opinion that the Board of Education has legal authority under the provisions of said Chapter 93 to borrow money to build a dining hall located on the campus and in close proximity to the various wings of the dormitory group. Such facilities would unquestionably work the good of the institution and its location and purpose would bring it within the meaning of the statute cited.

SCHOOLS AND SCHOOL DISTRICTS: The board of education of the school district does not have the authority to pay the expenses of a superintendent or a delegation of teachers or principals to a convention outside the state unless the superintendent is sent as a delegate of the board.

February 25, 1927. *Hon. John Ryder, House of Representatives:* You have requested an opinion from this department upon the following question:

Is it within the authority of the board of education of an independent school district to pay out of the funds of said district traveling expenses including railroad fare, hotel expenses and others of the superintendent of the city schools and a delegation of teachers or principals to attend a convention of teachers held outside of the state of Iowa?

A careful search of the statutes reveals no authority for the payment of such expenses. A school corporation is a creature of the legislature and has, therefore, no authority which is not granted to it. If the superintendent were being sent to represent the board and to gather information or data of value to the board and for its use, the board could pay such expenses for him as its representative or delegate. We are of the opinion, however, that no construction of the statute would permit even for that purpose the payment of the expenses of delegation of teachers or principals for the manifest reason that the purpose of the board would not require any such delegation.

NOMINATIONS for vacancies in the office of state senator. Discussion of method of nomination.

February 25, 1927. *Mr. H. O. Weaver, Wapello, Iowa:* You have requested the opinion of this department upon the question of whether or not a person may be a candidate by petition for the office of state senator in a district where a special election has been called to fill a vacancy.

Your attention is first called to the provisions of Chapter 36 of Title IV of the Code, 1924, which are the provisions of law prescribing the method by which political parties may make nominations for office. This chapter provides for the holding of primary elections in the first instance, to make nominations of candidates to be voted upon by the electors of the state at a regular general election. Said chapter also makes provision for the nominating of candidates for the party conventions in cases of vacancies in nominations occurring after the primary election has been held in any election year. Said chapter further provides, in sections 610 and 611 thereof, that political parties may make nominations for vacancies in the office of state senator to be filled at special elections in a senatorial district convention duly called for that purpose. Thus it will be observed that the method of nominating candidates for

office by political parties under all circumstances is prescribed in said chapter. We especially call your attention to the fact that there is nothing in Chapter 36 of the Code relating to nominations for office by political parties by any other method than those prescribed therein.

Your attention is also called to the provisions of Section 648, the last section in said chapter, which provides that:

"This chapter shall not be construed to prohibit nomination of candidates for office by petition as hereafter provided in this title; but no person so nominated shall be permitted to use the name of any political party authorized or entitled under this chapter to nominate a ticket by primary vote, or that has nominated a ticket by primary vote under this chapter."

It will be noted that Chapter 37 of Title IV of the Code, 1924, has been amended, revised and recodified, and now appears as Chapter 27 of the Acts of the Forty-first General Assembly. These provisions of law by the Forty-first General Assembly provide a method for the nomination of candidates for office by conventions or caucuses of qualified electors representing political organizations which are *not* political parties as defined by the law, and particularly Chapter 36 of the Code, 1924, and also by petition.

It will be observed that Section 17, Chapter 27 of the Acts of the Forty-first General Assembly, provides that nominations for candidates for state senator may be made by nomination paper or papers signed by not less than twenty-five qualified voters, residents of the senatorial district.

Section 20 of said chapter provides that the time and place of filing nomination petitions, the presumption of validity thereof, the right of the candidate to withdraw, etc., shall be governed by the law relating to nominations by political organizations which are not political parties, or in other words, by the provisions of Section 1 to 16 of Chapter 27, Acts of the Forty-first General Assembly.

Therefore it is quite evident, under the provisions of Section 14 of said chapter, that nominating petitions must be filed with the Secretary of State in case of a special election to fill a vacancy in the office of state senator not less than fifteen days before the time of holding such special election.

Thus it will be observed that a candidate may be nominated for any political office in this state either by a political party in the manner prescribed in Chapter 36 of the Code, 1924, or by a political organization not a political party, or upon petition by the required number of qualified voters, as provided in Chapter 27 of the Acts of the Forty-first General Assembly. Thus a person may be nominated by any one of the three methods in either a regular election or a special election.

It is, therefore, the opinion of this department that a qualified person may be nominated by petition as a candidate in a special election to fill a vacancy in the office of state senator, and that when so nominated said candidate will be classed as an independent candidate upon the ballot.

VENEREAL DISEASE. Discussion of right to quarantine for.

March 1, 1927. *Commissioner of Health:* You have requested the opinion of this department on the question of whether a local board of health has the right to quarantine persons infected with venereal diseases. Your attention is called to the provisions of Section 2287 of the Code, which provide that:

"When it shall appear to the local board that any person infected with any

venereal disease is not under the care and treatment of a physician or has not reported to said physician for a period of ten days, or is not taking recognized precautionary measures to prevent the infection of others, said board shall take such measures as it is authorized to take to protect the public health in the case of other communicable diseases dangerous to the public health, except as otherwise provided in this chapter."

It is the opinion of this department that a local board of health may quarantine any person infected with a venereal disease in a communicable stage in the same manner as it would parties infected with any other communicable disease dangerous to the public health.

You ask the further opinion of this department upon the question of whether or not a local board of health has the power to quarantine persons suspected of being infected with venereal diseases, in the same way as if the board had actual knowledge of the existence of such diseases. In this connection your attention is called to the provisions of Sections 2310, 2311 and 2312 of the Code. It is there provided that in all "suspected" cases of venereal disease in the infectious stages, the local board shall make use of every available means to determine whether the person suspected is infected with said disease. It is further provided that the health officer in each city, town or township shall examine every person *reasonably suspected* of having any venereal disease in the infectious stages, to ascertain such fact, provided that no person shall be examined who is under the care of a physician and is taking the proper precautionary measures to prevent the infection of others.

You will observe further that in Section 2312 it is provided that persons *reasonably suspected* of being infected with any venereal disease may be temporarily isolated in the detention hospital provided for by the local board until an examination can be made.

These are the only provisions of law relative to the matter, and we are of the opinion that the local health officer has full power to examine any person whom he has reasonable grounds to believe is infected with a venereal disease in a communicable stage, and when such an examination is made and it is determined that he has a venereal disease in a communicable stage, we believe such person may be quarantined under the authority of Section 2287 of the Code. Of course, if there is a detention hospital established under the provisions of this chapter, such person may be confined there.

SENTENCES—PENITENTIARY SENTENCES: Discussion of law as to computation of good time in case of two sentences.

March 1, 1927. *Warden, Men's Reformatory, Anamosa, Iowa:* You have requested the opinion of this department on the question of whether a prisoner is entitled to have two sentences construed as one or two separate sentences, for the purpose of computing good time allowance, when the prisoner was on parole under the first sentence and was convicted of a second offense while on parole and committed to the penitentiary where he served the full term of his second sentence and then was returned to finish the unexpired portion of his first sentence.

This matter was before the Supreme Court in the recent case of *Kirkpatrick vs. Hollowell*, the opinion being reported in 197 Iowa, 927. The court therein stated that when the prisoner was upon parole under his first sentence during the time he was serving the second sentence and his parole had not been revoked, he was not serving any imprisonment on his first sentence at the time

he was being imprisoned under the second. The term, therefore, could not run concurrently because there was then no imprisonment under the first sentence. The first sentence was suspended and in a sense was in abeyance while the second sentence was being served.

Hence under this ruling of the Supreme Court the two terms would be construed as separate and in computing good time you will consider them as separate sentences and not as one continuous sentence.

BOARD OF CONTROL—HOSPITAL AT IOWA CITY: Discussion of law as to who is liable for cost of transporting children from Feeble Minded School to Iowa City hospital where child is being treated under order of court prior to commitment.

March 1, 1927. *Board of Control:* You have requested the opinion of this department as to whether or not children who have been sent to the School for the Feeble Minded at Glenwood upon the voluntary application of their parents or guardians, and who prior to their commitment to the institution were patients at the hospital of the College of Medicine at the state University, receiving treatment under the provisions of Chapter 199 of the Code, may continue such treatment at the State hospital at the expense of the State, or should the School for the Feeble Minded bear the expense thereof from the time of their commitment thereto.

When any child is sent to the hospital at the State University for medical and surgical treatment by order of court, under the provisions of Chapter 199 of the Code, the expense thereof is paid from the appropriation for that purpose. It is provided, however, in Section 4030 of the Code,—the last section of said chapter, that the Board of Control of State Institutions may send any inmate of any of its institutions to the hospital of the medical college for treatment and care without securing the order of court required in other cases. In such cases the Board of Control is required to pay the traveling expenses of the patient and of the attendant out of the funds appropriated for the use of the institution from which the patient is sent.

You advise us that the children in question had been originally sent to the hospital for treatment by the District Court in the counties of their residence, and that their treatment at the hospital at the State University is being continued under the direction of the authorities at the hospital at Iowa City after they have been committed to the School for the Feeble Minded at Glenwood, You state that these children are sent to Iowa City at the will and call of the hospital authorities, and that they have not been originally committed to the hospital at Iowa City for treatment from the Feeble Minded Institution, but are merely continuing the treatment started prior to their admission into the School for the Feeble Minded. Under the facts as stated, it is the opinion of this department that the School for the Feeble Minded should not be charged with the expenses incident to the treatment of these children, and it is our further opinion that said expenses should be paid in the same manner as they were prior to the commitment of said children to the School for the Feeble Minded.

NEPOTISM: 1. Discussion of the affect and construction of the nepotism statute as apply to an employee whose salary does not exceed $600 per year. 2. The appointment of deputy county officers must be approved by the Board of Supervisors.

March 1, 1927. *County Attorney, Winterset, Iowa:* We have received your letter of February 23, 1927, in which you submit to this department the following inquiry:

"One of our County Officers has appointed her daughter as deputy in which office the deputy would receive a salary of $80.00 a month. The Board of Supervisors, of Madison County, under provision contained in Section 1166 of the Code, of 1924, refused to approve the appointment. The officer still keeps her daughter as deputy and is of the opinion that the last clause in Section 1166 would allow her to draw $600.00 a year regardless of the fact that the Board of Supervisors refused to approve her appointment.

"I would like your opinion as to whether or not this County Officer can keep her daughter as deputy and require the County Auditor to pay her $50.00 a month, or whether the Auditor should refuse to issue her a warrant in any amount."

* * * You will observe that under the exceptions contained in the statute a person without the prohibitive degree may be appointed to an office where the appointee receives compensation at the rate of $600.00 per year, or less. Therefore, the county officer who appointed her daughter as deputy at a salary of $80.00 per month has not done so contrary to the provisions of the Nepotism Statute. However, under the provisions of Section 5238 of the Code, 1924, the Board of Supervisors must approve the appointment of deputy county officers and the number of such deputies must be determined by the Board of Supervisors. Under the provisions of Section 5239, the appointment of deputies must be approved by the Board of Supervisors.

Therefore we think the Board of Supervisors is clearly within its rights in refusing to approve the appointment of the deputy in question.

MOTOR VEHICLES: The penalties provided in Section 5085 for failure to have car registered may be inflicted at any time after the failure to comply with the statute.

March 1, 1927. *County Attorney, Waukon, Iowa:* We have received your letter of February 20, 1927, in which you submit to this department the following inquiry:

"Section 5085 of the 1924 Code provides in substance that 'any person * * * operating a motor vehicle upon the public highways of the state which has not been registered according to law or has not displayed hereon two number plates isused by the automobile department showing the payment of a license fee *for the current year* * * * shall be guilty of a misdemeanor and punished accordingly.'

"In view of section 4931 providing for a monthly penalty of $1.00 for failure to license it would seem as if non-compliance with section 5085 were condoned at least until May when the motor vehicle is to be advertised and sold for nonpayment of license fees. (Sec. 4937).

"The nearest that I have found to aid in answering the above is found on page 1911, 1912 Report of Attorney General, which states that the penalty at that time was $50. (Ch. 72, Sec. 22, 34th G. A.) for running an auto 'on last year's license.'"

Under the provisions of Section 5085 of the Code, 1924, it is made a misdemeanor for any person, manufacturer, dealer or used car dealer to operate a motor vehicle upon the public highway of the state which has not been registered according to law, or has not displayed thereon two number plates issued by the automobile department showing the payment of a license fee for the current year, or which has not displayed thereon, "car in transit"

cards or "license applied for" cards where the same may lawfully be driven with such cards attached. The other section referred to in your letter, Section 4931, provides a monthly penalty of $1.00 for failure to have said car registered. Section 4933 provides that in the first week in May the County Treasurer shall publish in each of the official county papers the names of the delinquents or those who have not registered their motor vehicles. The penalties provided in Sections 4931 and 5085 are not dependent upon each other. Such penalties are separate and distinct, and we believe that any person who fails to register his car under the provisions of Section 5085 is guilty of a violation of such statute, notwithstanding the provisions of Section 4931, and that such prosecution may be had at any time for failure to do so, and it will not be necessary to wait until the 1st of May to institute a prosecution for such violation of the law.

MUNICIPALITIES: A city or town may pay for the lighting of its streets out of the general fund after the special lighting fund is exhausted.

March 2, 1927. *Auditor of State:* We desire to acknowledge receipt of your letter of February 7, 1927, in which you submit to this department a certain inquiry with reference to the right of a town to pay the bills for lighting the streets out of the general fund when the fund for such purpose has been exhausted. The facts from which your inquiry arose are as follows:

About fifteen or sixteen years ago an electric company located at Eldora, Iowa, secured for itself and successors a franchise from the town of Whitten, Iowa, granting the right to furnish the residents of said town with electricity and to light the streets thereof. * * *

The seven mill levy provided for by law for lighting purposes will produce in taxes at the present valuation, between $275 and $290, which is insufficient to meet the minimum fee provided for in the franchise ordinance.

The question submitted is as follows: Whether or not the bills for lighting the streets of the town of Whitten may be paid out of the general fund when the electric light fund has been exhausted.

Section 6211 of the Code, 1924, as amended, reads in part as follows:

"Any city or town shall have power to levy annually the following special taxes:

10. * * * and any town, not exceeding seven mills, which shall be used only to pay the amount due or to become due under any contract for gas light, electric light, heat, or power, including expenses of inspection."

Section 6207 of the Code, 1924, provides as follows:

"The council of each city or town shall levy a tax for the year then ensuing, for the purpose of defraying its general and incidental expenses, which shall not exceed ten mills on the dollar."

It will therefore be observed that the statute provides for a specific levy for the purpose of paying the cost and expenses of street lighting, and that the general fund may be used for the general or incidental expenses of the city.

It has been several times held, by the Supreme Court, that where the finances of a town or city will permit, certain costs of the municipality may be paid from the general fund even though the statutes provide for a specific levy for such purpose. Of course this rule is limited to the expenditure of the general fund for such specific purpose after the fund raised for such purpose by taxation has been exhausted. The following authorities so hold:

Ottumwa Brick & Constr. Co. vs. Ainley, 109 Iowa, 386;
Creston Waterworks Co. vs. City of Creston, 101 Iowa, 687;

Marion Water Co. vs. City of Marion, 121 Iowa, 306;
Shelby vs. City of Burlington, 125 Iowa, 343;
McAllen vs. Hamblin, 129 Iowa, 329;
Collins vs. City of Keokuk, 147 Iowa, 233.

We therefore hold that after the electric light fund is exhausted, the cost of lighting the streets may be paid from the general fund.

CEMETERIES: Unsold lots in a cemetery which are held for sale at a profit are not exempt from taxation.

March 2, 1927. *Auditor of State:* We have received your letter of February 10, 1927, in which you submit to this department a question that was submitted to your office by A. B. Hampton, Township Clerk, Kellerton, Iowa, which reads as follows:

"The Board of Trustees of Athens Township, wish information concerning the following:
"A cemetery in this township, joining the city of Kellerton, owned and operated by private parties, who sell the lots at around $20.00 per lot and do not contribute anything toward the upkeep of said cemetery.
"It is the contention of the above mentioned Board that this land would be subject to taxes and back taxes. * * *"

We believe that under the statement of facts contained in your letter the lots in the cemetery which are owned by private parties and still remain unsold are subject to taxes the same as other property. We draw a distinction between the lots in said cemetery that are now used for burial purposes and the lots that are still retained by the owners thereof for sale at a profit and the owners of which do not contribute anything toward the upkeep of said cemetery. We shall briefly state our reasons for this conclusion.

Section 6944 of the Code, 1924, provides in part as follows:

"The following classes of property shall not be taxed: * * *.
3. Public grounds, including all places for the burial of the dead, and crematoriums with the land, not exceeding one acre, on which they are built and appurtenant thereto, so long as no dividends or profits are derived therefrom.
7. All grounds and buildings used by cemetery associations and societies for cemetery purposes."

It will be observed that the above portion of the statute exempts places for the burial of the dead only when they are used for burial purposes and so long as no dividends or profits are derived therefrom. Manifestly, where a cemetery is laid out by private parties and lots are held for sale at a profit and the proceeds of such sale are not used for the upkeep or care of the cemetery, the portions thereof that are still held for sale are not exempt from taxation under the provisions of the above statute. It is our opinion that the 7th subdivision of Section 6944, does not apply to the question submitted because the cemetery referred to in your letter is not owned by a cemetery association but by private parties who hold the unsold lots for sale at a profit. The following authorities fully support this construction of the statute.

Mulroy vs. Churchman, et al., 52 Iowa, 238;
Simcock vs. Sayre, 148 Iowa, 132.

In the latter of the two cases above cited, the statute under the consideration therein was in substantially the same language as that contained in the present statute. The syllabus of said case is as follows:

"The unsold lots of a burial ground held and owned by a private individual

for sale at a profit are not exempt from taxation under the provisions of the statute exempting public grounds, including places for burial of the dead, from which no dividend or profits will be derived; nor is there an implied exemption of the same growing out of any question of public policy."

That authority governs in the determination of the question under consideration. It is therefore our opinion that the unsold lots in the cemetery referred to in the letter of the township clerk are not exempt from taxation under the present statute.

FISH AND GAME—FURS: Furs lawfully in the possession of a dealer in this State may be transported out of the State during the closed season of the animals from which the fur was taken.

March 2, 1927. *State Game Warden, Fish and Game Department:* We wish to acknowledge receipt of your favor of the 23rd, in which you request our opinion as follows:

"In your opinion would it be permitted for fur dealers in this state who have acquired furs legally taken in another state, to ship such furs from this state to another market, although there was at the time of the shipment, a closed season on such fur bearing animals in Iowa."

Section 1766 of the Code, 1924, as amended by Chapter 37, Laws of the 31st General Assembly, are the only provisions covering the handling of furs in this State.

We assume that the fur you refer to is that from animals named in these sections. Otherwise, there is no statutory restriction whatever. Assuming the fur to be that from animals named in the statute, we are of the opinion that they do not prohibit a dealer who has lawfully acquired and has in his possession furs in this State, from shipping the same to another State even though the shipment is during the closed season on the fur bearing animals.

MOTOR VEHICLES: There is no provision in the statute requiring the Secretary of State to report to the Board of Supervisors the name and number of all motor vehicle registrations.

March 4, 1927. *Secretary of State:* You have requested the opinion of this department upon a proposition submitted to you by Fred W. Buser, Treasurer of Des Moines County, on the following proposition, as stated by him:

"The board has passed a resolution demanding of me a report of all registrations for each month in the future in detail as to names, number assigned, etc."

As I understand this proposition, this report has nothing to do with the receipts in the treasurer's office, and is not for the purpose of checking the department. There is no provision in the statute for any such report, as is suggested by the treasurer, to be made to the board of supervisors requiring him to give the name and number assigned to persons whose motor vehicles are registered.

CORONER: The coroner may hold a secret inquest.

March 7, 1927. *County Attorney, Boone, Iowa:* Wish to acknowledge receipt of your oral request for an opinion as to whether or not a coroner may have a secret hearing or inquest.

Chapter 260 of the Code 1924 contains the provisions in regard to a coroner's inquest and it will be noted that nowhere is there a requirement that the inquest shall be public.

We are of the opinion that the coroner has a right to conduct an inquest the

same as any other court, has a right to conduct its affairs and such inquests may be secret if the coroner so elects.

CRIMINAL LAW: Costs in a criminal action are not part of the judgment for which the defendant is to serve time.

March 10, 1927. *County Attorney, Sioux City, Iowa:* We wish to acknowledge receipt of your favor of the 2nd, in which you enclose a letter from H. W. Henderson, Clerk of the District Court of your county, requesting an opinion as to the costs in a criminal action.

You are advised that the costs in a criminal action are not a part of the judgment for which the defendant is required to serve time in jail and that, therefore, the service by the defendant of a jail sentence would not release a judgment for costs.

TAXATION—CREAMERY COMPANY: Butter and butter fat manufactured by a creamery come under the provisions of Sections 6975 and 6976, Code, 1924, in reference to the assessment of manufacturers.

March 10, 1927. *County Attorney, Vinton, Iowa:* We wish to acknowledge receipt of your favor of the 17th, in which you inquire concerning the assessment of a creamery company.

You state that the assessor has been in the practice of assessing this company upon the butter manufactured by them and that the company objects to being assessed on this produce.

We are of the opinion that a creamery company engaged in the manufacture of butter and other butter fat products comes under the provisions of Sections 6975 and 6976, of the Code, 1924, in reference to the assessment of a "manufacturer" and should, therefore, be assessed upon the average value of the materials which enter into the manufactured product as is provided in the statutes referred to.

GASOLINE—DISCRIMINATION—OIL COMPANIES: An oil company has authority to lower its price for the sale of gasoline to meet the price of a competitor selling on contract.

March 10, 1927. *Hon. Leonard Simmer, House of Representatives:* We wish to acknowledge receipt of your favor of the 9th, in which you request our opinion on the following proposition:

"The Wapello Oil Co. of Ottumwa, Iowa, enters into a contract with customers charging said customers $2.50 advanced profits and in consideration of said advanced profits, agrees to sell to said customers gasoline at 2c under the normal prevailing station price.

"The Standard Oil Company and other large companies have met this competition in price, but without the charge of the $2.50 advanced profits to the customers.

"Now the question is, have they met the competition of the Wapello Oil Company when they sell their gasoline at the same price that the Wapello Oil Company does to its customers, when they have not charged $2.50 to the customer for that privilege. * * *"

The anti-discrimination statute prohibiting the unlawful discrimination in sales of commodities in section 9885, Code 1924. This statute after prohibiting discrimination in sales between different sections, localities, or communities, contains the following exceptions:

"* * *; provided, however, that prices made to meet competition in such sec-

tion, locality, community, city or town shall not be in violation of this section."

From the facts stated in your request, we are of the opinion that any oil company in competition with the Wapello Oil Company might reduce the price of gasoline to meet the price made by the Wapello Company to its contract customers and that this practice would be within the exception just quoted to section 9885 or in other words, would be to meet competition.

CONTRACTS—PUBLIC BUILDINGS: In contracts for the erection of public building a banker advancing money to the contractor with which to pay his pay roll does not entitle the banker to the benefits of section 10305, it not being labor performed, material furnished, or service or transportation within the meaning of that section.

March 10, 1927. *Auditor of State:* We wish to acknowledge receipt of your favor of the 8th, in which you request our opinion on the following proposition:

"We have on file in this office a sworn statement from the Commercial State Bank at Independence, Iowa, in the amount of $650.00 against O. H. Keeler, contractor for the new barn at the Independence state hospital.

"This was filed under Chapter 452, Section 10305, Code of 1924. The letter enclosed with the statement reads, 'that the money was advanced for labor to O. H. Keeler on the Independence state hospital barn. * * * "

"The question that I wish to ask is, does this claim for money furnished to O. H. Keeler to pay labor on the hospital barn come under the provisions of Chapter 452, Section 10305, Code of 1924, or not? * * * "

Section 10305, Code 1924, to which you refer, reads as follows:

"Any person, firm, or corporation who has, under a contract with the principal contractor or with subcontractors, performed labor, or furnished material, service, or transportation, in the construction of a public improvement, may file, with the officer authorized by law to issue warrants in payment of such improvement, an itemized, sworn, written statement of the claim for such labor, or material, service, or transportation."

It is to be noted that this statute is an amendment and recodification of the law as it existed in Section 3102, of the Code, 1897. The section last referred to was contained in the chapter on mechanics' lien. This statute in the amendments from time to time has always carried the idea that it was for the purpose of protecting subcontractors or those performing labor and furnishing material or transportation on the job.

The transaction of which you inquire appears to have been an advancement or loan made by the bank for the benefit of a contractor, the money being used to meet the payroll. Clearly, the bank did not "perform labor, or furnish material, service, or transportation" on the public improvement in question and we are of the opinion that they are not entitled to come within the provisions of this statute.

MUNICIPALITIES—PEDDLERS: Municipalities may not require a peddler to pass a physical examination as a conditional precedent to the issuance of a license.

March 11, 1927. *Auditor of State:* We have received your letter of February 11th, 1927, in which you submit to this department the following inquiry:

"Would it be legal for the City Council to pass a resolution requiring each peddler and canvasser to pass a physical examination and submit a certificate that he is clean and not contaminated with a contagious disease?"

The authority to regulate and license peddlers is contained in Section 5743 of the Code, 1924, and reads in part as follows:

"They shall have power to regulate and license: * * *
"3. Peddlers, house movers, bill posters, itinerant doctors, itinerant physicians and surgeons, junk dealers, scavengers, pawnbrokers, and persons receiving actual possession of personal property as security for loans, with or without a mortgage or bill of sale thereon."

At the out-set it may be well to refer to the fact that under the law all ordinances must be reasonable, fair and within the power granted by the legislature. It was so held in the following cases:

Meyers vs. C. R. I. & P. Ry. Co., 57 Iowa, 555;
State Center vs. Barenstein, 66 Iowa, 249;
Burg vs. C. R. I. & P. Ry. Co., 90 Iowa, 106;
Des Moines vs. Des Moines Water Works Co., 95 Iowa, 348;
Ottumwa vs. Zekind, 95 Iowa, 622;
Burlington vs. Unterkircher, 99 Iowa, 401;
Swan vs. City of Indianola, 142 Iowa, 731.

It is also the law that where a city is authorized to impose a license on trades and occupations such regulations are required to be reasonable and fair and not oppressive. *Iowa City vs. Glassman*, 155 Iowa, 671. However, the presumption is that an ordinance is reasonable and valid. *Burlington vs. Unterkircher*, 99 Iowa, 401; *Snoffer vs. C. R. & M. C. R. R. Co.*, 118 Iowa, 287; *Iowa City vs. Glassman*, 155 Iowa, 671.

We will now turn to the provisions of the statute for the purpose of discussing whether the proposed ordinance in question is a reasonable, fair and valid exercise of the authority therein granted. It will be observed that the power granted in Section 5743 is to regulate and license. Therefore, if the proposed ordinance does not come within the definition of the term "regulate" then the power to enact such an ordinance does not exist. The courts have been frequently called upon to define the word "regulate". In a general way the word "regulate" has been defined by the courts as follows:

"To regulate means to adjust by rule, method or established mode; to direct by rule or restriction; to subject to governing principles of law."

State vs. McConn, 77 Tenn. 1 (13);
Auto Gas Eng. Works vs. Hare, (Kans.) 67; 67 Pac. Rep. 444;
Weadock vs. Judge of Recorder's Court, 156 Mich. 376; 120 N. W. 991.

Therefore does the requirement in the proposed ordinance clearly come within the meaning of the word "regulate"? We are constrained to hold that it does not.

The requirement in the proposed ordinance that a peddler and canvasser must pass a physical examination and submit a certificate that he is clean and not contaminated with a contagious disease, is not a regulation of the business of peddling in any sense, but is clearly an attempt to regulate the habits of the peddler. To regulate business means to prescribe the amount of license that may be paid, or the conditions under which he may peddle or canvas, or the manner of conducting the business. The provisions of the ordinance in no sense regulate the business of peddlers and canvassers, but prescribes the conditions that must be met to entitle the peddler to a license, which has no direct relation to the business of peddling.

Therefore, it is the opinion of this department that an ordinance containing the provision in question would clearly be invalid.

TAXATION: Discussion of the taxation of the property of a manufacturing establishment.

March 12, 1927. *Auditor of State:* We have received your letter of March 8, 1927, in which you submit to this department a certain inquiry submitted to your office by Mr. Horning, one of the examiners, with regard to the assessment of property owned by the J. H. Morrell & Company in Ottumwa. The letter of Mr. Horning is as follows:

"* * * The J. H. Morrell Company own approximately 120 acres of land; 83 of which are within the city limits of Ottumwa; and 37 outside in Center township. Of the 83 acres within the city limits of Ottumwa, the buildings occupy about 40 acres. The 83 acres within the city limits, including the buildings, are charged with a millage of 150.31, which is the city mixed for agricultural lands. The regular city levy is 188.76 mills. The question is: Should the 83 acres within the city limits of Ottumwa, including the buildings, be classed as agricultural lands? The personal property of the J. H. Morrell Packing Company bears the regular city levy of 188.76 mills. They claim to have an opinion holding that packing plants should be assessed as agricultural lands. I have not seen the opinion, and do not feel that their contention is right."

It is the opinion of this department that the property owned by the J. H. Morrell Company should be assessed under the provisions of the statute relating to the assessment of property owned by manufacturers. The provisions of the statute relating thereto are as follows:

"Any person, firm, or corporation who purchases, receives, or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, refining, purifying, combining of different materials, or by the packing of meats, with a view to selling the same for gain or profit, shall be deemed a manufacturer for the purposes of this title, and shall list such property for taxation."

Section 6975 of the Code, 1924.

"Such personal property, whether in a finished or unfinished state, shall be assessed at its average value estimated upon those materials only which enter into the combination, manufacture, or pack, such average to be ascertained as in section 6972."

Section 6976 of the Code, 1925.

"Machinery used in manufacturing establishments shall, for the purpose of taxation, be regarded as real estate."

Section 6977 of the Code, 1924.

"Corporations organized under the laws of this state for pecuniary profit and engaged in manufacturing as defined in the third preceding section shall list their real estate, personal property not hereinbefore mentioned, and moneys and credits in the same manner as is required of individuals."

Section 6978 of the Code, 1924.

It will therefore be observed that the property belonging to manufacturing corporations must be assessed in the following manner.

First: Real estate in the same manner as is required of individuals.

Second: Personal property not used in the process of manufacturing in the same manner as is required of individuals.

Third: Moneys and credits must also be assessed in the same manner as is required by individuals.

Fourth: Machinery as real estate.

Personal property however, used in the process of manufacturing, refining, purifying, combining of different materials, or the packing of meats must be assessed as provided in Section 6976, that is, shall be assessed at its average value estimated upon those materials which entered into the combination,

manufacture, or pack, such average to be ascertained as in Section 6972. Section 6972 provides:

"The assessment shall be made at the average value of the stock during the year next preceding the time of assessment, and if the merchant has not been engaged in business for one year, then the average value during such time as he shall have been so engaged, and if commencing on January first, then the value at that time."

The assessments on meats in process of packing should, therefore, be assessed in the manner just detailed. If, however, the said Company owns ten acres or more of land within the city limits of Ottumwa, which is used exclusively for agricultural purposes, subject to the limitations prescribed in the statute (Sec. 6210), such land is not subject to assessment of taxes for city purposes.

Therefore, the assessment on the property of the J. H. Morrell Company, including the buildings, as agricultural lands is manifestly erroneous.

SCHOOLS—TEACHERS: 1. The holder of a primary teacher's certificate as provided in Section 3865 is not qualified for the office of County Superintendent.

March 14, 1927. *Superintendent of Public Instruction:* We desire to acknowledge receipt of your letter of March 5th, 1927, in which you submit to this department the following inquiry:

"Does a primary teacher state certificate meet the certificate requirements for holding the office of county superintendent?"

The statute prescribing the qualifications of a county superintendent is Section 4097 of the Code, 1924, and reads as follows:

"Such superintendent may be of either sex, shall be a holder of a regular five year state certificate or life diploma, and have had at least five years' experience in teaching or superintending; but anyone now serving shall be deemed eligible to reelection."

It will be observed that a county superintendent must be the holder of a regular five year state certificate or life diploma.

Section 3865 of the Code, 1924, provides for the issuance of a certificate to a primary teacher and reads in part as follows:

"The board of educational examiners may issue a special certificate, * * * to any primary teacher, of sufficient experience, who shall pass such examination as the board may require in the branches, and methods pertaining thereto, for which the certificate is sought. Such certificate shall be designated by the name of the branches and shall not be valid for any other department or branch. The board shall keep a complete register of all persons to whom certificates or diplomas are issued."

It is our opinion that the certificates issued to primary teachers under the provisions of the above section are not such certificates as are designated in section 4097, prescribing the qualifications of County Superintendents. The certificates or diplomas referred to in said section 4097 are such as are issued under the provisions of section 3863, which reads as follows:

"The board 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."

Section 3864 of the Code, 1924, prescribes the subjects which must be covered by the examination of those who secure a state certificate or a state diploma. We are, therefore, of the opinion that a certificate to a primary teacher issued by the State Board of Educational Examiners does not qualify

a teacher for the office of County Superintendent, but that the certificates and diplomas therein referred to are such as are covered by Sections 3863 and 3864.

FOREIGN CORPORATIONS—TAXATION: Foreign corporations owning property in this state are subject to taxation upon the property and stock owned by residents of this state in foreign corporations is subject to taxation in the hands of the stockholders under the provisions of chapter 332 of the Code, 1924.

March 15, 1927. *Examiner for the Executive Council:* We wish to acknowledge receipt of your favor of the 14th in which you request our opinion as follows:

"I desire your opinion as to whether stock of a corporation incorporated in another state should be assessed when the stock is invested in property within this state and which is assessed therein as other property? Also to whom assessed under such conditions when the stockholders reside within the state?"

We wish to call your attention to the provisions of Section 6953 of the Code, 1924, particularly paragraphs six and seven thereof, wherein it is provided:

"6. Property situated in this state belonging to any bank or company, incorporated or otherwise, whether incorporated in this or any other state.
"7. Corporation shares or stocks not otherwise assessed or excepted."

This statute enumerates what property is taxable and under the provisions thereof it is plain that if a foreign corporation owns property in this state, that property is subject to taxation the same as any other property of a like character. If the stock in such a foreign corporation is owned by a resident of this state, the stock is also subject to taxation, under the provisions of Chapter 332 of the Code, 1924. The stock should be assessed to the stockholder and the property assessed to the corporation.

TAXATION—INSURANCE: A Policy of life insurance is not subject to taxation.

March 15, 1927. *Auditor of State:* We have received your letter of January 28, 1927, in which you submit to this department the following inquiry:

"Is the loan value on a life insurance policy subject to taxation?"

At the outset we are confronted with the rule of law that taxation is the rule and exemption the exception, and that unless property is specifically exempted from taxation by the statute it is subject to taxation.

Beers vs. Langenfeld, 149 Iowa, 581.

We do not find any statute that specifically exempts life insurance policies. If the loan values of insurance policies are taxable at all they must be so taxed because they are credits within the meaning of Section 6984 of the Code, 1924. This statute reads as follows:

"The term credit, as used in this chapter, includes every claim or demand due or to become due for money, labor or other valuable thing, every annuity or sum of money receivable at stated periods, and all money or property of any kind secured by deed, title bond, mortgage, or otherwise; but pensions of the United States or any of them, or salaries, or payments expected for services to be rendered are not included in the above term."

Analyzing this section we find that the following are included within the definition of the term credit:

1. Every claim or demand due or to become due for money, labor or other valuable thing.

2. Every annuity or sum of money receivable at stated periods.

3. And all money and property of any kind secured by deed, title bond, mortgage or otherwise.

We are of the opinion that the loan value of an insurance policy does not come within any of the above designations of credits. A mere consideration of the purpose of such policies will, we believe, show the correctness of this conclusion. A policy of insurance is in no sense a debt or credit or claim or demand due or to become due, nor is it an annuity or sum of money receivable at stated periods, and it is also apparent that it does not constitute money or property secured by deed, title bond, mortgage or otherwise. Such contracts are strictly for indemnity, and are ordinarily not payable until the death of the one whose life is insured. While under some conditions the insurance company will pay or give credit for certain sums before they become due and payable, yet we clearly think they do not come within the designation or definition of credits as defined in the statute and we so hold.

The following authorities, while not strictly in point, have a tendency to support our conclusions. They do not involve the same question, but by analogy we believe they support the rule just stated.

Taxation of Life Insurance Policies, 17 Pa. Co. Ct. Rep. 183;
Cooper vs. Board of Review, 207 Ill., 472;
Fidelity Mut. Ins. Co. vs. Fitzpatrick, (La.) 136 Am. St. Rep. 358;
Board of Assessors of the Parish of Orleans vs. N. Y. Life Ins. Co., 216 U. S. 517;
Ky. & Louisville Ins. Co. vs. Commonwealth, 156 S. W. 897;
Association of Life Ins. Counsel Proceedings 1913-1921, p. 47.

It is therefore our conclusion that such policies are not taxable.

TAXATION: A non-resident may claim soldier's exemption from taxation. 2. The soldier may select the property that he claims is exempt whether located in the county where he lives or elsewhere in the state.

March 15, 1927. *County Attorney, Charles City, Iowa:* We desire to acknowledge receipt of your letter of March 7, 1927, in which you submit to this department the following inquiry:

"Your department has recently handed down an opinion that a soldier in order to be entitled to tax exemption must be a resident of the state of Iowa. Question has now arisen as to whether a soldier whose actual residence is in some other county of the state of Iowa can claim exemption on property situated in this county. In this county we have allowed exemption to a soldier residing in Chickasaw County, Iowa. This man has property in Chickasaw County and also in this county. The property here consists of a farm in Riverton Township. The exemption allowed by law has been deducted from the assessment on said farm. This hypothetical question will, I believe, tend to clarify my inquiries above."

On February 17, 1927, this department prepared an opinion from Hugh Mossman, County Attorney of Benton County, in which it was held that the exemption from taxation provided in Section 6946 of the Code, 1924, as amended by Chapter 147 of the laws of the Forty-first General Assembly, applied to non-resident soldiers as well as resident soldiers, and that all opinions prepared by this department in conflict with the rule therein announced were overruled. A copy of that opinion is hereto attached, and made a part hereof, and should be read in connection with this opinion.

While we are of the opinion that the soldier may make the selection of the property that he claims as exempt, under the statute, whether located in the

county where he resides or elsewhere, yet we believe the better practice is for such soldier to claim the exemption of property located in the county where he resides. However, we are clearly of the opinion that he may select any property that he owns for exemption under the statute.

TAXATION—BANKRUPTCY: It is not necessary for the county treasurer to file a claim against the bankrupt estate. 2. It is the duty of the bankruptcy court to order the tax paid. 3. The discharge of the bankrupt does not release or bar the claim for tax. 4. The making of a composition does not release the claim of the tax.

March 15, 1927. *County Attorney, Washington, Iowa:* We have received your letter of February 1, 1927, in which you submit to this department certain inquiries which you state as follows:

" * * * One Carr owned several hundred acres of land and considerable live stock, all of the real estate being heavily encumbered by mortgages and in November, 1921, he was adjudged bankrupt and the personal property was put in the hands of E. C. Eicher, trustee for the benefit of the bankrupt estate.

"Thereafter, and on January 1, 1922, delinquent personal taxes were levied against A. B. Carr but no claims in bankruptcy was ever filed therefor nor was any claim made against the property in the hands of the trustee. Composition was made whereby all of the land with the exception of some 400 acres was deeded to two men as trustees for certain unsecured creditors and the matter at this stage passed out of the bankruptcy court and the composition was approved by the bankruptcy court and it was ordered that all claims not filed within the year be barred and subsequent thereto an order of discharge was entered at the end of the year.

"The trustees for the certain unsecured creditors last referred to took only real estate and all of the personal property was turned over to Carr, and the trustees later and in order to avoid the foreclosure was compelled to deed over to the mortgage holders all the real estate in their hands.

"Subsequently the treasurer changed the assessment of personal property tax from Carr to McLaughlin & Cunningham trustees, and this of course appears as a cloud on the title of the owners of the various portions of the real estate. They have requested that this erroneous assessment be cancelled: (1) Because it is void as to the trustees in bankruptcy because not filed and proved as a claim. (2) Because there was ample personal property in the hands of the trustees in bankruptcy and that the land is only secondarily liable. (3) That the lien of the mortgage antedated the lien of the personal property tax."

While you have submitted to this department three inquiries we deem it advisable or necessary to pass upon only one of them, and in doing so we shall discuss three phases thereof. They may be stated as follows:

1. Is it necessary for the officer charged with the duty of collecting the tax to file a claim against the bankrupt estate?
2. Does the discharge of the bankrupt release or bar the claim of the tax?
3. What is the effect of a composition upon the rights of the public so far as the collection of the taxes is concerned?

It is provided in the Act of July 1, 1898, C. 541, Sec. 64 as amended; Act of Feb. 5, 1903, C487, Sec. 14; Act July 15, 1906, C. 3333, Sec. 9648 of the U. S. Compiled Statutes 1916, as follows:

"Debts which have Priority.—a—That Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payments of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

Under the provisions of the above statute it has been held that taxes need not be sworn to or no formal proof of claim is required, though of course, the tax authorities may appear and take action to compel the trustees to pay the taxes. It is the trustees' duty to search for taxes and his only necessary voucher is the ordinary receipt for taxes.

Standard vs. Dayton, 220 Fed. 441;
In Re Kallek, 147 Fed. 276;
Hecox vs. County of Teller, 198 Fed. 634;
In Re Prince & Walter, 131 Fed. 546;
In Re Harvey, 122 Fed. 745;
In Re Fisher & Co., 148 Fed. 907.

In the opinion of the court in the case of *In re Kallek*, we find the following language:

"It is not necessary for the public authorities to appear in a court of bankruptcy as ordinary claimants. They have no right in the administration as creditors, and no voice in the relation of trustee, and the liability for taxes is in no way affected by the discharge of the bankrupt. On the other hand, the duty of affirmative action rests upon the court of bankruptcy. It is the duty of the trustee to ascertain from the public records the amount due for taxes and bring the matter to the attention of the court, and thereupon it is the duty of the court to order their payment if there are sufficient funds in the estate for that purpose."

2. The Act of July 1, 1898, C. 541, Sec. 17, as amended, Act Feb. 5, 1903, C. 487, Sec. 5, (Sec. 9601 of the U. S. Compiled Statutes 1916), provided as follows:

"Debts Not Affected by a Discharge.—a—A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides; * * * *."

It has been held that subject to the exception specified in this section, which of course, includes taxes, a discharge in bankruptcy releases the debtor and his after-acquired property from all debts and liabilities which were provable in bankruptcy and which existed at the commencement of the proceedings.

A. Klipstein & Co. vs. Allen-Miles Co., 136 Fed. 385;
Ruhl-Koblegard Co. vs. Gillespie, 61 W. Va. 584;
In re Amer. Vac. Cleaner Co., 192 Fed. 939;
Nelson vs. Petterson, 229 Ill., 240;
Alling vs. Strake, 118 Ill. App. 184;
Drake vs. Vernon, 26 S. Dak. 354;
Thornbrugh vs. Madren, 33 Iowa, 380;
Magoon vs. Warfield, 3 G. Greene, 293;
Talbott vs. Suit, 68 Md. 443;
Withers vs. Stinson, 79 N. C. 341.

The authorities cited in the first subdivision of this opinion also support this rule. We are therefore, clearly of the opinion that the discharge in bankruptcy did not bar the right of the state or county to collect the taxes due from the bankrupt.

3. We now reach the final question, that is, what is the effect of a composition upon the right of the state to collect the taxes?

The courts have repeatedly held that the confirmation and performance of a composition operate as a discharge by operation of law and release the bankrupt from all of his debts which would be barred by a discharge, and in like manner terminate all remedies of creditors for the enforcement of their claims against either the bankrupt or his property.

In re Bjornstad, 5 Fed. 791;
Taylor vs. Skiles, 113 Tenn. 288;
Harrinson vs. Gamble, 69 Mich. 96;
Denny vs. Merrifield, 128 Mass. 228;
Turner vs. Hudson, 105 Me. 476.

It is well settled that an action on a debt or claim will not be barred by composition proceedings if it would not be discharged by the discharge of the debtor in bankruptcy.

Wilmot vs. Mudge, 103 U. S. 217;
Bayly vs. Washington & Lee Un., 106 U. S. 11;
Zavelo vs. J. S. Reeve & Co., 171 Ala. 401;
Mudge vs. Wilmot, 124 Mass. 493;
In re Kallek, 147 Fed. 276.

It is therefore quite apparent that as the claim for taxes is not barred or released by the discharge of the bankrupt, the confirmation and performance of a composition will not operate as a discharge of the claim for the taxes.

Therefore, the public authorities may avail themselves of any remedy provided in the statute for the collection of the tax due from the bankrupt.

COUNTIES—TOWNSHIPS: 1. Damages or claims resulting from the establishment of a township road may not be paid from the township fund. 2. Such damages must be paid out of the general county fund.

March 15, 1927. *Auditor of State:* We have received your letter of March 7, 1927, in which you submit to this department the following inquiry:

"Has the board of supervisors or the county auditor authority to pay damages or claims for the establishment of a township road from the county road fund or any other county fund?"

On January 26, 1927, an opinion was prepared by this department for your office, in which it was held that damages or claims resulting from the establishment of a township road may not be paid from the township fund. A copy of this opinion is attached hereto, and should be read in connection with this opinion.

Section 4635 of the Code, 1924, as amended by Chapter 6, of the laws of the Forty-first General Assembly, reads in part as follows:

"The board of supervisors shall, annually, at the September session of the board, levy the following taxes:

"1. County Road. A county road tax of not more than one mill on all the taxable property in the county.

"One half of the county road fund arising from the property within a municipality shall be paid over by the county treasurer to the treasurer of the municipality in the same manner as other municipal taxes and shall be expended by and under the direction of the council or commission, only on roads and streets within such municipality, which are continuations of such roads as are main arteries of travel leading to such municipalities.

"2. County road building. A county road building tax of not more than two mills on the taxable property in the county.

"The proceeds of such levies, except such amount thereof as is paid to the municipalities, shall be kept as a county road fund and shall be used, except as otherwise provided, solely for the purchase of road tools, machinery and equipment for the drainage of roads, for filling over culverts and bridge approaches, for the elimination of dangerous railroad crossings in both county and township roads, and for work on the county system."

It will be observed that there is no provision in the above statute making the county road tax or the county road building tax subject to use for paying

damages resulting from the establishment of a township road. We therefore believe that such damages must be paid out of the county general fund.

LEGISLATURE—APPOINTMENTS: Appointments of the same person a second time after the first appointment failed of confirmation by the senate is proper.

March 16, 1927. *Hon. Clem F. Kimball, Senate Chamber:* We are in receipt of the following communication from you:

"I desire your opinion on the following question:
'After action as to confirmation has been acted upon by the senate and the confirmation not agreed to, can the question of the confirmation of the same person, if again sent up by the governor, be acted upon by the senate in the same session?'"

You are advised that it is the opinion of this department that it is in accord with parliamentary procedure and the rules adopted by the senate of the Forty-second General Assembly to pass upon the question of the confirmation of an appointee by the governor to an office requiring confirmation, even though the same person has been appointed to the same office on a previous occasion and at the same session and said former appointment failed of confirmation.

March 16, 1927. *Hon. Clem F. Kimball, Senate Chamber:* We are in receipt of your communication requesting the opinion of this department upon a parliamentary question involving the right of the senate to consider whether or not it will confirm the appointment of a person by the governor to an office, which person has, at a prior time and during the same session, been appointed and said appointment has failed of confirmation. You have been advised that it is the opinion of this department that the senate could consider the confirmation of such an appointment. It is our contention that a new appointment in no way connected with the former appointment is of the same character as an appointment of a different individual, although in fact the appointee is the same person, and the appointment is for the same office. Hence we hold that such a new appointment does not have the effect of and is not a reconsideration of the former appointment which failed of confirmation.

We have searched the books for cases involving this question but have been unable to find one, as it is quite apparent that the question would never reach the courts because of its very nature.

PARKS: Certain cities permitted to levy additional tax for park purposes.

March 17, 1927. *Hon. Frank Hollingsworth, House of Representatives:* In reply to your inquiry of March 17th in which you submit to this department a letter from L. F. Mackey, city attorney at Boone, in which the following question is asked:

"Is paragraph 2 of Section 1, Chapter 312, Laws of the 38th General Assembly, still in effect?"

Upon examination, we find that all of the other sections of Chapter 312, Laws of the 38th General Assembly were compiled in the Code of 1924 with the exception of paragraph 2. Paragraph 2 is as follows:

"In all cities where said board shall have prior to January first, 1919, acquired property for park purposes, the said board is further authorized to certify to the county auditor in all succeeding years and cause to be collected

an additional tax of one mill each year up to and including 1949, to be used for the sole and only purpose of grading, road-building, building retaining walls, or riprap along water-courses and otherwise permanently improving any and all lands theretofore acquired for park purposes or improving any driveway or boulevard connecting one park with another."

This is not of a permanent or general nature as contemplated by the editor of the Code, as shown on the first page of the editor's introduction, Code of 1924. Due to the fact that this tax under paragraph 2 of Chapter 312 of the Laws of the 38th General Assembly can only be collected up to and including the year 1949, it was considered to be of a temporary nature and for that reason was omitted from the Code of 1924.

We are therefore of the opinion that paragraph 2 of Section 1, Chapter 312, Laws of the 38th General Assembly as above set out is still in full force and effect.

ASSESSORS—AGRICULTURAL STATISTICS: A property owner is required to give the assessor the information necessary to furnish crop statistics.

March 18, 1927. *Secretary of Agriculture:* We have received your letter of recent date in which you submit to this department the following inquiry:

"The following question has arisen in regard to the gathering agricultural statistics by the assessor and I would appreciate an early reply.

"Is it absolutely compulsory for a farmer to report on the individual farm report blanks furnished by the weather and crop bureau of the department of agriculture?

"This is a blank that is sent additional to tax report list. This report demands of the farmer as to the number of acres of corn, oats, etc., he is going to put in the coming year.

"Is a farmer compelled to tell the number of acres of each grain that he intends to put in the coming year? Your advice is appreciated in the inclosed envelope."

Sections 2596 and 2597 of the Code, 1924, read as follows:

"Agricultural statistics shall be collected each year by the township, town, and city asssessors under the supervision of the department, which shall design and distribute blank forms and instructions therefor." Section 2596.

"The assessor shall require each person whose property is listed, to make answers to such inquiries as may be necessary to enable him to return the foregoing statistics, carefully footed and summarized, to the department on or before the fifteenth day of April of each year." Sec. 2597.

It will be observed that the above statute requires the assessors to collect, each year, agricultural statistics under the supervision of the department of agriculture, the blanks therefor to be furnished and distributed by the department. The latter of the two sections contains a positive requirement that the assessor shall require each person whose property is listed to make answers to such inquiries as may be necessary to enable him to return such statistics to the department. The statute, in our opinion, is mandatory and the property owner is required to give the assessor the information necessary to furnish said statistics. Our conclusion is fully supported by the opinion of the Supreme Court in the case of *State vs. Dietrick*, 178 Iowa, 48.

SCHOOLS: Even though a member of the school board may contemplate selling property to the school district, this fact should not deprive him of his certificate of election. 2. If after he qualifies he does enter into a contract with the school district, the penalty provided in the statute should be visited upon him.

March 19, 1927. *Superintendent of Public Instruction:* We have received a letter from the President of the Board of Education of the Independent School District of Iowa City, Iowa, in which he requests this department to prepare an opinion upon the question which he stated as follows:

"We would like to have the opinion of the Attorney General as to whether or not our Board of Education has the right, and whether it is our duty to issue a Certificate of Election to any person who has been elected to membership of the Board of School Directors of the Iowa City Independent School District at their annual election held Monday, March 14, 1927.

"One of the candidates who was elected is the owner and operator of a Publishing Company which is endeavoring to get their publications in the public schools of this district and another individual elected at this election is employed in one of the prominent book stores operated under the name of his father, but is reputed to have a financial interest in the business and he has always represented this book store in connection with the making of contracts with the County Board of Education of Johnson County, Iowa.

It is the opinion of this department that the member elect of the Board of School Directors of the Iowa City Independent School District should be given the certificate of election, and that he should be permitted to qualify. However, after he has qualified, the Company of which he is the owner and operator may not under the law enter into a contract with said school district. In other words, the said company may not sell their publication to the Board of which the owner and operator of said company is a director. Section 4468 of the Code, 1924, absolutely prohibits the making of such contracts and this statute should be fully observed by the board, including the member who is an owner and operator of said company, and if such contract is made, then a prosecution should be instituted against the party violating the statute, and upon conviction punishment therein provided for should be visited upon the offending member. The case of *State of Iowa vs. R. E. Wick*, 130 Iowa, 31, fully supports our conclusions.

COUNTY RECORDER—FEES: Recording fees not necessary for county and state documents.

March 21, 1927. *County Attorney, Sioux City, Iowa:* Some time ago you requested an opinion from this department upon the question of whether or not the county recorder should charge a recording fee to representatives of the county or state for filing or recording easements to rights of way for public roads. You are advised that although there is no specific statute on the subject, it has been the universal custom and practice not to charge recording fees for public records. To do so would amount to taking the money out of one pocket and putting it in the other. All public business should be recorded free of charge. We have taken this matter up with the Highway Commission and they advise us that it is the universal practice and rule to record such instruments without charging the fee, and that they have had trouble in but one or two counties on the question.

SCHOOLS—DIRECTORS: It is against public policy for board of school directors to contract with the wife of a member of the board for transportation of pupils when the member is to receive pay from his wife for the use of equipment.

March 22, 1927. *Superintendent of Public Instruction:* We wish to acknowledge receipt of your favor of the 18th, in which you inquire in substance

whether or not it would be illegal for a school board to contract with the wife of one of the board members to transport school children to and from school, it appearing that the wife of the board members intends to use a bus, team, or other equipment belonging to her husband in transporting the pupils.

In this instance you state that part of the compensation for transporting the children would be paid to the husband, member of the board, for the use of his team, bus, or other personal property.

We believe the public policy of this State is well stated in section 13301 of the Code, 1924, wherein it is provided:

"If any state, county, township, city, school, or other municipal officer, not mentioned in this chapter, directly or indirectly accept any valuable consideration, gratuity, service, or benefit whatever, or the promise thereof, other than the compensation allowed him by law, conditioned upon said officer's doing or performing any official act, casting an official vote, making or procuring the appointment of any person to a place of trust or profit, or using his official influence or authority to give or procure for any person public employment, or conditioned upon said officer's refraining from doing or performing any of the foregoing acts or things, he shall be imprisoned in the penitentiary not exceeding two years, or in the county jail not exceeding one year, or fined in any sum not less than twenty nor more than three hundred dollars."

The school board member in the case presented by you would be receiving indirectly, if it could not be said directly, a valuable consideration or benefit by reason of the contract made by the board of which he is a member with his wife. It may be stated generally that it is against public policy for any official, state, county, or school to be directly or indirectly interested in any contract or employment wherein the board or department of which he is a member, is required to act for the public.

We would say in the instance presented by you that the contract should not be made by the board with the wife of one of its members.

MOTOR VEHICLES: LICENSES: Cars owned by non-residents are governed by the laws of the state of which their owners are residents.

March 23, 1927. *County Attorney, Sac City, Iowa:* We wish to acknowledge receipt of your favor of the 22nd, in which you ask for a ruling in regard to foreign cars coming into your county from another state which have the 1926 numbers on them.

The provisions of our motor vehicle statute, sections 4865 and 4866, Code 1924, provide in substance that the provisions of the motor vehicle law shall not apply to non-resident owners other than foreign corporations, manufacturers, or dealers, doing business in the State "provided that the owner shall have complied with the provisions of the law of the foreign country, state, territory, or federal district of his residence relative to registration of motor vehicles and the display of registration numbers thereon and shall conspicuously display his registration numbers as required thereby."

This exemption, however, does not apply to motor vehicles operated by non-residents unless the laws of their state have a reciprocal provision for residents of this State.

SCHOOLS: The Board of Education does not have the right to grant teachers a year's leave on pay.

March 24, 1927. *Superintendent of Public Instruction:* We have received your letter of March 23, 1927, in which you submit to this department the following inquiry:

"Does the Board of Education have the legal right to grant teachers of its school system a year's sabbatical leave on pay?"

An examination of the school statutes of the state fails to disclose any provision therein granting to a Board of Education the right to permit teachers of its school system a year's leave of absence on full pay for any reason or for any purpose. We are, therefore, clearly of the opinion that no such authority exists.

SCHOOLS: A school district may not use the insurance money for the purpose of erecting a school building without submitting the proposition to the electors.

March 23, 1927. *Superintendent of Public Instruction:* We have received your letter of March 21, 1927, in which you submit to this department the following inquiry:

"We have an inquiry from a school district that has suffered a fire loss and has received from the insurance company the sum of $75,000 in insurance. They have advertised and are holding a special election asking for authority to issue bonds not in excess of $40,000 for the purpose of erecting a new building. This board wishes to know if they can use the insurance money without further direction from the electors of the district."

You are advised that on July 21, 1926, this department prepared an opinion for Miss Mae E. Francis, the then superintendent of public instruction, upon the right of a school district to construct a school building without a vote of the electors. It was held in this opinion that all building programs of school districts must have the approval of the electors before they may be carried out. It is, therefore, apparent that your question must be answered in the negative. Under the facts stated in your letter the proposition to be submitted to the electors should be stated generally as follows: Shall the school district (naming it) construct a school building at a cost of $115,000.00, and for said purpose issue bonds not in excess of $40,000.00 and use the insurance money in the sum of $75,000.00.

The opinion referred to herein is hereto attached and should be read in connection with this opinion.

SCHOOLS: School boards may prohibit students from dancing at the school building or any other place on Monday, Tuesday, Wednesday and Thursday nights. 2. Unless school teachers' contracts so provide, school teachers may not be deprived of the right to dance. 3. If dancing on the part of the teachers renders them less efficient as teachers, their contract may be cancelled.

March 24, 1927. *Superintendent of Public Instruction:* We have received your letter of March 21, 1927, in which you submit to this department the following inquiry:

"Does a school board have authority to adopt and enforce a resolution forbidding students and teachers from dancing at the school building, or at other places on Monday, Tuesday, Wednesday and Thursday nights?

"The board is not objecting to dancing as such, but to what it terms the 'abuse of the privilege,' claiming that students and teachers come to school

in no physical condition to pursue their work properly. The object of the board is to forbid dancing all other times than at week-ends."

Section 4224 of the Code, 1924, reads as follows:

"The board shall make rules for its own government and that of the directors, officers, teachers, and pupils, and for the care of the schoolhouse, grounds, and property of the school corporation, and aid in the enforcement of the same, and require the performance of duties by said persons imposed by law and the rules."

The Supreme Court has had several occasions to construe the above statute and prior similar statutes. It has been frequently held that the rules adopted must be reasonable and clearly in the interest of the proper operation of the schools. The following authorities so hold:

Murphy vs. Board of Directors, 30 Iowa, 429;
Burdick vs. Babcock, 31 Iowa, 562;
Perkins vs. Board of Directors, 56 Iowa, 476;
Kinsor vs. Independent School District, 129 Iowa, 441;
Lee vs. Hoffman, 182 Iowa, 1216.

It is also well settled that the Board may prohibit students from doing anything outside of school hours that will have a tendency to militate against their school work or that will have a detrimental effect upon such students so that they may inefficiently pursue their school studies. It was so held in the case of *Burdick vs. Babcock*, 31 Iowa, 562, as the following quotation from the opinion will disclose:

"If the effects of acts done out of school houses reach within the school room during school hours and are detrimental to good order and the best interest of the pupils, it is evident that such acts may be forbidden. Truancy is a fault committed away from school. Can it be pretended that it cannot be reached for correction by the school board and teachers? *A pupil may engage in sports beyond school that will render him unfit to study during school hours. Cannot these sports be forbidden? The view that acts, to be within the authority of the school board and teachers for the discipline and correction, must be done within school hours, is narrow, and without regard to the spirit of the law and the best interest of our common schools. It is in conflict too with authority.* See upon this point, *Lander v. Seaver*, 32 Vt. 114, and *Sherman v. Inhabitants of Charlestown*, 8 Cush. 160, the doctrine we have above endeavored to sustain is, in these cases, distinctly announced."

It is therefore the opinion of this department that the board of directors may promulgate a rule prohibiting dancing on the part of the students either at the school building or at any other place on Monday, Tuesday, Wednesday and Thursday nights. The holding of dances at the school building may be forbidden at any time.

If the necessary result of students attending dances on certain nights of the week will make them less efficient as students and prove detrimental to the carrying on of their studies, it is clearly within the power of the school board to forbid such dances.

So far as the teachers are concerned, a different situation exists. We think it is clearly within the power of the school board to insert a provision in the teachers' contracts forbidding them to attend dances on any nights of the week that the board deems advisable. However, if there is no such provision in the teachers' contracts, it necessarily follows that they may not be forbidden the privilege of attending dances unless to do so would render them less efficient or incompetent as teachers. If it does so, then their contract may

be cancelled under the provisions of Section 4237 of the Code, 1924, on account of incompetency, inefficiency and inattention to duty. It was so held in the case of *Courtwright vs. Independent School District of Mapleton*, (Iowa) 212 N. W. R. 368.

SCHOOLS: The voters of a school township may not vote a tax of five mills per year for a period of six years for the purpose of building schoolhouses without complying with Secs. 4353 and 4354, providing for the incurring of and indebtedness for the purpose of building and furnishing schoolhouses.

March 24, 1927. *County Attorney, Atlantic, Iowa:* We have received your letter of March 23, 1927, in which you submit to this department the following inquiry:

"* * * 'Can the voters of a school township vote a tax of five mills a year for a period of six years and with the accumulation of funds so raised by said tax build one school building each year for six years; or in other words will it be necessary to vote each year for enough money to build one building at a time?' . . ."

Section 4217 of the Code, 1924, reads in part as follows:

"The voters assembled at the annual meeting or election shall have power; * * *

"7. To vote a schoolhouse tax, not exceeding ten mills on the dollar in any one year, for the purchase of grounds, construction of schoolhouses, the payment of debts contracted for the erection of schoolhouses, not including interest on bonds, procuring libraries for and opening roads to schoolhouses."

It will be observed that no tax in excess of ten mills may be, under the provisions of the above section, voted by the electors in one year. It is therefore apparent that the voters may not at any time or at one election vote a tax of five mills a year for a period of six years for the erection of a school house or school houses. However, Sections 4353 and 4354 provide for the incurring of indebtedness for the purpose of building and furnishing a schoolhouse or schoolhouses and additions thereto not in excess of five per cent of the actual value of the taxable property within such school corporation and the issuance of bonds therefor, but that no indebtedness can be contracted in excess of one and one-quarter per cent of such taxable value without the holding of an election. Therefore the method for the school district to pursue is to call an election and vote upon the proposition of building schoolhouses and the issuance of bonds therefor. This method pointed out in the statute should be followed in this case.

TAXATION: Property in Cedar Rapids all platted and houses erected thereon, if the same does not exceed 160 acres in any civil township is exempt from taxation.

March 25, 1927. *Auditor of State:* We have received your letter of March 24, 1927, in which you submit to this department the following inquiry:

"* * * Would wish to have an opinion in regards to property of Coe College. They have property scattered all over the City of Cedar Rapids, and request that they be exempt for the same. Would wish to know if the law provides that all property held by them, rented property or otherwise, should be exempt.' . . ."

Section 6944 of the Code, 1924, reads in part as follows:

"The following classes of property shall not be taxed: * * *

"11. Real estate owned by any educational institution of this state as a part

of its endowment fund, to the extent of one hundred sixty acres in any civil township."

Chapter 61 of the Acts of the Thirty-fourth General Assembly provides as follows:

"Real estate to the extent of not to exceed one hundred sixty acres in any civil township, owned by any educational institution of this state, as a part of its endowment fund, shall not be taxed."

This statute, which is substantially the same as the present statute, was under consideration in the case of *In Re Appeal of Trustees*, 185 Iowa 434. It was held in this case—

"Real estate which is owned by any educational institution of this state as a part of its endowment fund is exempt from taxation to the extent of 160 acres in any civil township, even though such township is coterminus with a city, and even though such real estate consists of ordinary city lots."

The lots involved in that case were platted and buildings had been erected thereon. This opinion is conclusive upon the question under consideration.

We are therefore of the opinion that the property owned by Coe College in the city of Cedar Rapids is exempt from taxation, providing same does not exceed one hundred sixty acres in any civil township. The fact that such property is rented will make no difference in the application of the rule. The property that is exempt is not limited to non-income property. In fact such property would not be of much value as an endowment unless rents or profits could be derived therefrom.

TAXATION: Where a widow of a veteran of the Civil War marries another veteran of the Civil War and divorces him, she is not a widow and is not entitled to the tax exemption provided in the statute.

March 25, 1927. *County Attorney, Burlington, Iowa:* We have received your letter of March 21, 1927, in which you submit to this department the following question:

"* * * Suppose A marries a veteran of the Civil War, which veteran dies, and as a widow she receives government pension and also exemption as provided by law from taxes. She subsequently marries the second time, marrying a second veteran of the Civil War, with whom she resides a short time, and who later deserts her. She then secures a divorce from him on the ground of desertion. Does she now, in this present status, assume the rights of a widow of a war veteran or has she become, in the eyes of the law, an unmarried person by divorce and entitled to no exemption? I would appreciate an early opinion on this question?"

Section 6946 of the Code, 1924, as amended by Chapter 147 of the Acts of the Forty-first General Assembly, provides in part as follows:

"The following exemptions from taxation shall be allowed: * * *
"5. The property, to the same extent, of the widow remaining unmarried and of the minor child or children of any such deceased soldier, sailor, or marine."

The question for our determination is whether or not the widow of a veteran of the Civil War who has since remarried and later divorced from her second husband is the widow of the veteran of the Civil War and entitled to an exemption from taxation.

On July 11, 1923, this department prepared an opinion for the Adj. General, Louis G. Lasher, in which it was held that a woman who has twice been married

and widowed is the widow of her second husband and not her first husband. We believe that when a woman remarries she ceases to be the widow of her first husband, and that the death of her second husband or a divorce from him will not restore to her her rights as the widow of her first husband. You will find this opinion reported in the report of the Attorney General for 1923-1924 on page 229. No doubt you have a copy of his report in your office. If not and you will so notify us we will send a copy of the report to you.

Neither is she the widow of her second husband, who was also a Civil War veteran. The Supreme Court in the case of *Debrot vs. Marion County*, 164 Iowa, 208, held that a widow is one whose husband is dead and who has not remarried, and not one who has been divorced within the meaning of the act of the 35th General Assembly, providing that if a mother of dependent children is a widow and is unable to properly care for them the court may fix the amount necessary for that purpose to be paid by the county. In this opinion we find the following language:

"Reduced to its final analysis, the ultimate question presented by this record is: Is the applicant in this case a widow within the meaning of chapter 31, Acts 35th General Assembly? She is undoubtedly the mother of the children; but it affirmatively appears that her second husband, who is the father of two of the children, is still living, although he is a nonresident of the state, and it does not appear in the pleading that the first husband, the father of the other child, is dead. In other words, the pleadings do not show that applicant is a widow as that term is ordinarily used. According to the lexicographers, a widow is a woman who has lost her husband by death, and has not married again. See Webster's New International and the Standard Dictionaries. See also *Cole vs. Mayne*, (C. C.) 122 Fed. 836; *Whitsell vs. Mills*, 6 Ind. 229. *In re Ensign's Estate*, 103 N. W. 284 (8 N. E. 544, 57 Am. Rep. 717); *Tyler vs. Ass'n*, 145 Mass. 134 (13 N. E. 360). Colloquially divorced women who have not been married again are sometimes spoken of as 'grass widows', or widows bewitched. In construing wills and contracts, the word 'widow' has occasionally been held to include a divorced woman; but in each and all of these cases it was due to the peculiar phraseology of the instruments."

We are therefore of the opinion that the woman involved in your inquiry is not entitled to the tax exemption as the widow of a Civil War veteran.

CONSTITUTIONAL LAW: The application of certain restrictions upon a group of cooperative marketing associations engaged in a certain business is not unconstitutional because it does not apply the same restrictions to cooperatives engaged in other lines of business.

March 25, 1927. *Hon. Heike A. Rust, House of Representatives:* You have requested an opinion upon the amendment to Section One, House File No. 347, by Committee of Agriculture, which provides that cooperative live stock shipping associations shall do business with members only.

It is not indicated in what particular it is contended that this amendment is unconstitutional. We assume, therefore, that it can be only upon the basis that it is an unreasonable classification of business and, therefore, void under what is termed, "class legislation" under the 14th amendment to the constitution of the United States. Assuming that this is the basis of the contention that the amendment is unconstitutional we render the following opinion:

The provisions of the 14th amendment to the federal constitution that, "no state shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of

life, liberty, or property without due process of law nor deny any person within its jurisdiction the equal protection of law" have been construed to grant to all persons equality before the law in the sense that they render void all statutes which make any unreasonable or arbitrary discrimination between persons or claims of persons.

In the interpretation of this amendment the courts have held that a statute will be sustained where the basis for classification made by it could have seemed reasonable to the legislature even though such basis to the court seems to be unreasonable. (*People vs. Metz*, 85 N. E. (N. Y.) 1070) and our own court has said that legislation which affects alike all persons similarly situated is not class legislation. *Hubbell vs. Higgins*, 148 Iowa, 36 at page 40.

The amendment referred to is not, in our opinion, class legislation and is, therefore, not unconstitutional because it does not affect persons within the class of cooperative livestock shipping associations which is one of the distinct classes already established by the legislature in chapter 8486 of the code.

Two recent decisions in jurisdictions not our own have applied the test of competition to determine whether or not an act affects persons in a certain class uniformly. We quote from these decisions as follows:

"The *true test* of unlawful statutory discrimination is merely whether all who are similarly situated are similarly treated or affected or, to put it in another way and in the language of the business world, *whether one is really hindered in his competition with others.*"

Gunn vs. Minneapolis R. R. Company, 158 N. W. (N. D.) 1004.

"The controlling test of the validity of all laws directed against a particular class may be said to be that the same means and methods shall be impartially applied to all the constituents of the particular class so that the law shall operate equally and uniformly upon all persons in the class sought to be regulated."

Booth vs. Dallas, 179 S. W. (Texas Appeals) 301 at p. 303.

We reach the conclusion that the amendment cited is not unconstitutional because the legislature has already separated such cooperative livestock associations from all other such cooperative associations and placed them in a class by themselves, and because the amendment will not place the livestock shipping association under any handicap because it is not in competition with any other cooperative marketing association other than associations of its own class.

SCHOOLS AND SCHOOL DISTRICTS: A board of education may rescind action taken in the employment of a superintendent at any time before the contract is entered into with such superintendent.

March 28, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of March 25, 1927, requesting an opinion upon the following question:

"On February 1, 1927, the school board of Logan, Iowa, passed the following resolution:

"Moved by Murray seconded by Copeland that the board contract with Mr. Keay for two years. Ayes—Copeland, Blumgren, Murray. Nayes—Allen, Wood.

"The motion was declared carried and on March 21, 1927, the minutes were read and approved."

It now appears that two new members have been elected and that a majority of the board is opposed to a two year contract and contend that no contract exists because no salary is stipulated. It is also contended that the motion is incomplete in that no salary is stated.

We are of the opinion that upon the submission and adoption of such motion that the salary paid at that time would be implied as the salary for the coming contract.

We are of the opinion that until a contract is signed the board may rescind its action by proper resolution. Therefore, unless a contract is signed before such rescision Mr. Keay would not occupy the status of a superintendent for the term provided in the resolution. If the present secretary and president will execute a contract upon the basis of the salary being paid at the present time such contract would, in our opinion, be valid under the present resolution of the board.

BANKS AND BANKING: The Superintendent of Banking cannot levy a stock assessment for the purpose of repaying directors funds advanced by them to take up bad assets.

March 28, 1927. *Superintendent of Banking:* I wish to acknowledge receipt of your favor of the 24th, in which you request our opinion on the following proposition:

"At the Farmers Savings Bank of Colo, Iowa, the Board of Directors as individuals, personally put in $54,000.00 recently to eliminate losses.

"They are now desirous of having the stockholders of said bank reimburse them and at a stockholders' meeting recently, said stockholders passed a resolution by a vote of 201 to 9 out of a total of 300 shares issued as is shown by Exhibit A attached.

"The Board of Directors has just passed a resolution asking for a 100% assessment being $30,000.00 as shown by Exhibit B attached.

"Please advise as to whether or not we will be justified in levying this assessment upon request of said stockholders, and if collection of same can be legally enforced, and being for the purpose of eliminating the loss of $4,323.45 and the balance to be used in reimbursing the directors for the amount advanced."

Section 9246, Code of 1924, provides for the assessment for the purpose of restoring impaired capital of a bank. This statute reads as follows:

"Should the capital stock of any state or savings bank become impaired by losses or otherwise, the superintendent of banking may require an assessment upon the stockholders, and shall address an order to the several members of the board of directors of such bank, fixing the amount of assessment required."

This is the only statutory provision authorizing the Superintendent of Banking to require an assessment prior to the closing of the bank and it will be apparent at once from a reading of the same that this assessment is only for the purpose of restoring impaired capital. If it is true that there are losses and some doubtful paper, the Superintendent of Banking might determine that the capital was impaired because of these facts but even if so, the assessment which he could properly levy would only be sufficient to replace the losses which are impairing the capital.

The directors by voluntarily contributing $54,000.00 for the purpose of removing losses are not in a position to now contend that this amount is an obligation of the bank and thus the capital impaired, and that they are entitled to have an assessment made upon the stockholders by the Superintendent for the principal object of repaying the advancement made by them. If the directors desire to be reimbursed from the stockholders, they must pursue some other plan than to request the Superintendent of Banking to levy an assessment for that purpose.

VETERINARIAN: One who has been engaged in the practice of veterinary medicine for about twenty years is not prohibited from continuing to so practice under the provisions of Chapter 132, Code, 1924.

March 29, 1927. *State Veterinarian:* You have orally requested our opinion as to whether or not one who has been engaged in the practice of veterinary medicine and surgery in this state for a period of about twenty years and who has not obtained a license under the provisions of Chapter 132 of the Code, 1924, is guilty of a violation of the provisions thereof.

Chapter 132 was contained in House File 68, Laws of the 40th Extra General Assembly, which was to "amend, revise and codify" the previous statutes upon this subject. House File 68 omitted from its provisions that previously contained in the law which authorized existing practitioners to obtain a certificate. Section 2766 now provides:

"No person shall engage in the practice of veterinary medicine unless he shall have obtained from the department of agriculture a license for that purpose."

In *State vs. McCoy*, 149 Iowa, 500, the Supreme Court of this State in construing the statute as it was at that time, held in substance that a veterinarian of good moral character who had practiced his profession in this state for five years prior to the passage of the statutes regulating the rights to practice and prescribing the punishment for a violation thereof, was not guilty of violating the law by failure to apply for and receive his certificate for practice as the law did not prohibit one thus qualified from practicing without a certificate.

In the cited case, it was said that there was no charge of undertaking to wear a title or degree, neither is there so undertaken in the case presented by you, therefore the provisions of Section 2771 of the Code, 1924, are not involved. The Court in the cited case at page 503 said:

" * * * and the act will be searched in vain for any prohibition of any person who had engaged in the practice of the veterinary science prior to January 1, 1901, from continuing such practice ad libitum. True, if he had practiced five years, and was of good moral character, he was 'eligible to registration as an existing practitioner,' and upon timely application might have received a certificate of qualification, and this would have been conclusive evidence of his right to practice. But suppose he concluded to continue his practice without procuring such certificate. Nothing in the act prohibited him from so doing. It is nowhere denounced as unlawful, and, not being in violation of 'any of the provisions of the act,' did not constitute a misdemeanor, within the meaning of the statute quoted. It is to be borne in mind that statutes in their nature penal are to be strictly construed. Nothing may be added by implication and even though it may have been the design of the legislature that all practitioners of the veterinary science for compensation be armed with certificates from the veterinary board, it is not so written, and in construing a criminal statute we are not permitted to read into it what the lawmakers, for reasons which are easily imagined, in their wisdom omitted."

There is no provision in Chapter 132, supra, that prohibits one who is already engaged in the practice of veterinary medicine or surgery and has been so engaged for a long number of years from continuing in that practice. The prohibition is that "no person shall engage in the practice." The term "engage" has been defined to mean to "embark" in the business. (Webster's New International Dictionery.) It also means something more than the doing of one act or an occasional transaction. *State vs. Robertson*, 48 S. E. (N. C.) 595. *White vs. Sykes*, 59 S. E. (Ga.) 228. We do not believe it can be said

that one who is already practicing veterinary medicine and surgery comes within the terms of the statute quoted. The statute is worded in a prospective manner and in addition thereto, being penal in its nature, must be strictly construed and thus it must be held to prohibit one from the time of its becoming effective engaging in the practice of veterinary medicine or from commencing such practice thereafter and not to prohibit one who has already been engaged in such practice for a long number of years.

SCHOOLS AND SCHOOL DISTRICTS: The teacher's certificate need not be registered each year if the teacher remains in the same county. Under the minimum wage law a teacher's wages would be governed by the highest grade certificate which she has registered in that county.

March 29, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of March 28, 1927, requesting an opinion of this department upon the following questions:

"Is it necessary for a teacher to register her certificate annually if she stays in the same county?

"If a teacher holds two certificates, one a second grade state and one a second grade uniform county and both are registered in the county, which will determine the wages under the minimum salary law?"

It is provided by statute, Section 3888, Code of Iowa, 1924, as follows:

"All diplomas and certificates shall be valid in any county when registered therein, and no person shall teach in any public school whose certificate has not been registered with the county superintendent of the county in which the school is located."

It is our opinion, therefore, that a certificate need not be registered annually if a teacher continues to teach in the same county. If a teacher renewed a certificate it would be necessary for her to register the new certificate.

It is further provided by statute, Sections 4341-4344, that a scale of wages known as minimum teacher's wage shall be paid in this state. The purpose of this statute is to reward a teacher for additional training and experience.

It is our opinion, therefore, that if a teacher had at one time two certificates of different grade registered in the county the one of higher grade would determine the minimum wage to be paid to that teacher. Any other conclusion would defeat the very purpose of the statute.

BANK STOCK—TAXATION: Bank stock which has been assessed to the bank prior to its going into the hands of the receiver should be assessed to the individual stockholder and not to the receiver.

April 1, 1927. *Superintendent of Banking:* We wish to acknowledge receipt of your favor of the 30th, with the enclosed letter from Mr. A. D. Pugh, Attorney at Law, Des Moines, with the enclosed statement of taxes claimed to be delinquent and due from said banks in Decatur County.

In reply we wish to say that it is our opinion that the taxes in question are not entitled to priority in payment from the receivership and in fact, should not be assessed against the receiver but against the stockholder. The authorities are legion holding that the tax is one upon the stock in the hands of the individual stockholder and not against the bank.

It is true that the legislature authorized that the assessment be made against the bank with the provisions that the bank should reimburse itself from the

property of the stockholders. This statute does not make the tax a lien upon the bank's property and merely provides a convenient means or agency for payment. The assessments in question should be changed and corrected to be assessments against the stockholders and not against the bank.

These cases are similar to ones tried in various courts of this state wherein the Superintendent of Banking as receiver for closed banks has obtained injunctions against various treasurers preventing the collection of taxes similar to those in question.*

TAXATION—VETERANS: Only honorably discharged soldiers, sailors and marines of the war with Germany who were in the American Army are entitled to the exemption from taxation prescribed in the statute.

April 4, 1927. *County Attorney, Burlington, Iowa:* We have received your letter of April 2, 1927, in which you submit to this department the following inquiry:

"Will you kindly advise me whether the exemptions from taxation granted to widows as covered in Section 6946 of the Code of 1924 and as amended by Chapter 147 of the Acts of the 41st General Assembly apply in any way to widows of the Allied Armies. The case in question is a resident widow of a soldier in the Canadian Army."

Section 6946 of the Code, 1924, as amended by Chapter 147 of the Laws of the 41st General Assembly provides in part as follows:

"The following exemption from taxation shall be allowed. * * * *
"3. The property, not to exceed $500 in actual value of any honorably discharged soldier, sailor, marine or nurse of the war with Germany. * * * *
"5. The property, to the same extent, of the widow remaining unmarried, and of the minor child or children of any such deceased soldier, sailor or marine."

It is well settled in this state that taxation is the rule and exemption the exception, and that the exemption statutes shall be strictly construed. It was so held in the following cases:

Morseman vs. Younkin, 27 Iowa, 350;
Trustees of Griswold College vs. State, 46 Iowa, 275;
Sioux City vs. Independent School Dist., 55 Iowa, 150;
Cassady vs. Hammer, 62 Iowa, 359;
In re Boyd's Assessment, 138 Iowa, 583;
Simcock vs. Sayre, 148 Iowa, 132.

It will be observed that those who are entitled to exemption under the third subdivision thereof are described as any honorably discharged soldier, sailor, marine or nurse *of the war with Germany.* What could have been the intention of the legislature in using this phrase? We think it was the manifest intention of the legislature to limit the exemption therein contained to one who served in the United States Army or Navy, or nurse in said war.

SCHOOLS AND SCHOOL DISTRICTS—TAXATION: The tax levy made at the September meeting of the board of supervisors is final and cannot be relevied after the adjournment of that session even though error is made in the levy.

April 5, 1927. *Department of Public Instruction:* You have requested an opinion of this department upon the following proposition:

*See *Andrew Rec. vs. Munn Co. Treas.*, 218 N. W. 526, 218 N. W. 526.

"Through error in the office of the county auditor there is a deficiency in the taxes levied by a school district in the amount of $7,000.00. This tax was levied for the year 1926 to be paid in the year 1927 and the first half thereof has been received. The inquiry is whether it is possible to levy an additional tax now to be collected in September 1927."

It is provided by statute that the levy shall be made by the board of supervisors at their September meeting for the ensuing year. (Code of Iowa 1924, Section 7171.) This tax is then certified to the county auditor and he delivers the books to the treasurer on the first day of the ensuing year. There is no possibility of changing the levy after the adjournment of the September session of the board of supervisors. It is, therefore, impossible to levy any tax now which could be collected with the September taxes of the year 1927. The only remedy for this situation is a transfer of money from another fund to the general fund, or the issuance of warrants in anticipation of increased tax levies to be certified by the board of directors and levied by the board of supervisors for the year 1927 to be collected in the year 1928.

STATE SINKING FUND: BANKS AND BANKING—TOWNSHIP CLERK: The provisions of House File 60, 42nd General Assembly, are applicable to deposit claims accruing in banks closed prior to the effective date of the act. Township Clerk is a "treasurer" within the meaning of House File 60, 42nd General Assembly in reference to the deposit of public funds.

April 6, 1927. *Treasurer of State:* We wish to acknowledge receipt of your favor of March 18th, in which you request our opinion as follows:

"It is requested that you advise whether or not the provisions of House File 60, Acts of the 42nd General Assembly, are applicable to a deposit claim accruing in banks which closed prior to the effective date of the Act.

"It is also requested that you give us your opinion as to whether or not the word 'treasurer' in the fifth line of Section 1 thereof, can be construed to include a township clerk who is the proper custodian of funds belonging to the township."

House File No. 60, to which you refer, is an act amending the provisions of Chapters 173 and 174, Laws of the 41st General Assembly, in reference to public funds in closed banks and creating a State Sinking Fund. It also amends the provisions of Chapters 179 and 180, Laws of the 41st General Assembly in reference to the reorganization and liquidation of closed banks. The act is purely a remedial statute and affects only certain matters of procedure in connection with the establishment of a claim against the State Sinking Fund and of reorganization proceedings. This being true, the provisions thereof would apply to deposit claims accruing in banks closed prior to the date this act became effective, but which had not been established or allowed under the provisions as of the chapter therein referred to prior to the amendment. In other words, all claims hereafter to be established and in reorganizations after the act referred to becomes effective, are subjct to its terms and provisions.

The term "treasurer" as ordinarily used and understood, is the fiscal officer of a corporation or municipality. He is the officer who has the custody of the public funds. *Miners' and Merchants' Bank vs. Ardsley Hall Company*, 99 N. Y. S. 98, 103, 113 App. Div. 194. *City of Newburyport vs. Spear*, 90 N. E. (Mass.) 522, 524.

The township clerk under the statutes of this State is the custodian of the moneys of the township and as such is its "treasurer" and we are, therefore,

of the opinion that the term "treasurer" as used in the act referred to includes township clerks.

CITIES AND TOWNS—MUNICIPAL BUILDINGS: The town can not erect a municipal building from profits earned by municipal light and water plants without an election.

April 6, 1927. *Director of the Budget:* You have requested our opinion on a proposition which may be stated in substance as follows:

The City of New Hampton which has a population of 2,500 owns its light and water systems. The city council desires to erect a building in that city which will be used as an office for the light and water systems and also a place where the fire fighting apparatus may be kept and where the city council may meet and that may be used to keep the city records and files. The estimated cost for this building complete is about $18,000.00. It is desired to use the earnings from the light and water plants to pay for the structure, it appearing that there is now on hand more than sufficient funds derived from the income of the light and water plants to pay this expenditure. The question is whether the city may construct this plant without holding an election as required under the provisions of section 5763, Code 1924.

The section referred to reads as follows:

"Any city or town may, when authorized by the voters, erect a city or town hall to be used for general community and municipal purposes, including an assembly hall, auditorium, public hall, armory, council chamber and offices, water works offices, fire or police station, or for any one or more of such purposes. * * *."

There is no provision in the chapter in regard to municipally owned light and water plants providing for an expenditure of this nature. It is clear from the facts stated that the building contemplated will be used for municipal purposes and includes one or more of the uses stated in the section just quoted.

We are, therefore, of the opinion that the proposition to erect this hall must be submitted to the voters as therein contemplated.

BOARD OF SUPERVISORS—BANKS: The board of supervisors has no power to abate a tax upon the capital stock of a bank where the same became a lien upon real estate on account of the fact that the bank closed prior to the end of the year in which the tax was levied.

April 7, 1927. *County Attorney, Allison, Iowa:* You have submitted to this department a petition made to the board of supervisors of Butler County, Iowa, by the assignees of properties including real estate from stockholders in the Beaver Valley State Bank, Parkersburg, Iowa, now closed, for the benefit of creditors of said bank for an abatement of capital stock tax assessed against the assignors, former stockholders, for the year 1924 made as of the date of January 1, 1924. The said bank ceased doing business on account of insolvency on November 21, 1924, and it is the contention of the petitioners that the capital stock was of no value on and after that date and that, therefore, the capital stock became worthless prior to January 1, 1925, the due date of the said tax upon the said capital stock. The petitioners request an abatement of the tax upon the above grounds and upon the further ground that the properties transferred, subject as they are to heavy incumbrances, are not of sufficient value to warrant the payment of this tax.

The petition does not indicate the date on which the assignment to the assignees for the benefit of creditors was made. Therefore, this opinion

must depend upon the contingency whether the assignment was made prior to the date on which the personal property tax was entered upon the delinquent personal property tax list under the provisions of Section 7190 of the Code of Iowa, 1924. This personal property tax levied as of January 1, 1924, became due and collectible January 1, 1925, and was delinquent if not paid on or before March 31, 1925. Under the section above cited it was incumbent upon the treasurer to enter the said tax upon the delinquent personal tax list between October 1, 1925, and December 31, 1925. If the said assignment were made prior to the date on which this entry in the said tax list was made, then, the delinquent personal taxes upon the said capital stock would not be a lien upon the real estate transferred and the assignees, petitioners herein, would take the property assigned free from the lien of the said tax. The said tax would, therefore, not be enforcible against any property in the hands of the assignees unless the assignment were made after the entry on the delinquent tax list.

This department has ruled that the mere fact that a bank closes prior to the end of the year in which the capital stock tax is levied does not abate the tax.

We find no power given your board to abate this tax in view of the foregoing opinion or to relieve the property in the hands of the assignees therefrom if it is in fact a lien thereon.

We are of the opinion that this tax, when entered upon the delinquent personal property tax list between October 1, 1925, and December 31, 1925, became a lien upon any real estate owned by the delinquent taxpayers at the time of its entry under the provisions of Section 7192 of the Code of Iowa, 1924. If the tax was so entered it is the duty of the board of supervisors to enforce the collection of the said tax and the duty of the county treasurer to sell any real estate owned by the delinquent taxpayers on the date the delinquent personal property tax was entered on the delinquent personal property tax list by the regular tax sale.

SCHOOLS—OFFICERS: A School Treasurer who moves out of the district forfeits his office. 2. SCHOOLS—LOVRIEN-BROOKHART LAW: Even though a school Treasurer moves out of the district, the funds of the district are protected by the Lovrien-Brookhart law. 3. SCHOOLS—OFFICERS: Quo Warranto is the proper remedy to test the right of the school Treasurer to hold the office.

April 8, 1927. *Superintendent of Public Instruction:* We desire to acknowledge receipt of your letter of April 7, 1927, in which you submit to this department the following inquiries:

"A school treasurer of a certain district moved out of the district three or four years ago but has continued to serve as treasurer in the district of his former residence even though he has since become mayor of the town to which he moved. His last appointment as treasurer of the school district of his former residence was over the protest of the minority members of the board.

"We would like the opinion of your office on the following questions:

"1. If a school board entrusts the funds of the district to the custody of a person who is not qualified to act in the capacity of treasurer, would the funds of said district be protected by the Brookhart-Lovrien Bank Guarantee Act in the event of the failure of the bank in which such unqualified treasurer had the funds of the district deposited?

"2. If the funds of the district are thus deprived of protection under the

Brookhart-Lovrien Act and the school board knowingly persists in leaving the funds in such unlawful custody, would the individual members of the board be personally liable in the event of the failure of the bank in which the funds were deposited?

"3. What steps are required to compel the board to comply with the law in the matter of having a treasurer who is legally qualified, and who should takes these steps?"

Section 4213 of the Code, 1924, provides as follows:

"*A school officer* or member of the board shall, at the time of election or appointment, be a qualified voter of the corporation or subdistrict."

Section 4200 provides for the election of school treasurer in districts composed in whole or in part of cities or towns, and reads as follows:

"In districts composed in whole or in part of cities or towns, a treasurer shall be chosen in like manner, who shall serve without pay and whose term shall begin on the first secular day of July, and continue for two years, or until his successor is elected and qualified."

Under the provisions of these two sections it is quite apparent that the school treasurer must be a resident of the district or subdistrict to entitle him to hold such office.

Section 1146, which is a part of Chapter 59, relating to vacancies in office, provides in part as follows:

"Every civil office shall be vacant upon the happening of either of the following events: * * * *

"3. The incumbent ceasing to be a resident of the state, *district*, county, township, city, town, or ward by or for which he was elected or appointed, or in which the duties of his office are to be exercised. * * *"

It was held in the case of Independent School District of *Manning vs. Miller*, 189 Iowa, 123, that, under the prior statute, which was practically the same as Section 1146, a school treasurer is a civil officer, and that such office becomes vacant whenever the incumbent ceases to be a resident of the district, and this is true when the incumbent moves from the district for which he was elected or appointed, even though he has not yet taken a permanent abode elsewhere. We are therefore of the opinion that the permanent removal of the treasurer from the school district created a vacancy in the office and the school board should immediately proceed to elect a successor as provided in Section 4223, providing for the filling of vacancies of school offices by the board thereof.

Section 2 of Chapter 173 of the Laws of the Forty-first General Assembly, the Brookhart-Lovrien Law, reads in part as follows:

"* * *, all interest hereafter collected by school treasurers as provided in section forty-three hundred nineteen (4319) of the Code, 1924, * * * *, is hereby diverted from the general fund * * * and shall be paid into the state treasury and kept in the fund created by this act, or so much thereof as shall be ordered so paid by the treasurer of state. No part of said interest above two and one-half per cent (2½%) per annum shall be so diverted or collected for said sinking fund."

The section therein referred to (4319) relates entirely to the deposit of school funds, by the school treasurer in some bank or banks in the state, at interest at the rate of at least two per cent (2%) per annum on ninety per cent (90%) of the daily balance payable at the end of each month.

We think it is manifest that under the provisions of the statute just quoted or referred to the school districts would be fully protected by Chapter 173

of the laws of the Forty-first General Assembly, even though there may be a vacancy in the office of school treasurer or the former treasurer holds the office, even though under the law he has no right to do so.

The securtiy of the revenues of school districts should in no way be prejudiced by the act of the school treasurer in holding an office to which he is not entitled.

We therefore hold that such funds are fully protected by the Brookhart-Lovrien Act. Our conclusions upon the first question submitted to us makes it unnecessary for us to answer the second one.

As already indicated, it is the duty of the board to declare a vacancy in the office of school treasurer and elect a treasurer to fill the vacancy. If the members thereof refuse to do so, however, any resident or taxpayer of the district may bring an action to test the right of said treasurer to hold the office. The proper proceeding is what is known as Quo Warranto. Chapter 531 of the Code, 1924, contains the provisions of the statute relating to this action.

BANKS AND BANKING—SMALL LOAN ASSOCIATIONS: A small loan association held to be operating a place of business in Marshalltown, as well as Des Moines, and thus requiring a permit for the Marshalltown office.

April 9, 1927. *Superintendent of Banking:* You have orally requested our opinion as to whether or not one M. Aliber of Des Moines, Iowa, licensed under the uniform Small Loan Act, in Des Moines, Iowa, only, and who is also operating a place of business or office in Marshalltown, Iowa, is violating the provisions of chapter 419, Code, 1924, particularly section 9416 thereof.

The facts stated by you are as follows:

A Mr. Tweedt, resident of Marshalltown, Iowa, is soliciting business under the Federal loan act we have referred to, at his office in Marshalltown. The application for the loan and other necessary papers to obtain the loan, including the note and mortgage, are executed by the borrower at Marshalltown in Mr. Tweedt's office upon forms furnished him by M. Aliber, the licensee in Des Moines. The notes are all payable to M. Aliber in Des Moines at his office. The papers are all prepared and executed in Marshalltown and forwarded to Mr. Aliber at Des Moines and, if accepted by him, a check is mailed direct from Des Moines to the borrower at Marshalltown. Mr. Aliber pays Mr. Tweedt a commission on each loan. It appears that Mr. Tweedt maintains his own office, does his own soliciting and advertising and that Mr. Aliber does not maintain an office, pay rent or advertise in Marshalltown. The record of loans made in the manner above related are kept in the Des Moines office and all payments made on loans thus made are made directly to Mr. Aliber at Des Moines, Mr. Tweedt, it appears has advertised in the Marshalltown papers as the "Equity Loan Agency." This is not the name of Mr. Aliber's company.

Section 9416 to which we have referred reads as follows:

"Not more than one place of business shall be maintained under the same license, but the licensing official shall issue more than one license to the same licensee upon the payment of an additional license fee and the filing of an additional bond for each license."

We believe in determining the question you have submitted that it is immaterial whether the loan is made in Marshalltown or Des Moines. However, we wish to call your attention to the provisions of Section 9425, Code, 1924, concerning the duty of the licensee to the borrower, that requires the licensee to do the following things:

"Deliver to the borrower, at the time a loan is made, a statement in the English language showing in clear and distinct terms the amount and date of the loan and of its maturity, the nature of the security, if any, for the loan, the name and address of the borrower and of the licensee and the rate of interest charged. Upon such statement there shall be printed in English a copy of the five preceding sections."

The licensee is also required after the loan is paid to release any mortgage, restore any pledge, cancel and return any note or any assignment given.

Under the facts related by you, it is clear that all of the things just enumerated must be done in Marshalltown, Iowa. In addition to this, the other things enumerated in your statement of facts are required in order to complete the loan. These things are also done in Marshalltown, Iowa.

Concretely, the question is whether or not the licensee is doing business in Marshalltown as well as Des Moines. The decisions of the various courts of last resort interpreting the term "doing business" in reference to foreign corporations are somewhat helpful in determining the question presented but we believe the statute before us is to be given a broader and more comprehensive interpretation than the ordinary statute or constitutional prohibition against foreign corporations doing business in a state. It was clearly the intention of the Legislature to require a license at each place of business where loans are made or business necessary to making the loan is transacted. The situation is somewhat analogous to that of branch banking. In other words, if a licensee were permitted to have agents about the state, he could maintain one central office and cover the entire state of Iowa in his operations. This was clearly not the intention of the Legislature or those who framed the statutes, the statute being one of a uniform nature adopted in numerous states.

The decisions are uniform in reference to foreign corporations doing business in a state to the effect that such a corporation may be said to be doing business in a state where it is transacting or doing any part of the business for which the corporation was created. Fletcher Cyc. Corporations, Vol. 9, page 9956. It is the general rule that a corporation is doing business in a state when it transacts some substantial part of its ordinary business therein. *Interstate Amusement Co. vs. Albert*, 239 U. S. 560, 161 S. W. (Tenn.) 488; 14 A. C. J. 1270.

Clearly the licensee, M. Aliber, is transacting or carrying on through his agent, Mr. Tweedt, at Marshalltown, a substantial part of the business for which he was licensed. The execution of the papers referred to, the requirements of the statute that can only be complied with at Marshalltown, all show clearly that the licensee is in fact maintaining a place of business at Marshalltown.

We are, therefore, of the opinion that M. Aliber should be required to obtain a license for his business transacted at Marshalltown, Iowa, and that the license he now holds to transact business in Des Moines does not cover the business obtained in Marshalltown in the manner related.

SCHOOLS: 1. Pupils may be temporarily absent from school for the purpose of attending a religious school without violating the compulsory attendance law, provided such absence does not interfere with school work. 2. If only a part of the class is absent attending religious schools, the remainder may not demand that the regular class work continue during the

absence of the other members. 3. Those who are absent attending religious schools may be required to make up their work.

April 11, 1927. *Superintendent of Public Instruction:* We have received your letter of April 7, 1927, in which you submit to this department the following inquiries:

"In a number of the schools of the State there are parents who wish their children to be out of school from a quarter to a half of a day once or twice a week for the purpose of receiving religious instruction away from the school during that time. As a result of this the following questions arise on which we would like your opinion:

1. If such pupils are within the compulsory attendance age, is such temporary absence from school a violation of the Compulsory Attendance Law?
2. If an entire class in the grades, for example, is not withdrawn can those remaining in school during the time the remainder of the class is out, demand that their work continue the same as if the entire class was present or may the teacher assign collateral work to be done by those remaining in the class?
3. If regular class work goes on during the absence of those who are attending religious instruction, may those who are absent be required to make up their work?"

Section 4410 of the Code, 1924, which requires school attendance, reads as follows:

"Any person having control of any child over seven and under sixteen years of age, in proper physical and mental condition to attend school, shall cause said child to attend some public or private school for at least twenty-four consecutive school weeks in each school year, commencing with the first week of school after the first day of September, unless the board of school directors shall determine upon a later date, which date shall not be later than the first Monday in December.

"The board may, by resolution, require attendance for the entire time when the schools are in session in any school year."

It is our opinion that a compliance with the above statute does not require a child of school age to attend school for every hour of the day and every day of the school year. If they attend with such a degree of regularity as to permit them to pursue their school studies, this will amount to a sufficient compliance with the statute. Students may be excused from school for any proper purpose, which would, of course, include the right to attend and secure religious instruction in other schools, unless to do so would seriously interfere with and impair their school studies. We therefore answer your first question in the negative.

We will answer your second question in this way: It is for the Board of Education to determine what work shall be given in the public school during the time certain students are absent therefrom receiving instruction in religious schools. The students have no right to dictate what particular work shall be done during such time. Of course, if regular class work is pursued during the absence of those who are attending religious schools, those who are absent may be required to make up their work. In other words, it is the duty of the students attending public schools to do the work required therein, and if they are absent for any purpose they must be required to make up their work.

SCHOOLS—ELECTIONS: Where the statute provides that polls shall be open at 12 and close at 7, and the notice provides for the opening of the polls at

1 and close at 2, if the election is held and bonds voted, the election will be valid.

April 12, 1927. *Superintendent of Public Instruction:* We have received your letter of April 12, 1927, in which you submit to this department the following inquiry:

"The president of the board of the school township of Rock Falls, having a petition signed by twenty-five per cent of the voters of the township, posted a notice calling for a special election for the purpose of voting bonds for a school building as provided for in Section 4354. In posting said notices it was advertised that the polls would open at one and close at two which does not seem to be in harmony with Section 4202 which requires that in any school district in which there is a city or town (as is the case in Rock Falls Township) the polls shall open at twelve and close at seven P. M. If the polls are actually opened at twelve and held open until seven, would the election be valid even though the notices call for the polls to open at one and close at two?"

Section 4354 of the Code, 1924, provides for the holding of an election in school districts for the purpose of voting on the creation of an indebtedness and the issuance of bonds for the construction of a schoolhouse or schoolhouses.

Section 4202 of the Code, 1924, relating to the opening and closing of polls at school elections was repealed by Chapter 26 of the laws of the Forty-first General Assembly, and the following enacted in lieu thereof.

"In all school districts in which registration of voters is required the polls shall open at seven o'clock a. m. and close at seven o'clock p. m.; *in school districts where registration of voters is not required, composed in whole or in part of cities or towns, or in consolidated school districts, the polls shall open at twelve o'clock noon and close at seven o'clock* p. m.; and in all other independent school districts and school townships the polls shall open at one o'clock p. m. and remain open not less than two hours."

The underlined portion of the above section relates to the school district in question.

The question for our determination is whether or not the fact that the notice of the special election prescribes that the polls will be open at one p. m. and close at two p. m. will invalidate the election and render the authorization of the creation of an indebtedness and the issuance of bonds absolutely void.

It has been several times held in this state that the statutes prescribing he time and manner of giving notice of special elections are directory merely, and the absence of insufficiency of such notice will not invalidate an election of which the people were duly notified.

Dishon vs. Smith, 10 Iowa, 212;
Paige Company vs. Emigrant Company, 41 Iowa, 111;
Ford vs. North Des Moines, 80 Iowa, 633;
McNees vs. School Township, 133 Iowa, 120;
Independent School Dist. vs. School Dist., 153 Iowa, 598;
McDunn vs. Roundy, 191 Iowa, 980.

It is also well settled that an election will not be invalidated by the omission of some duty by an officer charged with giving notice thereof when such election has been duly ordered and held.

Dishon vs. Smith, 10 Iowa, 212.

We are therefore of the opinion that if the election be held and the polls

remain open for the time prescribed in the statute, the election will not be void, even though the notice prescribes that the polls shall be open for a shorter period of time than prescribed in the statute, and that any bonds issued under the authorization voted by the electors of the school district will be valid and binding.

SCHOOLS AND SCHOOL DISTRICTS: A school board does not have the authority to close a school and send the children to an adjoining school district unless the provisions of Section 4227 of the Code exist.

April 12, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of April 5, 1927, in which you request an opinion upon the following question:

"A school in a subdistrict township wishes to send the pupils to a near-by town. All of the patrons are in favor but two. The school board are willing but the county attorney does not think that it is legal."

It is provided by statute, Section 4227, Code of Iowa, 1924, as follows:

"The board of directors shall determine the number of schools to be taught, divide the corporation into such wards or other divisions for school purposes as may be proper, determine the particular school which each child shall attend, and designate the period each school shall be held beyond the time required by law."

This section authorizes the board of directors of a township school corporation to divide the corporation into such divisions as it may deem proper. Under this section, then, the board has the power to establish boundary lines of subdistricts.

It is provided by statute, Section 4375, Code of Iowa, 1924, as follows:

"When the board is released from its obligation to maintain a school, or when children live at an unreasonable distance from their own school, the board may contract with boards of other school townships or independent districts for the instruction of children thus deprived of school advantages, in any school therein, and the cost thereof shall be paid from the general fund."

The conditions therein set out are the only conditions under which the board would be justified in closing a school and sending the children to an adjoining school except where the school is closed for lack of pupils under Section 4231 of the Code of Iowa, 1924.

In construing the section quoted above the supreme court of this state in the case of *Peterson vs. Pratt*, 183 Iowa, 462, held that a school district may contract for tuitioning its pupils in a foreign district only on condition that the county superintendent authorize a shortening of the school year and that authorization by the county superintendent to discontinue the school, a power not possessed by that official, will not authorize the board to so contract.

However, there is an indication in section 4376 of the code of Iowa 1924 that when there will be a saving of expense the children may be transported to a school in another corporation.

The cited section reads as follows:

"When there will be a saving of expense, and children will also thereby secure increased advantages, the board may arrange with any person outside the board for the transportation of any child to and from school in the same *or in another corporation, and such expenses shall be paid from the general fund.*"

It will, therefore, be seen that there is apparent conflict between Section 4375

and the interpretation placed upon it by the court and what might reasonably be implied in Section 4376.

Prior to the codification of 1924 the above sections were a part of Section 2774 of the code of 1897 and were connected in that code by the word, "and." Since they were not amended by the Fortieth General Assembly in Extra Session, we are of the opinion that the court would construe them together and would authorize the board to discontinue school and pay for the necessary transportation and tuition charges to the adjoining school out of the general fund.

We are, therefore, of the opinion that where any of the above conditions exist the board may discontinue a school and transport the pupils to another school in its own corporation or to a school in another corporation and pay the expense of such instruction and transportation from the general fund of the school district.

COUNTIES—JUSTICES OF PEACE: The Board of Supervisors is not required to furnish codes and session laws to Justices of the Peace. They may do so however.

April 13, 1927. *County Attorney, Waukon, Iowa:* We have received a letter from Mr. John H. Palmer, County Auditor of Allamakee County, in which he submits to us a certain inquiry with reference to the law relating to Justices of the Peace.

We have concluded to prepare an opinion for your office and mail a copy thereof to Mr. Palmer. We do this on account of the fact that many such inquiries have recently been submitted to this department.

Section 236 of the Code, 1924, provides as follows:

"The board of supervisors may purchase and pay for out of the general fund such additional number of copies of the code and session laws as may be deemed necessary for the use of county and township officers."

It will therefore be observed that the authority therein granted is permissive merely and that it is optional with the board to determine whether codes and session laws shall be purchased and furnished to Justices of the Peace.

Section 10516 provides that the board of supervisors shall furnish to the Justices of Peace a well bound black record book of not less than four quires with index suitable for a docket upon his certificate that the same is necessary for the business of the office.

We know of no other statutes providing that the county shall furnish any supplies of any kind to Justices of Peace. Therefore, we answer Mr. Palmer's question in the following way:

With the exception of the record book, which is covered by Section 10516, the board of supervisors is not required to furnish codes and necessary supplies to Justices of the Peace. The board may, however, at its option, purchase and furnish to each Justice of the Peace a code and necessary session laws.

SHERIFFS: County should pay necessary expenses of sheriff in attending Sheriffs' School called by governor and attorney general.

April 13, 1927. *County Attorney, Algona, Iowa:* In answer to your letter of recent date relative to the authority of the Board of Supervisors to pay the necessary expenses of your sheriff in attending the school of instruction for

sheriffs, held at Des Moines on March 4th and 5th at the call of the governor, you are advised that the reasonable necessary traveling and other expenses should be paid by the board, as the sheriff was obliged to be present as a part of his official duties.

OFFICERS—SCHOOLS—COUNTY SUPERINTENDENTS: A County Superintendent of Schools must be qualified at the time he takes office and not at the time of his election.

April 15, 1927. *Superintendent of Public Instruction:* We have received your letter of April 13, 1927, in which you submit to this department the following inquiry:

"Must a candidate for office have the necessary qualifications at the time of appointment or would the law be complied with if the qualifications were attained on or before the day of assuming office?

"This is a question that is bound to come up frequently for the reason that a county superintendent is to be elected in each of the ninety-nine counties on the second Tuesday of May of this year."

Section 4097 of the Code, 1924, prescribes the qualifications for a county superintendent and reads as follows:

"Such superintendent may be of either sex, shall be a holder of a regular five year state certificate or life diploma, and have had at least five years' experience in teaching or superintending; but anyone now serving shall be deemed eligible to reelection."

It will be observed that the statute does not prescribe the qualifications for election to the office, but prescribes the qualifications for holding the office. This is a material element in determining the question under consideration.

The rule is stated in 29 Corpus Juris on page 1376, as follows:

"The question as to when the qualifications necessary for legal appointment or election to office shall exist is one to which different answers have been given. Most of the cases hold that the term 'eligible' as used in a constitution or statute means capacity to be chosen and that therefore qualifications must exist at the time of election or appointment."

In the foot notes of this volume, the authorities disclose the fact that the rule as therein stated is supported by the courts of the following states: California, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, Pennsylvania, Rhode Island, and also England. The contrary rule, as disclosed by the annotations thereto, is supported by the courts of the following states: Iowa, Kansas, Kentucky, Wisconsin and Indiana.

The authorities cited to show that the Iowa courts hold contrary to the text as stated in the above volume of Cyc., are *State vs. Huegle*, 112 N. W. 234; *State vs. Van Beek*, 87 Iowa, 569; 54 N. W. 525; 43 Am. St. Rep. 397; 19 L. R. A. 622.

In the authorities above cited, it has held that the statutory qualifications for public office must exist either at the time of election or at the time of entering on the duties of the office, as the statute prescribing the qualifications may direct.

Where the words in the statute prescribing the qualifications for public office are "eligible to office" or equivalent thereto, the eligibility must exist at the time of entering the office and need not exist at the time of election. These authorities are determinative of the question you have submitted to us.

We therefore hold that the County Superintendent must have the qualifica-

tions prescribed in the statute at the time of entering upon the duties of the office, and that it is not necessary for him to be so qualified at the time of his election.

TAXATION: Corn raised within a year is exempt only when owned by the one raising the same. 2. It is not exempt from taxation when in the hands of a party who did not raise the same.

April 15, 1927. *County Attorney, Vinton, Iowa:* We desire to acknowledge receipt of your letter of April 12, 1927, in which you submit to this department the following inquiry:

"The law, as you know, provides that corn is not assessable for one year after it is grown. We are wondering if this rule extends to corn in elevators. The particular case in mind is the grain buyer at Mt. Auburn. The assessor called to make the assessment and he said he did not have any corn one year old, and therefore it was not to be assessed. Would be glad to be advised of your idea as to the proper way to assess this corn."

Section 6944 of the Code, 1924, provides in part as follows:

"The following classes of property shall not be taxed: * * * *

"13. Agricultural produce. The agricultural 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."

So far as we are able to discover, the Supreme Court of this State has never passed upon this exact question. However we believe the meaning of this section is plain. It is apparent that agricultural produce must have been harvested by or for the person assessed within one year previous to the listing to entitle the owner thereof to the exemption of such property from taxation. If such property is sold on or before the first day of January of the year in which the same is to be assesesd, it must be assessed to the owner thereof, notwithstanding the fact that it was raised or grown within the year. Any other construction would do violence to the language used in the statute.

We therefore hold that corn in elevators, unless owned by the person who raised the same, must be assessed if owned on the first day of January in the year in which the assessment is made.

MUNICIPALITIES: A proposition of levying a tax for the purpose of erecting a township hall may be submitted at a special election.

April 15, 1927. *County Attorney, Maquoketa, Iowa:* We have received your letter of March 15, 1927, in which you submit to this department the following inquiry:

"Referring to Chapter 284 of the Code of Iowa, 1924, the Trustees of one of our townships desire to levy a tax for the purpose of erecting a township hall. They would respectfully request advice from your department as to whether or not Sec. 5574 authorized the calling of a special election for that purpose."

Section 5574 of the Code, 1924, reads as follows:

"The trustees, on a petition of a majority of the resident freeholders of any civil township, shall submit to the electors thereof, by posting notices of such election in four conspicuous places in the township, thirty days before election, and the form of the proposition will be:

"Shall the proposition to levy a tax of * * * * mills on the dollar for the erection of a public hall be adopted?"

* * * We are of the opinion that unless a statute provides otherwise, or specifies that a public measure shall be submitted at a general election, it may be submitted either at a special or general election.

COUNTY OFFICERS—ELECTIONS: A county superintendent is elected by a majority of the votes cast by those present if a quorum is present.

April 18, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of recent date requesting an opinion of this department upon the interpretation of Section 4101 of the Code of Iowa, 1924, in regard to the election of county superintendents and especially the following questions:

"Can a majority of those present, provided there is a quorum in attendance, elect a County Superintendent?"

The cited section provides, among other things, as follows:

"Said convention shall select a chairman, and when so organized shall elect a county superintendent of schools."

This is the only provision in the statute regarding the election of the county superintendent by the convention.

It is the general rule that in the absence of express provision to the contrary a proposition is carried in a deliberative body by a majority of the legal votes cast. We are, therefore, of the opinion that since there is no restriction upon the vote in this convention that a quorum being present an election would be made by a majority of the votes cast. We are further of the opinion that the convention should adopt its own rule requiring a majority of the members present entitled to vote for an election.

MUNICIPALITIES—INSURANCE: The city may not advance money to pay the premiums on group insurance for its employees, even though the same may be taken out of the employees' salary.

April 19, 1927. *Director of the Budget:* We have received your letter of April 19, 1927, in which you submit to this department the following inquiry:

"We are advised that the city of Fort Dodge desires to buy group insurance, which is insurance on all employees of the city.

"The employees, on regular group insurance, may contribute at the rate of 60c per month per one thousand dollars. The average cost of group insurance is about 90c per month per thousand dollars. The city, in this case, will be required to pay the additional 30c.

"The amount of premium is payable by the city to the Insurance Company and the 60c is then deducted monthly from the employees' salaries.

"Will you kindly furnish an opinion as to whether this additional 30c per employee may be paid from the general fund of the city?"

* * * It will be observed that the plan outlined is for life and accident insurance, and that the taking of such insurance will not relieve the city of any liability in case of accident to employees.

It is a well known rule that municipal corporations can possess and exercise 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.

Burroughs vs. Cherokee, 134 Iowa, 429;
Brooks vs. Brooklyn, 146 Iowa, 136;
Bear vs. Cedar Rapids, 147 Iowa, 341;
Akron vs. McElligott, 166 Iowa, 297.

We have examined the municipal statutes of this state with care and we find no provision therein either expressly or impliedly granting to city or town councils the right to use any part of the general fund or any other fund in the payment of premiums for group insurance on its employees.

We have not overlooked the fact that the amount necessary to pay the premiums on such insurance is merely advanced by the city and is then deducted monthly from the employees' salaries. This fact will make no difference in the operation of the rule we have just announced. The statute does not contemplate that cities or towns shall become collecting agents for insurance companies, or that the method of bookkeeping of such cities and towns should be complicated by the adoption of the plan contained in the letter of the Mayor of Fort Dodge.

We are therefore of the opinion that the plan therein outlined is illegal and should not be adopted by a city of this state.

COUNTY OFFICERS—COUNTY FUNDS—BANKS: Where funds of a county are temporarily withheld on account of their deposit in insolvent banks the county treasurer should indicate in his ledger that no moneys are available, issue funds against the warrants and stamp them "not paid for want of funds" after which the warrants draw interest at the rate of five per cent.

April 19, 1927. *Auditor of State:* This will acknowledge receipt of your letter of recent date in which you request an opinion upon the following question:

Where funds of a county are temporarily withheld on account of their deposit in an insolvent bank and where the county treasurer's ledger account shows a balance in the several funds though no money is available, should warrants be stamped "not paid for want of funds," do they draw interest and, if so, at what rate?

It is provided by statute, section 5160, that where warrants are not paid for lack of money, the warrant should be stamped "not paid for want of funds" and should be endorsed by the county treasurer with the date of presentation, after which they draw interest at the rate of five per cent until the date when they are called by the county treasurer.

We are of the opinion that the above section applies to the question you submit.

We are further of the opinion that when a bank closes involving funds of the county, that the county treasurer should close the account on his ledger by indicating that the funds are not available and entering a claim against the receiver and the sinking fund. Thereafter, warrants must be issued and retired when the funds become available from the sinking fund.

We anticipate that this question will be largely relieved by the issuance of anticipatory warrants as provided by House File No. 42 of the Forty-second General Assembly.

FOREST RESERVATION—TAXATION: There is no maximum limit to the number of acres that may be claimed as a forest reservation. 2. There is a maximum limit of the numbers of acres that may be embraced in a fruit tree reservation.

April 19, 1927. *County Attorney, Logan, Iowa:* We desire to acknowledge receipt of your letter of April 15, 1927, in which you submit to this department the following inquiry:

"Is a forest reservation on which a person is entitled to tax exemption lim-

ited to ten acres, or does the limitation of ten acres in line seven of the statute apply only to fruit tree reservations? The exact question submitted to me by our County Auditor, is whether or not a property owner who is claiming tax exemption on sixty acres as a forest reservation is entitled to tax exemption on the whole sixty acres or on the ten acres. The sixty acres is in one tract."

Section 2606 of the Code, 1924, reads as follows:

"On any tract of land in the State of Iowa, the owner or owners may select a permanent forest reservation or reservations, each not less than two acres in continuous area, or a fruit-tree reservation or reservations, not less than one or more than ten acres in total area, or both, and upon compliance with the provisions of this chapter, such owner or owners shall be entitled to the benefits provided by law."

It will be observed that under the provisions of the above statute forest reservations must have at least two acres in continuous area, while fruit-tree reservations must not have less than one or more than ten acres in total area, or both.

It is therefore apparent that there is no maximum limit to the number of acres in a tract of land that the owner may claim as a forest reservation, while there is a maximum limit of the number of acres that may be embraced in a fruit-tree reservation. The term "or more than ten acres in total area" cannot possibly apply to a forest reservation because it is used in connection with the phrase "not less than one." It clearly indicates that it is applicable to such reservations and not to forest reservations.

We are therefore of the opinion that there is no maximum to the number of acres that an owner may claim as exempt as a forest reservation.

CIGARETTES—MUNICIPALITIES: 1. It is mandatory for the city council to revoke a cigarette permit where the permit holder has been convicted of a violation of the state. 2. A violation of the law by an employee will not work a revocation of the permit.

April 19, 1927. *Treasurer of State:* We desire to acknowledge receipt of your letter of April 14th, 1927, in which you submit to this department the following inquiry:

"Can the cigarette permit of a dealer be revoked for a violation of the provisions of this law committed by one who is in the employ of this dealer?"

Section 1559 of the Code, 1924, provides as follows:

"The city or town council or board of supervisors, as the case may be, granting such permit shall revoke the permit of any person who has been convicted of violating any of the provisions of this chapter and no permit shall again be granted to a person for a period of two years from the date his permit has been revoked."

In the opinion of this department prepared on October 16, 1923, it was held as follows:

"First, that in case of a violation of the cigarette act, it is mandatory that the council revoke the permit of a person so violating the act.

"Second, that the record of conviction of a permit holder in a court of this state must be received as a conclusive evidence that a violation of the act has taken place."

It is our opinion that a violation of any part of the provisions of the cigarette law on the part of an employee of the dealer will not work a revocation of the dealer's permit under the provisions of Section 1559, and we shall state our reasons therefor in as brief a manner as possible.

It will be observed that the language of the statute is, the city or town council or board of supervisors, as the case may be, shall revoke *the permit of any person who has been convicted of violating any provisions of this chapter.*

It is well settled in this state that penal statutes are to be strictly construed and applied only to such cases as plainly come within the provisions thereof. This rule of construction equally applies to a statute imposing a forfeiture as well as one providing for the punishment of an act as a crime. The following authorities so hold:

Burke vs. Mally, 141 Iowa, 55;
Lames vs. Armstrong, 162 Iowa, 327;
State vs. Reed, 162 Iowa, 572;
State vs. Deitrick, 178 Iowa, 48.

Therefore, considering the language of the statute hereinbefore quoted, and applying the rule of construction just stated, we are clearly of the opinion that a violation of the statute committed by an employee will not warrant the city or town council or board of supervisors in revoking the permit of the dealer under the provisions of Section 1559. Of course, the employee would be subject to the other penalties provided in the statute for a violation of the provisions thereof.

SCHOOLS: The procedure for adding territory to a consolidated school district is that prescribed in the statute relating to the original formation of the district.

April 20, 1927. *County Attorney, Mason City, Iowa:* We have received your letter of April 18, 1927, in which you submit to this department the following inquiry:

"The Independent Consolidated School District of Plymouth lies mostly in Cerro Gordo County, but extends into Worth County. That part of it which lies in Cerro Gordo County is in Falls Township and includes the town of Plymouth. The balance of Falls Township is a rural school township. It is proposed to add to the Independent Consolidated School District of Plymouth a small portion of Falls Township lying south of the Plymouth Consolidated District.

"The Board of Directors of the Consolidated School District of Plymouth, which is favorable to the addition of this territory to their district, have asked me to outline for them the complete procedure to be followed in effecting this addition of territory to the consolidated district. The exact procedure is not so clear. Will you advise me as to the correct method of procedure in adding additional territory to the Consolidated School District."

As we understand it, the Board of Directors of the Falls Township Rural School District will not agree to an adjustment of the boundary lines of the two districts, as provided in Section 4133, therefore this plan is eliminated from our consideration.

Section 4191 of the Code, 1924, reads as follows:

"Whenever it is proposed to extend the limits of, or add territory to, an existing independent city, town or consolidated district, the voters residing within the proposed extension or addition and outside the existing independent district, shall vote separately upon the proposition. The proposition must be approved by a majority of the voters voting thereon in each of such territories."

It will therefore be noted that under the provisions of the above section territory may be added to an existing consolidated district.

Section 4190 makes applicable to all districts, except when otherwise clearly stated, the provisions of the law relative to common schools and provides that the power granted to one form of corporation, or to a board in one kind of corporation, shall be exercised by the other in the same manner as nearly as practicable. It is therefore necessary for us to ascertain what is the method of annexing territory to an ordinary school district. A careful examination has failed to disclose any special provision of the statute relating to the addition of territory to school corporations, with the exception of Sections 4133 to 4191. We must, therefore, resort to the provisions of Chapter 209, to determine the question you have submitted.

We are clearly of the opinion that the procedure for adding territory to a consolidated school district is that prescribed in the statute relating to the original formation of the district, (Sections 4155 to 4170, both inclusive). The procedure apparently is the same as though a new consolidated district were to be organized, including the old territory as well as the new. It was so held in the following cases:

Arnold vs. School Dist., 103 Iowa, 199;
State vs. Thompson, 190 Iowa, 1160.

BOARD OF SUPERVISORS—FIDUCIARY FUNDS: Where the fees of the office of the clerk of the district court are deposited in a bank now in receivership the county board of supervisors does not have the authority to replace said fund and accept dividends or certificates issued representing the deposit.

April 20, 1927. *County Attorney, Corydon, Iowa:* This will acknowledge receipt of your favor of recent date in which you request an opinion of this department upon the following question:

Does the board of supervisors have the power and authority to take up trustees' certificates issued by a closed bank for funds deposited by the clerk of the district court or other fiduciary funds and pay into such fund an amount equal to the deposit, such funds having been paid into the office as fees due attorneys, filing fees, and other fees in connection with the office of the clerk of the district court?

Inasmuch as these fees belong to other parties and are held by the clerk or other county officer, except the treasurer, merely as trust funds or funds of a fiduciary nature the county has no interest in them and cannot, therefore, take up the trustees' certificates and pay into the office of the clerk, recorder, or other officer, except the treasurer, the amount of the deposit.

We have had this matter up a number of times especially in the matter of money paid for redemption from tax sale to the county auditor and others and have reached the conclusion that the persons entitled to these fees take the loss and their proportionate share of the dividends paid by the bank.

At any rate, the county has no such interest in them as would warrant the board of supervisors to expend funds of the county to replace the loss.

MUNICIPALITIES—PUBLIC FUNDS: Since the passage of the Brookhart-Lovrein bill it is not lawful for a municipality to pay for bonds out of its funds to secure deposit of funds in the bank.

April 20, 1927. *Count Attorney, Maquoketa, Iowa:* This will acknowledge receipt of your letter of recent date requesting an opinion of this department upon the following question:

May a city council or other municipality require its depository bank to fur-

nish depository bonds in addition to the protection provided by the Brookhart-Lovrein Act and pay the premium on the bond out of the funds of the town, of the city, or other municipality?

You have enclosed a copy of your opinion to municipalities in your county and inquire whether or not in the opinion of this department the opinion rendered by you is a correct exposition of the law on this question.

We are of the opinion that you have correctly stated the law upon this question and that the municipality cannot pay out of its funds the premium upon such bond though it may require a bond to guarantee the deposit in addition to the protection of the public fund statute to which reference is made herein.

This is especially true since the enactment of House File No. 42 of the 42nd General Assembly providing that no suit shall be maintained upon a bond and no liability enforced against any surety unless that surety has received a premium therefor. Under the previous statutes it has been held that the depository bank must furnish the bond and must pay the premium thereon.

LOTTERIES—GAMBLING DEVICES: A device whereby a patron of a county fair receives a number on an automobile even though he has purchased a ticket is a gambling device.

April 21, 1927. *County Attorney, Decorah, Iowa:* This will acknowledge receipt of your favor of recent date in which you request an opinion upon the following question:

Is it contrary to the statutes of this state prohibiting a lottery for a county fair association to prepare a ticket in two parts, one to be retained by the patron and the other part to be torn off and thrown in a box; after which, upon a drawing, the holder of every agreed numbered coupon drawn shall be entitled to purchase a Ford automobile at a nominal price or to buy a pony at a nominal price?

This department has ruled upon a similar question and we are enclosing herewith copy of the opinion heretofore rendered.

You are further referred to Section 13203 of the Code of Iowa, 1924, and to Sections 13208-13209 of said Code.

The only difference between your proposition and the cases cited in the opinion is that in your case a nominal price is to be paid for the article purchased.

We are of the opinion that this is not material since, without question, the holder of the coupon is engaging in a game of chance, lottery, gambling scheme, or device or trade scheme which is prohibited by statute.

SCHOOLS AND SCHOOL DISTRICTS: A school physician, dentist, or nurse employed by the school board and paid from public school funds cannot legally devote any of the time for which they are paid to the treatment or examination of children regularly enrolled in any school supported wholly or in part by or under the direction of any ecclesiastical or sectarian management or control.

April 22, 1927. *Superintendent of Public Instruction:* You have requested an opinion from this department upon the following question:

"An inquiry comes from Davenport raising the question as to whether a school physician, a school dentist, and a school nurse, employed by the school board and paid from public school funds, may legally devote any of their time to rendering service to children enrolled in parochial schools."

It is provided by statute, Section 5256, Code of Iowa, 1924, and of Iowa School Laws and Decisions, 1925, as follows:

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

We are of the opinion that a school physician, dentist, or nurse employed by the school board and paid from public school funds cannot legally devote any of the time for which they are paid to the treatment or examination of children regularly enrolled in any school supported wholly or in part by or under the direction of any ecclesiastical or sectarian management or control.

STATE BOARD OF CONSERVATION: 1. A Riparian owner cannot divert the course of a stream from the lower lands. 2. The owners of land have a right to insist that the stream follow onto their land without diversion, interruption or diminution. 3. Mandatory injunction is the proper remedy to force the land owner to restore the course April 22, 1927, of a stream to its natural channel.

Secretary of Executive Council: We have received your letter of April 13, 1927, in which you submit to this department the following inquiry:

"About a year ago a farmer living west of the Elbert State Park changed the course of a creek, and the water not running into the lagoons of the State park, they have now dried up.

"We have been informed that we can go out and open this ditch, but before proceeding, we would like an opinion from you as to whether or not the party who closed this ditch should not open it, and keep it open; instead of the State of Iowa."

While you do not state in your letter, we are assuming that the creek involved in your inquiry flowed in its natural state through the State Park, and that by diverting the course thereof into the lagoons there was no appreciable diminution of the water that flowed through the state lands onto the lower lands. This opinion is based upon this assumption.

It is well settled in this state that riparian owners have a right to insist that a water course flow in its accustomed course, and a riparian owner cannot divert the course of the stream from others even by changing the course of said stream only through his own land. The owners of the land through which a stream flows has a right thereto without diversion, interruption or diminution, except such diminution as is caused by proper use of the water.

It is well known that the owner of land, over which there is a natural watercourse, may divert the course of the stream on his own land provided he turns the water back to its natural channel before it reaches the land of the lower riparian owner. Both the lower and upper owners are entitled to have this done, and where the water has been diverted from its natural channel and thrown upon the land of another he not only has a right of action for damages, but he may restrain the party from thus diverting the water to his prejudice. The following authorities support the rules therein stated.

Moffett vs. Brewer, 1 Greene 348;
McCord vs. High, 24 Iowa, 336;
Van Orsdol vs. B., C. R. & N. Ry. Co., 56 Iowa, 470;
Falcon vs. Boyer, 157 Iowa, 745.

Under the law, every riparian owner has a right to use the water in the stream as it passes along and an equal right with those above and below him

to the natural flow of the water in its accustomed channel, without unreasonable detention, or substantial diminution, either in quality or quantity, and none of such owners have the right to use the water to the prejudice of the others, unless such a right has been acquired by license, grant or prescription. The following authorities support the rule just announced:

Willis vs. City of Perry, 92 Iowa, 297;
Gehlen Brothers vs. Knorr, 101 Iowa, 701;
Bramley vs. Jordan, 153 Iowa, 295.

Therefore, the farmer referred to in your letter had no right to change the course of the creek and prevent the water therein from running onto the state lands and into the lagoons of the State Park. This matter should at once be taken up with the said farmer with a view of inducing him to change the course of the creek so that it will run in its natural course. If he fails to do so upon demand, then it will be necessary for the State Board of Conservation to bring an action in the nature of a mandatory injunction to force the land owner to restore the course of the stream to its natural channel. It was so held in the case of *Falcon vs. Boyer*, 157 Iowa, 745.

SCHOOLS AND SCHOOL DISTRICTS: A transfer of funds from the general fund to the schoolhouse fund under the provisions of Section 4231 of the Code of Iowa 1924 is a permanent transfer and does not come within the provisions of Section 388.

April 22, 1927. *Superintendent of Public Instruction:* You have requested an opinion of this department upon the following question:

"May a school board transfer a surplus in the general fund to the schoolhouse fund permanently or must any transfer be subsequently returned to the general fund? Is there a conflict between Sections 4231 and 388?"

We are of the opinion that Section 388, Code of Iowa, 1924, does not apply to such a transfer as is authorized by Section 4231 of the same Code because the provisions of the said Section 388 are subject to the provisions of the law relating to municipalities and does not apply to permanent transfer of funds authorized by the statute.

FISH AND GAME—CARDINALS: Can not be shipped into Iowa for the purpose of sale as caged birds.

April 22, 1927. *State Game Warden:* I wish to acknowledge receipt of your favor of the 23rd in which you request our opinion on the following proposition:

"We have a letter asking permission for the Laredo Zoological Bird and Animal Company of Laredo, Texas, to ship four (4) Cardinals imported from Mexico to the Des Moines Bird Company, Des Moines, Iowa.

"We wish to call your attention to Section 1774 in reference to the sale of non-game birds, to Section 1767, giving the list of birds known as game birds, and to Section 1776 enumerating the birds not protected."

Section 1767 to which you refer fixes the closed season for certain birds and animals. This section includes the game birds which are named in Section 1774. Section 1776 referred to by you names the birds not protected by the provisions of our law from being shot or killed.

We wish to call your attention to the provisions of Section 1777 to which you have not referred and that reads as follows:

"This chapter shall not be construed to forbid the selling or shipping of

parrots, canaries or any other cage birds which are imported from other countries or not native to any part of the United States."

We are advised, and from an examination of the authorities upon such questions, find that cardinals are natives of the United States and of the State of Iowa and the prohibition of the statutes referred to therefore applies to these birds and they can not be shipped into this State for the purpose of exhibit or sale as cage birds.

APPROPRIATIONS: Where a contract has been entered into involving the appropriations for the hospital of the insane at Mt. Pleasant the balance in said appropriation does not revert to the general fund of the state under the budget law.

April 22, 1927. *Board of Control:* We desire to acknowledge receipt of your letter of April 20, 1927, in which you submit to this department the following inquiry:

"We wish to refer you to Section 59, Chapter 218, Acts of the 41st G. A. which provides for the disposition of appropriations remaining unexpended or unobligated at the close of business June 30, 1927. This section provides that all such funds shall revert to and become a part of the general fund of the state treasury.

"This section is not entirely clear to us. For instance some time ago a railroad company filed an estimate with this board covering repairs to side track to the Mount Pleasant State Hospital. Our contract with the company provides that the state furnish the material and labor but that the work be done under the supervision of the company. The board members at that time set aside the amount of $6,000 from the general appropriation for the board as provided in paragraph 16, Section 48, Chapter 218, Laws of the 41st G. A. It now appears that the railroad company has made only a small amount of the repairs necessary on this side track and the amount set aside by the board to be used for this purpose will not all be expended July 1 of this year."

The appropriations for the support of the Board of Control, and the various institutions under the management of the said Board are contained in Section 48 of Chapter 218 of the Laws of the Forty-first General Assembly, subdivision 1 to 17, both inclusive. Section 59 of Chapter 218 of the Laws of the Forty-first General Assembly, commonly known as the budget law, provides as follows:

"*Except where otherwise specifically provided by law*, all appropriations made by this act, remaining unexpended or unobligated, at the close of business on June 30, 1927, shall revert to and become a part of the general fund in the state treasury; provided, however, that all balances remaining in the appropriations which have been made annually for each year of the biennium, shall revert annually."

It will be observed that the above section is made applicable only to all appropriations made in the budget law remaining unexpended or unobligated.

If a contract has been entered into covering a part or all of an appropriation therein contained, then this section does not apply and such obligated or contracted appropriation did not revert to and become a part of the general fund in the state treasury.

It is quite apparent that the appropriation referred to in your letter and any other appropriations of a similar kind are not covered by said statute because they are, in reality, obligated or the expenditure thereof contracted for.

MUNICIPALITIES: The proceedings of the City Council may not be published in a high school paper.

April 23, 1927. *County Attorney, Anamosa, Iowa:* We have received your letter of April 21, 1927, in which you submit to this department the following inquiry:

"The Olinian, as I understand it, is a high school paper published at Olin and circulates among pupils in the school and those interested in the educational affairs of the district and has a circulation of about two hundred.

"Mr. Carstens publishes the Olin Recorder which is a newspaper of general circulation in Olin and vicinity of about seven hundred twenty subscribers. Olin is a town some eight hundred. Mr. Carstens desires to know whether publication in the Olinian of the proceedings of the town council is a sufficient compliance with Section 5722 of the Code."

Section 5722 of the Code, 1924, relates to the publication of the proceedings of the city or town council and reads as follows:

"Immediately following a regular or special meeting of the city or town council, the clerk shall prepare a condensed statement of the proceedings of said council, including the list of claims allowed and from what funds appropriated, and cause the same to be published in one or more newspapers of general circulation, published in said city or town; provided, however, that in cities and towns in which no newspaper is published, such statement and list of claims shall be posted in at least three public places on the business streets of said city or town."

It will be observed that the requirement is that such proceedings shall be published in one or more newspapers in general circulation published in such city or town. Is a high school publications, such as the one published at Olin, a newspaper of general circulation? We are contstrained to hold that it is not. A high school publication is in no sense a newspaper within the ordinary acceptation and meaning of the term. Such publication is merely for the benefit of the instructors and students in the school, and while such publication may have a larger circulation than among the students and instructors, it can in no sense be said to either be a newspaper or one for general circulation. A high school publication, of course, is largely confined to the publication of school notes and news. It does not publish items of general information with reference to the community, but is confined largely to school activities.

We are therefore of the opinion that the publication of the proceedings of the city or town council in the high school publication is not a sufficient compliance with the statute.

CORPORATIONS—EXECUTIVE COUNCIL: A corporation being indebted in an amount in excess of 2/3 of its capital stock does not warrant the Executive Council in refusing to issue a permit to exchange stock for property.

April 23, 1927. *Executive Council:* This department is in receipt of your inquiry of April 18th as follows:

"Do you consider that the Executive Council would be justified in denying the application for issuance of stock because of the fact that the corporation is indebted in an amount more than two-thirds of its capital stock, although it has sufficient property or surplus to warrant the approval of the application, if it were not excessively indebted?"

The code, under Section 8351 sets out that the articles of a corporation shall fix the amount of indebtedness of the company which shall not exceed

two-thirds of the capital stock, however, under Chapter 385 of the Code of 1924, is found the sections pertaining to the duties of the Executive Council where there is a proposal to pay for capital stock and property or in any other thing than money, and under Sections 8413 and 8414 of said chapter the rules are laid down as to the valuations to be placed on the property which is to be exchanged for capital stock and under Chapter 385 we are unable to find anything that would justify the Executive Council in denying the application for the issuance of stock in the event that said corporation had an excessive indebtedness.

We are, therefore, of the opinion that the questions submitted to this department would of necessity have to be answered in the negative.

BOARD OF SUPERVISORS—RESOLUTION PROHIBITING PERSONS FROM TRESPASSING UNENFORCIBLE: No power given supervisors to create a misdemeanor.

April 23, 1927. *County Attorney, Manson, Iowa:* This department is in receipt of a letter dated April 21st in which you submit the following inquiry:

"Our Board of Supervisors passed a resolution prohibiting persons from walking over the lawn of the court house yard and providing a penalty of from $5.00 to $10.00 for violation. Can this order be enforced?"

This evidently is an attempt on the part of the board of supervisors to make trespassing upon the court house lawn a misdemeanor. All crimes in the State of Iowa are clearly statutory and the power to create such lies in the state as a sovereign and it alone has the right, through the legislature, to delegate to municipalities or subordinate organizations the power to pass such ordinances. Such power was delegated to cities and towns and is found under Section 5738 of the Code of Iowa, 1924, as shown by the following:

"* * * for the protection of the property and inhabitants, and preservation of peace and good order therein * * *."

Under Section 5130, being the general power granted to the board of supervisors, I fail to find that the legislature made any such provision as above quoted and we are, therefore, of the opinion that the board of supervisors would be unable to enforce this order.

MUNICIPALITIES: The city or town may not operate a gas filling station.

April 26, 1927. *County Attorney, Fairfield, Iowa:* We desire to acknowledge receipt of your letter of April 23, 1927, in which you submit to this department the following inquiry:

"We would like to have your opinion as to whether or not our city council could authorize and conduct a municipal gasoline filling station."

It is well settled that a municipal corporation possesses and exercises the following powers only: First, those granted in express words; second, those necessarily implied or necessarily incident to the power expressly granted; and third, those absolutely essential to the declared objects and purposes of the corporation.

Burroughs vs. Cherokee, 134-429, 109 N. W. 876;
Brooks vs. Brooklyn, 146-136, 124 N. W. 868;
Bear vs. Cedar Rapids, 147-341, 126 N. W. 324;
Akron vs. McElligott, 166-297, 147 N. W. 773.

It has also been held by the Supreme Court that authority conferred upon municipal corporations is to be strictly construed and must be closely followed.

Burlington vs. Keller, 18 Iowa, 59;
Clark vs. Des Moines, 19 Iowa, 199;
Keokuk vs. Scroggs, 39 Iowa, 447;
Becker vs. Keokuk Water Works, 79 Iowa, 419.

Any doubt or ambiguity arising from the terms used by the legislature in a grant of power to a municipal corporation must be resolved against the existence of the power and in favor of the public.

Heins vs. Lincoln, 102 Iowa, 69;
Brooks vs. Brooklyn, 146 Iowa, 136.

With the above rules in mind, we have carefully examined the municipal statutes of this state and especially Chapter 292, Section 5738 to Section 5786, relating to the general power of municipalities, and we find no statutes or sections thereof which expressly or impliedly grant to cities and towns the right to operate gas filling stations within their limits or to transact such a business. We are, therefore, clearly of the opinion that municipalities in this state may not do so.

SCHOOLS—ELECTIONS: 1. An elector at school elections must have the same qualifications as voting at a general election. 2. Where a school district located in two counties, an elector who has resided in the district more than ten days but moves from one county to another county within sixty days is not a valid elector in said school district.

April 26, 1927. *Superintendent of Public Instruction:* We desire to acknowledge receipt of your letter of April 22, 1927, in which you submit to this department the following question:

"If a person has been a resident of a school district ten or fifteen years but the day before election he moves from one part of the school district to another part of the district and in doing so crosses the county line and takes up his residence in another county even though he has not moved out of the district, would such person have a right to vote at the school election the day following his move or would he lose his vote by virtue of the fact that he had not been a resident of the county to which he moved sixty days?"

It is provided in Section 4196 of the Code of 1924, as follows:

"To have the right to vote at a school meeting or election, *a person must have the same qualifications as for voting at a general election* and must have been for ten days prior to such school meeting or election an actual resident of the corporation and precinct or sub-district in which he offers to vote."

Therefore, to solve your question we must determine what are the qualifications for voting at a general election. It is provided in Article II, Section 1 of the Constitution as amended by the first amendment of 1868 reads as follows:

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

It was held in the case of *Taylor vs. Independent School District*, 181 Iowa, 544, that a school election comes within the meaning of the above constitutional provisions and that the constitutional requirement that a citizen shall

have resided in a county in which he proposes to vote, sixty days preceding the election, is an absolute requirement. It was also held in this case that an elector who had resided in a proposed district for more than sixty days but had moved from one county to another less than sixty days prior to the school election was not qualified to vote at said election. This authority is determinative of the question you have submitted and we must hold that the elector referred to in your communication is not qualified to vote at the school election.

SCHOOLS AND SCHOOL DISTRICTS—COUNTY OFFICERS: A county superintendent is elected upon receiving a majority of votes present if a quorum be present. 2. The question of eligibility is determined as of the date of qualifying not as of the date of election.

April 28, 1927. *Mr. Irving D. Long, Manchester, Iowa:* You request an opinion of this department upon the following questions:

"1. Is any certain number of votes required to elect the County Superintendent, or does the candidate receiving the largest number on the first ballot receive the election?

"2. Can a person who does not hold the required certificate at the time of election be elected to the office and qualify later?"

This department has ruled under date of March 27, 1924, that a majority of those authorized to attend a convention constitute a quorum and that a majority of the voters present at the election may elect a superintendent. This ruling is based upon the general 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 in the law, the constitution, or by-laws to the contrary. Since there is no provision in the law requiring more than a majority of the votes in a convention to elect a county superintendent and since there are no constitution and by-laws the general rule would apply as above stated.

We have also ruled upon the second inquiry as stated above to the effect that the county superintendent must have the qualifications prescribed in the statute at the time of entering upon the duties of the office and that it is not necessary for him to be so qualified at the time of his election.

COUNTY OFFICERS: The county is not liable to an indictee for the amount of the cash bond posted by him and by the clerk deposited in a bank now closed if the deposit was made in good faith.

April 29, 1927. *County Attorney, Wapello, Iowa:* This will acknowledge receipt of your favor of recent date in which you request an opinion from this department upon the following question:

"An indictee posts a cash bond of $300 with the clerk of the district court for his appearance on trial. Upon dismissal of the case he demands the cash deposited which has been by the clerk deposited in a bank. The clerk gave the indictee a check for the amount in the town where the bank was located on April 18, 1927, which check was deposited for collection at another bank in the same county on the same day. The bank closed on April 19th and the check, therefore, dishonored when presented.

"Your inquiry is whether the county is liable to the indictee for the full amount of the cash bond deposited."

While this question has not been definitely presented to the court it was in issue in the matter of the claim of *Rhodes, County Auditor, vs. Commercial*

Savings Bank of Des Moines, Iowa, in the matter of redemption moneys paid for the redemption of properties from tax sale and the holders of the tax sale certificates intervened claiming the right to subrogation in the deposit and accepting depositors' claims against the bank for their certificates.

Inasmuch as the title to this cash deposited in lieu of a bond did not pass to the county until it was officially forfeited by court order the funds in the hands of the clerk would merely be a trust fund in his hands and the county would be in no way liable for their disposition.

EMINENT DOMAIN—EASEMENT: An easement is an interest in land for which the owner must be paid under condemnation proceedings unless the easement was merely permissive.

April 29, 1927. *County Attorney, Emmetsburg, Iowa:* We wish to acknowledge receipt of your favor of the 23rd, in which you request our opinion as follows:

"We will assume that a land owner has granted an easement on a strip of land belonging to him, and said easement has been granted to an electric light corporation, giving to said corporation a right to erect poles and wires along his property, said land being agricultural land and not in an incorporated town. We will assume that later this same strip upon which there is an easement granted is condemned for highway and road purposes. The question is who would the public be liable to in payment of damages in the purchasing of the roadway. Would the township or county in making payment for said damages, pay said damages to the landowner over whose real property this roadway and easement runs, or would they make payment to the electric company?"

An easement is an interest in land for which the owner is entitled to compensation the same as the owner of the title or the tangible property itself. However, no compensation can be recovered for the taking of a right of way when the use of the property taken was merely permissive.

It was held in *New York Tel. Co. vs. State*, 169 App. Div. 310, 154 N. Y. S. 1059, that the easement of a telephone company in a street is property for which compensation must be made when appropriated by the State. A similar holding is found in the case of drains. *Matter of Rochester*, 24 App. Div. 383, 48 N. Y. S. 764. A large number of cases and general principles are found in 20 C. J. 653 to 660.

We believe, therefore, that in condemning property separate awards should be made to the owner of an easement and to the owner of the fee.

SCHOOLS AND SCHOOL DISTRICTS: 1. The school board has the power to require a schedule of four regular subjects daily in addition to two regular periods for physical education. 2. The school board may refuse to permit a student to register in the high school merely for the two periods per week for physical education. The board may consider circumstances, age, health, home conditions and other surroundings in determining such rule. 3. Before tuition can be charged under Section 4277 of the Code a student must be enrolled in good faith. 4. A pupil enrolled in a parochial school for the regular school work should not be permitted to schedule physical education for two periods per week in the public schools.

April 30, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your favor of recent date in which you request an opinion from this department as follows:

"1. Does a school board have authority under Section 422 to adopt a rule

requiring all public high school students to schedule for four regular subjects daily in addition to two regular periods per week offered by the high school to meet the requirements of the law in physical education?

"2. Does this same section leave it to the discretion of the board to permit, if it sees fit, certain public high school students to schedule for only part time work; for example for the physical education that is offered two regular periods a week?

"3. If not, what is the least amount of work a board may permit a student to schedule for?

"4. If a person of school age who is a resident of a school corporation that does not maintain a public high school wishes to enroll in an approved public high school as a non-resident student, must that student schedule for full time work in that high school if his home district is to be obligated under Section 4277 to pay his tuition.

"5. If such student is not required to schedule for full time could he be permitted to schedule for the two periods per week in physical education and obligate his home district to pay a proportionate part of the tuition required of non-resident students in that high school for full time work?

"6. Would the answer to question No. 5 be different if such student were scheduled in the public high school for the two periods per week in physical education and in a parochial school for four regular periods a day five days a week?

"7. Is it within the discretion of the board to refuse to permit *resident* students to enroll in the public high school for physical education if such students are enrolled in a parochial school for their regular high school work?"

We shall consider your queries in the order set out above.

1. Under the power given the board of Section 4224, Code of Iowa, 1924, to make rules and regulations we are of the opinion that a board has the authority to adopt a rule requiring all public high school students to schedule for four regular subjects daily in addition to the two regular periods per week required for physical education.

The only limitation placed upon this section by the courts is that the rules shall be reasonable. In view of the fact that our public high schools are organized upon the basis of four regular subjects, we are of the opinion that such a rule would be reasonable.

2. We are of the opinion that under our organization of schools it would be an abuse of such discretion for the board to permit a pupil to schedule only for the two regular periods per week for physical education. It would not be an abuse of discretion, in our opinion, for the board to consider the circumstances, age, health, home conditions, and other relationships surrounding the pupil in permitting such pupil to schedule part time work. However, to extend this discretion to the mere schedule of one subject on two days per week would, in our opinion, so interfere with the regular school organization that it would not be within the discretion of the board.

3. The query under this number has been covered by our answer to query No. 2.

4. In order to be entitled to the tuition charge provided by Section 4277 of the Code, we are of the opinion that the student must be enrolled in good faith but the board would be entitled to take into consideration the conditions cited in our answer to query No. 2 above.

5. We are of the opinion that it would not be within the discretion of the board to permit a student to schedule two periods per week in physical education and obligate his home district to pay a proportionate part of the tuition required of non-resident students in that high school for full time work. In

order to be entitled to tuition under Section 4277 a student must be regularly enrolled in that high school and carry a full course or practically a full course subject to the conditions set out in answer to your query No. 2.

6. Our answers to query No. 5 would not be affected by the fact that the student were scheduled in the public high school for the two periods per week for physical education and in a parochial school for four regular periods a day five days a week. We call your attention to our answer to query No. 5 in regard to enrollment in good faith in such school.

7. Under the powers and authority of the board as authorized in Section 4224, it is within the discretion of the board to refuse to permit resident students of the district to enroll in the public high school for two periods per week for physical education if such students are enrolled in a parochial school for their regular high school work. It is within the power of the board to determine the conditions upon which pupils shall be entitled to attend the public high school with reference to the course of study and schedule of the student as well as for the other general regulations of the school.

BANKS AND BANKING—RECEIVERSHIPS: A receiver appointed by the court prior to the enactment of the present statute making the Superintendent of Banking sole and only receiver is not discharged by this statute and a transfer made by him of property owned by the bank is a valid transfer.

April 30, 1927. *Department of Banking:* This will acknowledge receipt of your favor of recent date in which you request an opinion from this department upon the following question:

Is a transfer made by the receiver of a closed bank who was appointed prior to the enactment of our present statute requiring that the superintendent of banking be the sole and only receiver a valid transfer under our present statutes?

The statute in question is as follows:

"The superintendent of banking henceforth shall be the sole and only receiver or liquidating officer for state incorporated banks and trust companies and he shall serve without compensation other than his stated compensation as superintendent of banking, but he shall be allowed clerical and other expenses necessary in the conduct of the receivership."

It will be noted that the statute provides that henceforth the superintendent of banking shall be the sole and only receiver for insolvent banks. It is our opinion that the only construction that can be placed upon this statute is that the word "henceforth" applies to banks thereafter becoming insolvent. The statutory provisions became effective by publication May 3, 1923, and it is our opinion that a receiver appointed prior to that time would continue to act until his final discharge by the court; and that the rights of all parties would become fixed by the appointment of that receiver as of the date of his appointment; and that his acts as receiver when properly approved by the court would be valid and binding upon all parties concerned.

BOVINE TUBERCULOSIS—ASSESSORS: Assessors should not circulate petitions asking for the enrollment of counties for the eradication of bovine tuberculosis or resignations while discharging the duties of his office.

May 2, 1927. *Secretary of Agriculture:* We have received your letter of recent date in which you submit to this department a question which you have stated as follows:

"Lyon County is on the accredited area basis of the bovine tuberculosis

eradication plan. Those opposed to the testing in that county have arranged with the assessors to carry the following petition and secure names:

'Petition

'To the Iowa State Sect. of Agriculture.

'We the undersigned farmers, cattle owners and feeders hereby ask and request that the law enforcing T.B. testing in the county of Lyon, State of Iowa, and the petition requesting said law to be enforced, be not enforced and said petition not to be considered as we do not approve and do not want to test our stock under the present plan, we the undersigned that signed the petition in favor of said testing ask that our name be stricken from the petition and not considered as in favor of said T. B. testing.'

"Are the assessors violating the law by circulating such petitions when on offcial duty?"

Assessors are public officials and their duties are prescribed by statute. In addition to assessing property, as provided in Chapter 342, assessors must also acquire certain information with regard to the census. (Section 414); and also with reference to crops statistics. (Sections 2596 and 2597 of the Code, 1924.)

The statutes do not vest in assessors any duties with reference to the eradication of bovine tuberculosis, or the securing of names of signers to the petition asking for the enrollment of the counties under either plan, or securing signatures to remonstrances.

It is our opinion that assessors, while discharging the duties of their office should not, as a matter of sound public policy, undertake to perform services for private individuals, but should confine their efforts and labors to that which the statute requires of them.

We therefore hold that the assessors, who circulate such petitions when on official duty are violating the spirit of the statutes under which they are employed.

TAXATION: The County Auditor must transcribe the assessment on or before the first day of January in each year.

May 2, 1927. *Auditor of State:* We have received your letter of February 10th, 1927, in which you submit to this department a certain question submitted to your office by Mr. A. L. Lawrence, one of the state examiners. The letter of Mr. Lawrence is as follows:

"Owing to the diversity of opinion and practice among the county auditors regarding the proper method of compiling Tax Lists, we desire an opinion from the Attorney General on this subject.

"The diversity of methods to which we refer are briefly set out as follows:

"First. Some Auditors claim that under Sec. 10116 and following sections, that they are not obliged to make transfers of title on the tax lists; that their duty is only to enter deeds on transfer books.

"Second. Other Auditors claim that if they are obliged to make transfers or show change of ownership on tax lists that such changes are only to be made every two years, in other words the year in which real estate is assessed.

"Third. Still other Auditors consider that under Sec. 7146, these changes of ownership should be made on tax lists each year, but they differ as to the *time of year* in which such lists should be transcribed. Some contending that the books should be written up, so far as ownership is concerned, immediately upon the return of assessors' books, which would mean during the month of April or May. Others claim that the work of transcribing should not be commenced before at least September for the reason that the books should show all transfers, as near as possible, up to the time of the delivery of said tax lists to the County Treasurer for collection.

"While it is true that the State has adopted a uniform form for said tax lists and that it is made obligatory upon all Auditors to use said form, it is also quite evident that unless a uniform method of *compiling* said tax lists is enforced, the uniform system as a whole becomes entirely worthless.

"For this reason it seems to us that a uniform method of procedure in the making of these lists should be prescribed by this department."

The solution of the question submitted depends upon the construction of Sections 10116 and 7146 of the Code, 1924. Section 10116 reads as follows:

"The recorder shall not record any deed or other instrument unconditionally conveying real estate until the proper entries have been made upon the transfer books in the auditor's office, and indorsement made upon the deed or other instrument properly dated and officially signed, in substantially the following form:

"Entered upon transfer books and for taxation this ..... day of ..... 19.... My fee 25c paid by recorder. ..... Auditor."

This section requires the County Recorder to refuse to record any deed or other instrument unconditionally conveying real estate until certain entries have been made upon the transfer books in the auditor's office. These requirements are as follows:

First. To endorse upon the deed or other record properly dated and officially signed substantially the following entry:

Entered upon transfer books for taxation on this .... day of ....., 19..... My fee 25c paid by recorder. ..... Auditor.

Second. An entry made upon the transfer books in the Auditor's office.

It will be seen that there is no requirement in this section that the auditor shall make any change on the tax list.

We will now turn to Section 7146 and see whether it requires the auditor to make a transfer upon the books in his office. This section reads as follows:

"At the time of transcribing said assessments into the tax list, the county auditor shall correct all transfers up to date and place the legal description of all real estate in the name of the owner at said date as shown by the transfer book in his office. At the end of the list for each township, town, or city he shall make an abstract thereof, and apportion the consolidated tax among the respective funds to which it belongs, according to the number of mills levied for each."

As the above statute requires the auditor at the time of transcribing said assessments into the tax list, to correct all transfers up to date and to place the legal description of all real estate in the name of the owner at said date, as shown in the transfer book in his office, we must turn to the section providing the time for transcribing said assessments. The section referred to, Section 7145, requires the County Auditor to transcribe said assessment before the first day of January in each year. These two sections, when read together, are plain and susceptible of no misconstruction. The correction referred to in Section 7146 must be made at the time the assessments are transcribed into a book to be known as the tax list, which may be done at any time before the first day of January *in each year.* Manifestly, the County Auditor has some discretion as to the time of transcribing said assessments, provided, of course, he completes the work before the first day of January. The corrections should be made as provided in Section 7146 up to the date of actually transcribing said assessments.

SCHOOLS—TAXATION: Discussion of the amount of tax that may be levied for school purposes in a Consolidated District. 2. The additional levy pro-

vided for in Section 4388 is a part of the levy for the general fund as provided in Section 4386. 3. Section 4388 does not provide for a separate and distinct levy.

May 2, 1927. *County Attorney, Grundy Center, Iowa:* We have received your letter of February 10, 1927, in which you submit to this department the following inquiry:

"We are enclosing herewith a copy of a letter received by our county auditor objecting to the levy of a tax in the Transportation Fund for the Consolidated Districts of Dike and Conrad, in our County. We are also enclosing herewith a statement of budget estimates for both of said school districts and a certified copy of the record of the levies made by the Board of Supervisors.

"We would appreciate very much an opinion from your office as to the legality of this levy. It is our opinion that the general school fund and transportation fund should be considered as one fund and the levy made as one levy. Considering it this way, neither of the two have exceeded the statutory limitation of one hundred dollars per person of school age in their district. Conrad District has 339 persons of school age which would permit them to ask for $33,900. And the Dike School district has 294 persons of school age which would permit them to ask for $29,400. Section 4388, as we understand it, merely authorizes school boards to estimate an additional $5.00 for each person of school age for transporting children when they find that the general fund is not sufficient.

"Our Board of Supervisors will meet on Tuesday the 15th of next month and would appreciate very much having your opinion on this matter at that time if possible."

Under the law a consolidated school district may levy the following taxes:

1. For the general fund $100.00 for each person of school age in the district. Section 4386 of the Code, 1924. If the amount so estimated under the provisions of Section 4386 of the Code, does not equal $1,000 for each school thereof, the corporation may estimate not to exceed $1,000 for each school in the corporation. Section 4387 of the Code, 1924.

2. In addition to the amounts authorized by Sections 4386 and 4387, school boards may include in their estimates not to exceed $5.00 for each person of school age in the district for transporting children to and from school when authorized by law.

3. Under the provision of Section 4388 of the Code, 1924, school districts may levy the additional sum authorized by Section 4448. Section 4448 authorizes the levy of an additional amount not to exceed the sum of $1.50 for each pupil residing in the school corporation to pay for school books and supplies.

While Section 4388 provides for an additional levy for the purpose of paying the costs of transporting children to and from school when authorized by law, it is our opinion that this levy is a part of the levy for the general fund as provided in Section 4386, and that said Section does not provide for a separate and distinct levy. It merely adds to the amount that may be levied for the general fund.

We have not attempted to make any computation for the purpose of determining the amount that may be levied in the two consolidated school districts involved in this inquiry. We have, in a general way, discussed the statutes relating thereto and the amount that may be raised in such districts. The application of the rule herein announced to the facts in these districts must be made by the taxing authorities.

STATE BOARD OF CONSERVATION—NAVIGABLE STREAMS: SAND: GRAVEL: 1. The Board of Conservation may lease islands on the Iowa side of the Mississippi river. 2. However, they may not permit the cutting of timber on such islands. 3. The state may sell any part of the land underlying navigable waters. 4. The state may authorize the sale of sand and gravel from the bed of the Mississippi or Missouri rivers.

May 3, 1927. *Secretary of the Executive Council:* We desire to acknowledge receipt of your letter of February 25, 1927, in which you submit to this department the following inquiry:

" * * * What we want at this time is your written opinion as to the right of the State of Iowa to lease the islands in the Iowa side of the main channel of the Mississippi River, and remove or dispose of the timber thereon.

"In regard to the sand and gravel tax, we want your written opinion as to our rights to collect same to the center of the main channel of the Mississippi River. In other words, we want to know just what our position is in relation to the general supervision of all that part of the River within the boundaries of the State of Iowa."

Section 1812 of the Code, 1924, grants jurisdiction over all meandered streams and lakes of the state and of state lands bordering thereon to the State Board of Conservation. This section reads as follows:

"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, is conferred upon the board. The board, with the approval of the executive council, may establish parts of such property into state parks, and when so established all of the provisions of this chapter relative to public parks shall apply thereto."

Section 1819 of the Code, 1924, reads as follows:

"The board may, with the approval of the executive council, lease for periods not exceeding one year such parts of the property under its jurisdiction as to it may seem advisable. All leases shall reserve to the public of the state the right to enter upon the property leased for any lawful purpose."

The above section is amply sufficient to grant to the Board of Conservation the right to lease the islands on the Iowa side of the Mississippi River. However, no authority is therein granted to the Board or any other state body to permit the cutting of timber on such islands. The authority to lease does not carry with it the right to destroy any part of the premises leased. We are therefore of the opinion that neither the Board of Conservation nor the Executive Council has the authority to destroy timber on leased premises.

The second question submitted to us, which relates to the sand and gravel tax, is not entirely free from doubt. The authorities upon the right of the State to sell any part of the land underlying navigable waters are decidedly in confict. The rule is stated in 29 Cyc. page 357 is as follows:

"The general rule is that a state has the absolute power to grant its lands under water, unless prohibited by statute. In a part of the states, however, it is held that the title of the state to lands under a navigable water and the power of disposition is an incident and a part of its sovereignty that cannot be surrendered, alienated, or delegated except for some public purpose or some reasonable use which can fairly be said to be for the public benefit."

The courts in the following states support the majority rule: Colorado, Georgia, Maryland, Michigan, New Jersey, New York, Ohio, Oregon, Texas, Washington, and the United States Courts. Supporting the minority rule are

the following: Minnesota, Virginia, Wisconsin, Tennesee, Illinois and Rhode Island.

So far as we are able to discover, the Supreme Court of this state has never passed upon this question. However, we believe the great weight of authority supports the majority rule and that it would be adopted by the courts of this state. We, therefore, hold that the state has absolute right to grant its lands under navigable waters to private individuals. If they may do this, then obviously they may sell the sand and gravel underlying navigable streams. The right to sell the soil under such streams manifestly carries with it the right to sell a part of such soil. We believe the statute granting jurisdiction to the State Board of Conservation over navigable streams of the state is broad enough to confer jurisdiction over the border streams, the Mississippi and Missouri Rivers. However, no right may be granted by the State Board of Conservation that will in any way interfere with navigation or with the rights of riparian owners.

COMMERCIAL FEED: A jobber residing in another state must pay the inspection fee for the sale of commercial feed in the state of Iowa.

May 3, 1927. *Secretary of Agriculture:* We have received your letter of April 22, 1927, in which you submit to this department the following inquiry:

"A good many feed jobbers take orders for carloads of linseed meal, cotton seed meal and other feeds and have these cars shipped from Minneapolis, Kansas City, or other points outside of the state direct to the dealer with no inspection tags attached. They make the sale, collect the money, take out their commission and remit their balance to the mills outside of the state. They have asked this question:

" 'Are we liable for the inspection tags being attached to these sacks of feed?'

"I have been inclined to hold that a jobber in this state who makes the sale is responsible and I ask your opinion in regard to this point."

Chapter 152 of the Code, 1924, prescribes certain regulations for the sale of commercial feed within the State of Iowa, as therein defined. It will not be necessary, in the determination of your question, to refer to or quote many portions of said statute.

Sections 3118, 3119 and 3122 read as follows:

"Before any person shall solicit orders for, deliver, offer or expose for sale, or sell any commercial feed, he shall, except as otherwise provided in the following section, pay to the department an inspection fee of ten cents per ton for each ton of said feed sold or offered or exposed for sale." Sec. 3118.

"Before any person shall solicit orders for, deliver, offer or expose for sale, or sell any stock tonic, he shall, in lieu of the inspection fee provided in the preceding section, pay to the department, on or before the fifteenth day of July each year, a general inspection fee of six dollars per annum for each product manufactured. Inspection shall be made as provided in chapter 147." Sec. 3119.

"The inspection fee provided in Section 3118, shall be paid by attaching a tag to each lot shipped in bulk and to each package or container of commercial feed. Tags for such use shall be procured from the department, which shall issue them in denominations suitable for all quantities." Sec. 3122.

It will be observed that under the first above quoted section, before any person shall solicit orders for, deliver, offer or expose for sale, or sell any commercial feed, except as provided in Section 3119, he shall pay to the department an inspection fee of ten cents per ton for each ton of said feed sold or exposed for sale.

The next section contains a similar provision with the reference to the sale of any stock tonic, and requires that the one selling said stock tonic shall pay to the department, in lieu of the inspection fee provided for in Section 3118, on or before the fifteenth day of July each year, a general inspection fee of six dollars per annum for each product manufactured.

Section 3122 provides that one offering or selling stock tonic shall attach a tag to each lot shipped in bulk and to each package or container of commercial food. Such tags shall be procured from the department of agriculture, which shall issue them in the denominations suitable for all quantities.

It is the opinion of this department that the jobbers referred to in your letter must comply with the statute and pay the inspection fee and use inspection tags, as provided in the statute.

MUNICIPALITIES: 1. In arriving at the debt limit monies and credits are to be taken into consideration.

May 4, 1927. *Auditor of State:* We desire to acknowledge receipt of your letter of April 28, 1927, in which you submit to this department the following inquiry:

"A question has arisen in regard to the limit of indebtedness of a county or other political municipal corporation.

"In arriving at the limit of indebtedness of a county or other municipality shall the actual value of the taxable value of general property within a district plus, the actual value of moneys and credits be used as a basis of computing the one and one-fourth per cent or shall the actual value of the taxable value within a district, exclusive of moneys and credits, be used as a basis of one and one-fourth per cent?"

Article XI, Section 3 of the Constitution of the State provides as follows:

"No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum *on the value of the taxable property within such county or corporation—to be ascertained by the last State and county tax lists, previous to the incurring of such indebtedness.*"

The Statutory provision is found in Section 6238 and reads as follows:

"No county or other political or municipal corporation shall become indebted in any manner for its general or ordinary purposes to an amount exceeding in the aggregate one and one-fourth per cent of the *actual value of the taxable property within such corporation. The value of such property shall be ascertained by the last tax list previous to the incurring of the indebtedness.*"

It will be seen that so far as the description of the taxable property, which is the basis for the determination of the debt limit, is concerned, there is no essential difference between the language of the two provisions. It has been held that the value furnishing the basis for determining whether the limit of indebtedness has been exceeded, is the aggregate value of all the property, real and personal, returned by the assessor for taxation, and not the taxable value of 25% of the actual value as provided in the Code.

Halsey & Co. vs. Belle Plaine, 128 Iowa, 467;
Miller vs. City, 188 Iowa, 514;
Nash vs. Council Bluffs, 174 Fed. 182.

The Supreme Court has held that in determining the debt limit of a county or other municipality, monies and credits must be included in the taxable

property and added to the actual value of the real and personal property other than monies and credits.

McLeland vs. Marshall County, 199 Iowa, 1232 (1252);
Mack vs. Independent School District, 200 Iowa, 1190.

Therefore, it is our opinion that the actual value of monies and credits must be taken into consideration in determining the debt limit of a municipality.

MULCT TAX—NUISANCE: Where a decree enjoining the maintenance of a nuisance was signed and filed after the conveyance of the property, there is no lien on the property for the mulct tax. No. 2. The tax cannot be collected from the new owner of the property. No. 3. Neither may the property be sold for the mulct tax.

May 4, 1927. *Auditor of State:* We have received your letter of April 25, 1927, in which you submit to this department the following inquiries:

"Under Code of 1924, Section 1614, a mulct tax of $600.00 was levied against a farm, Lucas County, Iowa. The proceedings in this case started January 12, 1927, and the judge's final decree was signed April 15, 1927, and certified to County Auditor by County Clerk on April 18, 1927.

"In the time elapsing between starting proceedings in this case and final decree by judge, this farm was sold and conveyance made on February 15, 1927.

"Question 1. Shall county auditor run this mulct tax on the tax books of 1926, now in the hands of the county treasurer (being collected in 1927), or run tax on the 1927 tax book now being prepared in the county auditor's office, which will be collected in 1928?

"Question 2. This property being sold and conveyance made February 15, 1927, can tax be charged as a lien against land and can it be collected from new owner or sold for tax, as case might be?"

Sections 1613, 1614 and 1615 of the Code, 1924, govern these questions.

Under the first section above cited, the mulct tax therein provided for, when a permanent injunction issues against any person for maintaining a nuisance, shall be imposed upon the building and upon the ground on which same is located.

Under the provisions of Section 1614, the lien shall be imposed when the other taxes are entered, and the same shall be and remain a lien on the land upon which said lien was imposed until fully paid.

It is provided in the last section that the provision of law relating to the collection of taxes, the delinquency thereof, and the sale of the property therefor, shall govern the collection of the tax herein prescribed in so far as the same are applicable.

Therefore, as the judge's final decree was signed April 15, 1927, and certified to the county auditor by the county clerk on April 18, 1927, the said tax should be entered on the tax record for the year 1927 which become payable in the year 1928. This conclusion is in strict compliance with the provisions of Section 1615, which makes the law relating to ordinary taxes applicable to the mulct tax.

It is also the opinion of this department that in view of the fact that the property was sold and conveyance made several months prior to the entering of the judge's final decree and the attempted entering of the lien, it is now too late to enter a lien against the land which has been conveyed. Therefore, the tax cannot be collected from the new owner, and neither may the property be sold for the mulct tax.

TOWNSHIPS—WORKMEN'S COMPENSATION: Townships do not come within the provisions of the Workmen's Compensation law.

May 4, 1927. *County Attorney, Denison, Iowa:* We desire to acknowledge receipt of your letter of April 27, 1927, in which you submit to this department the following inquiry:

"The Township Trustees of Milford Township, Crawford County, have asked this office if it is necessary for them to carry Workmen's Compensation Insurance on their Road Superintendents, Section 1421 of the Code specifies that municipal corporations, counties, etc., but does not directly name townships.

"It is my opinion that townships come within the scope of said law, but I desire your opinion on same."

Chapter 70 of the Code, 1924, contains the provisions of the statute relating to the Workmen's Compensation. Section 1421 of the Code, contains the definition of the terms used in the statute, and defines employer as follows:

" 'Employer' includes and applies to any person, firm or association, or corporation, state, county, *municipal corporation*, city under special charter and under commission form of government, school district, and the legal representatives of a deceased employer."

The statute also includes the following section:

"Where the state, county, *municipal corporation*, school district, or city under any form of government is the employer, the provisions of this chapter for the payment of compensation and amount thereof for an injury sustained by an employee of such employer shall be exclusive, compulsory, and obligatory upon both the employer and employee, except as otherwise provided in the preceding section." Sec. 1362.

It will be observed that townships are not specifically included therein. Unless they come within the designation of municipal corporations, manifestly they are not covered by the workmen's compensation statute. It therefore becomes necessary for us to determine what is the nature of a township, or in other words, whether townships come within the definition of the term "municipal corporations." It has been held by the Supreme Court that a township is no more than a legal subdivision of a county for governmental purposes and has no corporate powers as such.

Township of West Bend vs. Munch, 52 Iowa, 132;
Wells vs. Stomback, 59 Iowa, 376;
Hansen vs. Cresco, 132 Iowa, 533;
Austin Western Co. vs. Weaver Township, 136 Iowa, 709;
Davis vs. Laughlin, 147 Iowa, 478;
In re Iowa College Trustees, 185 Iowa, 434.

It was held in the case of *Hansen vs. Cresco*, supra, that a township was not a municipal corporation. Therefore, it is our opinion that a township does not come within the provisions of the workmen's compensation statute.*

COUNTIES—TOWNSHIPS: Where the township road levy is exhausted no money can be expended for improvement or repair of highways on the township system.

May 6, 1927. *County Attorney, Decorah, Iowa:* We have received your letter of April 30, 1927, in which you submit to this department the following inquiry:

"The township trustees of Highland Township, Winneshiek County, Iowa, have asked me for help in this situation, to-wit: Recently a change in the road was made by the Board of Supervisors to avoid a bad curve in the road,

*See *Hopp vs. Brink*, 217 N. W. 551.

and to avoid a sharp stony hill, making the road run in a new right of way. This is a township road and the trustee who interviewed me says that the township cannot raise the necessary funds to do this work; that the tax levy is now up to the limit, and no funds available with which to perform this work, on a cash basis, or on anticipated levy or taxes anticipated on their present levy.

"What alternative or 'subterfuge' or emergency plan of financing this work can be devised?"

Section 4795 of the Code, 1924, provides for the levy of a township road fund of not to exceed six mills, and Section 4797 of the Code contains the provisions of the statute relating to the purpose for which said road fund may be used. Section 4781 defines the duties of trustees with reference to the repair and improvement of the roads in the township road system. This section contains the following provisions:

"They shall not incur debts for said purposes unless funds have been provided for the payment thereof by an authorized levy."

It will therefore be observed that the township trustees may not contract for or expend any sum for the improvement or repair of roads in the township system unless funds have been provided for the payment thereof by authorized levy.

Therefore, we know of no way that a township may enter into a contract for the improvement of such roads until the township has sufficient funds in payment therefor.

MINORS—BILLIARD HALLS: Billiard halls which are operated under the club plan prohibited.

May 6, 1927. *County Attorney, Orange City, Iowa:* In reply to your letter of May 4th in which you submit the following inquiry:

"Section 13219 of the Code, 1924, relates to the presence of minors in billiard rooms. Does this statute also apply to billiard rooms operated on the club plan?"

Section 13219 is as follows:

"No person who keeps a billiard hall, or nine or ten pin alley, or the agent, clerk, or servant of any such person, *or any person having charge or control of any such hall*, or alley, shall permit any minor to remain in such hall, or alley, or to take part in any of the games known as billiards or nine or ten pins."

Under the provisions of the above quoted statute, the fact that the operator of the billiard room advertised the same as a club and issues membership cards to minors upon the payment of $1.00 membership fee, does not place him outside of Section 13219. This section does not refer to public billiard halls but refers to any billiard room and specifically says, "or any person having charge or control of any such hall,".

It is therefore the opinion of this department that anyone operating under a club system with the payment of a membership fee and who permits minors to frequent the billiard room or to play either billiards or pool in said hall is clearly violating Section 13219, Code of 1924.

SCHOOLS AND SCHOOL DISTRICTS—COUNTY OFFICERS: Representation in County Convention to elect a County Superintendent. The abandonment of a town of its incorporation does not destroy the independent school district established therein and that district is entitled to a vote in the convention to elect a county superintendent.

May 9, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your favor of recent date in which you request an opinion from this department on the following question:

"The town of Knowlton voted down their corporation and became a rural independent district. They are situated in Jefferson Township, which has a township district organization. They also want to hold their five directors.

"Is this district entitled to a vote in the election of a county superintendent? We would like to have your opinion at as early a date as possible."

We are of the opinion that the abandonment of a town of its corporate existence would not work the abandonment of the independent school district nor would it destroy it as a village independent district.

We are, therefore, of the opinion that under Section 4098 of the Code of Iowa, 1924, which provides that the delegates to the convention to elect county superintendents shall be one for each city, town, or *village independent district.* The village independent district of Knowlton would be entitled to a vote in the convention to elect a county superintendent.

BUILDING AND LOAN ASSOCIATION—MEMBERSHIP FEE: H. F. No. 330, Acts 42nd G. A. became effective on publication and applies to all existing or future association regardless of conflicting provisions in articles of incorporation or by-laws.

May 9, 1927. *Auditor of State:* You have requested the opinion of this department as to whether or not the provisions of House File No. 330, enacted by the last general assembly and which became effective on publication, apply to all existing building and loan associations.

In answer to your inquiry you are advised that the provisions of House File No. 330 of the Acts of the Forty-second General Assembly became applicable to all building and loan associations operating in this State the next day after the law was published, as provided in the publication clause attached thereto, and the provisions of this law apply to all such associations regardless of any contrary or different provision in the articles of incorporation or by-laws of such associations. The statute, by operation of law, rendered ineffective any provision in conflict therewith in the articles of incorporation or by-laws of such associations.

ADJUTANT GENERAL—APPROPRIATION—UNEXPENDED FUNDS: Funds which have become a valid indebtedness are not such unexpended funds as to necessitate reporting same to the Executive Council.

May 11, 1927. *Adjutant General:* Replying to your inquiry of May 6th in which you submit the following request:

"A contract or a lease is entered into and executed prior to July 1, 1927, between a duly appointed representative of this Department and a property owner for the rental of a building, for National Guard Armory purposes; such lease includes an obligation to pay, from State funds allotted the National Guard for the purpose of Armory Rental, a stated amount per annum for a period of two (2) years (July 1, 1927 to June 30, 1929).

"Question: May such amount be considered and set aside as obligated funds out of any otherwise unobligated funds of the Armory Rental now allotted this department for the biennium ending June 30, 1927?"

Under the statute now existing the appropriation expiring June 30, 1927, can only be used to pay for a valid indebtedness incurred prior to that date and the question involved in your request is whether or not a contract entered

into in good faith prior to June 30, 1927, and which provides for the expenditure of the appropriation so that such expenditure will be available for the completion of the contract. This involves a determination of the question as to what is meant by the term "unexpended balance." The courts have passed on this matter in a number of cases and which are as follows:

"Unexpended, as used in Gen. St. c. 73, 21, as amended by Act March 20, 1876, 1, providing that commissioners of lunatic asylums shall report to the state auditor any 'unexpended balance' in their hands, means undisposed of. One of the meanings given by all lexicographers of 'expend' is 'to dispose of,' and where the board had exercised the power which they possessed, and had set apart the money then on hand for a specific purpose, it was no longer unexpended, within the fair meaning of the statute. *Norman vs. Central Kentucky Lunatic Asylum*, 17 S. W. 150, 152, 92 Ky. 16.

"Acts 1883, par. 4, providing that 'any unexpended balance' that may be in the state treasury to the credit of the military fund on the 1st day of July, 1883, shall be transferred, on the warrant of the Auditor of Public Accounts, to the general revenue fund, should not be construed to include every part of the fund which has not been actually paid out of the treasury prior to the 1st day of July, without regard to existing claims against it, however, just and well founded, but it means whatever may remain of the fund after the payment of all proper and just claims against it which accrued during the year ending on, and including the whole of, the 30th day of June, and the fact that a part of these claims had not been actually paid on the 1st of July will make no difference in this respect. *People v. Swigert*, 107 Ill. 494, 499."

The contract entered into in good faith and under authority from the legislature would create such a valid indebtedness as to set aside as obligated funds, that amount necessary to keep or pay for the contract or lease entered into.

It is, therefore, the opinion of this department that such sum would not under the present statute have to be reported as an "unexpended balance."

TAX EXEMPTION—FOREST TREE RESERVATION—TAXATION: Forest tree reservations must be maintained so as to foster and encourage the natural growth of the trees therein before claimant for tax exemption on account thereof may have the benefit thereof.

May 13, 1927. *Secretary of Agriculture:* You have requested the opinion of this department upon the following proposition relating to forest tree reservations:

"Is it necessary to clean up the underbrush, dead timber and keep the trees trimmed up in order that the reservation may be exempt from taxes as indicated in Section 7110 of the 1924 Code or is it only necessary to have the number of required trees per acre?"

In answer to your question it has been necessary to carefully read all of the provisions of Chapter 126 of the Code relative to fruit tree and forest reservations. It seems to be the purpose of the statute to encourage and to promote the growing of forest and fruit trees such as are described and named in the law. It was not intended by the enactment of this law to permit anyone to plant such a reservation and then neglect and forget it. The purpose of the law is as stated, to foster and promote the growth of such trees. Conditions cannot be permitted to exist in any such so-called reservation which will deter and interfere with the proper and natural growth of the trees therein, and the owner still be entitled to any benefits on account thereof.

It is the opinion of this department that those charged with the duty of

inspecting and determining whether or not a forest or fruit tree reservation is properly established and maintained should also determine whether or not the owner thereof has permitted conditions to arise and to exist which will interfere with the natural growth of the trees growing therein before the owner thereof may be permitted to have the benefit of tax exemption thereon.

SCHOOLS AND SCHOOL DISTRICTS—BONDS: 1—The reissuance of bonds by a school district is an issue of bonds within the provisions of Section 4188. 2—The county superintendent should not approve a petiion for dissolution of consolidated school district until after hearing objections thereto.

May 16, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your favor of recent date requesting an opinion upon the following questions:

A petition to dissolve the Olin Consolidated School District properly signed and verified has been filed in the office of the county superintendent of the proper county. This district was organized in 1919 but has not built a central school building but has removed the rural school buildings from their location to the building already erected by the Olin Independent School District.

The district as now constituted has reissued bonds in the amount of $5,000 to cover indebtedness originally contracted by the Olin Independent School District prior to consolidation. The district in March, 1926, voted bonds to the amount of $110,000 to a new building but these bonds have not been sold. You submit the following queries:

1—Since the board of the Olin Consolidated School District has reissued bonds, shall they be considered in the same class with the bonds voted but not issued for the purpose of building a new building?

2—If reissuing bonds is not to be construed as issuing bonds when shall the petition to dissolve be approved? Does "at once" as used in paragraph 4, Section 4188, Code of Iowa 1924, refer to the filing of the petition or the decision of the county superintendent after hearing objections?

3—If the conclusion is reached that the Olin Consolidated School District has not issued bonds shall the county superintendent set a final date for filing objections and file notice of such date or shall the order approving the petition be entered at once and that order published?

The bonds reissued by the Olin Consolidated School District are the obligation of the entire district and we are of the opinion that they are to be construed in the same category as any other bonds which would include, of course, the bonds in the amount of $110,000 which have been voted but which have not been issued and that the result is exactly the same as though a five thousand dollar issue of the one hundred ten thousand dollars voted had been sold.

It is, therefore, necessary, in our opinion, that the county superintendent proceed under paragraph 4, Section 4188 of the Code, 1924, to set a date for filing objections and for final hearing of the matter on its merits. Thereafter, within five days the county superintendent must reach a conclusion upon any objections filed and enter an order either approving the petition or dismissing it. Upon entering that order she shall "at once" publish the order in some newspaper in which the original notice of hearing was published. It will be observed that "at once" refers to the publication after the county superintendent has entered the order either approving the petition or dismissing it.

It will be observed then, that the simplified procedure is as follows—the county superintendent having had filed in her office a petition properly signed and verified should fix a final day for filing objections and of hearing thereon. At that hearing all interest in parties may be heard, evidence taken, and arguments made. Within five days after the conclusion of the hearing the county

superintendent must rule upon any objections and either approve or dismiss the petition. Immediately upon the entering of this order the county superintendent must publish this order in some paper in which the original notice was published.

May we add that if the county superintendent finds that the objections are not well founded and that the district has issued bonds in conformity with the foregoing rule, it is the duty of the county superintendent to dismiss the petition. If the county superintendent finds that the objections are well founded and that bonds have not been issued in conformity to Section 4188 and this opinion, then the county superintendent should approve the petition and the matter should proceed to election.

MUNICIPALITIES—TAXATION: A municipality cannot anticipate revenues except for the current fiscal year and for such amounts only as will be collected during that year from taxes.

May 16, 1927. *Auditor of State:* This will acknowledge receipt of your favor of recent date in which you request an opinion of this department upon the following question:

"The clerk of the town of Moneta neglected to certify to the county auditor, amounts for all of the town funds, with the exception of the general fund, for which levies were to have ben entered for the 1926 tax. There are five funds, grading, improvement, light, town hall and road drag. The town has no balance from last year, its funds having been in the closed Moneta Savings Bank. Its 10.0 mill general fund has only produced $133.46. The town is without money and wants to know what can be done.

"Since it is too late to make a change on the 1926 levies, what would you advise should be done?"

This question involves the anticipation of the revenues. It is provided by statute, Section 6223, of the Code of Iowa 1924, as follows:

"Loans may be negotiated or warrants issued by any municipal corporation 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 and warrants shall not exceed the estimated revenue of such corporations for the fund or the purpose for which the taxes are to be collected for such fiscal year."

Under the provisions of this statute a municipal corporation may anticipate its revenue for the fiscal year not in excess, however, of the amount which it is to receive from taxes during that fiscal year. Inasmuch as the town of Moneta has received all of the tax levied for the year 1926, warrants could not be issued until after March 31, 1927, in anticipation of the taxes levied and to be collected for the fiscal year ending March 31, 1928. It will, therefore, be possible for this municipality to issue warrants in anticipation of the taxes which will be collected in October, 1927, and April 1928, after March 31, 1927.

We are of the opinion that under this provision this municipality may anticipate its revenues from year to year and in a brief time relieve itself of the burden caused by the mistake that has been made in the certification of its levies. Our court has held that the purpose of the above statutes is to place municipal corporations on a cash basis and prevent the accumulation of floating indebtedness and, further, that the power to borrow money under this section does not authorize the issuance of negotiable bonds in the absence of express authority.

COUNTIES—PRIMARY ROADS—ROADS—HIGHWAYS: Counties have no vested right in the so-called allotment to the county out of the primary road fund under the Shaff law. It is possible a subsequent legislature might withdraw these so-called allotments from the counties.

May 16, 1927. *County Attorney, Fort Dodge, Iowa:* You have requested the opinion of this department upon two propositions arising under the Shaff bill, Senate File No. 104, as enacted by the Forty-second General Assembly, which becomes effective on July 4, 1927.

1. Your first question is as follows:

"Whether, in your opinion, under the present law, any of the burden of paying the interest or principal on the bonds issued for paving primary roads in Webster County would have to be paid by the taxpayers of Webster County by an increase in the taxes of Webster County?"

In answer to this question you are advised that when bonds are voted under the provisions of Section 4720 of the Code, the proposition must carry with it an authorization for the board of supervisors to levy a sufficient tax to retire the maturing bonds and pay interest from year to year. This section, as well as Section 4722 of the Code, will continue in full force and effect after the taking effect of Senate File No. 104. Section 4722 provides that when such a bond issue and tax levy has carried the board of supervisors shall, each year thereafter during the life of the bonds, levy on all the property of the county such part of such authorized tax as will clearly meet the matured or maturing interest for the ensuing year on all such oustanding bonds and also any amount of maturing principal of bonds, provided, however, that only so much of said tax shall be levied in any year for principal of said bonds, if any, as cannot be met by the county's allotment of the primary road funds available for such ensuing year. Thus it will be observed that the law will still require authorization for a tax levy to meet the principal and interest on these bonds. If, however, the funds necessary to maintain the primary roads already built and the amount required to pay maturing principal on bonds and interest in any year do not exceed the amount which the county would receive in said year on the basis of an allotment of the primary road fund among the counties, as provided in the law, then there will be no necessity for there ever being a tax levied. Section 35 of Senate File No. 104 specifically appropriates the funds made available to each county for the payment of maintenance of the primary roads and the maturing principal and interest of primary road bonds issued by said county. We believe that the foregoing will sufficiently indicate to you the law relative to the first proposition propounded.

2. Your second question is as follows:

"Whether or not the law in the future might be so changed that the burden of paying the interest and principal on these primary road paving bonds would rest upon the taxpayers of Webster County?"

In answer to this question you are advised that while such is possible, it is entirely improbable. It has been the history of such matters that unless there is something radically wrong and detrimental to the state growing out of a law, the legislature will be slow to change any provision thereof upon which the counties of the state, or any considerable number thereof, have relied and have made expenditures, and incurred large indebtedness based thereon. We, therefore, express the opinion, and while this is not strictly a legal proposition, that under the circumstances and past experience of the state in such matters

it is quite unlikely that a future legislature will substantially disturb the revenues available for the purposes expressed and projects entered upon, in accordance with the provisions of Senate File No. 104 of the Acts of the Forty-second General Assembly.

BOARD OF EDUCATION: Deed to land not necessary for educational purposes may be signed by president and secretary of the board.

May 17, 1927. *Iowa State Board of Education:* You have requested an opinion from this department upon the proposition of who should execute a deed conveying certain lands under the control and direction of the Board of Education.

The title to all property belonging to the state is in the State of Iowa. The Board of Education is given the possession, control and jurisdiction, subject to the will of the legislature, over certain lands belonging to the state and devoted to educational purposes, located at the various educational institutions. In the absence of a specific provision of law there is no authority for the sale or disposal by any means of any lands belonging to the state. The General Assembly has, in sub-paragraph 5 of Section 3921 of the Code, authorized the State Board of Education, with the approval of the Executive Council, to "dispose of real estate belonging to said institutions when not necessary for their purposes." The procedure by which a sale of real estate by the board may be accomplished is set out in Section 3922 of the Code, where it is provided that no sale shall be made save upon the order of the board made at a regular meeting or one called for that purpose, and then in such manner and under such terms as the board may prescribe, subject however to the approval of the Executive Council.

When all of the requirements of the statutes have been complied with, we are of the opinion that such a deed should be executed by the president and secretary of the State Board of Education, and that certified copies of the resolutions of both the Board of Education and the Executive Council authorizing and approving the sale of the property should be attached to the deed.

TAXATION—TRANSMISSION LINES: The lands, buildings and machinery of transmission line companies located outside of cities and towns should be assessed by the local assessor and not by the Executive Council.

May 17, 1927. *Secretary, Executive Council:* Under date of April 20, 1927, you submitted to this department three questions with reference to the assessment of electric transmission property. Your first inquiry is as follows:

"Should we assess all electric transmission property situated outside of incorporated limits of cities and towns, such as steam and hydro-electric plants, substation equipment, etc.?"

In answer to your inquiry we quote Sections 6979 and 6980 of the Code, which read as follows:

"The lands, buildings, machinery and mains belonging to individuals or corporations operating waterworks or gasworks; the lands, buildings, machinery, tracks, poles and wires belonging to individuals or corporations furnishing electric light or power; the lands, buildings, machinery, poles, wires, overhead construction, tracks, cables, conduits, and fixtures belonging to individuals or corporations operating railways by cable or electricity, or operating elevated street railways; and the lands, buildings, tracks, and fixtures of street railways operated by animal power, shall be listed and assessed in the assessment district where the same are situated." Section 6979.

"Where any such property except the capital stock is situated partly within and partly without the limits of a city or town, such portions of the said plant shall be assessed separately, and the portion within the said city or town shall be assessed as above provided, and the portion without the said city or town shall be assessed in the district or districts in which it is located." Section 6980.

Under the provisions of the above sections the real estate or power plants of transmission companies must be assessed in the taxing districts where located and are not assessable by the Executive Council. Section 7090 of the Code provides that transmission line companies shall furnish to the Executive Council the following information:

"The location and length of each division within the state and the character of poles, towers, wires, substation equipment and other construction of each such division, designating the length and portion thereof in each separate county into which each such division extends."

The term "substation equipment" as used in the above section means transmission line equipment auxiliary to the conducting of the line itself such as transforming stations but cannot by any stretch of imagination be construed to refer to the power plant itself. The term "other construction," as used in the section, being words of a general character, is limited to the same class of equipment as precedes these general terms and, therefore, refers back simply to anything of the character of poles, wire, towers, etc.

It is this class of property with which the Executive Council deals and not with the power plants themselves. An opinion is being prepared for you covering the other propositions involved and will be forwarded to you shortly.

BANKS AND BANKING: 1—Where a bank fails to pass resolution and make application for renewal of its charter within the time required by law the bank must be closed by the state department. 2—Stockholders may by unanimous consent waive time of notice of special stockholders' meeting.

May 19, 1927. *Superintendent of Banking:* You have requested an opinion from this department upon the following question:

Where a bank fails to take proper steps toward renewing its charter until an expiration of time to within thirty days of the expiration of the ninety day renewal period, is it possible for the Department of Banking to renew such charter, or is any recourse open to the department other than to close the bank upon the expiration of the period? Would it be possible for the stockholders by unanimous consent to waive a thirty day notice required for special meeting at which the application for renewal of charter could be considered and thus secure a renewal of the charter?

It is provided by statute, Section 8365, Code of Iowa, 1924, that the charter of a banking corporation may be renewed from time to time if, within three months before or after the time of termination thereof, a two-thirds majority of the votes cast at any regular or special meeting called for that purpose be in favor of such renewal.

It is further provided by statute, Section 8372, Code of Iowa 1924, that such meeting except the annual meeting, shall be called upon notice signed by at least two officers of the bank and by a majority of its directors, specifying the object of the meeting and the time and place thereof published once a week for four consecutive weeks before the time at which the same is to be held in some newspaper in the county wherein the bank is located.

It is our opinion that if the officers of the bank permit the time to expire so that it is impossible to call a special meeting with notice thereof as here-

inbefore specified before the expiration of the three months period after the expiration of the charter, your department has no recourse except to close the bank upon the expiration of the three months after the expiration of the charter.

However, the notice of special stockholders' meeting is for the benefit of the stockholders and if they, by unanimous consent, waive that notice and agree that a meeting may be held without such notice, your department would be justified in granting a renewal of the charter, if the stockholders at such special meeting held before the expiration of the three months period adopt a resolution by an affirmative vote of two-thirds of the shareholders extending the corporate existence of the bank.

BARBER LAW—COSMETOLOGY LAW: Discussion of the working and administrative provisions of the law.

May 20, 1927. *Auditor of State:* You have requested the opinion of this department upon several propositions arising under Senate File No. 437, the barber bill, and Senate File No. 158, the cosmetology bill. The provisions of these two bills are similar upon the propositions in question and our conclusions as to the same features in both bills are the same.

The first question presented is whether or not the language of Section 8 of Senate File No. 437 and Section 9 of Senate File No. 158, providing that the entire cost of the administration and enforcement of each act respectively shall not exceed in any year the receipts by virtue of each such act in any year, creates trust funds out of the said receipts. After carefully reading the whole of each act referred to, and looking to the intent as manifested by the language employed and the manner in which said bills were drawn, we have reached the conclusion that it was the intention of the legislature that no trust funds should be created. We are of the opinion that the funds received under each of the acts referred to should be credited to the general funds of the state, and that no expenditure should be made whatever on account of the administration of each such law in excess of the receipts by virtue of each such act respectively. The language used are words of limitation on the amount available from the general fund only.

Your next question is whether or not the examining boards under each such act are entitled to draw supplies from Furniture and Store account, which will include all necessary office equipment under and by virtue of the provisions of Section 2463 of the Code. You are advised that it is the opinion of this department that the provisions of Section 2463 of the Code are applicable to each of the examining boards described in the two acts under discussion, and that each such board is entitled to the supplies and furniture authorized by said section.

You next make inquiry as to from which fund the cost of printing necessary under each of said acts shall be paid. You are advised that it is the opinion of this department that the general provisions of the law providing for the printing for the other departments under the supervision and direction of the State Department of Health are applicable and apply with like force and effect to the requirements under the two acts in question.

You next inquire as to which fund shall be charged with the traveling expenses of inspectors appointed under the authority of Section 8 of Senate File No. 437 and Section 9 of Senate File No. 158. The language of these two

sections is substantially the same, and provides that "the compensation of such inspectors and clerical assistants shall be paid from the appropriation made in Section 2462 of the Code." You are advised that it is the opinion of this department that when the compensation of such inspectors is fixed, such compensation should include the necessary traveling expenses to be incurred by said inspectors in the performance of their duties under each act respectively.

You are also advised that it is the opinion of this department that the accounts under each of these acts should be carried according to the fiscal year, and computations made on that basis.

COUNTY HOSPITAL FUNDS: County treasurer is required by law to handle all money for hospital trustees.

May 20, 1927. *Auditor of State:* You have requested the opinion of this department upon the following propositions relative to the handling of county hospital funds:

"First. Our examination of county records disclose a practice whereby the County Auditor issues a warrant on the County Hospital Fund on an order from the Hospital Board of Trustees payable to the bank and it is then disbursed by the Hospital Board by their own check on the bank for the payment of salaries and current expenses. Is it permissible to do this?

"Second. Is it legal for the County Auditor to issue any warrants on the County Hospital Fund on an order of the Hospital Board without itemized sworn claims having first been filed with the County Auditor?"

Your questions are answered by the provisions of Section 5358 of the Code, which section is a part of the chapter relating to county public hospitals, and is as follows:

"The county treasurer shall receive and disburse all funds under the control of said board of trustees, the same to be paid out only upon warrants drawn by the County Auditor by direction of the board of supervisors after the claim for which the same is drawn has been certified to be correct by the said board of trustees."

It is the opinion of this department that all county hospital funds should be received by the county treasurer and disbursed by him; the same to be paid only upon warrants drawn by the county auditor by direction of the Board of Supervisors, after the claim for which the same is drawn has been certified to be correct by the board of hospital trustees. The law does not permit the auditor to draw a warrant on the county hospital fund in a lump sum payable to the trustees, and they, in turn, deposit said warrant in a bank and check against that fund in the payment of salaries and current expenses.

In answer to the second question you are advised that Section 5358 of the Code applies also, and that the certificate of the board of trustees as to the correctness of the claims is all that is required.

COUNTY HOSPITALS—INDIGENT PATIENTS: Power to admit indigent patients to county hospitals. Use of two mill tax levy under Section 5353, transfer of funds from poor fund.

May 21, 1927. *Auditor of State:* Replying to your letter of May 18th in which you request an opinion on the following matters:

"1. Is it now necessary to secure the approval of the supervisors, overseer of the poor, or township trustees before admitting an indigent patient to a county hospital for free treatment?

"2. Is the two mill tax levy permitted under Section 5353, Code of 1924, confined to the use and care of indigent patients?

"3. Can a lump sum be transferred from the poor fund to the county hospital fund for the use of indigent patients and that sum be regarded as a maximum amount that the county could pay during the annual period for the care of such patients?"

In reply to the first question, we desire to set out Section 5359, which is as follows:

"Said Board of Hospital Trustees shall:

"8. Determine whether or not any applicant is indigent and entitled to free treatment therein, and to fix the price to be paid by other patients admitted to such hospital for their care and treatment therein."

The above quoted paragraph clearly shows that the intention of the legislature was to place this power in the hands of the hospital trustees exclusively and we are, therefore, of the opinion that neither the supervisors, overseer of the poor, nor township trustees have any authority to pass upon the entrance or admittance of indigent patients to the county hospital.

In answer to the second question relative to the two mill tax for the improvement and maintenance of the hospital, the question resolves itself as to what is meant by improvement and maintenance and we are of the opinion that the word "improvement" as set out in Chapter 97 of the 41st General Assembly refers to repairs and alterations which might be necessitated in operating the hospital, and that the word "maintenance" should be interpreted to mean current expense of the institution. Sums received from patients who are able to pay for their care in the county hospital would be placed in the hospital fund and these sums, together with the amount received through the two mill tax levy, should be used for necessary operating expense.

In answer to the third question relative to transferring from the poor fund to the hospital fund, we are of the opinion that there is no authority in the statute which would provide for such an action as the poor fund is governed under the sections found in Chapter 267 of the Code and are entirely separate and distinct from the provisions of Chapter 269 referring to county public hospitals.

INTOXICATING LIQUORS—COUNTIES: Expense of analysis of intoxicating liquors where the evidence is to be used in the prosecution of a case, is a proper expense and should be paid by the board of supervisors.

May 23, 1927. *County Attorney, Waverly, Iowa:* We desire to acknowledge receipt of your letter of May 21, 1927, in which you submit to this department the following inquiry:

"The Board of Supervisors of Bremer County, Iowa, desires to know whether or not the allowing of claims on the part of A. W. Swensen for chemical analysis of liquor samples is a proper expense on the part of this office in preparing a case for prosecution, and whether or not the quantity heretofore analyzed, as above stated, is a reasonable amount. There has been no objection heretofore on allowing these claims, which rarely exceed the sum of $15.00. However, of late, there was a suggestion made by one of the members of the Board, that the expense was too high and he would allow no further claims of this nature."

It is the opinion of this department that any expense that is necessary in preparing a criminal case for trial must be paid from the county funds. This manifestly includes any expense that may be incurred in having an analysis of intoxicating liquor made.

SCHOOLS AND SCHOOL DISTRICTS: A school board may spend not to exceed $200 for activities including athletics and may place a small amount as an emergency fund to meet deficits.

May 23, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of recent date in which you request an opinion upon the following question:

"Is it legal for a board to place in its budget a small sum to take care of any deficits that might arise from extra-curricular activities such as music, dramatics, athletics, etc.?

"This board states that its greatest deficits arise from its declamatory contests and football activities."

It is provided by statute as follows:

"It may provide and pay out of the general fund to insure school property such sum as may be necessary, and may purchase dictionaries, library books, including books for the purpose of teaching vocal music, maps, charts, and apparatus for the use of the schools thereof to an amount not exceeding two hundred dollars in any one year for each school building under its charge; and may furnish schoolbooks to indigent children when they are likely to be deprived of the proper benefits of the school unless so aided; and shall, when directed by a vote of the district, purchase and loan books to scholars, and shall provide therefor by levy of general fund." Section 4238, Code of Iowa 1924.

Under this section it has been held that the board of directors have the power to purchase musical instruments and other equipment necessary for the use of the school.

It is further provided by statute that the board of education shall prescribe the courses of study for the schools of the corporation. Section 4250. It is further provided that the board of education shall make such contracts with teachers as will be necessary to carry out the activities of the school.

Under the statute establishing the office of Budget Director it is provided, Sections 373 and 373A, Code of Iowa, 1924, as follows:

"Each municipality may include in the estimate herein required an estimate for emergency or other expenditure which amount cannot reasonably be foreseen at the time the estimates are made, and such emergency fund shall be used for no other purpose." Section 373.

"Supplemental estimates for particular funds may be made for levies of taxes for future years when the same are authorized by law. Such estimates may be considered and levies made therefor at any time by filing the same, and upon giving notice in the manner required in section three hundred seventy-five (375). Such estimates and levies shall not be considered as within the provisions of section three hundred seventy-four (374)." Section 373A.

We are, therefore, of the opinion that the board of directors of a school corporation may purchase the necessary equipment for the school for such music, dramatics, athletics, and such other activities as are properly authorized by the board and within the statutory limitation of $200 in any one year, and that the board may also employ the necessary instructors to carry out the purposes of the board in these subjects. Such funds as may be used for this purpose may be included in the local budget, together with a reasonable emergency fund, and filed under the provisions of the statute in the regular budget made by the local governing board under the provisions of the statute, and may be for such sums as are within the power of the board to levy, subject to the approval of the Director of the Budget.

SCHOOLS—COUNTY SUPERINTENDENTS: No part of the county teachers' institute fund may be used for any other purpose than to pay the expenses of such institute.

May 23, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of recent date in which you request an opinion upon the following inquiry:

"A county superintendent employed a lecturer to address a boys' and girls' institute and wishes to know if the $100 she promised to pay him, or any part of it, can be taken out of her regular institute fund."

It is provided by statute, Section 4114, Code of Iowa, 1924, as follows:

"No part of the county teachers' institute fund may be used for any other purpose than to pay the expenses of *teachers' institutes.*"

It is, therefore, the opinion of this department that this county superintendent may not use any of the institute fund for the payment of the expenses of boys' and girls' institutes.

AUTOMOBILES—TRANSFERS: Fee of 50c charged for transfers applied for after July 4th.

May 24, 1927. *Department of State:* Replying to your letter of May 20th in which you submit the following question:

"If automobile transfers are dated any time before July 4th and not made upon the state records until after July 4th, are we in a position to charge the old fee of $1.00 for this transfer?"

Under Section 4964, Code of 1924, as amended, to take effect July 4th, the law will read as follows:

"Upon filing the application for transfers, the applicant shall pay a fee of 50 cents for the transfer, * * *".

We are, therefore, of the opinion that the date of the transfer would not be a controlling factor but that the fee charged should be that which the law contemplates at the time of application; in other words, any applications presented prior to July 4th will call for a fee of $1.00 and those presented after July 4th, the fee charged should be 50c regardless of the date of the transfer.

NOTARY PUBLIC: A notary public is only entitled to take acknowledgments within the confines of the county for which his appointment is made.

May 25, 1927. *Governor of Iowa:* Replying to your inquiry of May 25, 1927, concerning the question as to whether a notary public is only authorized to take acknowledgments within the county of his appointment, I desire to refer you to Section 1203, Code of 1924, which is as follows:

"Each notary is invested, within the county of his appointment, with the powers and shall perform the duties which pertain to that office by the custom and law of merchants."

In the case of *Reeves & Company vs. Savings Bank*, which is found in the 166 Iowa, at page 411, the court had the following to say:

"In *Willard vs. Cramer*, 36 Iowa, 22, and in *Greenwood vs. Jenswold*, 69 Iowa, 53, it was held that the name of the county is an essential part of the title of a notary public. Every notary public in this state is appointed as such for some particular county, and his title is not set forth within the meaning of the statute unless such county is indicated."

By the express requirements of Section 10103, Code of 1924, the caption is required, and it is required to precede the certificate. According to the statute

the function of such caption is to show where the acknowledgment is taken. Obedience to this requirement does not dispense with obedience to Section 10094. The form as set forth in Section 10103 outlines the official title of a notary public as notary public in and for said county.

We are, therefore, of the opinion that under Section 1203, a notary public is entitled to take acknowledgment only within the county for which his appointment is made, unless he has taken advantage of Section 1204 and filed with the clerk of the district court a certified copy of his certificate of appointment.

SCHOOLS AND SCHOOL DISTRICTS: 1—Electric transmission lines cannot be across school grounds. 2—City council has no authority to forbid loading its school busses at the most accessible point to the school grounds.

May 25, 1927. *Department of Public Instruction:* This will acknowledge receipt of a letter written your department by R. T. Neff in regard to the location of wires of a high power electric transmission line across the corner of a school ground and whether or not the city council may compel the school board to cease loading the transportation busses in front of the building along the ground on which the said transmission line runs.

This electric company has no power or right to trespass upon the school ground by carrying wires across the corner thereof as indicated in a diagram submitted to this department by Mr. Neff. The proper remedy is to secure a mandatory injunction to compel the electric company to remove the wires. The enforcement of that right by the school board would not permit the electric company to cut off the service of the school district from its lines since as a public utility company it must render service to anyone who meets the general rules and regulations of the company.

Neither does the city council have any authority to forbid the school board to load its busses at the most accessible point and if the electric wires interfere with the access, ingress, or egress to and from the building their erection may also be enjoined.

HIGHWAYS—BOARDS OF SUPERVISORS: Boards of supervisors may not add roads to those described in a petition in the establishment of a road improvement district.

May 25. 1927. *County Attorney, LeMars, Iowa:* We desire to acknowledge receipt of your letter of March 12, 1927, in which you submit the following inquiry:

"Can the board of supervisors after a petition has been presented to them which proposes the improvement of a certain road only, at their final hearing make a final order which includes other roads in the same district or only improve part of the road which the petition asked to be improved in whole?"

Section 4746 of the Code, 1924, provides for the establishing of assessment districts for the graveling, oiling or other suitable surfacing of roads of the secondary system. The power of establishing such districts is vested in the Boards of Supervisors. It is only necessary for us to consider a portion of said section in the determination of the question submitted. The section contains the following provisions:

"Hearings on said petition may be adjourned from time to time without loss of jurisdiction on the part of the board. On the final hearing, the board shall proceed to a determination of said matter. It may reject the proposal or it may approve the same and establish the district as petitioned for. It may

modify the petition either by excluding lands therefrom or by adding lands thereto, *or otherwise modify same*, or the board may withhold final order in such matter until such roads, or any designated part thereof, are drained or graded to their satisfaction."

An analysis of the portion of the above statute will disclose the fact that the board at the final hearing may do one of three things:

First. Modify the petition by excluding lands therefrom, or

Second. Modify the petition by adding lands thereto, or

Third. Otherwise modify the same.

It is quite apparent, we think, that the phrase "otherwise modify" cannot be so construed as to grant to the board of supervisors the right to add roads or portions thereof that are not described in the petition. Under the above statute the board may, of course, in considering the petition, come to the conclusion that some lands described in the petition would not be benefited by the improvement, or that lands not described therein would be benefited thereby.

If it were the intention of the legislature to permit the inclusion of highways not described therein, it seems to us that the legislature would have so stated with the same degree of particularity that it did in providing that lands might be excluded from or added thereto.

We are therefore of the opinion that the board may not at the final hearing, include other roads than those contained in the petition.

HIGHWAYS—BRIDGES: Under the provisions of the highway statute it is only necessary for the State Highway Commission to refund the amount expended by Counties on bridges, and the amount expended on culverts should not be refunded.

May 25, 1927. *Iowa State Highway Commission:* We desire to acknowledge receipt of your letter of May 6, 1927, in which you submit to this department the following inquiry:

"Section 5 of Senate File 104, Forty-second General Assembly provides 'Where additional right of way has been acquired or where bridges have been built on the primary roads under the supervision of the Highway Commission and paid for out of the county road or bridge funds since April 19, 1919, said county shall be reimbursed for said right of way and said bridges out of the primary road fund * * *'.

"Section 4668 of the Code divides bridge structures on the highways into two classes, to-wit, culverts and bridges. A culvert includes 'any drainage structure having a total clear span of twelve feet or less.' The term 'bridge' includes all waterway structures having a clear span in excess of twelve feet.

"We desire your opinion on the following questions: In making refunds to the counties under the provisions of said Section 5, Senate File 104, 42d General Assembly, should such refunds include expenditures by the counties for all drainage structures on the primary road system paid for by the county (culverts as well as bridges) or should it include only those expenditures made by the county for bridges alone?

"It is of course understood that expenditures by the county for right of way would be refunded in either event."

Section 5 of Senate File 104, the Acts of the Forty-second General Assembly, as amended by Section 1 of Senate File 353, reads as follows:

"Where additional right of way has been acquired, or where *bridges* have been built on the primary roads under the supervision of the highway commission, and paid for out of the county road or bridge funds since April 19, 1919, said County shall be reimbursed for said right of way and said bridges

out of the primary road fund within five annual payments (the first payment to be made January 1, 1928, and the board of supervisors is authorized to issue certificates anticipating the amount to be received. Said certificates shall not be issued for a period in excess of six (6) years nor to bear an interest rate to exceed five (5) per cent) from the taking effect of this act; provided, however, that any county that has received, or will receive during the year of 1927, primary road money for use on secondary roads, the amount of such primary road money so received by such county and used on the secondary roads shall be deducted from the amount of refunds provided for herein. The refunds made to any county under this section shall at the option of the board of supervisors of said county be placed to the credit of the county road fund or the county *bridge* fund."

The terms "culvert" and "bridges" are defined in section 4668 of the Code, 1924, in the following language:

"The term 'culvert' shall include all waterway structures having a total clear span of twelve feet or less, except that such term shall not include tile crossing the road, or intakes thereto, where such tile are a part of a tile line or system designed to aid subsurface drainage.

"The term 'bridge' shall include all waterway structures having a clear span in excess of twelve feet."

It is a well settled proposition of law that statutes relating to the same person or thing, or of the same class of persons or things are in pari materia, and are to be taken together and examined as one law for the purpose of arriving at the legislative intent.

Harriman vs. State, 2 G. Gr. 270;
Moriarty vs. Central Iowa R. Co., 64 Iowa, 696;
Central Iowa R. Co. vs. Board of Sup'rs, 67 Iowa, 199;
State vs. Smith, 7 Iowa, 244;
State v. Shaw, 28 Iowa, 67;
Rhode vs. Bank, 52 Iowa, 375;
Allen vs. Davenport, 107 Iowa, 90;
Drahos vs. Kopesky, 132 Iowa, 497;
Fairfield vs. Shallenberger, 135 Iowa, 615;
Eckerson vs. Des Moines, 137 Iowa, 452;
Howard vs. Emmet County, 140 Iowa, 527;
Conly vs. Dilley, 153 Iowa, 677.

Applying this rule of construction to the question under consideration, it is manifest that the definition of the word "bridge," as found in the above section, 4668, must be read into said statute. It is, therefore, our opinion that it is only necessary for the State Highway Commission to refund to the county the amount actually expended on *bridges*, meaning of course, such waterway structures having a clear span in excess of twelve feet.

SCHOOLS AND SCHOOL DISTRICTS: 1—A junior college may be established only by vote of electors at the annual election. 2—A school maintaining a junior college prior to the effective date of H. F. 249 may continue such operation. 3—A school which has passed a resolution and entered into contractual relationship to establish a junior college prior to the effective date of H. F. 249 may continue the operation.

May 25, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your favor of recent date in which you request an opinion from this department upon the following questions:

"1. Can these fourteen high schools that have been maintaining a Junior College continue to maintain them without submitting the question to the voters?

"2. Shortly before House File 249 went into effect a number of boards adopted a resolution to establish a Junior College to begin with the opening of the next school year in September. Is this resolution legal or must the question of establishment and maintenance be submitted to the voters?

"3. Can the question of establishing and maintaining a Junior College be voted on at a special election called for that purpose or must it be submitted at the annual meeting in March only?"

It is provided by Section 4217 of the Code of Iowa, 1924, as amended by House File 249 of the Forty-second General Assembly as follows:

"The voters assembled at the annual meeting shall have power: * * *

"8. To authorize the establishment and maintenance in each district of one or more schools of a higher order than an approved high school course."

It is provided by Section 4197 of the Code of Iowa, 1924, with reference to special elections as follows:

"The board of directors may call a special meeting of the voters of any school corporation by giving notice in the same manner as for the annual meeting, which shall have the powers given to a regular meeting with reference to the sale of school property and the application to be made of the proceeds, and to vote a schoolhouse tax for the purchase of a site and the construction of a necessary schoolhouse, and for obtaining roads thereto."

It is further provided in House File 249, Acts of the Forty-second General Assembly, that Section 4267 of the Code of Iowa, 1924, is repealed and the following enacted in lieu thereof:

"The board may establish graded and high schools and determine what branches shall be taught therein, but the course of study shall be subject to the approval of the superintendent of public instruction."

There is then added to Chapter 214 of the said Code, Section 4267-b1 as follows:

"The board, upon approval of the State Superintendent of Public Instruction, and when duly authorized by the voters, shall have power to establish and maintain in each district one or more schools of higher order than an approved four-year high school course. Said schools of higher order shall be known as public junior colleges and may include courses of study covering one or two years of work in advance of that offered by an accredited four-year high school."

A perusal of these statutes forces the conclusion that a school district may establish a school of a higher order after the effective date of House File 249, only upon authorization by the electors of the district. We are, therefore, of the opinion that no board of education can, without such vote, establish a junior college course after the effective date of said House File 249. Where a board of education passed a resolution establishing a junior college course but took no further action prior to the effective date of the statute, we are of the opinion that such passage of such resolution is not sufficient organization to permit the completion without a vote of the electors of the district.

In regard to the fourteen school corporations which have been maintaining a junior college established under Section 4267 of the Code of Iowa, 1924, we are of the opinion that such corporations may continue to maintain such schools under the provisions of the former statute. It is our understanding that these schools charge a tuition fee sufficient to maintain the said junior college courses without any additional burden upon the taxpayer. No one, therefore, is harmed by the continued operation of these schools and there is, therefore, no one to complain of their continued operation.

We are of the opinion that where the board of directors of a school corporation has, prior to the effective date of the statute passed a resolution, entered into contracts with its pupils and teachers, and established its course all prior to such effective date, that such steps taken are such organization as would warrant the board of education in perfecting the organization and of offering the courses without a vote of the electors.

In answer to your third question, we are of the opinion that the legislative intent is clear in the addition of this power to the voters at the general election but without amending Section 4197 with reference to the powers of electors at special meetings that such power can be exercised only at the annual meetings or election.

HIGHWAYS—BRIDGES: The new highway statute will become effective on July 4, 1927, and anticipation receipts for the bridge money to be refunded may not be refunded before the said date. 2. Certain suggestions as to how to procede in determining the amount to be refunded.

May 26, 1927. *County Attorney, Sioux City, Iowa:* We desire to acknowledge receipt of your letter of May 20, 1927, in which you submit to this department the following inquiry:

"The Board of Supervisors of Woodbury County have asked that we obtain an opinion from your office in the following matter:

"It appears from the statutes enacted by the Forty-second General Assembly that the Counties will receive from the Highway Commission a refund of the money spent upon primary roads out of the County Bridge Fund.

"May the Board of Supervisors of Woodbury County enter into contracts for the expenditure of funds from the bridge fund of Woodbury County during the current year, anticipating the amount to be refunded to them by the Highway Commission as above mentioned; or is the Board limited in its expenditures during the current year to the revenue from taxation collectible during this year?"

Section 5 of Senate File 104, as amended by Section 1 of Senate File 353, of the Acts of the Forty-second General Assembly, in a general way provides that where additional right of way has been acquired, or where bridges have been built on the primary roads under the supervision of the highway commission and paid for out of the county road or bridge funds, since April 19, 1919, said county shall be reimbursed for said right of way and said bridges out of the primary road fund in five annual payments. Section 1 of Senate File 353, provides as follows:

"The first payment to be made January 1, 1928, and the board of supervisors is authorized to issue certificates anticipating the amount to be received. Said certificates shall not be issued for a period to exceed six (6) years, nor bear interest to exceed five (5) per cent per annum."

These two statutes do not become effective until July 4, 1927. It will therefore be seen that the board of supervisors may anticipate the receipt of said money and may enter into contracts with reference to the expenditure thereof after the law became effective. However, before entering into any contracts with reference to the amount to be refunded, the board of supervisors should ascertain, by a conference with the state highway commission, how much is due the county under the law.

In anticipating the amount to be refunded, the board of supervisors should take into consideration the interest on the anticipation certificates to be issued under the provisions of the statute, so that the total amount refunded

will not exceed both the principal of the certificates and interest. For illustration, if the amount to be refunded is $50,000, the board should issue anticipation certificates in a smaller sum, so that the total amount refunded will approximately equal the amount of the anticipation certificates with interest.

We suggest that you take the matter up with the state highway commission at once.

NOTARY PUBLIC—ACKNOWLEDGMENTS—BANKS: One not having an interest either direct or contingent in a conveyance has right to take acknowledgments.

May 27, 1927. *Superintendent of Banking:* In reply to your letter of May 25th in which you submit the following question:

"Is it legal for a teller, bookkeeper or other employee not known as an official to take acknowledgments running to the bank?"

In reply, I would state that there seems to be no question but what stockholders may not take acknowledgments where the bank is a grantor or the one benefiting thereby. This is carried out by a recent case of *Farmer vs. Ames Farmers Canning Company*, 190 Iowa, 1259, and in which a large number of cases are cited. However, as to employees such as you mention in your request, the case of *Bardsley vs. German American Bank*, 113 Iowa, 216, has the following to say:

"The law relating to the subject is well settled and generally understood. One having an interest direct or contingent in a conveyance or its subject matter, cannot take and certify an acknowledgment thereof and the record of an instrument so acknowledged does not impart notice to the third persons of the mortgagee's interest thereunder. As between the parties, however, the mortgage is valid and enforceable. Citing *Wilson vs. Traer and Co.*, 20 Iowa 231; *Smith vs. Clark*, 100 Iowa, 605; *Bank vs. Radtke*, 87 Iowa, 365: The mere fact that one is an officer of a corporation of an agent of a co-partnership does not disqualify him from taking the acknowledgment of an instrument made to his principal. It is only when he has an interest in the subject matter of the contract or the contract itself that he is disqualified."

To cite some definitions bearing on the statutes of employees as distinguished from officers, I would refer you to *Munn vs. Wellsburg Banking and Trust Company*, 66 W. Va. 204; 66 S. E. 230; where is found the following:

"One employed as bookkeeper for a definite period is not an officer or agent of such corporation within the Code of 1906, Section 2281, holding his place during the pleasure of the directors and removable by them without cause, without liability on the corporation for breach of contract of employment."

In the case of *American Soda Fountain Company vs. Stalzenbach*, 68 Atl. 1078, officers of a corporation are defined as follows:

"Officers are the means, the hands, the head by which a corporation normally acts. The word 'officers' has this precise meaning. Webster gives its etymology as 'opps.' help 'Facere' to do or make."

A distinction is made between an employee and an officer in the case of *Padden vs. City of New York*, 92 N. Y. Supp. 926, and states as follows:

"The distinction is plainly taken between a person acting as a servant or employee who does not discharge independent duties but acts by the direction of others, and an officer empowered to act in the discharge of a duty on the legal authority in official life."

We are, therefore, of the opinion that a teller, bookkeeper or other employee

and who are not known as officials, and who do not own any stock in the bank, may take acknowledgments of instruments coming to the bank in whose employ they are at that time.

JUVENILES—TRAINING SCHOOL—JAIL. Officers may in certain cases confine paroled or runaway boys for safe keeping.

May 27, 1927. *Board of Control:* In reply to your letter of May 26th in which you submit for an opinion the following question:

"May paroled or runaway boys from the training school at Eldora be held temporarily in city or county jails when there is no other adequate provision made for their safe-keeping?"

Section 3653, Code of 1924, which pertains to counties having a population of over 40,000 and which is as follows:

"In counties having a population of more than forty thousand, the board of supervisors shall provide and maintain, separate, apart and outside the inclosure of any jail or police station, a suitable detention home and school for dependent, neglected and delinquent children."

does not of necessity apply to paroled or runaway boys who are inmates of the training school and the authority therefor is found under Section 3617 as follows:

"This chapter shall not apply to any child who is accused of an offense which is punishable by life imprisonment or death, but shall otherwise apply to all children who are not feeble-minded and who are under eighteen years of age and who are not inmates of any state institution or of any institution incorporated under the laws of this state."

Section 5499 must also be taken into consideration referring to minors separately confined, which reads as follows:

"Any sheriff, city marshal, or chief of police having in his care or custody any prisoner under the age of eighteen years, shall keep such prisoner separate and apart, and prevent communication by such prisoner with prisoners above that age, while such prisoners are not under the personal supervision of such officer, if suitable buildings or jails are provided for that purpose, unless such prisoner is likely to or does exercise an immoral influence over other minors with whom he may be imprisoned. Any officer having charge of prisoners who without just cause or excuse neglects or refuses to perform the duties imposed on him by this section may be suspended or removed from office therefor."

However, each individual case should be governed by its own facts and if, in the opinion of the sheriff or officer by whom the boy is to be held temporarily, there is danger of the boy escaping and there is no suitable or safe place in which to confine the child, then in that event said sheriff or officer would be justified in placing the child in the city or county jail. However, said child should not be placed in close proximity with any other prisoner or prisoners unless it is absolutely unavoidable.

WITNESSES: In criminal cases financial ability of defendant is not for the judges to take into consideration on application for order.

May 27, 1927. *County Attorney, Waterloo, Iowa:* In reply to your letter of May 25th in which you submit the following inquiry for an opinion:

"Must a trial judge order witnesses subpoenaed at the expense of the State on the behalf of the defendant charged with the crime regardless of the defendant's financial ability to pay the fees?"

This question falls entirely within the provisions of Section 13880 of the Code of 1924, which is as follows:

"Witnesses for the defense shall be subpoenaed at the expense of the county only upon the order of the court or judge thereof before which the case is pending made upon a satisfactory showing that the witnesses are material and necessary for the defense, which order may be made at the time of the trial or other disposition of the case. The board of supervisors shall not allow any claims for fees of witnesses not thus authorized."

The controlling part of the above quoted section in relation to the question submitted would be the following:

"* * made upon a satisfactory showing that the witnesses are material and necessary for the defense, * *".

In the cases which have been submitted to the Supreme Court of this state relative to witness fees under this section your particular question has never been raised but the Supreme Court has held that the Board of Supervisors had no discretion but when such order was made they must pay the witness fees of those included in the judge's orders, together with whatever necessary mileage had accrued.

In the case of *State vs. Gilbert*, 138 Iowa, 355; and *Jones County vs. Linn County*, 68 Iowa, 63; the Supreme Court held that the showing necessary was only such as would satisfy the court and that the thing to be considered in such showing was the necessity and materiality of the witnesses for the defense.

We are, therefore, of the opinion that the financial ability of the defendant to pay said fees is not, under the above quoted section, a matter for the judges to take into consideration upon application being made to them for such an order.

SCHOOLS—TEACHERS: 1. Until a teacher's contract has been signed the board may rescind its action employing the school teacher. 2. Where it is the understanding that a written contract shall be prepared and signed a teacher has no binding contract with the district until the contract has been signed. 3. A small shed on a school lot which was erected so that the school children may keep their horses and ponies therein while attending school may be taken over by the school board and repaired unless there was a different agreement at the time it was erected.

May 27, 1927. *County Attorney, Maquoketa, Iowa:* We desire to acknowledge receipt of your letter of May 25, 1927, in which you submit to this department the following inquiries:

"Members of the school board of Union Township, through the County Superintendent's Office, have called on this office and submitted the following situation upon which they would request an opinion from your department.

"On May 16 the board met in special session for the purpose of employing teachers for the coming school year and found on file the application of Marjory Kempter. By ballot vote on recommendation of the director of the district the board voted to employ the said Marjory Kempter for the school year for that district. No contract was signed and no action was taken by either party in reliance of the action of the board.

"On May 23 the board again met in special session and voted to reconsider the action of the former meeting and on reconsideration rescinded the action wherein they had selected Marjory Kempter as teacher for that particular district. The board then voted to elect another party in her stead.

"Was there a contract with Marjory Kempter as contemplated by the school laws and if so was the action of the board of the session of May 23 in rescind-

ing said contract legal, or may Miss Kempter legally maintain an action for the contract for the year?

"I have advised the president to sign no contract with either party until the matter is definitely determined.

"Secondly: In this same school district parties from outside of the district have made arrangements to send their children to school later and with the approval of the president of the board, but not the approval of the board as a whole, constructed a small shed or barn on the school lot in order that their children might keep their horses and ponies therein while attending school.

"So far as I have been able to determine the law does not contemplate the erection of any such building and it is now in such condition that there is danger for the small children playing on the grounds, and it is also allowed to go for weeks at a time without being cleaned down and is causing a filthy and unhealthy condition on the grounds.

"The board, however, has declined to take any steps for its removal and contemplates taking the same over.

"Can the board lawfully take over the building and repair and maintain the same thereon? If not what action should the director of the district institute to compel its removal?

"These are matters in which they have specifically requested an opinion from your department and I have therefore gone into the law only in a hasty manner."

While you do not state in your letter, we are assuming, for the purpose of preparing this opinion, that it was the intention of the school board to enter into a written contract with the said Marjory Kempter, and that all of the terms of the contract were not agreed upon.

It is the usual custom in this state for school boards to enter into written contracts with school teachers. Therefore, if we are correct in the above supposition, then there was no contract consummated by the mere action of the board in voting to employ the teacher in question. The following authority supports the rule: *Weitz vs. Independent District of Des Moines*, 79 Iowa, 423.

The syllabus to this case contains the following:

"Where plaintiff relied upon a resolution of defendant's directors accepting his bid for the erection of a school house, it was error to refuse defendant leave to plead and prove that it was the understanding of both parties that a written contract should be executed by the parties, and that the plaintiff should give bonds for the performance of such contract, for if such was the understanding, there was no consummated contract."

We are therefore of the opinion that the board of directors may rescind its action in employing the school teacher in question and may enter into a binding contract with another teacher. This conclusion is based upon the proposition that no valid contract was made to the school teacher.

In answer to your second inquiry, we will say that it is the opinion of this department that even though the erection of the small shed or barn on the school lot in order that the children may keep their horses and ponies therein while attending school was not built by the school board or paid for out of the school's funds, such school board may now take over the control, management and maintenance thereof and repair the same out of the school funds, unless there was a different agreement or understanding at the time it was erected. Such a barn or shed may be erected by the school district, if in their judgment it is an aid to the maintenance of the school. However, if the school board does not desire to take over and maintain the same, then it should be destroyed so as not to endanger the school children.

FAIR ASSOCIATIONS—STATE AID: Discussion of changes in the law by 42d General Assembly.

May 28, 1927. *Secretary, Iowa State Fair and Exposition:* You have requested the opinion of this department upon two propositions involving state aid to county fair associations.

Your first question is whether or not a county fair association which is incorporated, may change its name and renew its articles of incorporation and still receive aid in the same manner as though it continued under the same name. In answer to this proposition you are advised that as long as the corporate organization is the same the change of name makes no difference and renewal of a corporate charter is in effect a renewal of the corporate life of the corporation. We know of no reason why any such association changing its name and renewing its charter may not continue to receive the aid provided by law.

Your second question is whether or not a fair association which did not hold a fair in 1926, the last fair being held in 1925, can receive aid under the provisions of the amendment to Section 2902 of the Code as contained in Senate File No. 360 of the Acts of the Forty-second General Assembly. Senate File No. 360, insofar as applicable, provides as follows:

"The appropriation which is made biennially for state aid to the foregoing societies shall be available and applicable to incorporated societies of a purely agricultural nature which were entitled to draw eight hundred fifty dollars ($850.00) or more state aid in 1926, or societies located in counties having no other fair or agricultural society and which were in existence and drew state aid in 1926."

The society about which you inquire is located in a county where another society is receiving aid. Therefore, under the provision of law just quoted, said society not having been entitled to draw the state aid in 1926 and there being another agricultural society which was in existence and which did draw state aid in 1926, said association will not be entitled to receive state aid for a period of three years, and as further provided in subparagraph 6 as contained in the provisions of Section 2 of Senate File No. 360.

SCHOOLS AND SCHOOL DISTRICTS: A cement plant is not a mine and is, therefore, not entitled to participate in the appropriation for mining camp schools.

May 31, 1927. *Department of Public Instruction:* This will acknowledge receipt of your request for an opinion upon the following question:

Is a school built for the accommodation of pupils whose parents are working at a cement plant entitled to state aid under the provisions of the statute appropriating money for the aid of mining camp schools?

This proposition turns upon the question of whether a cement plant is a mine within the meaning of the statute.

It has been held that Portland cement is the slow-setting product of high temperature kiln burning of a pulverized cement rock or mixture of clay and limestone of a very exact and regular composition. *Donaldson vs. Roksament Stone Company*, 170 Fed. 192. It will, therefore, be seen that the cement is a product of manufacturing and not a mineral within the meaning of the term " a mining product."

The term "mine" has also been distinguished from the term "quarry" in *Guffey Petroleum Company vs. Murrel*, 53 South. 705, 713, where the court said:

"The verb 'mine' in its ordinary acceptation means to dig in the earth to get ore, metals, coal, or precious stones. The noun 'mine' means a pit or hole in the earth from which metallic ores, precious stones, or other mineral substances are taken by digging, distinguished from the pits from which stones for architectural purposes are taken, which are called 'quarries'."

We are, therefore, of the opinion that the appropriation for mining camp schools cannot be properly used for aid of a school for the accommodation of children of employees at cement plants.

DEPARTMENT OF PUBLIC INSTRUCTION—SCHOOL DISTRICT: Determination of time for withdrawals from petition.

June 3, 1927. *Department of Public Instruction:* In reply to your inquiry of June 2nd in which you submit the following question:

"Where a petition for dissolution of an independent school district which had at that time 299 electors of which number 155 had signed the petition for dissolution and where a notice had been published setting the 25th day of May at 12 o'clock noon, as being the limit for filing of objections, and that a few minutes prior to the expiration of the time for filing of objectins, eight electors filed a sworn statement requesting that their names be withdrawn from said petition; would this render the petition for dissolution insufficient?"

In reply to such question I desire to call your attention to Section 4157 of the Code, 1924, which is as follows:

"Within ten days after the petition is filed, the county superintendent shall fix a final date for filing objections to the petition in the office of the county superintendent, and give notice for at least ten days, by one publication in a newspaper published within the territory described in the petition, or if none be published therein, in the next nearest town or city in any county in which any part of the territory described in the petition is situated. Objections shall be in writing in the form of an affidavit and may be made by any person residing or owning land within the territory described in the petition, or who would be injuriously affected by the formation of such new corporation, and shall be on file not later than twelve o'clock noon of the final day fixed for filing objections."

In the above quoted section it states that objections shall be in writing in the form of an affidavit and shall be on file not later than twelve o'clock noon of the final day. In this particular instance the objections were in the form of a withdrawal of the names of eight electors and was evidently filed in time so that it would take from the original number of one hundred fifty-five (155) eight names, leaving one hundred forty-seven (147) which would not constitute a majority of the electors in that district. It would, therefore, be necessary for the county superintendent to take such withdrawals into consideration and we are of the opinion that said petition was not sufficient to grant such dissolution.

SCHOOLS—PAROCHIAL SCHOOLS: Renting of a school room in public school building not to have any connection with sectarian schools.

June 3, 1927. *Department of Public Instruction:* In reply to your inquiry of June 1st in which you submit the following question:

"Would it be legal for a school board to rent a room or rooms in a public school building to a parochial school? If it is not legal, how may the same be prevented?"

In reply to this I desire to quote Section 5256 which is as follows:

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

Also Section 4371, which is as follows:

"The board of directors of any school corporation may authorize the use of any schoolhouse and its grounds within such corporation and not within the limits of a city or town for the purpose of meetings of granges, lodges, agricultural societies, and similar rural secret orders and societies, and for election purposes; such use to be for such compensation and upon such terms and conditions as may be fixed by said board for the proper protection of the schoolhouse and the property belonging therein, including that of pupils."

It is a well settled proposition that the enumeration of certain specific things in a statute operates as an exclusion of things not mentioned therein.

Talbot vs. Blackledge, 22 Iowa, 572;
State vs. Santee, 111 Iowa, 1.

The question which you submit is largely covered by the case of *Knowlton vs. Baumhover*, 182 Iowa, 691, and Mr. Justice Weaver writing the opinion had the following to say:

"In short, it must be said that, with the abondonment of the public schoolhouse, and the transfer of the school into the parochial building, and its organization and conduct as there perfected, the school ceased to have a public character, in the sense contemplated by our laws, * * *. If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state, and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer and infidel —shall not be used, directly or indirectly, for religious instruction, and above all, that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed, or belief."

On page 713 Mr. Justice Weaver in this same case, speaking of a New York case wherein the question of religious teaching was raised refers to Section 3, Article I, of the Constitution of Iowa, and says:

"The Constitution of that state provides, substantially in the words of our statute, that neither the public property nor credit nor money may be used, directly or indirectly, in the aid of any school wholly or in part under the control of any religious denomination. Applying this provision of the law to the facts above noted, the court says: 'Here we have the plainest possible declaration of the public policy of the state, as opposed to the prevalence of sectarian influences in the public schools.'"

On page 721 the learned Justice quoting from the case of *State vs. District Board*, 76 Wisc. 177, cites the following:

"As the state can have nothing to do with religion except to protect everyone in the enjoyment of his own, so the common schools have nothing to do with religion in any respect. They are as completely secular as any of the other institutions of the state, in which all people alike have equal rights and privileges."

Further, on page 724, Mr. Justice Weaver states:

"It is self-evident proposition that the public schools of the state are under legislative control, and that school directors have no powers except those which are conferred by the statutes upon them. * * * Let any other become the set-

tled law of the state, and the day of the destruction of our system of nonsectarian public education will be far advanced. Let it once be understood that it is possible by any scheme or device to lawfully compass any public school about with religious influences in the interest of any sect or denomination, and you will have offered a tempting prize to the propagandist and proselyter of every creed; and wherever the adherents of any particular creed can command a majority of any school board, it may abandon the schoolhouse provided for the common and equal use of all the people, * * *"

"We do not believe that the people of this country are ready for such a surrender of one of the most distinctive features of a free government to ecclesiastical domination, and we are sure that, when properly construed, the law will not fail to place upon it the seal of condemnation."

We are, therefore, of the opinion that a school board does not have the power conferred upon them by statute to rent a room of the schoolhouse under their supervision to a parochial school, and that the proper method of preventing same would be an action in equity asking for an injunction.

CORPORATIONS—FOREIGN CORPORATIONS—PERMITS: Similarity of names.

June 4, 1927. *Secretary of State:* Replying to your letter of May 26th in which you request an opinion on the following:

"May the Secretary of State prohibit or refuse to accept articles of incorporation of any foreign concern contemplating qualification in Iowa under a name exactly like the name of a corporation already admitted to Iowa, or organized as a domestic corporation?"

In reply, we would say that the matter of issuing permits to foreign corporations is fully covered by Chapter 386 of the Code of 1924, and this chapter fully sets out the necessary steps to be taken by said foreign corporation who desires a permit to operate within this state.

Under "Corporations", paragraph 3928—14a Corpus Juris, the following is said:

"Under principles of comity and except as otherwise provided by constitutional or statutory provisions, a corporation created by any state or nation is permitted to enter other states and there to exercise all legitimate powers conferred upon it and to carry on as a corporation any business not prohibited by the local laws or against the local public policy. The rules of comity are subject to local modification by the lawmaking power."

In Section 8432, Code of 1924, foreign corporations are subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of a like character organized under the general laws of Iowa, and shall have no other or greater powers.

On page 314 of 14 Corpus Juris, under the title of "Corporations" is found the following:

"Scope of inquiry by the secretary of state. It has been held that, in passing on the similarity of names under a statute prohibiting a corporation from taking the name of an existing corporation, or a name so nearly resembling the same as to be misleading, it is not the duty of the secretary of state to inquire into the character of the business of the respective corporations, but it is his duty to inquire only into the similarity of the names, and if, in his judgment, the names so nearly resemble each other as to be misleading, it is his duty to reject the offered articles of incorporation. In other jurisdictions, however, the character of the business of the respective corporations as well as their location is taken into consideration in determining whether the similarity of names is calculated to deceive. This is clearly the more reasonable

rule, for it is obvious that a similarity of names calculated to mislead in the case of corporations engaged in the same business and the same locality might have no such tendency at all in the case of corporations not engaged in the same business or locality."

We are, therefore, of the opinion that foreign corporations which have complied with all the requirements of Chapter 386 of the Code, 1924, are entitled to the issuance of a permit by the Secretary of State, regardless of the similarity of the name of said corporation with that of a corporation already licensed in this state, unless there are sufficient facts to warrant a reasonable belief in the mind of the Secretary of State that to grant such a permit would create confusion, interference and injury, and to mislead the public, or that their object is an unlawful one or against public policy, or that their plan for doing business is dishonest or unlawful, in which event he may invoke the authority granted under Section 8334 and refuse such permit.

BOARD OF CONTROL: Board has full jurisdiction over institutions under its control and is the proper body to make all contracts for said institution.

June 6, 1927. *Board of Control:* You have requested the opinion of this department upon the question of whether, under the law, it is the duty of the Board of Control, or of the executive officer of one of the state institutions under the control of the board, to purchase and lease equipment necessary in the management and conduct of the institution. You state that the executive officer of one of the institutions is of the opinion that he is the officer vested with this authority.

Chapter 167 of the Code, 1924, contains the provisions of law relative to the governing of the state institutions under the Board of Control. It will be noted that the first section thereof, 3287, provides that the Board of Control "shall have full power to contract for, manage, control and govern, subject only to the limitations imposed by law", certain named institutions. The language of the whole chapter follows this first declaration of power, and there can be no question, from a reading thereof, but that the board has plenary power over the institutions placed under its jurisdiction. The provisions of law relative to the appointment of an executive officer for each institution are advisory in nature and do not tend to divest the board of any supervisory power over any such institution. It will be noted that Section 3292 provides that the executive officer, warden or superintendent, as the case may be, of such an institution is appointed by the board, and is given control over the property used in connection with the particular institution, subject, however, to the orders of the board. The board has full power to remove any such officer. The only provisions of law relative to the powers of an executive officer are contained in this section. Surely it cannot be contended that the language used there is such as to divide the responsibility between the Board of Control and the executive officer, or to relieve the Board of Control of any responsibility for the management, control or government of any institution.

We are of the opinion that the Board of Control is the authority which should make the contracts for the leasing of property or equipment or for the purchase of equipment for the institutions under its jurisdiction. There are instances where the board might delegate or authorize the executive officer or superintendent of any institution to act for it, but it must be kept in mind that the

board is primarily charged with full responsibility in connection with the management, control and governing of each institution under its control.

FINES—JUSTICES OF PEACE: 1. The Justice of Peace should pay the fines received by him to the County Treasurer within the thirty day period prescribed in the statute. 2. If he fails to do so and deposits the money in a bank which afterwards fails he will be personally liable for the amount of the fines.

June 7, 1927. *Auditor of State:* We have received your letter of June 2, 1927, in which you ask this department to prepare an opinion upon a question contained in a letter written to your department by Mr. A. S. Lawrence, one of your examiners. The letter of Mr. Lawrence is as follows:

"We desire to submit a question for the determination of the Attorney General.

"One of the Justices of the Peace in the course of business collected $218.31 in fines and fees, the item of fees amounting to $3.31. Instead of turning these fines over to the County Treasurer as provided by Section 13596, he deposited the same in bank to his credit as Justice of Peace. The bank closed its doors with this deposit involved in the failure still to his credit. He now attempts to make an assignment of this deposit to the County Treasurer and Auditor in full payment of this indebtedness to the County.

"Can he do so or rather has the Auditor and Treasurer a right to receive the assignment as full payment of these fines?"

Section 13596 of the Code, 1924, reads as follows:

"If a fine is imposed, and paid before commitment, *it shall be received by the justice and paid over to the county treasurer within thirty days after the receipt thereof.*"

It is the opinion of this department that after the thirty day period for the payment of fines to the County Treasurer as provided in the above section has elapsed, the justice of the peace holds the same at his own risk and peril. A violation of the statute amounts to a technical conversion of said funds, and the justice of the peace is now personally liable for the payment of said funds. The fact that the bank is now in the hands of a receiver will make no difference in the application of the rule. Therefore, it is our opinion that the Auditor and Treasurer have no right to receive the assignment of the claim against the bank as full payment of these fines. The following authorities fully support the rule herein announced.

29 Cyc. 1439;
Lowry vs. Polk Co., 51 Iowa, 50;
State vs. Houston, 78 Ala., 576;
Alston vs. Ala., 92 Ala. 124; 13 L. R. A. 659;
Beveans vs. United States, 80 U. S. (13 Wal.) 56;
Halliburton vs. United States, 80 U. S. (13 Wal.) 63.

We therefore hold that the justice of the peace should be required to make a full accounting of said fines.

SCHOOLS AND SCHOOL DISTRICTS: A school board may employ a physician for medical inspection of schools and medical examination of pupils but cannot maintain a medical clinic.

June 7, 1927. *Superintendent of Public Instruction:* You have submitted to this department for an opinion the following question:

"Is it within the discretion of a school board to employ a physician to have medical inspection of schools and medical examination of pupils and pay said physician out of school funds?"

It is provided by statute, Code of Iowa, 1924, Section 4263, as follows:

"The teaching 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 courses provided for normal children. Said subject shall be taught in the manner prescribed by the state superintendent of public instruction."

It will be noted from the above quotation that it is incumbent upon the board of education to provide for those pupils who are physically unable to take the courses provided for normal children. It will, therefore, be not only within the power but the duty of the board of education to make such physical examinations of pupils as would enable the board to prescribe proper courses and provide proper methods of instruction.

This question has been the subject of judicial determination in jurisdictions other than our own and the courts have held that such provision is within the power of the boards of the various school districts.

It is also the duty of the board of education of any school district to cooperate with the board of health in the prevention of the spread of communicable diseases and to prescribe such rules and regulations as may effect that result and to provide such examination of the pupils as is necessary for such purpose.

The question was before the supreme court of the state of Minnesota in the case of State vs. Brown, 112 Minn. 370, in which case the court said:

"Education of a child means much more than merely communicating to it the contents of textbooks, but even if the term were to be so limited, some discretion must be used by the teacher in determining the amount of study each child is capable of. The physical and mental powers of the individual are so interdependent that no system of education although designed solely to develop mentality would be complete which ignored bodily health and this is peculiarly true of children whose immunity renders their mental efforts largely dependent upon physical conditions. It seems that the school authorities and teachers coming directly in contact with the children should have an accurate knowledge of each child's physical condition for the benefit of the individual child for the protection of the other children with reference to communicable diseases and conditions and to permit an intelligent grading of pupils. All of these considerations as well as many others unnecessary to mention convince us that the conclusions of the learned trial judge were entirely right (holding that a writ of mandamus should issue to compel the comptroller of the city of Minneapolis to countersign a warrant for $60 rendered by petitioner at the request of the board of education of Minneapolis in making an inspection of the physical condition of pupils in the schools)."

The question has also been the subject of determination by the supreme court of the state of Colorado, which court held in the case of Hallett vs. the Post Printing & Publishing Company, as follows:

"It is also undoubted that the board may provide for the physical as well as the mental education of pupils. It follows that if they provide physical education they must, within reasonable limits as to expense and time of pupils, provide for determining what is proper and beneficial for each pupil by all reasonable means including examination, physical as well as mental by suitable persons and for proper physical exercises and development to overcome defects.

"The fact that the persons employed are professional medical men and nurses does not preclude but justifies their employment for such a purpose."

The latter case cited is particularly in point in the construction of our own statutes because in Section 4263 quoted above it is made obligatory upon the

board to maintain modified courses in physical training to fit the needs of the pupils in the school.

We are, therefore, of the opinion that it is within the discretion of a school board to employ a physician to make medical inspection of schools and medical examination of the pupils and to pay the cost thereof out of the funds of the school district. There is, however, no provision for a medical clinic or for any treatment of pupils by a physician at the expense of the school corporation. Neither can this be done by the physician or medical inspector, even without expense to the district, unless it is done with the knowledge and consent of the parent or legal representative of the pupil. Such medical examination and inspection is, in our opinion, limited to diagnosis only.

SCHOOLS AND SCHOOL DISTRICTS: A school district may loan funds only under the provisions of Section 12, Chapter 92, of the Acts of the 42nd General Assembly providing for the investment of inactive funds not used for current use.

June 7, 1927. *Superintendent of Public Instruction:* We desire to acknowledge receipt of your letter of June 6, 1927, in which you submit to this department the following inquiry:

"Mr. Otto Kleis, Treasurer of the Independent School District of Sheldahl, Iowa, states that the Independent District of Sheldahl has received a bequest of $7,271.62 from the late Henrietta Burkey. Said bequest, by the terms of the will, is to be used only for the purpose of building a room or rooms onto the building at Sheldahl.

"Mr. Kleis has this money in his possession at the present time. He has received an order from the secretary of the board directing him to turn this money over to A. F. Miller, Cashier of the Polk City Savings Bank, directing that he shall use his best judgment in placing the same. Said investment is to be subject to call by the board of directors at any time.

"The treasurer, Mr. Otto Kleis, requests an opinion as to whether this procedure would be legal, and if not legal, what would be the proper procedure in handling this bequest. Will you also please advise as to the details of the procedure?

"Would the law that requires the vote of the people before a school building can be erected, even though the money is on hand, apply where the money on hand is from a bequest rather than from a tax source?"

Section 4316 prescribes the duties of the school treasurer, and 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. He shall register all orders drawn and reported to him by the secretary, showing the number, date, to whom drawn, the fund upon which drawn, the purpose and amount."

It will, therefore, be observed that the treasurer is the officer who is empowered by law to receive all moneys belonging to the corporation. * * *

Section 4319, as amended by Chapter 173 of the Acts of the Forty-first General Assembly, and Chapter 92 of the Acts of the Forty-second General Assembly, read as follows:

"It is hereby made the duty of the treasurer of each school corporation to deposit all funds in his hands as such treasurer in some bank or banks within the county or within five miles of its border within the state of Iowa as directed by the board of directors of such school corporation, at interest at the rate of at least two and one-half 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 fund of such school corporation."

We are clearly of the opinion that under the Sections of the Code quoted herein, the school treasurer is the only officer who is authorized to receive any funds belonging to the school district.

Therefore, the school board has no right or authority to direct the school treasurer to turn the money referred to in your letter over to A. F. Miller, Cashier Polk City Savings Bank for investment, or for any other purpose. It is also our opinion that the school board has no authority to invest or loan school funds, except that an inactive fund not needed for current use and which is being accumulated as a sinking fund for a definite purpose, the interest of which is used for the same purpose, may be invested in anticipatory warrants isseud by the Treasurer of State, United States Government Bonds, local certificates or warrants issued by any municipality or school district within the county, or in municipal bonds which constitute a general liability. The investment, however, of these funds must be done by the treasurer only when directed by the board of education of the school district. This is the only provision made for investing the school district's funds, and all other funds must be deposited in a bank under the provisions of the sinking fund statute. This exception is made in Section 12 of Chapter 92 of the Acts of the 42nd General Assembly.

It was held by this department in two opinions that a school district has no right to erect a building without a vote of the electors. The first of these opinions was prepared on July 21, 1926, for Miss Mary E. Francis, the then Superintendent of Public Instruction, and the second one on March 23, 1927, for your office.

In the second of said opinions it was held that insurance money which was paid by the insurance company to reimburse the school district for the loss of its school house, could not be used for erecting a school building without submitting the proposition to the electors. These opinions are therefore determinative of the second question you have submitted, and it is our opinion that even though the school district receives a bequest of a sufficient amount to erect a new school building or an addition to the old one, the same cannot be so expended without a vote of the people.

TAXATION—BANKS AND BANKING: A bank may deduct the actual value of real estate located outside the state of Iowa from its returns on capital stock for taxation purposes.

June 8, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of recent date requesting an opinion upon the following questions:

1—Can a bank in making tax returns to the assessor deduct all property owned by them from their capital and surplus?

2—Can such bank deduct the value of real estate from the amount of its capital and surplus and the value of its shares in making returns for taxation?

3—May such banks deduct the value of such real estate if that real estate is located outside the state of Iowa?

A bank may deduct from the value of the shares of its capital stock and surplus only such property as is provided by statute.

It is provided by statute, Code of Iowa, 1924, section 7002, 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."

Under the interpretation of the above statute this department held under date of February 16, 1926, that real estate owned by the said bank located in another state is subject only to the jurisdiction of that state for the purpose of taxation and is assessed and taxed where located. We quote from the cited opinion as follows:

"To refuse the deduction of capital invested in real estate located outside of the state of Iowa would be, in effect, to subject this real estate to taxation in Iowa as well as to taxation in the state where located. We do not believe that this was the intention of the legislature."

This question has been determined indirectly, at least, by our supreme court in the case of *Security Savings Bank vs. Board of Review of the City of Waterloo*, 189 Iowa, 463. In the cited case the actual value of the real estate was $67,886.00 and the assessed value, $40,260.00. The bank contended that the deduction should be for the actual value of the real estate and the board of review that it should be for the assessed value and no more. The district court allowed the deduction only of the assessed valuation but the supreme court reversed the decision of the lower court and permitted the deduction of the full amount claimed by the bank as the actual value of the real estate.

A part of the real estate, the value of which was ordered deducted, was located in the state of Colorado and a part of it in the state of Texas. The opinion of the supreme court, therefore, permits the deduction of the actual value of real estate located outside the state from the value of shares of the stock of the bank.

It will be noted in the cited section that the bank is entitled to a deduction, also, for the amount of stock held by it in a corporation owning real estate on or in which the bank or trust company is located. *

BANKS AND BANKING: Personal property in the hands of a receiver of a national bank is exempt from state taxation.

June 10, 1927. *County Attorney, Waukon, Iowa:* This will acknowledge receipt of your letter of recent date inquiring whether personal property in the hands of the receiver of an insolvent national bank is subject to taxation by the state.

We have made an examination of the case cited, *Rosenblatt vs. Johnson*, 104 U. S. 462, and find that its holding is in support of the contention made by Mr. Fouts, assistant supervising receiver. We have also followed this case through the Citator and find that it has never been distinguished or reversed.

In the cited case the court, speaking through Mr. Chief Justice Waite, said:

"The single question in this case is, whether the personal assets and personal property of an insolvent national bank in the hands of a receiver appointed by the Comptroller of the Currency, in accordance with the provision of Section 5234 of the Revised Statutes, are exempt from taxation under State laws, and we have no hesitation in saying that in our opinion they are. Such property and assets, in legal contemplation, still belong to the bank, though in the hands of a receiver, to be administered under the law. The bank did not cease to exist on the appointment of the receiver. Its corporate

*See H. F. 402—43rd G. A.

capacity continues until its affairs are finally wound up and its assets distributed. *Bank of Bethel vs. Pahquioque Bank*, 14 Wall. 383; *Kennedy vs. Gibson*, 8 id. 498; *Bank vs. Kennedy*, 17 id. 19.

If the shares have any value, they are taxable in the hands of the holders or owners, under Section 5219 of the Revised Statutes; but the property held by the receiver is exempt to the same extent it was before his appointment."

You will recall that in recent opinions the supreme court of the United States has held that personal property in the hands of a national bank shall be taken into consideration in determining the value of the shares of stock and the assessment thereon made thus rather than the stock be assessed as personal property and as property of the bank.

COUNTIES—STATE INSANE HOSPITALS—BEQUESTS: The governing boards of state institutions may accept gifts, devises or bequests of property both real or personal so long as it is for a purpose not inconsistent with the objects of such institutions.

June 15, 1927. *County Attorney, Logan, Iowa:* We have received your letter of June 14, 1927, in which you submit to this department the following inquiry:

"There has been admitted to probate in the District Court of Harrison County, Iowa, the will of one Fred Ruthardt. * * *

"The wife of Fred Ruthardt has been an inmate of the Hospital for the insane at Clarinda, Iowa, for a great many years. Harrison County has paid to the State Hospital at Clarinda $4,250.44 on her account and no part of this has ever been collected by the County. * * *

* * * one provision in the will of Fred Ruthardt as follows:

" '3rd. On account of my wife being an inmate of the Clarinda Insane Hospital for many years my real estate will go to said hospital.'

"Is it not true that this attempted bequest must fail because of the incapacity of said State Hospital to own real estate?"

Your inquiry is answered by the provisions of the Statute. Section 10187 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 therefore be seen that this section grants full authority to state institutions to accept gifts, devises or bequests of property real or personal, and that the governing board, which would be the State Board of Control in this case, may accept said gifts, devises or bequests. Therefore, the bequest to the Clarinda Hospital for the Insane is of full force and effect.

CITIES AND TOWNS—HIGHWAYS: A town may use funds belonging to it for the purpose of opening a road beyond the corporate limits by vote of the people under section 6224-5-6, Code of Iowa, 1924.

June 18, 1927. *Director of the Budget:* This will acknowledge receipt of your favor of recent date requesting an opinion of this department upon the following question:

"Can a town use funds belonging to the town for the purpose of opening a road in the township outside the corporate limits, said road to take the place of a street which is being vacated because of the excessive expense of maintaining the street?

"The present street is so situated that it is impassable after a heavy rain thus causing considerable expenditure of money to keep the street in condition."

This matter is determined by statute and you are referred to Sections 6224, 6225, and 6226 of the Code of Iowa, 1924.

These sections provide in substance that an election must be called by the city or town council upon the presentation to it of a petition signed by one third of the resident taxpayers thereof asking the submission of said question of aiding in the construction or repair of any highway leading thereto. Notice must be posted in five public places of such special election ten days before the date thereof setting forth the particular highway proposed to be aided, the proportion of the higway tax then levied and not expended or next thereafter to be levied to be apportioned to such project.

If the proposition carried the road may be constructed but the amount of money expended therefor shall not exceed fifty per cent of the tax levied for the purpose of construction and repair of roads, streets, and highways.

STATE OFFICIALS—STATE OFFICERS—CODE: Who are to be termed state officials.

June 18, 1927. *Superintendent of Printing:* In reply to your recent oral request for an opinion on the following question:

"Under paragraph 10 of Section 235, Code of 1924, who are to be termed state officials?"

In connection with the above cited paragraph 10, we must of necessity consider paragraph 11 of Section 235 which says, "to the separate departments of principal state offices". In view of the fact that a large majority of the created boards and commissions of the State of Iowa have been in the past placed under the head or in the department of one of the principal departments of the state by the legislature, it is evident that paragraph 10 refers to a limited number of the officials named on the official roster.

In view of the foregoing, we desire to quote the case of State vs. Chittenden, which is found in the 107 N. W. (Wisc.) page 507, as follows:

"The term 'state officers', used in the act under consideration, is sometimes construed as meaning only heads of the executive departments of the state elected by the people at large, such as Governor, Lieutenant Governor, State Treasurer, Secretary of State, Attorney General, and the like. In its more comprehensive sense it includes every person whose duties appertain to the state at large. The exact sense in which the term is used in any particular law must often be determined by ordinary rules for judicial construction. One of the cardinal rules thereof, is, that a meaning should not be attributed to words leading to absurd consequences. That at once, we should say, narrows the meaning of the term here to its more restrictive and ordinary signification. Otherwise, it would apply to all actions wherever commenced in the state, regardless of the residence or principal place of abode, or official residence of the parties, in the event of the defendant being sued in his official capacity and his possible field of operations extending to the whole state. That would include every member of each of the numerous legislative creations called boards or commissions, every notary public, every state game warden and his deputies, and a multitude of other officers. Such a construction would turn a law, evidently intended to prevent unnecessary disturbance of public affairs into one of an opposite character.

The state officers, heads of departments who have their official residence at the capitol of the state and who are expected to keep open office there during business hours and, generally speaking, to be there themselves, might be greatly prejudiced, and the public welfare as well, by their being required to

attend trials of actions in their official capacities in distant parts of the state. The reason of the law seems to strictly confine it to such officers. To extend it further would necessarily advance its boundaries so as to include all persons to whom the term in any reasonable sense could apply. So we reach the conclusion that the legislature used it in its restrictive sense,—the one which commonly occurs to the mind when the words are spoken. Courts elsewhere, in similar circumstances, have said that, as a general rule, it applies only in that sense. *State ex rel. Stearns vs. Smith*, 6 Wash. 496, 33 Pac. 974."

We are, therefore, of the opinion that paragraph 10, applies only to state officers who are heads of departments and who have official residence at the capitol and who keep open office during regular business hours, and that Section 11 applies, to such boards and commissions as are found in the official roster and have an office at the capitol and who are represented there by a secretary as well as the separate departments of principal state offices.

SCHOOLS—LIBRARY FUND: The county auditor should withhold 15c per pupil as soon as the apportionment of interest on the permanent school fund comes into his hands after September 1, 1927. The county board of education *may* expend said fund after the 1st day of October.

June 21, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of recent date requesting an opinion of this department upon the construction of Section 4322 of the Code of Iowa, 1924, as amended by Chapter 93 of the Acts of the Forty-second General Assembly. Your specific questions are as follows:

"1. When should the County Auditor withhold the fifteen cents as required by Section 4322?

"2. Should he withhold the fifteen cents all at one time or seven and one-half cents at one apportionment and seven and one-half out the others?

"3. If the County Auditor can not withhold the fifteen cents before October 1, 1927, what will be the first day the County Board can buy library books?

"4. If a County Board of Education does not purchase books between the first day of July and the first day of October, can it make the purchase during the month of October—or even November?"

We shall answer your questions in the order submitted.

Section 102 of the Code of Iowa, 1924, provides that the State Auditor shall apportion the interest on the permanent school fund among the several counties on the first Monday in March and September. Section 4396 of the said Code provides that the county auditor shall apportion the said interest to the various school districts on the first Monday in April and the first Monday in October of each year. Chapter 93 of the Acts of the Forty-second General Assembly provides that the auditor of each county shall withhold from the said apportionment for the several school districts fifteen cents for each person of school age as shown by the annual report of the secretary for the purchase of books. This fund shall be set aside to the county board of education and must be by it expended between the first Monday of July and the first Monday in October of each year.

Under these provisions, then, the county auditor will receive on the first Monday in September, 1927, an apportionment from the Auditor of State. He will have this fund in his hands from the first day of September to the first Monday in October, 1927. During this period the county board of education is required to expend this money withheld by the auditor for the purchase of library books.

In answer to your questions then, we are of the opinion:

1—That the county auditor must withhold this fund when any funds apportioned by the Auditor of State come into his hands. Under the statutes the first funds coming into his hands from that source will be on the first Monday in September, 1927, and we are of the opinion that he should withhold the amount specified from that fund for the use and benefit of such library fund and for the expenditure of the county board of education.

2—That the entire amount of fifteen cents per pupil may be withheld from a single apportionment, either the first or second semi-annual.

3—That the county auditor should withhold and turn over to the county board of education the above specified amounts as soon as they come into his hands after September 1, 1927.

4—That the county board of education may expend such apportionment withheld by the county auditor and any unexpended balance in said fund at any time after it is set aside or withheld by the county auditor. We are of the opinion that the term "shall" as used in Section 2 of Chapter 93 of the Acts of the Forty-second General Assembly is directory only and not mandatory and the failure to expend the money on or before October 1st would not bar the expenditure at a subsequent time for the purposes specified in the act.

FISHING LICENSE—CITY LAKE OR RESERVOIR: City lake or reservoir not within the meaning of "stock meandered" lakes.

June 21, 1927. *Fish and Game Department:* In reply to your request of June 17th, which reads as follows:

"We wish your construction of Section 1719, Code of 1924.

"What we desire to know is if under Section 1719 a city lake or reservoir, which has been stocked with fish by this department, would require a fishing license from residents while fishing therein?"

We quote Section 1719:

"No male person over the age of eighteen years shall fish in the stocked meandered lakes of the state without first procuring a fishing license, nor shall any non-resident fish in any state waters without first procuring a fishing license."

The construction of this section largely depends upon the words "stocked meandered lakes". "Stocked", we believe, refers entirely to those lakes which have been stocked with fish by your department. "Meandered", as used throughout the statute and in legal sense, means those lakes which have been surveyed either by government or state surveyors for the purpose of determining a boundary line.

We are, therefore, forced to come to the conclusion that "stocked meandered lakes", refers only to those lakes which have been surveyed by state or government engineers and which have been stocked with fish by the State Fish and Game Department.

We are, therefore, of the opinion that a city lake or reservoir, although stocked by the Fish and Game Department, not having been meandered, would not require a person fishing therein to have a license.

SCHOOLS—LIBRARIES—The county board of education is not limited in its purchase of books to the list prepared by the State Board of Educational Examiners under Chapter 93 of the Acts of the Forty-second General Assembly.

June 23, 1927. *Superintendent of Public Instruction:* You have requested an opinion from this department upon the construction to be placed upon Chapter 93 of the Acts of the Forty-second General Assembly, especially whether it is

mandatory upon the county board of education to select the books to be purchased under the provisions thereof only from the list of books prepared by the state board of educational examiners as is provided in Section 3 of said chapter.

It is provided by Section 2 of said Chapter 93 as follows:

"Between the first Monday of July and the first day of October in each year, the county board of education shall expend all money withheld by the auditor, as provided in the preceding section, *in the purchase of books for the use of the school district*, and shall distribute the books thus selected to the librarians among the several school districts in the proportion that the number of persons of school age living in the school district bears to the number of such persons living in the county."

It is further provided in Section 3 of said Chapter 93 as follows:

"The state board of educational examiners shall prepare annually lists of books suitable for use in school district libraries, and furnish copies of such lists to each county superintendent and to each member of each county board of education."

Under these sections it is made the duty of the county board of education to select and purchase books for the use of the school district. It is made the duty of the state board of educational examiners to prepare a list of suitable books for use in school district libraries and furnish such lists to the county superintendent and to the county board of education.

We are of the opinion, however, that the selection and purchase of such books is within the discretion of the county board of education and that it is not limited in the absence of any specific limitations in the statutes quoted above to the books enumerated on the list prepared by the state board of educational examiners.

We are not construing sections of the statute covering the inspection of schools and their approval by the various inspectors of the Department of Public Instruction for state aid since the question of qualifying for state aid is not involved in the purchase herein authorized by the county board of education.

SCHOOLS AND SCHOOL DISTRICTS: School board has no authority to borrow money either with or without a vote of the electors.

June 23, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following question:

"1. Is a school board authorized to borrow money for the erection of a school house or any other purpose?

"2. If not, can a vote of the people authorize a school board to borrow money for school building or other purposes?"

A school board is not authorized to borrow money for the erection of a school house or for any other purpose.

It is a well settled rule that corporations, such as school districts, which are created by statute, have only such power as is delegated to them by such statute. We find no statutory provision authorizing a school board to borrow money for any purpose.

Inasmuch as the board of directors of a school district is limited by statutory powers granted to the corporation, likewise the electors are limited by statutory grants.

Powers of the electors are enumerated in Section 4217, Code of Iowa, 1924

and amendments thereto. A careful perusal of this Section, and of the amendments thereto, fails to reveal any statutory authority in the electors to authorize the board to borrow money for any purpose whatever.

The electors are empowered to authorize the issuance of bonds to pay the debts contracted for the erection of a school house, procuring libraries, and opening roads to school houses. The bonding power is limited in the limitation of indebtedness and the taxing power for these purposes to ten mills on the dollar in any one year.

While we are cognizant of the fact that some municipal corporations, including school districts, do borrow money on ordinary promissory notes, we are of the opinion that such action is illegal and beyond the authority of the board whether authorized by the electors so to do or not.

CORPORATIONS: Date of expiration shall date from the time set in articles.

June 23, 1927. *Secretary of State:* I desire to acknowledge receipt of your request of June 14th on the following question:

"May a corporation renew its articles to become effective at an earlier date than the date of expiration shown in the original article?"

Section 8366 reads as follows:

"Such renewals shall date from the expiration of the corporate period which it succeeds and shall be limited in duration to a period not exceeding the time allowed by law to the same class of corporations."

Under the above quoted section we are forced to the conclusion that the articles of incorporation will continue to be in force until that date set out in the articles as the date of expiration, unless such articles are forfeited by the proper procedure or the corporation is properly dissolved and that a renewal of said articles must and shall date only from the date of expiration as shown in Section 8366.

BANKS AND BANKING: A claim for labor for ninety days and not to exceed $100 prior to receivership is entitled to a preference.

June 23, 1927. *Banking Department:* This will acknowledge receipt of your request for an opinion upon the following question:

Is a claim for labor performed for a bank within ninety days prior to its closing on account of insolvency, and its affairs taken charge of by the Superintendent of Banking or a Receiver appointed for the purpose of liquidation, a preferred claim against the assets of said bank?

It is provided by statute, Section 12719, Code of Iowa, 1924, as follows:

"When the property of any person, partnership, company or corporation has been placed in the hands of a receiver for distribution, after the payment of all costs the following claims shall be entitled to priority of payment in the order named: * * * *

"3. Debts owing to employees for labor performed as defined by Section 11717."

It is then provided in Section 11717, cited in the foregoing quotation, as follows:

"When the property of any company, corporation, firm, or person shall be seized upon by any process of any court, or placed in the hands of a receiver, trustee, or assignee, or their property shall be seized by the action of creditors, for the purpose of paying or securing the payment of the debts of such company, corporation, firm, person, the debts owing to employees for labor performed within the ninety days next preceding the seizure or transfer of such property to an amount not exceeding one hundred dollars to each person, shall be a preferred debt and paid in full, or if there is not sufficient realized from such property to pay the same in full, then, after the payment of costs, ratably out of the fund remaining."

In the case of *Leach vs. Exchange State Bank*, the Supreme Court of this state, in interpreting Section 12719, held that since the enactment of Chapter 189 of the Acts of the 40th General Assembly, and the acts of the various legislatures culminating in the enactment of said Chapter 189, that the State of Iowa had adopted a definite banking code, and that the dissolution and liquidation of state banks is governed by that special banking code, and is without the provisions of Section 12719, in so far as it applies to claims for priority.

Since there is no provision in this special banking code for the priority of labor claims, and since the court held in the Exchange State Bank case that the general statute, Section 12719, of the Code of 1924, did not apply to the liquidation of state banks, there would be no such priority unless there is some subsequent legislative enactment granting such priority.

An examination of the acts of the General Assembly, since the opinion in the Exchange State Bank case, reveals that on April 9, 1925, two days after the opinion was rendered, an act was certified as to publication by the secretary of state, being Chapter 182 of the Acts of the 41st General Assembly of Iowa, which amended Section 12719 of the Code of Iowa, 1924, by adding thereto the following:

"The provisions of this section shall not apply to the receivership of state banks, savings banks, loan and trust companies, or private banks, and in the receivership of state banks, savings banks, loan and trust companies, or private banks, no such preference or priority shall be allowed as is provided in this section except for labor provided by statute."

The said chapter further declares the legislative intent and its interpretation of the provisions of said section.

Inasmuch as under the declaration of legislative intent as enacted in Chapter 182 of the Acts of the 41st General Assembly, the priority claim for labor as provided by statute is preserved, it is necessary to look to the general statutes for the limitation of such claims for priority. Looking therefore to Section 11717, hereinbefore quoted, we find that a limitation is made to labor performed within ninety days next preceding the date on which the property of such insolvent company, corporation, firm or person shall be placed in the hands of a receiver for the benefit of creditors, or seized by an action of the creditors, and to an amount not exceeding one hundred dollars to each person.

We are, therefore, of the opinion that since the enactment of Chapter 182 of the acts of the 41st General Assembly, and its effective date, the claim for labor for a period of time not exceeding ninety days next preceding the appointment of the receiver of said bank, in a sum not exceeding one hundred dollars, is entitled to priority over other creditors, and that the holder thereof is entitled to payment in full from the assets of the bank.

CITIES AND TOWNS—RIVER FRONT IMPROVEMENT: The state owns the bed of meandered rivers between the cities' edges where a River Front Commission has been established, and the state may dispose of any deposits therein provided there is no interference with the beautification of the river front or the river at the point where the deposits are located.

June 24, 1927. *Executive Council:* You have requested the opinion of this department upon the question of whether or not the State of Iowa has control and title to that portion of the bed of a meandered stream under the water

where a city has taken jurisdiction of the shore line on either side under the so-called River Front Commission law.

The provisions of law to which you refer are contained in Chapter 294 of the Code, 1924. It is the purpose of these provisions of law as amended by Chapters 117 of the Acts of the Forty-first General Assembly, and 260 and 261 of the Acts of the Forty-second General Assembly to permit cities and towns through which a meandered stream passes to beautify the river front. The title to the river bed, insofar as is necessary to accomplish this purpose, or. in other words—to the water's edge, practically speaking, is given to the city or town which has elected to take advantage of the provisions of this law. The state, however, has not relinquished its primary or fundamental right and title to the river bed proper. However, where a city has taken jurisdiction and has undertaken to make improvements, the state could not in any manner use or authorize the use of the river bed adjoining said improvements in such manner as to interfere with the beautification and improvement of the river front.

If however there are places in any city where the city has not undertaken to make improvements, the State of Iowa has the title and ownership to the deposits, including sand and gravel therein, and is justified in charging any person removing such deposits a reasonable price therefor.

CIGARETTES: A person holding cigarette rights in an entire hotel building may establish more than one stand at which cigarettes are sold in said building, under the same permit.

June 24, 1927. *Treasurer of State:* You have requested the opinion of this department upon the question of whether or not a person who holds the exclusive right to sell cigarettes in a hotel building may establish more than one stand therein under one permit.

It is the purpose of the statute to control and regulate the sale of cigarettes. The statute provides that each person desiring to sell cigarettes must obtain a permit for each "place" where sales are made. It is the opinion of this department that under the facts stated by you the "place" involved is the hotel building. We can see no reason why the person who has the exclusive right to sell cigarettes in the entire building should be required to obtain more than one permit for the building regardless of the number of stands in that building at which cigarettes are sold.

EXECUTIVE COUNCIL: APPROPRIATIONS: The appropriation for repairing the State Capitol and Historical Buildings made by the 41st General Assembly, Chapter 217, may be carried over the biennium for the purpose of completing the work.

June 24, 1927. *Executive Council:* You have requested the opinion of this department upon the following proposition:

"The Executive Council desires an opinion regarding whether or not funds as appropriated by the 41st General Assembly in Chapter 217 revert back to the General Fund on Unexpended Balances as of July 1st, 1927.

"I might state to you that we have approximately $40,000 in this fund that the Council desires to use after the first of July for repairs to the building."

Chapter 217 of the Acts of the Forty-first General Assembly provides that

"There is hereby appropriated out of any funds in the state treasury not otherwise appropriated the sum of eighty-four thousand three hundred

fifteen dollars ($84,315.00) or so much thereof as may be necessary for the payment of expense of repairing the state capitol and historical buildings under the supervision and direction of the executive council, * * * *."

It will be observed that the language used by this appropriation act does not limit the use of the appropriation made to any length of time. It is the practice and the custom and the general understanding that appropriations revert, at the end of the biennial period during which they were made, to the general fund. However, where a special appropriation is made, such as the one in question, there is provision in the law for the retaining and carrying over of any unexpended balances therein, in Sections 290 et seq. of the Code.

It is provided in Section 290 that all commissions, boards, officers or persons placed in charge by statute of special work for which a specific appropriation of state funds has been made, shall biennially report to the executive council the progress of such special work, the balance on hand in such fund, a list of all unpaid bills, and the amount of each then outstanding, with such other information as the council shall from time to time require. It is then made the duty, in Section 291 of the Code, of the council to satisfy itself as to the situation in regard to said special fund, and it is made its duty to fix a day for hearing on the question of whether or not the unexpended balance then on hand should be transferred to the general revenue fund, or whether or not the fund should be continued and expended for the purposes for which it was appropriated. After holding the hearing and following the procedure outlined in these provisions of law the executive council should notify, in writing, the auditor and treasurer of state of its disposition of the matter.

If the work and special purposes for which the appropriation made by Chapter 217 of the 41st General Assembly have not been completed, it is within the province of the executive council, in view of the provisions of law just referred to, to continue such unexpended balance and to permit its expenditure for the purposes defined by law.

COUNTIES—BRIDGE AND CULVERT CONSTRUCTION: Purchases not to exceed $1,000 on a single project.

June 28, 1927. *County Attorney, Northwood, Iowa:* We desire to acknowledge receipt of your request of June 25th which is as follows:

"Has a county acting under or through its proper officers, the authority or right to make purchases necessary on a particular project then under construction where the order does not exceed $500 but the total of various purchases throughout the year amount to a sum in excess of $1,000?"

In reply, we desire to quote Section 4647, also Section 1168, of the Code of 1924:

"Section 4647. 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 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 exceeding the lowest bid received, or build by day labor, subject to the approval of the state highway commission."

"Section 1168. Officers empowered to expend, or direct the expenditure of, public money of the state shall not make any contract for any purpose which contemplates an expenditure of such money in excess of that authorized by law."

Under the above sections it was evidently the intention of the legislature that public officials charged with purchase of materials or labor on a project where the total cost would exceed $1,000 should not divide such material or labor so as to evade the above quoted sections, and we are of the opinion that a board of supervisors should not purchase material on a single project where the estimate of said material is over $1,000 without advertising and purchasing by a contract letting. However, if such purchases fall beneath $1,000 on each individual project, then in that event the board of supervisors would be authorized to make the purchase without a letting.

APPROPRIATIONS: SUPPLIES: The appropriation of $250,000 to the Department of Agriculture for Animal Health and Veterinary for eradication of tuberculosis, etc., and miscellaneous is broad enough to include printing used in connection with such work.

June 30, 1927. *Secretary of Agriculture:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the question of whether printing, binding and similar supplies may be paid out of the appropriation set aside by the Forty-first General Assembly, in the amount of $250,000, annually for the department of Animal Health and Veterinary, found in Chapter 218, page 199, lines 49 to 54 inclusive.

Said chapter, hereinbefore cited, provides for an appropriation of $500,000.00 for the current biennium, for the purpose of control and eradication of contagious and infectious diseases of live stock, tuberculosis inspectors, assistant state veterinarians, indemnities and *miscellaneous.*

We are of the opinion that such printing as is necessary in connection with the eradication and control of such diseases could be paid for from this fund under the term miscellaneous items as used in the appropriation act.

We have examined the appropriation made to your department for the same purpose in Chapter 275, Acts of the Forty-second General Assembly, page 237, lines 29 to 32 thereof, and find that it makes the same provision for miscellaneous expense.

We are therefore of the opinion that the same rule would apply to the appropriation for each year of the biennium beginning July 1, 1927.

SCHOOLS AND SCHOOL DISTRICTS: A school board may prescribe duties for a school secretary in addition to the statutory duties and such employment is not contrary to the statute that the secretary shall not be a teacher or other employee of the board.

June 30, 1927. *Superintendent of Public Instruction:* You submit to this department for an opinion the following question:

May a board of education legally employ a secretary at a salary ranging from $60 to $100 per month and to include in the secretary's duties the usual attendance at board meeting and keeping the records of the board and, in addition thereto, recording grades at school, acting as secretary to the superintendent and keeping and compiling records in his office?

It is provided by statute, Section 4222, Code of Iowa, 1924, as follows:

"On the first secular day in July the board shall elect a secretary who shall not be a teacher or other employee of the board. * *"

The duties of the secretary are prescribed by Section 4308 of the Code of Iowa, 1924, which requires the secretary to keep a complete record of all the proceedings of the meetings of the board and the voters of the corporation, copies of all reports made and filed, accounts, claims, etc. The secretary is

further required to keep a copy of all monthly receipts, disbursements, balances, warrants drawn, census, and various reports.

The secretary is also an officer of the board and is subject to the assignment of such duties as the board may prescribe. We are, therefore, of the opinion that the board may include in the duties of the secretary the keeping of the permanent records of the school and such other duties as it may prescribe and that the assignment of such duties to the secretary does not bring this employment within the prohibition of the statute that the secretary shall not be a teacher or other employee of the board.

SCHOOLS AND SCHOOL DISTRICTS: 1—A school maintaining a high school is not entitled to aid for standard schools. 2—The aid appropriated by Chapter 219, Acts of the 42nd G. A. is limited to rural schools.

June 30, 1927. *Department of Public Instruction:* You have submitted to this department, for an opinion, the following propositions:

"(1) Does Section 4329, Code of 1924, with subsequent amendments, prohibit township high schools that are neither city independent nor consolidated school districts, from maintaining standard rural schools in the sub-districts where this township high school is governed by the same board of directors and where schools are not centrally located. If so, are such sub-district schools entitled to state aid as standardized rural schools?

"(2) Does a high school maintained by rural independent district where there are three directors and where two or more teachers are employed and where the high school and grades are taught in the same building or adjoining building, and where the same board operates the rural school, come within the meaning of 'high school' under this section, and is such a school prohibited from receiving state aid as a standard school for the grade work?

"(3) Will a small town independent district where two or three teachers are employed, be entitled to state aid as a standard school under this section and the subsequent amendments thereto?

"(4) If one sub-district of a school township maintains high school work in addition to regular grade work in the same building, is such a school included in the term 'high school' under this section and is such a school entitled to state aid as a standard school?"

It is provided by statute, Section 4329, Code of Iowa, 1924, as follows:

"Any school located in a district, other than a city independent or consolidated district, not maintaining a high school, which has complied with the provisions of this chapter, shall be known as a standard school. Every standard school, before it may be designated as such school, shall have been maintained for eight school months during the previous year. It shall during the previous school, etc."

Since all of the propositions submitted by you are based upon the interpretation of the above statute, we shall answer your questions in the order submitted.

1. A township school corporation is a district within the meaning of the statute. We are therefore of the opinion that a township school corporation maintaining a high school is not entitled to state aid for standard schools under the provisions of this chapter. The statute specifically provides that it shall apply to any school located in a district . . . . not maintaining a high school.

If the township school corporation maintains a high school which operates under the same board of directors and in connection with the rural schools, even though those rural schools are located in different parts of the district,

it is maintaining a high school and we think it specifically excepted from the schools which may become eligible to the state aid under this chapter.

2. High school is not specifically defined by statute. Reference is made to higher and graded schools in Section 4267 of the Code. We are of the opinion, however, that the term "high school" is so recognized and established as a school beyond the eighth grade that the enactment of the statute for state aid to standardized rural schools is based upon that interpretation. We are, therefore, of the opinion that a rural independent district which maintains a course of study beyond the eighth grade is not entitled to aid under this chapter.

3. Section 4329 of the Code hereinbefore quoted defines the school districts which shall be designated as standard schools. It is, however, provided in Section 4332 with reference to state aid as follows:

"State aid shall be given to *rural* districts maintaining one or more standard schools to the amount of six dollars for each pupil who has attended said schools in said district at least six months of the previous year."

It is further provided in Section 4335 of the Code as follows:

"Upon receiving from the county superintendent a satisfactory report showing that any rural school has fulfilled the requirements of a standard school, * * *"

While under the definition for standard schools as set out in Section 4329 might include a small town independent school district where two or three teachers are employed, we are of the opinion that the state aid is limited to such standard schools as are rural. We reach this conclusion by the provisions of Sections 4332 and 4335, which are the sections which provide for state aid and determine the manner in which it shall be expended.

This construction is further supported by the appropriation act, laws of the Forty-second General Assembly, Section 37, Chapter 275, lines ten to eleven, which read as follows:

"Standard schools (for use of rural schools only) $100,000."

It will be noted that the phrase in parenthesis was added by the Forty-second General Assembly and that no such parenthetical expression of the intention of the legislature is found in the acts of the Forty-first General Assembly, Chapter 219, Section 40, line ten, of the acts of the Forty-first General Assembly.

4. The maintenance by a sub-district in a school township of work of a grade beyond the eighth grade is, in our opinion, a high school within the meaning of this section, and such a school is therefore not entitled to state aid as a standard school under this chapter.

STATE INSTITUTIONS: A person committed to a state institution, ineligible to be received there, is a ward of the Board of Control and may by it be transferred to the proper institution.

July 1, 1927. *Board of Control:* You have submitted to this department for an opinion the following proposition:

"In October, 1926, the District Court of Buena Vista County, Judge DeLand presiding, committed Violet McCord, aged fifteen, to the Training School for Girls at Mitchellville, and she was received at that institution October 25, 1926. In January, 1927, it was discovered that Violet was pregnant and she was placed in the Salvation Army Rescue Home at Des Moines, Iowa for care and confinement. Her baby was born April 8, 1927.

"The matron of the Salvation Army Rescue Home was given to understand at the time the girl was placed out there that the girl was no longer a ward of the Board of Control and with that understanding, she wrote the authorities in Buena Vista County asking them what disposition she should make of the case when the girl was ready to leave the institution. Judge DeLand ruled that the girl was still under the control of the State Board of Control having been committed by his court to the Mitchellville institution and that her disposition should be made by the Board of Control."

You inquire whether this commitment is void because under Section 3646 (3) the inmate was disqualified by reason of her condition to be committed to the training school for girls at Mitchellville.

We are of the opinion that though the condition of this inmate was not known at the time the commitment was made, the commitment was valid and that the inmate is a ward of the Board of Control.

We are further of the opinion that the Board's action in removing the inmate from the training school to the Salvation Army Rescue Home was proper, but that now since the disability is removed, the girl should be returned to the custody of the Board and by it, by proper order, under authority of the statute, transferred to the proper institution for her care.

SCHOOLS AND SCHOOL DISTRICTS: A resident of a township maintaining a township high school is not entitled to send his children to an adjoining school district and have his tuition paid by the district of his residence.

July 1, 1927. *Superintendent of Public Instruction:* You have submitted to this department for an opinion the following proposition:

"Mr. Van Der Zyl is a resident of Linn Grove Township in Jasper County. He lives two miles southwest of the Independent School District of Sully, but outside the district of Sully, which is also in Linn Grove Township. Linn Grove Township maintains a four-year approved high school at the town of Linnville, located in the northeast corner of Linn Grove Township, four miles east of Sully. This would make Mr. Van Der Zyl six miles or over from the Linnville high school. He can send his children to the Linnville high school without paying tuition, since he lives in the school township of Linn Grove, but if he send his children to Sully, it being an independent district, he would be required to pay tuition. This tuition he would pay to Sully, in addition to his taxes in Linn Grove Township to support the Linnville high school, he feels would be a burden and wants to know if there is any method by which his children could attend the Sully high school at the expense of the Linn Grove Township school organization.

"We understand that the county superintendent would be unwilling to consent, as provided in Section 4274."

Inasmuch as Linn Grove Township maintains a four year high school a resident of that township school district is entitled to the privileges of that school and is not entitled to attend any other high school at the expense of the district of his residence. The fact that the high school is not conveniently located does not alter the matter. Since the Linn Grove Township high school is not a consolidated school there is no provision for transportation. There are a few rulings of your department to the effect that a person living more than a reasonable distance from school is entitled to transportation. We are of the opinion, however, that such ruling could not be applied to transportation to township high schools.

BUDGET DEPARTMENT—HIGHWAY COMMISSION: Duty of Budget Department to audit Highway Commission under provisions of Section 37, Chapter 101, Acts 42nd General Assembly with available means.

July 1, 1927. *Director of the Budget:* You have requested the opinion of this Department on the following proposition:

"I am calling your attention to Section 37, Chapter 101, Laws of the Forty-second G. A., which reads as follows:

" 'The director of the budget shall, at least once each year, cause all books and accounts of the state highway commission to be examined by certified public accountants, and a detailed report of such examinations to be filed and kept in his office.'

"There was no appropriation made to carry out the provisions of this section and the Budget Department has no funds available for such purpose.

"We would like a decision from you as to how this section may be complied with and from what funds, if any, such expenses may be paid."

The appropriation for your Department for the biennium commencing July 1, 1927, is contained in Section 7 of Chapter 275, of the Acts of the 42nd General Assembly.

There seems to be no special provision made for the requirements of Section 37, Chapter 101, of the Laws of the 42nd General Assembly, which provisions require you to cause to be made once each year, an examination of the books and accounts of the highway commission by certified public accountants. However, it will be observed that there is provision for employment by you of one state accountant and five assistant accountants. There is also an appropriation of $1,000.00 for the purpose of employing extra help.

You are advised that it is the opinion of this Department that you should undertake to do the work required of you under the provisions of Section 37, Chapter 101, the Acts of the 42nd General Assembly, with the assistance and means made available to you in the Budget Act.

If you are unable to do the required work with the means available, you may be required to secure additional funds by some other method authorized by law.

MUNICIPALITIES: A municipality may publish reports concerning its properties and in reasonable amount pay for same out of general funds of the municipality.

July 6, 1927. *Auditor of State:* This will acknowledge receipt of your letter of recent date in which you request an opinion of this department upon the question of whether a city owning its own electric light plant may publish a report of an investigation made by a committee to the city council together with the resolutions passed by the city council in a newspaper of general circulation in the city and pay the publication fee out of the electric light and general funds of the city.

A municipality may extend its funds for any public purpose which is within the scope of its general powers. We are of the opinion, therefore, that a city may expend its general funds within a reasonable limit for the publication of investigations of its properties and special reports of committees in investigating same. The expenditures for this purpose should, of course, be in reasonable amount and should not contain political or other extraneous matter.

BUDGET LAW: STATE INSTITUTIONS: Balance of appropriation for state institutions which has been withdrawn does not revert to the general fund.

July 6, 1927. *Director of the Budget:* We are in receipt of your letter of June 20, 1927, requesting the opinion of this department on the following question:

Whether or not the unexpended balance of the appropriation of $166,200, which was made to the School for the Blind for the biennium ending June 30, 1927, and which balance has been withdrawn from the treasury, should be transferred to the general fund, or whether it should remain in the hands of the School for the Blind.

Chapter 218, Sub-section 5 of Section 49, Acts of the Forty-first General Assembly, made an appropriation for the School for the Blind amounting to $176,200, "*or so much thereof as may be necessary to be expended as follows*, for the biennium ending June 30, 1927."

Of this amount $166,200 was for salaries, support and maintenance. Section 59 of the same chapter, Acts of the Forty-first General Assembly provides that, "all appropriations made by this act remaining unexpended and unobligated at the close of business June 30, 1927, shall revert to the general fund."

We are of the opinion that the balance of $8,000, which you state remains in the hands of the finance officer of the School for the Blind, does not revert to the general fund for the reason that requisitions for all of the sum appropriated have been filed with the Auditor of State and warrants have been issued by the Treasurer of State to the finance officer of said institution, and therefore all of said sum has been expended so far as the State is concerned.

The State Board of Education, after an appropriation has been withdrawn from the treasury, has complete charge and control of the disposal of said funds, and the State has no further control of said funds, except to see that they are expended for the purpose for which they were appropriated.

BOARD OF HEALTH: BARBERS' EXAMINATION: Only four examinations for barbers may be held in a year and such examinations may be given at such places as the department may designate.

July 6, 1927. *Department of Health:* We are in reecipt of your request of July 5, 1927, asking for an opinion upon the following question:

Whether or not under the provisions of Section 2471 of the Code, 1924, it may be possible to hold more than four examinations per year for barbers, and whether said examinations may be held in such places as the department may designate?

Section 2471 provides in part as follows:

"Each examining board shall hold regular sessions for the purpose of giving examinations at such times as the department may fix, not to exceed four in any one year. * * * * * All other sessions of the examining boards shall be held at the seat of government unless otherwise ordered by the department."

After careful examination of the statute pertaining to the examinations, and particularly of the Section above referred to, we are of the opinion that only four examinations may be given in any one year, and that such examinations may be given at such places as the department may designate.

However, in view of the fact that there will be quite a number of applicants for examination each year, each examination in our opinion may continue for a period of days permitting the board to divide the applicants into groups and designating the day or days of the period that the members of each group are to appear for the examination.

The board will not, however, be permitted to continue their examinations for any other period of time than that which is absolutely necessary. The expense of these examinations will have to be audited by the board of audit, and advice

from this board should be secured before any examinations are held with a view of finding out the rules which they will follow.

TAX COLLECTORS: County may employ assistance to discover omitted personal property for taxation, and pay compensation for general fund. County may employ delinquent personal property tax collectors whose compensation shall not exceed 15% of amount collected and which compensation must be paid from general fund. County board cannot delegate authority to bring suits to an individual generally.

July 6, 1927. *Auditor of State:* You have requested the opinion of this department upon the question of whether or not the board of supervisors of any county may employ private individuals for the purpose of discovering unlisted or omitted property for taxation and collecting the tax thereon, and pay the compensation of such persons pro rata out of the amounts collected for the various municipalities entitled to these recovered taxes. You have stated that a number of counties have been desirous of entering into such a contract, using as authority therefor the provisions of Section 7161 of the Code, which read as follows:

"It shall be lawful for the board of supervisors of any county to employ any person, corporation, or firm for a reasonable salary or per diem to assist the proper officers in the discovery of property not listed or assessed for taxation as required by law."

We are of the opinion that the provisions of the law just quoted authorize and permit the board of supervisors of any county to employ any person, corporation or firm for a reasonable salary or per diem to assist the proper county officers in the discovery of property not listed or assessed for taxation as required by law. There can be no question about the authority to employ assistance for this purpose. The real question is whether or not when taxes are collected by said persons on property which has not been listed or assessed in the regular way, the board can charge the expense or the compensation of collecting the same pro rata against the various municipalities receiving the taxes so collected. There are a number of other provisions of the law to be taken into consideration in determining this phase of the question. There is no question but that a great amount of personal property, moneys and credits particularly, escape assessment and taxation, and it was undoubtedly the intention of the legislature that the assessing officers be given every possible assistance and afforded every possible means by which such property may be listed and assessed and the owners thereof required to pay their fair proportion of taxes to the state and municipalities thereof. There can be no question but what the primary duty of assessing, listing and collecting taxes, except perhaps in special charter cities, rests with certain county officers, namely, the auditor and treasurer. Both the auditor and the treasurer are given specific authority to pick up any omitted property which they find not listed. The county, generally speaking, collects the taxes for all the municipalities thereof and for the State, and distributes the proceeds therefrom to these various municipalities and the State.

The first provision made by law for the employment of additional help by counties for the purpose of discovering unassessed property was made by the 28th General Assembly in 1900. Those provisions were contained in what is known as Chapter 50 of the Acts of the 28th General Assembly. After providing specifically that the board of supervisors of any county could enter into

such contracts, the 28th General Assembly then provided that the total charges, fees and expenses authorized under the act should not exceed fifteen per cent of the taxes paid into the county treasury, and that such compensation should be deducted from the total amount collected before the taxes recovered were distributed. Thus it will be noted that specific provision was made by law for the making of a pro rata charge against the taxes due the municipalities for the cost of the collection of the taxes. These provisions continued as the law until 1911 when Chapter 66 of the Acts of the 34th General Assembly was enacted prohibiting the entering into such contracts and repealing all of the provisions of Chapter 50 of the Acts of the 28th General Assembly. There was never any authority for the board of supervisors to employ any person to discover property not listed or assessed for taxation, as required by law, until the Code of 1924 went into effect on October 28, 1924. In the code revision session of the General Assembly, Section 7161 of the Code, 1924, was added to what became Chapter 344 of the Code, and then only by amendment from the floor of the senate, said section not having been made a part of the chapter by the code commissioners. It will be observed that when Section 7161 of the present code was enacted, the General Assembly did not revive or reenact any of the provisions of Chapter 50 of the Acts of the 28th General Assembly relative to the compensation to be paid any such person, nor the provisions permitting the charging of the cost of such service against the municipalities entitled to the tax so recovered. Hence the only way that the compensation of any such person so employed by the provisions of Section 7161 of the Code, 1924, could be paid, would be out of the general fund of the county.

Originally it was provided in Section 7227 of the Code, 1924, that the delinquent personal property tax collectors should be paid from the taxes collected, and said amount deducted ratably from the several funds in which such taxes so collected by the collector belonged. The 41st General Assembly in Chapter 149 of its acts, repealed this particular provision of the law and provided that:

"The interest and penalty on delinquent taxes collected shall be apportioned to and become a part of the general fund of the county, and the amount allowed as compensation to delinquent tax collectors shall be paid from said fund."

Thus it will be observed that the latest expression of the legislature upon a similar proposition is to the effect that the general fund of the county should be made to bear the cost of the collection of delinquent personal property taxes.

It will also be observed that the legislature provided, when it made this change, that the interest and penalty on delinquent taxes collected should be paid into the general fund of the county. This relieves the additional burden, to a marked degree, placed upon the general fund. Moneys and credits form a large part of the delinquent taxes so collected and the interest upon such delinquent taxes is paid into the general fund under this provision, there being no penalties collected upon moneys and credits which have been omitted and later listed and the tax collected.

We are therefore of the opinion that the board of supervisors cannot pay any person employed for the purpose of discovering omitted property subject to taxation and collecting the tax thereon from the taxes collected before apportioning said taxes to the respective funds or municipalities to which they

belong. Such compensation and costs must be paid from the general fund of the county. The matter of the employment of assistance in the discovery and collection of taxes on omitted property of course rests in the sound discretion of the county officers.

You have further requested the opinion of this department on the question of whether or not the board of supervisors may enter into a contract with a person, firm or corporation, such as to authorize and permit such person, firm or corporation to bring suits for the collection of taxes or other obligations owing the county or any political sub-division of the county, when in the judgment of any such person, firm or corporation, such suits should be brought. It is the opinion of this department that such a contract would be jeopardizing in nature and against public policy. The county must use the county attorney for the purpose of bringing suits to collect claims due the county except when the county attorney is disqualified because of personal interest in the litigation, etc. If for any reason the county attorney is disqualified or if the county attorney in the opinion of the board requires assistance, the board may employ additional counsel to bring specific actions for the county. The county cannot delegate to a private individual or corporation its duties and powers in such matters.

NOXIOUS WEEDS: AGRICULTURE: The provision requiring boards of supervisors at their April meeting to fix the date for destruction of weeds is mandatory but not exclusive and the board may fix the date at a later time.

July 6, 1927. *Secretary of Agriculture:* You have requested an opinion of this department upon the following proposition:

Warren County, Iowa, by its board of supervisors fixed the date for the destruction of Canada thistles for September 1, 1927, which date is too late to prevent the blooming and seeding of said weeds.

Your inquiry is whether or not the board of supervisors at a subsequent meeting may establish an earlier date and advertise same in such manner that it will become effective and whether, without such subsequent action, by the board of supervisors, the destruction of the weeds may be forced by the officers charged with the enforcement of this statute.

Section 4819 of the Code of Iowa, 1924, as amended, provides as follows:

"Each owner and each person in the possession or control of any lands, including railroad lands shall:

"1. Cut, burn, or otherwise destroy, in whatever manner may be prescribed by the board of supervisors, provided that on railway right-of-way the owner may select its own method of destroying weeds if such method is equally effective as that prescribed by said boards in the respective counties, all noxious weeds thereon, as defined in this chapter, *at such times in each year and in such manner as shall prevent said weeds from blooming or coming to maturity*, and keep said lands free from such growth of other weeds as shall render the streets or highways adjoining said lands unsafe for public travel, or shall interfere in any manner with the proper construction or repair of said streets or highways."

The statute further provides, Section 4821 of the Code of Iowa, 1924, as amended, as follows:

"The board of supervisors of each county shall, at their April meeting of each year, * * * by resolution make an order fixing the time for destruction of noxious weeds and may fix different times for the destruction of different varieties of weeds."

It is then further provided that notice of such time shall be published by

one publication in the official newspapers of the county. Such notice shall set the time for destruction, the manner, if other than cutting above the ground, and that unless the said order is complied with the said board will cause said weeds to be destroyed and the cost thereof to be taxed to the owner of the property.

It will be noted that Section 4819 above quoted makes it the duty of each owner or person in possession of lands to destroy noxious weeds including Canada thistles at such times in each year and in such manner to prevent such weeds from blooming or coming to maturity.

We are of the opinion that the authority given to the board of supervisors to fix the time for such destruction is merely to establish the evidentiary fact of failure to destroy without the specific proof in each instance that the weeds have bloomed or reached maturity; and that the duty to destroy is still incumbent upon the property owner or person in possession.

We are further of the opinion that the use of the word "shall" in Section 4821 and the provision that the action shall be taken at the April meeting of each year does not prevent the board of supervisors from passing another or different resolution than the one passed at the April meeting and at a date subsequent thereto. It is our opinion that the word "shall" is used merely to make such action obligatory upon the county board of supervisors so that in case they fail to act any person injured by such failure may resort to a mandatory order to compel such action by the board.

We suggest in this matter that the county board of supervisors fix an earlier date for the destruction of Canada thistles, give proper notice thereof, and proceed to the destruction of the weeds if the property owner fails to perform his duty.

AGRICULTURE: RESTAURANTS: A license for a restaurant, lunch stand, or cafe, is a sanitary license and is not transferable from one location to another.

July 6, 1927. *Secretary of Agriculture:* You have requested an opinion of this department upon the following question:

"We would like to have your written opinion relative to the transfer of location of restaurants, lunch stands, and cafes. Under our law would the license permit them to do so without securing a license for each new location?"

This matter is governed by statute, Sections 2809-2813, inclusive, of the Code of Iowa, 1924. The only provision found for the transferring of a license is in the case of a hotel license under the provisions of Section 2809. We are of the opinion that this refers to the transfer of a license from one person to another and not from one place to another. Since the application provided for in the statute requires items as to location, building, and equipment, and the license issued is in the nature of a sanitary license, not in any manner personal, and since the license fee is largely for the purpose of payment of inspectors, we are of the opinion that a license issued to an individual for one location is not transferable to another location and that a new application accompanied by a new fee should be required.

This opinion is also based upon the fact that there is no provision in the statute for any such transfer of such license. The statute provides in fact, that no license other than a hotel license shall be assignable.

SCHOOLS AND SCHOOL DISTRICTS: Consolidated school districts cannot transport children attending parochial schools and in the event of injury the driver is liable for damages for his negligence; members of the board under certain conditions may be liable; and the liability to the child cannot be protected by waiver or bond.

July 7, 1927. *Superintendent of Public Instruction:* You have requested an opinion of this department on the following statements of fact and questions:

"Certain students, residents of a consolidated school district, are regularly enrolled in and attend a parochial school near-by the public school building. These students live in the country, and the public school bus passes their homes on its way to and from the public school.

"1. (a) Could the school board of the public school legally arrange to transport these parochial school students to the public school building free?

"(b) At a cost to cover expenses?

"The students in question leave the bus at the public school building mornings and walk to the parochial school building returning to the public school building in the evening to ride home.

"In the event of injury to one of these parochial school students while enroute to or from the public school building in the regular school bus with the regular bus driver:

"2. (a) Is the district liable for damages?

"(b) Are the members of the board individually liable?

"(c) Is the bus driver liable?

"(d) Would the answers to a, b, and c, be any different if the injury occurred when someone not regularly appointed was driving the bus in place of the regular bus driver?

"If the individuals of the board and the bus driver are each personally liable, can the parents of these parochial school children protect the board members and the bus driver:

"3. (a) By a bond?

(b) By a waiver?"

We shall answer your questions in the order submitted.

It is provided in Article I, Section 3, of the Constitution of the State of Iowa, as follows:

"The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry."

It is further provided by statute, Section 5256, Code of Iowa, 1924, and of the Iowa School Laws and Decisions, 1925, as follows:

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

In the interpretation of these constitutional and statutory provisions the supreme court of this state in the case of *Knowlton vs. Baumhover*, 182 Iowa, 691, held that the carrying on with public school funds of a public school in conjunction with and as a part of a parochial school devoted in part to sectarian teaching is wholly illegal and no lapse of time and no acquiescence of the people therein will give it validity.

In the cited case the two schools were conducted in one building, one in one room and one in the other. The contribution which was being made from the public money of the public school district was for the maintenance of the building. In the case you submit the principles are identical with the cited

case though the public property owned by the school district and used is the transportation facilities. There can be no question but that such transportation facilities used in any manner directly or indirectly to transport children who attend a parochial school either without charge or for compensation would be illegal and contrary to the statutes and the constitution of the State of Iowa and of the opinions of our supreme court.

2. The question of the liability of the district, the members of the board and the bus driver was the subject of an opinion of this department of December 20, 1924, Report of the Attorney General 1923-1924, page 359, although the question involved in that opinion was the liability to children whom the district was lawfully authorized to transport. We quote from that opinion as follows:

"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 vs. 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 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."

The question submitted differs from the question under consideration in that opinion because in the case you submit the action of the driver is unlawful and the act in itself malfeasance in office.

The district, however, would in no event be liable since a public corporation is not liable for the acts of its officers either within their duty or in excess thereof.

In the case submitted the acts of the driver are not only in excess of his power as an agent of the board to perform a duty but are unlawful as well. It is our opinion that the driver would be liable for any injury resulting to such pupils unlawfully transported which resulted from his negligent acts.

While there is doubt as to the liability of members of the board where such transportation is done with their knowledge, consent and approval, whether expressed or implied, there is some authority which would indicate that they might too be liable as individuals to the person injured.

We quote from 29 Cyclopedia of Law and Procedure, Officers, page 1441, as follows:

"An officer, not a judge of a higher court, is, however, *liable for every act*

in excess of his jurisdiction. This is such a fundamental principle of the English law that there are few cases that directly discuss it."

It would not be material whether the operator of the bus or transportation vehicle were the regularly appointed driver or not if the substitution were done with the approval of the board.

3. It would be impossible for this unlawful transportation to be done by the driver with approval of the board under the protection of a bond or a waiver by the parent. In the first instance, a bond to indemnify the driver or the board from liability for his or its negligent acts which may be committed while engaged in such unlawful and illegal act, would not be a valid and binding obligation. The parent could execute a waiver which would release the driver and the members of the board from any liability to the parent for damages incurred, costs or expenses for medical attention or loss of services to the parent, but the right of the child to recover for its injury could not be waived, since the parent has no authority to waive such right, nor does the child have capacity to do so.

TRUST COMPANIES: Trust companies may invest trust funds in first mortgage bonds secured by indenture of trust on real estate where the clear unencumbered value thereof is at least twice the authorized bonds. Such investment shall not be restricted to the state of Iowa but may be made in states meeting the statutory requirements.

July 7, 1927. *Superintendent of Banking:* We wish to acknowledge receipt of your favor of the 29th ult. with the attached letter from Lane & Waterman of Davenport, concerning the investment of securities by a trust company organized under the laws of this state. They give it as their opinion that under the provisions of Section 12772 of the Code, 1924, the trust companies acting as trustees are permitted to invest trust funds in first mortgage bonds secured by indentures of trust on real estate where the clear unencumbered value of the real estate is at least twice the aggregate authorized issue of bonds under the mortgage; and further, that investments of this nature are not restricted to the state of Iowa, but may be made in the state of Illinois, or other states meeting the statutory requirements.

Under the provisions of paragraph 2 of the section referred to, and in the absence of any prohibition contained in the laws of this state applicable to trust companies, we concur in the conclusion of Lane & Waterman, and you are so advised.

BOARD OF HEALTH: HOSPITALS: The course of study and the arrangement for graduation of nurses is in the control of the Board of Nurse Examiners.

July 8, 1927. *Department of Health:* This will acknowledge receipt of your letter of recent date in which you request an opinion of this department upon the question of whether the Maternity Hospital of Sioux City, Iowa, may establish training for a period of one and one-half years, which training would be accepted by the University Hospital at Iowa City and the course completed there, and upon the completion of said course what diploma or certificate of graduation should be given.

It is within the power of the board of nurse examiners to approve training schools for nurses. If within the judgment of that board such a course as you have outlined would meet the requirements the hospital at Sioux City

could be accredited for the amount of training permitted by your board. The certificate of graduation should read, of course, from the University Hospital at Iowa City since the hospital at Sioux City would not be offering courses which would meet your final requirements.

TAXATION: TRUST FUNDS: A trustee who is a resident of this state must list for taxation purposes all funds which he holds in trust.

July 8, 1927. *County Attorney, Jefferson, Iowa:* We have your letter under date of July 5, 1927, requesting an opinion upon the following question:

Are funds in the hands of a trustee who is a resident of this state subject to taxation under the laws of this state in the county of the residence of said trustee, the cestui que trust being a non-resident?

Section 6956, so far as this question is concerned, reads as follows:

"Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed: * * *

"3. The property of a beneficiary for whom the property is held in trust, by the trustee."

Section 6957 provides as follows:

"Any person required to list property belonging to another shall list it in the same county in which he would be required to list it if it were his own, except as herein otherwise directed; but he shall list it separately from his own, giving the assessor the name of the person or estate to which it belongs."

We are of the opinion that under the two sections referred to the funds in the hands of the trustee in your county are subject to taxation under the laws of this State. This being the case we believe the other questions referred to in your letter have been answered.

TAXATION: REFUNDS: Private bank not entitled to refund of taxes voluntarily paid when over-assessed.

July 8, 1927. *County Attorney, Allison, Iowa:* You have requested the opinion of this department on the question of whether or not a private banking institution in making its tax return may deduct the amount of bills payable shown on its books, which bills payable were collateraled by certain of its own bills receivable. You state that question has arisen where the county auditor of your county corrected the assessment against such an institution so as to increase the amount of taxes over what the assessor had assessed the property, by $549.68, and that this increase was the result of the county auditor failing to make the deductions hereinbefore described. You state also that said banking institution has filed a claim with your board of supervisors for a refund of this so-called excess tax under the provisions of Section 7235 of the Code, which provides that:

"The board of supervisors shall direct the treasurer to refund to the taxpayer any portion thereof found to be illegally exacted or paid, with all interest and costs actually paid thereon."

We are also advised that the banking institution paid these taxes without protest and raised no question about the correctness thereof until this application for refund was filed.

We are of the opinion that said banking institution has no remedy under the statute for the reason that the so-called excessive tax was, if anything, an error in judgment as to the total value of the property of the banking in-

stitution and that tax having been voluntarily paid and without protest, the statute in question does not apply. This situation is comparable to where a man voluntarily pays taxes upon an assessed value greatly in excess of the value of his property. It has been uniformly held under such circumstances that he cannot recover any such excess taxes paid voluntarily and without protest.

We are therefore of the opinion that under the facts as stated by you, there is no authority in law for the refund by the board of supervisors of the taxes paid in excess of what the banking institution claims they should have paid.

CITIES AND TOWNS: WATERWORKS: Municipal waterworks accounts are subject to audit by Auditor of State under Section 113, Code of 1924.

July 8, 1927. *Auditor of State:* You have requested the opinion of this department as to whether or not you may examine the books of the Des Moines City Waterworks under the provisions of Section 313 of the Code, and charge the expense of the same against the municipality.

Section 113 of the Code, 1924, as amended by Chapter 123 of the Acts of the Forty-first General Assembly, provides as follows:

"The auditor of state shall cause the financial condition and transactions of all county offices to be examined at least once each year by a state examiner of accounts, and shall cause a like examination to be made at least once each two years, of all offices of all cities and towns having a population of three thousand or more including offices of cities acting under special charter."

It is then provided in the following sections of the law how the examination shall be made and the method by which the examiners shall be paid out of the state funds and the method by which the state may secure reimbursement from the municipality examined.

The Des Moines City Waterworks was established under the provisions of Chapter 314 of the Code, 1924. The question as to the right of your office to examine this particular plant arises because of the provisions of Section 6177 of the Code, 1924, as amended by Chapter 128 of the Acts of the Forty-first General Assembly, which provides the manner and method by which such a waterworks board shall keep its books. It is also provided in said section that the board shall at least once a year cause to be prepared and printed for public distribution a complete financial statement. It is also made the duty of the city council to select an expert accountant who shall examine the accounts of the waterworks board once a year. You have advised us that the waterworks board contend that these provisions are special provisions and have been enacted subsequent to the provisions of Section 113 of the Code and supersede it, and therefore insofar as the Des Moines City Waterworks are concerned, places said office without the provisions of such section.

It will be observed that the examination and audit required by the provisions of Section 6177 of the Code, is for the purpose of determining whether or not the accounts of the waterworks board balance. In other words, it is merely a straight bookkeeping audit. Under the provisions of Section 113, et seq. of the Code, the Auditor of State is authorized in addition to the audit of the accounts to determine whether or not the expenditures shown by the records of the waterworks board, have been made according to law. The state auditor's examination goes more into the policy of the operation of the plant

and its affairs. The two examinations are in no wise of the same character or comparable.

You are advised that we have carefully examined all of the provisions of law touching the proposition submitted together with all authorities shedding any light upon the situation, and are of the opinion that the provisions of Chapter 314 of the Code, do not in any way suspend or supersede the provisions of Section 113 of the Code, which authorizes and directs the Auditor of State to examine all "offices" of cities and towns having a population of three thousand or more at least once each two years. There can be no question but what the office of the board of waterworks trustees is an "office" of the City of Des Moines. It may not be one of the regular constituted governmental offices, but nevertheless, it is an "office" of the City of Des Moines performing a proprietary function. The waterworks' property, mains and plant, in its entirety, is owned by the City of Des Moines. The City of Des Moines is liable for the torts of the waterworks trustees and their employees. The City of Des Moines is responsible primarily for all of the acts of the waterworks trustees. The waterworks trustees are in fact, officers of the City of Des Moines. The mere fact that the statute permits them to operate independent of the city council, insofar as the operation and management of the city waterworks is concerned, does not change the character of their situation.

It is therefore the opinion of this department that the office of the board of waterworks trustees of the City of Des Moines, is an "office" of the City of Des Moines and the accounts of said office are therefore subject to audit and examination by the auditor of state under the authority of Section 113, Code, 1924, as amended.

BANKS AND BANKING: TAXATION: A bank cannot alter its report on real estate owned by the bank to deduct same from capital stock tax after the matter has passed the Board of Review.

July 11, 1927. *Auditor of State:* You have submitted to this department for an opinion the following proposition:

"On January 1, 1926, the Parnell Savings Bank of Parnell, Iowa, submitted their statement of assets and liabilities for the purpose of taxation as provided by Chapter 333, Code of 1924.

"The bank now comes before the Board of Supervisors with a petition under date of March 24, 1927, claiming that the original statement as referred to above was erroneous in that certain real estate which they claim ownership was not deducted on account of same not being listed on said original statement. They now submit an amended statement including such additional real estate and ask the supervisors to order an abatement of tax by including the above mentioned additional real estate.

"Our conclusion as verbally given to the officials was that said petition could not be considered for two reasons, first, that the Board of Supervisors has no jurisdiction of such a case, that they have no authority to revise or order correction in valuation. Second, that when an assessment has been regularly made by the assessor and approved by Board of Review and no appeal taken to District Court within statutory period, that the matter cannot be revived or the assessment abated or changed. * * *"

We are of the opinion that your conclusions are correct and that the board of supervisors has no power to abate the tax or change the assessment in any manner. The assessment was made upon the voluntary statement of the bank and after the matter passed the Board of Review and the period for appeal has expired there can be no abatement.

EXECUTIVE COUNCIL — TAXATION — COOPERATIVE ASSOCIATIONS — ELECTRIC AND TRANSMISSION LINES: Under Chapter 390, cooperative corporations or associations not organized or operating for profit, are exempt from assessment, all others who are operating transmission lines in conducting of electric energy, located within the state and wholly or partly outside of cities and towns, are subject to assessment by the Executive Council.

July 11, 1927. *Executive Council:* We have received your letter of April 11, 1927, in which you submit to this department the following inquiries:

"First. Should all electric transmission non-profit sharing cooperative associations be eliminated from our list whether or not they are incorporated under Chapter 390 of the revised Code? If so, should we not eliminate all mutual telephone companies from our files?

"Second. Should we assess individually owned transmission lines which are merely operated for personal use?

"Third. Should we assess such lines as the Winterset Country Club Line which was built by its members to supply light at the Club House? One farmer tapped the line but he merely pays for the amount of electricity he uses."

I

This department has prepared an opinion upon the first question contained in your request. It was prepared for your office on March 18, 1927. It was held in said opinion that the clause contained in Section 7089 of the Code, which reads, "except cooperative corporations or associations which are not organized or operated for profit," clearly refers to companies incorporated under the provisions of Chapter 390 and are clearly exempt. It was also held in said opinion that the exemption includes associations, which term does not necessarily mean corporations, and if certain individuals associate themselves together for the purpose of operating an electric transmission line on the cooperative non-profit sharing plan, they are entitled to the exemption provided in the statute. A copy of that opinion is attached hereto and should be read in connection with this opinion.

II

A reading of Section 7089 will disclose the fact that with the exception of "cooperative corporations or associations which are not organized for profit," all transmission lines for the conducting of electric energy located within the state and wholly or partly outside of cities and towns, whether formed or organized under the laws of this state or elsewhere, are subject to assessment by the Executive Council. The corporations or associations which come within the exception therein specified, are defined in the opinion written by this department for your office on March 18, 1927. As there are no other exceptions in the statute, we are of the opinion that your second and third questions must be answered in the affirmative.

The courts of this state have held repeatedly that taxation is the rule and exemption the exception.

Trustees of Griswold College vs. State, 46 Iowa, 275;
Sioux City vs. Independent School Dist., 55 Iowa, 150;
In re Boyd's Assessment, 13 Iowa, 583;
Simcock vs. Sayre, 148 Iowa, 132.

It has also been held that statutes under which exemptions are claimed should be strictly construed.

Trustees of Griswold College vs. State, 46 Iowa, 275;
Sioux City vs. Independent School Dist., 55 Iowa, 150;
Cassady vs. Hammer, 62 Iowa, 359.

Applying this rule of statutory construction to the questions under consideration, we have no hesitation in holding that such property is subject to taxation.

It is our opinion, also that mutual telephone companies, even though not operated for profit, should not be eliminated from your files. The chapter relating to the assessment of telegraph and telephone companies for taxation purposes is Chapter 336, Sections 7031 to 7045.

Section 7031 requires every telegraph and telephone company operating a line in this state to furnish to the executive council, on or before the first day of May in each year, a statement verified by its President or Secretary, containing the matters or information therein described. We find no exceptions in this statute. Therefore, it is apparent that such telephone companies should be assessed the same as other property.

COUNTY SUPERVISORS: SCHOOLS AND SCHOOL DISTRICTS: County supervisors have no authority to pay tuition of school children forced to attend school in another district because of no bridge across a stream and school boards cannot force them to construct a bridge.

July 11, 1927. *County Attorney, Rock Rapids, Iowa:* We are in receipt of your letter under date of July 8, 1927, requesting an opinion on the following questions:

1. Do the supervisors have authority to pay tuition of school children who are forced to go out of their particular school district because the board has not provided for a bridge across a stream?
2. Can a school board force the supervisors to put in a bridge across a stream?

We will answer the questions in order.

We are of the opinion that the board of supervisors do not have authority to pay the tuition of any school children who are forced to go out of their own particular district because of the lack of a bridge across a stream. Section 4665 of the Code, 1924, provides as follows:

"The county bridge and culvert system shall be constructed and maintained as follows:

* * * * * * *
* * * * * * *

"3. All bridges and all other culverts within said system, by the county."

We are of the opinion that a school board cannot force a board of supervisors to put in a bridge across a stream for, under the section referred to above, our supreme court has held in the following cases that the duty to construct bridges and culverts is a discretionary matter with the board of supervisors and that they could not be mandamused and compelled to put in a bridge or culvert:

Thurston vs. Arnold, 43 Iowa, 192;
Leonard vs. Wakeman, 120 Iowa, 140;
McCarl vs. Clark Co., 167 Iowa, 14.

ESCHEAT ESTATES—EXECUTIVE COUNCIL: The expense of appraisement of property in an escheated estate and taxes which are due at the time the property escheats, may be deducted from the proceeds of said estate under Sec. 4472, Code, 1924.

July 11, 1927. *Executive Council:* We have your letter under date of July 9, 1927, requesting an opinion on the following question:

Whether or not the expense of appraisement and taxes are to be paid out of the proceeds of the sale of lands from an escheated estate, said land being sold in accordance with Code Section 4472.

Section 1219 of the Code, 1924, provides as follows:

"The compensation of appraisers appointed by authority of law to appraise property for any purpose shall be fifty cents per hour for each appraiser for the time necessarily spent in effecting the appraisement and five cents a mile for the distance traveled in going to and from the place of appraisement, which shall, unless otherwise provided, be paid out of the property appraised or by the owner thereof."

We are of the opinion that under this section the expense of the appraisement of the land in question should be paid out of the proceeds of the sale. We are also of the opinion that the taxes which were due up to the time said land escheated are a lien on said property and should be paid out of the proceeds received from the sale of the same.

HEALTH: Cost of vaccination of school children should be paid by parents of children.

July 11, 1927. *County Attorney, Sac City, Iowa:* We desire to acknowledge reecipt of your letter of May 21, 1927, in which you submit to this department the following inquiry:

"During the past winter a case of scarlet fever broke out in district No. 5 Clinton township, Sac County, Iowa, and the health physician for said township advised immediate vaccination of all the children for scarlet fever. This was done under the direction of the doctor, and the bill has been turned in for the amount of the serum and the cost of the work to the supervisors. The work was done under the direction of the board of trustees and they have O. K.'d the bill. * * *

"The question which I would like to have as a ruling in this matter, is whether or not the board of supervisors can allow this bill, and if they cannot if the township trustees can allow the bill, out of what funds can they allow the same, or if the trustees themselves are personally liable in this matter."

It is the opinion of this department that the cost and expense of vaccinating the school children, as a condition precedent to their right to attend the public school, should be paid by the parents of the children. The only expense or cost that may be paid under the provisions of Chapter 108, Sections 2247 to 2279, inclusive, of the Code, 1924, out of the county funds, are for services rendered in connection with contagious and infectious diseases and the quarantine therefor.

It is quite apparent that while vaccination is used as a preventive of such contagious and infectious diseases, yet the only expenses that may be paid out of the county funds are such as are in connection with the treatment of contagious and infectious diseases and the quarantine thereof. We are therefore clearly of the opinion that the expense of the vaccination must be paid by the parents of the children.

COOPERATIVE ASSOCIATIONS: Discussion of law relative to both classes and particularly as to combinations of such associations.

July 11, 1927. *Secretary of State:* We have received your letter of May 26, 1927, in which you submit to this department three questions submitted to

your office by Mr. A. E. Cotterill, the Secretary-Treasurer of the Farmers Educational and Co-operative Union of America. The letter of Mr. Cotterill is as follows:

"Would like very much to have your opinion on three questions:

"1st, Can a capital stock cooperative association organized under Chapter 389 federate or combine with similar associations for the purpose of organizing a non-stock non-profit association under Chapter 390?

"2d, Can a combination be formed of local associations incorporated under both Chapter 389 and 390 by the terms set out in Sections 8470 and 8499?

"3d, Will your department permit a federation of cooperative associations to accept individual members of the local associations as members of the federated association? Practically all the cooperative associations have a large amount of business with non-members, which they do not care to lose. Wishing to use a contract and it not being enforcible when handling business for non-members, we desire to have a contract between the individual member and central corporation also a contract between the member associations and the central association. If the cooperative laws will permit us to organize the farmers sales agency, it will expedite matters very much as we have both kinds of associations incorporated under both chapters 389 and 390 and very few of them want to restrict their business to members only as they are afraid they would fail owing to not having sufficient volume to meet expenses and we want to have sufficient volume guaranteed by contract to the central association before starting operations."

Chapter 389 of the Code of 1924, contains the provisions of the statute relating to profit sharing, and Chapter 390 the provisions relating to non-profit sharing cooperative associations. In determining the questions under consideration, it will not be necessary for us to consider more than two sections of these statutes. Section 8470 reads as follows:

"At any regular meeting, or any regularly called special meeting, at which at least a majority of all its stockholders shall be present, or represented, an association organized under this chapter, may by a majority vote of the stockholders present or represented, subscribe for shares and invest its reserve fund, not to exceed twenty-five per cent of its capital, in the capital stock of any other cooperative association."

It is quite apparent that the above section does not authorize the cooperative associations organized under the provisions of Chapter 389 to federate or combine with similar associations for the purpose of organizing a non-profit association under Chapter 390. This statute merely permits such an association to subscribe for shares and invest its reserve fund not to exceed twenty-five per cent of its capital in capital stock of any other cooperative association.

Section 8499 reads as follows:

"Likewise, associations may be formed under this chapter whose membership shall consist of other associations formed under the provisions of this chapter, the purpose being to federate local associations into central cooperative associations for the more economical and efficient performance of their marketing or other operations."

The above statute therefore specifically authorizes the combination of local cooperative associations, but by the specific provisions thereof the authority therein granted is limited to combination of local associations organized under the provisions of such chapter (390), which entirely relates to nonprofit-sharing cooperative associations.

It is therefore our opinion that such associations organized under the provisions of Chapter 389 relating to profit sharing cooperative associations may not combine for any purpose, but that each association may hold shares of

stock in any other cooperative associations. Nonprofit-sharing cooperative associations, however, may, under the provisions of Section 8499, combine with local associations organized for the same purpose and under the same chapter, but may not combine with profit-sharing cooperative associations organized under the provisions of Chapter 389.

HIGHWAYS—TELEGRAPH LINES: Highway officers have right to relocate poles of telegraph company on highways so as not to interfere with use of highway by public.

July 12, 1927. *Iowa State Highway Commission:* We are in receipt of your letter of recent date, wherein you state that the Postal Telegraph Company is refusing to relocate their telegraph poles located on primary roads which are being improved by the highway commission, said relocation being ordered under the provisions of Chapter 248 of the Code, 1924, on the grounds that they are operating under the authority of an Act of Congress known as the Post Road Act of 1866, and more particularly known as Sections 5263 and 5269 of the revised statutes of the United States.

You will note that we furnished you with an opinion dated February 28, 1924, relative to the right of the board of supervisors to require the relocation and removal of such poles. We have carefully read the Federal Statutes and particularly Section 5263 of the revised statutes, which seems to permit any telegraph company accepting the provisions of the law to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, but, however, such lines to be so constructed and maintained as not to obstruct or "interfere with the ordinary travel on such military or post roads." We have reviewed the decisions of the Supreme Court of the United States construing the effect and scope of these laws, and are of the opinion that the rights and privileges granted by the Act of 1866, are to be enjoyed in "subordination to public use and private rights, and subject to any lawful exercise of the police power belonging to the state." (*Richmond vs. So. Bell Telephone Co.*, 174 U. S. 771.)

The Supreme Court of the United States has also held that the Act of 1866 was a "permissive" statute and that "it never could have been intended by the Congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered." (*Western Union Telegraph Co. vs. Mass.*, 125 at 548.)

A case arose under this Act of 1866 in Massachusetts wherein the town of Essex undertook to force the removal of posts and wires of the New England Telegraph Company from its streets. The company secured an injunction restraining the authorities of the town from interfering in any manner with its property. Upon appeal to the Supreme Court of the United States, that high court modified the injunction by adding thereto the following language:

"Provided, that nothing herein shall be so construed as to prevent the Board of Selectmen, or the town of Essex from subjecting the location and operation of the company's lines to reasonable regulations." (*Town of Essex vs. New England Telegraph Co.*, 239 U. S., 313.)

Thus the courts of last resort have always held that the Act of 1866 is per-

missive in nature and does not prohibit a state or municipality thereof from regulating in any reasonable manner the construction, erection and maintenance of the poles and wires of companies acting thereunder.

We are therefore clearly of the opinion that the Postal Telegraph Company is subject to regulation under the laws of this state and particularly under the provisions of Chapter 248 of the Code of 1924.

SCHOOLS AND SCHOOL DISTRICTS—NUMBER OF PUPILS: The five or seven pupils required under Sec. 4231 of the Code of 1924, must all be residents of the particular district.

July 12, 1927. *County Attorney, Sigourney, Iowa:* We have your letter under date of July 8, 1927, requesting an opinion on the following question:

Must the seven children required under Section 4231 of the Code, 1924, all be residents of the district in question, or can non-resident tuition pupils be counted as making up the seven?

We are of the opinion that under Section 4231 the five or seven children, as the case may be, must all be residents of the particular district for the reason that non-resident pupils may or may not attend the school outside of their own district. Even though they have signified their intention of attending school in an outside district they might change their mind and attend school in another district, thus leaving the particular district without the required number of pupils and, too, Section 4231 of the Code of 1924, provides in part as follows:

"No contract shall be entered into with any teacher to teach any school in the school corporation when the average attendance in said school 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.* * * *".

You will see that the pupils referred to in said section are pupils who are residents of said district.

TAXATION: A person who has control of certificates of deposit in a bank though issued in the name of another is liable for taxation and is not entitled to deduct debts of the party in whose name the certificate is issued.

July 12, 1927. *County Attorney, Eagle Grove, Iowa:* This will acknowledge receipt of your letter of recent date requesting an opinion of this department upon the following question:

One, Mary King, had an account of about $29,000 in a bank. She drew checks on this account payable to six of her children, which checks were endorsed by them and for which the bank issued six certificates of deposit payable to Mary King and her different children. Mary King, the mother, retained possession of the certificates of deposit, collected the interest therefrom, and used the same and has, since the bank closed, collected the dividends paid by the bank.

Demand is now made upon her for taxes upon these certificates and she seeks to avoid the tax upon the grounds that the money does not belong to her and that her children were indebted to an excess of the amount of the certificates at the time the tax was sought to be levied.

You have rendered an opinion under Section 6958, Code of Iowa, 1924, that Mary King is personally liable for the taxes sought to be collected and that the debts owing by the children cannot be deducted from the amount of the joint certificates of deposit for the purposes of taxation.

We have checked over the statutes cited and, also, the cases of *German Trust Company vs. Board of Equalization*, 121 Iowa, 325, and *Heinz & Fisher vs. Board of Equalization*, 121 Iowa, 445, and are clearly of the opinion that the opinion rendered by you is correct.

In the cited cases, the court holds that there must appear the agency of the party listing; the possession or control by the agent of the money, notes, or credits of the principal; and that such possession or control must be with a view to the pecuniary profit of the agent or principal.

We believe that all of the points required in the opinion of the trust company against the board of equalization are submitted by you. We are, therefore, of the opinion that the agent, Mary King, is liable for the taxes upon these certificates of deposit.

SCHOOLS AND SCHOOL DISTRICTS: The term "kindergarten age" as used in Chapter 90, Acts of the 42nd G. A. applies to children over five years of age and under seven, who have not attended school.

July 12, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your favor of recent date in which you request an opinion of this department upon the following question:

"What is the meaning of 'kindergarten age' as used in line 6, Section 1, Chapter 90, Acts of the 42d G. A.?"

The question of the interpretation of the term, "kindergarten" has been the subject of determination by a number of courts.

In *Bronx Borough Teachers' Association vs. Board of Education*, 118 N. Y. Supplement, 483, 484, the court said:

"Teachers of the graded classes are to be distinguished from the 'Kindergarten,' which refers to teachers in kindergartens in which no grades exist and where the children are usually boys and girls of the ages of from four to six years."

The question was before the court in *Los Angeles County vs. Kirk*, 83 Pac. 250, 148 Cal. 385, and in that case the court said:

"The term 'kindergarten' was devised to apply to a system elaborated for the instruction of children of very tender years, which by guiding their inclination to play into organized movement, and investing their games with an ethical and educational value, teaches, besides physical exercises, habits of discipline, self-control, harmonious action and purpose, together with some definite lesson of fact. It is apparent that the work contemplated by such a system is purely preliminary to, and entirely different in character from, the ordinary work of the common school, and is in fact designed to fit very young children, whose minds and bodies are, solely because of their tender age, not yet capable of the instruction contemplated in an ordinary school, for such school work."

Under our statute children are permitted to attend school at the age of five years. Section 4268, Code of Iowa, 1924.

Children over the age of seven years are required to attend school. Section 4410, Code of Iowa, 1924.

We are, therefore, of the opinion that the term, "children of kindergarten age" should be interpreted to mean those children between the ages of five and seven years who have not attended school. We are of the opinion that no child under the age of five years should be taken into consideration because such children are not entitled to school privileges in any event.

We are also of the opinion that children over seven years of age should not be taken into consideration. Such children should have, by that age, reached a stage of development which would enable them to enter the primary grades without the primary training of the kindergarten.

SCHOOLS AND SCHOOL DISTRICTS: A school board may purchase property, if authorized, in more than one location.

July 12, 1927. *County Attorney, Ida Grove, Iowa:* This will acknowledge receipt of your letter of recent date requesting an opinion of this department upon the following question:

"Does the Board of Directors have authority to make such purchase despite the fact that the building is two blocks distant from the present schoolhouse and grounds? At present the schoolhouse and grounds do not occupy an area of more than five acres."

We are of the opinion that the board of directors of a village independent school district may purchase property which is not contiguous to the established school site. It has been held that ample grounds are essential for the exercise or recreation of the children and that land may be condemned for the purpose of providing such grounds in addition to grounds for a site already secured. *Independent School District of Huitt*, 105 Iowa, 663.

The limitation to five acres in any one site is merely limitation upon the amount of property which the school board can take under condemnation proceedings and does not affect the amount of property which a school corporation may own if it can be purchased at a reasonable figure.

FISH AND GAME: Game not protected by statute may be received and transported by a transportation company.

July 13, 1927. *County Attorney, Guthrie Center, Iowa:* This will acknowledge receipt of your letter of recent date in which you request an opinion of this department upon the following proposition:

May a red fox be shipped legally within the state of Iowa in view of Sections 1780 and 1766 of the Code of Iowa, 1924?

This involves the interpretation in Section 1780, of the following words:

"Any of the fish, game, animals, or birds taken, caught or killed within the state."

We are of the opinion that the quoted section applies only to game which is protected in some manner by statute. Since the red fox is not in any manner protected by law, we are of the opinion that it is not unlawful to take or transport such animals.

We reach this conclusion from a general construction of the entire statutes regulating the shipment or transportation of fish and game in the state. These statutes do not purport to protect *all* game in the state. The exception raised in Section 1780 to the effect that "nothing in said section shall apply to such animals as are considered fur-bearing animals in this chapter," merely makes the statute applicable to game which is protected but which does not come under the classification of fur-bearing animals as defined in Section 1766.

COUNTY JAIL: A county may build a jail not to cost exceeding ten thousand dollars without a vote of the people and may pay for same in two successive years.

July 13, 1927. *County Attorney, Osceola, Iowa:* This will acknowledge re-

ceipt of your letter of recent date in which you request an opinion of this department upon the following proposition:

"The Board of Supervisors of Clarke County in 1926 made a mill levy for the purpose of building a County Jail, said levy yielding $4905.00 and paid by the tax payers during the year 1927. At the time this levy was made the funds so raised were thought to be ample but when plans and specifications for said jail were adopted and the same submitted for bid on the 27th day of June, 1927, it was found that the funds were approximately $1000.00 short.

"*Question:* May the Board of Supervisors in view of Section 5258 enter into a contract for the construction of a jail under the terms of which an amount not in excess of $4905.00 will be due and payable in 1927, and the balance to be due and payable in 1928, building to be completed September the 15th 1927?"

It is provided by statute, Section 5258 of the Code of Iowa, 1924, as follows:

"It shall be unlawful for any county, or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.

"Any officer allowing a claim, issuing a warrant, or making a contract contrary to the provisions of this section, shall be held personally liable for the payment of the claim or warrant, or the performance of the contract."

It is further provided by statute, Section 5261, of the Code, that a jail not exceeding in cost the sum of ten thousand dollars may be built by the county without submitting the proposition to a vote of the electors.

We are of the opinion that the board of supervisors may enter into a contract for the completion of this jail to become due partly in 1927 and paid out the sum on hand or to be paid in during that year and may meet the balance of the expenditures in the year 1928 by the levy of sufficient taxes in the year 1927 due and payable in the year 1928. If the building is not completed until about September 15, 1927, the levy may be made for the year 1928 prior to the issuance of any warrant or the incurring of any expense in connection therewith.

FISH AND GAME: Fish and Game Department has the power to purchase land for the purpose of establishing a game farm or sanctuary but the title must be taken in the name of the state of Iowa.

July 13, 1927. *Fish and Game Department:* You have requested an opinion of this department upon the following proposition:

Do the statutes of this state authorize the Fish and Game Department to purchase a game sanctuary?

It is provided by statute, Section 1709, Code of Iowa, 1924, as follows:

"The state game warden shall have the right to establish and control the state hatcheries and game farms, * * *"

This section was amended by Chapter 32 of the Acts of the Forty-first General Assembly to provide that whenever any land, stream, or lake has been declared by the state board of conservation to be a public park and has been taken for public park purposes, or where any land is now owned and used by the state of Iowa, the state game warden shall have the right and power to establish state game refuges or sanctuaries on such land where the same is suitable for this purpose.

A sanctuary is defined as a refuge, a place of refuge and protection, or a pro-

tection. Under Section 1709 a state game farm is a place of refuge, a refuge, or a place of protection for game.

We are, therefore, of the opinion that under the cited sections, it is within the power of the Fish and Game Department of the state of Iowa to purchase land for the purpose of establishing a game farm or sanctuary, same to be paid for out of the fish and game protection fund, and title to be taken in the name of the state of Iowa.

TAXATION: Refund for taxes paid on agricultural land should not be made until sufficient funds are in the hands of the county treasurer belonging to the taxing district having received the credit. (No opinion rendered on the question of the right to the refund by the taxpayer.)

July 13, 1927. *County Auditor, Davenport, Iowa:* You have made an oral request to the writer for an opinion of this department on the following proposition:

Where taxes levied, assessed, and paid upon agricultural land has been ordered refunded by the board of supervisors upon application of the taxpayer, may such refunds be made from the general county funds or must the county auditor withhold the issuance of warrants until there is sufficient money in the particular funds of the particular taxpaying district sufficient to pay said warrant and may such warrant be drawn before the apportionment of taxes is made to the tax-paying body?

As we understand this case, a landowner in a city or town who owns agricultural land which is not liable for taxation under the provisions of Section 6210 of the Code of Iowa, 1924, for city purposes, has had levied, assessed, and has paid taxes thereon for such benefits. The taxes have been apportioned by the county treasurer to the various funds of the city or town. The taxpayer now seeks a refund and there are not sufficient funds in the hands of the county treasurer which have been collected for the benefit of said city or town and which may be apportioned to it to make such refunds. Your inquiry is whether the county may advance this money and await the collection of further taxes from said city or town or whether the county auditor should withhold the issuance of a warrant until sufficient funds are on hand in the particular funds of the said city or town to make such payments.

We are of the opinion that the county auditor should not draw any warrant nor the county treasurer make any refund of such taxes, even though ordered by the board of supervisors, until such time as there are in the hands of the treasurer sufficient moneys assessed and collected for the benefit of, belonging to, and to be apportioned to, said city or town for the various funds into which the taxes sought to be refunded were apportioned and paid to pay such refunds.

This question has been the subject of judicial determination in this state a number of times and we cite you the following cases:

District Township vs. District Township, 56 Iowa, 85;
Iowa Railroad Land Company vs. Woodbury County, 64 Iowa, 212;
Stone vs. Woodbury County, 51 Iowa, 522;
Steele vs. Madison County, 198 Iowa, 902.

In the Steele case, on page 905, the court speaking through Mr. Justice Stevens, said:

"Taxes paid to the county treasurer are distributed by him and credited to the various funds for which they were levied, and are paid out by him to the

taxing units entitled thereto. The refund, when made, must be out of and in proportion to the various funds to which the erroneous or illegal tax has been credited."

The court has also held that it is the duty of the county treasurer to apportion the refund and deduct the amount thereof from the various funds of the taxing body to which the taxes collected were credited.

TRUST FUNDS—TAXATION: Funds in the hands of a resident trustee whose cestuis que trustents are non-residents, are subject to taxation under Sec. 6955 of Code, 1924.

July 14, 1927. *County Attorney, Jefferson, Iowa:* We are in receipt of your letter under date of July 12, 1927, requesting an opinion on the following question:

Whether or not funds in the hands of a trustee who is a resident of this state, are subject to taxation under the laws of this state in the county of a residence of said trustee, the cestuis que trustent being a non-resident of the state.

Section 6956, so far as this question is concerned, reads as follows:

"Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed: * * *

"3. The property of a beneficiary for whom the property is held in trust, by the trustee. * * *"

Section 6957, provides as follows:

"Any person required to list property belonging to another shall list it in the same county in which he would be required to list it if it were his own, except as herein otherwise directed; but he shall list it separately from his own, giving the assessor the name of the person or estate to which it belongs."

We are of the opinion that under the two sections above cited, that the funds in the hands of a resident trustee, whose cestuis que trustents are non-residents, should be listed by said trustee and that said funds are subject to taxation under the statutes of our state as above cited.

Section 6956 of the Code of 1924, provides that every inhabitant of the state of full age and sound mind, shall list property of a beneficiary for whom the property is held in trust by a trustee.

In the case of In Re Assessment of Boyd 138 Iowa, 583, at page 589, the court states as follows:

"If the referee be a trustee, holding the property as such for the benefit of another or others, and having control and management thereof, he should list the same with the assessor; and in contemplation of law he is regarded as the owner thereof when the owner does not reside in the county."

In view of the holding in the above cited case, we cannot see how any other conclusion could be drawn. We are mindful of the fact that there may be cases in which a hardship may be worked, but this, of course, could not change the law. The law being as it is, the board of supervisors would have no option in the matter.

NOTICE OF HEARING—BUDGET LAW: Notice of hearing provided for in Section 352 need not be a separate notice but may be combined with notice of hearing on resolution of necessity.

July 15, 1927. *Director of the Budget:* We are in receipt of your letter under date of July 14, 1927, requesting an opinion on the following question:

Whether or not the notice of hearing on plans and specifications and form of contract as provided for in Section 352 of the Code of 1924 and the notice of a hearing of a resolution of necessity as provided for in Section 5997 of the Code 1924, may be combined in one notice.

Section 352, Code of 1924, provides as follows:

"Before any municipality shall enter into any contract for any public improvement to cost five thousand dollars or more, the governing body proposing to make such contract shall adopt proposed plans and specifications and proposed form of contract therefor, fix a time and place for hearing thereon at such municipality affected thereby or other nearby convenient place, and give notice thereof by publication in at least one newspaper of general circulation in such municipality at least ten days before said hearing."

Section 5997, Code of 1924, provides as follows:

"It shall cause notice of the time when said resolution will be considered by it for passage to be given by two publications in some newspaper published in the city, the last of which shall be not less than two nor more than four weeks prior to the day fixed for its consideration; but if there be no such newspaper, such notice shall be given by posting copies thereof in three public places within the limits of the city."

We are of the opinion that the notice of hearing provided for in Section 352, Code of 1924, as above set out, and the notice of hearing provided for in Section 5997, Code of 1924, as above set out, may be combined in one notice provided that the time of notice specified in each section is complied with.

We find nothing in the statutes requiring the giving of a separate notice in each instance. We are returning herewith copy of the notice which appeared in the Pella Chronicle under date of May 6, 1927.

HIGHWAYS: Railroad is required to construct and maintain culverts and bridges for crossings.

July 15, 1927. *Iowa State Highway Commission:* You have requested the opinion of this department on the following proposition:

"There are numerous bridge and culvert structures located on the highways of this state within the limits of the right of way of the railroad companies. These structures were built and heretofore have always been maintained by the railroad companies at their expense. They span drainage ditches and water-courses which flow parallel to the railroad and within the limits of right of way owned by the railroad company. Whose duty is it to maintain and reconstruct such structures?

"In the past, as stated above, the railroad companies have maintained these structures, but recently instructions have gone out from the railroad companies to their maintenance forces to stop maintaining such structures inasmuch as they contend it is the duty of the highway authorities to take care of this maintenance."

The question presented, involves the consideration of several sections of the law. Section 8000 of the Code, 1924, provides that "Every corporation constructing or operating a railway shall * * * construct at all points where such railway crosses any public road good, sufficient and safe crossings * * *." It is then provided that any railway company neglecting or refusing to comply with the provisions of this section are liable for all damages sustained by reason of such refusal or neglect. Thus it will be observed that the statute plainly makes it the duty of a railway company to construct and maintain good, sufficient and safe crossings where such railway crosses any public road.

If there are watercourses, ditches, or ditches occasioned by the building up

of the railroad bed, it would follow that where a highway crossing is constructed, proper bridging, culverting, etc., must be built, otherwise it would not be possible to build a good, sufficient and safe crossing.

There are other provisions which have a bearing upon the question submitted. It is provided in Section 7540 of the Code, 1924, that whenever the board of supervisors shall have established any levee, or drainage district, or change of any natural watercourse and the levee, ditch, drain or watercourse as surveyed and located crosses the right of way of any railroad company, the county auditor shall immediately cause to be served upon such railroad company a proper notice in writing, stating the nature of the improvement to be constructed, the location and the full requirements for its complete construction across such right of way as shown by the plans, specifications, plat and profile of the engineer appointed by the board, and directing such company to construct such improvement according to said plans and specifications across its right of way and to build, construct, or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain or watercourse crosses its right of way, in such a manner so as not to obstruct, impede or interfere with the free flow of the water therein, within thirty days from the time of the service of such notice upon it.

It is made the duty of certain public officials in every instance to construct either the crossing, the waterway, bridge or culvert on the failure of the company to comply with the order as contained in said notice.

The question of the liability of the railroad company to build and maintain sufficient and proper crossings where the railway crosses the highway, has been definitely determined by the Supreme Court in *See vs. Wabash R. Co.*, 123 Iowa 443. The court said, referring to Section 8000 of the Code, that the statute absolutely requires railroad companies to construct specified crossing wherever their road crosses public streets or highways and makes them absolutely liable for failure to do so. The same decision of the Supreme Court also declares it to be the duty of the company to repair such crossings and keep them in safe condition. The Supreme Court held in *Peterson vs. C. M. & St. P. Ry. Co.*, 185 Iowa 378, that it is the duty of the railway company to properly maintain crossings over the public highways. It is also the rule in this state as laid down by the courts, that the embankment constructed as a necessary approach to the crossing, is a part of the crossing and that the company is required to keep it in repair. As stated by you in the proposition submitted, no railroad company has heretofore questioned its duty to build and maintain adequate crossings. It goes without saying that the building of bridges and culverts over waterways, ditches and drains upon the right of way where the railway crosses a public highway, is an incidental part of the construction of a crossing.

We are clearly of the opinion that railway companies are required to construct and maintain the necessary bridges and culverts incident to the construction and maintenance of proper crossings where its railway crosses a public highway.

TAXATION—DRAINAGE DITCH RIGHTS OF WAY: Under Chapter 173, 42nd G. A., drainage ditches are exempt from taxation, commenced with year 1927.

July 16, 1927. *Auditor of State:* In answer to your letter of recent date making inquiry as to when the provisions of Chapter 173, Acts of the 42nd General

Assembly, relative to exemption from taxation of rights of way for established public levies and rights of way for established open public drainage improvements, will be applicable, you are advised that it is the opinion of this department that said exemption will apply to the taxes assessed in 1927 and payable in 1928. You will note that the act says that such property "shall not be taxed". Property is not taxed until a levy is ascertained and applied to the valuation thereon, entered on the records, and transferred to the collecting officer. In other words, it does not become a lien until the 31st day of December under our law. Therefore, the exemption applies to the taxes for the year 1927, as above stated.

SCHOOLS AND SCHOOL DISTRICTS—INVESTMENT OF FUNDS: Funds in the school house fund levied for the purpose of payment of bonds are not subject to investment and withdrawal from a bank by the board of education.

July 16, 1927. *Superintendent of Public Instruction:* You have requested an opinion of this department upon the interpretation to be placed upon Section 12, of Chapter 92, of the Acts of the Forty-second General Assembly with reference to the investment of public funds.

Said Section 12 of Chapter 92 provides as follows:

"The governing council or board who by law are authorized to direct the depositing of funds shall be authorized to direct the treasurer to invest *any fund not an active fund needed for current use and which is being accumulated as a sinking fund for a definite purpose, the interest of which is used for the same purpose*, in the certificates provided by this act, or in United States government bonds, or in local certificates or warrants issued by any municipality or school district within the county, or in municipal bonds which constitute a general liability, and the treasurer when so directed shall so invest such fund."

It will be noted that the funds to be invested are such funds as are not needed for current use and which are being accumulated as a sinking fund for a definite purpose, the interest on which is used for the same purpose.

To ascertain what funds, if any, held by a school district come within this classification it is necessary to review the provisions of the statute relative to the deposit of public funds. Since your inquiry concerns school funds only we shall direct our attention to that statute only.

In the beginning when interest was first provided for upon the deposit of school funds the interest accrued to the contingent fund. Chapter 247, Acts of the Thirty-fifth General Assembly. Subsequently, when the contingent fund and the teacher's fund of school districts were consolidated into what is known as the "general fund" the interest accrued to that fund. Chapter 386 of the Acts of the Thirty-seventh General Assembly. This provision is retained in the present statute. Section 4319 of the Code of Iowa, 1924.

The cited section, Section 4319, requires the treasurer to deposit all funds in his hands as such treasurer in some bank or banks within the county or within five miles of its border within the state of Iowa as directed by the board of directors. The only exception which can be taken to that section would be the later enactment of Section 12, Chapter 92, and the funds which can be withdrawn from the deposit by order of the board of directors and invested are funds described in said Section 12.

We are of the opinion that an active fund needed for current use is any fund drawn upon from time to time for the payment of obligations coming due and that only such funds as are being accumulated for a definite purpose

and such funds as are entitled to the interest for the benefit of that particular fund can be withdrawn by order of the board of education and invested under the provisions of this section.

It is a well established rule of statutory construction that an exception must be strictly construed. Under this rule, we are of the opinion that a sinking fund in a school house fund for the purpose of retiring outstanding bonds at a future date cannot be withdrawn and invested because the interest thereon has never nor does it now in the absence of a diversion order by the Treasurer of State under Chapter 173, Acts of the Forty-first General Assembly, and acts amendatory thereto accrue to the school house fund but, rather, to the general fund of the school district. We are also of the opinion that a fund out of which payments at stated intervals are made is not subject to the operation of Section 12 of said Chapter 92 because it is an active fund if it is subject to payment at state intervals.

TAXATION: Automobile finance investment should be taxed as moneyed capital.

July 16, 1927. *Auditor of State:* You have requested the opinion of this department on the question of whether money invested by automobile finance companies, where said companies loan money on automobiles purchased on the monthly payment plan, is subject to taxation as moneyed capital or as moneys and credits.

The Supreme Court of the United States in the case of the *First National Bank of Guthrie Center vs. Anderson* 269 U. S., 341, a tax case, stated that the term "other moneyed capital", as used in the taxation of bank stocks and within the meaning of Section 5219 of the revised statutes of the United States, is not intended to include all moneyed capital not invested in national bank shares, but only that which is employed in such way as to bring it into substantial competition with the business of national banks. It is further stated that moneyed capital is brought into such competition where it is invested in shares of state banks or in private banking; and also where it is employed, substantially as in the loan and investment features of banking, in making investments, by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment.

While the Supreme Court in thus defining moneyed capital was referring to the question of unlawful discrimination in the taxation of national bank stock by the taxing officials of Guthrie County, nevertheless, the language used is applicable and of assistance in determining the proposition submitted. National banks make investments by way of loan, discount, etc., in notes and other securities with a view to sale or repayment and reinvestment in this very same manner. They deal to a degree in this same class of finance. Therefore, conversely speaking, the Supreme Court of the United States in these bank tax cases, indicates clearly that money so invested is moneyed capital.

It is therefore the opinion of this department that money invested directly in financing the purchase of automobiles on the monthly payment plan such as you have described, should be assessed and taxed as moneyed capital.

PRISONERS—COUNTY SHERIFF: The board of supervisors may allow the sheriff the actual expense incurred by him in caring for prisoners when the county provides no facilities for this purpose.

July 18, 1927. *County Attorney, Rock Rapids, Iowa:* We wish to acknowledge receipt of your favor of the 1st in which you inquire in substance whether or not the board of supervisors may properly allow claims filed by the sheriff for care of prisoners including their meals amounting to more than the fees which the sheriff may charge for this purpose under the provisions of Section 5191 of the Code of Iowa, 1924. It appears that your county does not have a jail or other suitable place in which prisoners may be kept and that it is necessary for the sheriff to make special arrangements for the care of prisoners and for their meals.

The fees allowed the sheriff under the provisions of the section referred to are fees to which he is entitled as part of his compensation and for which he is not required to account as belonging to the county. The county is responsible and required to provide a safe place to keep prisoners and for their care while confined. If a county jail or other suitable place is not maintained and the sheriff does not have facilities to prepare their meals it would be lawful and proper for the county to make other provisions for the care of prisoners and in doing so the county might properly allow claims for the actual cost of keeping and caring for such prisoners even though the amounts exceed the fees provided for under Section 5191, supra.

COUNTY TREASURER—COUNTIES AND COUNTY OFFICERS: Under Section 7496, County treasurers are authorized to stamp warrants "Not Paid for Want of Funds," drawn on the drainage funds where he has no funds in said drainage account.

July 18, 1927. *County Attorney, Fairfield, Iowa:* We are in receipt of your letter under date of July 15, 1927, requesting an opinion on the following question:

"A drainage district has been established by the Board of Supervisors, assessment has been approved and levied but no payment has been made thereon by any of the assessed property owners. Work has been begun by the contractor and he is demanding payment. *Under these facts would the County Treasurer be authorized to stamp warrants "not paid for want of funds", and drawing legal interest as provided by Section 7496 of the Code?*"

Section 7496 of the Code of 1924, provides as follows:

"All warrants drawn upon the funds of any drainage district, which can not be paid for want of funds, shall bear interest at the rate of six per cent per annum, payable annually, from and after the date of presentation thereof to the treasurer. The treasurer shall indorse such warrants 'Not paid for want of funds', keep a record of the same, together with the name and postoffice address of the holder, issue calls for outstanding warrants at such times as he may have funds to pay the same, and pay such warrants under the same procedure as is provided by law in relation to county warrants generally. No additional presentation of warrants shall be required to entitle the holder to the new warrant, made payable to his order, and bearing the original number, preceded by the words, 'issued as unpaid balance due on warrant number .....'."

Section 7481 of the Code, 1924, provides as follows:

"Such taxes when collected shall be kept in a separate fund known as the drainage or levee fund of the district to which they belong, and shall be paid out only for purposes properly connected with and growing out of the drainage or levee improvement of such district, and on order of the board. Interest collected by the treasurer on drainage or levee districts funds shall be credited to the drainage or levee district to which such funds belong."

We are of the opinion that under Section 7481, set out above, when any

drainage taxes are collected they shall be kept by the county treasurer in a separate fund known as the "drainage or levee fund" of the district to which said fund belongs, and that said funds shall be paid out only for the purposes connected with and growing out of the drainage or levee improvement of such district on the order of the board.

We are also of the opinion that under Section 7496, as set out above, the county treasurer is specifically authorized to stamp all drainage warrants "Not paid for want of funds" where he does not have the funds in the drainage account of a particular drainage district with which to pay the same.

Section 7498 of the Code of 1924, provides for the call by the county treasurer of any unpaid warrants and provides the notice which shall be given the holders of the said warrants.

TAXATION: Property correctly listed by the assessor but not carried on the assessors' books or auditors' books cannot be assessed as omitted property and the penalty for its collection charged. The error should be corrected by the auditor.

July 18, 1927. *Auditor of State:* We wish to acknowledge receipt of your favor of the 2nd in which you request our opinion on the following proposition:

"Where a person assessed gives in monies and credits for taxation, same is placed on the assessment rolls but has not been carried to the assessors' book, nor to the tax list, should same be assessed as omitted property and interest charged at the rate of 6% as required under Section 7155 and would the tax ferret be allowed his per diem for placing same on tax list?"

We are of the opinion that this property should not be assessed as omitted property but that it is an error of the assessor and auditor in not carrying the property listed on the assessment roll to the assessors' book and to the auditors' book. This is an error that should be corrected by the auditor and if the books have been turned over to the treasurer they should be corrected by joint action of the auditor and the treasurer.

SETTLEMENT OF PAUPER—COUNTIES AND COUNTY OFFICERS: A pauper who has resided in a county for one year or more and who has not received notice as provided in Section 5315, obtains a settlement.

July 19, 1927. *Assistant County Attorney:* We are in receipt of your letter under date of July 8, 1927, requesting an opinion on the following question:

Can a pauper who has been residing in the county for more than a year without receiving notice to leave, and who during his period of residence in said county, has been receiving support from the county of his former residence, acquire a residence in said county?

Section 5315 of the Code of 1924, provides as follows:

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

We are of the opinion that if no notice to depart or leave has been served upon said person, and they have lived in said county for the period of one year or more, that said person acquires a settlement in said county as provided for in paragraph 1 of Section 5311 of the Code of 1924, which reads as follows:

"1. Any adult person residing in this state one year without being warned to depart as provided in this chapter acquires a settlement in the county of his residence."

We are of the opinion that the above is true even though the county of the pauper's former residence did for a time contribute to the support of the pauper, while said pauper was residing in the county of his last residence.

LOAN COMPANIES—MISCELLANEOUS: Licensees under Chapter 419, Code of 1924, are not authorized to make loans on real estate.

July 19, 1927. *Superintendent of Banking:* We are in receipt of your letter under date of July 15, 1927, requesting an opinion on the following question:

Are licensees under Chapter 419, the Code of 1924, Sections 9410 to 38, inclusive, authorized to make loans on real estate as well as on chattels?

The title to Chapter 419, is *Chattel Loans.* Section 9410 of said chapter provides as follows:

"No person, copartnership, or corporation shall engage in the business of making loans of money, credit, goods, or things in action in the amount or to the value of three hundred dollars or less, and charge, contract for, or receive a greater rate of interest than eight per cent per annum therefor, except as authorized by this chapter, and without first obtaining a license from the superintendent of banking, hereinafter called the licensing official."

We are of the opinion that licensees under and in accordance with Chapter 419, Code of 1924, are not authorized to make loans under the provision of said chapter upon real estate for the reason that the title to said chapter specifically specifies *Chattel Loans*, and the history of the law as shown by the house and senate files, shows that it was the intention of the Legislature that the purpose of the law was to regulate persons, copartnerships, or corporations, who were engaged in the business of making chattel loans.

CORONER: Is not entitled to charge an additional fee for making scientific examination.

July 19, 1927. *County Attorney, Jefferson, Iowa:* We wish to acknowledge receipt of your favor of the 9th in which you request an opinion upon the following proposition:

"Our coroner is a local physician and takes the position that when he performs a scientific examination, that he should be entitled to additional compensation. I have advised him that I do not feel that he is entitled to such additional compensation. * * *"

Section 5237 of the Code, 1924, enumerates the fees to which the coroner is entitled as his compensation. Section 5218 of the Code, 1924, concerning the duties of the coroner on inquests reads as follows:

"In the inquisition by a coroner or by an acting coroner, when he or the jury deem it requisite, he may summon one or more physicians or surgeons to make a scientific examination, who, instead of witness fees, shall receive a reasonable compensation to be allowed by the board of supervisors. If the coroner is also a physician he may make such scientific examination."

The office of coroner is an ancient office originating in the early days of England and up until recent time the coroners were knights or men of considerable property and financial means. At common law the coroners were entitled to no compensation for their services and neither were the jurors or witnesses who were summoned to appear and testify. In the absence of a statutory provision fixing fees for the coroner he would not be entitled to any

compensation for the duties performed by him. The rule is well stated in 13 Corpus Juris, 1258, where it is said:

"Where the only compensation provided for a coroner for the discharge of his official duties consists of fees, and certain duties are imposed upon him by law for which no compensation is provided, he cannot recover for services in the performance of such duties on the basis of a quantum meruit, nor at all, the conclusive presumption being that compensation for such services is covered by the allowance made for the performance of other official acts for which fees are prescribed."

Although the exact proposition has not been passed upon by our own court, we find a similar holding in the case of a justice of peace in the case of *Sanford vs. Lee County*, 49 Iowa, 148.

It will be noted in Section 5218, supra, that the fees provided in this section refer to the physician or surgeon summoned by a coroner. The provision that the coroner may make such examination is a separate sentence of this section and, of course, the coroner could not summons himself to attend an inquest that he was conducting in his official capacity. This section merely permits the coroner or authorizes him to make such scientific examination if he is a physician or surgeon provided he elects to do so. No compensation for the examination is provided.

In view of the fact that no express compensation is provided for the coroner in the event he is a physician and makes the scientific examination, and the fact that his fees are specifically stated in Section 5237, supra, we are of the opinion that the coroner may not charge an additional sum for scientific examinations made by him in the inquisition.

SCHOOLS AND SCHOOL DISTRICTS—SALARIES—TEACERS: To be entitled to the minimum salary provided for in Section 4341, Code of 1924, teachers must have endorsement of her experience as provided for in Section 4342. School board may be punished under Section 4344, Code of 1924, when they collude with a teacher to defeat the provisions of Section 4341.

July 19, 1927. *Superintendent of Public Instruction:* We are in receipt of your letter under date of July 15, 1927, requesting an opinion on the following question:

Where a teacher has had the necessary two years' experience in teaching, but has not had the proof of successful experience indorsed on the back of her certificate for any one of the following reasons:

1. Ignorance of the requirement.
2. Neglect.
3. Refusal in order that the board may not know that she is entitled to a higher wage.
4. Collusion with the board in order to avoid the requirement of the minimum salary law:

and a school board has entered into a contract with such teacher at a wage or salary that did not take into consideration the teacher's experience, could such board be held for violation of a minimum salary law and punish in accordance with Section 4344, Code of 1924?

Section 4342 of the Code of 1924, provides as follows:

"The holder of any certificate, in order to become entitled to the increase in salary provided by the preceding section because of successful teaching experience, must file with the county superintendent, his certificate, also proofs of one or two years of teaching experience, as the law requires.

"If in the opinion of the county superintendent the proofs are satisfactory, he shall indorse such findings on the back of said certificate and return the

same to the holder thereof, and any certificate properly indorsed by the county superintendent shall be evidence of qualifications for the increase of salary provided by the preceding section for such teaching experience."

We are of the opinion that a teacher who has had the two years' experience as provided for in Paragraph 2, Section 4341 of the Code of 1924, but who through ignorance of the law or through neglect has not had proof of successful experience endorsed on the back of her certificate by the county superintendent, is not entitled to the increase in salary provided for in such a case where she has had the proper endorsement of her experience made, for under Section 4342 above referred to, before the teacher is entitled to demand the minimum wage provided for, after she has had two years' successful teaching she must have had the endorsement made on the back of her certificate.

In such a case the school board who has made a contract with a teacher who has had two years' successful experience but who has not had the endorsement of successful experience made on the back of her certificate, is not required under Section 4342 to pay the minimum salary or wage which said teacher would be entitled to had she had the proper endorsement made on the back of her certificate and so long as the contract provides for payment of the minimum wage provided for teachers who had no experience, said school board could not be punished under Section 4344 of the Code, 1924.

We are, however, of the opinion that the contract of a teacher who has refused to have the certificate of experience endorsed on the back of her certificate in order that the board may not know that she is entitled to the higher minimum wage, or who has colluded with the board in order to avoid the requirements of the minimum salary law, is void and that a school board who has entered into such a contract (colluding with a teacher) at a wage or salary that did not take into consideration the teacher's experience, could be punished under Section 4344, Code of 1924, for violating the minimum salary law.

PURCHASES—REQUISITIONS—BOARD OF CONTROL: Discussion of Chapter 27, Laws of 42nd G. A.

July 19, 1927. *Board of Control:* We desire to acknowledge receipt of your request of July 16th on Chapter 27, Laws of the 42nd General Assembly, in which you submit the following question:

"We would like an opinion as to whether the Board would be permitted where an article cannot be described in general terms, to use a trade name or brand and use the words 'or equal' in order to convey to the bidders in an intelligent manner the kind of quality of the article wanted."

In reply we would say that it is necessary to read carefully the contex of this act where it is clearly set out that the purpose of this act is to promote the use of materials, products, etc., manufactured or grown within the State of Iowa, by requiring a preference to be given them.

In construing a statute the Supreme Court has laid down some rules as follows:

"It must be presumed that the legislature did not intend an enactment to work absurd consequences. *State vs. McGraw*, 191 Iowa 1090."

"'May, must, shall and will' are elastic and frequently treated as interchangeable. *Union Trust and Savings Bank vs. Blair-Harper Feed Co.*, 202 N. W. 839."

"In construing a statute, the rules for interpretation direct attention to the

signs of the legislative intent such as the contex of the clause in question, statutes in pari materia and the reason and spirit of the law. *State vs. Sherman*, 46 Iowa 415."

"In construing a statute it is proper to take into consideration the law as it was before the mischief sought to be remedied and the nature and reason of the remedy. *Elks vs. Conn*, 186 Iowa 48."

In the context of the act referred to, is found the following:

"And the contracting and purchasing agents thereof whenever such materials, products, and supplies are available, suited for the intended use and can be secured without loss; * * *".

But taking into consideration the meaning and purpose of this act, we find that it was not mandatory but is largely directory and does not prohibit the purchase of other materials, products, etc., manufactured outside the State of Iowa, unless the same product manufactured and grown within this state is of equal value for the purpose for which it is procured and the same can be secured at an equal price or less.

"The true application of a statute depends upon the legislative intent, which is to be ascertained by means of well known rules of interpretation, and not alone from the abstract and permissible definition of terms used. *Fidelity Loan and Trust Company vs. Douglas*, 104 Iowa 532."

"In arriving at the intention of the legislature, the subject matter, effect, consequences and reason and spirit of the statute must be considered as well as words, in interpreting and construing it. *Newgirg vs. Black*, 174 Iowa 636."

Whether the public demand would be for certain products, and this would be a matter of discretion resting with the department purchasing the same, it was evidently not the intention of the legislature to hold the purchaser to a strict and literal interpretation of this chapter and this particularly applies to certain products which are of technical and professional use, as for instance, medicines, medical instruments and objects of like character.

"Where a statute is of doubtful construction, it is proper to give some weight to what might be considered as demanded or forbidden by the public interest. *Small vs. C. R. I. & P. Ry.*, 50 Iowa 338."

Upon matters which public interest would demand should be discretionary on the part of the purchaser, the word "shall" in the third line of Section 2, of Chapter 27 will be regarded as "may".

"The word 'shall' appearing in statutes is generally construed to be mandatory, but, where no right or benefit depends upon its imperative use, it may be and often is treated as being synonymous with 'may'. *Vale vs. Messenger*, 184 Iowa 553."

We are, therefore, of the opinion in view of the above citations and a careful reading of the context and sections of Chapter 27, that the purpose of this chapter was to promote the use of Iowa Products and was not intended to be so literally construed that articles of a technical or professional nature which are known only by a brand or trade name, could not be so designated in the requisitions placed before your department and that this section should be construed as to give all reasonable or equitable benefit to Iowa products but is not to be adhered to so strictly that state institutions will be supplied with inferior goods or goods which are not adapted for the use intended.

TAXATION—DRAINAGE EXEMPTION: The amount of right of way may be determined from the records required to be filed with the auditor in connection with the drainage improvement.

July 20, 1927. *County Attorney, Pocahontas, Iowa:* We wish to acknowledge receipt of your favor of the 30th in which you inquire, in substance, the

manner in which the auditor is to determine the amount of land exempt from taxation when used for drainage purposes under the provisions of Section 6945 of the Code of 1924, as amended by Chapter 173, Laws of the Forty-second General Assembly, when there is no record of the land contained in the right of way as required under the provisions of Section 7438 of the Code of 1924.

Under the earlier drainage laws of this state it was necessary that a survey be made of the proposed improvement which was required to be filed with the auditor of the county. If the improvement was ordered by the supervisors contracts were let and filed with the auditor. From these records the auditor should be able to ascertain the width of the ditch and its length. With this information it is merely a matter of mathematical computation to determine the number of acres exempt and we are of the opinion that this is the procedure that should be followed.

STATE BOARD OF CONSERVATION—EXECUTIVE COUNCIL: The state board of conservation with the approval of the Executive Council has the power to list property under its jurisdiction for the period of one year only.

July 20, 1927. *Executive Council:* We are in receipt of your letter under date of July 15, 1927, requesting an opinion on the following:

Has the State Board of Conservation the power to grant authority to power companies to run wires and poles through state parks to give service to the power companies' customers on the other side of the park?

Section 1819, Code of 1924, provides as follows:

"The board may, with the approval of the executive council, lease for periods not exceeding one year such parts of the property under its jurisdiction as to it may seem advisable. All leases shall reserve to the public of the state the right to enter upon the property leased for any lawful purpose."

We are of the opinion that the State Board of Conservation, with the approval of the Executive Council, has power to lease a right of way through a state park to power companies for the purpose of running wires and poles through the state park. However, under Section 1819, it will be noted that the lease cannot be made for a period exceeding one year.

PARTIAL PAYMENT CERTIFICATES—CERTIFICATES: The company issuing certificates payable on partial payments comes within the provisions of Chapter 392, Code of 1924, and the fact that a policy of insurance is required to be taken by the purchaser in another company and deposited with the selling company does not exempt the seller from the provisions of the statute.

July 20, 1927. *Auditor of State:* We wish to acknowledge receipt of your favor of the 19th in which you request our opinion as to whether or not certain certificates which the Lincoln Securities Company of Colorado proposes to sell in this state would come within the provisions of Chapter 392 of the Code of 1924.

We have examined the copies of the certificates enclosed by you and are clearly of the opinion that the sale of these certificates would fall within the provisions of the chapter referred to. The fact that one form of the certificate contains a provision in reference to the deposit of an insurance policy with the company who pay the premiums thereon as long as the cash surrender value of the certificate is sufficient does not bring the sale of the certificate within the exception of the chapter referred to. Section 8517 of this chapter in part provides:

"The term 'association' shall mean any person, firm, company, partnership association or corporation, other than building and loan associations and insurance companies and associations, which issue stock on the partial payment or installment plan. * * *"

The term "stock" is defined in this section to mean certificates or contracts in the nature of those submitted. It will be noted that the exception above referred to is that of "insurance companies and associations". These certificates are not issued by an insurance company but by the Lincoln Securities Company, the policy referred to being in a separate company known as the Continental Assurance Company.

BUDGET LAW—CITIES AND TOWNS: Cities and towns may anticipate tax authorized to be levied by Paragraphs 8 and 9, Section 6211, and to issue certificates or bonds in anticipation of the same.

July 21, 1927. *Director of the Budget:* We are in receipt of your letter under date of July 19, 1927, requesting an opinion on the following question:

1. In reading Section 6261, is it your opinion that cities with a population of less than 3,000 and towns may anticipate the tax authorized to be levied by Paragraphs 8 and 9 of Section 6211, and issue bonds or certificates for the purchase of fire equipment?
2. What is your interpretation of Section 5767 of the Code of 1924, in connection with the preceding question?
3. If fire equipment is purchased by a city or town and bonds or certificates are issued under the provision of Section 6261, Code of 1924, should such bond issue be charged against the constitutional limit of debt a city or town may incur?

We shall answer the questions in the order in which they are set out.

I.

Section 6261 of the Code, 1924, provides as follows:

"Any city or town may anticipate the collection of taxes authorized to be levied for the grading fund, city improvement fund, district sewer fund, city sewer fund, the fund for equipping fire departments, the fund for the construction of sewer outlet and purifying plants, the fund for paving roadways, and the fund for flood protection, and cities of the first class may so anticipate the taxes used for the fund for the construction of main sewers, and for that purpose may issue certificates or bonds with interest coupons."

We are of the opinion that under Section 6261 of the Code, 1924, cities and towns with a population of less than 3,000 may anticipate a tax authorized to be levied by Paragraphs 8 and 9, Section 6211, Code of 1924, and issue bonds or certificates for the purchase of fire equipment. Authority is specifically granted to cities and towns to anticipate the collection of taxes authorized to be levied for equipping fire departments.

II.

We are of the opinion that Section 5767 does not in any way conflict with Section 6261, Code of 1924. Section 5767 simply grants a city power to, by ordinance or resolution, levy at any one time the whole or any part of the cost of the fire property and equipment so long as they do not exceed one and one-half mills to be paid each year over a period of not to exceed ten years, and a city or town may proceed either under Section 5767 or Section 6261, Code of 1924.

III.

We are of the opinion that if fire equipment is purchased by a city or town

and bonds or certificates are issued under the provisions of Section 6261 of the Code, 1924, that such bond issue should be charged against the constitutional limit of debt a city or town may incur; the constitution providing that no municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount in the aggregate exceeding five per cent (5%) in value of the taxable property within such county or corporation.

LEASES—COUNTIES AND COUNTY OFFICERS: Board of Supervisors do not have authority to lease property belonging to the county.

July 21, 1927. *County Attorney, Atlantic, Iowa:* We have your letter under date of July 15, 1927, requesting an opinion on the following question:

Would the Board of Supervisors have the legal right to enter into a long time lease with our local post of the American Legion, whereby a part of the grounds upon which our county court house stands would be leased to the Legion post and the Legion post permitted to erect or move onto this land a building for use by the Legion?

We have made a careful study of the statutes granting the power to boards of supervisors and are of the opinion that the board of supervisors does not have the power to lease property belonging to the county for the power to lease county property has not been specifically granted to the board of supervisors, nor has here been any power granted to them where such power would be necessarily implied.

Paragraph 13, Section 5130 of the Code, 1924, provides as follows:

"* * * 13. When any real estate, buildings or other property are no longer needed for the purposes for which the same were acquired by the county, to sell the same at a fair valuation."

We are of the opinion that under the above section, if the county board of supervisors in the exercise of their discretion; decided that any real estate, buildings or other property were no longer needed for the purpose for which they were acquired, they might sell the same at a fair valuation but this section would not, in our opinion, give them the right to lease said property or any part of it.

INDUSTRIAL COMMISSIONER—WORKMEN'S COMPENSATION: Compensation claims of employees of the State Highway Commission are to be paid out of the general fund of the state treasury or out of the appropriation made to Industrial Commissioner for such purpose.

July 22, 1927. *Director of the Budget:* We are in receipt of your letter under date of July 21, 1927, requesting an opinion on the following question:

Should workmen's compensation claims of employees of the State Highway Commission be paid out of a primary road fund, the uses of which fund are defined in Section 4, Chapter 101, Acts of the Forty-second General Assembly?

Section 1418, Code of 1924, provides as follows:

"All valid claims now due or which may hereafter become due employees of the state under the provisions of this chapter shall be paid out of any funds in the state treasury not otherwise appropriated."

Section 1419, Code of 1924, provides as follows:

"The auditor of state is hereby authorized and directed to draw warrants on the state treasury for any and all amounts due state employees under the provisions of this chapter upon there being filed in this office, either a memorandum of settlement approved by the industrial commissioner or of an award made by a board of arbitration, for which no review is pending, or an

order of the industrial commissioner from which no appeal has been taken, or a judgment of any court of the state accompanied by a certificate of the industrial commissioner setting forth the amount of compensation due and the statutory provisions under which the same should be paid."

We are of the opinion that Section 4, Chapter 191, Acts of the Forty-second General Assembly, does not in any way change the manner or method of paying compensation claims of the employees of the State Highway Commission.

Section 1418, as set out above, provides that all claims for compensation of state employees shall be paid out of any funds in the state treasury not otherwise appropriated. Section 1419 authorizes and directs the auditor of state to draw warrants on the state treasury in payment of compensation claims when a memorandum of settlement approved by the industrial commissioner or of an award made by a board of arbitration for which no review is pending, or an order of the industrial commissioner from which no appeal has been taken, or a judgment of any court of the state accompanied by a certificate of the industrial commissioner setting forth the amount of compensation due and the statutory provisions under which the same should be paid.

Claims for compensation of employees of the highway commission should, therefore, be paid in accordance with Sections 1418 and 19 of the Code of 1924.

STAY BONDS: Under Section 13970 Code 1924, stay bond stays execution against defendant's real estate when proceeding against it to collect fine.

July 25, 1927. *County Attorney, Waterloo, Iowa:* You have requested the opinion of this department as to whether or not under the provisions of Section 13970 of the Code, the stay bonds referred to therein, given by defendant under judgment to pay a fine, will stay or withhold the issuance of the mittimus for failure to pay the fine.

You are advised that the provisions of Chapter 655, Code of 1924, relate to the subjecting of real estate, owned by a defendant who has a judgment for a fine against him, to the payment of the fine. Section 13970 provides for the stay of execution against such real estate and not to the stay of the mittimus, which issues out of the court committing the defendant for failure to pay the fine. All that these provisions do is to protect the real estate and do not in any manner affect the issuance of the mittimus.

INTOXICATING LIQUOR—CONVEYANCES: Mortgages and conditional sale vendors are not included within the meaning of the word "owner" as used by Section 2004, Code of 1924.

July 25, 1927. *County Attorney, Fairfield, Iowa:* We are in receipt of your letter under date of July 21, 1927, requesting an opinion on the following question:

Would a proper construction of the word "owner" as used in the second line of Section 2004 of the Code of 1924 include a mortgage holder or a holder of a conditional contract of sale?

We are of the opinion that mortgages and vendors under a conditional contract of sale are not included within the term "owner" as used in Section 2004.

Section 2012, provides in part as follows:

"No conveyance shall be returned to any claimant, either as owner or lien holder, nor shall any claim be established when such claimant: * * *"

Under this section it will be noted that there is a distinction made between a claimant as owner and a claimant as a lien holder, and this section being a

part of Chapter 97, of the Code of 1924, of which Section 2004 is a part, we think shows clearly that a mortgagee or lien holder was not intended to be included within the meaning of the word "owner".

INDUSTRIAL COMMISSIONER—WORKMEN'S COMPENSATION: Claims for compensation of employees of the State Fair Board should be paid out of any funds in the state treasury not otherwise appropriated or out of appropriation named to Industrial Commissioner for that purpose.

July 25, 1927. *Director of the Budget:* We are in receipt of your letter under date of July 22, 1927, requesting an opinion on the following questions:

1—Should not claims for workmen's compensation on account of state fair board employees be paid out of the receipts of the board instead of out of the state treasury?

2—Should not the state fair board be required to reimburse the state for claims paid out of the state treasury on account of compensation for the employees of the board from the date of the enactment of Section 2888 of the Code?

Section 1418, Code of Iowa, 1924, provides as follows:

"All valid claims now due or which may hereafter become due employees of the state under the provision of this chapter shall be paid out of any funds in the state treasury not otherwise appropriated."

We are of the opinion that under the section above set out, that all the claims for workmen's compensation on account of state fair board employees should be paid out of any funds in the state treasury not otherwise appropriated, and that Section 2888, Code of 1924, has not in any manner amended or changed the provisions of Section 1418 and of Section 1419 of the Code of 1924.

The state fair board should, therefore, not be required to reimburse the state for claims which have been paid out of the state treasury on account of compensation due employees of said board.

GASOLINE TAX: If remittance is mailed on or before 20th of month for preceding month's business it is in time under provisions of Section 4, Chapter 248, Acts of 42nd G. A.

July 26, 1927. *Treasurer of State:* You have requested the opinion of this department on the following proposition:

"Section 4, Senate File 347, Acts of the 42nd G. A., fixes the time for filing report by gasoline distributors of gasoline imported the preceding month. It also fixes the time that payment should be made of the license fees on gasoline imported.

"In reading the entire section it appears that there is a conflict in the time that remittance must be made, and an opinion is desired as to whether or not we may accept remittance without penalty if said remittance is mailed on the 20th day and received in the office the following day. * * *"

After carefully reading all the provisions of law pertinent to the question presented, we are of the opinion that you should accept without penalty any remittance mailed you upon the 20th of the month for the preceding month, as indicated by the postmark thereon, regardless of the date, received at your office.

DEPOSITORY—COUNTY TREASURER—BANKS: State funds not liable for proportionate share of loss in closed bank.

July 29, 1927. *Auditor of State:* We desire to acknowledge receipt of your request of July 12th in which you submit the following for an opinion:

"When a county treasurer having public funds deposited in a depository bank, which fails and is liquidated, creating a loss of such public funds, can the treasurer charge off such loss to the funds affected, or is that a matter for action of the board of supervisors?

"If the loss may be charged off, can any part of such loss be charged to state funds or automobile license account?"

* * * In view of the fact that the Board of Supervisors are given general powers to examine and settle all accounts, and to examine, settle and allow all claims, and to have the care and management of the property and business thereof, in all cases where no other provision is made, it would therefore be proper that the Board of Supervisors adopt a resolution reciting the facts with reference to the deposit of this money, the failure of the bank and the appointment of a receiver, the amount received from dividends and from the sureties on the depository bonds, and the amount of the loss. They should therein instruct the county treasurer and county auditor to make the proper entries on the books in their offices, showing the amount of the loss so that said loss could be charged off against the funds affected as deposited in the insolvent depository, excepting the state funds and soldiers' bonus fund.

As to your second question, it is not the power of the county, either through the Board of Supervisors or any other officer, to charge such loss off to any state funds. County revenues are subject to legislative control and its local government can have no will contrary to the will of the state. It is subject to the paramount authority of the state in respect to both its property and revenue held for public purposes.

We are, therefore, of the opinion that it is the duty of the Board of Supervisors by resolution, to charge off such loss against the several funds included in the deposit but not to include therein any state funds or any money belonging to the soldiers' bonus fund.

CITIES AND TOWNS—INDEBTEDNESS: Bonds or certificates issued for the purpose of purchasing fire equipment under the provisions of Sections 6261-2 and 3, do not create a debt which should be charged against the constitutional limit of a debt a city or town may incur.

July 30, 1927. *Director of the Budget:* We are in receipt of your letter under date of July 28, 1927, requesting an opinion on the following question:

If fire equipment is purchased by a city or a town and bonds or certificates are issued under the provisions of Section 6261 of the Code of 1924, should such bond issue be charged against the constitutional limit of debt a city or town may incur?

Article 11, Section 3 of the Constitution of the State of Iowa, provides as follows:

"No county, or other political or municipal corporation should be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation—to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness."

Section 6261 of the Code of 1924 provides as follows:

"Any city or town may anticipate the collection of taxes authorized to be levied for the grading fund, city improvement fund, district sewer fund, city sewer fund, the fund for equipping fire departments, the fund for the construction of sewer outlet and purifying plants, the fund for paving roadways, and the fund for flood protection, and cities of the first class may so antici-

pate the taxes used for the fund for the construction of main sewers, and for that purpose may issue certificates or bonds, with interest coupons."

Section 6263 of the Code of 1924, provides as follows:

"Said certificates or bonds and interest thereon shall be secured by said assessments and levies, and shall be payable only out of the respective funds named, pledged to the payment of the same, and no certificates or bonds shall be issued in excess of taxes authorized and levied to secure the payment of the same. It shall be the duty of said city to collect said several funds with interest thereon, and to hold the same separate and apart, in trust, for the payment of said certificates or bonds and interest, and to apply the proceeds of said funds pledged for that purpose to the payment of said certificates or bonds and interest."

Paragraphs 8 and 9 of Section 6211 of the Code of 1924 authorizes the levy of one and a half mills to be used to acquire property for the use of the fire department and to equip the same and, also, for the levy of two mills to be used to maintain the fire department except that cities of the population under three thousand, and towns, may also use the fund to purchase fire equipment. We are of the opinion that bonds or certificates issued for the purpose of purchasing fire equipment under the provisions of Section 6261 of the Code of 1924, do not create a debt which should be charged against the constitutional limit of debt a city or town may incur. That is, of course, provided the bonds or certificates are issued strictly in compliance with Sections 6261-2-3, and are chargeable only against the particular fund and that only.

In reaching this conclusion we have looked to the decisions of our own supreme court for guidance and in the case of *Grant vs. City of Davenport*, 36 Iowa 396, Justice Cole held that even if there be no money in the treasury, yet current expenses incurred in anticipation of collection of taxes duly levied do not constitute an indebtedness within the meaning of the constitutional provision. The theory upon which this holding is justified is said to be that while the right to use the current revenue actually in the treasury for current expenses even as against a claim of creditors is absolutely necessary to the life of the municipality and to the successful accomplishment of the purposes of its creation. It is equally legitimate to make an appropriation in advance of the receipt of the revenues because that the revenues will be receipted is a legal certainty.

In the case of *Swanson vs. City of Ottumwa*, 118 Iowa, page 180, Justice Weaver held that obligations incurred in anticipation of revenues yet to be collected and those incurred in anticipation of or reliance upon a ***special fund*** pledged to their payment are not to be regarded as debts in applying the constitutional limitation. If the obligation creates a debt which is a general obligation and payable out of any funds belonging to the municipality, then, it is usually construed to be a debt chargeable against the constitutional limit.

We are of the opinion, therefore, that under the holdings of the cases above cited we can reach no other conclusion than the one stated above. So much of our opinion rendered you under date of July 21, 1927, as may seem or be inconsistent to this opinion is hereby recalled, this opinion being the controlling one.

BOARD OF CONTROL AND STATE INSTITUTIONS—BLIND PENSION: A blind person who is a student of a State blind school is not entitled to the pension provided for under Chapter 272, Code of 1924.

August 1, 1927. *County Attorney, Knoxville, Iowa:* We are in receipt of your letter under date of July 30, 1927, requesting an opinion on the following question:

Is a young woman who is blind and at the age of twenty-four, entitled to a blind pension under Chapter 272 of the Code of 1924, when it appears that she has been a student of the blind school at Vinton, Iowa, since she was seven years old and contemplates attending there for another year? When she first attended the blind school at Vinton, her parents were residents of Monroe, County, Iowa. Twelve years later her parents moved to Mahaska County. Three years ago they moved to Marion County. If she is entitled to a blind pension, what county should pay it?

We are of the opinion that in construing Chapters 203-4 together with Chapter 272, that while the blind girl was attending the school at Vinton, in accordance with the provisions of Chapters 203 and 204, that she is not entitled to a blind pension as provided for in Chapter 272, for while she is a student she is being supported in accordance with said Chapters and there would be a duplication of support were she permitted to have a pension as provided in Chapter 272.

This girl is now a resident and has obtained a settlement in Marion County and if she should not attend school she would be entitled to the pension provided by Chapter 272 and Marion County would have to pay it.

TAXATION—BANKS: State bank only entitled to deduct real estate in the name of the bank.

August 1, 1927. *County Attorney, Clinton, Iowa:* At your request Mr. John W. Strohm, State Fire Marshal, requested our opinion, in substance as to whether or not in assessing a state bank the bank was entitled to deduct real estate appearing in the name of certain of its stockholders personally; the bank contending that there was some understanding with the stockholders concerning the title to the property, and that it is in fact the real estate of the bank.

Under the taxing statute banks are entitled to deduct only such real estate as they own by legal title, and a deduction of real estate appearing in the name of stockholders as individuals would not be authorized.

FENCES—TOWNSHIP TRUSTEES: Trustees have no jurisdiction in an incorporated town.

August 2, 1927. *County Attorney, Sigourney, Iowa:* I desire to acknowledge receipt of your request of July 21st in which you submit the following question:

"Under Section 5543, the township trustees are fence viewers of the township and do the township trustees have jurisdiction to decide controversies arising in regard to fences in an incorporated town?"

Under Section 5531, it is provided that a township may be divided where it includes a city or town with a population exceeding 1,500 and under Sections 5553 and 5554 where a city or town constitutes one or more civil townships, the offices of township trustees are abolished and their duties taken by the city council and city clerk.

Under Section 5738 is found the general powers granted to a council and we believe this is broad enough and it was the intention to place all power formerly given township trustees, in the city council and that it was not the intention of the legislature to confer upon township trustees any jurisdiction within the incorporated limits of a city or town.

We are, therefore, of the opinion that township trustees have no jurisdiction to act as fence viewers within an incorporated town.

COMMISSIONER OF LABOR—CHILDREN: Parents must control or manage amusement place to come within the exceptions in Sec. 1526, Code of 1924. Work permit to be issued at place of residence.

August 2, 1927. *Commissioner of Labor:* We desire to acknowledge receipt of your request of July 15th in which you submit the following questions:

Can a child under fourteen years of age be used in an act conducted by its parents when such act is only a part of a general show in a place of amusement conducted by a general manager not the parent of the child?

Is the work permit to be issued by the superintendent of a school or person authorized by him in writing in the school district where the child is to work, or from the district of the child's residence?

In reply we desire to set out Section 1526 of the Code of 1924, which is as follows:

"No person under fourteen years of age shall be employed with or without compensation in any mine, manufacturing establishment, factory, mill, shop, laundry, slaughter house, or packing house, or in any store or mercantile establishment where more than eight persons are employed, or in any livery stable, garage, place of amusement, or in the distribution or transmission of merchandise or messages; but nothing in this section shall be construed as prohibiting any child from working in any of the above establishments or occupations when operated by his parents."

In view of the above section, we are of the opinion that to fall within the exception noted in the last four lines of this section, the parents would have to be in control of the place of amusement. In other words, that though they had control of the child or children, the fact that they themselves were but employees would not place them within the exceptions noted in this section.

In reply to the question concerning the work permit, we believe that this should be issued by the superintendent of the schools, or other party authorized to issue same at the place of the child's residence where the child's school record is available and all the conditions are known.

We are, therefore, of the opinion that a child under fourteen years of age cannot be used in an act conducted by its parents when such act is only a part of a general show of which the parents are not the owners or in control, and that a permit authorizing the child to work should be issued by the superintendent or other party authorized in the district where the child resides but that such permit would not be limited to one particular locality.

SCHOOLS—COUNTY SUPERINTENDENT—DEPUTY—BOARD OF SUPERVISORS: It is within the power of the Board of Supervisors to determine whether or not in their judgment a deputy to the county superintendent shall be appointed as well as to fix the salary.

August 3, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your request for an opinion upon the following proposition:

Is the power of the county board of supervisors limited to the approval of the qualifications or suitability of a deputy county superintendent; or may the board of supervisors refuse to approve an appointment on the sole grounds that they do not consider a deputy necessary to the office?

It is provided by statute, Section 5238, Code of Iowa, 1924, as follows:

"Each county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, and county superintendent of schools, *may, with the approval*

of the board of supervisors, appoint one or more deputies or assistants, respectively, not holding a county office, for whose acts he shall be responsible. The number of deputies, assistants, and clerks for each office shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board."

It will be noted from the above quotation that the appointment may be made. It will also be noted that the number of deputies should be determined by the board of supervisors.

We are, therefore, of the opinion that it is within the power of the board of supervisors to determine that no deputy is necessary for the office of county superintendent and that the board is within its power in refusing to approve an appointment if, in its judgment, a deputy is not necessary.

SCHOOLS AND SCHOOL DISTRICTS: A school district liable for tuition of a high school pupil under the provisions of Section 4277 is not entitled to an offset of the tax, under Section 4269.

August 4, 1927. *County Attorney, Algona, Iowa:* This will acknowledge receipt of your letter of recent date in which you request an opinion of this department upon the following proposition:

"A child taking high school work and having duly finished the 8th grade in his own school district attends school in a district having a high school course. The father of the child owns property and is paying sufficient taxes in the school district where said child attends and in sufficient amount to pay the entire tuition, or if offset to equal the amount of the tuition charged. However, the District certifies to the County Auditor the total amount of the tuition and the County Auditor proceeds to charge same to the District in which the child lives.

"Is the amount of the tax paid by the parent of the child deductible, and if so what would be the proper method?"

It is provided by statute, Section 4277 of the Code of Iowa, 1924, that the tuition of any student attending a high school in a foreign school corporation shall be paid by the district of his residence if that district does not maintain a high school. From this it will be observed that the obligation of paying tuition to the school corporation furnishing the high school training is upon the school corporation of the student's residence and is not an obligation of the parent or guardian.

It is further provided by statute with reference to the offset of taxes paid by a parent in Section 4269, Code of Iowa, 1924, as follows:

"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."

From this section it will be observed that the right to the offset is reserved by the statute to the parent or guardian and not to the school district of the student's residence.

We are, therefore, of the opinion that the school district of the residence of a student who attends high school in another corporation is not entitled to offset the tax paid by the parent or guardian of the student on such tuition and that the district of the student's residence must pay the tuition to the claimant corporation.

COUNTY HOSPITALS—HOSPITALS: 1—A county hospital board may erect a nurses' home without a vote of the people if it has funds available without

the issuance of bonds. 2—There is no authority for the transfer of moneys from the county poor fund to the county hospital fund.

August 5, 1927. *Director of the Budget:* You have requested from this department an opinion upon the following proposition:

"The trustees of a county hospital desire to contract for the erection of a nurses' home in connection with said hospital, to cost from $30,000 to $35,000—$15,000 of which is donated by a private party, the balance to be taken $10,000 from the maintenance fund of said hospital and $10,000 to be transferred from the poor fund of the county to the said hospital building fund. There will be no additional levies required and no bonds to be issued.

"Is it legal to make such expenditure without a vote of the people?"

The county hospital is established by a vote of the people under the provisions of Chapter 269, of the Code of Iowa, 1924, being sections 5348 and 5368 of the said code.

Among the powers granted to the board is the following:

"1. Purchase, condemn or lease a site for such public hospital and *provide and equip* suitable hospital buildings. **"

Section 5359, Code of Iowa, 1924.

The board is further empowered to levy a tax not to exceed two mills for the maintenance of such hospital. Section 5353, Code of Iowa, 1924. The board is also empowered to issue bonds when authorized to do so by the electors at an election.

It will, therefore, be observed that the only propositions required to be submitted to the electors are the one to establish the hospital and the one to issue bonds. However, the funds available in the maintenance fund can be used for this purpose only when transferred by the board of trustees of the hospital with permission of the Director of the Budget under the provisions by the authority of Sections 387 and 388 of the Code of Iowa, 1924.

This department has ruled under date of May 21, 1927, in an opinion to J. W. Long, Auditor of State, that there is no authority for transferring from the county poor fund to the county hospital fund. It would, therefore, be beyond the authority of the board of supervisors to transfer the $10,000 surplus in the instant case to the county hospital fund for the purposes desired.

Under the provisions of the statutes cited, we are of the opinion that the board of trustees of the county hospital may erect a nurses home in connection with such hospital without a vote of the people if the funds are available within the tax levies authorized by the statute.

BOARD OF SUPERVISORS: Board of Supervisors have no authority to pay the bill incurred by an organization of citizens who employed an undercover man to obtain evidence concerning the violation of the liquor laws.

August 5, 1927. *County Attorney, Tama, Iowa:* We wish to acknowledge receipt of your favor of the 3d in which you request our opinion on the following proposition:

"Some certain citizens of Traer, Iowa, in Tama County, Iowa, without the knowledge or consent of the Board of Supervisors and County Attorney, employed a Federal officer as an under cover man to obtain information for the conviction of law violators under the Prohibition Laws of the Federal Government. These citizens appeared before the Board of Supervisors yesterday, asking the Board to allow payment of a bill of some $307.00 for expenditures thus made.

"I do not know where there is any law authorizing,

"First: Citizens to contract indebtedness in matters of this kind without

some agreement with the Board of Supervisors as to the payment of the claim.

"Second: Have the Board of Supervisors any right to pay the claim under the circumstances, if the same has been contracted by the citizens unknown to the Board of Supervisors?

"Third: Whatever action was taken was under the Federal Act and not the State law and would it not be expected that whatever help or assistance was given should be taken care of, if at all, under the Federal Appropriations Act?

"Fourth: Would it not follow, that if citizens of Traer, under the state of facts, could be re-imbursed for their acts in the premises and authorize payment of the claim, could not the other towns and cities of the county compel the same action by the Board of Supervisors to approve claims unauthorized, in the same way?

"I would appreciate having your opinion in due time concerning the above matters and oblige."

There can be no question but that the Board of supervisors and your county would not be responsible for expenses or any indebtedness for services rendered by one employed in the manner stated in your request. Only the Board of Supervisors have authority to bind the county to pay such an indebtedness. Neither would the Board of Supervisors be authorized in reimbursing citizens of Traer for payments made by them to an under cover man or person whom they individually employed to obtain evidence concerning the violation of the prohibitory laws. Such claims would not be obligations of the county and the board would not be authorized in allowing them.

We do not know what procedure might be taken to procure reimbursement from the federal government. This is a matter that probably should be taken up with the United States District attorney. I doubt very much, however, whether the federal government would be willing to reimburse the citizens in question for the expense they have incurred.

BANKS AND BANKING—COUNTY AUDITOR—TAX SALE CERTIFICATES: A county auditor is not liable for deposits of trust funds deposited by him in a bank. This applies to the holder of redemption money for tax sale certificates.

August 6, 1927. *County Attorney, Pocahontas, Iowa:* This will acknowledge receipt of your letter of recent date in which you request an opinion of this department upon the following proposition:

What is the liability of the county auditor in a case where he has received redemption money, placed same in a bank designated by the county board of supervisors as a depository of public funds of the county in the name of the auditor as auditor, which bank closed and which bank has now paid a dividend of ten per cent to the auditor as auditor and which dividend has been tendered to the certificate holder and by him refused and demand made for the full amount?

It is assumed that the auditor is not guilty of fraud or bad faith and that he used reasonable diligence in selecting the bank for a depository.

No case of this nature has been the subject of final judicial determination in our jurisdiction. We have had the question arise a number of times but have not had any certificate holder contest our position that the certificate holder is entitled to be subrogated to the rights of the county auditor in whatever dividend is paid upon the account. Our position that the county auditor is not liable in the absence of bad faith or lack of due diligence has also been sustained by district courts of the state in several instances. In the Des Moines banks where this question first arose a number of certificate holders

through their attorneys filed petitions of intervention praying that they be subrogated to the rights of the county auditor in the deposit in proportion to the amount that their certificate bore to the full amount deposited in that particular fund.

We are, therefore, of the opinion that the county auditor is not liable under the above statement of facts and assumptions and that the certificate holder is entitled only to whatever dividend is paid upon the deposit by the bank.

COUNTIES AND COUNTY OFFICIALS—REAL ESTATE MORTGAGES INDEXED AS CHATTELS: Real estate mortgages which pledge the rents, issues and profits or which convey the rents, issues and profits, create an incumbrance on personal property and should be indexed in accordance with Section 10032.

August 6, 1927. *County Attorney, Waukon, Iowa:* We are in receipt of your letter under date of August 3, 1927, requesting an opinion on the following question:

Section 10032, of the Code of 1924, as amended by the Acts of the Forty-second General Assembly, provides as follows:

"Real estate mortgages which create an incumbrance on personal property shall, after being recorded at length, be indexed in the chattel mortgage index book.* * *"

Does the following clause contained in a real estate mortgage, create an incumbrance on personal property within the meaning of the above section:

"* * and for the foreclosure of this mortgage, and as a part of the decree therein, the mortgagors agree that a receiver may be appointed by the court upon the request of the party of the second part, its successors or assigns, such receiver to take immediate possession of said mortgaged premises and to have the management of same and *shall collect the rents and profits thereon, either in the form of crop and share rent or cash rent, for the year allowed by law for redemption, and the net profits after the payment of expenses, shall be applied toward the payment of this indebtedness.*"

We are of the opinion that the clause above referred to, does not create an incumbrance on personal property within the meaning of the above section. Our Supreme Court has decided this question in the case of *Whiteside vs. Morris*, 197 Iowa, page 211. The Supreme Court held that a real estate mortgage containing no pledge of the rents except an authorization of an appointment of a receiver to take charge of said rents in the event of foreclosure, creates no lien on such rents until foreclosure is commenced and such receiver is appointed. You will see that the court makes a distinction between a real estate mortgage which contains a pledge of the rents, and one which contains only the authorization of the appointment of a receiver for the collection of such rents.

SCHOOLS AND SCHOOL DISTRICTS: An elective course in bible study may be given in high school.

August 8, 1927. *Superintendent of Public Instruction:* You have requested an opinion of this department upon the following proposition:

"Does Section 4250 which confers upon the school board the authority to prescribe courses of study for the schools of the corporation, permit the board to provide for a course in Bible study in high school for which credit towards graduation is allowed? In some schools this work is taught by a regular teacher on the school pay roll, while in other schools the work is divided among various ministers."

It is provided by statute, Section 4250 of the Code of Iowa 1924, that the

board of education of any school corporation shall prescribe courses of study for the schools of the corporation.

From this it will be observed that a board of education has the power to prescribe courses of study and to evaluate same for graduation purposes. Under this section, then, the board of education has the power to prescribe whatever courses of study its discretion may direct and may include a course in bible study unless restricted in its power to prescribe a course of study or prohibited from offering a course in bible study either by the statutes or by the constitution.

It is provided by statute, Code of Iowa, 1924, Section 4258, as follows:

"The bible shall not be excluded from any public school or institution in the state, nor shall any child be required to read it contrary to the wishes of his parent or guardian."

The constitutionality of this section has been the subject of judicial review by our supreme court in the case of *Moore vs. Monroe, et al.*, 64 Iowa 367, 20 N. W. 475, in which case the section was held constitutional. The court, speaking through Mr. Justice Adams, said:

"The plaintiff insists, however, that it is unconstitutional. The provision of the constitution which it is said to conflict with is article 1, section 3, bill of rights. The provision is in these words: 'The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister or ministry.'

"The plaintiff's position is that, by the use of the school-house as a place for reading the Bible, repeating the Lord's prayer, and singing religious songs, it is made a place of worship; and so his children are compelled to attend a place of worship, and he, as a taxpayer, is compelled to pay taxes for building and repairing a place of worship.

"We can conceive that exercises like those described might be adopted with other views than those of worship, and possibly they are in the case at bar; but it is hardly to be presumed that this is wholly so. For the purposes of the opinion it may be conceded that the teachers do not intend to wholly exclude the idea of worship. It would follow from such concession that the schoolhouse is, in some sense, for the time being, made a place of worship. But it seems to us that if we should hold that it is made a place of worship, within the meaning of the constitution, we should put a very strained construction upon it. The object of the provision, we think, is not to prevent the casual use of a public building as a place for offering prayer, or doing other acts of religious worship, but to prevent the enactment of a law whereby any person can be compelled to pay taxes for building or repairing any place designed to be used distinctively as a place of worship. The object, we think, was to prevent an improper burden."

It will be noted in the cited case that the objection raised was that the school building was being used as a place for reading the bible, repeating the Lord's prayer, and singing religious songs, which made the schoolhouse a place of worship and which compelled the children of petitioner to attend a place of worship and he, a taxpayer, to pay taxes for building or repairing a place of worship.

The court held that these purposes were not in contravention of the constitution unless they imposed a tax burden or compelled pupils to attend the instruction.

We are, therefore, of the opinion that an elective course in bible study may be prescribed by a board of education of a school corporation in this state

so long as in the language of the Iowa Supreme Court in the case cited, Moore vs. Monroe, "no person is compelled to pay taxes for building or repairing any place designed to be used distinctively as a place of worship."

The courts, however, uniformly hold that such instruction as is offered must not be theological or sectarian in character or devoted to any particular creed.

SCHOOLS AND SCHOOL DISTRICTS—COUNTY BOARD OF EDUCATION: The county board of education may require bonds of depository for county textbooks and unless insurance is carried the county fund from which the books are bought must suffer the loss.

August 8, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of recent date in which you request an opinion of this department upon the following proposition:

"In counties having county uniformity of textbooks where the textbooks are placed in depositories in various parts of the county for sale to the children, who is responsible in the event of loss of books by fire? Are surety bonds required of the depositors and, if so, who approves of such bonds, the County Board of Education or the Board of Supervisors?"

It is provided by statute, Section 4461 of the Code of Iowa 1924, as follows:

"Unless otherwise ordered by the board of education, the county superintendent shall have charge of such text books and of the distribution thereof among the depositories selected by the board; he shall render to the board at each meeting thereof itemized accounts of his doings, and shall be liable on his official bond therefor."

This section is the only provision made for the distribution of such textbooks and the selection of depositories therefor. Under it the county superintendent is liable on his official bond for the faithful performance of his duties in connection therewith and for his accounting therefor.

If the books were destroyed by fire the loss would fall upon the county funds out of which the books are purchased.

No bonds are required of the depositories by statute but such bonds could be required by the county board of education. It would be advisable, we think, for the county board of education to require a fidelity bond of the depository and an agreement to carry insurance on the books so that in case of fire protection would be afforded to the property. We are of the opinion that the county board of education has the power to do this under the general powers granted by Chapter 231, Code of Iowa 1924 as amended.

COUNTY HOSPITALS: A county hospital cannot charge the board of supervisors and the poor fund for treatment of indigent patients.

August 9, 1927. *Auditor of State:* We have received a letter from the chairman of the board of hospital trustees of Washington County in which he requests an opinion of this department upon the following proposition:

May a board of trustees of a county public hospital file a claim for a charge of $15 per week for the care of indigent patients with the county board of supervisors and have the same paid by said board out of the county poor fund or any other fund?

Inasmuch as this is a question of considerable importance we are rendering your department an opinion thereon and forwarding copy to said chairman.

It is provided by statute, Section 5334, Code of Iowa, 1924, that the board of supervisors may contract with the lowest responsible bidder for furnishing medical or dental attendance required for the poor for a term not exceeding

one year. It is further provided by statute, Section 5367 and 5368 that where there is no county hospital, the board of supervisors may by agreement establish one or more wards in a public or private hospital for the treatment of indigent patients and may levy a tax not to exceed one-half of one mill.

The foregoing provisions provide the only medical attention and care created in a county where a county public hospital is not established.

The county public hospital is established under the provisions of Chapter 269, Code of Iowa 1924, as amended. Under this chapter, as amended, provision is made for the levy of a tax for the maintenance of a hospital. Section 5353 of the Code of Iowa 1924, as amended. Provision is also made for determining whether or not an applicant is indigent and entitled to free treatment therein and for the hospital benefits accorded residents of the county.

We quote the provisions of Section 5362 in regard thereto as follows:

"Any resident of the county who is sick or injured shall be entitled to the benefits of such hospital, but every such person, except such as may have been found to be indigent and entitled to free care and treatment, shall pay to the board of hospital trustees reasonable compensation for care and treatment according to the rules and regulations established by the board. * * * "

From the sections cited and quoted it will be observed that indigent residents of the county are entitled to free care and treatment in such county public hospital. It will also be observed that the tax levy provided for the county public hospital is an additional tax levied for the maintenance thereof.

We are, therefore, of the opinion that the provisions made for the establishment of a county public hospital and for a tax levy in support thereof was intended by the legislature to supply hospitalization service to indigent residents of the county without charge to them or to the poor or any other fund of the county, and that, therefore, the board of trustees of the county public hospital cannot collect from the county board of supervisors, or from any other county fund, any amount for the treatment of indigent patients.

TOWNSHIPS—ROADS: Townships do not have authority to issue or sell bonds for the purpose of raising money to improve roads.

August 10, 1927. *County Attorney, Estherville, Iowa:* We wish to acknowledge receipt of your favor of the 9th in which you request our opinion in substance as to whether or not a township has authority to sell its bonds to raise money for the improvement of a township road. A township is not a municipal corporation and would not have authority, in the absence of an express statutory provision, to issue bonds. Chapter 244 of the Code, 1924, in reference to the township road system, does not contain a provision authorizing a township to issue bonds for such purpose, and in Section 4781 thereof it is provided:

"They shall not incur debts for said purposes unless funds have been provided for the payment thereof by an authorized levy."

Neither is there any provision in the statute authorizing the township to provide a levy from which bonds may be retired.

We are, therefore, clearly of the opinion that the township would not have authority to issue or sell its bonds to raise money for road improvement.

COUNTIES AND COUNTY OFFICIALS—GRADING CONTRACT: Contracts for road improvements where the estimated cost is more than $1,000.00, must be first advertised and bids received, after which the board may reject all

bids received and re-advertise and receive new bids and let the contract to the lowest bidder, or it may let the work privately at a cost not exceeding the lowest bid received, or it may build by day labor subject to the approval of the State Highway Commission.

August 11, 1927. *County Attorney, Washington, Iowa:* We are in receipt of your letter under date of August 1, 1927, requesting an opinion of this department on the following question:

Whether or not under Section 4647, Code of 1924, where a road improvement costs more than $1,000.00, it must be let on competitive bidding or may be completed by day labor without advertising and receiving bids.

Section 4647, Code of 1924, provides as follows:

"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 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 exceeding the lowest bid received, *or build by day labor, subject to the approval of the state highway commission.*"

It would seem to us that the statute is very clear and that if the engineer's estimate shows that the improvement is to cost more than a thousand dollars, that the board must advertise and receive bids, after which it may at its discretion proceed as follows:

1—It may reject the bids received and readvertise and receive new bids and let the contract to the lowest bidder; or
2—It may let the work privately at a cost not exceeding the lowest bid received; or
3—It may build by day labor subject to the approval of the State Highway Commission.

You will note that the board must first advertise and receive bids, after which it may proceed at its option in the manner suggested above.

DEPARTMENT OF AGRICULTURE—BREAD: Chain bakery must conform with Section 3, Chapter 62, 42nd G. A.

August 15, 1927. *County Attorney, Sioux City, Iowa:* I desire to acknowledge receipt of your request of August 9th concerning the necessity of wrapping bread when sold by a chain grocery, the bread being baked in their own bakery and distributed through their own stores in the city.

Under Chapter 62 of the 42nd General Assembly, it was evidently the intention of the Legislature to require all bakeries to wrap their bread and stamp upon the wrapper the exact weight in order that the consumer might be informed of the weight of the loaf which he purchased. The fact that this would be conducive to sanitation also enters into the reason for drafting this law.

Under Section 3, Chapter 62, Acts of the 42nd General Assembly, the Secretary of Agriculture is given the power to make such rules and regulations as he might deem necessary and not inconsistent with this act. The Department of Agriculture has ruled that the only exceptions to Chapter 62 are where bread is sold in the bakery or place of business where same is baked and in that event the bread must be placed in a case and a placard shown in a conspicuous place plainly giving the weight of the loaves displayed for sale.

We are, therefore, of the opinion that where bread is sold outside of the place of business where the same is baked, it is necessary that the same be wrapped and stamped as provided in this chapter and that bread should not be delivered unwrapped to other places of business to be sold even though the

places where the same is delivered constitute a part of the same organization where the bread is baked.

SCHOOLS AND SCHOOL DISTRICTS: A consolidated school district cannot be dissolved by changing its boundary lines under the provisions of Section 4133, Code of Iowa, 1924.

August 17, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of recent date in which you request an opinion of this department upon the following proposition:

"Can school boards acting under section 4133 by concurrent action change the boundaries of consolidated school districts and thereby dissolve a legally established consolidated school district as set forth in the letter attached hereto and made a part hereof?"

In the statute relating to consolidated independent school districts as set out in Chapter 209, Code of Iowa, 1924, Section 4818, provision is made for the manner of dissolution of consolidated independent school districts. We refer to Sections 4188-9, which we shall not quote herein.

We are, therefore, of the opinion that the boundary lines of a consolidated independent school district cannot be changed under the provisions of Section 4133 in such manner as to dissolve the district and that the only manner such district can be dissolved is under the statutory regulations hereinbefore cited.

DEPARTMENT OF AGRICULTURE—TUBERCULOSIS: The appropriation for the biennium beginning July 1, 1927, is available for animals on or after that date, though the test were made prior thereto.

August 18, 1927. *Secretary of Agriculture:* You have requested an opinion of this department upon the following proposition:

Is the appropriation for the biennium beginning July 1, 1927, for the purpose of eradication of bovine tuberculosis available for the payment for cattle slaughtered where the test was made prior to said July 1st but the condemnation and slaughter was not made until or after July 1, 1927?

It is provided by statute, Section 2675 of the Code of Iowa, 1924, as amended, 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."

It is further provided by statute, Code of Iowa, 1924, Section 2652, that no cattle infected with tuberculosis shall be killed without the owner's consent unless there shall be sufficient funds to pay for such cattle in the allotment made for that purpose from the appropriation for the eradication of infectious and contagious diseases among animals, as provided by statute.

We are, therefore, of the opinion that the date of slaughter and not the date of the test is the date upon which the payment is made to depend, and that the appropriation available for the biennium beginning July 1, 1927, is available for the payment of cattle slaughtered on or after July 1, 1927, up to and including June 30, 1929, and that such appropriation is available even though the test is made prior to July 1, 1927.

AUDITOR OF STATE—REAL ESTATE MORTGAGES INDEXED AS CHATTEL—RECORDING FEES—ACKNOWLEDGMENTS: A real estate mortgage which pledges rents, issues, income and profits to the payment of a debt secured by the mortgage, or which conveys the same, creates an encumbrance upon personal property within the meaning of Sec. 1032, Code of 1924. No

recording fees may be collected. County recorder must receive and record instruments filed for that purpose.

August 18, 1927. *Auditor of State:* We are in receipt of your letter under date of August 9, 1927, requesting an opinion of this department on the following questions:

"1. Should a real estate mortgage containing a receivership clause, only be indexed; or should a mortgage which also pledges the rents, issues, income and profits to the payment of the debt also be indexed in the Chattel Mortgage index? Sec. 10032 Code, Amended Chap. 212, 42nd G. A.

"2. If instruments mentioned in question 1 are to be indexed, should recorder charge and collect fee for indexing and also statutory fee for recording at length?

"3. Should instruments in writing, other than United States and State Patents (or certified copies thereof), be recorded unless properly acknowledged?"

1.

Section 10032, Code of 1924, as amended by the Acts of the Forty-second General Assembly, provides as follows:

"Real estate mortgages which create an incumbrance on personal property shall after being recorded at length, be indexed in the chattel mortgage index books. * * *"

It will be noted that under the above section a real estate mortgage which creates an incumbrance on personal property shall be indexed as a chattel mortgage by the county recorder. He has no option, and when such a mortgage is filed with him it is his duty to not only record it as a real estate mortgage, but also to index it as a chattel mortgage.

The test, therefore, is whether or not a real estate mortgage creates an incumbrance upon personal property, and is not whether the said mortgage contains a receivership clause or whether it pledges the rents, issues, income and profits.

Our Supreme Court has held in the case of *Whiteside vs. Morris*, 197 Iowa, 211:

"A real estate mortgage containing no pledge of the rents except an authorization of the appointment of a receiver to take charge of said rents in the event of a foreclosure creates no lien on such rents until foreclosure is commenced and such receiver is appointed."

From this it would, therefore, seem that our courts have definitely determined that a mortgage containing only a receivership clause does not create an incumbrance upon personal property within the meaning of Section 10032, Code of 1924, as amended.

It would appear that in accordance with the holding of the Supreme Court in the above referred to case, a real estate mortgage which pledges the rents, issues, income and profits to the payment of the debt secured by the mortgage, and one which conveys not only the real estate but the rents, issues and profits, creates an incumbrance upon personal property within the meaning of Section 10032 of the Code of 1924, as amended.

It will, therefore, be necessary for the recorder to determine in each particular case whether or not the mortgage creates an incumbrance on personal property, and knowing that there are innumerable forms of real estate mortgage used, and that it would be hard to determine from the language used in said mortgages whether or not they create an incumbrance on personal prop-

erty, we, therefore, suggest that if there is any doubt in the mind of the county recorder that he index said mortgage in the chattel mortgage index.

2.

We are of the opinion that inasmuch as Section 10032 only provides for the indexing in the chattel mortgage index of a real estate mortgage which creates an incumbrance on personal property, that said recorder can only collect the fee for recording the real estate mortgage and cannot also collect the fee for indexing said mortgage as a chattel mortgage.

3.

Section 5171, Code of 1924, provides as follows:

"The recorder shall keep his office at the county seat, and shall record at length, and as speedily as possible, all instruments in writing which may be delivered to him for record, in the manner directed by law."

We are of the opinion that under the above section the county recorder has no option in determining whether or not an instrument should be recorded, but must accept the same and record it when filed in his office for that purpose. It is not for him to say whether or not the instrument is properly acknowledged. That is a question for the courts to determine.

LIBRARIES—COUNTY BOARD OF EDUCATION: Statutory provision that county board of education cannot purchase library books applicable to counties where a contract exists between the school corporation and a city library; no exception being made in the statute.

August 25, 1927. *Iowa Library Commission:* This will acknowledge receipt of your letter of recent date in which you request an opinion from this department upon the following question:

Do the provisions of Section 4391, Code of Iowa, 1924, which relieve the school treasurer from withholding funds for library purposes, relieve the county board of education from the selection and purchase of library books, under the provisions of Chapter 93, Acts of the 42d G. A., where contracts have been entered into by county boards of supervisors or township trustees with the library board of a city library for the use of said library by the entire county including schools?

It is provided by statute, Section 4391, Code of Iowa, 1924, in part as follows:

"During the existence of such contract the school corporation shall be relieved from the requirement that the school treasurer shall withhold funds for library purposes."

The cited chapter, 93, Acts of the 42d G. A., provides that the county auditor shall withhold annually fifteen cents per pupil, and that the county board of education shall expend such sum for the various school districts in the county. There is no stated exception to this rule and no provision made for relieving the board of this responsibility where contracts have been entered into by county boards of supervisors or township trustees. We are, therefore, of the opinion that the county auditor must withhold, and the county board of education must expend for each school district, annually, fifteen cents per pupil of the enumeration of the said district, as shown by the annual county superintendent report and the report of the secretary of the board of that district.

TAXATION: A delinquent tax collector is entitled to a commission on taxes committed to him and collected and paid over by him. Taxes, the subject of litigation, are not delinquent unless the decree of the court is violated.

August 25, 1927. *Auditor of State:* This will acknowledge receipt of your letter of recent date requesting an opinion upon the following proposition:

The Des Moines National Bank, the Iowa Loan and Trust Company, and the Bankers Trust Company filed objection to the assessments made on their capital stock by the city assessor for the years 1919, 1920, 1921 and 1922. They appealed to the district court of the United States and their contention upheld. The county treasurer was enjoined from collecting taxes in excess of the amount claimed and admitted by said banks.

The question now arises whether or not the delinquent tax collector is entitled to a commission on these taxes so collected.

It is provided by statute, Section 7223, Code of Iowa, 1924, as follows:

"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."

From the above quotation it will be observed that the delinquent tax collector is entitled to a commission on the amount of all taxes *collected and paid over by him.* The general rule is that a collector generally has authority to demand and enforce the payment of all the taxes on the list *committed to him,* although assessed before he was appointed, or although they become delinquent and the time expires when he should make his return, and he may also be given authority to collect the arrears of taxes or the delinquent taxes of preceding years. (37 Cyc. 1200.)

From the facts stated in the decree of the United States District Court, and in the proposition submitted, it is evident that these taxes were neither committed to nor collected by the delinquent tax collector. It should be further observed that since the taxpayer adopted the judicial method of determining the amount of taxes due from and properly payable by it, and since the decree of court established that amount and provided for interest thereon, the tax would not be delinquent at any period of time, and would therefore not properly come within the authority of the delinquent tax collector. We are, therefore, of the opinion that a delinquent tax collector is not entitled to a commission upon the taxes paid by these banking corporations to the county treasurer of Polk County, Iowa.

TAXES: Compromise of personal property taxes. Term "collectible in the usual manner" used in Chapter 177, Acts of the 42d G. A. refers to collection by distress and sale and not by an action at law. These words do not refer only to the method of collecting personal property taxes by the sale of real estate.

August 31, 1927. *County Attorney, Carroll, Iowa:* We wish to acknowledge receipt of your favor of the 30th in which you request our opinion as follows:

"Chapter 177 of the Acts of the 42nd General Assembly provides that personal property taxes may be compromised when they are not a lien upon real estate, are delinquent for one or more years and are not collectible in the usual manner. * * * I should like to have your opinion on the following question: "What is meant by the use in the statute of the words 'collectible in the usual manner?' * * *"

Section 7193 of the Code, 1924, as amended by the 41st and 42d General Assemblies, provides a comprehensive method for the compromise of both delinquent real estate and personal property taxes. The section as amended

cannot be said to apply to any particular method for the collection of delinquent property taxes. The amendment contained in Chapter 177, Laws of the 42d General Assembly, provides for the compromise of personal property taxes under certain conditions, and must be construed in reference to the collection of delinquent personal property taxes only. The amendment just referred to is as follows:

"When personal property taxes are not a lien upon any real estate and are delinquent for one or more years, the board may, when it is evident that such tax is not collectible in the usual manner, compromise such tax as above provided."

The words "collectible in the usual manner" used in connection with the other language of this amendment, clearly refer to the collection of personal property taxes. The "usual manner" of collecting delinquent personal property taxes when not a lien upon real estate is by distress and sale, under the provisions of Section 7189 of the Code, 1924. We do not believe that this language refers to an action at law which may be commenced by the county treasurer for the collection of delinquent taxes, under the provisions of Section 7186 of the Code, 1924. If an action were commenced under the provisions of the section last referred to, the board would have authority to compromise or settle the action. Thus requiring suit by the county treasurer would add nothing to the authority they now have to compromise the taxes referred to. And if it is evident that the taxes could not be collected by distress and sale, an action at law would generally add nothing but additional costs to making the collection.

We are, therefore, of the opinion that the term "collectible in the usual manner" refers to a collection by distress and sale, and not to an action at law under the provisions of Section 7186 of the Code, 1924, and that these words do not refer only to the method of collecting personal property taxes by the sale of real estate.

BOARD OF CONSERVATION—JURISDICTION—BUILDINGS: The Board of Conservation has jurisdiction over all shacks or buildings built within meandered line of state waters which have been set aside as a game sanctuary and has power to remove the same in accordance with Sec. 1812, Code 1924 and Chap. 40 of the Acts of the 42nd G. A.

September 1, 1927. *State Fish and Game Department.* We are in receipt of your letter under date of September 1, 1927, requesting an opinion of this department on the following question:

Who has jurisdiction of removal of shacks built within the meandered line of state waters, which has been set aside as a game sanctuary?

Section 1812 of the Code of 1924, provides as follows:

"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, is conferred upon the board. The board, with the approval of the executive council, may establish parts of such property into state parks, and when so established all of the provisions of this chapter relative to public parks shall apply thereto."

Chapter 40 of the Acts of the Forty-second General Assembly, Section 1799-b, provides as follows:

"No person, association or corporation shall build or erect any pier, wharf, sluice, piling, wall, fence, obstruction, building or erection of any kind upon

or over any state owned land or water under the jurisdiction of the board, without first obtaining from such board a written permit. The board shall charge a fee of two dollars for each such permit issued. * * *"

Section 1799-c of the same Chapter provides as follows:

"The board shall have full power and authority to order the removal of any pier, wharf, sluice, piling, wall, fence, obstruction, erection or building of any kind upon or over any state owned lands or waters under their supervision and direction, when in their judgment it would be for the best interests of the public, the same to be removed within thirty days after written notice thereof by the board. Should any person, firm, association or corporation fail to comply with said order of the board within the time provided, the board shall then have full power and authority to remove the same."

It will be noted from the reading of the above statutes, that the board of conservation has been granted the power and authority to order the removal of any pier, wharf, obstruction, erection or building of any kind upon or over any state owned land or waters under their supervision and direction. We are, therefore, of the opinion that the board of conservation has the power to remove shacks or buildings built within the meandered line of state waters which have been set aside as a game sanctuary.

COUNTY OFFICERS—PRIZE FIGHTING—BOXING: Where contestants box for a prize, reward, or anything of value and an admission fee is charged either directly or indirectly, there is a violation of Sec. 13225, however where the contestant receives no prize, fee or reward, and an admission fee is charged, there is no violation.

September 6, 1927. *County Attorney, Burlington, Iowa:* We are in receipt of your letter under date of August 27, 1927, requesting an opinion of this department upon the following question:

Does Section 13225 of the Code of 1924 prohibit a group of citizens from forming a club with membership dues of one dollar a month and such club having boxing contests where the contestants are paid for boxing, but where admission is free to members in good standing only?.

Section 13225 provides as follows:

"Whoever engages in any boxing contest or sparring exhibition with or without gloves for a prize, reward, or anything of value, at which an admission fee is charged or received, either directly or indirectly, and whoever knowingly aids, abets, or assists in any such boxing contest or sparring exhibition, and any owner or lessee of any ground, lot, building, hall, or structure of any kind knowingly permitting the same to be used for such boxing contest or sparring exhibition, shall be fined not exceeding three hundred dollars, or imprisoned in the county jail not exceeding ninety days."

It will be noted from reading the section above quoted that emphasis is placed upon the words "for a prize, reward or anything of value at which an admission fee is charged or received either directly or indirectly." We think the statute is clear and that if the contestants box for a prize, reward, or anything of value at which an admission fee is charged either directly or indirectly, that there would be a violation of the statute. However, if the contestants receive no prize, reward or anything of value, we think that the forming of a club with membership dues for the purpose of staging such contests, would not be a violation of Section 13225, and that where the contestants receive no prize, fee, or reward, that said club could charge admission fee under this statute. The emphasis seems to be upon the fact that the contestants receive a prize, fee, or reward, and where they do, no admission can be collected either

directly or indirectly, but where they do not receive a prize, fee, or reward, we think that admission could be collected.

TAX SALE CERTIFICATE REDEMPTION—CITIES AND TOWNS—AUDITOR OF STATE: Any holder of any special assessment certificate or bond or any city or town in which said property is located may redeem the same from tax sale and may force the holder of the tax sale certificate to surrender the same.

September 8, 1927. *Auditor of State:* We are in receipt of your letter of September 3, 1927, requesting an opinion of this department upon the following question:

"Where property is sold at tax sale and the city or town in which property is located wishes to redeem same from tax sale, can the holder of the certificate be forced to surrender same in the interest of the city or town?"

We call your attention to Chapter 154 of the Acts of the 42d General Assembly, which reads as follows:

"Sec. 6041. Assignment of certificate. Any holder of any special assessment certificate against a lot or parcel of ground, or any holder of a bond payable in whole or in part out of a special assessment against any lot or parcel of ground, or any city or town within which such lot or parcel of ground is situated, which lot or parcel of ground has been sold for taxes, either general or special, shall be entitled to an assignment of any certificate of tax sale of said property for any general taxes or special taxes thereon, upon tender to the holder or to the county auditor of the amount to which the holder of the tax sale certificate would be entitled in case of redemption."

You will note from the reading of the above section that any city or town within which a lot or parcel of ground is situated which has been sold for taxes either general or special, shall be entitled to an assignment of any certificate of tax sale of said property for any general or special taxes thereof upon tender to the holder of said certificate or to the county auditor of the amount to which the holder of the tax sale certificate would be entitled in case of redemption.

We are, therefore, of the opinion that where property is sold at tax sale, that the city or town in which said property is located may redeem the same at tax sale and may force the holder of the certificate to surrender the same.

BANKS AND BANKING—BUILDING AND LOAN ASSOCIATIONS: A building and loan association may receive deposits if it issues shares of stock for the same.

September 10, 1927. *Department of Banking:* This will acknowledge receipt of your letter of recent date in which you request an opinion of this department upon the question of whether it is any violation of the law for a building and loan association to publish an advertisement, copy of which you enclose, and whether such association may accept savings deposits. A copy of the advertisement complained of follows:

"SAVE REGULARLY

A saving account with this association is safe, sane and profitable.
It will be a pleasure for us to discuss our plan with you.
Waterloo Bldg. & Loan Assn.
200-202 East Fifth Street.

W. H. Brunn, President. R. E. Eickelberg, Secretary."

It is provided by statute, Section 9328, Code of Iowa 1924, as follows:

"It shall be unlawful for any building and loan or saving and loan association *to receive deposits of money without issuing shares of stock for the same*, or to transact a banking business."

A limitation upon the issue of stock to not more than ten thousand dollars to any one person except that any association having assets in excess of one million dollars may issue stock to one person at par not in excess of one per cent of its assets.

The powers of building and loan associations are set forth in Section 9329, Code of Iowa 1924, from which it will be noted that a building and loan association does not have the power to accept savings deposit other than stock deposits upon such terms and at such times as the articles of incorporation may provide.

While we have no knowledge of the plan and, therefore, cannot pass upon the legality of the same, we are of the opinion that the advertisement would not be false within the meaning of Sections 13069 and 13070, relating to fraudulent advertisements or any other statutes, because a building and loan association does have the right to accept deposits upon certain conditions hereinbefore specified.

BANKS AND BANKING—TAXATION: A defunct bank is assessed as of its condition on January 1, 1927.

September 12, 1927. *County Attorney, Bedford, Iowa:* This will acknowledge receipt of your letter of recent date in which you request an opinion of this department upon the following question:

The Blockton State Savings Bank closed after January 1, 1927, to liquidate its business. The bank was assessed by the assessor as money and credits in the assessment made early in 1927. Our county auditor thinks that the bank should be assessed in the same manner as any other bank and should pay taxes likewise.

You inquire which method of assessment is correct. We are of the opinion that the bank should be assessed as of its condition on January 1, 1927, and that if it were at that time open for and doing business in the regular way the assessment should be as of that date in the regular manner regardless of the fact that the actual listing of the property for assessment by the assessor was not made until after the bank had closed its doors for the purpose of liquidation. We base our opinion on Section 6956 of the Code of Iowa 1924 to which we refer you.

SCHOOLS AND SCHOOL DISTRICTS: The transportation must be furnished to pupils living an unreasonable distance from school but no established distance constitutes an unreasonable distance; all conditions affecting the child's attendance being taken into consideration.

September 13, 1927. *County Attorney, Algona, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition.

"Hebron Township lies on the Minnesota line and contains thirty sections of land. There are only six sub-school districts in the school township, and necessarily puts a number of families more than two miles from a school house. In some places there are no roads opened, so that by highway parties would be as far away as four miles. They wish to know if there is any way of compelling the school board to allow transportation of pupils where the distance travelled is more than two miles."

There is no statutory provision requiring transportation where pupils live at any particular distance from the school building. This department has ruled, however, that it is within the discretion of the board to furnish transportation where children live at an unreasonable distance from school and that since it is a discretionary matter with the board an appeal will lie to the county superintendent and to the superintendent of public instruction for an abuse of that discretion.

The Department of Public Instruction has ruled in a number of cases holding that where a child lives at such an unreasonable distance from school that it does not receive equal school privileges the board may be required to provide transportation. You are referred to the decisions of the Department of Public Instruction, School Laws and Decisions 1925, pages 308, 316, 324, 327 and 281.

BOARD OF SUPERVISORS—TAXATION: Board of Supervisors cannot compromise a tax represented by a tax sale certificate but may compromise the balance of the tax or any tax antedating the tax sale certificate. Special assessments cannot be compromised.

September 16, 1927. *Auditor of State:* This will acknowledge receipt of your request for an opinion of this department upon the following proposition:

"Can the Board of Supervisors compromise taxes on real estate after same has been sold for taxes and certificate issued? Chapter 148, 41st General Assembly.

"If the board has power to so compromise, would that power extend where special taxes were included in sale."

The cited chapter appears in the Code of Iowa 1927, being Section 7193A1 thereof, which reads as follows:

"When any property in this state has been offered by the county treasurer for sale for taxes for two consecutive years and not sold, or sold for only a portion of the delinquent taxes, then and in that event the board of supervisors of the county is hereby authorized to compromise the delinquent taxes against said property antedating any tax sale certificate; or being a part of the taxes due for the year for which such property was sold for taxes, and may enter into a written agreement with the owner of the legal title or with any lien holder for the payment of a stipulated sum in full liquidation of all delinquent taxes included in such agreement."

We are of the opinion that the board of supervisors cannot compromise the tax represented by the tax sale certificate itself but that the board could compromise the balance of the taxes above the amount of the tax sale certificate. We are also of the opinion that the board could compromise any taxes against said property antedating the tax sale certificate and for which the property was not sold.

We are of the opinion, however, that special assessments would not be affected by this provision and that the provisions of Chapter 346 apply to general taxes only.

The provision for the sale of property for special assessments are contained in Chapter 308 of the Code of Iowa 1927, Section 6037 et sequi. Under the provisions of said chapter the city may purchase the property at tax sale and as such purchaser could compromise the general tax under the provisions of Section 7193A1.

SCHOOLS AND SCHOOL DISTRICTS: Pupils cannot be excused from instruction in physiology and hygiene on account of religious belief; may be excused from instruction in physical education for such reason.

September 17, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your request for an opinion from this department upon the following proposition:

May pupils at the request of their parents for and on account of religious beliefs be excused from receiving instruction in the subject of Physiology and Hygiene; or, in physical education?

These questions are covered by the statute, Code of Iowa 1927, Section 4259, with reference to physiology and hygiene, and Section 4264 with reference to physical education.

Under the provisions of Section 4259 all pupils are required to receive instruction in physiology and hygiene, which instruction must be as direct and scientific as that given in other essential branches and each pupil shall be required to complete the part of such study in his class or grade before being advanced to the next higher. It is also incumbent on the board to require all teachers to give such instruction from which requirements there is no exception.

Under the provisions of Section 4264 with reference to physical education there is specific exception to those pupils whose parents or guardians shall file a written statement with the principal or teacher that such course conflicts with his religious belief.

We are, therefore, of the opinion that the board of education cannot exempt or excuse any pupil from the instruction in physiology and hygiene upon the contention that it is contrary to his religious belief or for any other reason, but that a pupil must be excused from the course in physical education if the statement in writing hereinbefore described is filed with the principal or teacher.

PUBLIC FUNDS—CITIES AND TOWNS: The policemen's pension fund and firemen's pension fund do not come within the scope of the Brookhart-Lovrien Act because they are in the hands of the city treasurer as treasurer of the board of trustees for the fund and not as city treasurer.

September 20, 1927. *Auditor of State:* This will acknowledge receipt of your letter of September 20, 1927, requesting an opinion upon the following proposition:

"During the course of the examination of the city of Clinton, Mr. Keith, the City Treasurer, raised the question as to whether the interest on certain trust funds, i. e., the Police Pension Fund and the Firemen's Pension fund should divert to the state sinking fund or to the credit of the funds themselves."

The policemen's pension fund and the firemen's pension fund are governed by Chapter 322 of the Code of Iowa, 1927. The funds are derived from various sources including a tax levy of not to exceed two mills, membership fees, donations, gifts, grants, devises, bequests, rewards, fees and other emoluments.

The funds are in the control of a board of trustees consisting of the chief of each department, the city treasurer and the city solicitor or attorney under the provisions of Section 6311 of said Chapter.

The board of trustees has the power to invest any surplus left in such funds at the end of the fiscal year under the provisions of Section 6312 of said Chapter.

The provisions for the diversion of interest to the state sinking fund for the protection of public deposits are contained in Chapter 55A1 of the Code of 1927. Under the provisions of that chapter, particularly Section 1090A6, it is

provided that all interest hereafter collected by city treasurers as provided in Section 5651 of the Code of Iowa, 1927, shall be upon the order of the state treasurer diverted to the state sinking fund for public deposits. No reference is made in said section to the deposits to be made by the board of trustees of the policemen's pension fund or of the firemen's pension fund.

We are, therefore, of the opinion that the funds in the policemen's pension fund and in the firemen's pension fund for current uses should be deposited by the board of trustees for each of said funds and that the interest should not be diverted to the treasurer of state but should be retained by the treasurer of the board of trustees. We reach this conclusion from the fact that the funds are not under the control or management of the city council and do not, therefore, come within the provisions of the deposits by treasurers of cities and towns.

As to the surplus funds which may be built up in the hands of the board of trustees of either the policemen's pension fund or the firemen's pension fund, investment thereof should be made under the provisions of Section 6312 of the Code of Iowa, 1927, and the interest therefrom would accrue to the fund from which the investment was made.

We are further of the opinion that Section 12 of Chapter 92 of the Acts of the Forty-second General Assembly does not apply to funds in the hands of the board of trustees for the policemen's pension fund or the firemen's pension fund for the reasons hereinbefore set out.

SCHOOLS AND SCHOOL DISTRICTS: Parents nor others can demand the right to have pupils excused during the regular school day for the purpose of religious education; nor demand extra time of the teacher or regular schedules to make up work lost by such absence; neither can credit be given in religious instruction given outside of school to supplant the class work missed while pupils are absent for religious instruction.

September 21, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your request for an opinion of this department upon the following proposition:

"1. Can parents or others demand it as a right that school boards or superintendents release or excuse children a certain portion of the regular school day one or more times a week during a portion of the school year to attend upon religious instruction of a denominational or sectarian character?

"2. If they can demand the above as a right, can they also demand extra time of the teacher to enable them to make up school work lost during such absence? If so, is the board required to pay such teachers extra compensation?

"3. Can they demand that credit be given them in such religious instruction to take the place of the class work missed in order to avoid making up the work lost?

"4. Can parents or others demand it as a right that the regular schedule of class and study periods in the public schools be arranged to permit groups to be absent at regular periods, one or more times during the week, for denominational or sectarian religious instruction, or, are school officials entitled to the uninterrupted use of the time from 9 A. M. to 4 P. M. in scheduling the regular work of the public schools?"

We shall treat the inquiries in the order submitted.

1. No provision is made anywhere in the statute for the excuse of a pupil for any instruction outside of school whether of a religious character or not. We are, therefore, of the opinion that no parent or any other person can demand, as a matter of right, that pupils be released or excused during the

regular school hours as established by the board of education for the purpose of religious instruction.

2. Since inquiry No. 1 has been answered in the negative that answer could dispose of this inquiry. However, if it is assumed that the board of education excuses pupils for religious instruction such pupils have no right to demand extra time of the teacher to make up work lost during such absence nor can the teacher, in the absence of a contract, be required to give such additional time.

3. There is no provision in the statute for giving credit toward graduation for religious instruction. This would be particularly true if the credit given for such instruction were given in place of work actually lost because of absence from work.

4. The arrangement of the course of study and of the schedule of classes is within the jurisdiction and discretion of the board of education and of its agents, the superintendent, principals and teachers. Likewise, the hours which school is to be kept is within the jurisdiction and discretion of the board of education within reasonable limits. Therefore, neither parents nor others can demand it as a right that the schedule be so arranged that pupils or groups of pupils may be absent at regular periods, one or any number of times a week, for denominational or sectarian religious instruction. It is within the power of the board of education to establish the hour for commencing school and the hour for closing and within that time the jurisdiction of the pupils is entirely within control of that board if such pupils are to attend school.

This question has been the subject of judicial interpretation in many decisions of the court and has been condemned upon two grounds:

(1) The state law required attendance of pupils during the entire time of the school session with exceptions which do not include religious instruction; (2) the well established policy of the state that religious instruction shall not be given in the public schools or under their auspices.

The question was before the court in *Stein vs. Brown*, 211 New York Supplement, 822, where the court observed that the plan could not be justified from the standpoint of necessity as religious instruction could be given on non-school days or after the school day had ended. The court suggested that the pupils who leave the school for religious instruction are likely to fall behind those remaining the full time as they are deprived of instruction given during their absence.

The court, however, raised the more serious objection in the connection of religious instruction with the public schools and in the opinion said:

"Religious instruction belongs to the parents of the children and the churches and religious organizations of the country. It should be given outside of the public schools and outside of school hours. The resolution of the defendants was undoubtedly well-intended, and is doubtless an outgrowth of the feeling that many well-intentioned persons entertain that the religious instruction of the young is being neglected, and that something should be done to remedy this condition, and that it should be done under the auspices of, and in co-operation with, the schools, as in effect it would be if the defendants' resolution here attached were carried out; but the difficulty with it is that it violates the policy above referred to, fundamental with the state, and for the reasons indicated their desires cannot be legally carried into effect."

We are, therefore, of the opinion that neither parents or others have any right to demand that pupils be released or excused during the regular school

day for religious instruction and that if such pupils are excused they have no right to demand additional time of the teacher either at her sacrifice or for additional compensation to make up the time lost during such absence from the regular school instruction.

We are further of the opinion that neither parents or others have any right to demand that the schedule of the public schools be so arranged as to permit groups to be absent or excused from school during the regular school day as established by the board of education for the purpose of attending religious instruction.

TAXATION—RAILWAY PROPERTY: Taxation of a railway company is upon the basis of real property and delinquent taxes are, therefore, not liable for penalty for delinquent personal property taxes under Section 7215 of the code.

September 23, 1927. *County Attorney, Albia, Iowa:* This will acknowledge receipt of your request for an opinion upon the following proposition:

The Albia Light & Railway Company operated a line in Monroe County, Iowa. In June, 1925, and before the assessment was made for that year, this county abandoned the line and proceeded to remove the ties and rails from the roadbed, its rolling stock consisting of only a few antiquated trolley cars which had been operated over the line. The Executive Council assessed the said company at the rate of $2,800 per mile on the line from Albia to Hiteman. The company offers to pay the tax upon said assessment together with the penalty of one per cent per month and the question involved is whether the said tax is subject to the five per cent penalty for delinquent personal property taxes under the provisions of Section 7215, Code of Iowa 1924.

This question is to be determined upon the question of whether the property assessed is assessed as real estate or as personal property.

The provisions for the assessment of the property of railroad companies are contained in Chapter 337 of the Code of Iowa 1924. The assessment is determined upon the amount of real estate owned and used exclusively in the operation of the road, including the roadbed, bridges, culverts, depot grounds, station buildings, yards, section and tool houses, roundhouses, machine and repair shops, water tanks, turntables, gravel beds, stone quarries and all other real estate, together with the rolling stock, cars, and other such property incident to the operation of the road. Section 7047 and 7060, Code of Iowa 1927.

It is a well settled rule that it is competent for the legislature for the purposes of taxation to make that realty which would be personalty at common law and vice versa. It must, therefore, be determined whether the legislature of this state in providing the method of assessment of the property of railway companies has classified such property as real estate or personal property.

It has been held that an easement where a railroad is built on the bed of a public street may be assessed and taxed as real estate, *Baltimore City vs. West Maryland Railway Company*, 50 Maryland 274; that a grain elevator may be taxed as real estate, *Chicago, etc., Railway Company vs. Huston County*, 38 Minn. 531; that improvements upon land may be taxed as real estate, *New Mexico vs. United States Trust Company*, 174 U. S. 545; and that it is within the power of the legislature to treat rolling stock of a railroad as real property for the purpose of taxation, *Louisville, etc., Railway Company vs. State*, 25 Indiana, 177.

In the last cited case the question arose upon the question of title to the act which provided for.

"'Valuation of all lands, town lots, depot grounds, and buildings, and im-

provements thereon, other than roadbeds, switches and side-tracks, and railroad tracks and superstructures thereon, used or held by railroad companies, according to the same rule prescribed for ascertaining the value of other real property,' proceeds to direct that the appraisers shall 'then appraise the value of said road per mile, through their respective counties, including in that valuation the value of all the rolling machinery aforesaid, depots, depot grounds, and machine shops.'"

It was contended that the rolling stock was personal property and that since there was no mention of it in the title the act was void.

The court speaking through Mr. Justice Ray said:

"This objection is not well taken. The rolling machinery is intimately connected with the purposes and uses of the railroad track and superstructure, and the power of the legislature to treat it as realty for the purposes of taxation cannot be seriously questioned. *It is so treated in this act*, and is therefore embraced in the title."

A comparison of the language used in the Indiana statute hereinbefore quoted with the language used in our own statutes reveals a striking similarity.

It must also be considered that in the instant case the property is, in fact, under the decisions of the court practically entirely composed of roadbed, right of way and terminals, all of which are, in fact, real estate.

We are, therefore, of the opinion that railway property in this case is, in fact, real estate, is assessed as such and that the taxes levied therefor are not subject to the penalty in Section 7215 of the code cited.

COUNTY OFFICERS—CIGARETTE PERMIT—TRANSFER: A permit to sell cigarettes is not transferable from one person to another and the holder of a permit must operate the place from which sales are made.

September 24, 1927. *County Attorney, Atlantic, Iowa:* We are in receipt of your letter under date of September 19, 1927, requesting an opinion of this department upon the following question:

Whether or not a permit to sell cigarettes is transferable and whether or not the party who has a permit may sell his place of business and retain the permit under an agreement with the new purchaser that the new purchaser will handle cigarettes for said permit holder, the permit holder to derive all the profits from said sale.

Section 1558 of the Code 1927, provides as follows:

"Such permit shall:

1. Be granted only to a person owning or operating the place from which sales are to be made under the permit.
2. Not be transferable.
3. Be numbered and show the name and the residence of the person to whom granted and the place of business of the holder where sales are to be conducted under said permit."

It will be noted from a reading of the above section that a permit may only be granted to a person owning or operating the place from which the sales are made, and that said permit is not transferable. We are, therefore, of the opinion that a permit to sell cigarettes is not transferable and that where a person sells his place of business, he cannot make an arrangement with the new owner to have said owner sell said cigarettes for him under his permit. This would be contrary to the provisions of the statute set out above for the permit holder would not be owning or operating the place of business as is required by the statute.

SCHOOLS AND SCHOOL DISTRICTS: A bond indemnifying the district for damages incurred in connection with the transportation of pupils to public and parochial schools in busses owned by the school district is void because the purpose is unlawful.

September 26, 1927. *County Attorney, Jefferson, Iowa:* This will acknowledge receipt of your letter of recent date in regard to a bond which you submit in connection with the transportation of pupils to a parochial school by the use of public school transportation busses.

The purpose of this bond, as set out by the terms thereof is as follows:

"The purposes for which the above described automobiles are to be used are to transport public and parochial pupils to and from school."

We are of the opinion that this bond is void as to any protection in the case of parochial school pupils because such transportation is not only illegal but unconstitutional.

We adhere to our original opinion that it is unlawful and unconstitutional for the school board to transport pupils who do not attend the public school and to use public school property therefor and that no valid bond can be written which will affect the situation.

AUTOMOBILES—TRUCKS—LICENSES: Non-resident owners operating in Iowa for hire must have license.

October 11, 1927. *Secretary of State:* We desire to acknowledge receipt of your request of October 11 as follows:

"Are trucks owned by non-resident operators and which are now in use in the State of Iowa in hauling required to pay a license fee?"

In reply we desire to say that under Section 4864 we find Paragraph Two as follows:

"when such vehicle is kept and used in this state a majority of the time, by a non-resident."

The above section pertains to when licenses are required.

We are, therefore, of the opinion that a truck being used on a contract for hauling in the State of Iowa should be required to pay a license fee for the reason that the same is not a visitor, as it is being used for business purposes and being operated upon the highways of this state and falls within Paragraph Two of Section 4864 as above quoted.

TUITION IN PUBLIC SCHOOLS—BOARD OF CONTROL — TRAINING SCHOOL: Where boys and girls who have been committed to one of the training schools and are placed on contract in homes, the school board of the district where said boy or girl attends school cannot collect tuition from the Board of Control.

October 13, 1927. *State Board of Control:* We are in receipt of your letter under date of October 4, 1927, requesting the opinion of this department on the following question:

The Board of Control have placed under contract a number of boys and girls who were committed to the Training Schools at Eldora and Mitchellville, in private homes in various parts of the state. Some of these boys and girls are attending the public schools in the cities and towns where they are now residing. The question now arises whether or not the school board of the public school in which one of these boys and girls may be in attendance can charge and collect from the Board of Control tuition fees under and in accordance with Section 4277, Chapter 215 of the Code of 1927.

Section 4277 above referred to does not apply to boys and girls who have been placed in homes by the Board of Control as suggested in your question. This section applies only to the students referred to in Section 4275. We do not find any statute which would permit the school board of a school in which one of the training school children was in attendance to collect or require the payment of a tuition fee. We are of the opinion that where the student has been placed in a home under contract by the Board of Control that that becomes the residence of said pupil and that that residence entitles said pupil to attend the public schools of said place without the payment of tuition as provided for in Section 4273 of the Code of 1927.

BANKS AND BANKING: The Articles of Incorporation of a bank which desires to take advantage of additional powers provided in Section 9284 should specify the additional powers it intends to assume and not merely contain the number of the chapter in which the section is contained.

October 13, 1927. *Superintendent of Banking:* I wish to acknowledge receipt of your favor of the 10th in which you request our opinion as follows:

"Your attention is directed to Article II of the enclosed form for Articles of Incorporation, setting out that the nature of the business to be transacted is governed by Chapters 413, 415 and 416, the latter giving the bank authority to act in a fiduciary capacity.

"Several attorneys have taken the position that inserting the number of the chapter is not sufficient to authorize a bank to act as executor, trustee, guardian, etc., but that the language of Section 9284 should be used. We desire your opinion as to whether or not their position is correct."

The article to which you refer in the form of Articles of Incorporation furnished by your department reads as follows:

"Business.

The general nature of the business to be transacted by this corporation shall be that of a savings bank, conducted under the provisions of Chapters 413, 415 and 416 of the Code of Iowa and acts of the legislature amendatory thereto; and this corporation hereby assumes and takes to itself all and singular the powers conferred upon savings banks by the laws of Iowa, and accepts all the duties and obligations imposed thereby."

Section 9284, to which you refer, in relation to the rights of a bank to act as guardian, trustee, executor, etc., in part is as follows:

"Authorization.—Additional powers. Trust companies, state and savings banks existing under the provisions of this title, in addition to the powers already granted to such corporations, shall have power, when so authorized by their articles of incorporation:

"1. To be appointed * * *."

This proposition has never been determined by the Supreme Court of this state or of any other state in which we have been able to find a similar statute.

As a general rule it may be said that the articles of incorporation must specify the purposes for which the association is formed, and must comply with the provisions of the statute in all respects. There is no statutory requirement that the articles of incorporation of a savings bank state in detail the objects for which it is formed. The only requirement is that the articles shall state "the object for which it is formed". (Section 9157, Code, 1927).

However, a reading of the section, 9284 supra, discloses that the power to act as trustee, executor, etc., is an additional power to that ordinarily enjoyed by a savings bank, and such power must be authorized by its articles. We are of the opinion that it would be better practice for the corporation to specify what

additional powers, under the provisions of Section 9284 supra, it intends to assume, and that the general statement that a corporation will transact business under the provisions of Chapter 416, of which Section 9284 is a part, is too general in its term.

INTOXICATING LIQUOR: Retail druggists engaged in compounding tinctures, extracts, etc., in which alcohol is used, must obtain a manufacturer's permit. It is not necessary that a licensed dentist or veterinarian obtain a permit before securing alcohol for non-beverage purposes.

October 14, 1927. *County Attorney, Ottumwa, Iowa:* We wish to acknowledge receipt of your favor of the 12th in which you request our opinion upon the three following propositions:

"1. Section 2136 of the Code of 1927 covers permits of wholesale drug corporations authorizing said corporations to sell certain alcohol and wines to certain specified individuals and firms and intoxicating liquors to certain specified individuals and firms under certain conditions.

"2. The question arising under this section is whether or not under paragraph 2 of this section a pharmacist who is registered under the law in this State, or under paragraph 3 a firm or corporation which is actually engaged in the retail drug business is authorized to make purchases of alcohol and wines for the purposes covered by this section and not for unlawful purposes, without obtaining a permit from the District Court.

"3. Whether or not under Paragraph 10, Section 2136 of the Code of 1927 a licensed Dentist or a Veterinarian under paragraph 11 of the same section are authorized to make purchases of alcohol for the purposes covered by this section and not for unlawful purposes without obtaining a permit from the District Court."

Section 2136, to which you refer, is contained in the chapter in reference to permits of wholesale drug corporations authorizing them to purchase and sell intoxicating liquors, not including malt liquors. The paragraphs of this section to which you refer read as follows:

"The permit issued to a wholesale drug corporation shall authorize said corporation, under the limitations herein provided, to sell:

"1. * * *

"2. Alcohol and wine for the purpose of manufacturing patent and proprietary medicines and toilet articles and compounding medicines, tinctures, extracts, or other like commodities, none of which are susceptible of use as a beverage, to pharmacists who are registered under the laws of this state and who are actively engaged in this state in the retail drug business and in such compounding.

"3. Alcohol and wine for the purpose of manufacturing patent and proprietary medicines and toilet articles and compounding medicines, tinctures, extracts, or other like commodities, none of which are susceptible of use as a beverage, to firms or corporations which are actively engaged in this state in the retail drug business and in compounding such medicines, tinctures, extracts, or other like commodities, under the immediate supervision of a pharmacist licensed under the laws of this state. * * *

"10. Alcohol to licensed dentists for the purpose of sterilization, annealing gold, or other like nonbeverage purposes.

"11. Alcohol to licensed veterinarians for any legitimate nonbeverage purpose."

In this connection we wish to call your attention to the fact that the section we have just quoted from authorizes the permit-holder "to sell" to the persons or firms therein enumerated.

In connection with your first inquiry we wish to call your attention to the

provisions of Chapter 103 of the Code, 1927, referring to permits to manufacturers. Section 2164 thereof reads as follows:

"Patent and proprietary medicines, tinctures, extracts, toilet articles, and perfume, and other like commodities, none of which are susceptible of use as a beverage but which require as one of their ingredients alcohol or vinous liquors, may be manufactured within this state, provided a permit so to manufacture is first obtained as hereinafter provided."

The two chapters we have referred to must be read and construed together and effect given to both if possible. When thus read and construed there is no conflict between the statutes and it is plain that wholesale druggists may sell to the persons referred to in Section 2136, supra, but that any such persons or corporations who intend to use alcohol or vinous liquors for manufacturing patent and proprietary medicines, tinctures, extracts, toilet articles, perfume and other like commodities none of which are susceptible of use as a beverage, must obtain a manufacturer's permit before they may use the alcohol or vinous liquors for this purpose.

There is no requirement in the statute that makes it necessary for a licensed dentist or veterinarian to obtain a permit in order to have alcohol for the purposes stated in Section 2136, supra, and we are of the opinion that a wholesale druggist holding a permit under Chapter 101 of the Code, 1927, may sell alcohol to licensed dentists or veterinarians, and the latter may purchase the same without having a permit.

CORPORATIONS—PERMIT: American Fur Ranch Co. of Minneapolis, Minnesota, comes within the provisions of Chapters 392 and 393 and must secure a permit in accordance therewith.

October 14, 1927. *Secretary of State:* We are in receipt of your letter under date of October 13, 1927, requesting an opinion of this department on the following question:

The American Fur Ranch Company of Minneapolis, Minnesota, has opened up an office in this state and is selling fur bearing animals such as muskrats and minks to the public on a partial payment plan, as well as on single payment plan, the investor buying a certain number of animals at a specified and agreed price on a conditional sale contract under the agreement that if the purchase price is not paid, the amount already paid will be forfeited as liquidated damages. The agreement also specifies that the company is to retain possession of the animals purchased and to take care of them for a certain period of time, at which time the increase is to be divided with the investor in the company on a certain basis.

The question has now arisen, whether or not this company is within the provisions of Section 8525, of the Code of 1927, and therefore required to secure a permit.

Upon examining the statute, Section 8525 of the Code of 1927, we are of the opinion that the American Fur Ranch Company of Minneapolis, is engaged in such business as comes within the provisions of Section 8525, Code of 1927, and that before they can engage in such business it will be necessary for them to secure a permit in accordance with the provisions of Chapter 392 and Chapter 393 of the Code of 1927.

COUNTY ATTORNEY, JAILS: The word "jails" in Section 5505, Code of 1927 means all the jails in the county.

October 17, 1927. *County Attorney, Vinton, Iowa:* In reply to your request of October 10 in which you submit the following inquiry:

"Under Section 5505 of the Code of 1927 does the word 'jails' mean the county jail or all the jails within the county?"

Under the provisions of Sections 5505-5509 inclusive, we are of the opinion that the word "jails", being in the plural was meant to include all the jails within the county, and that it was the intention of the legislature, in view of the fact that the county jail is visited each term by the grand jury who submit a report of its condition to the district court, that it was intended that the condition and operation of the different jails through the county should be investigated twice a year and a report of the same submitted to the district court.

PARDONS—PAROLES—COMMUTATIONS—DISTRICT COURT: The District Court cannot grant pardons, paroles or commutations of sentences and cannot suspend the execution of sentence once judgment is pronounced.

October 20, 1927. *Bureau of Investigation:* We wish to acknowledge receipt of your request for an opinion upon the following proposition:

"It has been the custom of judges in a number of the district courts of this state to issue memorandum releases for prisoners sentenced to a term in jail, before the expiration of such sentence.

"In issuing the above described releases, in order to accommodate defense attorneys and others, there is no record made in the records of the district court and in the clerk's office, the record showing indictment, arraignment, pleas and conviction, sentence, and return of the mittimus, which would indicate that the prisoner had served his full time.

"It is my belief that the court's issuing a release of the nature above described before the expiration of the sentence is an unlawful assumption of power that is vested only in the executive."

In reply we wish to call your attention to an opinion given by this department dated April 23, 1924, to Honorable John E. Craig, Judge of the District Court in Lee County, Keokuk, Iowa, in which we held that the district court had no power to remit a fine nor to release a prisoner committed to jail under sentence prior to the expiration of the sentence. The opinion referred to does not set out the authorities or the statutes applicable. We concur in this opinion and because of the importance of the question involved we will cite the authorities sustaining this conclusion.

Chapter 188 of the Code, 1927, contains the statutes with reference to paroles. Section 3800 thereof in part reads as follows:

"Parole by court. The trial court before which a person has been convicted of any crime except treason, murder, rape, robbery, arson, second or subsequent violation of any provision of title 6, or of the laws amendatory thereof, may, by record entry, suspend the sentence and parole said person during good behavior:

"1. * * *.

"2. * * *.

"3. * * *."

Other than the statute above quoted paroles are placed in the jurisdiction of the State Board of Parole.

Chapter 189 of the Code, 1927, contains the statutes in reference to pardons, commutations, remissions and forfeitures. Section 3812 thereof provides:

"Nothing in the preceding chapter shall be construed as impairing the power of the governor under the constitution, to grant a reprieve, pardon, or commutation of sentence in any case."

Section 3813 provides:

"A person whose sentence has been suspended may be pardoned by the gov-

ernor at any time after such suspension on such conditions as he may think proper."

The last sentence undoubtedly refers to a suspension of sentence under the provisions of Section 3800, supra.

Section 3824 of this chapter provides:

"The governor shall have power to remit fines and forfeitures upon such condition as he may think proper."

Chapter 656 in reference to execution requires that immediately upon pronouncement of judgment that a certified copy thereof must be furnished to the officer whose duty it is to execute the same—

"* * *, who shall proceed and execute it accordingly, and no other warrant or authority is necessary to justify or require its execution." (Section 13971, Code, 1927).

Chapter 655 contains the only statutory provision in reference to a stay of execution, Section 13970 thereof providing:

"The defendant may have a stay of execution for the same length of time and in the same manner as provided by law in civil actions, and with like effect, and the same proceedings may be had therein."

The stay referred to is that provided upon appeal when a bond is furnished, as provided under Section 11706 of the Code, 1927. We wish to call attention to the fact that Section 3800, supra, only refers to the suspension of "sentence" and does not refer in any manner to the suspension of execution. A reading of the statutes alone, we believe is fully sufficient to sustain the conclusion of this department.

The question involved is not a new one to the Supreme Court of this State and was first considered in the case of *State vs. Voss*, 80 Iowa 467, wherein, our court, speaking through Justice Beck, squarely held that the district court had no authority to suspend the execution of a judgment for a crime committed and that a condition contained in the judgment suspending the execution was void and of no effect to delay execution of the sentence. The court at page 470 said:

"In this case the action is disposed of,—is ended by judgment; and the plaintiff's remedy is indefinitely suspended, or wholly cut off, by the order suspending execution during the pleasure of the judge of the court. The distinction between suspending judgment and suspending execution is obvious, and need not be further pointed out. Counsel for the defendants cite in support of the action of the court below the following cases: * * *. These are cases wherein sentence after the verdict was suspended,—a very different thing from the suspension of execution after judgment on sentence."

This proposition was also considered by the Supreme Court in the case of *Miller vs. Evans*, 115 Iowa, 101. Justice Ladd, at page 102, said:

"The right to suspend sentence after being pronounced is denied the courts of this state. *State vs. Voss*, 80 Iowa, 467. And this seems now to be the prevailing rule." (Citing a large number of cases.)

Justice Ladd further said:

"The authority 'to grant reprieves, commutations and pardons, after convictions for all offenses, except treason and cases of impeachment,' is by the constitution lodged in the governor; and an order by a court suspending judgment after being entered, save for purposes of appeal, is clearly obnoxious to the objection that it is an attempted exercise of power not judicial, but vested in the executive. Section 16, article 4, Constitution of Iowa."

The case last referred to is cited with approval in the recent decision of our Supreme Court in the case of *Hall vs. Wheeler*, 196 Iowa, 100, 103, and the rule announced in *State vs. Voss*, supra, is followed by our court in the recent decision of *State ex rel vs. Hume*, 193 Iowa, 1395. The distinction pointed out by our courts in the cases referred to is also recognized by the Supreme Court of New York in *People vs. Court of Sessions*, 141 N. Y., 288, 36 N. E. 386, wherein under a statute similar to our own it was held that the courts were permitted to suspend sentence after the verdict, which was an entirely different thing from suspending sentence after it had been imposed or, as the courts often say, suspending execution after sentence, and that the latter could not be done. In addition to the rule announced by our court being followed by a great majority of the state courts, it is also the federal rule and is stated in *Ex Parte United States*, 242 U. S., 27.

There can be no doubt under the decisions of our Supreme Court and the statutes of this state but that a district court is clearly without authority or jurisdiction to release prisoners committed to the county jail in the manner stated in your inquiry.

SCHOOLS AND SCHOOL DISTRICTS: Residence for school purposes is determined by intention of the parties and is broader than residence for taxation or suffrage.

October 20, 1927. *County Attorney, Waukon, Iowa:* This will acknowledge receipt of your letter of recent date in which you request an opinion construing the term "residence" as used in Section 4273 Code of Iowa, 1927.

The term "residence" for school purposes has been given a rather liberal construction. In construing the said term the supreme court of this state speaking through Mr. Justice DeGraff in *Mount Hope School District vs. Hendrickson*, 197 Iowa 191, said:

"Ordinarily, the legal residence of a minor is the same as that of his parents but a minor may have a residence for school purposes other than that of his parents. The test of residence which will confer school privileges is not the same as the test for taxation or for the exercise of the right of suffrage" *School District vs. Pollard*, 55 N. H. 503; *State vs. Board of Education*, 96 Wis. 95; *Yale vs. West Middle School District*, 59 Conn. 489 (13 L. R. A.) 161; *Board of Education vs. Lease*, 64 Ill. App. 60.

The court further construes the word "residence" to mean the place, abode or dwelling of the person.

It has been further held that the residence of a child for school purposes is not destroyed by the mere fact that his father and mother have separated and destroyed the common home where one of the parents is providing for him in the place which had been their home while they were a united family. *Board of Education of El Reno vs. Hobbs*, 8 Okla. 293; 56 Pac. 1052.

It has also been held that a child whose father has no home or means of acquiring one and whose mother is dead is entitled to free tuition in the district in which he resides with an aunt with whom the child makes his home pursuant to the arrangement by which the aunt has entire charge of the child.

We are, therefore, of the opinion that since the father in the case you cite rents the entire upstairs of a home, the mother staying there perhaps one-half of her time with the children but during the other time returns to the farm, is to be determined entirely by the intention of the parties as to where they intend to maintain a residence.

The question of procedure, however, is outlined in the case of *Preston vs. Board*, 124 Iowa 355, where the court held that the determination of residence for school purposes is one for the board from which an appeal must be taken to the county superintendent and from that officer to the Superintendent of Public Instruction. We believe that if the county auditor should undertake to set over the tuition directing the county treasurer to make the transfer, that such officers could be enjoined by the rural district and the question of residence determined in that suit. In that case, of course, it would be incumbent upon the rural district to take the initiative in determining the residence.

DEPARTMENT OF HEALTH: Member of examining board designated to attend annual convention of profession or meeting of examining boards is not required to secure approval of executive council before expenses may be paid out of state funds.

October 20, 1927. *Director of the Budget:* You have requested the opinion of this department upon the question of whether or not a member of one of the examining boards under the Department of Health, who has been designated by his board to attend either the annual meeting of the national association or society or of the national organization of state examining boards for such profession, must first secure the approval of the Executive Council and attach such approval to his expense account before the Auditor of State may issue a warrant therefor.

Section 2465 of the Code, 1927, was enacted by the Extra Session of the Fortieth General Assembly, and provides that each such examining board may select one of its members to attend either of the annual meetings described in the proposition submitted, and that the member so selected shall receive his necessary traveling and hotel expenses in attending such meeting.

Section 398 of the Code, 1927, provides that claims for expenses in attending conventions and conferences outside of the state, shall not be allowed unless the voucher is accompanied by so much of the minutes of the Executive Council certified to by its Secretary, as show that such expense was authorized by said Council. This provision of law was enacted by the Thirty-ninth General Assembly.

We are of the opinion that the provisions of Section 398 just referred to, apply generally to all state employees except those specifically excepted in the section itself and except those delegates selected under Section 2465. Section 2465 was a later enactment and makes special provision for delegates selected under its provisions and, therefore, creates an exception to the general provisions of Section 398. There are no conditions attached to any of the provisions of Section 2465, save that the examining board must, by proper action, select one of its members as the delegate for that board. The voucher for the expenses of such delegate should be accompanied by the resolution of the examining board wherein he was designated by them as the proper person to attend the meeting, before the Auditor would be justified in issuing a warrant for such expense.

SCHOOLS: Department of public instruction may approve state aid for erection of additional building.

October 24, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of October 24, 1927, requesting an opinion of this department upon the following proposition:

Owing to development of mines in the vicinity of the consolidated school of Dallas the building is overcrowded and rooms are being used that are poorly lighted and ventilated. At an election held a proposition to issue bonds to build an addition to the building was rejected. The board of education decided to construct an addition to the building with funds already on hand including $3,000 state aid allotted to the Dallas school district from the mining camp fund from the executive council on June 20, 1927. Contract was let for building and the construction is under way.

You inquire whether or not the Department of Public Instruction has the right to approve the use of $3,000 state aid toward the erection of this addition.

The only provisions restricting the expenditure of an appropriation made for mining camp schools are found in Section 37, Chapter 275, Acts of the 42nd General Assembly. The only limitation placed upon the use of this fund by the Superintendent of Public Instruction is the approval of the executive council after a comprehensive program showing the entire proposed expenditure has been under consideration.

We are, therefore, of the opinion that subject to this limitation the Superintendent of Public Instruction can direct the expenditure for any purpose in connection with the school to which the fund is allotted.

LEVY—WRIT OF EXECUTION—SHERIFFS: Sale to be made by sheriff making levy.

October 25, 1927. *County Attorney, Leon, Iowa:* We desire to acknowledge your request of October 22 in which you submit the following question:

"Where a writ of execution issued in one county is sent to the sheriff of an adjoining county, and the levy made upon personal property, and thereafter the personal property is returned to the sheriff of the county from which the writ was issued, should the sheriff of the county in which the execution was issued or the sheriff who made the levy give notice and sell the same?"

In writing this opinion, we are assuming that a proper writ was issued, directed to the sheriff of the adjoining county, who, upon receiving the same, made the levy and thereafter turned the property over to the sheriff of the county from which the writ was issued as custodian.

In view of the above facts, we are of the opinion that the sheriff of the adjoining county should advertise and sell this property under the authority of the writ directed to him.

PRIMARY ROADS—BRIDGES—CITIES AND TOWNS—REIMBURSEMENT: No reimbursement for bridges within cities and towns.

October 25, 1927. *Iowa State Highway Commission:* We desire to acknowledge receipt of your request of October 22nd as follows:

"Where a county since April 19, 1919, has constructed and paid for a bridge located on an extension of a primary road within the limits of a corporated town or city, should reimbursement be made by the Highway Commission under Section 4755-b5?"

We first desire in reply to your request to quote Section 4755-b2:

"4755-b2. *'Road systems' defined.* The highways of the state are, for the purposes of this chapter divided into two systems, to wit: the primary road system and the secondary road system. The primary road system shall embrace those main market roads (not including roads within cities and towns) which connect all county seat towns and cities and main market centers, and which have already been designated as primary roads under chapter 241, Code of 1924; provided, that the said designation of roads shall be, with the consent of the federal authorities subject to revision by the state highway commission.

Any portion of said primary system so eliminated by any changes shall revert to and become a part of the system from which originally taken. The state highway commission may, for the purpose of affording access to cities, towns or state parks, or for the purpose of shortening the direct line of travel on important routes or to effect connections with interstate roads at the state line, add such road or roads to the primary road system, but no other increase shall be made in the mileage of the primary roads until the present primary road mileage has been completed as this chapter provides."

We particularly desire to call your attention to the exclusion found in the parenthesis which is shown as follows: "(not including roads within cities and towns)".

Under Section 4755-b5 we find the following:

"* * * or where bridges had been built on the primary roads under the supervision of the highway commission, and paid for out of the county road or bridge funds since April 19, 1919, * * *"

The above quotation specifies what bridges fall within those for which reimbursement may be made, and in it is found the words "primary roads" and in view of the fact that the primary road system as defined under Section 4755-b2 specifically excludes roads within the cities and towns, we are of the opinion that bridges located within the limits of an incorporated town or city do not fall within the Section 4755-b5 and the Highway Commission should not make reimbursement for them.

COUNTY TREASURER—MUNICIPALITIES—TAXES: County Treasurer required to make report to municipality of funds collected.

October 25, 1927. *County Attorney, Fort Madison, Iowa:* We desire to acknowledge receipt of your request of October 20 in which you submit the following question:

"Is it necessary for the County Treasurer in reporting the amount of taxes collected for municipalities, to give specific data as to which public improvement the amounts collected are to be applied on?"

In answering this request, we desire to quote Section 6229:

"6229. *Taxes paid over.* Before the third Monday of each month, the county treasurer shall give written notice to the mayor of each municipality in the county of the amount collected *for each fund* up to the first day of that month, including the amounts collected to pay bonds issued to pay the costs of public improvements for which special assessments have been levied and certified, and the mayor of each municipality shall draw an order therefor in favor of the city treasurer, countersigned by the clerk or auditor of the municipality, upon the county treasurer, who shall pay such taxes to the treasurers of the several municipalities only on such order."

We are of the opinion that the words "for each fund" specifically makes it a duty of the county treasurer to give by written notice sufficient data for the municipality to determine to which fund the moneys collected by the county treasurer shall be credited to. This is further strengthened by Section 6230 wherein it makes it a felony for any city or township official to participate in, advise, consider, or allow a diversion of any funds, and in order to make it possible for city officials to properly know to what fund the moneys collected should be allowed, the written notice given by the county treasurer should show the necessary data.

BANKS AND BANKING: Finance companies purchasing automobile paper are not required to secure a license under the small loan act.

October 28, 1927. *Department of Banking:* This will acknowledge receipt of your request for an opinion upon the following proposition:

Is it necessary that automobile finance companies dealing in the purchase of so-called automobile paper secure a license to do business from the Superintendent of Banking of the state of Iowa under Chapter 419 of the Code of Iowa 1927?

Upon investigation we find that the automobile finance companies are, without exception, engaged only in the business of discounting negotiable instruments received by automobile dealers in payment for automobiles sold to the makers of the negotiable instruments. When the automobile is sold by the automobile dealer, it is the practice to establish a price for sale on time, or in other words, on installment payments, for a sum which is higher than the cash price for the automobiles. It is the universal practice that either a mortgage or conditional sales contract is used for the purpose of securing the obligation of the purchaser for the unpaid purchase price and the note which evidences the obligation is payable in stated installments and bears interest only after maturity. It is these purchase money notes, secured by a conditional bill of sale or mortgage, which the finance companies purchase from the dealer at a discount, which discount is usually approximately the difference between the dealer's cash price and his price for automobiles sold on time.

It is well established in this state, as well as in foreign jurisdictions that the payee of a promissory note may dispose of it at any rate of discount from its face, and the purchaser will have the right to enforce its full amount against the maker without any defense on the ground of usury. *Dickerman vs. Day*, 31 Iowa 444; *Comstock vs. Wilder*, 61 Iowa 274; 39 *Cyc.* §31-932.

There is no provision in the Code of Iowa requiring the licensing of persons, partnerships, or corporations engaged in the business of financing automobile paper and the operations of such financing companies as above described are not circumscribed by statutory provisions.

We are, therefore, of the opinion that such automobile financing companies and such companies as purchase automobile paper do not come within the license acts requiring a license from the Superintendent of Banking of the state of Iowa.

SCHOOLS AND SCHOOL DISTRICTS: 1. There is no law requiring a mat while boxing in school. 2. School board is not liable for injuries to pupils. 3. School board can be sued as other public corporations. 4. School board may settle claim for injury or pay doctor bill. 5. Teacher, coach, or superintendent may be liable if injury is due to direct negligence.

October 28, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following propositions:

"1. Is there a law concerning the use of a mat while boxing in school?
2. Can the school board be held liable for an injury to a pupil while in school?
3. Can the school board be sued and if so in what court?
4. Has the school board any legal right to settle a claim for injury to a pupil while in school?
5. In case of neglect on their part can a coach or superintendent of schools be held liable?"

We shall treat your inquiries in the order submitted.

We have made careful search of the statutes and we find no provision requiring the use of a mat for boxing in public schools.

The general doctrine is that a school corporation is not liable for non-contract injuries. The leading case on the subject held that no recovery could be had against the board of directors where a pupil was injured by an explosion which followed the throwing of petroleum upon kindling by a janitor in kindling fire. This finding was in the face of the fact that the board of directors had been twice notified of the method used by the janitor in kindling fire.

A school corporation may be sued in any court in the same manner as any other corporation, public or private, or an individual may be sued.

While there is little authority upon your question No. 4 as submitted, we are of the opinion that a school board could legally pay a reasonable sum for physician's care or hospital treatment where a pupil was injured while attending school. The board is, of course, under a former opinion expressed, not under legal obligation or liability to make any such settlement.

A teacher, coach, or superintendent of schools has been held liable to a student who is injured as a direct consequence of such instructor's negligence. In an English case on this question it was held that a teacher who kept a bottle of phosphorous in the room where athletic equipment was kept was liable for injuries received by a pupil who carried the bottle of phosphorus to a playground where it was ignited and where another pupil was injured in the explosion. It would be necessary, of course, that the damages be traced directly to the negligence of the instructor. It has also been held that a janitor is liable to any pupil whom he injures because of failure to use proper care in his work. *Ford vs. School District of Kendall Borough*, 15 Atl. (Pa.) 812; *School District vs. Williams*, 38 Ark. 454; *Donovan vs. McAlpin*, 85 N. Y. 185.

SCHOOLS AND SCHOOL DISTRICTS: It is within the discretionary power of a school board to require shower baths for girls after physical education classes under proper protection.

November 2, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your request for an opinion of this department upon the following proposition:

Would a rule of the board of education of a school corporation in connection with the enforcement of Sections 4263-4, Code of Iowa 1927, requiring shower baths following the class period for girls under reasonable and proper precaution be an abuse of discretion of said board?

It is provided by statute, Section 4263, Code of Iowa 1927, as follows:

"The teaching 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 courses provided for normal children. Said subject shall be taught in the manner prescribed by the state superintendent of public instruction."

The statute further provides in Section 4264 of said Code for the length of the course, the conduct and attainment of the pupils.

It will be noted that under the quoted section the course must include effective health supervision and health instruction and that the courses are required of both sexes. Since the question of reasonable construction of a rule of the board of education adopted under its discretionary powers is a question for judicial determination, we must approach it from the judicial viewpoint.

That physical exercise produces perspiration is too well known to require consideration. That the invigoration of shower baths of proper temperature and proper attention afterwards is conducive to health is also too well known to require consideration. The only question under consideration is whether or not the necessary precautions are taken by the board and by the supervising officers of the board to prevent undue familiarity and to cultivate the natural feminine modesty.

We are, therefore, of the opinion that a rule requiring proper shower baths after the classes in physical education for girls is within the discretionary powers of the board subject to proper precautions as above suggested. What these precautions should be would, of course, depend upon the circumstances, conditions, and sentiments in each particular locality.

SCHOOLS AND SCHOOL DISTRICTS: 1. School board may be required to exempt child from physical education class if disability justifies exemption. 2. School board may employ physician and refuse to take certificate of physician, chiropractor, or osteopath and rely upon its own school physician.

November 3, 1927. *Superintendent of Public Instruction:* You have submitted to this department for an opinion the following propositions:

"1. Would a school be required to exempt a particular child from even a modified course if in the judgment of a regular physician such child should be exempt?

"2. If a board is required to exempt a child from even a modified course on the certificate of a regular physician, would it be under the same requirement if the certificate were from a chiropractor or an osteopath?

"3. May a board require, before exempting a child from even a modified course, that a certificate be obtained from the school's own physician or someone appointed by the school?"

It is provided by statute, Section 4263, Code of Iowa 1927, as follows:

"The teaching 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 courses provided for normal children. Said subject shall be taught in the manner prescribed by the state superintendent of public instruction."

We are of the opinion that a school board could be required to exempt a particular pupil from even a modified course if in the judgment of competent physicians such child should be exempt. It would, however, be within the power of the board of such school corporation to employ its own physician or physicians and to determine thereby the competency of the child to take such modified courses of instruction as the board offered and the board would not be precluded from making an investigation of its own regardless of certificates made or filed by a physician not in its employ. This rule would apply, of course, to any practitioner whether a physician, chiropractor or osteopath.

The board of said school corporation could, of course, accept any certificate furnished but it is within the discretionary power of the board in order that its own courses may be protected that it require certificates of health from its own physician or from one designated by the board.

TAXATION—OMITTED PROPERTY—AUDITOR—TREASURER: (1) Local Board of Review does not have power to omit taxable property from assessment roll. (2) County Auditor has power to place on the tax list omitted property and may be compelled to do so and to also correct assessment roll. (3) Board of Supervisors has authority under certain conditions to suspend

or omit taxes and to allow certain exemptions. Treasurer is not authorized to correct errors in assessment rolls or to place on the tax list omitted property

November 3, 1927. *County Attorney, Rock Rapids, Iowa:* We are in receipt of your letter under date of October 8, 1927, requesting an opinion of this department on the following question:

A piece of taxable real estate was assessed by the assessor. The board of review in checking over the assessment rolls decided to drop this property from the rolls, and did so.

1. Has the board of review the power to drop taxable property from the assessment roll?
2. Can the county auditor now be compelled to place the omitted property on the books?
3. Can the treasurer be required to place the omitted property on the books after the first of the year?

I.

Under and in accordance with Chapter 343, Code of 1927, the local boards of review have power to: (1) Approve the assessment as made by the assessor, (2) Increase the assessment as made by the assessor, (3) Reduce the assessment as made by the assessor, (4) Add to the assessment roll omitted property, (5) Correct the assessment roll.

The board of supervisors acting as such, has the power to remit taxes assessed against the property owned by individuals who are public charges; and when acting as a board of review for the county, no doubt would have the power to omit or drop from the assessment roll, property of individuals who are public charges, all in accordance with Section 6950.

We do not find any statute which would give the local boards of review the power to drop or omit taxable property from the assessment roll, but we do find in Section 6948 a provision which requires the beneficiary of an exemption allowed by Section 6946 and Section 6947, to file with the assessor a written statement to the effect that he is the owner of the property on which the exemption is claimed.

The board of supervisors, acting as such, has power in accordance with Section 6949 to allow an exemption to one who is entitled to the same where a statement is filed with said board before September 1st of the year following the year for which said exemption is claimed. The board also has the power in accordance with Section 6950, when it is petitioned by a person who, by reason of his age or infirmity, is unable to contribute to the public revenue to order the county treasurer to suspend the collection of taxes against such petitioner for the current year, or they may cancel and remit said taxes under certain conditions. The board of supervisors may in accordance with Section 7237, Code of 1927, remit the taxes of any person whose buildings, crops, stock, or other property have been destroyed, if such property has not been sold for taxes or if said taxes have not been delinquent for thirty days at the time of the loss, and then they can only remit such an amount as is not covered by insurance.

It would, therefore, appear that the local boards of review do not have power to drop taxable property from the assessment roll. A board of supervisors does have power under certain conditions as noted above, to suspend or remit taxes and to allow certain exemptions.

II.

Section 7149, Code of 1927, reads as follows:

"The auditor may correct any error in the assessment roll or tax list and may assess and list for taxation any omitted property."

From reading the above section it will be seen that it is one of the duties of the county auditor to correct errors in the assessment or tax list and to assess and list for taxation purposes omitted property. It, therefore, being the duty of the auditor to assess and list omitted property, he may be compelled to add any *taxable property* which has been omitted, except, of course, property which has been exempted by the action of the board of supervisors and mandamus would be the proper remedy.

III.

We do not find any statute which would authorize the treasurer to add any omitted property after the first day of January of the year in which the taxes are due and payable or at any other time. This duty is that of the county auditor. He may do it after the first of the year and, of course, when he does do it, the treasurer's books would be corrected accordingly.

HIGHWAYS—ROADS—BOARD OF SUPERVISORS: The board of supervisors may abandon a county road and make it a part of the township road system by proceeding in accordance with Sec. 4637 of the Code.

November 7, 1927. *County Attorney, Guttenberg, Iowa:* We are in receipt of your letter under date of October 21, 1927, on the following question:

A change of Primary Road No. 13 in the vicinity of Strawberry Point, Iowa, involves the taking over of about seven miles of township road as a new route for the primary road, the old primary road under Section 4755-b2, Code of 1927, reverting to the county road system as it belonged to said system before it became a primary road.

There is now no necessity for keeping this road as a county road and the board of supervisors wish to make it a township road as the township was relieved of seven miles of road by the change. How should the board of supervisors proceed?

Under Section 4560 of the Code of 1927, the board of supervisors has general supervision of the roads in the county with power to establish, vacate and change them in accordance with the provisions of Chapter 237, Code of 1927.

Under Section 4638, the board of supervisors is given power under certain conditions to add such township roads from the township road system as have been improved in accordance with the general plans and specifications furnished by the engineer. It would thus appear from the reading of the two sections cited, that the board of supervisors has the power to establish, vacate and change the roads in the county, and that they may make a township road a county road under certain conditions.

Section 4637 provides that the board of supervisors, when they desire to make any change or modification in the county road system for the purposes therein enumerated, may do so by and with the consent and with the authority of the Iowa State Highway Commission.

We are of the opinion that where the Board of Supervisors desires to abandon a county road and to make it a part of the township road system, they may do so by proceeding in accordance with Section 4637, Code of 1927.

BOARD OF SUPERVISORS—DEPUTY COUNTY OFFICIALS: Revocation of appointment by principal only.

November 8, 1927. *County Attorney, Waterloo, Iowa:* We desire to acknowledge receipt of your request of November 7 as follows:

"May the Board of Supervisors, after having approved the appointment of a deputy county official and after said official has accepted such appointment and entered upon his duties, rescind their action so as to terminate his term of office?"

In reply we desire to cite and quote Section 5240 of the Code of 1927 which is as follows:

"5240. Revocation of appointment. Any certificate of appointment may be revoked in writing at any time by the officer making the appointment, which revocation shall be filed and kept in the office of the auditor."

In view of the fact that this is the only provision for the revocation of an appointment, all others would of necessity be excluded, and the Board of Supervisors would not have the power to take any further action and thereby terminate the officers term of office.

BANKS AND BANKING: A trust company may be authorized to transact business limited to a fiduciary capacity.

November 8, 1927. *Superintendent of Banking:* You have requested the opinion of this department as to whether by agreement or reservation in a charter authorizing a trust company to transact business in this state its functions could be limited to acting as a trust company with fiduciary capacity without engaging in the active banking business.

It is my opinion that such a limitation can be placed upon a trust company by limitation in its charter to transact business and with its articles of incorporation providing for its operation only as a trust company in the technical sense in which the words "trust companies" are used rather than in the statutory sense.

CONTRACTS—BOARD OF SUPERVISORS: Supervisors may contract where does not exceed collectible revenue for that year.

November 8, 1927. *Auditor of State:* We desire to acknowledge receipt of your request of November 4 as follows:

"Can the board of supervisors contract for lumber and bridge material in 1927 if the amount of the contract will exceed the collectible revenue of the bridge fund for the year 1927?

"Would a contract be legal for the purchase of bridge material to be used in 1928 and paid for in 1928 providing said contract did not exceed the collectible revenue if it was entered into before January 1, 1928?"

In reply to your first question we desire to quote Section 5258 which pertains to expenditures confined to receipts and which is as follows:

"It shall be unlawful for any county, or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.

"Any officer allowing a claim, issuing a warrant, or making a contract contrary to the provisions of this section, shall be held personally liable for the payment of the claim or warrant or the performance of the contract."

This section is followed by Section 5259 which grants certain exceptions. In answering your question we are assuming that the contract to which you

refer, would not fall within any of the exceptions found in Section 5259, and would be, therefore, forced to answer the question in the negative.

In answering question two, we are of the opinion that the Board of Supervisors could legally enter into a contract for the purchase of bridge material to be used in 1928 and paid for in 1928 where the contract does not exceed the collectible revenue for that year.

SCHOOLS AND SCHOOL DISTRICTS: 1. Distance from school, under Section 4232, Code, measured by traveled highway and not across fields. 2. District may contract with parent for such transportation and parent may permit child to walk reasonable distances.

November 9, 1927. *County Attorney, Osceola, Iowa:* This will acknowledge receipt of your letter of recent date in which you submit a plat of two school districts and request the opinion of this department upon the following propositions:

1. Is the distance from school, where a school is closed under the provisions of Section 4232, Code of Iowa 1927, to be measured by traveled highway or by a distance, one-half by traveled highway and the other half through fields?
2. If the district pays (in this case $150) to the parent for transporting the children can the parent then instead of transporting the children permit them to walk to school across said route which consists of one half traveled highway and one-half across the field?

This department has ruled that the distance limitation established in Section 4232 of two miles beyond which distance the district of the child's residence must pay transportation is to be measured by traveled highway and not across fields and that the district of the child's residence cannot compel it to cross fields to attend school. This determines your first inquiry.

In answer to your second inquiry, we are of the opinion that the responsibility is upon the district for transporting the children and that any sum paid by the district to the parents is for a release of this legal liability of the board for transportation and that the parents having received an agreed sum may either transport the children or permit them to walk to school even across fields. In other words, a parent may voluntarily send his child to school through fields but he cannot be required so to do.

FILMS—PICTURES—FIGHT PICTURES:

November 9, 1927. *To the County Attorneys of the State of Iowa:* It has come to the attention of this Department that promoters have entered the State of Iowa for the purpose of inducing local organizations and theaters to exhibit films or moving pictures of the Tunney-Dempsey Fight. The exhibition of such films or pictures in this state is a violation of law.

Sections 13186, 13187 and 13188 of the Code 1927, make the exhibition of such pictures unlawful and provide the punishment for their exhibition. Section 13186 makes it unlawful for any person to exhibit the pictures, and Section 13188 provides that anyone who shall assist or aid, in any manner, any person exhibiting such pictures shall be punished by a fine of not less than fifty nor more than one hundred dollars, or imprisonment in the county jail not more than thirty days. Under this section the representatives of any organization who aid in the furtherance of any plan to exhibit the pictures of a prize fight are subject to prosecution. Section 13187 is more drastic in its provisions and provides for the punishment of any person or corporation who permits the use

of their building for the exhibition of prize fight pictures. The punishment in this case is a fine of not less than five hundred nor more than one thousand dollars, or imprisonment in the county jail not less than thirty days nor more than one year, or by both fine and imprisonment in the discretion of the court. In addition to the above sections, where two or more persons conspire together to violate the law they would be subject to prosecution under the conspiracy section which carries with it a penalty of three years in the penitentiary.

I am calling your attention to this matter so that in case there is any attempt in your county to exhibit these films you may take action in the first instance to prevent their being shown, and in the second place to prosecute, in the event they are shown, and to call the attention of your sheriff to this law and ask him to be on the lookout for an attempted violation of the law.

SCHOOLS AND DISTRICTS—COUNTY SUPERINTENDENTS: Affidavit of appeal from school board to county superintendent may be signed by aggrieved party or his attorney, but no other.

November 9, 1927. *County Attorney, Waukon, Iowa:* This will acknowledge receipt of your letter of recent date requesting an opinion of this department upon the following proposition:

May the affidavit which is the basis for an appeal from the decision of the board of directors of a school corporation to the county superintendent be made by a person other than the person aggrieved or by the attorney for such aggrieved person?

The cited section of the statute, Section 4298, provides in part as follows:

" * * The basis of the proceedings shall be an affidavit filed with the county superintendent by the party aggrieved within the time for taking the appeal, which affidavit shall set forth any error complained of in a plain and concise manner."

We are clearly of the opinion that only the person aggrieved can file the affidavit of appeal for the reason that an individual cannot borrow complaints for the purpose of appeal. Any other person than the person aggrieved cannot be affected by the appeal and one not thus affected cannot borrow objections.

The question of whether the affidavit of appeal may be made by the attorney for the aggrieved party presents a more difficult proposition. The statute is not specific as to the party who shall sign the affidavit of appeal. In general, pleadings may be verified by an attorney if he is conversant with the facts since in connection with such matter one may do by his attorney what he may do himself. We are, therefore, of the opinion that the affidavit of appeal may be verified by an an attorney for the aggrieved party if the attorney is conversant with the facts in the case.

BONDS—IMPROVEMENTS—SCHOOLS AND SCHOOL DISTRICTS: Under Section 4177 a school board of a consolidated school district cannot make repairs or improvements on school buildings or grounds or build a new school building or increase the size of one, without an authorization by the electors of the district.

November 10, 1927. *Director of the Budget:* We have your letter under date of November 3, 1927, requesting an opinion of this department on the following questions:

(1) The school board of a consolidated school is desirous of making improvements in their school building which will cost to exceed $2,000.

(2) Said school district needs a larger and better school building. Can they

in any way issue bonds for such purpose without being authorized by a vote of the qualified electors of said district?

I.

Under Section 4177, Code of 1927, the school board of a consolidated school district is prohibited from making any repairs or improvements on school buildings or grounds when the cost thereof exceeds $2,000, without first calling a special election and submitting the question to the qualified electors of the district. The school board of a consolidated school district may not, therefore, make any repairs, the cost of which will exceed $2,000 without first being authorized by the qualified electors of said district.

II.

The same section provides that a school board may not build or equip a school house or improve any school building without first calling a special election and submitting the question to the qualified electors of said district.

We are, therefore, of the opinion that a school board of a consolidated district cannot build a new school building or increase the size of the one already built where the cost would exceed $2,000, unless they have been authorized to do so by a favorable vote of the qualified electors of said district.

It was suggested in your request that Section 4353 might be inconsistent with Section 4177. We call your attention to Sections 4353 and 4354 where you will note that those sections provide for a submission of the question of building a school house or making additions thereto, to a vote of the qualified electors. We cannot see, therefore, where there is any inconsistency.

PURCHASE OF CITY HALL—CITIES AND TOWNS: Cities and towns cannot purchase or build a city hall nor levy a tax for said purpose without first being authorized to do so by a vote of the electors of said city and when authorized by said vote they may purchase a city hall on contract. The contract for the purchase of a city hall which created a general obligation of the city would create a debt within the meaning of the constitution.

November 10, 1927. *Director of the Budget:* We are in receipt of your letter of the 8th inst. requesting an opinion of this department upon the following questions:

(1) Whether or not the city council can legally enter into a contract for the purchase of a city hall without first being authorized to do so by a vote of the electors of said city.

(2) Whether or not the city council, where they have been authorized by a vote of the people, may enter into a contract for the purchase of a city hall, which contract provides for the payment of a fixed amount in monthly installments and carries interest at the rate of 6% per annum.

(3) If the city council has been authorized by a vote of the people to purchase a city hall and said city hall is purchased on a contract which is payable on the installment plan, does such a contract create a debt against the city within the meaning of Chapter 319 of the Code of 1927?

I.

Section 6239 of the Code of 1927, provides in part as follows:

"Cities and towns when authorized to acquire the following named public utilities and other improvements may incur indebtedness for the purpose:

"* * * 5. Of constructing city and town halls. * * *"

Section 6241 provides as follows:

"No such indebtedness shall be incurred until authorized by an election."

Sections 6242, 6243, 6244, 6245 and 6246 provide the procedure which must be followed in connection with the submission of the question to a vote of the

people. In accordance with the above sections, the city council cannot purchase or build a city hall, nor can they levy a tax for said purpose without first being authorized by a vote of the qualified electors of said city.

II.

We do not find any statute which would prohibit the city council from purchasing a city hall on contract where, of course, the electors of said city have authorized the purchase of same and the levy of a tax. It would appear, however, that the purchase of a city hall under a contract which provided for the payment of six per cent interest would be rather a high rate of interest for bonds might be issued and sold at an interest rate not exceeding perhaps four and one-half per cent per annum.

III.

Where a city council is authorized by a vote of the people to purchase a city hall and where they purchase said city hall on a contract payable in installments, and which bears interest at the rate of six per cent, said contract would create a debt within the meaning of the constitutional five per cent limit.

If, however, the contract of purchase contained a provision which made the purchase price of said contract payable only out of the funds collected from the two mill levy as authorized by Section 6211, paragraph 28, specifically limiting the payment of said purchase price to said fund and did not create a general liability on the part of the city, then said contract would not create a debt within the meaning of the constitutional debt limit.

COUNTY AUDITOR—TAXATION—MANDATORY LEVY: Where a levy has been certified to the county auditor in accordance with Section 1179-b2 after the first day of September and before the first day of January of the year in which said taxes are to be collected the county auditor must enter said levy.

November 10, 1927. *Director of the Budget:* We are in receipt of your letter under date of November 7, 1927, requesting an opinion of this department on the following question:

"Section 1179-b2, Chapter 63-B1, Code of 1927, provides as follows:

" 'Mandatory levy. The governing authority of these political subdivisions before issuing bonds shall, by resolution, provide for the assessment of an annual levy upon all the taxable property in such corporation sufficient to pay the interest and principal of such bonds within a period named not exceeding twenty years. A certified copy of this resolution shall be filed with the county auditor or auditors of the counties, as the case may be, in which such public corporation is located, and the filing thereof shall make it a duty of such officers or officer to enter annually this levy for collection until funds are realized to pay the bonds in full.'

"Section 6227 of the Code of 1927, provides as follows:

" 'All assessments and taxes of every kind and nature levied by the council except as otherwise provided by law, shall be certified by the clerk on or before the first day of September to the county auditor and by him placed upon the tax list for the current year, etc.'

"The question now arises as to whether or not the county auditor under and in accordance with Section 1179-b2, is compelled to enter said levy for collection in the year 1928 even though the levy of said tax was not certified to him on the first day of September 1927."

We call your attention to Section 6227, above set out, especially to that part which reads:

"* * * *except as otherwise provided by law* * * *."

We also call your attention to Section 1179-b2, set out above, which statute

makes it the duty of the county auditor where a certified copy of the resolution providing for the assessment of an annual levy has been filed with him, to enter annually this levy and collection until the funds are realized to pay any bonds which may be issued.

We are of the opinion that there is no inconsistency between Section 1179-b2 and Section 6227, and that if a levy has been certified to the auditor in accordance with Section 1179-b2, after the first day of September and before the first day of January of the year in which said taxes are to be collected, that the county auditor must enter said levy, said section so providing.

TAXATION—CORPORATIONS—BUILDING AND LOAN ASSOCIATIONS: The reserve and undivided profits of the building and loan associations are taxable as monies and credits unless being used in competition with other moneyed capital if said association complies with Sections 6994-6, inclusive, Code of 1927.

November 10, 1927. *Auditor of State:* We are in receipt of your letter of November 7, 1927, requesting an opinion of this department on the following question:

Are the reserve, contingent or undivided profits of a building and loan association taxable as monies and credits, or as personal property?

Sections 6994, 6995 and 6996, Code of 1927, are the sections which apply to *domestic* building and loan associations with respect to taxation of monies and credits. If a domestic building and loan association complies with the provisions of the sections above referred to, said corporation shall be entitled to be assessed on the net actual value of its monies and credits at the rate of five mills on the dollar, which taxation shall be in lieu of all other taxes on its monies and credits.

The reserve and undivided profits of such a corporation would be taxable as monies and credits unless, of course, they are being used in competition with other moneyed capital as defined by Section 5219 of the Revised Statutes of the United States.

If a building and loan association does not comply with the provisions of the statutes cited heretofore, said company should be taxed on the same basis as moneyed capital. The question as to whether or not such a company is in competition, is a question of fact to be determined in each particular case.

FEES—COUNTIES—REFEREE IN PROBATE: Under Sections 12041 and 11630 of the Code, the district court is authorized to appoint a referee in probate and to fix his compensation and the fees to be charged against estates. Under Sections 5245-6-7 all fees over and above the compensation of the probate referee belong to the county.

November 10, 1927. *County Attorney, Cedar Rapids, Iowa:* We are in receipt of yours of recent date requesting an opinion of this department on the following questions:

The court in and for Linn County, Iowa, entered an order on the 3rd day of January, 1927, appointing a referee in probate and specifying the fees that he should receive, said fees being based on the amount of each estate, and also specifying a maximum to be paid said referee for any one year's service in the sum of $2,400. On the 1st day of November 1927, the referee so appointed had been paid the sum of $2,400.

(1) Shall this office continue to tax the costs as provided for in said order?
(2) If so, to what fund shall the fees over and above the $2,400 be credited?

I.

Section 12041 of the Code of 1927, authorizes the court to appoint a referee in probate matters. Section 11630 of the Code, 1927, specifies that where a referee is appointed by a court, that the court shall fix the compensation that he shall receive.

Our Supreme Court has held in the case of *Burlingame vs. Hardin County*, 180 Iowa 919, that the court acted under the authority of Section 12041, and that under said section the court has authority to appoint a referee in probate to handle all probate matters and that it was not necessary to have a separate order entered for the appointment of a referee for each estate.

II.

Section 5245, Chapter 263, Code of 1927, provides in substance as follows:

"That all fees collected by the clerk of the district court, unless otherwise provided for by statute, shall belong to the county."

Section 5246 requires that a record be kept of all fees collected and Section 5247 requires that he make a quarterly report, and that he pay quarterly into the county treasury all fees collected during the preceding quarter, taking duplicate receipts therefor and filing one of such receipts in the office of the auditor and entering upon the fee book of his office the date and amount of each payment into the county treasury.

It would, therefore, appear that any and all referee fees over and above $2,400 which are collected by the clerk of the district court in and for Linn County, belong to the county and should be paid by said clerk quarterly into the county treasury.

In writing this opinion it has not been our intention to question the authority of the court or the legality of the order which was entered by it, but rather to explain and clarify the action of the court.

HEALTH OFFICER—CHIROPRACTOR: Chiropractor eligible to hold office of local health officer under provisions of Sections 2231 and 2181 of the Code, 1927.

November 11, 1927. *State Board of Chiropractic Examiners:* You have requested the opinion of this department upon the following proposition:

"Is a Chiropractor eligible to appointment as a local Health Officer in view of the provisions of Sections 2231 and 2181 of the 1924 Code?"

Section 2231 of the Code of 1927, provides that each local board of health shall have a health officer who shall be a physician or one specially trained in public hygiene and sanitation.

Paragraph 5 of Section 2181, of the Code 1927, defines the term "physician" as follows:

" 'Physician' shall mean a person licensed to practice medicine and surgery, osteopathy and surgery, osteopathy, or chiropractic under the laws of this state; * *"

Hence the general definition of a physician includes a licensed practitioner of chiropractic. We are, therefore, of the opinion that a person licensed to practice chiropractic in this state, is eligible to appointment as health officer of a local board of health.

COUNTIES—RABIES—AGRICULTURE: Counties may compensate from domestic animal fund for loss of livestock whose death is the result of rabies.

November 15, 1927. *Secretary of Agriculture:* This will acknowledge receipt

of your letter of recent date requesting the opinion of this department upon the following proposition:

May compensation be paid from the domestic animal fund by the board of supervisors for the loss of livestock whose death is the result of rabies?

It is definitely established that rabies originate in dogs and that the spread of this contagion is from the result of the bite of a dog.

It is provided by statute, Code of Iowa, Section 5452, as follows:

"Any person damaged by the killing or injury of any domestic animal or fowl by wolves, or by dogs not owned by said person, may, within ten days from the time he or his agent has knowledge of such killing or injury, file with the county auditor of the county in which such killing or injury occurred a claim for such damage."

We are, therefore, of the opinion that any animal whose death is traceable to the spread of such contagion by dogs may be paid for by the board of supervisors from the domestic animal fund.

SCHOOLS AND SCHOOL DISTRICTS: May compel attendance even though residence is not accessible by road.

November 15, 1927. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of recent date in which you request an opinion upon the following proposition:

A man lives on a farm to which there is no road but, rather, an unfenced lane for three-quarters of a mile through pastures and three large gates. The land is rough and a road would be expensive. Therefore, neither the county nor the school district has seen fit to establish a road.

You inquire whether, under these circumstances, such resident of a school district can be compelled to send his children to school.

A former statute provided that beyond a certain distance the compulsory education requirement could not be enforced. However, the present statutes makes no such exception and we are of the opinion that the responsibility for sending children to school rests upon the parent and that such duty can be enforced in the ordinary manner.

SHALE—PERSONAL PROPERTY—TAXATION: A pile of shale may or may not be personal property, it depends upon the intention of the owner as shown by his own statements or acts.

November 15, 1927. *Auditor of State:* We are in receipt of your letter of November 14, 1927, requesting an opinion of this department on the following question:

"Is a shale pile from an old coal mine personal property or is it a part of the real estate?"

"The form or character of property may in some instances be changed from personalty to realty or from realty to personalty by the act of the owner or other person in dealing with it." 32 Cyc. 672.

It would appear from reading the above quotation that the question as to whether or not shale is personalty or realty is to be determined by the intention of the owner in each instance, such intention being determined by some act of the owner or some statement.

For example—if the owner of a pile of shale was from day to day or week to week, selling the shale to the public, such an act would, we think, show that said owner had elected to consider said shale as personal property. On the other hand, however, if the owner was not selling or offering for sale said

shale to the public and he himself considered said shale as a part of the realty, then we think that such shale should be considered a part of the realty. The character of a pile of shale, that is, whether or not it is real or personal property, may change from year to year in accordance with the intention of the owner as expressed by himself or by his acts.

To determine, therefore, whether or not a pile of shale is personal property or real property, it would be necessary to consider each individual case.

SCHOOLS AND SCHOOL DISTRICTS—CITIES AND TOWNS: City may condemn strip of land off school playground if such condemnation does not destroy or seriously interfere with the use of the school property.

November 16, 1927. *Superintendent of Public Instruction:* You have requested an opinion from this department upon the following proposition:

Is it within the power of a city to condemn a strip of land fifteen feet wide along the side of the playground owned and used as a part of a public school ground?

Our court speaking through Mr. Justice Deemer in *City of Albia vs. C. B. & W. Railway Company*, 102 Iowa 624, quoted from the case of *C. M. & St. Paul Railway Company vs. Starkweather*, 97 Iowa 159, as follows:

"It is not true that property devoted to one public use cannot be subjected to any other. It is within the power of the General Assembly to make the same property subservient to different public uses or even to take it from one public use and devote it to another."

Mr. Justice Deemer added, however, the following modification where on page 627 he said:

"The doctrine is subject to the modification, however, that the power to take the property for the second public use when such an appropriation would supersede or defeat the first one, must be given expressly or by necessary implication; and stress is placed on that modification by most of the authorities to which we have referred."

This rule as laid down by Mr. Justice Deemer is the generally accepted rule. McQuillin on Municipal Corporations, Volume 4, Section 1496, page 3131.

In order to determine the question it is necessary to examine our statutes to find if authority is granted to cities to take the property of school corporations either expressly or by necessary implication.

The statutes with reference to this question provide as follows:

"Cities and towns shall have power to purchase or provide for the condemnation of, pay for out of the general fund or the specific fund, as may be provided, enter upon and take any lands within or without the territorial limits of the city or town for the following purposes:

* * * *

3. For establishing, laying off, widening, straightening, narrowing, extending, and lighting streets, avenues, highways, alleys, wharves, landing places, public squares, public grounds, public markets and market places, and public slaughterhouses."

Section 6195, Code of Iowa 1927.

We find no specific authority to condemn public school property. The question then arises whether the general power granted in the quoted section is broad enough as to necessarily imply the power to condemn property owned and used by a public school corporation.

In the determination of this question it has been held that the statutory authority to lay out and improve streets and to take private property for the

purpose of local improvements does not by implication confer authority to condemn public library land for widening a street since the first use will be destroyed. *Moline vs. Greene*, 252 Ill. 475 96 N. W. 911.

In the cited case the court said:

"Appellant argues that taking ten feet of land will not destroy the library; that it will still have sufficient grounds for carrying out the purposes for which it was established. The case must be controlled by legal principles and not by considering the practical effect of allowing the taking of land in this particular case. If it is held appellant has authority to take part of the property, it would necessarily require holding that all of the property could be taken by virtue of the same authority, if that were sought to be done. Our conclusion upon this branch of the case is, that no authority exists in appellant to take the property of the library for the purpose of devoting it to a public street."

The court in the cited case further held that to take a strip of ten feet of land from the library grounds and devote it to the use of a public street would prohibit the library thereafter from having any use or control over it.

It has been further held that a public square in a village cannot be condemned for a schoolhouse site. *McCullough vs. Board of Education*, 51 Cal. 418. It is said in Lewis on Eminent Domain (3rd Edition) Section 435, that lands and buildings in actual use for public schools cannot be taken for other public uses under a general authority.

While it will be observed that the weight of authority is to the effect that property of a public school corporation devoted to a public use cannot be taken by another corporation for another public use, however, there is authority to support the proposition that a strip off school lands may be condemned for a street where the remainder will be benefited. *Roberts vs. Seattle*, 63 Wash. 573, 116 Pac. 25.

In the cited case a strip thirty feet wide was taken off the state university grounds for a street. In the opinion, the court speaking through Mr. Justice Mount, said:

"It is also argued that the land taken was already devoted to a public use—that of education, and therefore cannot be taken for another public use. There is nothing in the record to indicate that the thirty-foot strip of land in question is actually in use by the university, and there is nothing to indicate that the taking of the strip of land will impair the use of the land remaining. On the other hand, the record shows that the remaining land will be benefited. Under this condition it may be taken." (Citing cases.)

The doctrine adopted by the courts of this state is, we think to the effect that the rule of paramount interest governs and that if the property dedicated to one public use can be taken for another public use without defeating its purpose it may be so taken. It therefore becomes a question of fact in the instant case to be determine whether the strip of land fifteen feet in length may be taken from the playground of the public school corporation without defeating or seriously interfering with the purpose for which it was originally taken. If it can be so taken we think the city would have the authority to condemn; otherwise not.

EXECUTIVE COUNCIL—APPROPRIATIONS: Under Chapter 276, Acts 42nd G. A., Executive Council may expend not to exceed $129,000, for all of the itemized purposes stated and is not limited to the individual estimates for each purpose set out.

November 18, 1927. *Executive Council:* You have requested the opinion of this department on the following proposition:

"The 42nd General Assembly, under Chapter 276, set aside $129,000, or so much thereof as may be necessary for certain improvements at the seat of government.

"We find that on the estimates as set out in this chapter—some will not cost as much as appropriated for that purpose, and in other instances the cost will be greatly in excess of the amount set aside.

"Can the Executive Council expend more than set aside, provided that at no time the total amount will not exceed $129,000?"

You are advised that it is the opinion of this department that you may expend up to $129,000.00 under the provisions of Chapter 276, the Acts of the Forty-second General Assembly, for the purposes enumerated therein, and that the amounts set opposite each itemized purpose are directory only and that you are not required to stay within the limitations of those estimates so long as you expend the money for the specific purposes named, and do not exceed the total amount appropriated. As stated these amounts are estimates and are directory only in nature.

CRIMINAL LAW—LOTTERIES: Dealer who takes numbers of automobiles making purchases and draws by lot and gives number drawn a prize not conducting a lottery but is violating trade scheme statute.

November 22, 1927. *County Attorney, Knoxville, Iowa:* This will acknowledge receipt of your letter of recent date in which you request an opinion upon the following proposition:

A local oil company in promoting an advertising or trade scheme, takes the number of the car of the purchasers of gasoline and at the end of the month draws a number by lot and gives the owner of the car whose number is drawn a prize, being $7.50 in trade.

You inquire whether or not this is a lottery within the meaning of Section 13218 of the Code of Iowa 1927.

Section 13218, Code of Iowa 1927, provides as follows:

"If any person make or aid in making or establishing, or advertise or make public any scheme for any lottery; or advertise, offer for sale, sell, negotiate, dispose of, purchase, or receive any ticket or part of a ticket in any lottery or number thereof; or have in his possession any ticket, part of a ticket, or paper purporting to be the number of any ticket of any lottery, with intent to sell or dispose of the same on his own account or as the agent of another, he shall be imprisoned in the county jail not more than thirty days, or be fined not exceeding one hundred dollars, or both."

We are of the opinion that this is not a lottery within the meaning of the quoted section because the price paid is only the regular price for the merchandise and no ticket or other chance is sold by the dealer or paid for by the purchaser.

We are of the opinion, however, that it is in violation of Section 13203, et sequi, which provides that any property offered as a part of a trade scheme shall be subject to seizure. The distinction between the case you cite, Report of the Attorney General 1925-1926, page 196, is that where the key or number is given only to persons who make purchases the scheme is in violation of Section 13202 et sequi, while in the case where numbers were given to all persons who visited the store whether purchasers or not, no violation of the statute exists.

WIDOW'S PENSION—PAUPER—INSANE—SETTLEMENT: A mother whose husband has been committed to the state institution has the settlement of

her husband at the time of commitment and is entitled to a widow's pension in accordance wih Section 3641 even though her husband has escaped from said institution.

November 23, 1927. *County Attorney, Sioux City, Iowa:* We are in receipt of your letter under date of November 12, 1927, requesting an opinion of this department on the following questions:

Mr. and Mrs. Puffet resided in Woodbury County, Iowa. Mr. Puffett was adjudged insane by the Insane Commission of Woodbury County and was committed to the State Insane Hospital at Cherokee. Subsequent to his commitment Mrs. Puffett was granted a widow's allowance for the care and support of her five children who were minors. Some time later she and her children moved to Wright County and have resided in that county less than a year. Wright County served notice upon Mrs. Puffett as required by Section 5315, Code of 1927. The husband and father has since escaped from the State Insane Hospital and his whereabouts are unknown. The district court of Woodbury County at an ex parte hearing cancelled the widow's allowance. Mrs. Puffett was raised in Wright County where her mother now lives and had a residence in Wright County prior to her marriage. The following questions now arise:

1. Has Mrs. Puffett by reason of her return to the county of her settlement at the time of her marriage acquired a settlement in Wright County such as entitled her to poor relief?
2. If not, has she and her children a settlement in Woodbury County such as charges Woodbury County with the duty of caring for her?
3. Is she entitled under the law to a widow's pension and if so, from what county?

Section 5311, Code of 1927, provides as follows:

"A legal settlement in this state may be acquired as follows: (1) Any adult person residing in this state one year without being warned to depart as provided in this chapter, acquires a settlement in the county of his residence. (2) A married woman has the settlement of her husband if he has one in this state, or if she lives apart from or is abandoned by him she may acquire a settlement as if she were unmarried. Any settlement which the wife had at the time of the marriage may at her election be resumed upon the death of her husband or if she be divorced or abandoned by him, if both settlements were in this state. * * * *"

Section 5312, Code of 1927, provides as follows:

"A legal settlement once acquired continues until lost by acquiring a new one."

Section 5315, Code of 1927, provides as follows:

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

Section 5316, Code of 1927, provides as follows:

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

It will be noted from reading Section 5311 above set out that under the facts stated in your letter, the husband had a legal settlement in Woodbury County at the time he was adjudged insane. It will also be seen from reading paragraph two of Section 5311, that a married woman has the settlement of her husband if he has one in this state and that if he has not, or if she lives apart

from him or is abandoned by him, she may acquire a settlement as if she were unmarried. In the present case the husband having been adjudged insane, has not the capacity to choose or select a new settlement—his settlement is Woodbury County. His wife is not living apart from him by choice nor has she been abandoned by him, he being insane. His wife, therefore, has the same settlement that her husband had at the time he was adjudged insane, which was Woodbury County. Mrs. Puffett, therefore, by reason of her return to Wright County did not acquire settlement in Wright County and would, therefore, not be entitled to poor relief from Wright County; this for the reason that she has not been abandoned or is not living apart from her husband by choice, his residence, therefore, being her residence, and for the further reason that notice to depart as provided for in Section 5315, was served upon her within one year by Wright County.

II.

The settlement of the husband at the time he was adjudged insane was Woodbury County and as has been stated in part one hereof, the settlement of the husband is the settlement of the wife and her children unless she lives apart from him and we construe this to mean from choice, that is, on account of some disagreement between the husband and wife, or if she is abandoned by her husband. In this case she is not living apart from him by choice nor has she been abandoned by him, he being insane. His settlement, therefore, at the time of his adjudication is her settlement and that of her children, and that settlement is Woodbury County and Woodbury County is therefore, charged with the duty of caring for her and her children in accordance with the statutes pertaining to the relief of the poor.

III.

Section 3643, Code of 1927, provides as follows:

"Any mother whose husband is an inmate of any institution under the care of the Board of Control, shall, for the purposes of the third preceding section, be considered a widow, but only while such husband is confined."

From reading the above quoted section it will be observed that Mr. Puffett being confined in a state institution under the care of the Board of Control, Mrs. Puffett is to be considered a widow and is, therefore, entitled to the relief provided for in Section 3641 of the Code of 1927. It is true that the above quoted section states that any mother whose husband is an inmate of an institution under the care of the Board of Control, shall be considered a widow only while such husband is so confined. We are of the opinion that the words "so confined" are intended to mean, until such husband is lawfully released from said institution. Mrs. Puffett is, therefore, entitled to a widow's pension.

COUNTY ATTORNEY—LIQUOR CASE—FEES: Where plaintiff is successful in liquor injunction, liquor nuisance or contempt case and the attorney's fees which have been taxed as part of the costs are uncollectible, the county is liable for said fees.

November 28, 1927. *County Attorney, Osage, Iowa:* We are in receipt of your letter under date of November 21, 1927, requesting an opinion of this department on the following questions:

1. As to whether or not when the costs are unpaid in an injunction matter because of inability to collect, is the county liable for the attorney's fees?
2. Where the costs and fine of liquor nuisance are unpaid and uncollectible, is the county then liable for the county attorney's fee allowed as part of the costs?

3. Where the fine and costs including attorney's fees in a contempt action are uncollectible is the county attorney's fees in such case collectible of the county?

I.

Section 2023 of the Code of 1927, provides as follows:

"In each and every action in equity for injunction against a person charged with keeping an intoxicating liquor nuisance, and to abate the same, and on each and every action to enjoin and restrain a bootlegger as provided in this title, the court or judge before whom the same shall be heard and determined, shall, if the plaintiff be successful, allow the attorney prosecuting such cause an attorney's fee of twenty-five dollars, such fee to be assessed as cost in such cause."

It will be seen from reading this section that if the plaintiff be successful in securing an injunction against a person charged with keeping an intoxicating liquor nuisance, the judge or court shall allow the attorney prosecuting such cause an attorney's fee of twenty-five dollars, said fee to be taxed as part of the costs.

We are of the opinion that under this section, where the prosecution has been successful and a fee has been taxed against the defendant by the court as part of the costs, the county attorney is entitled to be paid said fee by the county upon his certifying that said fees are uncollectible from the defendant.

Section 2023-a2 provides as follows:

"In no case shall an attorney fee be allowed in an intoxicating liquor nuisance injunction proceeding, as provided in the second preceding section, unless the property in which the nuisance is maintained, and the owner of such property, shall be made party defendants, and an order of abatement issued as a part of the judgment, unless the court or judge hearing the cause shall find from competent evidence that the nuisance has been abated in good faith prior to the hearing, and the costs of the action paid."

This section needs no explanation and simply defines the conditions under which a fee may be taxed under Section 2023.

II.

Section 1930 of the Code of 1927, provides as follows:

"Whoever shall erect, establish, continue or use any building, erection, or place for any of the purposes herein prohibited, is guilty of a nuisance and upon conviction shall pay a fine of not less than three hundred nor more than one thousand dollars and costs of prosecution, which shall include a reasonable attorney's fee to be taxed by the court, and stand committed to the county jail until such fine and costs are paid, and be imprisoned in the county jail for a period of not less than three months nor more than one year."

It will be seen from reading the above section that where one is found guilty of maintaining a liquor nuisance, that a reasonable attorney's fee may be allowed by court and taxed as part of the costs.

We are of the opinion that if the fees taxed against the defendant as provided for under the above section are uncollectible and the county attorney so certifies, the county is liable for said fees.

III.

Section 2023-a1 of the Code of 1927 provides as follows:

"In each and every proceeding in equity for a contempt for violating any injunction, temporary or permanent, issued or decreed therein, the court or judge before whom the same shall be heard and determined, shall if the plaintiff be successful, allow the attorney prosecuting the cause a reasonable attorney's fee, such fee to be assessed as costs in such cause, but in no case where

the defendant enters a plea of guilty shall the fee be more than twenty-five dollars. In case a fine be assessed he shall be allowed in addition to the said fee a commission of ten per cent of the fine collected."

The above section provides for the allowance of an attorney's fee in all contempt cases where the plaintiff is successful, said fees to be taxed as a part of the costs and not to exceed twenty-five dollars when the defendant pleads guilty. The attorney is also entitled to an additional fee where a fine is assessed at the rate of ten per cent of said fine.

We are of the opinion that in a case where a plaintiff is successful and an attorney's fee is taxable as a part of the costs and that said fee is uncollectible and the county attorney so certifies, the county is liable for the payment of the same, however this would not include the fee of ten per cent.

WIDOW'S PENSION—DIVORCED MOTHER: Under Section 3641 a mother who is divorced and whose divorced husband has since died is entitled to a widow's pension.

November 29, 1927. *County Attorney, Davenport, Iowa:* We are in receipt of your letter under date of November 16, 1927, requesting an opinion of this department on the following question:

A woman was married and one child was born during wedlock. She then obtained a divorce from her husband. Some time after the divorce was granted he died. This woman has made application for a widow's pension under Section 3641, Code of 1927. Should the pension be granted?

Section 3641 authorizes the payment of a pension to the mother of neglected or dependent children, who is a widow and has been a resident of the county to which she makes application for one year preceding the filing of such application. The question in the present case is whether or not a divorced mother whose husband has since died, is a widow within the contemplation of Section 3641.

Our supreme court has held in the case of *Debrot vs. Marion County*, 164 Iowa 208, that a divorced woman with children, whose divorced husband was living, was not a widow within the contemplation of Section 3641, and, therefore, not entitled to a widow's pension for the support of said dependent children. The court in that case suggested that the father was still living and that there was a duty imposed upon the divorced wife, as well as the father, to support said minor children. The court also in passing, suggested that there was nothing in the record in the trial of that case that shows that the father was unable to contribute to the support of said children. It would appear upon reading the statute and the case above referred to, that a widow who is a mother within the contemplation of Section 3641, is one whose husband is dead or, as provided for in Section 3643 of the Code of 1927, one whose husband is an inmate of some state institution. It would seem that the theory back of Section 3643 was the fact that the husband being an inmate of a state institution, would not have an income whereby he could contribute to the support of his children and that that duty, therefore, should be imposed upon the state.

We think, therefore, that a divorced mother whose divorced husband is dead, is a widow within the contemplation of the statute and if she has been a resident of the county to which she makes application for a widow's pension for a year, that she is eligible for a widow's pension. We think that she is a widow within the contemplation of Section 3641, Code of 1927, as she is deprived of support, her former husband and father of the children being dead.

We are, therefore, of the opinion that a divorced mother whose divorced husband is dead, is a widow within the meaning and contemplation of Section 3641, and that she is, therefore, entitled to a widow's pension, she having the proper residence in the county to which she makes application and being herself unable to support said minor children.

OFFICIAL PUBLICATIONS: See opinion for authorized publications for which city or town may pay compensation.

November 29, 1927. *Auditor of State:* We are in receipt of your letter under date of November 4, 1927, requesting an opinion of this department on the following question:

"Enclosed please find list indicating the nature of publications that have been published in both the Burlington Hawkeye and Gazette. The publications that have been published two successive times by these papers have been charged for at the rate of more than $1.00 per square for the first publication and 50c for the second. For instance, in the paving of Gunnison Street, the notice had 75 lines, was published twice by each paper, and the Burlington Hawkeye charged $7.50 for the publication. If the price should be divided by the two papers, I can only figure that the proper charge should be $5.47. This has been computed by me by counting the number of lines, giving ten cents a line as the proper charge. I have used this method due to the fact that the law provides a dollar per square for ten lines of brevier type, but this paper—as have practically all newspapers—has their type leaded to provide more space between lines for the convenience of their readers. The nature of the publications are as follows: Ordinances, Mayors' Notices, Mayors' Proclamations, Notices to Contractors, Paving Notices, Sewer Notices, List of Claims, Notices by Heads of Various Departments.

"We would like an opinion as to how many newspapers may be used in connection with the publication of the ordinances, notices, etc., and as to the legal charge for said publication, and if the statute provides for the publication in only one newspaper or whether said ordinances or notices may be published in two newspapers and the legal fee split between said publications.

ORDINANCES

Section 5720 of the Code of 1927, requires the publication in a newspaper published and of general circulation in the city or town, of all ordinances of a general or permanent nature and those imposing a fine, penalty or forfeiture. It provides for only one publication in a newspaper and would, therefore, authorize the payment of only one publication fee.

Section 11106, Code of 1927, provides the compensation that may be paid for the publication in a newspaper of any notice, order, citation or other publication required by law, said fee being not to exceed $1.00 for one insertion for each ten lines of brevier type or its equivalent in a column not less than two and one-sixth inches in width. This section would govern the compensation that may be paid for the publication of ordinances.

PROCEEDINGS OF REGULAR OR SPECIAL MEETINGS OF THE CITY OR TOWN COUNCIL

Section 5722 provides for the publication of the proceedings of the regular or special meetings of the city or town council in *one or more* newspapers. Section 5723 provides for the payment of not to exceed one-third of the legal fee provided by statute for the publication of legal notices, as provided for in Section 11106.

ADVERTISEMENT FOR BIDS

Section 6004, Code of 1927, provides for the giving of notice by two publications in a newspaper for bids for all contracts for construction or repair of street improvements or sewers. This section authorizes two publications in

one newspaper published in the city, the fee to be paid being that provided for in Section 11106.

NOTICES OF ASSESSMENT

Section 6026, Code of 1927, provides for the giving of notice of assessment in connection with street improvements or sewers by two publications in each of two newspapers. The fees provided for in Section 11106 would be the fees authorized.

NOTICE OF RESOLUTION OF NECESSITY

Section 5997, Code of 1927, provides for the publication of notice of hearing on resolution of necessity by two publications in a newspaper published in the city. Such notice must be published in accordance with Section 5997 when the council contemplates constructing or reconstructing or resurfacing any street improvement or sewer, the fee being that provided for in Section 11106.

ADVERTISING FOR BIDS FOR SUPPLIES

Paragraph 15, Section 5663, Code of 1927, provides for the advertising in at least two newspapers. The fee would be that provided for in Section 11106.

As to all other publications which a city or town are authorized and required to make, if the statute does not designate the number of publications, then said matter would seem to be left within the discretion of the council or officer required to make the publication and if no fee is provided for said publication, it would be that fee provided for in Section 11106, Code of 1927.

PREMIUM—BONDS—MEMORIAL: Premium received from sale of memorial building bonds should be used for the payment of interest and for retiring the bonds and cannot be used as a part of the proceeds of the bonds.

November 30, 1927. *Auditor of State:* We are in receipt of your letter under date of November 29, 1927, requesting an opinion of this department on the following question:

The electors of the city of Cedar Rapids authorized the issuance of $800,000 worth of bonds for the purpose of paying for the expense of erecting and equipping a memorial building as provided for in Chapter 33, Code of 1924. These bonds were sold and a premium of $28,183.00 was received, this premium being the difference between the rate of interest the bonds carried and the rate at which they were sold. The question now arises as to whether or not the memorial commission of Cedar Rapids may use this $28,183 in connection with the payment of the expense of the erection and equipment of said memorial building, or whether or not the premium received should be placed in the fund for paying interest and retiring said bonds.

The question submitted to the people of Cedar Rapids was:

"Shall the city of Cedar Rapids, Iowa, erect and equip a memorial building as provided in Chapter 33 of the 1924 Code of Iowa, and issue bonds in the sum of not to exceed eight hundred thousand dollars ($800,000.00) to cover the expense of the same?"

It will be seen from reading the above question that the people of Cedar Rapids by their favorable vote authorized the expenditure of eight hundred thousand dollars ($800,000) and that amount only, to cover the expense of erecting and equipping a memorial building. The bonds carried interest at the rate of four and one-half per cent (4½%). They were sold at such a lower rate of interest so that the difference between the four and one-half per cent (4½%) and said lower rate resulted in a premium of $28,183.00. The purchasers of these bonds will receive four and one-half per cent (4½%) interest from the date of issuance of the bonds and the $28,183.00 premium really repre-

sents interest and we think should be placed in the fund for paying the interest on and retiring said bonds. This $28,183.00 premium will reduce only the amount which the city will have to levy for the purpose of paying the interest and retiring bonds.

Section 490, Chapter 33 of the Code of 1927, authorizes a levy of not to exceed five mills on all taxable property within the county, city or town for the development, operation and maintenance of the memorial building and it would appear, therefore, that if, where a bond issue has been voted and the amount voted is not sufficient to properly erect and equip the building, that the levy provided for in Section 490 would provide means with which to do so.

We are, therefore, of the opinion that the premium received from the sale of the memorial building bonds should be used for the payment of interest and retiring of the bonds and that it cannot be used by the memorial commission in the payment of the expenses for erecting and equipping of said memorial building, the said commission having been authorized by the people to spend only the sum of eight hundred thousand dollars ($800,000) for said purposes.

SHERIFFS—GASOLINE TAX: Sheriffs are not entitled to a refund of gasoline tax paid for gasoline used in the performance of their duty.

December 1, 1927. *Sheriff, Mason City, Iowa:* It has come to my attention that at the recent conference of the sheriffs held in Des Moines, they received from some source the impression that sheriffs operating their own automobiles in performing the duties of their office might obtain a refund of the license fee paid on gasoline purchased.

I wish you would correct this impression as it may avoid misunderstanding between the treasurer's office and the sheriff who would make application for a refund. Under Section 5093-a8 of the Code of 1927, the only refund that can be paid on account of gasoline license fee is on such gasoline as is used in motor vehicles owned and operated by the state or by a municipality of the state. An automobile owned by the sheriff and used by him in serving processes for which he obtains mileage, is not being operated by the county in the sense that he can obtain this refund and unless the county owns or hires the vehicle for its use, no refund can be paid.

I wish you would correct this impression by writing to each sheriff in the state so that confusion may be avoided and they will be spared the embarrassment of making application for refund on cars owned by them.

BOARD OF CONTROL—BUDGET DIRECTOR: Industries revolving funds at Fort Madison and Anamosa cannot be transferred to any other fund.

December 2, 1927. *Director of the Budget:* You have requested the opinion of this department upon the following proposition:

"The Board of Control desires to use about $35,000 of the surplus in their industry fund for improvement of the heating plants at Cherokee and Clarinda.

"Does Section 55 of the appropriation bill of the Forty-second G. A. give authority to the Governor and Director of the Budget to approve such transfer or has the Board of Control sufficient authority over such funds to use them for the above named purposes on their own motion?"

Your attention is called to the provisions of Section 3764-b1 to 3764-b3, of the Code, 1927. These provisions were enacted by the Forty-second General Assembly and create and establish at the State Penitentiary at Fort Madison, and at the State Reformatory at Anamosa, respectively, an establishing and

maintaining industries revolving fund, which fund shall be permanent and composed of the receipts from the sales of articles and products manufactured and produced, from the sale of obsolete and discarded property belonging to the various industrial departments, and from the funds which were in the establishing and maintaining industries funds for each of said institutions prior to the enactment by the Forty-second General Assembly.

It is then provided that these funds shall be used *only* for establishing and maintaining industries for the employment of the inmates at the respective institutions named. It is also provided that these funds shall not revert to the general fund at the end of any annual or biennial period and shall remain available for the purposes stated in the law.

Under the provisions of Section 55, of Chapter 275, of the Acts of the Forty-second General Assembly, commonly known as the General Appropriation Act, the governing board of any state department, institution or agency, in the interests of economy and efficiency may, with the written consent and approval of the governor and director of the budget, first obtained, at any time during the biennium, partially or wholly use its unexpended appropriations for purposes properly within the scope of such department, institution or agency. It is quite evident after carefully reading the provisions of law referred to herein, that the provisions of Section 55, Chapter 275, of the Acts of the Forty-second General Assembly, cannot apply to the industries revolving funds. Said industries revolving funds cannot be used for any other purpose than those described in the law and are not subject to transfer.

It is, therefore, the opinion of this department that transfers cannot be made from the industries revolving funds of the State Penitentiary at Fort Madison and the Reformatory at Anamosa.

SCHOOLS AND SCHOOL DISTRICTS: An alien child is entitled to the same school privileges as any other resident.

December 2, 1927. *Superintendent of Public Instruction:* You have requested an opinion of this department upon the question of whether alien children are entitled to attend the public schools of this state.

It is provided by statute, Section 4273, Code of Iowa 1927, as follows:

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

A residence is a permanent abode and dwelling place as distinguished from mere temporary local residence. An actual resident is one who is present in person in a place. *Sears vs. Boston*, 1 Mete. (Mass.) 250, and *Lawson vs. Adlard*, 46 Minn. 243 at 245, 48 N. W. 1019.

An alien is a foreigner a person resident in one country but owing allegiance to another. An alien friend is one whose country is at peace with the one where he *resides*. In *Lem Moon Sing vs. United States*, 158 U. S. 547, the court speaking of an alien said:

"His personal rights when he is in this country and such of his property as is here during his absence are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States. While he lawfully remains here he is entitled to the benefit of the guaranties of life, liberty and property secured by the constitution to all persons of whatever race within the jurisdiction of the United States."

The privilege of attending the public schools is not a privilege or immunity

appertaining to a citizen of the United States as such. *Ward vs. Flood*, 48 Cal. 36.

The privilege of attending school is determined by the statutes of the state where admission is sought and the children reside. That the residence for school purposes is broader than the requirement for voting has been held by our court. See opinion of this department to your department October 20, 1927.

We are, therefore, of the opinion that children of aliens who are actual residents of the state of Iowa are entitled to school privileges without tuition in the district wherein they reside.

SOLDIERS' RELIEF COMMISSION: Where vacancy exists should be filled from qualified applicant.

December 5, 1927. *County Attorney, Waterloo, Iowa:* We desire to acknowledge receipt of your request of November 30 in which you submit the following:

"As the Commission now stands, there are two Union soldiers and one Spanish-American War soldier on the Commission. The appointee of last September has filed his bond and qualified and I would like your opinion and advice in the situation. Do you think, under Section 5387 of the Code of 1927, that this appointment of the Union soldier was illegal, and if so is there a vacancy within the meaning of the law so the Board can appoint a World War veteran according to the probable intent of said section or do you believe that the language of this section is directory only, the appointment having been made and the appointee having qualified, what can be done?"

In reply we desire to quote Section 5387, Code of 1927, as follows:

"Relief commission. Said fund shall be disbursed by the soldiers' relief commission, which shall consist of three persons, all of whom shall be honorably discharged soldiers, sailors, marines, or nurses of the United States who served in the military or naval forces of the United States in any war. Said membership shall at all times, as near as possible, be equally divided between the soldiers, sailors, marines, and nurses of the Civil war, Spanish-American war, and World war."

In view of the above quoted section, we are of the opinion that the legislature fully intended that all matters being equal, the soldiers' relief commission should consist of one member from each of the three classes designated, but that in the event there was no applicant or none qualified from a certain class, then the Board of Supervisors might choose from one of the other classes, and in the particular question which you have submitted, we believe that if the Board of Supervisors have appointed two Union soldiers and on Spanish-American War soldier on this commission, that the commission is now a legally constituted board unless there was at the time of the appointment of the last Union soldier a World War veteran who had made application and who was qualified to fill the position, and we are assuming from your statement of facts that there was no World War applicant, in which event the commission as now constituted is legal and meets the requirements of Section 5387.

BRIDGES—HIGHWAYS—ROADS: Reimbursement to be made where bridges are now on primary system.

December 6, 1927. *State Highway Commission:* We desire to acknowledge receipt of your request of November 5 in which you submitted to this department the following questions:

"1. Where a county, subsequent to April 19, 1919, has constructed bridges under the Highway Commission's supervision, on a road which was at the time said bridges were constructed, a part of the primary road system, and where

subsequent to the construction of said bridges a change has been made in the location of the primary road, so that said bridges are no longer on the primary road, should the Commission make a refund to the county from the primary road fund on account of such bridges?

"2. Where a county, subsequent to April 19, 1919, has constructed bridges under the Highway Commission's supervision, on a road which was at the time of the construction of said bridges a part of the secondary road system, and subsequent to the construction of said bridges said road has become a part of the primary road system, should the Highway Commission refund to the county from the primary road fund on account of said bridges?"

In reply we desire to say that we are of the opinion that under Section 4755-b5, Code of 1927, one of the controlling factors which should be taken into consideration is the fact that this statute went into effect on July 4, 1927, and that the roads upon which bridges had been built, and which were at that time designated as primary roads, were the ones which the legislature intended to have taken into consideration for refunds.

Where bridges were built on primary roads subsequent to April 19, 1919, and which roads were later allowed to revert to the secondary road system, and the bridges were at that time built of the county bridge fund on primary roads but have since that time reverted to the secondary road system, there would be no refund on those bridges which had gone back to the secondary road system, prior to July 4, 1927.

However, in the question submitted concerning bridges built on secondary road system after April 19, 1919, the bridges in that instance were paid for out of other funds than those of the primary road system. Therefore, there should be a reimbursement made for those bridges.

Therefore, in conclusion we would say, that we must answer your first question in the negative and the second question in the affirmative.

BOARD OF SUPERVISORS—ASSESSORS—EXEMPTIONS:

December 6, 1927. *County Attorney, Clinton, Iowa:* We desire to acknowledge receipt of your request of November 23 in which you submit the following proposition:

"Where the Board of Supervisors adopted a resolution stating that 'whereas no exemption shall be allowed for the year 1926, due in 1927, where no claim was filed on or before September 21, 1926' is the resolution in conflict with Section 6948, Code of 1927, where exemptions have been filed with the assessor, who, in turn, has failed to file the same with the County Auditor?"

In reply we desire to set out Section 6948 as follows:

"Listing by assessors. The beneficiary of exemptions allowed by the two preceding sections shall file with the assessor a written statement that he is the owner of the property on which the exemption is claimed, and every assessor shall annually make a list of persons entitled to such exemption and return such list to the county auditor upon forms to be furnished by the auditor for that purpose; but the failure on the part of any assessor so to do shall not affect the validity of any exemption."

We are of the opinion that where a taxpayer has fulfilled a requirement in Section 6948 by filing his exemption with the assessor, he is entitled to such exemption and the Board of Supervisors could not by a resolution such as above set out cause said taxpayer to lose his exemption and that any attempt to do so by the Board of Supervisors would conflict with Sections 6948 and 6949. And as the provisions in Section 6949 state that the Board of Supervisors may allow an exemption where a claim for exemption has not been filed with

the assessor but is filed with the Board of Supervisors on or before September 1 of the year following, it was the intention of the legislature that the board pass upon each individual case and not as a general classification.

COUNTY TREASURER—TAX SALES—TAXATION: County treasurer must sell property for all taxes either general or special which are at the time of sale delinquent and unpaid.

December 7, 1927. *County Attorney, Harlan, Iowa:* I am in receipt of your letter under date of December 5, 1927, requesting an opinion of this department on the following question:

Where property is sold for taxes, does the county treasurer have the right to sell the same for the property tax (general taxes), and not include special assessments against said property which have not been paid?

Section 7244 of the Code of 1927, provides as follows:

"Annually, on the first Monday in December, the treasurer shall offer at his office at public sale all lands, town lots, or other real property on which *taxes of any description* for the preceding year or years are delinquent, which sale shall be made for the total amount of taxes, interest, and costs due and unpaid thereon."

It will be noted from reading the above section that it is made the duty of the county treasurer annually to offer for sale all lands, lots or other real property on which *taxes of any description* are delinquent. It, thus being the duty of the county treasurer to sell said property on which any tax of any description is delinquent, it would seem that he is not given any option or right to sell the property for only a part of the delinquent taxes, but must sell it for all taxes either general or special which are at the time of the sale delinquent. He would not have to, and does not have the right to, include any special assessment which is not delinquent. The purchaser at a sale would take his certificate subject to any special assessments which are not payable or delinquent.

LIFE PRISONERS—PENITENTIARIES: Honor time may be dated back where facts warrant such acts.

December 7, 1927. *Board of Control:* We desire to acknowledge receipt of your request of December 5 in which you submit the following question:

"May the Board of Control date back the honor time of a life prisoner in the penitentiary to the date of his entrance?"

In reply we desire to quote Section 3778 as follows:

"Special reduction. Any prisoner in either of said institutions who may be employed in any service outside the walls of the institution, or who may be listed as a trusty, may, with the approval of the board of control, be granted a special reduction of sentence, in addition to the reduction heretofore authorized, at the rate of ten days for each month so served."

In reply we desire to say that we are of the opinion that the matter of special reduction of prisoners is to a large extent discretionary with the Board of Control, based upon the prisoner's character and behavior during his incarceration and we, therefore, must conclude that the Board of Control may date back the honor time of life prisoners to the date of their entrance to the penitentiary, if the facts warrant such action in the opinion of the board.

COUNTY FAIRS—AGRICULTURE—STATE AID—PREMIUMS: Entitled to state aid only after awards have actually been paid.

December 7, 1927. *Iowa State Fair Board:* This will acknowledge receipt of a letter from Mr. B. I. Salinger in regard to the payment of awards made by the Carroll County fair association. From this letter and from our conference it appears that awards to exhibitors have not been paid and the inquiry is whether the state aid provided by statute may be paid to a trustee and by him prorated among the holders of awards without the advance payment of such awards by the county association; or in the alternative, whether receipts in full could be procured from the holders of awards with the understanding that after the state aid was procured it would then be paid to them on a pro rata basis.

The appropriation made by the state of Iowa for the benefit of county fairs is predicated upon the performance of certain conditions by the county fair association. One of these conditions is specifically enumerated in the statute, Section 2902, Code of Iowa 1927, as follows:

"Each society shall be entitled to receive aid from the state if it files with the state fair board on or before November first of each year, a sworn statement which shall show:

"1. The actual amount paid by it in cash premiums at its fair for the current year, which statement must correspond with its published offer of premiums.

"* * *"

It is then provided in Section 2903, as follows:

"The amount allowed to any society as state aid shall be a sum equal to eighty per cent of the first one thousand dollars, seventy per cent of the second one thousand dollars, and sixty per cent of the third one thousand dollars paid in cash by the society for premiums at its annual fair for the current year, but the total aid shall not in any one year exceed two thousand dollars to any one society."

We are of the opinion that in the face of the above statutes the appropriation made by the state would not be available until the conditions enumerated in the statutes had met with full compliance by the county agricultural or fair society and that the plans above enumerated could not be approved.

BANKS AND BANKING: Banks organized under the laws of the state of Iowa cannot pledge assets to secure deposits except postal savings funds, distinguishing *Andrew vs. Odebolt Savings Bank*, 214 N. W. 559.

December 7, 1927. *Superintendent of Banking:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following proposition:

Is the ruling of the Department of Banking forbidding the pledging of assets of a bank under state supervision to secure a deposit in the bank in conflict with the opinion of the supreme court of the state of Iowa in *Andrew, Superintendent vs. Odebolt Savings Bank*, 214 N. W. 559?

In regard to the pledging of assets to secure a deposit, it is provided by statute, Code of 1927, Section 9268, as follows:

"All state and savings banks existing under and by virtue of the laws of this state are authorized and permitted to deposit with the treasurer of the United States such of the securities of the depositing bank as may be required to secure the postal savings funds deposited therein."

It is a well established rule of the statutory construction that the inclusion

of one power is the exclusion of others. Under this rule the naming of postal savings deposit in the statute authorizing and permitting the pledging of securities therefore excludes any other pledge.

The case cited by you in your request held that where the deposit was already made and where no funds were either deposited or withdrawn after the mortgage was pledged as security for the deposit, that the bank and the depositor had treated the deposit as an indebtedness or, in fact, loan for which the bank could pledge collateral under the provisions of Section 9222 of the Code.

In the opinion the court said:

"The notes and mortgage could not be accepted by the county treasurer or the board of supervisors in lieu of a bond executed for the purpose of completing an arrangement between the county and a bank as a depositary of public funds, but where a deposit has already been made and the relation of creditor and debtor created, there would seem to be no legal reason why the county may not accept any form of security for the payment thereof that the debtor is able to give. The ultimate question, therefore, in the case is: Had the officers of the Odebolt Savings Bank power or authority to remove from its bills receivable the notes and mortgage and transfer them to the county as collateral security for the payment of the indebtedness of the bank thereto?

"Section 9222 of the Code authorizes state and savings banks to contract indebtedness or liability for necessary expenses in managing and transacting their business for deposits and to pay depositors, provided that, in pursuance to an order of the board of directors previously adopted other liabilities not in excess of an amount equal to the capital stock may be incurred."

We are of the opinion that the decision of the supreme court does not abrogate your ruling that the assets of the bank cannot be pledged to secure a deposit. The opinion of the court does not so hold and is not applicable to an ordinary deposit because of the express conditions enumerated by the court which held, in fact, that the bank and the depositor had treated the deposit more in the nature of a bills payable than an ordinary deposit.

We are, therefore, of the opinion that your department should adhere to the ruling heretofore made and enforce it with reference to deposits in banks under your jurisdiction.

PRISONERS—COUNTY OFFICERS: Sheriff entitled to not to exceed $250 for lodging prisoners from each county where prisoners from more than one county are lodged.

December 8, 1927. *County Attorney, Sibley, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

Prisoners from Lyon County are lodged in the county jail of Osceola County. Under sub-section 11, Section 5191, Code of Iowa 1927, may the sheriff be limited to $250 for the lodging of prisoners from both counties or is he entitled to collect from each county independently and not to exceed $250 from each?

We are of the opinion that the limit of $250 per year applies to the prisoners from one county and that under your circumstances the sheriff would be entitled to collect for lodging prisoners an amount not to exceed $250 from each county. Any other construction upon this statute would permit the lodging of Lyon County prisoners in Osceola County and force the sheriff to take care of them at a low cost to Lyon County or, possibly, at no cost at all if the amount paid by Osceola County should reach the maximum.

TAXATION—SCAVENGER SALE—COUNTY OFFICERS: 1. Treasurer must sell at scavenger sale for all taxes due and delinquent both general and spe-

cial. 2. If the sale does not return sufficient to discharge all tax the purchaser takes title free and clear of lien of the tax. 3. Board of supervisors cannot compromise special assessment tax. 4. Purchaser at tax sale takes property subject to subsequent special installments. 5. Holder of certificate may recover from city any deficiency if the certificate is a general obligation of the city.

December 8, 1927. *County Attorney, Bedford, Iowa:* This will acknowledge receipt of your letter of recent date in which you request an opinion from this department upon the following propositions:

1. Under the provisions of the statute for the so-called scavenger sale of property for delinquent taxes must the treasurer offer the property for all taxes due and delinquent both general tax and any special assessment tax?
2. If the property so sold does not return sufficient to pay the entire amount of the delinquent tax does the purchaser at tax sale receive a title free and clear of the lien of the tax represented by the difference between the sale price and the principal amount of the delinquent tax?
3. May the special assessment tax be compromised by the board of supervisors if the treasurer cannot sell for the delinquent special assessment tax?
4. Does the purchaser at a tax sale take the property subject to subsequent special assessment installments?
5. If, upon sale by the county treasurer of property at scavenger sale, the property does not bring sufficient amount to cancel all taxes both general and special assessment can the bond or certificate holder recover from the city the difference between the amount received from the sale and the principal amount due on the special assessment bond or certificate?

We shall answer your inquiries in the order above set out.

This department has held that in view of the statutory provisions the treasurer must offer property for all taxes due and delinquent at the time of the tax sale including any special assessment tax.

The purchaser takes the property free and clear of the lien of said delinquent tax both general and special assessment tax.

This department has also held that the special assessment tax cannot be compromised by the board of supervisors because the rights of the certificate holder are affected and the certificate holder is the only person who may compromise the tax with the owner.

We are of the opinion that the purchaser at tax sale takes the property subject to subsequent special assessment installments. The only tax which is affected by the tax sale is that delinquent at the time of sale for which the sale is held.

The fifth question above set out is now before the supreme court of the state of Iowa in a case entitled, *Hauge vs. City of Des Moines,* which was submitted to the court October 27th. We rather anticipate a ruling by that court at the full bench session December 13th and in view of that fact are not rendering an opinion on that question at this time. If the assessment body by the terms of the certificate made the certificate a general obligation thereof it would unquestionably be liable for the deficiency. If the certificate or bond is so worded that the city merely acts as agent or trustee for the collection of the special assessment tax it is our personal opinion that the tax body would not become liable for the deficiency in such special assessment. We shall, however, write you further when the opinion of the supreme court in the cited case is filed.

BOARD OF CONSERVATION—LAKES AND STREAMS—DAMS: Power to issue permit for erection of a dam exclusive in the Council.

December 9, 1927. *Executive Council:* We desire to acknowledge receipt of your request of December 9 which is as follows:

"Under Chapter 87, Section 1812, of the 1927 Code, a part of which is as follows:

" 'Jurisdiction (that is the Board of Conservation) over the meandering streams and lakes of this state and all such lands bordering thereon, not now used for some other state body for state purposes, is conferred upon the Board.'

"The Executive Council desires an opinion if it is necessary that they secure written permission from the Board of Conservation to grant a permit to an electric company for the constructing of a dam across any meandering stream in the state of Iowa.

"Your attention is called to Chapter 363 regarding mill dams and races, Section 7767, etc., which makes it the duty of the Executive Council to grant said permit to an applicant for the construction of a dam, or for an existing dam."

In reply we desire to quote Sections 1799-b2, 1812, and 7767 as follows:

"1799-b2. Construction Permit—Regulations. No person, association or corporation shall build or erect any pier, wharf, sluice, piling, wall, fence, obstruction, building or erection of any kind upon or over any state-owned land or water under the jurisdiction of the board, without first obtaining from such board a written permit. The board shall charge a fee of two dollars for each such permit issued. * * *"

"1812. Jurisdiction. 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, is conferred upon the board. The board, with the approval of the executive council, may establish parts of such property into state parks, and when so established all of the provisions of this chapter relative to public parks shall apply thereto."

"7767. Prohibition—permit. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same."

In view of the fact that the legislature has specifically placed in the hands of the Executive Council the regulation and licensing of the erection of dams in the state of Iowa, we are of the opinion that it would not be necessary to first secure a permit from the Board of Conservation, and that the only necessary consideration would be the securing of a permit to erect a dam from the Executive Council under the provisions of Section 7767.

December 17, 1927. *Executive Council:* We desire to acknowledge receipt of your request of December 17 in which you submitted the following question:

"Has the Board of Conservation any concurrent jurisdiction as to the licensing of dams where the same are to be constructed along the meandered streams, or where the abutting property is owned by the state?"

In reply we desire to say that it is our opinion that the jurisdiction given the Board of Conservation under Section 1799-b2 would not apply to the permission to erect a dam across waters upon which state land abuts; that it was the intention of the legislature to grant to the Board of Conservation only such powers as might be necessary to preserve the lakes and streams of this state for the purpose of beautifying and utilizing them as places of enjoyment; and that it was the intention of the legislature when they specifically placed in the hands of the executive council the power to license dams to grant such

power as a revenue measure which would increase as the water power of this state was more fully utilized in the future.

We must, therefore, hold that under the question submitted to us the power to grant such permit lies solely in the executive council.

CIGARETTE PERMITS: Granting cigarette permits is discretionary in the proper authorities.

December 9, 1927. *Treasurer of State:* We desire to acknowledge receipt of your request of December 5, which was as follows:

"1. Can a Board of Supervisors or a City or Town Council, where they have granted permits to some persons, refuse to grant a cigarette permit to others?

"2. In refusing to grant a cigarette permit, can the Board of Supervisors, City or Town Council, be compelled to furnish or give a reason why said permit was refused?"

In reply we desire to quote Section 1557 of the 1927 Code as follows:

"Permit to sell. No person shall sell cigarettes or cigarette papers without first having obtained a permit therefor in the manner provided by this chapter. Such permit may be granted by resolution of the council of any city or town under any form of government and when so granted, may be issued by the clerk of such city or town. If issued to a person for use outside of a city or town such permit may be granted by resolution of the board of supervisors and when so granted shall be issued by the auditor of the county. Such permit shall remain in force and effect for the two years following the July first after its issuance, unless sooner revoked."

In view of the language used in the above section we are of the opinion that the granting of a cigarette permit by either a board or city council is absolutely discretionary, and they may refuse to grant a permit and are not compelled to give any reason therefor.*

BOARD OF CONSERVATION—MEANDERED STREAMS AND LAKES—ICE: The Board of Conservation may regulate, restrict and prescribe the manner in which the public may take the ice from meandered lakes and streams and may collect a fee or compensation from those members of the public who desire to take the ice for industrial or commercial purposes.

December 10, 1927. *Board of Conservation:* We have your letter under date of December 8, 1927, requesting an opinion of this department on the following question:

Under the provisions of Section 1812 of the Code of 1927, the State Board of Conservation is given jurisdiction over the meandered lakes and streams of the state. The question now arises as to the extent of the ownership of the state in the ice on the meandered lakes and streams and as to whether or not the state can dispose of such ice for commercial purposes or otherwise; also what are the rights of the riparian owners on meandered lakes and streams in the water and ice.

Section 1812 places all meandered lakes and streams of this state, as well as all lands bordering on said lakes and streams, under the jurisdiction of the Board of Conservation. Section 1799-b1 which was passed by the 42nd General Assembly so far as is material here reads as follows:

"It shall be the duty of the board to adopt and enforce such rules and regulations as it may deem necessary, *regulating or restricting the use by the public of any of the state parks or state owned property or water under their jurisdiction.* * * *"

*So held in *Great A. & P. Tea Co. vs. City of Perry*, Dallas Co. Dist. Court, 1928.

The general rule in this state is that the title to ice is in the one owning the title to the soil upon which the water rests. The title to the soil upon which the water rests in all meandered lakes and streams of this state is in the state. From this it follows that the ice on all meandered lakes and streams of this state is in the state. A riparian owner, therefore, on a meandered lake or stream has no title or ownership in or of the ice formed on said lakes and streams and, therefore, having no property right does not have such an interest which would entitle him to sell the ice. A riparian owner on a meandered lake or stream has the same rights as any other member of the public to the use of the water and therefore the ice found on said meandered lake or stream, this right being a common right, one member of the public having the same right to the water or ice that another has and it is only by an actual appropriation thereof each year that any right thereto can be acquired. The right of the riparian owner, as well as any other member of the public, to the use of the water and ice on a meandered lake or stream contemplates a reasonable use thereof and any use by any member of the public which might be unreasonable or which would prejudice or interfere with the rights of the other members of the public would be an unreasonable use. These rights are subject to any just or reasonable regulations by the state. These regulations, however, must not be such as well interfere with or destroy the rights of the public.

Thus, it may be said that the general public has the right to take the ice from the meandered lakes and streams of the state for their own private use under such rules and regulations as the state may prescribe. *This right to the use of the ice of meandered lakes and streams does not grant the right to any individual, firm or corporation to take the ice from meandered lakes and streams for commercial or industrial purposes, except under such rules, regulations and restrictions as the state may prescribe.*

Under Section 1712 above, a Board of Conservation is given jurisdiction over all meandered lakes and streams of this state and under Section 1799-b1, there is imposed upon the board the duty of adopting and enforcing such rules and regulations as it may deem necessary, regulating or restricting the use by the public of any state owned water under their jurisdiction.

We, therefore, conclude that the Board of Conservation has the power and right to regulate, restrict and prescribe the manner in which the public may take the ice from the meandered lakes and streams of this state and they have the right to regulate, restrict and prescribe the manner in which any member of the public may take the ice from the meandered lakes and streams for commercial or industrial purposes, and that in the exercise of this right they may collect a reasonable fee or compensation from such individual, association or corporation for the exercise of such right.

ASSISTANTS—EXTRA HELP—COUNTY TREASURER: County treasurer does not have the right to employ additional help in connection with the issuance of motor vehicle licenses without the approval of the board of supervisors.

December 12, 1927. *County Attorney, Burlington, Iowa:* We are in receipt of your letter of December 7, 1927, requesting an opinion of this department on the following question:

Does the county treasurer have the right to employ additional help in connection with the issuance of motor vehicle licenses and pay for said help out of the 50c fee allowed the county treasurer in accordance with Section

5012, Code of 1927, without the approval or authority of the board of supervisors?

Section 5012 of the Code of 1927, authorizes the county treasurer to retain for the use and benefit of the county general fund, fifty cents for each motor vehicle license issued by him.

Section 5238 of the Code of 1927, provides that the board of supervisors shall determine the number of deputies, assistants and clerks for each county officer.

We are, therefore, of the opinion that the county treasurer cannot employ additional help for his office without the authorization and approval by the board of supervisors.

PERSONAL TAXES—AFTER ACQUIRED PROPERTY—COMPROMISE—TAXATION: Delinquent personal taxes become a lien upon after acquired real estate providing they have been entered upon the delinquent personal tax list and can only be compromised therefor in accordance with Section 7193-a1 to 7193-b1.

December 12, 1927. *County Attorney, Cresco, Iowa:* We are in receipt of your letter of December 9, 1927, requesting an opinion of this department on the following question:

One R. J. Baldwin of Cresco, Iowa, is delinquent in his personal tax for the years 1919 to 1923 inclusive. In April 1923 he acquired title to a house and lots upon which there is a first mortgage of $1,900 and a second mortgage of $3,000. The mortgage indebtedness exceeds the value of the property. Said Baldwin has offered to compromise these taxes. Can this be done in view of Section 7193-b1, Code of 1927?

Section 7192 of the Code of 1927, makes personal taxes entered on the delinquent personal tax list as provided in Sections 7190 and 7191 a lien on any real estate owned or acquired by any person whose personal property taxes are delinquent.

Section 7193-b1 provides as follows:

"7193-b1. Compromising tax on personal property. When personal property taxes are not a lien upon any real estate and are delinquent for one or more years, the board may, when it is evident that such tax is not collectible in the usual manner, compromise such tax as provided in the four preceding sections."

Section 7193-b1 applies to personal property taxes which are not a lien upon any real estate and which are delinquent for one or more years and the board is authorized to compromise such tax when it is evident that such tax is not collectible. It will be noted that under Section 7192, if the personal tax has been entered on the delinquent personal tax list as provided in Sections 7190 and 7191, it is a lien upon any real estate owned or acquired by the party whose taxes are delinquent. It, therefore, seems that if the personal taxes of R. J. Baldwin which have been delinquent for the years 1919 to 1923 inclusive, have been entered upon the delinquent personal tax list, that they are a lien on the property which he acquired in 1923 and that they could only be compromised in accordance with the provisions of Sections 7193-a1 to 7193-b1, inclusive.

If, however, the delinquent taxes have not been entered on the delinquent tax list as provided for in Section 7192, they should be, and the procedure provided for in Section 7193-a1 to 7193-b1 inclusive, complied with before a compromise can be made.

COUNTY ATTORNEY—EXPENSES OF COUNTY ATTORNEY—CLAIMS: The Board of Supervisors may allow a claim for expenses in the office of the

county attorney even though the date of the last item is more than five years prior to its presentment to the board, providing said claim is just, legal and filed in accordance with the statutes.

December 13, 1927. *Auditor of State:* We are in receipt of your letter of December 8, 1927, requesting an opinion of this department on the following question:

"Can a claim for expenses in the office of the county attorney, the last item of which is dated October 27, 1922, be legally allowed by the Board of Supervisors at the present time?"

We are unable to find any statute which would prevent the board of supervisors from allowing such a claim provided, of course, it is a just and legal claim and filed in accordance with the statutes.

POOR—BURIAL—DEAD BODIES: For rule as to burial of persons who were inmates of a state institution or who were paupers, see opinion.

December 14, 1927. *Department of Health:* We are in receipt of your letter under date of September 8, 1927, requesting the opinion of this department upon the following question:

If an inmate of one of our state institutions dies and does not himself before death express any wish as to the disposal of his body and his relatives are located but they do not wish to assume any responsibility for the burial or the cremation of the body—what action should the state institution take—should the body be classified as an unclaimed body and shipped to the State University for scientific purposes, in accordance with Section 2351, Code of 1924, or should the body be buried in the institution's cemetery?

In considering the above question, we will consider other questions than the one submitted for the reason that we have had numerous requests for opinions concerning the disposal and burial of the dead and for the reason that there seems to be quite some uncertainty or misunderstanding concerning the subject of the disposal of the dead.

Section 2351 of the Code of 1924, provides that the body of every person dying in a public asylum, hospital, county home, penitentiary or reformatory of this state, or found dead within the state, and which is suitable for scientific purposes shall be delivered to the medical college of the State University or some other designated college located in this state. Said statute, however, provides that *no such body shall be delivered to any such college or school if the deceased person expressed a desire during his last sickness that his body should be buried or cremated, nor if such is the desire of his relatives or friends.*

Section 2354, Code of 1927, provides that when any dead body has been delivered under Chapter III for scientific purposes and subsequently the relatives or friends of said deceased person claim said body, it shall be delivered to said relatives or friends for burial *without* public expense.

I.

The first question which should be determined is, who is to pay the expense of burial of a person not an inmate of a state institution and who has expressed a desire during his last illness that his body should be buried, or whose friends or relatives have expressed such a desire?

(a) If said deceased person has an estate, then the expense of his burial should be paid by his estate.

(b) If said deceased person was a poor person as defined in Chapter 267, Code of 1927, and had no estate or property and had relatives as defined in

Section 5298, Code of 1927, such as a father, mother and children who were able to pay the expense of burial, then they would have to pay the same, or if he did not have such relatives but had remote relatives as defined by Section 5301, such as grandparents who were financially able, or male grandchildren, then they would have to pay the expense of his burial.

(c) If said deceased was a poor person as defined in Chapter 267, Code of 1927, and had relatives within the classes defined in Sections 5298 and 5301 of the Code of 1927, who were financially unable to pay the expenses of his burial then the expense should be paid out of the poor fund of the county in which he had a settlement, provided, of course, that application was made by said relative in the same manner as in cases for relief for the support of the poor.

(d) If friends of the deceased requested that he be buried and an application was made by said friend in the same manner as is made for relief for the support of the poor, then the expense of his burial should be paid out of the poor fund of the county in which the deceased had a legal settlement. "Friend", as used in Section 2351 of the Code of 1927, should be construed, we think, to mean one who has been more or less closely associated with the deceased during his lifetime as distinguished from one who was only a casual friend or acquaintance.

II.

The next question to be determined is, where the deceased is an inmate of a state institution as defined in Section 2351, and he has expressed a desire that his body be buried or his relatives or friends have so expressed themselves, then how should the expense of burial be paid?

(a) If the deceased left an estate, then the expense of his burial would have to be paid by said estate.

(b) If the deceased left no estate and was a poor person as defined in Chapter 267, Code of 1927, and had relatives as defined in Sections 5298 and 5301 who were able to pay the expense of his burial, then they would have to pay the same.

(c) If the deceased was a poor person as defined in Chapter 267, Code of 1927, and had no relatives as defined in Sections 5298 and 5301, then the expense of such poor person's burial should be taken care of by the institution in the same manner as was the expense of his care and keep while an inmate in said institution.

(d) If the deceased was a poor person as defined in Chapter 267 and had no relatives within the class defined in Sections 5298 and 5301, but had a friend or friends who had requested that he be given a burial, then the expense of such poor person's burial should be taken care of by the institution in the same manner as was the expense of his care and keep while an inmate in said institution.

III.

Another question to be determined is, where the deceased is an inmate of a state institution as defined in Section 2351, Code of 1927, who expressed no desire before his death as to the disposal of his body and whose relatives or friends do not express any such desire, what disposition shall be made of his body?

Under Section 2351, Code of 1924, if such deceased person's body was a fit subject for scientific purposes, then it would be delivered to the medical college of the State University or such other college as the State Board of Health might

direct and the expense of transporting said body to such college or school would have to be paid by the college or school receiving the same.

Under Section 2355, if such body had been dissected, the remains of said body shall be decently buried or cremated.

IV.

The last question to be determined is, if the body of such deceased person has been delivered to some college or school in accordance with Section 2351, Code of 1924, and before it has been dissected a relative or friend should claim it as provided for in Section 2354, Code of 1927, who would then pay the cost or expense of the burial?

Section 2354 provides that if, after the body has been delivered to some college or school and it is claimed before dissection by some relative or friend, that the body shall be surrendered to said relative or friend for burial without public expense. In such a case, therefore, the relative or friend who claims the body will have to pay the expense of burial.

RADIOS—TAXATION—ASSESSORS: Radios not exempt from assessment for taxation purposes.

December 16, 1927. *County Attorney, Atlantic, Iowa:* We desire to acknowledge receipt of your request of December 13 in which you submit the following question:

"Should radios be assessed as furniture or as musical instruments?"

We believe that in the past victrolas and other machines of this character have been classed as musical instruments and while of a mechanical nature, nevertheless, fall within the meaning of the statutory provision for assessment purposes. In the case of *Aeolian Co. vs. Hallett and Davis Piano Co.*, 134 Federal, 872, a mechanical piano player was held to be a musical instrument, and in view of the fact that a radio is purely a reproducing instrument such as a mechanical piano or victrola, we believe that it should be placed under the classification of musical instruments.

AGRICULTURAL SOCIETY—COUNTY MILLAGE TAX—TAX—FAIR: Society entitled to participate in County Millage Tax.

December 22, 1927. *Secretary, State Fair Board:* We desire to acknowledge receipt of your request of December 19 in which you submitted the following question:

"Would a county agricultural society that held a fair in 1925 but did not hold a fair in 1926 or 1927 have any claim on the county millage tax in case they decide to hold a fair in 1928?"

In reply we desire to quote Section 2905 of the Code of 1927 as follows:

"County Aid. The board of supervisors of the county in which any such society is located may levy a tax of not to exceed one-half mill upon all the taxable property of the county, the funds realized therefrom to be known as the fair ground fund, and to be used for the sole purpose of fitting up or purchasing fair grounds for the society, provided such society shall be the owner in fee simple, or the lessee of at least ten acres of land for fair ground purposes, and shall own buildings and improvements thereon of at least eight thousand dollars in value."

We are of the opinion that where a county agricultural society meets the requirements of the above quoted section, they may participate in the county millage tax for the year 1928, even though they held no fair in the years 1926 or 1927.

TAXATION—FAIR ASSOCIATION—EXEMPT PROPERTY: Property not used by a county fair association in connection with the conduct of the fair or the income from which is not used for such purposes is not exempt from taxation. Real estate owned by the fair association which was platted and offered for sale to the public is not exempt from taxation.

December 22, 1927. *County Attorney, Fort Dodge, Iowa:* We are in receipt of your letter under date of December 17, 1927, requesting an opinion of this department on the following question:

The Hawkeye Fair & Exposition is a stock company organized under the laws of the State of Iowa in 1919, and purchased 76 acres of land to be used for the purposes of an annual fair. In 1923 said association set aside 26 acres of their holdings and had it platted into town lots and offered them to the public for sale. Some of these 26 lots have already been sold and those remaining unsold were assessed for the years 1924 and 1925 and the taxes paid by the fair association. The fair association now presents to the board of supervisors of Webster County, Iowa, a petition for a refund of the taxes paid on these lots for the years 1925 and 1926. The records show that the unsold lots against which the assessment was made and upon which the taxes were paid have since the petition for refund has been filed, been transferred by warranty deed to L. E. Armstrong under date of November 17, 1927.

Is the Hawkeye Fair and Exposition Association entitled to a refund of these taxes?

We have examined the opinion which you enclosed rendered your board of supervisors under date of November 16, 1927, and it would appear to us that the conclusions which you reach are correct. Under the case of *Foy vs. Coe College*, 95 Iowa 689, and all of the Iowa decisions pertaining to the question, we think there can be no doubt but that the lots which the fair association offered for sale were not exempt from taxation and were not, therefore, within the provisions of Section 6944, Code of 1927.

INSURANCE—MOORE INSURANCE REDEMPTION PLAN: Held to be a violation of Section 8666, Code of 1927.

December 22, 1927. *Commissioner of Insurance:* We are in receipt of your letter under date of December 20, 1927, requesting an opinion of this department on the following question:

"The Moore Insurance Redemption Company have submitted to this department for consideration the following scheme of doing business:

"They place with the various merchants certain Saftee Receipts. These receipts are made in different denominations and units and are paid for by the merchants issuing same for advertising purposes only. The merchants give these receipts to their cash customers as an endorsement for cash paid. The Moore company agrees with the merchants and the public that the holders of Saftee Receipts may have same redeemed at the Moore office on a basis of 75c of their face value. This redemption is payable by an order for insurance on any insurance company selected by the holders of Saftee Receipts. The insurance company accepting said order may, after issuing insurance desired by our client, present order to our company and receive full face of said order in cash. The Moore company's income is derived from the differential of 25% in the rate of redemption of the Saftee Receipts for which they have rendered advertising service to merchants and also from service charge paid them by insurance companies for rendering advertising services.

"The question we desire determined is: Is the plan as proposed a violation in any way of Section 8666 of the Code of 1927?"

We are of the opinion that the plan or scheme proposed by the Moore Insurance Redemption Company is a violation of and contrary to the provisions of Section 8666 of the Code of 1927.

TOWNSHIP TRUSTEE: Compensation to be paid by hour.

December 22, 1927. *County Attorney, Britt, Iowa:* In reply to your request of December 16 in which you submitted the following question:

"In reference to section 5571 of the 1927 Code providing for the payment of the township trustees at a rate of $4.00 a day.

Does this mean that the trustees shall be paid 50c an hour or does it mean that $4.00 is the minimum pay for meeting on any official business? Suppose the trustee should meet five different times during the month, and the entire time spent in all of the meeting is only 8 hours, would that entitle him to $4.00, or would he be entitled to $20.00?"

We desire to quote you Paragraph 1 of Section 5571 as follows:

"Compensation of trustees. Township trustees shall receive:

1. For each day's service of eight hours necessarily engaged in official business, to be paid out of the county treasury, four dollars each. In townships embraced entirely within the limits of special charter cities, the compensation of township trustees shall be four dollars per day."

In view of the wording of the above quoted section in which the day of service is divided into eight hours, and the compensation to be received is set at four dollars and which distinguishes between township trustees and trustees of townships which are embraced entirely within the limit of special charter cities, we are of the opinion that township trustees as mentioned in your request would be paid fifty cents an hour for actual number of hours engaged in their official capacity.

SCHOOLS AND SCHOOL DISTRICTS—CITIES AND TOWNS: A city cannot levy a tax or license upon activities of the school district though coincident in territory.

December 23, 1927. *Department of Public Instruction:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

The town council of Coon Rapids in 1886 passed the following ordinance:

"Any person conducting a bowery dance, theatrical performance, lunch stand, or any game or amusement for gain shall secure a license,"

Under this ordinance is the superintendent of schools subject to prosecution if he does not secure a license to conduct athletic contests or public school programs where an admission is charged?

Under the statutes of the state of Iowa a city is a municipal corporation having certain limited boundaries and limited powers and authorities granted to it by statute. Under the same statutes a school district is a municipal corporation likewise having certain boundaries which may or may not coincide with the boundaries of a city or town incorporation and having certain definite powers and duties to perform.

Despite the fact that these two corporations may occupy the same territory they are separate and distinct corporations not in any manner dependent upon one another. Their rights, powers and duties are defined by statute and in the absence of statute the city council has no authority to interfere with or place a license upon any of the activities of the school district.

Since there is no statute authorizing the city to charge such license fee we are clearly of the opinion that the city council has no authority to charge or collect any license fee for any school activity performed or conducted within the boundaries of the school district.

DOGS—DOMESTIC ANIMALS—CLAIMS: A dog is not a domestic animal under the meaning of Section 5452.

December 29, 1927. *County Attorney, Waverly, Iowa:* We have your letter of December 23, 1927, requesting an opinion of this department on the following question:

Is a dog a domestic animal such as the legislature had in mind when they enacted Section 5452 of the Code of 1927?

Section 5452 of the Code of 1927, reads as follows:

"CLAIMS. Any person damaged by the killing or injury of any domestic animal or fowl by wolves, or by dogs not owned by said person, may, within ten days from the time he or his agent has knowledge of such killing or injury, file with the county auditor of the county in which such killing or injury occurred a claim for such damage."

It will be noted from reading the above section that any person damaged by the killing or injury of any domestic animal or fowl by wolves or by dogs not owned by said person, may file a claim with the county auditor for such damage.

It would, therefore, appear that the legislature did not consider a dog as a domestic animal. We are, therefore, of the opinion that a dog is not such a domestic animal as was contemplated in Section 5452.

BANKS AND BANKING — TAXATION—SPECIAL ASSESSMENTS — TAX CERTIFICATES: Tax Certificate issued on delinquent paving tax sale would proceed to deed in the same manner as any other tax sale certificate.

December 29, 1927. *Superintendent of Banking:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following propositions:

"One of our banks has purchased Tax Certificates on delinquent paving. As we understand it, these are to be refunded later out of the Primary Road Fund. How do you regard these Certificates? Should they go along to deed?"

Under provisions of former statutes special assessments for hard surfacing of roads were levied against certain adjoining lands. Concerning those assessments the Forty-second General Assembly made the following provisions in Sections 4755-b21-b22-b23:

"In all cases where special assessments for hard surfacing primary roads have heretofore been levied, under the provisions of Chapter 237, acts of 38 G. A. and amendments thereto, all of the same shall be refunded in the amounts levied, less any refunds heretofore made, out of the primary road fund or out of funds arising from the sale of primary road bonds. No special assessments for paving primary roads shall be levied after this chapter becomes effective."

"The state highway commission shall determine the time when such refund shall be made of the assessments levied in any hard surfacing district; provided that refunds shall be made in all districts within a period of five years from the date this chapter becomes effective."

"In no case shall interest be allowed on amounts so refunded. Interest on deferred installments shall cease on date of call of the last outstanding certificates of the district."

From these provisions it will be noted that the refund may be made by the state highway commission at any time within five years from the effective date of the act which was Chapter 101, Acts of the Forty-second General Assembly. This chapter became effective July 4, 1927. Thus it will be noted that the

refunds may or may not be made within the time for the issuance of tax deed if the real estate has been sold for these special assessments.

It is further provided by statute that real estate shall be sold for special assessments in the same manner as for general taxes. Therefore, the purchaser at tax sale for special assessment paving or hard surfacing taxes would be entitled to deed after the expiration of three years from the date of sale and after ninety days' notice of the issuance of said deed given by the holder of the tax sale certificate to the owner of the property.

We are of the opinion that the provision for refund of these taxes in no way affects the right of the holder of the tax sale certificate to deed upon the expiration of the three year period and the giving of proper notice. In no other manner can the holder of such certificate legally issued to him protect his rights. We regard these special assessment tax sale certificates valid as fully and in the same respect as any other tax sale certificate and the holder thereof entitled to all of the rights provided under the statute for the holder of a tax sale certificate.

BOARD OF PAROLE—PRISONER—TWO OFFENSES: (1) Where a prisoner is convicted on two offenses and the order of commitment specifies that the second term shall begin at the expiration of the first the board of parole cannot parole said prisoner under the first sentence without paroling him for the second, both sentences being construed as continuous. (2) Where a prisoner has been convicted of two offenses and committed only on one, the board may parole him without regard to the second offense. Board of Parole cannot parole a prisoner who has been committed upon two offenses which are to run consecutively for the second offense and not the first offense until the first sentence has expired.

December 30, 1927. *Board of Parole:* We are in receipt of your letter under date of December 15, 1927, requesting an opinion of this department on the following question:

"A prisoner is convicted upon two distinct offenses, receiving sentences to run consecutively, and application is made for the parole of the prisoner during the time of his service under the first sentence.

"1. If the order of commitment specifies that the second term shall begin at the expiration of the first term and the Board of Parole should act affirmatively and parole the prisoner under the first sentence, would that have the effect to parole him under the second sentence and release him entirely from further imprisonment?

"2. If the prisoner has been committed on one offense only and the commitment on the second offense has not been issued, and the Board of Parole should act affirmatively and parole the prisoner under the first sentence, would that have the effect to parole him under the second sentence and release him entirely from further imprisonment?

"3. After the prisoner has been committed on both offenses, can the Board of Parole parole the prisoner upon his second sentence before the expiration of the first sentence?"

I.

Section 3786 of the Code of 1927, provides as follows:

"The board of parole shall, except as to prisoners serving life terms, or under sentence of death, or infected with venereal disease in communicable stage, have power to parole persons convicted of crime and committed to either the penitentiary or the men's or women's reformatory."

Under Section 13959 of the Code of 1927, if the defendant is convicted of two or more offenses, the punishment of each of which is or may be imprisonment, the judgment may be so rendered that the imprisonment on any one

shall commence at the expiration of the imprisonment upon any other of the offenses.

Under Section 13961 where a prisoner has been sentenced for two or more separate offenses and the second term is ordered to begin at the expiration of the first, the several terms shall be construed as one continuous term of imprisonment.

We are of the opinion that where a defendant is convicted of two offenses and the order of commitment specifies that the second term shall begin at the expiration of the first, the Board of Parole cannot parole said prisoner under the first sentence without paroling him for the second sentence. This, for the reason that under Section 13961 both sentences are construed as one continuous term of imprisonment.

II.

We are of the opinion that where a defendant has been convicted of two offenses and has only been committed on the first offense, no commitment having been issued as to the second, the Board of Parole could without doubt parole the prisoner for the sentence for which he is serving without regard to the second sentence for which no commitment has been issued. The Board of Parole would have no jurisdiction with respect to the second sentence until a commitment was issued.

III.

We are of the opinion that under the section above referred to, the Board of Parole can grant a parole if the prisoner is eligible, to a prisoner who is serving two separate sentences at any time during the entire term but that when said parole is granted it carries with it a parole for the balance of the entire term. We are also of the opinion that the Board of Parole cannot parole a prisoner for the second offense and not the first offense until the first sentence has expired. We can see no necessity for granting a parole on the second sentence until the first sentence has expired unless, of course, he is paroled for the balance of the first sentence as well as the second sentence. This, of course, presupposes that the order of commitment specifies that the second sentence shall begin at the expiration of the first.

SALARIES: May pay for work done outside office employment, at home.

January 3, 1928. *Executive Council:* We desire to acknowledge receipt of your request of December 29 as follows:

"On December 7 and 8th the Executive Council and the Board of Conservation held a hearing in the Senate Chamber, in regard to the construction and building of a dam in the Des Moines River near the city of Ft. Dodge. It was necessary to have a reporter take down the evidence submitted at this hearing. * * *

"Mr. Foss's time for taking the shorthand notes was paid for by the State of Iowa, but in transcribing said notes he worked at his home after office hours, and it is this time for which he has made the charge of $143.25.

"An opinion is desired as to whether or not the Executive Council can pay Mr. Foss $143.25 from funds available for this work?"

In reply we desire to cite to you Chapter 275, Parapraph 61, the Laws of the Forty-second General Assembly, being as follows:

"All salaries provided for by this act are in lieu of all existing statutory salaries, for the provisions provided herein, and shall be payable in equal monthly or semi-monthly installments, and shall be in full compensation for all services except as otherwise expressly provided."

In view of the fact that Mr. Foss is a regular employee of the Railroad Commission and that the work done for the Executive Council is in no way a part of the duties and the same was not done during the time of his regular employment, we are of the opinion that the Executive Council may pay Mr. Foss for transcribing the shorthand notes where the same was done at his own home after regular hours.

SCHOOLS AND SCHOOL DISTRICTS—COUNTY SUPERINTENDENTS: School corporations lying partly in two counties are entitled to participate in the convention to elect a county superintendent in the county where their administration building or buildings lie.

January 3, 1928. *County Attorney, Humboldt, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion from this department upon the following proposition:

Where a school corporation occupies territory in two different counties, the building being located in one or the other of said counties, in which county is the said district entitled to participate in the election of a county superintendent?

The statute provides, Section 4099, Code of Iowa 1927, that each school corporation except rural independent districts shall be represented at the convention by the president of the school board or, in his absence or inability to act, some member of such board to be selected by the board.

The question you submit has not been, insofar as we can find, submitted to the supreme court of this state. Neither are we able to find any direct statutory provision or situation analogous to the situation you describe. We are, therefore, left to what would constitute a reasonable construction of the statutes as relate to the county superintendent and the schools under his charge.

The duties of the county superintendent are prescribed in Section 4106 of the Code. Under this section the county superintendent is a means of communication between the Department of Public Instruction and the various officers and instructors *in the county.* He must visit each public school in the county at least once during each school year and when requested to do so by a majority of the directors of any school corporation therein and report upon the condition of *such school.* He must enforce all of the provisions of the school law so far as it relates to the schools or school officers *within his county.*

A school district is a corporation and as such has a situs of doing business. This situs is the administration offices if we apply the general rules of corporations.

We are, therefore, of the opinion that a school corporation whose territory lies in Humboldt County and another county would have a situs in Humboldt County if its administration buildings were located therein and that such school corporation would not have a situs in Humboldt County if its administration building or buildings were not located therein. Therefore, any school corporation whose administration building or buildings are located in Humboldt County would be entitled to a vote in the convention to elect a county superintendent and any school corporation whose administration building or buildings are not located within the county would not be entitled to such representation.

AGRICULTURE—COUNTY FAIRS—FAIRS: 1—Fair society holding land under contract of purchase not entitled to county aid. 2—County aid not limited to provisions of Section 2902, Code, with reference to state aid.

January 4, 1928. *County Attorney, Fort Madison, Iowa:* This will acknowledge receipt of your letter of recent date in regard to the right of the West Point Agricultural Society to share in the county aid for fairs under the provisions of Section 2905, Code of Iowa 1927, upon the following conditions:

The Society was organized in April, 1927; has not yet conducted a fair; and holds a contract of sale for ten acres or more of land including buildings and improvements thereon of the value of $8,000 or more.

Your inquiry is whether the society holds a fee simple title in compliance with the cited section. You also inquire whether, if this society should lease the real estate and purchase the buildings and improvements of at least $8,000 in value, it would comply with the provisions of the cited section and whether Section 2902, paragraph 6, of the Code of Iowa 1927, applies to the question of county aid.

One holding land under contract of purchase has the equitable title thereto which carries with it the right to receive the rents, issues and profits of the land. A fee is the largest possible estate which a man can have, being an absolute estate. *Biggerstaff vs. Van Pelt*, *9 N. E. (Ill.) 804 at 806. The fee is the greatest interest that can be granted in real estate. In Re Brookfield, 68 N. E. (N. Y.) 138 at 140. Ownership in fee simple implies an indefeasible legal title—the entire title and estate in land. *U. S. vs. Hyde*, 132 Federal 550. An estate in fee simple is the greatest that one can possess. *Parker vs. Comrad*, 85 Pacific (Kan.) 111.

We, therefore, concur in your opinion that this society does not have fee simple title within the meaning of Section 2905 of the Code.

We concur, also, in your opinion that a lease of the real estate in the extent of at least ten acres together with the purchase of buildings and improvements thereon of the value of $8,000 would bring the society within the terms and conditions of the cited section.

We further concur in your opinion that Section 2902, paragraph 6, applies only to the state aid allowed through the Iowa State Fair Board and not to the aid provided by the county under the provisions of Section 2905, as we interpret it.

SHERIFF—MILEAGE: Entitled to actual expenses in bringing prisoner back from outside state.

January 6, 1928. *County Attorney, Corning, Iowa:* This is in reply to your oral request of this date in which you submit the following question:

"Is the sheriff allowed 10c per mile in actual carfare for returning a prisoner from Arizona when the sheriff was not acting under requisition?"

In view of Section 13498 which limits a person acting as an agent under a return of requisition to his actual and necessary expenses, and in view of the fact that the sheriff is not serving a warrant as the limits of his jurisdiction are confined to the boundaries of the county in which he is sheriff, we are of the opinion that where a prisoner would waive extradition and accompany a sheriff from Arizona to the State of Iowa, the sheriff would not be performing such a duty as is contemplated under the statute providing for mileage at 10c per mile, but that in fact he is only performing such a duty as is found under Sec-

tions 13497 and 13498. The fact that the prisoner willingly returns does not alter the situation to the extent that the sheriff may claim 10c per mile for mileage.

We must, therefore, hold that under the circumstances as related by you the sheriff is entitled to his necessary and actual expenses both for himself and the fugitive.

STATE INSTITUTIONS—BANKS: A bank cannot act as treasurer of an institution under the control of the state board of education.

January 6, 1928. *Iowa State Board of Education:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

May a bank act as treasurer of one of the institutions under the control of the Iowa State Board of Education?

It appears that the Cedar Falls National Bank, Cedar Falls, Iowa, one of whose officers is treasurer of the Iowa State Teachers College, has requested that the bank be appointed treasurer instead of such officer. The matter has been taken up with the Comptroller of Currency and that officer has advised as follows:

"If the position of treasurer carries with it no obligation except to receive money on deposit and cash checks drawn against the deposit, there would appear to be nothing illegal in the bank acting as treasurer."

This quotation in itself bars the bank from acting as treasurer. The duties of the treasurer are more than merely to receive money on deposit and cash checks drawn against it. The treasurer occupies a fiduciary relationship to the institution and occupies a position which a bank cannot occupy.

We are, therefore, of the opinion that no one except a natural person may act as treasurer of the institutions under the control of the board of education.

SCHOOLS AND SCHOOL DISTRICTS: A school maintained in conjunction with parochial school has "ceased to have a public character"; therefore not entitled to state aid.

January 7, 1928. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of recent date enclosing a copy of a letter received from F. C. Bowersox, county superintendent of Clinton County, Iowa, which is self-explanatory.

The letter follows:

"I have a peculiar situation in Clinton County. In the northern part of Waterford Township, Clinton County, we have a strong Catholic settlement. Some years ago this church established a school, built a very nice two story building with four modern school rooms, and a Sister's home and dormitory rooms in the rear. The Board of Directors in the said Waterford Township, then closed two of their rural school houses, No. 1 and No. 3, the children going to this new and better building. They hired two Sisters to teach two of the rooms paying them from public funds.

"They now have a very good school system out in the open country. They have three teachers (all Sisters). The first has three grades, and is supported by the church. The rest of the grades are divided between the other two teachers, who receive the same salary as the other rural teachers in the township. The schools are under the supervision of the County Superintendent. The State and County courses of study are followed. The teachers cooperate in every way possible, so that the school is very good.

"There is no religion taught during the school day. The children come early and get some instruction in their faith before school.

"These schools are very well equipped and according to rating given should be on the standard list. They desire to be placed upon this list. In view of Section 5256, Iowa Code, 1924, and the decision of the Supreme Court, *Knowlton vs. Baumhover*, 182-691, may they legally be so placed?"

You inquire whether this arrangement by the board is in conflict with the decision of the supreme court of the state of Iowa in the case of *Knowlton vs. Baumhover*, 182 Iowa 691, and whether or not, in the opinion of this department, your department could extend the recognition, except as to state aid, contemplated for standardized schools.

The facts stated are practically identical with the facts stated in the *Knowlton vs. Baumhover* case. In that case the court, speaking through Mr. Justice Weaver, said:

"In short, it must be said that, with the abandonment of the public schoolhouse, and the transfer of the school into the parochial building, and its organization and conduct as there perfected, the school ceased to have a public character, in the sense contemplated by our laws, and became, has since been, and now is, a religious school, maintained and conducted with a special view to the promotion of the faith of the church under whose favor and guardianship it was founded."

The court in the cited case said further:

"If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state, and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer, and infidel—shall not be used, directly or indirectly for religious instruction, and above all, that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed, or belief."

Under the force and effect of the decision of our supreme court in the cited case, it is our opinion that there is no alternative but to hold that the school described in the communication above has, in the words of the court, "ceased to have a public character."

If it then has ceased to be, as the court has said, a school of a public character, it is not entitled to recognition as a public school either for the purpose of state aid or any other recognition.

CITIES AND TOWNS: 1—City marshal ex officio officer of superior court; receives fees as sheriff in civil cases and as constable in criminal cases. 2—A city employee on regular salary may be paid additional salary if given additional duties. 3—Trust fund deposited by clerk in closed bank not a loss to city. 4—Maintenance of electroliers does not authorize a five mill tax under Section 6211 (10) Code. 5—City may build bandstand on leased property and remove same at termination of lease; however no provision for transfer of funds from general fund to park fund unless the city has no board of park commissioners.

January 10, 1928. *Auditor of State:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon a number of propositions submitted by your examiner with reference to practices in the city of Oelwein.

We shall not re-state the propositions but shall endeavor to answer them in the order submitted.

1—Under the provisions of the statute, Section 10719, a city marshal is made ex officio the executive officer of the superior court. In the same chapter, Sec-

tion 10750, it is provided that he shall receive the same fees and compensation in civil cases as the sheriff receives under the provisions of Section 5191 of the said code, but in criminal cases he is entitled to the same fees for his services as are paid to the constable in justice court. We are of the opinion that these fees are in addition to his regular salary for the reason that he has other duties aside from those of executive officer of the superior court. The same rule would not apply to the chief of police or other police officer either in municipal or police court.

2—The said marshal is entitled to the same fees for serving original notices, attachments, executions, and other civil process as the fee to which the sheriff is entitled to under Sections 5191-5192 of the Code.

3—A city employee who is working on a regular salary may be paid an additional sum if additional duties are imposed. We are, therefore, of the opinion that the city of Oelwein properly paid an additional amount to the employee in charge of the sewage disposal plant as inspector of construction work; said additional amount being in the discretion of the council.

4—The loss of the $600 which was deposited by the electric company seeking a franchise to cover the cost of a special election would fall upon the company making the deposit if such company agreed to pay the cost of the election. If the company did not agree to pay the cost of the election the costs thereof would simply be a charge against the city and no loss could be charged to the clerk in the absence of bad faith.

5—After careful search of the statutes we find no authority for the levy of a tax for a light maintenance fund except where the city owns its own electric light plant. The electric light fund is specifically limited to five mills in any city with a population of more than five thousand. See Section 6211, subsection 10, of the Code of Iowa 1927. While the city owns the electroliers the electric light plant fund provided under sub-section 30 of Section 6211 is specifically limited to cities and towns owning and operating an electric light plant.

6—We are of the opinion that building a bandstand on leased property is within the power of the city if the expenditure is made in the proper manner. This is not a donation to another corporation but is merely the erection of a building which is the property of the city and which may be removed from the leased property if the lease is terminated. We, therefore, make a distinction between this case and the Newton-Iowa case which you cite.

We find no provision of the statute, however, for transferring money from the general fund to the park fund by the city council unless the city has no board of park commissioners, in which case the transfer and expenditure could be done in the manner outlined in Sections 5810-5811, Code of Iowa 1927.

HOGS INJURED OR KILLED—BOARD OF SUPERVISORS—CLAIMS FOR DAMAGES: Claims for damages for the injury or killing of hogs by wolves or dogs under Section 5452, must be filed within ten days from the date the claimant or his agent has knowledge of the death or injury.

January 10, 1928. *County Attorney, Manchester, Iowa:* We are in receipt of your letter of January 6th requesting an opinion of this department on the following question:

"A claim has been filed with the Board of Supervisors for four hogs that were injured by dogs on November 24th, 1927, which hogs were taken care of by the owners and died December 14th. Claim was filed with the County Auditor

on December 16th. The question is whether or not this claim was filed within ten days as required by the statute."

Section 5452 of the Code of 1927, reads as follows:

"Claims. Any person damaged by the killing or injury of any domestic animal or fowl by wolves, or by dogs not owned by said person, may, within ten days from the time he or his agent has knowledge of such killing or injury, file with the county auditor of the county in which such killing or injury occurred a claim for such damage."

It will be noted from reading said section that the claim for damages in such cases must be filed within ten days from the time the claimant or his agent has knowledge of the injury or killing. We are of the opinion that where the animal dies as a result of the injury by wolves or dogs, that the claim for damages must be filed within ten days from the date the claimant or his agent has knowledge of the death.

We are also of the opinion that where the animal is injured only, that the claim for damages must be filed with the county auditor within ten days from the time the claimant or his agent has knowledge of the injury.

FISH AND GAME—LICENSE—HUNTING ON HIGHWAYS: It is unlawful to hunt upon the public highway of this state either with or without a license.

January 13, 1928. *State Game Warden:* We have your letter of January 9, 1928, requesting an opinion of this department on the following questions:

1. Is it unlawful to hunt upon the public highways of this state either with or without a license?

2. Is it unlawful to carry a loaded shotgun in a motor vehicle?

I.

Section 1723 of the Code of 1927, reads as follows:

"Authority of License. The license shall authorize its holder to fish and hunt in accordance with the provisions of this chapter in any county of the state, but not on private waters, or on inclosed or cultivated lands without permission of the owner or the tenant, nor hunt upon any public highway or railroad right-of-way."

Section 1718 of the Code of 1927, reads as follows:

"No person shall hunt, pursue, kill, or take any wild animal, bird, or game in this state in any manner or trap fur-bearing animals or game without first procuring a license."

It will be noted from reading Section 1723 above quoted, that a license does not authorize the holder thereof to hunt upon private waters or upon inclosed or cultivated land without permission of the owner or the tenant, nor to hunt upon any *public highways* or railroad right-of-way.

It will also be noted from reading Section 1718 above quoted, that no person shall hunt any wild animal without first procuring a license, except, of course, such persons as are excepted in Section 1720, such as the owner or tenant of a farm and their wives, children and employes.

We are, therefore, of the opinion that no person can hunt upon the public highways of this state either with or without a license and this applies to all wild animals, birds, game and the like.

II.

Section 1772 of the Code of 1927 reads as follows:

"No person shall carry a gun or other firearm, except a pistol or revolver,

in a motor vehicle unless the same be unloaded in both barrels and magazine and taken apart or contained in a case."

This section, we believe, needs no explanation and fully answers your second question.

TAXES—SCAVENGER SALE: The owner of property cannot be a purchaser at scavenger tax sale. When the owner buys he must pay the taxes.

January 13, 1928. *County Attorney, Ida Grove, Iowa:* We are in receipt of your letter of January 10, 1928, requesting an opinion of this department on the following questions:

1. Can a property owner purchase his own property at a scavenger tax sale?
2. Where property is sold by the treasurer for less than the amount of the taxes, how should the treasurer apply the money received, that is, to what funds should it be credited?

I.

We are of the opinion that the owner of property can never be a purchaser at any tax sale, either at a general or a scavenger sale. Our Supreme court has repeatedly held and it is the rule in Iowa, that one who is under duty to pay the taxes such as a mortgagee or the owner, could not be a purchaser at a tax sale and acquire any rights by virtue of a tax deed. A mortgagee of property, therefore, who purchases at a tax sale pays the taxes and does not receive any benefits as a purchaser. Likewise the owner or mortgagor pays the taxes and does not receive any benefits as purchaser. It would also, we think be against public policy to permit the owner of property to be a purchaser at a scavenger sale.

II.

Section 7256 of the Code of 1927, provides as follows:

"Unavailable tax—credit given. Any taxes on such real estate, in excess of the amount for which the same was sold, shall be credited to the treasurer by the auditor as unavailable, and he shall apportion such excess among the funds to which it belongs, and if any of such excess belongs to the state, it shall be reported by him to the auditor of state as unavailable, who shall give the county credit therefor."

It will be noted from reading said section that the unavailable taxes; that is, the amount of taxes in excess of what the real estate sold for, shall be credited by the auditor to the treasurer and by the auditor apportioned among the funds to which it belongs and that if any excess belongs to the state, the auditor shall report the same to the auditor of state who shall give the county credit therefor.

We are, therefore of the opinion that the amount received at scavenger tax sale shall be apportioned among the funds to which it belongs.

We call your attention to Sections 7193-a1, 7193-a2, 7193-a3, 7193-b1, 7194, 7195 and 7196. It will be noted from reading these sections that where a compromise has been made in accordance with the provisions of Section 7193-a1, the unavailable taxes are credited to the treasurer and apportioned among the funds to which they belong and that if any unavailable taxes should be subsequently collected, they are credited back to the several funds to which they belong. * * *

ELECTIONS—EXPENSE—TRANSPORTATION FOR VOTERS: Claim for the expense of transporting voters to and from the polls is unauthorized.

January 14, 1928. *County Attorney, Maquoketa, Iowa:* We are in receipt of your letter of December 22nd requesting our opinion on the following question:

On November 1, 1927, a special election was held in Jackson County on the question of issuing road bonds. At that time a bridge on a county road near Green Island, Iowa, was out and as a result the voters would have been required to travel approximately twenty miles in reaching the polls to vote. To avoid this the township trustees made arrangements to have them cross the river in a row boat and employed cars to get them on the other side of the river and take them to the polls and return them to the river. A claim for this expense has been presented to the board of supervisors. The question is, can the board legally allow this claim?

We are unable to find any statute which would impose upon the township trustees or board of supervisors, the duty of furnishing to any voter a means or conveyance to the polls. Such a practice would be contrary to public policy and would permit corrupt practice by unscrupulous office seekers and politicians. We are, therefore, of the opinion that the board of supervisors does not have power to authorize such an expenditure or approve such a claim.

DEPARTMENT OF HEALTH—EXPENSE OF REMOVING DEAD ANIMALS—NUISANCE: Under Section 2240 the local board of health must first give the owner or occupant of any property allowing a nuisance to exist, a reasonable time within which to remove the same at his own expense and if said owner does not abate the nuisance within a reasonable time, then the board may cause the same to be abated and cause the costs and expenses to be paid by the owner.

January 16, 1928. *Commissioner of Health:* We are in receipt of your letter under date of January 4th requesting an opinion of this department on the following question:

The township trustees in a township receive complaints that dead hogs had been thrown in a certain river and that they were lying along the side of the stream. The township trustees acting as the local board of health spent two days attempting to locate and trying to find the owners. They found the hogs and located the owner and found more dead hogs on his place and ordered them destroyed. The township trustees, acting as the local board of health, sent two men to burn the dead hogs. The bill has been filed by the township trustees for services spent in connection with the matter and also for the services of the two men who were hired to burn the hogs.

The question then is, how is this bill to be paid, that is, out of the county funds or the township funds?

Section 2240 of the Code of 1927, provides as follows:

"Abatement of Nuisance: The local board may order the owner, occupant, or person in charge of any property, building, or other place, to remove at his own expense any nuisance, source of filth, or cause of sickness found thereon, by serving on said person a written notice, stating some reasonable time within which such removal shall be made, and if such person fails to comply with said order, the local board may cause the same to be executed at the expense of the owner or occupant."

Section 2243 provides as follows:

"Collection of costs for abating nuisance: All expenses incurred by the local board in proceeding under the four preceding sections may be recovered by suit in the name of the local board, or said board may certify the amount of said expense, together with a description of the property, to the county auditor who shall enter the same upon the tax books as costs for removing a nuisance and said amount shall be collected as other taxes."

It will be noted from reading Section 2240 above set out that the local Board of Health has the power to order the owner or occupant or any person in charge of any property, building or other place, to remove at his own expense any nuisance, source of filth or cause of sickness found thereon and that if such person after a reasonable notice, fails to comply with said order the local Board of Health may cause the same to be done at the expense of the owner or occupant.

It will also be noted that under Section 2243, all of the expenses incurred by the local board in connection with the abatement of any nuisance as provided for in Section 2240, may be collected by a suit in the name of the local Board of Health or said board may certify the amount of said expense, together with a description of the property, to the county auditor who shall enter the same upon the tax books as costs for removing a nuisance and it shall then be collected as other taxes.

It must also be noted that under Section 2240, the board must first give the owner or occupant of any property allowing a nuisance to exist, a reasonable time within which to remove said nuisance at his own expense and that if said owner or occupant does not abate the nuisance within said time then the board may cause the same to be abated and under Section 2243 may sue the owner or occupant for the expense incurred or certify the same to the county auditor, who shall enter the same on the tax books. It would, therefore, appear in the present case that the local Board of Health (Township Trustees) did not proceed in accordance with Section 2240, that is, they did not give the owner a reasonable time within which to abate the nuisance but proceeded immediately upon their own initiative to do so and having so done, they are not entitled to receive any compensation either from the owner or from the county.

In order for the local board to be entitled to compensation for their services in connection with the abatement of the nuisance, it would be necessary for them to proceed in accordance with Section 2240, that is, they must give the owner or occupant of the property where the nuisance exists, an order to abate the same together with a reasonable notice giving him an opportunity to remove it at his own expense and then if he should fail to do so, the local board could then abate said nuisance and charge the expense to the owner or occupant.

We are also of the opinion that if the local board has proceeded in accordance with the provisions of Section 2240 and have certified the expense to the county auditor in accordance with Section 2243, the claim for said expense should be paid out of the county funds.

CLERK OF THE DISTRICT COURT—COLLECTION OF FEES: Under Section 10837, the clerk of the district court should collect the fees for filing a petition, appeal or writ of error in advance.

January 17, 1928. *Auditor of State:* We have your letter of December 30th requesting an opinion of this department on the following question:

Under Section 10837, are the fees for filing any petition, appeal or writ of error and docketing the same to be collected by the clerk of the district court in advance or at the time of final adjudication?

We are of the opinion that under Section 10837, the clerk should collect in advance—that is, at the time of filing, the fee of $1.50 for filing any petition, appeal or writ of error and for the docketing of the same.

SCHOOLS AND SCHOOL DISTRICTS: A school board may determine whether instruction outside of school is equivalent to that in school for the purpose of determining whether a prosecution shall be made under Section 4413, Code.

January 17, 1928. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following proposition:

Does Section 4413, Code of Iowa 1927, empower the board of education to pass upon the competency of instruction or details of instruction given by an instructor other than the public schools?

The enforcement of the above statute and the compulsory education statutes is delegated to the board of education and other officers. Any officer charged with this duty may determine for himself whether or not the instruction is equivalent and, if not, prefer charges against the parent.

It is then a question for the court and the jury to determine whether or not there has been a violation of the statute and, if so, to inflict the penalty prescribed.

SCHOOLS AND SCHOOL DISTRICTS: A school board does not have the authority to lease a school site of a temporary character and abandon its permanent site.

January 17, 1928. *Superintendent of Public Instruction:* This will acknowledge receipt of your request for an opinion of this department upon the following proposition:

"Does a school board in a rural independent district have authority to enter into a lease for a school site for the purpose of having the site on to which it may move the school building now located on a site owned by the school district?"

As we understand this request, a school board now owns a site and has a permanent building located thereon. The board desires to lease another site under a rental contract and remove the school building now owned to that site and thus abandon the site now owned by the district. Your inquiry is as to the authority of the school board to make and enter into such rental agreement.

The statute provides that the electors shall have the power to vote a tax for the *purchase* of grounds, construction of schoolhouses, etc. Section 4217 (8). It further provides that the school corporation may become indebted for the purpose of procuring a site or sites for schoolhouses and other school buildings. Section 4353. It is further provided that the board of directors when authorized by the voters may issue bonds to borrow money for the purpose of *acquiring* sites for school purposes.

The only provision for leasing property is contained in Section 4374, Code of Iowa 1927, which provides as follows:

"The board may, when necessary, rent a room and employ a teacher, where there are ten children for whose accommodation there is no schoolhouse."

It has been held by our supreme court that the power to acquire a school site is discretionary with the board. The cases, however, refer to situations where the people have already provided by their vote the necessary means with which to acquire the school site. They also refer to cases where the site chosen is of a permanent character.

We are of the opinion that in the absence of express statutory authority a school board would not have the power to lease a site of a temporary character

and remove its building from a permanent location to such temporary location. This would be especially true where there is a forfeiture clause in the lease because subsequent owners and subsequent boards of education might easily prejudice the rights of the district by working a forfeiture of the lease. It should be understood that this opinion is limited to a situation where it is proposed to abandon a permanent site for one of a temporary character.

SCHOOL FUNDS: A reappraisement is not necessary on a renewal of a loan of school funds.

January 19, 1928. *County Attorney, Sidney, Iowa:* This will acknowledge receipt of your letter of recent date in which you request an opinion upon the following proposition:

"When a loan of school funds is renewed under Section 4494 of the Code of 1927 is it necessary to have the property reappraised as is outlined in Section 4488?"

We are of the opinion that the statute does not require a reappraisal at the time of the renewal of the loan. We base this opinion upon the fact that the statute provides that the time of payment, without further security, may be extended in writing, to be recorded as the original security was, and before maturity of the claim, when the board of supervisors for cause shall so order. If the board of supervisors may extend the loan without requiring further security, we are of the opinion that they may renew the loan upon the same security without further appraisal.

PENSIONS: No refunds for payment made by state between application for Federal Pension and granting of same.

January 20, 1928. *Adjutant General:* We desire to acknowledge receipt of your request of January 6 in which you submit the following question:

"Certain survivors and widows are securing from this state pensions for Indian relief expeditions and the government under a recent act now intends to provide a pension for these parties. Shall the state attempt to secure a refund where there may be a duplication between the state and federal governments, or shall the pensioner be dropped from the state roll when it is assured that he is receiving federal pension?"

In reply we would say that under the acts of our legislature no provision was made for the refund of pensions, and we are of the opinion that the pensioners should be dropped when your department is assured that they are receiving a federal pension—this to apply to the survivors or widows of the Northern Border Brigade and of Mitchell's Cavalry, but that such parties should not be required to make any refund.

The survivors and widows of the Spirit Lake Relief Expedition should not be dropped from the state pension roll even after they were receiving additional pensions from the federal government, in view of Sections 480 to 482, inclusive.

COUNTY OFFICERS: Date of eligibility for county office is the date of induction into office and not the date of nomination or election.

January 20, 1928. *County Attorney, Indianola, Iowa:* This will acknowledge receipt of your letter of recent date in which you inquire whether an attorney who has not yet finished his course of study at the State University, and who will not take his examinations until June, is qualified to enter the June Primaries as a candidate for county attorney.

It has been the ruling of this department that the date on which eligibility is required is the date of induction into office and not the date of the election. This position is supported by the following authorities:

State vs. Van Beek, 87 Iowa, 569;
State vs. Huegle, 112 N. W., 234.

TAXES—CHATTEL MORTGAGES: Chattel mortgages superior to personal property tax unless said property falls within Section 7205. Holder of tax certificate entitled to 6% on money where refund made on account of void sale.

January 23, 1928. *County Attorney, Pocahontas, Iowa:* I desire to acknowledge receipt of your letter of January 20 in which you submit the following questions:

"1. Is a lien for taxes on personal property superior and paramount to a chattel mortgage given on said personal property?"

"2. Where a sale of real estate is void, is the party holding a tax certificate entitled to eight per cent (8%) interest on the money paid the County Treasurer when said sum is refund?"

In reply to your first inquiry, we desire to cite you the opinion of this department for 1925 and 1926 at pages 188 and 491 and in addition to state that a tax lien is superior to a chattel mortgage only when such property is defined under provisions of Section 7205, Code of 1927.

In reply to your second inquiry, we are of the opinion that where the purchaser was entitled to a refund from the County Treasurer on account of failure of the county official to carry out the provisions of the code as outlined in Section 7252, the purchaser would be entitled to a return of his money with lawful interest, or in other words six per cent (6%).

TAXES: Property assessed January 1st or exempted as of that date, carries the assessment or exemption for the balance of the year.

January 23, 1928. *County Attorney, Mason City, Iowa:* We desire to acknowledge receipt of your request of January 20 which is as follows:

"On January 1, 1927, the First Reform Church of Meservey, Iowa, owned Lots 9 and 10, Block Two (2), Meservey, Iowa. During the month of January they were assessed but were marked exempt by the assessor in accordance with section 6944 of the 1927 Code, which provides for the exemption of Church property. On February 16 the Church sold the above property to a one Louis Foss and on the same date bought lots 9 and 10, Block Twelve (12) Meservey, Iowa.

"The Directors of the Church now ask for a transfer of the exemption from lots 9 and 10, Block Two (2) to the lots 9 and 10, Block Twelve (12) while Louis Foss, the purchaser of lots 9 and 10, Block Two (2), contends that the exemption should remain on the lots owned by the Church on the first day of January."

In reply we would say that we are of the opinion that the exemption is determined by the owner as of January 1 and that Lots 9 and 10 of Block Two (2) are exempt for the 1927 taxes and that Lots 9 and 10 of Block Twelve (12) are not exempt, and that the First Reform Church, having purchased Lots 9 and 10 of Block Twelve (12) subject to the taxes of 1927, this property would be liable for said taxes, as subdivision 9 of Section 6944 exempts property from taxation but does not exempt or contemplate refund of taxes which have been levied prior to the time the property came into the hands of religious, literary or charitable societies.

DRAINAGE WARRANTS: County responsible for payment under certain conditions.

January 23, 1928. *County Attorney, Sidney, Iowa:* We desire to acknowledge receipt of your request of January 20 in which you submit the following question:

"Where a warrant was drawn on a drainage district for preliminary work before this district was established, and which district was never established and the county auditor permitted the petitioners to file a worthless bond, is the warrant payable by the county?"

In view of the fact that the county is acting as a municipality at the time the petition and bond are filed with the county auditor, and the county orders and authorizes the necessary preliminary work to be done, we are of the opinion that this warrant should be paid by the county; and if the county auditor through error or negligence accepts a worthless bond, the county only is estopped by such circumstances from securing reimbursement from the sureties and the warrant holder must and may look to the county for payment as the drainage district never having come into being, the warrant is an obligation of the only existing municipality, to-wit: the county.

NUISANCES—BOARD OF HEALTH: May proceed on petition where local board refuses to act.

January 25, 1928. *Department of Health:* Replying to your request of December 28, 1927, which is as follows:

"Section 2212, Code of Iowa, 1927 reads as follows: '2212. *Refusal of local board to enforce rules.* If any local board shall fail to enforce the rules of the state department or carry out its lawful directions, the department may enforce the same within the territorial jurisdiction of such local board, and for that purpose it may exercise all of the powers given by statute to the local board, and may employ the necessary assistants to carry out its lawful directions.'

"Sections 2239 to 2246, Code of 1927, refer to the duties of the local board of health relative to the abatement of a nuisance. If, in the case in question, the local board of health fails to act in abating such nuisances, will you kindly inform me if the state department of health has any jurisdiction and if so, how should it proceed to abate the nuisance?"

Will say in reply that you will not find in Sections 2239 to 2246, Code of 1927, the power to abate a nuisance where a local board of health has failed to do so. However, under Section 2191, under the chapter entitled "State Department of Health—Powers and Duties," a careful examination discloses that paragraph six is as follows:

"6. Make inspections of the sanitary conditions in any locality of the state upon written petition of five or more citizens from said locality, and issue directions for the improvement of the same, which shall be executed by the local board."

Under this paragraph of Section 2191, we believe that the State Department of Health would have the power where the local board of health had refused or neglected to abate a nuisance, to make an inspection upon the petition and if a nuisance were found, to proceed to abate the same.

TOWNSHIPS—ROADS—TRUSTEES—CLERK: Clerk of township not to contract with trustees for labor or material.

January 26, 1928. *County Attorney, Audubon, Iowa:* I desire to acknowledge receipt of your request of December 29 in which you submit the following questions:

1. "Will you please give me your opinion as to whether a clerk of the township trustees may be the holder of a contract for grading township roads and receive the stipulated price therefor?
2. "May the trustees let the contract to the highest and best bidder as they see it?"

In reply to your first question I note that you cite Section 4685, Code of 1927, and I desire to refer you to Section 13327, Code of 1927, which I believe is even more broad and comprehensive than the section to which you refer. It is a well known principle of law that public officials shall not be interested in contracts made with any governing body of which they are a member or an employee. This thought is well expressed in the cases of *James vs. City of Hamburg*, 174 Iowa, 301; and *Peet vs. Leinbaugh*, 180 Iowa, 940. We are, therefore, of the opinion that a clerk of the township trustees should not contract for either labor or material to be delivered or rendered to the township of which he is an official.

As to the second question which you submit, public contracts are to be let to the lowest responsible bidder and the terms 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 a contract he could perform strictly in accordance with its terms.

In answering your second question I am assuming that you refer to Section 4647, Code of 1927, in which it says that culvert and bridge construction, where the engineers' estimate exceeds One Thousand Dollars, shall be advertised and let at a public letting. While certain discretionary power rests with the township trustees in determining who is the lowest responsible bidder, they should act without favoritism or arbitrarily and upon their honest conviction based upon the facts.

TOWNSHIP TRUSTEES—ROADS—HIGHWAYS: Under duty to clear roads of obstructions including snow drifts but only with due regard for the available funds for road purposes.

January 27, 1928. *County Attorney, Waukon, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

Is it incumbent upon the township trustees to keep roads open for travel in case same are closed by snow and, if so, whether for automobile traffic or for teams only?

The statute, Section 4834, Code of Iowa 1927, provides as follows:

"The board of supervisors and township trustees shall cause all obstructions in highways under their jurisdiction to be removed."

This statute is in practical effect the same as the statute, Section 993, Code of Iowa 1873. In the interpretation of the latter section the supreme court in *Patterson vs. Vail*, 43 Iowa, 142, speaking through Mr. Justice Day, said:

"To obstruct a highway it is not necessary that it should be rendered impassable. An obstruction is an obstacle, an impediment, a hindrance, that which impedes progress."

In the cited case the court also held that mandamus is the proper remedy to compel the removal of such obstruction.

We are, therefore, of the opinion that it is the duty of the township trustees to remove snow from the highways under their jurisdiction if such snow renders the roads impassable.

It is, of course, a question for the sound discretion of the trustees to be determined with reference to funds available for road purposes. Sound judgment must also be exercised in case of extended storms and general blocking of roads by snowstorms.

COOPERATIVE ASSOCIATIONS: 1. Reserve fund cannot be used as capital in the business. 2. Patronage dividend can be used if waived by members. 3. Any member may demand and enforce patronage dividend as to him.

January 27, 1928. *Secretary of State:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following propositions:

"1-A. For what purpose, if at all, may the reserve fund in Section 8507, be used?
"B. Under the construction of Section 8507, can this reserve fund be used in the business?
"C. If you decide that the reserve fund can be used, does the Board of Directors determine its uses?
"2-A. Is it mandatory, under Section 8507, that any remainder or surplus shall be returned to the members as a patronage dividend, or is it at the discretion of the Board of Directors?
"B. Instead of declaring a patronage dividend, can the Board of Directors use it otherwise?
"C. If all the members except one agreed not to take the patronage dividend, but to leave it in the business, what are the relative rights?"

The cited section of the statute provides that the following funds shall be set up from the surplus at the end of the year.

1. Reserve fund at no less than ten per cent per year until such fund shall equal forty per cent of the invested capital.
2. Educational fund to consist of not less than one per cent nor more than five per cent.
3. Patronage dividend pro-rated on amount of business done by member.

It is evident, from the wording of the statute, that it was the intent of the legislature that the reserve fund be set aside, not for the purpose of increasing the capital on which business could be done, but rather a cushion fund to absorb losses which might occur up to the end of any one year. If it were the intent of the legislature that this fund could be used in the business, then the statute would have required a surplus to be added to the capital stock and the fund would have become, not a reserve fund but, in fact, surplus in addition to capital.

We are, therefore, of the opinion that this reserve fund cannot be used as capital stock if used in the transaction of the business. Our reply to inquiry 1-A, B, and C, must, therefore, be in the negative.

The legislature in the wording of the statute granted a discretionary power to the board of directors in the expenditure of the permanent educational fund but used language which must be construed as mandatory with reference to the patronage dividend.

We are, therefore, of the opinion that it is mandatory upon the board of directors to return the surplus remaining after the reserve and educational funds have been provided for to the patrons upon a pro rata basis upon the amount of business done by the member through the association.

The right to patronage dividend, however, is a right which may be waived and if all members waived this right the dividend could be left in capital and surplus fund of the association and be used in the regular transaction of the business. If any one member demands his patronage dividend, he could compel the board of directors to pay the same to him in an amount in proportion to the amount of business done by him through the association to the total amount of business done. The remaining members could, of course, waive their patronage dividend.

TOWNSHIP CLERK—MAYORS: Office of Mayor and Township Clerk are not incompatible.

January 30, 1928. *County Attorney, Pocahontas, Iowa:* We desire to acknowledge receipt of your letter of January 27 in which you submit the following question:

"May the same person hold the offices of Mayor of an incorporated town and clerk of the surrounding township in which said town is located."

In reply we desire to cite to you an opinion written to the Auditor of State on March 16, 1926, which is found on page 312 of the reports of the Attorney General for 1925 and 1926, and to also cite Section 523-b1 which is a recent enactment. After comparing the opinion above cited with this section of the Code we are of the opinion that the two offices are not incompatible, and that the same may be held by the same person.

INDUSTRIAL COMMISSION — WORKMEN'S COMPENSATION — SPECIAL POLICEMEN: Peace officers under Sec. 1422 must be (1) making or attempting to make an arrest (2) giving pursuit (3) performing official duties where there is peril or hazard peculiar to the work of their office. Special policeman who attempts to stop a driver of a car who failed to stop at an intersection is not within the provisions of the workmen's compensation act if he is injured by being run over.

January 31, 1928. *Industrial Commissioner:* We are in receipt of your letter under date of January 30, 1928, requesting an opinion of this department on the following question:

The mayor of a certain city employed a man as a special policeman. This special policeman was subject to call and worked at such times as he was directed to by the city. While acting as special policeman, he attempted to stop a car coming from a side road or street onto Primary Highway No. 11 because of the driver's failure to stop before entering said Primary Highway. It appears that the special policeman stepped out into the street to warn and stop the approaching car and that the driver of said car did not stop but ran into and injured the special policeman. The question then is: Was this special policeman performing such a duty at the time of his injury as would bring him within the provisions of Section 1422, Code of 1927, and therefore entitled to compensation?

It will be noted from reading Section 1422, Code of 1927, that a peace officer comes within the provisions of Section 1422 only when: "While in the 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 offices."

It will thus be seen that the legislature has limited the employment in which compensation is allowable to those cases where the peace officer is, (1) making or attempting to make an arrest, (2) giving pursuit, (3) while performing

such official duties where there is peril or hazard peculiar to the work of their office. Thus, unless a peace officer is engaged in one of the three acts above set out, he does not come within the provisions of Section 1422 and is not entitled to compensation.

It would appear from the affidavit which you attached and from the facts stated in the question above, that the special peace officer, A. L. Heath, was not at the time he was injured, performing such a duty as would entitle him to compensation within the meaning of Section 1422.

We also call your attention to the opinion of the Attorney General rendered you under date of November 21, 1925, which opinion is found at page 209 of the Report of the Attorney General for the years 1925-6.

CLAIMS OF PHYSICIAN—CORONER—BOARD OF SUPERVISORS: Board of supervisors are not authorized to allow claims of a physician or surgeon called by the coroner where no inquisition is held.

January 31, 1928. *County Attorney, Clinton, Iowa:* We are in receipt of your letter under date of January 27th requesting an opinion of this department on the following question:

Can the board of supervisors, under the laws of this state, approve and pay claims of physicians in cases where they have been called by the coroner in good faith to render professional services providing the claims are reasonable, regardless of whether or not an inquisition is held?

Section 5218, Code of 1927, provides as follows:

"In the inquisition by a coroner or by an acting coroner, when he or the jury deem it requisite, he may summon one or more physicians or surgeons to make a scientific examination, who, instead of witness fees, shall receive a reasonable compensation to be allowed by the board of supervisors. If the coroner is also a physician he may make such scientific examination."

It will be noted from reading the above section, that the coroner or the acting coroner is only authorized in cases where an inquisition is held, when he or the jury deem it necessary, to summon one or more physicians or surgeons to make a scientific investigation and that said physician or surgeon is to receive in lieu of witness fees a reasonable compensation for such services to be allowed by the board of supervisors.

We are, therefore, of the opinion that the board of supervisors are not authorized to allow claims of a physician or surgeon called by the coroner where there is no inquisition held; this for the reason that the coroner is not given authority by statute to call a physician or surgeon except where he holds an inquisition and he or the jury deems it necessary to have a scientific examination made.

CIGARETTES—PERMIT: The holder of a permit is authorized thereunder to sell cigarettes at the address or place of business for which the permit authorizes and he may discontinue business at said address for a period and may upon resumption of business continue to sell cigarettes under said permit.

February 1, 1928. *Treasurer of State:* We are in receipt of your letter of January 13, 1928, requesting an opinion of this department on the following question:

May a merchant who has been issued a permit to sell cigarettes at a particular address, who sells his business and then on a later date purchases the same, continue to sell cigarettes under said permit, the term for which said permit was originally issued having not yet expired?

We are of the opinion that a permit to sell cigarettes entitles the holder thereof to sell cigarettes under said permit at any time during the period for which it was issued, providing of course, the sales are made at the address for which the permit was issued and that he might, if he desired, sell out his business at said address for a period of time and at a later date repurchase said business and again operate under said permit, providing of course the terms for which it had been issued had not expired and providing, of course, the permit had not been revoked by action of the governmental body issuing said permit. This for the reason that we do not find any statute pertaining to the issuance of such permits which would require a continuous operation of business under said permit.

GENERAL OBLIGATION BONDS—SPECIAL ASSESSMENT BONDS: Special obligation of city cannot be transferred to general obligation.

February 1, 1928. *Director of the Budget:* We desire to acknowledge receipt of your request of February 1, which is as follows:

"We are submitting for your opinion a matter concerning the payment of special assessment bonds which were issued by a city and are similar in form to the bonds described in the case of *Hauge vs. Des Moines*, 216 N. W. (Iowa) 689.

"Said bonds are payable only out of funds arising from the collection of assessments on property within the benefited districts and it now appears that the collections will be insufficient to pay the special assessment bonds and that the deficiency may become a general obligation against the city because of the decision of the Supreme Court cited above.

"Assessments were made and bonds issued by the city to pay for improvements and special funds set up covering each improvement, in which funds deficiencies now exist. The question is whether the city may issue warrants drawn on these particular assessment funds to take up the bonds as presented, which will create an overdraft in said funds and pay the warrants from the general balance of city funds in the hands of the city treasurer and later take up the warrants or overdraft by issuing funding bonds or general obligation bonds of the city."

In reply we will say that the question submitted is answered somewhat by the case of *Hauge vs. Des Moines*, supra, and we should take into consideration Section 6121, which is as follows:

"Payment From Special Fund. 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."

It will be seen from this section that there is no general liability on the city under this section, but that all bonds shall be paid out of the special tax. However, the Supreme Court has said that a general liability on the part of the city may exist under Section 6123, which is as follows:

"Liability of City. Such certificates, bonds, and coupons shall not make the city liable in any way, except for the proper application of said special taxes."

Under this section where there has not been a proper application of the special taxes, a general obligation may exist; whether or not a city might become liable under Section 6123 is not to be determined by the city officials, but depends upon the facts as interpreted by the court, and before the city officials would be authorized to transfer a special obligation to a general obligation of the city, it would be necessary that the question be passed upon by the court.

We are, therefore, of the opinion that the question submitted to us in your inquiry would have to be answered in the negative.

SCHOOLS AND SCHOOL DISTRICTS: An appeal will not lie from a refusal of the individual members of the board to attend a board meeting.

February 3, 1928. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

"A certain school board refuses or neglects to call a meeting to act on the request of patron for tuition, or for the purpose of determining residence, or to determine any other matter that the board has power to determine.

"Would such refusal or neglect constitute an act from which an aggrieved party could appeal to the County Superintendent?"

An action of a board of education to be subject to appeal to the county superintendent must be an action of the board or a refusal to act upon a proposition in a meeting assembled. We are, therefore, of the opinion that no appeal will lie from the mere refusal of the individual members of the board to attend the meeting for the purpose of giving consideration to a matter at issue.

TAXATION—BANKS AND BANKING: The personal property of a bank is taken into consideration in determining the value of the stock and is, therefore, not taxable to the institution.

February 3, 1928. *County Attorney, Leon, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

Is a tax on personal property levied against a national bank where the bank has more than sufficient real estate to offset the capital stock a proper tax and, if assessed and real estate owned by the bank for the delinquent tax thereof, is such delinquent tax a lien upon the real estate owned by the bank or in the hands of a receiver after the bank closes?

The property of a bank is to be taken into consideration in determining the value of the stock and the assessment thereon. The personal property itself is, therefore, not to be assessed at the point where it is located but is to be listed and taken into consideration in determining the assessable valuation of the stock.

We are enclosing herewith copy of an opinion rendered by this department upon the question of whether or not personal property in the hands of a receiver of a national bank is assessable as such.

In the enclosed opinion we find the following quotation:

"* * * If the shares have any value they are taxable in the hands of the holders or owners, under Section 5219 of the Revised Statutes; but the property held by the receiver is exempt to the same extent it was before his appointment."

ROADS AND HIGHWAYS—REFUNDS: Refunds under Section 4755-b25, Code of Iowa 1927, are to be made to the person who actually paid the assessment; where property is sold for failure to pay such tax to the record owner whether redemption is made or not.

February 3, 1928. *County Attorney, Independence, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following propositions, in connection with the interpretation of Section 4755-b25, Code of Iowa, 1927:

1. Are the refunds made to the present record owner of the property or to the person or persons who actually paid the assessments?

2. Assuming that they go to the persons actually paying the assessments, to whom would such refund be paid if the property has been sold at tax sale and not redeemed, whether to the holder of the tax sale certificate or the record owner?
3. In case of tax sale where the purchaser at said tax sale paid the assessment and a mortgagee or other interested party redeemed from said sale, shall the refund be paid to the mortgagee (or other redemptioner), the purchaser, or the record owner?

The cited section determines your first inquiry where the property has been sold and a part of the assessments paid prior to sale. Under the provisions of the said section the refunds are to be paid to the person paying the tax in the proportion paid or assumed.

In answer to your second inquiry, we are of the opinion that the record title owner at the time of the tax sale is entitled to the refund. We reach this conclusion for the reason that the tax is paid by the surrender of the real estate taxed and it would be inequitable for the purchaser at tax sale to hold the property and be refunded the money which he paid therefor.

We are of the opinion that the same response must be made to your third inquiry. The purchaser at tax sale would not be entitled to the refund because he has been reimbursed by reason of the redemption made by the mortgagee or other redemptioner. He, therefore, has no right whatever in the tax. The mortgagee or other redemptioner did not pay the tax in such a sense that he is entitled to the refund of the assessment. Again the record title owner paid the tax by the surrender of his property and we are, therefore, of the opinion that he is entitled to the refund.

TAXATION—SOLDIERS: Soldiers who enlisted in the U. S. Army after November 11, 1918, though assigned to foreign duty not entitled to tax exemption under Section 6946 of the Code.

February 7, 1928. *County Attorney, Fort Madison, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following question:

Is a soldier who enlisted in June, 1919, subsequent to the signing of the Armistice on November 11, 1918, but prior to the ratification of the peace treaty entitled to the tax exemption provided for soldiers and sailors of the war with Germany under the provisions of Section 6946, Code of Iowa 1927?

We are of the opinion that the exemption applies only to soldiers who enlisted or were inducted into service prior to the date of the cessation of hostilities, to-wit, November 11, 1918.

The general rule as to tax exemptions is that they shall be given a strict construction. In this case the treaty of peace was not actually signed for some years after the cessation of hostilities and the army of occupation sent into Germany and maintained there was acting under the terms of the Armistice which provided for the cessation of hostilities and the entry into Germany of the army of occupation. The original Armistice was for a period of thirty-six days subject to extension. It was extended December 13, 1918, to January 17, 1919, and on January 16, 1919, with further agreements to February 17, 1919, and finally extended until the terms of the treaty could be agreed upon.

It has been held that the Civil war as to certain states ended with the proclamation of the president on April 26, 1866, but as to other states the state of war continued until a subsequent proclamation of the president. The following wars have been held to end with the cessation of hostilities:

Sweden-Poland 1716; France-Spain 1720; Texas-Mexico 1836; Spanish Wars with American Colonies—Early Nineteenth Century.

It was held in *The Bain vs. Speedwell*, 2 Dallas (U. S.) 40, 1 Law Edition 208, that a vessel captured after the preliminary articles of peace cannot be continued. It has been held, however, that a state of war with Spain did not cease until a ratification of the treaty in April, 1899.

We have examined the terms of the Armistice of November 11, 1918, and are of the opinion that it and the subsequent extensions thereof, in fact, terminated the war with Germany, at least in so far that a man who enlisted subsequent to that date even though serving in the army of occupation would not be entitled to the tax exemption provided for by the statute. This is further shown by the fact that both the state and federal governments fixed November 11, 1918, as the last enlistment date for the adjusted compensation and insurance provisions of their statutes; thus adopting the theory that such date was the termination of the war with Germany.

COUNTY OFFICERS—BOARD OF SUPERVISORS: Board has power to build a transmission line subject to provisions of Section 5130.

February 7, 1928. *County Attorney, Bedford, Iowa:* This will acknowledge receipt of your letter of recent date requesting an opinion of this department upon the following proposition:

Is the board of supervisors clothed with the power to erect a transmission line at a cost of $3,000 to connect the county home with a private transmission line from which electric current would be taken for the use of the county home?

Under the general powers of the board of supervisors set forth in Section 5130, Code of Iowa 1927, we find the following:

"* * *

"6. To represent its county and have the care and management of the property and business thereof in all cases where no other provision is made.

"* * *

"15. To build, equip and keep in repair the necessary buildings for the use of the county and of the courts."

Under these provisions we are of the opinion that the county board of supervisors would have the authority to build a transmission line for the purpose of carrying electric current to the county farm. It would be necessary, however, for the county to advertise for bids under the provisions of Section 5131 if the cost would exceed $2,000.00.

SOLDIERS' ORPHANS' HOME—BOARD OF CONTROL: The board of control may transfer inmates from the Soldiers' Orphans' Home to Eldora Training School even though boy is past 18 years of age.

February 8, 1928. *Board of Control:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

The age limit for committing boys to the Eldora Training School is 18 years. There is a boy inmate in the Davenport Soldiers' Orphans' Home, past 18 years of age, whom the superintendent of the Home has asked this Board to transfer to the Training School for Boys.

Has the Board of Control authority, in view of the age of this boy, to order the transfer?

The statute provides that any delinquent boy over the age of ten years shall be committed to the State Training School for Boys if seriously delinquent,

and to the State Juvenile Home if not seriously delinquent. If the child is under the age of ten years and is not delinquent he may be committed either to the Soldiers' Orphans' Home or to the State Juvenile Home. Section 3646, Code of Iowa, 1927. The commitment in each of the above cases continues until the child attains the age of twenty-one years unless otherwise discharged.

The statute confers upon the Board of Control the power to transfer any inmate to any other of said institutions at any time for the purpose of effecting the declared intent of the chapter, being Chapter 180 of the Code, Section 3648, Code 1927.

We are, therefore, of the opinion that although commitments cannot be made to the State Training School for Boys by the court after they have reached the age of eighteen, yet the Board of Control under the cited section has the authority to transfer any inmate of any one of the institutions above described to any other of the said institutions if the intent of the statute will be thereby made effective.

If this boy had reached a point of delinquency or incorrigibility which, in the judgment of the Board of Control renders him an unsatisfactory inmate at the Soldiers' Orphans' Home, the Board may transfer him to the State Training School for Boys at Eldora and maintain him as such inmate there until he reaches the age of twenty-one years.

BOARD OF SUPERVISORS—BANKS: Board of Supervisors has power to compromise judgments against sureties on depository bonds in closed banks.

February 8, 1928. *County Attorney, Ida Grove, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

"Has the Board of Supervisors authority to compromise judgments obtained against sureties on depository bonds of closed banks?"

The general powers of the board of supervisors are contained in Section 5130, Code of Iowa, 1927. Under those general powers we find delegated to the board of supervisors the power to examine and settle all accounts of the receipts and expenditures of the county and to examine, settle, and allow all claims against the county unless otherwise provided by law. The board also has the power to make all contracts necessary for the control, management, and improvement, or disposition of property and has the power to do such other acts and exercise such other powers as may be authorized by law. Section 5218, Code of Iowa, 1927.

The board has the further power where judgment has been secured against any county treasurer or other county officers and the sureties on his official bond in favor of any county and same remains unsatisfied to compromise the said judgment and to enter full satisfaction thereof under the terms of said compromise when and if the board of supervisors of such county are satisfied that the full amount thereof cannot be collected. Sections 5136, Code of Iowa, 1927.

Under these sections our court has held that a county has the power to make a valid compromise of a disputed claim.

Grimes vs. Hamilton, 37 Iowa, 290;
Mills County vs. Burlington Railway Company, 47 Iowa, 66;
Collins vs. Welch, 58 Iowa, 72.

Under and by virtue of these powers, it has been held that the board may

compromise a claim against an officer for moneys irregularly drawn from the treasury.

McCarty vs. Eggert, 154 Iowa, 28.

It has been held further that the board may accept a promissory note in settlement of claims against an officer who is in default.

Under these powers we are of the opinion that the county board of supervisors may compromise a claim against sureties on a bond where such claim has been reduced to judgment and where, in the judgment of the county board of supervisors, the full amount thereof cannot be collected.

DOMESTIC ANIMALS: County has no recourse against owner of dog.

February 10, 1928. *County Attorney, Storm Lake, Iowa:* We desire to acknowledge receipt of your request of February 1, which is as follows:

"The owner of sheep has some killed by dogs, he elects to present his claim against the Domestic Animal Fund of Buena Vista County, the county allows the claim, the county knows the owners of the dogs that did the damage. Question: Has the county any rights against the owner of the dogs? If so, what are they and how protected."

We desire to say in reply that in Section 5452 and subsequent sections, we do not believe that the county has any right of action against the owners of dogs guilty of killing domestic animals. We find under Chapter 276, Code of 1927, that owners of dogs are required to license the same and said license fee shall be kept by the county treasurer under the name of the Domestic Animal Fund, so that the Domestic Animal Fund is provided for from the license fees, and the statute does not contemplate any action against the owners of the dogs.

CHINCHILLA RABBITS—DOMESTIC ANIMALS: Chinchilla rabbits are not domestic animals.

February 10, 1928. *Attorney at Law, Vinton, Iowa:* We desire to acknowledge receipt of your request of February 8th, which is as follows:

"Do Chinchilla rabbits fall within the meaning of the term 'domestic animals' under Chapter 277?"

In reply, we desire to say that we are of the opinion that this must be answered in the negative as rabbits have always been known as being of a wild and untamed nature and not of a domestic nature, and even though certain breeds of this animal were being raised for purely domestic purposes, we are of the opinion that the Legislature did not contemplate that animals of this character should fall within the meaning of "domestic animals" in Chapter 277.

MILEAGE—BOARD OF SUPERVISORS: Supervisors entitled to mileage only when they use their own conveyance.

February 10, 1928. *County Attorney, Sidney, Iowa:* We desire to acknowledge receipt of your request of February 8th, which is as follows:

"Quite frequently all three members of the Board of Supervisors go with the County Engineer in his car on committee work. Is each member entitled to collect mileage for such trips under Section 5125 of the Code of 1927 or are they entitled to mileage only when they drive their own cars?"

In reply, we desire to say that in our opinion under Section 5125, Code of 1927, it was not intended that any member of the Board of Supervisors should collect mileage unless they were providing their own transportation such as

renting a car or driving their own, or paying car fare to and from their point of work.

TAXATION—STOCKHOLDER—BANKS: A bank is not entitled to military exemption from real estate owned by the bank.

February 11, 1928. *County Attorney, Sidney, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

Is a stockholder who is entitled to military exemption under the provisions of Section 6946, Code of Iowa 1927, entitled to such exemption on real estate owned by the bank where such real estate equals the amount of the capital stock?

We are of the opinion that this stockholder is not entitled to any tax exemption from the tax due on the real estate owned by the bank. The stock tax is a tax levied directly upon the stockholder but payable by the bank and collectible from him by the bank. The tax on the real estate is a tax upon property owned by the bank and he has neither ownership in the property nor liability for the tax.

BOARD OF SUPERVISORS—COUNTY OFFICER: County Attorney is entitled to office rent, stenographer and typewriter.

February 13, 1928. *Mr. V. S. White, Britt, Iowa:* We desire to acknowledge receipt of your request of February 6 in which you submit the following questions:

"1. May the Board of Supervisors pay my office rent and repay me for the rent that I have paid since the first day of January, 1927?
"2. May the Board of Supervisors pay for one-half the expenses of a stenographer and may the board refund one-half the money I have expended paying my stenographer?
"3. May the board purchase a new typewriter for me?"

I would say in reply to question 1 that under Section 5133 we are of the opinion that the Board of Supervisors are obligated to furnish county attorneys with an office and in case one is not available at the court house, that they pay or make some provision to repay for rent expended for the county attorney's office. We refer you to an opinion written by this department which is found on Page 140 of the bound volume of the Attorney General's Report for 1923-1924.

As to your second question we refer you to Page 613 of the bound volume of the Attorney General's Report for the year 1919-1920, also Page 306 of the Report for 1917-1918 wherein it is said:

"We held that under certain conditions the Board of Supervisors were authorized to employ clerical assistance for the office of the county attorney. It is the opinion of this department that the rule announced in that opinion should be applied alike whether the county attorney maintains his office in the court house or elsewhere."

In reply to your third question we feel that Section 5134 is sufficient authority to authorize the Board of Supervisors to furnish or purchase a typewriter for your office as typewriters are furnished to the other county officials and in this day and age typewriters are essential in any public office, so that the Board of Supervisors would be authorized to make this purchase.

BOARD OF CONTROL—STATE INSTITUTIONS—INSANE: Sections 3361, 3362 and 3363, apply to patients of the institutions and one who is discharged is not a patient.

February 13, 1928. *County Attorney, Sioux City, Iowa:* We are in receipt of your letter under date of February 3, 1928, requesting an opinion of this department on the following question:

Whether or not under Sections 3361 and 3362 of the Code of 1927, after a patient has been discharged from a state institution which is under the control and management of the Board of Control, the operation contemplated may be performed by a local surgeon in the city of his residence, such surgeon to be designated by the Overseer of the Poor?

From a reading of Sections 3361, 3362 and 3363, it will be seen that the operation contemplated may be performed on any inmate of a state institution under the control of the Board of Control when such patient is afflicted with insanity, idiocy, imbecility, feeblemindedness or syphilis, and that said operation may only be performed under the conditions named in Section 3361, and that the designation of a surgeon to perform said operation is to be made by the superintendent of the hospital in which said patient is an inmate. It would appear, therefore, that these sections apply only to inmates of state institutions and do not apply after they have been discharged from said institution.

We are, therefore, of the opinion that under these sections the Overseer of the Poor would have no authority whatsoever to select the surgeon and have the operation performed after the patient had been discharged and had returned to the city of his residence.

TAXATION—BOARD OF SUPERVISORS: Under Section 7193-A1, Code 1927, board of supervisors is not authorized to compromise personal property taxes unless same are not a lien on real estate and have been offered for sale for two consecutive years and not sold.

February 13, 1928. *County Attorney, Burlington, Iowa:* We are in receipt of your letter under date of February 7th requesting an opinion of this department on the following questions:

Where a man offers to pay his taxes at the county treasurer's office and the county treasurer merely gives him his real property tax and fails to mention the personal property tax, and the man then thought he had paid all his taxes in full. Three years later he receives notice of the delinquent personal property tax. * * *

Under Section 7193-A1, Code of 1927, the board of supervisors are authorized to compromise delinquent taxes. Does this section refer to personal property tax? Is it within the power of the board to (1) remit the interest and penalty, (2) correct the original tax under the above circumstances, (3) would Section 7193-B1, Code of 1927, help us out in this situation.

We are of the opinion that under Section 7193-A1, Code of 1927, the Board of Supervisors is not authorized to compromise personal property tax unless the same is not a lien upon real estate, in which event the board would be authorized to compromise the tax, provided that the property had been offered for sale for the taxes for two consecutive years and not sold, or sold for only a portion of the delinquent taxes.

Under Section 7193-B1, Code of 1927, the Board of Supervisors would have power to compromise the personal property taxes when they are not a lien upon any real estate and have been delinquent for one year or more, provided

that said personal property tax is not collectible. It will be noted that under this section, if the party against whom the taxes were assessed is able to pay, that the board would have no authority to make any compromise with him. The primary duty is upon the taxpayer to pay his taxes and the fact that the treasurer omitted to give him a statement of his personal property tax, would not relieve him of his duty to pay.

DISTRICT COURTS—JUVENILE COURTS: The district court has jurisdiction to try a child under 18 years of age for an indictable offense and may, upon conviction, enter judgment or remand case to the juvenile court for judgment.

February 14, 1928. *Deputy County Attorney, Keokuk, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

May the district court try a boy sixteen years of age indicted by the grand jury for breaking and entering; or must the case be transferred to the juvenile court?

It is provided by statute, Section 3605, Code of Iowa, 1927, as follows:

"There is hereby established in each county a juvenile court, which, and the judges thereof, shall have and exercise the jurisdiction and powers provided by law."

Under the provisions of Section 3606, the judges of the district court constitute such juvenile court. Under Section 3607, the judges of the district court may designate one of their number to act as the juvenile court in any county or counties of the district and may designate a superior or municipal court judge to act as such juvenile court. In your case, we assume that a judge of the district court has been designated as the juvenile court.

The jurisdiction of such juvenile court is fixed by statute, but rather indefinitely so. It is apparently set out in Section 3617 of the Code and extends to children under the age of eighteen years, where the offense charged is not punishable by life imprisonment or death and who are not feebleminded or inmates of a state institution, or institution incorporated under the laws of this State. The only reference made to the juvenile court in this Chapter is that the petition alleging a child to be dependent, neglected or delinquent, shall be filed with the clerk of the juvenile court. Section 3621, et seq.

It is further provided that upon the filing of such a petition, the court or judge (presumably the juvenile court) shall fix a time for the hearing and give notice thereof.

It is then provided in Section 3632 of the Code, that after investigating the facts, the court may in its discretion, cause the child to be charged with an indictable offense and proceed with a preliminary examination as other magistrates, or an offense not triable on indictment, in which case he may order any peace officer to file the information against such child and proceed to try the case before a jury of twelve.

From the above, it will be observed that where the charge is an indictable offense, the court exercises the power of a magistrate. His power then would be the power of a justice of the peace or a municipal court officer to hold the accused to the grand jury.

This conclusion is further sustained by Section 3636, which provides as follows:

"When there is a conviction in the district court of any delinquent child of

an indictable offense, the district court may enter judgment thereon, or, if the punishment be not imprisonment for life, or death, it may transfer the cause to the juvenile court. * * *"

We are, therefore, forced to the conclusion that in a case where the grand jury has indicted a child under the age of eighteen years, the district court should proceed with the trial in the regular procedure established for the trial of criminal cases and upon conviction either enter judgment accordingly or transfer the case to the juvenile court under the provisions of Section 3636, supra.*

FEES—DEPUTIES—FISH AND GAME: County not liable for fees in J. P. Court where case is unsuccessful.

February 14, 1928. *Fish and Game Department:* We desire to acknowledge receipt of your request of February 1 in which you submit the following question:

"Kindly advise if our deputies are permitted to collect deputy costs in cases brought to the Justice of the Peace in good faith but later dismissed by said Justice."

In reply we desire to say that we are of the opinion that deputy game wardens would not be entitled to collect any fees in cases which were dismissed by the Justice of Peace. As we understand it these fees, when collected, are payable into the Fish and Game Department and if they were paid where the suit was unsuccessful the costs would of necessity have to be certified by the Justice to the County Auditor for payment.

We do not believe that the statutes contemplate that where an action is brought before a Justice of Peace and the same is unsuccessful that the county should pay fees to any state department.

HOSPITALS—STATE UNIVERSITY HOSPITALS: Neither the state, the university, nor the hospital are liable for injury to patients while at the hospital.

February 15, 1928. *Iowa State Board of Education:* This will acknowledge receipt of your letter of recent date in which you request an opinion from this department upon the following proposition:

"What liability, if any, does the State University of Iowa and the State Psychopathic Hospital incur in case of suicide, assault or escape of patients who are receiving treatment in the state Psychopathic Hospital?"

No guarantee is given to any patient who is committed to any of these institutions. We are, therefore, of the opinion that neither the University of Iowa nor the State Psychopathic Hospital would incur any liability in case of suicide, assault or escape of patients who are receiving treatment at the hospital.

CRIMINAL LAW—ESTATES—STATUTE OF LIMITATIONS: Statute of limitations does not begin to run on the crime of embezzlement by executor or administrator until the settlement of the estate—estate is settled when final report is approved.

February 18, 1928. *County Attorney, Glenwood, Iowa:* We are in receipt of your letter of February 1, 1928 requesting an opinion of this department on the following question:

*See *State vs. Reed*, 218 N. W. 609.

It appears that the administrator of a certain estate probated in the courts of this county, embezzled several thousand dollars of the assets of the estate. * * * The final report of said administrator has not yet been approved. The question is, from what date does the statute of limitation commence to run?

Section 13036, Code of 1927, provides as follows:

"If any executor, administrator, or guardian embezzles or fraudulently converts to his own use any money or property collected or received by him or coming into his possession or under his control by virtue of his said office, he is guilty of larceny and the statute of limitations shall not begin to run as to such offense until the settlement of the estate or the attainment of majority by the ward, as the case may be."

Section 13444 of the Code of 1927, provides as follows:

"In all other cases an indictment for a public offense must be found within three years after the commission thereof, and not afterwards."

It will be noted from reading Section 13036 above set out, that the statute of limitations does not begin to run on the embezzlement by an executor or administrator of an estate until the settlement of the estate. The statute of limitations for such an offense is three years from the time of the commission of said offense and that an indictment must be found within said period.

Section 12044, Code of 1927, provides that a final settlement of an estate must be made within three years unless otherwise ordered by the court.

Section 12046 provides that the executor or administrator must account for all the property inventoried at the price at which it was appraised, as well as for all other property coming into his hands belonging to the estate.

Section 12050 provides in substance that any person interested in the estate may attend upon the settlement of the executor's or administrator's accounts and contest the same.

Section 12051 provides in substance that if the accounts of the administrator or executor have been settled in the absence of any person adversely interested, and without notice to such person, that such person may have said settlement opened within three months by making application showing this fact.

Section 12052 provides in substance that upon final settlement, an order shall be entered discharging the administrator or executor from further duties and responsibilities.

Section 12073 provides that unless notice be waived in writing, no administrator, executor, guardian or trustee shall be discharged from further duty or responsibility upon final settlement, until notice of the application for discharge shall have been served upon the persons interested as required for the commencement of civil action, unless a different notice is prescribed.

We are of the opinion that an estate is not settled within the meaning of the statutes of this state pertaining to the settlement of estates, until the executor or administrator has filed his final report and made a proper accounting and said final report approved in accordance with the statutes by the court. That is, that an estate is not settled until the order approving the final report and accounting of the administrator has been entered. We reach this conclusion for the reason that no act of the administrator or executor in connection with the administration of an estate, is final until it has been approved by order of the court duly entered in accordance with the statutes pertaining to such matters. No administrator is entitled to any credit for disbursements or expenditures made in connection with the administration of said estate until the same

have been approved. Neither is an administrator or executor entitled to a discharge until his final report shall have been approved by an order of court duly entered in accordance with the statutes pertaining to same. In other words, there is no settlement of an estate if there is an adjudication of that fact by an order of court approving the final report or account of the executor or administrator.

It would, therefore, appear from what has been said heretofore herein that the statute of limitations which applies to the offense of an embezzlement by an executor or administrator does not commence to run, in accordance with Section 13036, until an order has been entered in said estate approving said final report and the accounting of said executor or administrator.

This rule, however, we think would be different in connection with such a matter in a case where the administrator or executor had filed his final report and where an order had been entered finding that he was short, and an order entered removing such executor or administrator. The statute would then commence to run from the date the order was entered removing said executor or administrator.

ARCHITECTS REGISTERED: A company having an architectural department cannot use the word "architect or architectural" in connection therewith if it receives compensation directly or indirectly for its designs.

February 20, 1928. *County Attorney, Fairfield, Iowa:* This will acknowledge receipt of your letter of recent date in which you request an opinion of this department upon the following proposition:

"A company manufacturing barn equipment maintains an 'architectural department' which department makes plans and specifications for proposed buildings in which the company is furnishing equipment and said architectural department with said company has been so operating for a period of more than 20 years. Is this company entitled to use the words 'architectural department' in connection with their business, when as a matter of fact none of the men employed in that department are licensed under the recent law requiring the registration of architects in this state."

If this department renders its service for hire or receives any compensation from the owners of buildings which it designs, we are of the opinion that it cannot use the term "architectural department" in connection with its business unless the men employed are licensed under the law requiring registration of architects.

HIGHWAY COMMISSION—BOND—CONTRACTS: Retained percentage cannot be released by filing of an indemnifying bond in accordance with Chapter 459, Code 1927.

February 21, 1928. *Iowa State Highway Commission:* We are in receipt of your letter under date of February 7th requesting an opinion of this department on the following question:

Under Section 10310 to Section 10312 inclusive, Chapter 459, Code of 1927, the Highway Commission is required to retain at least 10% of the contract price until thirty days after the completion of the work. The question is as to whether or not where the retained percentage is being held, the same may be released by the contractor or anyone else by the filing of an indemnifying bond under the provisions of Chapter 459.

To begin with we call your attention to Chapter 459. It will be noted that this chapter applies only to the release of liens against personal property and,

therefore, has no application to contracts for the construction of public improvements. Under Sections 10310, 10311 and 10312, it is mandatory that the public corporation retain at least 10% of the contract price for at least thirty days after the completion and final acceptance of the improvement, at the end of which time it may pay out the retained percentage, provided of course, no claims have been filed within said period. If, however, claims have been filed the public corporation shall continue to retain of the retained percentage, a sum not less than double the total amount of the claims.

Under Section 10313, a public corporation, principal contractor, or any claimant for labor or material, or the surety on the contractor's bond, may at any time after the expiration of thirty days and not later than six months following the completion and final acceptance of said improvement, bring an action in equity in the county where the improvement is located to adjudicate the rights to the said retained percentage or to enforce liability on the bond. Under this section, if an action is not brought within six months from and after the date of final completion and acceptance, that right is barred, six months being the statutory period.

We are, therefore, of the opinion that under Chapter 452, the retained percentage cannot be released by the filing of an indemnifying bond by the principal contractor or anyone in accordance with the provisions of Chapter 459, as that chapter only applies to liens against personal property.

MEDICAL EXAMINERS—EXPENSES TO CONVENTIONS: Not necessary to secure permission of Executive Council.

February 21, 1928. *Auditor of State:* We desire to acknowledge receipt of your request of February 18 which was as follows:

"At a meeting of the board of Medical Examiners, January 17, 1928, a delegate (Dr. Jepson) was appointed to attend the annual congress on medical education at Chicago on February 6, 7, and the 8th.

"This is in accordance with Section 2465, Code of 1927. Is this section an exception to Section 398, Code of 1927, or should Mr. Jepson get the authority from the Executive Council to make this trip?"

In reply we desire to cite Section 398, Code of 1927, as follows:

"Expense attending conventions. Claims for expenses in attending conventions, and conferences outside the state shall not be allowed unless the voucher is accompanied by so much of the minutes of the executive council, certified to by its secretary, as show that such expense was authorized by said council. This section shall not apply to such claims in favor of the governor, attorney general, railroad commissioners, or commerce counsel."

We desire to cite also Section 2465 as follows:

"Representation at national meetings. Each examining board may select one of its members to attend either:

1. The annual meeting of the regular national association or society of the profession for which such board conducts examinations for licenses; or
2. The annual meeting of the national organization of state examining boards for such profession.

The member so selected shall receive his necessary traveling and hotel expenses in attending such meeting."

We are of the opinion that Section 2465 is a special exception from the general provisions of Section 398 above cited, and that it is not necessary for one who falls within the provisions of Section 2465 to secure the permission or authority of the Executive Council before his expense account may be passed upon and approved by the Board of Audit.

BOARD OF SUPERVISORS—COUNTY OFFICERS—TAX COLLECTOR: Board of supervisors may authorize county treasurer to employ delinquent personal tax collector. Resolution authorizing the treasurer to appoint tax collector which does not limit or fix the period authorizes the treasurer to employ a tax collector until the Board revokes the authority.

February 24, 1928. *County Attorney, Council Bluffs, Iowa:* We are in receipt of your letter of February 4, 1928, requesting an opinion of this department on the following question:

In January, 1925, the county treasurer of Pottawattamie County by and pursuant to authority of the Board of Supervisors, employed a delinquent tax collector for the years 1925 and 1926. In January 1927 this tax collector continued to perform the duties of the delinquent tax collector in the treasurer's office. Said collector made collections and filed a claim with the Board for his percentage, which was duly allowed and paid. A few weeks ago he filed a claim for $1,586.57, same being the percentage for the collection of tax from the Citizens Gas and Electric Company of this city, and also filed a claim for the sum of $207.37 for the collection from John Beno Company. Both of these companies failed to pay their taxes October 1, 1927 and were at that time placed on the delinquent tax list and notice of the delinquency and the amount of the tax due was sent to said companies some time during the early part of November. These taxes were immediately paid by said delinquents. The question now has arisen as to whether or not the Board of Supervisors have authority to pay the items last above mentioned in view of the fact that there was no record of the appointment of the delinquent tax collector for the year 1927. It is conceded, of course, that both delinquent companies were amply able to pay their taxes and that their delinquency was merely an oversight. The treasurer contends that regardless of the cause of delinquency they were in fact delinquent and that the taxes were clearly collectible as such.

Under Section 7225, Chapter 346, Code of 1927, 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 delinquent personal taxes and may pay such collector as full compensation for all services rendered and expenses incurred, a sum not exceeding 10%, said compensation not to be paid or allowed until the taxes collected have been paid to the county treasurer.

Under Section 7226, Code of 1927, no delinquent taxes for the current year shall be turned over for collection before the first day of November. Under the resolution which was adopted by your Board of Supervisors, your county treasurer was authorized to employ a delinquent personal tax collector. No time or period, however, was designated. It would appear, therefore, that under said resolution your treasurer had authority to employ a tax collector for each year until your Board of Supervisors should determine that such services were no longer needed and the resolution which they adopted was rescinded. It appears from your statement that this resolution has never been rescinded and your county treasurer, therefore, had the power to appoint a collector for the years 1927 and 1928. It also appears from the facts stated that this collector continued to collect the delinquent taxes under the supervision of your county treasurer even though your treasurer did not formally, in writing or otherwise, designate him as collector for such year. It also appears that he collected the delinquent taxes, turned them over to the county treasurer and filed claims with your Board of Supervisors for compensation for such collection, which claims were paid.

We are, therefore, of the opinion that your county treasurer had the authority to appoint and employ a delinquent personal tax collector for the years 1927 and 1928 and that by permitting said collector to continue in his employment

during the years 1927 and 1928, he would now be estopped to deny the authority of the said collector and the Board of Supervisors would have authority to allow the claims filed by such collector with them for his compensation as provided for in their resolution passed some time in 1925.

The fact that the taxpayer who was delinquent was amply able to pay the taxes which he owed, would make no difference so far as the right of the collector to receive compensation for their collection was concerned. The statute provides that they are delinquent when they are not paid at the time due, which in this case was not later than October 1st. These taxes from your statement were not turned over to the collector until after the first day of November which would be in compliance with Section 7226, Code of 1927.

CRIMINAL LAW — INDICTMENT — SENTENCE — REVERSAL: Where defendant has served time under sentence which was later reversed and defendant acquitted on second trial, but on a new indictment and new charge convicted, defendant not entitled to credit for time served.

February 21, 1928. *Warden of State Penitentiary:* We are in receipt of your letter of February 10th requesting an opinion of this department on the following question:

We have a prisoner in this institution who was sent here some time ago under a sentence for life having been found guilty of the crime of rape. After he had served about 18 months of this sentence, the Supreme Court of this state reversed the decision of the lower court and he was taken back to the county from which he was committed and upon retrial acquitted of the charge of rape. Later he was indicted for a violation of Section 13184, Code of 1927, on the charge of Lewd and Lascivious Acts with a child. Upon trial he was convicted of said charge and sentenced to three years in the penitentiary. The question then is, should the time he served on the sentence for rape be deducted from the last sentence or does he have to serve the three years on the last sentence?

Section 14018, Code of 1927, provides as follows:

"If a defendant, imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court is again convicted, the period of his former imprisonment shall be deducted from the period of imprisonment to be fixed on the last verdict of conviction."

It will be noted from reading said section that where the defendant is imprisoned during the pendency of an appeal and a new trial is ordered by the Supreme Court, in which he is again convicted, that the former imprisonment shall be deducted from the period of imprisonment to be fixed on the last verdict of conviction. This section provides only for the giving of credit where the defendant has been convicted upon new trial of the same offense.

We are, therefore, of the opinion that where a defendant has served time under a sentence which was later reversed, and upon the second trial he was acquitted and was then indicted on another charge, he is not entitled to credit on the last sentence for the time served under the sentence which was reversed and upon second trial acquitted.

REAL ESTATE—TAXES: Holder of tax certificate not entitled to pay last half of taxes on April 1st.

February 24, 1928. *County Attorney, Ames, Iowa:* We desire to acknowledge receipt of your request of February 16 as follows:

"When Real Estate has been sold for taxes, does the holder of the tax certificate have the right to pay the taxes for the entire year on April 1st, if they are not paid by the owner of the said real estate, under the new law?"

"Under Section 7211, Code of Iowa, 1927, provision is made that the last half of the taxes does not become delinquent until October 1st after due, altho the first half of the taxes was not paid when due."

In reply we will say that the owner of a tax certificate would not be entitled to pay the entire amount of taxes for the year due on the property on April 1st as the tax certificate owner could not force the fee holder to pay the last half of the taxes until October 1st and would not be entitled to any interest on the last half of the taxes even if the same were paid April 1st. Section 7211 of the Code of 1927 permits a property holder to pay his taxes on or before April 1st and October 1st without penalty on the last half of the taxes, and the fact that the property was sold does not change the rights of the property holder to redeem and pay only such taxes as may be due at the time of the redemption.

BONDS—BOARD OF SUPERVISORS—PRIMARY ROADS: Unexpended balance of proceeds of bond sale cannot be transferred to general fund of county, —must be applied to the retirement of bonds if not needed.

February 24, 1928. *Iowa State Highway Commission:* We are in receipt of your letter of February 9, 1928, requesting an opinion of this department on the following questions:

1. Assume that a county has voted a million dollars primary road bonds, that all of such bonds voted have been issued and sold, that the primary road system is fully paved and that there remains in the bond fund an unexpended balance of $10,000. May this unexpended balance in the primary bond fund be transferred to the general fund of the county under the provisions of Section 5289, Code of 1927?

2. Assume that a county voted primary road bonds under the provisions of Chapter 241, Code of 1927, in the year 1923, that portions of the bonds so voted were issued and sold in the years 1923 and 1924, and that the board of supervisors made a levy each year sufficient to provide funds with which to pay accruing interest.

Assume that on July 4, 1927, there was a small balance in this redemption and interest fund resulting from the tax levy unexpended and that during the remainder of the year 1927, further collections of this tax were made.

May the board of supervisors transfer this unexpended balance in the primary road bond redemption and interest fund to the county general fund or should this money be used for the purpose for which the tax was levied and the money raised notwithstanding the fact that the statute now provides that the interest as well as the principal of primary road bonds, may within certain limitations be paid from the primary road fund?

I.

Section 4753-a13 provides in part as follows:

"* * *

The county treasurer shall, when so directed by the board, apply any part or all of said bonds in payment of any warrants duly authorized and issued *for the particular purpose for which such bonds are issued*, provided the same are applied for at least part of such bonds plus all accrued interest, or the county treasurer shall when so directed by the board, advertise and sell any part or all of said bonds for the best attainable price and for not less than par plus all accrued interest, and *apply the proceeds wholly for a like purpose.* * * *"

Section 4753-a18 provides a penalty for any member of the board of supervisors or other county officer who authorizes or issues, or permits to be issued, any certificate or bond in violation of the requirements of Chapter 241, Code of 1927, or who diverts any authorized certificate or bond or the proceeds derived

therefrom, or any part thereof, to any other purpose than the purpose specified in said chapter. It will be seen from reading that part of Section 4753-a13 set out above, that the proceeds derived from the sale of bonds authorized to be issued in accordance with Chapter 241 must be applied and used for the particular purpose for which they were issued. Clearly, under this section where the total authorized issue of bonds have been sold and where the improvement contemplated has been completed and there remains in said bond fund an unexpended balance, the county board of supervisors could not by resolution, under Section 5289, Code of 1927, transfer said unexpended balance to the general fund of the county. This unexpended balance must be used for the purpose for which the bonds were sold and if it is not needed, it must be used in the redemption of the bonds which have been issued and sold. Any other rule would permit a county to defeat the purpose for which the bonds were issued. This rule also applies equally to bonds issued under and in accordance with Chapter 242 of the Code, 1927.

II.

Section 4753-a12 provides in substance that the board of supervisors shall each year after the voters have authorized a bond issue, levy on all of the property of the county such part of the tax authorized as will clearly meet, (1) the matured or maturing interest for the ensuing year on all such outstanding bonds, and (2) any amount of maturing principal of bonds, provided, however, that only so much of said tax shall be levied in any year for principal of said bonds, if any, as cannot be met—(a) by the county's allotment of the primary road fund available for such ensuing year, and (b) by the proceeds of special assessments on benefited property. It will be noted that under this section the board of supervisors is only authorized to make a levy each year sufficient to pay the interest for the ensuing year upon the outstanding bonds and as will pay such part of the principal of said bonds maturing each year as is not taken care of by the county's allotment of primary road fund available for the ensuing year, or as is not taken care of by special assessments.

We are, therefore, of the opinion that under this section the board of supervisors could not transfer any unexpended balance in the primary road bond redemption and interest fund of the county general fund for the reason that said board is only authorized to make such a levy each year as will pay the interest for the ensuing year on the bonds outstanding and any deficiency in the principal. Any balance derived from the levy which is not needed to take care of these annual payments, would have to remain in said fund and be taken into consideration by said board in making their levy for the following year; this notwithstanding the provisions of Section 4755-b4, Chapter 241-b1, Code of 1927.

COUNTY OFFICERS—COUNTY RECORDER: The county recorder cannot refuse to file instruments because acknowledgment is alleged to be defective.

March 1, 1928. *County Attorney, Charles City, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

Is it the duty of the county recorder to refuse to record instruments with faulty acknowledgments or acknowledgments which are defective under recent decision of the district court of the United States for the Southern District of Iowa?

It is provided by statute, Section 10106, as follows:

"It shall not be deemed lawfully recorded, unless it has been previously acknowledged or proved in the manner prescribed in this chapter, except that affidavits need not thus be acknowledged."

The county recorder is not an attorney and there is no duty imposed upon that officer to determine the legal sufficiency of an acknowledgment. We are, therefore, of the opinion that it is the duty of the county recorder to record any instrument filed if it is purported to be acknowledged before an officer authorized to take acknowledgments.

It would, of course, be perfectly proper for the county recorder to call attention to any party offering an instrument for record that a recent opinion of the above named court has held that the full title of the acknowledging officer, for instance, notary public in and for Floyd County, Iowa, must appear both in the body of the acknowledgment and after the signature of the acknowledging officer.

TAXATION—EXEMPTIONS—SOLDIERS: Widowed mother of a soldier since deceased is entitled to exemption if she would be dependent upon her son were he living.

March 5, 1928. *County Attorney, Logan, Iowa:* We desire to acknowledge receipt of your request of March 2 which is as follows:

"I would like to have your opinion upon the following question:

"Section 6946 of the Code of Iowa, 1927, provides in part as follows:

" 'Military Service—Exemptions. The following exemptions from taxation shall be allowed * * * and the property to the same extent, of the widowed mother, remaining unmarried, of any such soldier, sailor or marine where the said widowed mother is dependent upon any such soldier, sailor, or marine for support, and he has not otherwise received the benefits above provided.'

"We have a case where such a widowed mother, remaining unmarried of a soldier who was killed in service in the World War, is making application for the exemption contemplated in this statute.

"Is she entitled to such exemption? * * *"

In reply we would say that we are of the opinion that the proper standard by which to determine the eligibility of a widowed mother of a deceased soldier for tax exemption under Section 6946 would be whether or not, if this son were at the present time living, is the financial condition of the mother such that she would be dependent upon this son; and in the event that she would be dependent, provided said son were living, then such tax exemption should be granted her.

We believe that this was the intention of the legislature and that it was not their intention to make the life of the son one of the requirements upon which to base the rights of the mother to exemption.

BUILDING AND LOAN ASSOCIATION—INTEREST RATE: If interest rate is raised—not retroactive—that is, it does not affect previous borrowers, only affects new borrowers.

March 8, 1928. *Auditor of State:* We are in receipt of your letter of February 23d requesting an opinion from this department on the following question:

"I would like to have an opinion relative to raising the interest rate, showing whether an association could raise the rate on new loans without affecting the rate on old loans."

Section 9314, Code of 1927, limits the maximum rate of interest that may be

charged to the borrower at 8% and that in case of a reduction in this rate, the reduction should apply to members who had borrowed before the reduction was made; that is, previous borrowers should receive the benefits of the reduction and pay the rate as it was then fixed.

It will be noted that the only requirement is that in case the rate of interest is reduced at any time, that the reduction should accrue to the benefit of all members who were borrowers previous to the reduction. There is no requirement that in the event the interest is raised, it would automatically be raised on the previous borrowers.

We are, therefore, of the opinion that in the event the interest rate of any building and loan association should be raised, it would not be retroactive and affect the previous borrowers but that it would only affect subsequent borrowers. This for the reason that so far as the previous borrowers are concerned, they have a contract with the association for a specified rate subject only to the provisions of the statute; that is, that in the event the rate is reduced they shall receive the benefits of the reduction. If the rate was increased, then there would be an impairment of their contract.

Future borrowers, of course, would be subject to the new rate and the same would be a part of their contract.

COUNTIES—ROADS AND HIGHWAYS: Section 4655, Code, 1927, fixes the maximum amount which may be levied for road building purposes. The maximum may not be increased by vote under the provisions of Section 5266.

March 12, 1928. *County Attorney, Carroll, Iowa:* I wish to acknowledge receipt of your favor of the 9th in which you request our opinion as follows:

"The Board of Supervisors of Carroll County now levies a county road building tax of two mills, which is the maximum levy permitted for that purpose under Section 4635 of the Code. They are considering whether it is possible to have the people of the county vote for a larger tax levy for this purpose. The idea is not to issue bonds, but to increase the moneys in the county road building fund for the next two or three years in order to grade, drain and gravel all the county road system, without the issuing of bonds, and without putting the county in debt for this purpose. * * *

"Please give me your opinion whether this section, or any of the other sections in Chapter 265 of the Code, will permit a vote to increase the above tax levy. * * * "

Section 5266 provides for the submission to an election of questions in regard to the increased tax levy which is authorized by statute. The early decisious cited under the annotations to this section hold that it applies only to the two sections immediately preceding it. Giving it a broader interpretation, however, it would not apply to the proposition submitted by you for the reason that Section 4655 fixes the maximum amount that may be levied for the purposes therein enumerated. The statute does not provide that this maximum may be increased at the will of the voters, and in the absence of such a provision Section 5266 could have no application.

We know of no provision in the statute authorizing the voters to increase the maximum levy fixed in Section 4635 for county road building.

CITIES AND TOWNS—ELECTION: Candidates may be nominated by petition containing the names of a number of candidates. It is not necessary that each candidate's name be presented by separate petition.

March 12, 1928. *Irving H. Knudson, House of Representatives:* We wish to acknowledge receipt of your favor of the 12th in which you request our opinion

as to the legality of nominating candidates for office in a town in the following manner:

"It appears that one paper would nominate: a mayor and five councilmen, you understand, on the same paper; another would nominate a treasurer and an assessor on the same paper; and a third would nominate five councilmen and no other officer. Now, as I understand it, what Mr. Kleaveland would like to find out is whether or not it is legal to nominate on the same paper candidates for different offices."

We must assume that the nomination papers referred to are petitions, under the provisions of Chapter 37-A2 of the Code, 1927. Section 655-A17 of this chapter provides:

"Nominations for candidates for state offices may be made by nomination paper or papers signed by not less than five hundred qualified voters of the state; for county, district or other division, not less than a county, by such paper or papers signed by not less than twenty-five qualified voters, residents of such county, district, or division; 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."

There is nothing in the provisions of this chapter or elsewhere in the code requiring that nominations made in this manner shall be by separate petition for each office or candidate, and in the absence of such prohibition we are of the opinion that the petition may nominate a candidate or candidates for any one or all of the town offices coming up for election.

BRIDGES: Board of Conservation has power to grant permission to Highway Commission to build solid bridges over meandered lakes and streams.

March 15, 1928. *Board of Conservation:* In reply to your letter of February 7 we note that you submit the question as to whether or not the Board of Conservation would have the power to grant permission to the highway commission to build a solid bridge over a navigable channel which has been used for commercial freight.

The question to which you refer is on primary road No. 71 passing between East and West Okoboji Lake and from all information that we are able to secure, a solid bridge would affect only one small steam boat which plies between these two lakes; and in the event that a solid bridge were built it would be of sufficient height so that this solitary steam boat could pass through by merely placing a hinge upon the smokestack a few feet from the top so that the stack might be lowered to clear the bridge.

In view of the above state of facts that have come to our attention and Section 1812, Code of 1927, which gives to the Board of Conservation jurisdiction over all meandered streams and lakes, we believe that the board of conservation would be entirely within its rights in granting permission to the highway commission to build a solid bridge.

BOARD OF SUPERVISORS—TAXES: Supervisors may not adjust taxes unless same falls within Sec. 7193-b1.

March 16, 1928. *County Attorney, Burlington, Iowa:* We desire to acknowledge receipt of your request of March 13 in which you submit the following question:

"'A' goes to the County Treasurer's office in 1924 and offers to pay his taxes and is told what the amount will be, and he tenders the check, which is accepted, cashed, the money received, and 'A' proceeds on his way feeling that his taxes have been paid.

"Now in 1928, a Tax Ferret is employed and sends 'A' a statement for unpaid personal taxes in 1924, plus interest and penalties. 'A' is willing to pay the tax as due in 1924, but refuses to pay interest and penalty. Can the Board of Supervisors adjust this tax? What procedure should be followed in such a case?"

It is evident that if the board found that this situation fell within the provisions of Section 7193-b1 they might compromise such tax. The procedure of which is found in the four preceding sections. In the event, however, that this situation was not covered by the above cited section indicating same could be collected in the usual manner, we are of the opinion that the board of supervisors could not make an adjustment.

BOARD OF SUPERVISORS—TAX EXEMPTION—SOLDIERS: Supervisors may not discriminate.

March 16, 1928. *County Attorney, Independence, Iowa:* We desire to acknowledge receipt of your request of March 14, together with the following three questions:

"1. May the Board of Supervisors disallow this claim for soldiers' tax exemption where proper claim was not filed with the assessor?
"2. May the Board of Supervisors discriminate by allowing one soldier's exemption and disallowing another when both have complied with the law?
"3. May the Board of Supervisors allow exemption on War of the Rebellion claims and disallow War with Germany claims in cases where both failed to list their claim with the assessor but filed their claim before the 1st of September with the auditor?"

In reply to your first question we would say that under Section 6949, Code of 1927, the following:

"But it may be allowed by the board of supervisors" would seem to clearly indicate that the matter of granting an exemption by the board of supervisors was discretionary and would permit them to adopt the policy covering exemptions, but the board of supervisors would not be, under Section 6949, permitted to discriminate between two soldiers who had conformed to the statutory requirements.

COSMETOLOGIST—BOARD OF HEALTH: Licensed cosmetologists may work in the home of a customer.

March 17, 1928. *County Attorney, Des Moines, Iowa:* I am in receipt of your communication of the 10th instant, in which you propound the following inquiry:

"Can a registered cosmetologist make appointments with customers in their own home, where she uses all the paraphernalia belonging to the customer and kept by the customer in her own home, providing this cosmetologist has no office or equipment either in her own home or in any office?"

I do not know of any provision of law which would prevent a licensed cosmetologist from doing work for a customer in the customer's own home and using the custmer's own paraphernalia in doing the work. Under the law relating to the practice of cosmetology, which is Chapter 124-B1, Code of 1927, a cosmetologist is not required to have an office in any particular place in order to practice the profession, and I do not know of any provision that would prevent a cosmetologist from meeting each customer in the customer's own home and performing the service in the manner stated in your inquiry.

CLERK OF THE DISTRICT COURT—COUNTY OFFICERS—ESTATE: Clerk of the District Court should certify change of title to the county auditor as follows: 1—Change by judgment or decree of the District Court after the time for appeal has expired. 2—Change by judgment of decree of the Supreme court after procedendo has been signed in Clerk's office. 3—Change by will when the final report of the executor or executrix has been approved. 4—Change by inheritance when the final report of the administrator has been approved.

March 19, 1928. *County Attorney, Charles City, Iowa:* We are in receipt of your letter under date of March 15th requesting an opinion of this department on the following question:

1. Under Section 10836, Code of 1927, at what time should the clerk of the district court certify to the county auditor change of title in a testate estate and in an intestate estate?
2. Under Section 6946, Code of 1927, paragraph 3, the soldier, sailor, marine or nurse in the war with Germany is given an exemption from taxation not to exceed $500.00 in actual value. Where a soldier who is entitled to the exemption and whose property was assessed in January say of the year 1928, and in February the soldier sold his property to one who was not entitled to the exemption, not being within the class defined in paragraph 3 of said section, is the new owner entitled to the benefit of the exemption for that year or must he pay the full tax?

I.

Section 10836 of the Code of 1927, provides as follows:

"Where the title of any real estate is finally established in any person or persons by judgment or decree of said court or of the supreme court, or where title to real estate is changed by judgment, decree, will, proceeding, or order in probate, the clerk of the district court shall certify the same under the seal of said court, to the county auditor of the county in which said land is located."

It will be noted from reading the above section that the Clerk of the District Court of the county in which land is located must certify to the county auditor the change of title when, (1) title is finally established in any person or persons by judgment or decree of the district court or of the supreme court, or (2) where title to real estate is changed by judgment, decree, will, proceeding, or order in probate.

We are of the opinion that where the title is changed and established in any person or persons by judgment or decree of the district court that the clerk of said court should certify the same to the county auditor immediately after the time for appeal has expired and when the title has been changed and established in any person or persons by judgment or decree of the Supreme Court immediately after the procedendo has been filed in his office.

We are also of the opinion that where the title to real estate is changed and established in any person or persons by will, the clerk should certify the same to the county auditor when the final report of the executor or executrix has been approved and the executor or executrix discharged.

We are of the opinion that where in an intestate estate there is real estate which passes by the laws of inheritance, the clerk of the district court should certify the same to the county auditor when the final report of the administrator has been approved and the administrator discharged.

In the case of a will, that is, a testate estate, no certification should be made until final report has been approved for the reason that the estate might

be insolvent and it might be necessary to subject the real estate to the payment of the debts of the decedent. The same is also true in an intestate estate.

II.

For answer to question No. II we are enclosing herewith an opinion rendered by this department to James L. Cameron, County Attorney, Eldora, on the 23d day of June, 1926.

BOARD OF CONTROL—SOLDIERS' HOME: Under Section 3366, Code of 1927, the wife of an old soldier who was not his wife at the time the old soldier was first admitted to the Soldiers' Home is not eligible to admission to said home.

March 19, 1928. *Board of Control:* Under date of October 27, 1927, this department rendered your board an opinion relative to the admission of soldiers and their wives to the Soldiers Home at Marshalltown. When the opinion was written all of the facts were not before the writer and we are therefore recalling said opinion and substituting this opinion therefor. The question is, where a soldier who is within the class named in paragraph one of Section 3366, Code of 1927, has once been admitted to the Soldiers Home at Marshalltown and then honorably discharged and after his discharge marries, whether or not under Section 3366 said soldier and his new wife may be admitted to the Soldiers' Home at Marshalltown, Section 3366, Code of 1927, so far as is material to the question provides as follows:

"The following named persons are entitled to admission into the Iowa Soldiers' home if they do not have sufficient means or ability to support themselves:

1—A person who has been commissioned, enlisted, or inducted into the military or naval service of the United States and who served in Iowa military organizations, or who was accredited to Iowa, or who was a resident of Iowa when he was so commissioned, enlisted, or inducted, a member of the northern border brigade, and the lawful wife, if any, of such person at the time of his original admission, without regard to residence in this state at the time original application is made. * * *".

It will be noted from reading that part of Section 3366 which is set out above, that it authorizes the admission of a soldier who served in any of the Iowa military organizations or whose service was accredited to Iowa, or who was a resident of Iowa when he entered the service, and for the admission of his lawful wife who was his wife at the time of his original admission, without regard to the residence in this state at the time original application for admission to the home is made. It is clear from reading said section that if at the time of the soldier's original admission to the home he had a wife, that both he and his wife might be admitted into the home, but that if at the time of his original admission he was single and unmarried and then later married, that the new wife could not under said section be admitted to said home.

MINT VENDING MACHINE—SLOT MACHINE—GAMBLING DEVICE—JENNINGS VENDING DEVICE:

March 19, 1928. *Cosson & Newcomb, Attorneys at Law:* I am in receipt of your letter of the 10th instant in which you state that one of your clients is complaining because of the service you have given him in connection with some vending device matter. From what I can gather from information from various sources the trouble with people interested in these automatic vending devices in that misrepresentations are being constantly made by the salesmen to customers, the salesmen advising the customers that the

Attorney General's Department has held that their particular class of vending device is a legal device and can be operated in this state without violating the law. This is a misrepresentation, as no opinion has ever been given, to my knowledge, by this department, saying that any particular class of vending device is a legal device. If they have a device which is entirely legitimate and can be truly said to be an automatic vending machine, giving exactly the same amount of merchandise each time for the same compensation, they do not require even the service of a lawyer to pass upon the question of its legality. If, on the other hand, they are putting out a vending device which vends the same amount of merchandise each time a coin is deposited and have an arrangement by which additional awards may be made, either through the operation of the machine or by the merchant as a part of the machine transaction, they would be operating a gambling device if chance played any part in the making of the additional award. A machine which vends the same amount of merchandise for each coin deposited and, in addition, might deliver discs or tokens which could be used to play back into the machine for the purpose of making weather predictions, or telling fortunes, or things of like character which have no intrinsic value, would not be a gambling device, but if same discs or tokens were redeemed by the merchant in whose place of business a machine was operated, regardless of the instruction of the manufacturer of the machine to the contrary, the machine would at once become a gambling device.

As has been discussed between you and me, in connection with this matter, a deck of cards in themselves is not a gambling device, but it may easily be converted into a part of a gambling arrangement. The great difficulty with vending devices, as a rule, is that they are constructed so that they can easily be used for violation of the law and, while one man may use a machine legitimately and as the manufacturer intended it should be used, his next door neighbor may use it unlawfully, and that is the difficulty that manufacturers of these devices find themselves in by not making a machine which is purely an automatic vending device.

One thing I want to make plain at this time, as I have orally stated to you in our discussions, is that this Department, as you know from your own experiences as Attorney General, is not in the position of approving anybody's method of transacting business. Every person has a right under the laws of this state to carry on any legitimate business in which he may choose to engage. If a business is so near the border line of violation of a penal statute that the person conducting it feels that before he can operate he must have the opinion of the Attorney General to enable him to begin operation it would be best for him to reform his business so as to remove all doubt as to its legality. If the makers of any particular brand of so-called vending devices desire to institute suit this Department will do our best to meet the issue, but we are not going to be in the attitude of becoming a sales argument for the merchandising of their device, and we have no fear that the courts of this country will ever restrain the law enforcing officers from prosecuting violators of the law.

COOPERATIVE CREAMERIES — TAXATION: Creamery will fall within definition of manufacturer for assessment purposes.

March 21, 1928. *County Attorney, Vinton, Iowa:* We desire to acknowledge receipt of your letter of March 7 which is as follows:

"In reference to the question of taxation of the co-operative creamery at Garrison, Iowa, I would be glad if we could get it straightened out so these parties would know just what they should do with reference to the taxation.

"The assessor at this place insists on assessing the property on some basis of production. I think he strikes some sort of an average of the amount they have on hand during the year.

"Now if the assessment should be made on the basis of the finished product they have on hands January 1st of each year, the problem would be solved because they generally do not have much on hand then.

"Of course, you will understand there is no question about the tax on the building and equipment. These are given in for their amount. It is only on the butter.

"A letter from your Mr. Blake states, 'For your convenience, the writer would say that he is not aware of any statute which would exempt any product on hand at the first of the year of your association'.

"If this is to be the basis of taxation, perhaps there will no difficulty about it.

"The Secretary of this association has written some other co-operative creameries and is advised by them that they pay no tax on their finished product. The point they make is that a creamery is not a profit making institution so far as the creamery itself is concerned. The cream is gathered from the farmers, made into butter and all the profit paid back to the farmer except the running expenses of the institution.

"I would be glad to have you go over this carefully as possible and let us have your opinion as to just how the tax should be made."

In reply we desire to quote Sections 6975, 6976, 6972 as follows:

"6975. 'Manufacturer' defined—duty to list. Any person, firm, or corporation who purchases, receives, or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, refining, purifying, combining of different materials, or by the packing of meats, with a view to selling the same for gain or profit, shall be deemed a manufacturer for the purposes of this title, and shall list such property for taxation."

"6976. Assessment—how made. Such personal property, whether in a finished or unfinished state, shall be assessed at its average value estimated upon those materials only which enter into the combination, manufacture, or pack, such average to be ascertained as in section 6972."

"6972. Stocks of merchandise. In assessing such stocks of merchandise, the assessor shall require the production of the last inventory and enter the date thereof in the assessment roll. If, in the judgment of the assessor, the inventory is not correct, or if it was taken at such time as to render it unreliable as to the amount or value of such merchandise, he shall assess the same by personal examination. *The assessment shall be made at the average value of the stock during the year next preceding the time of assessment*, and if the merchant has not been engaged in business for one year, then the average value during such time as he shall have been so engaged, and if commencing on January first, then the value at that time."

In view of the above quoted section, we are of the opinion that a cooperative creamery falls within the definition of a manufacturer in Section 6975, and as Section 6976 states the manner in which the assessment shall be made as the same as found in Section 6972, we believe that the assessment should be made at the average value of the stock during the year next preceding the time of assessment.

CHATTEL MORTGAGES—RECORDERS: Where no maturity date on chattel mortgage, recorder should not destroy them for ten years from date of execution.

March 21, 1928. *County Attorney, Wapello, Iowa:* We desire to acknowledge receipt of your request of March 3 which is as follows:

"On the disposition of chattel mortgages under Section 10030 where the note is secured by a chattel mortgage or a conditional sale of contract for a demand note or there is no provision in the chattel mortgage or conditional sale of contract as to the time when the debt is due, shall the recorder keep the same on file for fifteen years or five years after it was due or outlawed?"

Under the provisions of Section 10030, the recorder is ordered to destroy all chattel mortgages five years after date of maturity. Section 10023 makes a chattel mortgage or conditional bill of sale contract void after five years after maturity.

We are, therefore, of the opinion that where neither the note nor the conditional bill of sale contract or chattel mortgage specifies the time of maturity, the period of time would begin to operate from the execution of these papers, and if no extensions were granted, five years after the execution the same would become void, and the recorder should then keep only those papers for five years longer or a total of ten years from the date of execution.

In any event, the recorder by keeping demand notices and mortgages on file for a period of ten years from the date of execution will conform to the above cited sections, and will not interfere with anyone's rights under Paragraph 6 of Section 11007 which provides that actions may be brought on written contracts within ten years.

AVIATION FIELD—CITIES AND TOWNS: Council has no power to rent an aviation field or airport.

March 21, 1928. *Auditor of State:* We desire to acknowledge receipt of your request of March 20 which is as follows:

"Has the city legal power to rent an aviation field?
"If the power is not expressly given to the city council, is it forbidden?
"Or in other words, if the city council should rent a piece of ground would it be possible to have an injunction served to stop them from paying the rent?"

In reply we would say that a city council has no other powers than those specifically granted by the statutes and we are of the opinion that the council would have no more right to rent an aviation field than they would to rent a terminal for a bus line or railway station.*

ELECTIONS: Public canvass, under Section 840, Chapter 41 of the Code of 1927. Judges of the election must publicly canvass the vote and credit each candidate with the number of votes credited for him.

March 23, 1928. *County Attorney, Des Moines, Iowa:* We are in receipt of your letter under date of March 22, 1928, requesting an opinion of this department on the following question:

Kindly advise us whether or not under the statutes pertaining to the conduct of elections, the public may or may not be present in the polling places immediately following the close of the polls when the canvass of the vote is made by the judges of election.

Section 840, Chapter 41 of the Code of 1927, provides as follows:

"When the poll is closed the judges shall forthwith, and without adjournment:
1. Publicly canvass the vote, and credit each candidate with the number of votes counted for him.
2. Ascertain the result of the vote.
3. Compare the poll lists and correct errors therein.
4. Cause each clerk to keep a tally list of the count."

*See S. F. 285, Acts 43rd G. A.

From a reading of the above section, under paragraph 1 thereof, it is plain that the judges of the election must *publicly* canvass the vote and credit each candidate with the number of votes counted for him.

The public has the right to be present at the canvass of the votes in any election held under the laws of this state and such canvass must be in full view and in the presence of the public. Of course, any of the public who are present at the canvass of the votes must not interfere with the work of the judges in making the canvass. The above statute applies with equal force to all elections conducted in this state, whether they be general or special, state, county or city.

Anyone who should attempt to prevent the public from being present at the polls at the canvass of the votes would be subject to arrest and immediate prosecution. The purpose of the public canvass is to prevent fraud or any appearance of fraud. The provision is a wise one and should be observed by election boards.

BONDS—CITIES AND TOWNS—STREET IMPROVEMENTS: Where unexpended balance is caused through clerical error same may be used to pay defaulted interest and bonds.

March 24, 1928. *Auditor of State:* We desire to acknowledge receipt of your request of March 23 which is as follows:

"Whether or not the unexpended balances in some of the 'paid up' street improvement bond fund schedules may be used to pay principal and interest on defaulted bonds of other schedules unpaid because of insufficient funds. * * *"

In reply we would say that we are assuming in answering this request that the over and short account created in the street improvement bond fund in the City Treasurer's office was caused through clerical error by erroneously placing funds to the improper schedule number.

In view of this we are of the opinion that where the proper amounts have been levied and collected from the property owner, but not properly applied to the correct bond issue to which it was related, that in that event the city would be authorized and wholly within its rights in using any funds in the over and short street improvement bond fund account in the payment of principal and interest on defaulted bonds of other schedules.

BOARD OF HEALTH — COUNTIES — LOCAL BOARDS — QUARANTINABLE DISEASES, ETC.: Counties are liable for all of the expenses incurred in carrying out the provisions of Chapter 108, Code of 1927, which pertains to communicable diseases; placard and quarantinable diseases, quarantine and isolation cases.

March 24, 1928. *County Attorney, Waterloo, Iowa:* We are in receipt of your letter under date of March 19, 1928, together with enclosures, requesting an opinion of this department on the following question:

Whether or not the county is liable for the expenses incurred by the local board of health of the city of Waterloo, in connection with placard, quarantinable and isolation cases, under the provisions of Chapter 108, Code of 1927.

The provisions of Chapter 108, make it the duty of the local boards of health to carry out the provisions of said chapter. Section 2254 of said chapter provides that all quarantinable and placard diseases shall, as soon as possible, be definitely diagnosed and the proper warning sign placed in a conspicuous

place on the house, dwelling or place in which the quarantinable or placard disease exists. Chapter 108 covers the following matters.

1. Communicable diseases.
2. Placard diseases.
3. Quarantinable diseases.
4. Quarantine.
5. Isolation.

Section 2273 provides that all services and supplies furnished to individuals or families under the provisions of Chapter 108, must be authorized by the local board or by one of its officers acting under the rules of said board. It is further provided that a written order for said supplies designating the person or persons employed to furnish such services or supplies, must be issued before the services or supplies are actually furnished and that such order shall be attached to the bill when the same is presented for audit and payment.

Section 2274 of said chapter, provides as follows:

"All bills incurred in carrying out the provisions of this chapter in establishing, maintaining, and terminating quarantine and isolation, in providing a necessary house or hospital for isolation, and in making fumigations or disinfections, shall be filed with the clerk of the local board. Said board at its next regular meeting or special meeting called for the purpose shall examine and audit the same and, if found correct, approve and certify the same to the county board of supervisors for payment."

We call your attention to the following language found in the above section: "All bills incurred in carrying out the provisions of this chapter—in establishing, maintaining, and terminating quarantine and isolation, etc. * * *" In Section 2571-a of the Supplement of 1913, we find the same language as is used in the above quotation, except that the word "and" is inserted after the word "chapter." We also call your attention to House File 260, Fortieth Extra General Assembly, Chapter 1 thereof, where it will be noted that the law as it existed in the 1913 Supplement was not changed but was only rewritten.

We are, therefore, of the opinion that it was the intention of the legislature that all of the expenses incurred in carrying out the provisions of Chapter 108, were to be paid by the county. There is no good reason why the expenses incurred in connection with placard diseases should not be paid by the county as well as those in connection with quarantinable diseases, quarantine and isolation.

The cost of the necessary supplies, such as order blanks, notices and books, used by the local board in connection with the carrying out of the provisions of Chapter 108, are proper expenses and should be paid by the county.

We have checked the itemized statement which was furnished the county by the city of Waterloo, and find that all items therein contained are proper expenses in accordance with the provisions of Chapter 108 of the Code of 1927, and they all should be paid by the county. All of the items are expenses incurred in connection with the administration of the provisions of Chapter 108.

POLLUTION—BOARD OF HEALTH: Duties and powers of Executive Council as to stream pollution.

March 27, 1928. *Executive Council:* We desire to acknowledge receipt of your request of March 26 in which you submit the following:

"Kindly outline the duties and define the jurisdiction of the Executive Council under Chapter 105, Code of 1927, so far as the same pertains to the hearings and orders to be given in forbidding further operation of any manu-

facturing plant or other establishment that might be polluting the streams of the state of Iowa."

In reply we would state that prior to the Forty-first General Assembly there were no duties or powers given to the Executive Council in matters of this character, the sole power resting with the Department of Health. However, at the Forty-first General Assembly an amendment was offered to Section 2201 in both the House and the Senate, both of which bills called for a limitation of an expenditure of more than $500.00 and in the house a requirement of the written approval of three-fourths of the members of the Executive Council.

However, these bills were amended so as to read as follows:

"No order shall be issued under the provisions of the preceding section that will require the expenditure of more than $5,000.00 without the written approval of a majority of the members of the State Executive Council."

Section 2198 Code of 1927 provides for the investigation of pollution of water; Section 2199 provides for the time and place of hearing; Section 2200 provides for the serving of notice, and Section 2201 provides for the making of an order by the Department of Health to conform with the evidence and their findings and Section 2201-a1 which has previously been quoted and which was passed in the Forty-first General Assembly provides for a limitation on expense.

It is evident that the entire proceedings pertaining to the pollution of water in this state is entirely within the jurisdiction and power of the Department of Health, who shall hold the hearings after proper notice of the time and place has been given; and the Department of Health shall take and require evidence sufficient for them to make a finding and decision, and they shall then make such order as they deem will be for the best interests of the public.

However, if they find that it shall be necessary for the best interests of the public to require the property owner in order to alleviate the situation to make an expenditure of more than $5,000.00, then in that event the Department of Health shall place all the evidence and findings and order before the Executive Council who shall either approve or disapprove this order.

In order to carry out the thought and intention of the legislature as regards the pollution of streams, we might say further that the hearings and procedure outlined in Chapter 105, Code of 1927, are exclusively the duty of the Department of Health, and the Executive Council has no power or authority to be a party to these hearings, their sole duty being to approve or disapprove the finding or order of the Department of Health where the same will involve an expenditure of over $5,000.00. It is first the duty of the Department of Health after having held such hearing to make an order and finding which will properly meet the situation as outlined by the evidence and facts brought out in the hearing.

SCHOOLS AND SCHOOL DISTRICTS: The boundary line between consolidated school districts may be changed by concurrent action of the boards.

March 28, 1928. *Department of Public Instruction:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following question:

"How may territory be detached from one consolidated school corporation and attached to an adjoining consolidated school corporation?"

The statute, Chapter 209, Code of Iowa 1927, provides for the organization,

operation, and dissolution of consolidated school districts. In this chapter we find no reference to the question of altering boundary lines.

It is further provided in Chapter 210 of the said Code that the provisions of the law relative to common schools shall apply alike to all districts except when otherwise clearly stated. Since there is no special provision for altering the boundary lines of consolidated school districts such action would be regulated by the general statutes on such question.

The changes in boundary lines of school districts are made under provision of Section 4133 of the Code which provides as follows:

"The boundary lines of contiguous school corporations may be changed by the concurrent action of the respective boards of directors at their regular meetings in July, or at special meetings thereafter, called for that purpose. The corporation from which territory is detached shall, after the change, contain not less than four government sections of land, and its boundary lines must conform to the lines of congressional divisions of land. In the same manner, the boundary lines of contiguous school corporations may be so changed that one corporation shall be included in and consolidated with the other as a single corporation."

We are, therefore, of the opinion that the procedure in the quoted section would govern the detachment of territory from one school district and its attachment to another.

BUDGET LAW—MUNICIPALITIES—REPLACEMENT CONTRACTS: A contract by a municipality for the purchase of replacement machinery and equipment is not such a contract as is contemplated under Section 352, Chapter 23, Code of 1927.

March 28, 1928. *Auditor of State:* We are in receipt of your letter under date of March 28, 1928, requesting an opinion of this department on the following question:

Can a city enter into a contract for the purchase of machinery and equipment for a municipal owned water plant said machinery being a replacement, where the purchase price of the same exceeds the sum of $5,000.00, without complying with the provision of Chapter 23 of the Code, 1927.

Section 352, Chapter 23 of the Code, 1927, provides as follows:

"Before any municipality shall enter into any contract for any public improvement to cost five thousand dollars or more, the governing body proposing to make such contract shall adopt proposed plans and specifications and proposed form of contract therefor, fix a time and place for hearing thereon at such municipality affected thereby, or other nearby convenient place, and give notice thereof by publication in at least one newspaper of general circulation in such municipality at least ten days before said hearing."

Public improvement is defined in Section 351, as follows:

"Public improvement as used in this chapter shall mean any building or other construction work to be paid for in whole or in part by the use of funds of any municipality."

It will be noted that under Section 352, that before any municipality may enter into a contract for any public improvement to cost $5,000.00 or more, that the governing body proposing to make such contract should adopt the proposed plans and specifications and proposed form of contract therefor, fix a time and place for hearing thereon, and give notice thereof by publication, etc.

Therefore, if the contract is not one for a public improvement, then it would not be such a contract as would come within the provisions of Section 352 of the Code, 1927.

If machinery and equipment to be used as a replacement is within the meaning of the definition of public improvement, it must come under the words "construction work" as used in Section 351. Construction work is usually defined as everything originally done in making a completed structure or works, and, of course, in this instance, it is such a structure or works as is to be used by a municipality. Thus in the establishment by a municipality of a water plant, in the first instance, the building together with the machinery and equipment would be considered within the meaning of the above definition, construction work, as it is all necessary to make the completed work. If the completed work has been established and constructed, then replacement of worn out machinery in such plant would not be considered as construction work.

We are, therefore, of the opinion that a contract for the purchase of machinery which is to be used as a replacement in a municipal owned water plant, is not such a contract as was contemplated, and as would come within the provisions of Section 352, Chapter 23, of the Code, 1927.

TAXATION—AGRICULTURAL LAND: Tax on agricultural land not recoverable if voluntarily assessed and paid without protest.

March 29, 1928. *County Attorney, Decorah, Iowa:* You have submitted to this department for our consideration a brief prepared by the Ferosearch Company, Charles City, Iowa, in regard to the question of the refund of taxes on agricultural land voluntarily paid. This department has held that the taxpayer is not entitled to a refund of the tax unless the tax was paid under protest. The courts uniformly speak of this as a tax exemption and the rule is that tax exemptions shall be construed strictly and that they shall not be refunded unless the taxpayer protects himself by paying the tax under protest.

In the brief cited a case is submitted which held that the taxpayer was entitled to an injunction restraining the treasurer from sale of the property consisting of agricultural lands where the tax was, in part, within the exemption. With this rule there can be no controversy. However, we do not feel that that case applies to a situation where the taxpayer has paid the tax voluntarily. We reach this conclusion from the opinion of the court in *Winzer vs. City of Burlington*, 68 Iowa, 279.

In the cited case the landowner had paid the taxes for three years *under protest* and brought the suit to restrain the further collection of taxes and for the recovery of those taxes previously paid. There was a judgment for the plaintiff from which the defendant appealed.

In the cited case the court said:

"We think that where a tax is not merely informal and irregular, but is illegal and void as being levied upon property not liable to taxation, *and the owner of the property makes payment under protest*, the better rule is that he may recover it back. Such seems to be the policy of our law."

The court refers to Section 780 of the Code, being the Code of 1873. We have examined this section and find that it is in practically identical form with the present statute. Section 6210, Code of 1927.

The section governing refunds of erroneous tax, being Section 7235, Code of Iowa, 1927, appeared in the Code of 1897, Section 1417. In construing that section the court in *Slimmer vs. Chickasaw County*, 140 Iowa, 448, at 455 said:

"Where one voluntarily hands in to the assessor a list of property which he represents is liable to assessment, and thereafter pays the taxes levied which

are used and expended by the county, he can not thereafter change front and say that the property was not assessable for any amount. As it is the duty of assessors to list for taxation all property which may be presented to them as subject to taxation, the owner can not, after the assessment has been made and taxes paid, recover the amount back on the theory that the property is not subject to taxation in the district where returned. Section 1417 does not cover such a case, and if it applies to erroneous taxation at all, it should not be held to relieve one who voluntarily and of purpose presents his property for taxation, and thereafter, and after having paid the taxes, changes his mind and concludes that the property was not subject to taxation. On the theory of an estoppel the case is not difficult of solution."

The theory upon which this is based is that the taxpayer voluntarily submits his property for taxation and after having submitted it he concludes that it is not subject to such taxation and seeks to recover. "This," the court said, in *Slimmer vs. Chickasaw County*, supra, "he could not do."

We therefore confirm the opinion heretofore rendered by this department.

ESTATES—TAXATION—COUNTY OFFICERS: After an estate has been closed the county treasurer cannot list and assess omitted personal property, for under Section 7158, Code of 1927, the listing of omitted moneys and credits and the collection of the tax thereon must be made before a transfer of the property has occurred.

March 30, 1928. *County Attorney, Newton, Iowa:* We are in receipt of your letter under date of March 24, 1928, requesting an opinion of this department on the following question:

"A decedent has omitted moneys and credits from forty to fifty thousand dollars prior to 1923 which as I understand is outlawed and not collectible. In addition to these omissions there was an omission of about fifty thousand dollars for each of the years 1923 and 1924, which is not yet outlawed. The decedent died June 30, 1924, and the securities were dated several years prior to his death. The administrator filed his inventory August 28, 1924, showing moneys and credits in the sum of eighty-six thousand dollars and the decedent had only listed moneys and credits in the sum of thirty thousand dollars. The administrator filed his final report on September 1, 1925, and was discharged.

"No claim was filed by the county treasurer for any of the omitted taxes. The county treasurer now wishes to list, assess and collect taxes on the part which was omitted. Can the estate be re-opened for the collection of these taxes on the omitted moneys and credits? Can the heirs be held for this tax the estate having been closed?"

Under Section 7155 of the Code, 1927, the county treasurer is authorized to list and assess omitted properties at any time within five years from the date at which assessment should have been made.

Section 7158 of the Code of 1927 provides as follows:

"7158. Time limit. Such assessment shall be made within four years after the tax list shall have been delivered to the treasurer for collection, and not afterwards, *if the property is then owned by the person who should have paid the tax.*"

We call your attention to that part of the above section which is in italics. It would appear that if the property has been transferred in any manner before an assessment is made by the treasurer that the treasurer would then be without power or authority to make such assessment.

The treasurer is authorized, under the provisions of Section 7155 to 58 inclusive, to list and assess omitted properties or property and to collect the tax which may be due therefrom provided said assessment is made within five years from and after the time such assessment should have been originally

made and the treasurer is authorized to proceed against the owner of said property upon whom was the duty to list the property for the years from which it was omitted. This, of course, would authorize him to proceed against the administrator or executor of such owner.

We are, however, of the opinion that if the treasurer does not list and assess omitted property before an estate is closed that he cannot thereafter list, assess and proceed against the heirs for the collection of the tax which was assessed against the omitted properties belonging to the decedent.

BANKS AND BANKING: In a suit on a directors' guarantee the court may reform the guarantee contract as to parties in court.

April 3, 1928. *Department of Banking:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

In a suit on the directors' guarantee on notes of a bank is it within the jurisdiction of the court to reform the guarantee contract where all parties have not been served with notice and are, therefore, not in court?

While the contract could not be reformed to the detriment of those who had not been brought within the jurisdiction of the court by service of notice, we are of the opinion that otherwise the contract may be reformed and that as to such parties as have been served with proper notice the decree is binding. Those who had not been served with notice but who had not been affected adversely by the decree would have no cause to complain.

DAMS: Reconstruction of abandoned dam requires permit.

April 3, 1928. *Executive Council:* We desire to acknowledge receipt of your request of April 2 in which you submit a letter from Ellis J. Hook, County Attorney at Decorah, on the following question:

"Where a property owner has an abandoned or partially destroyed dam on his premises which has not been used for several years and he desires to again place the same in commission, is it necessary that he secure a permit and annual license to operate the same?"

In reply we would say that Section 7767, Code of 1927, prohibits the construction, maintenance, or operation of any dam on any navigable or meandered stream for any purpose or any other stream for manufacturing or power purposes.

Under the facts as related by Mr. Hook the party in whom he was interested contemplated using this for power purposes, and we are of the opinion that under Chapter 363, Code of 1927, it would be necessary for this party to secure a permit to reconstruct this dam, and in the event that this dam when constructed had more than 25 horse power capacity, it would then be necessary that he pay an annual license fee.

The above opinion is based on the theory that the word "constructed" as found in Section 7767 includes any necessary reconstruction work as defined by the following cases:

Bell County vs. Lightfoot, 138 SW 381, 104 Texas, 346;
Commonwealth vs. Hayden, 97 NE, 783, 211 Mass. 296;
Home Mixture Company vs. Corporation, 176 Federal, 600.

RELOCATION OF COUNTY ROAD—ROAD BOND ELECTION—HIGHWAY COMMISSION—BOARD OF SUPERVISORS:

April 3, 1928. *Auditor of State:* We desire to acknowledge receipt of your request of March 30th which is as follows:

"Can the Board of Supervisors, with the consent of the Highway Commission, order a change or relocation of a county road, to be improved by graveling, under the recent county road bond election, when the road has been specifically described in the published notice of road bond election, without jeopardizing the bond election?"

In reply we would say that Section 4761 specifically sets out the form of submission under which bond issues shall be submitted to the voters, and it is our opinion that where a road has been specifically described in the published notice of a road bond election and in the ballots submitted to the people neither the Board of Supervisors nor the Highway Commission has the right or power to change or relocate any of the roads to be improved, or in other words any improvement that is carried on must be done upon the roads which were specifically authorized by the voters.

PUBLIC FUNDS—BANKS AND BANKING: Deposit in bank under proper authority may be made at a rate greater than 2½% on 90% of the daily balances and on a time certificate; the interest diverted, however, must be 2½% on the full deposit.

April 3, 1928. *Director of the Budget:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following propositions:

"Will the city receive the protection of the state sinking fund law providing the city council shall deposit the surplus funds in time certificates of deposit?

"When public funds are placed on time deposit, must the interest be computed and remitted monthly in the same manner as are funds deposited on open account?

"In view of the provisions of Section 1090-a7 of the Code, is the amount of interest to be remitted based on two and one-half per cent of the full amount on time deposit or on two and one-half per cent of ninety per cent as applied to interest on open account?"

The question is ruled in part by the opinion of this department to the Auditor of State, Report of the Attorney General 1925-1926, page 463.

In supplementing the cited opinion we shall say that the funds deposited on time deposit in banks duly designated as depository banks as provided by law would be protected by the public fund act. The interest, however, should be computed at the end of each month at the rate of two and one-half per cent on the full amount of the time certificate and transmitted to the county treasurer monthly in order that the county treasurer's record may be complete. The charge for this interest can be entered on the certificate of deposit or charged against the deposit monthly as it is diverted to the county treasurer by the bank.

We reach the conclusion that the interest should be computed at the rate of two and one-half per cent on the full amount of the deposit from the provisions of Section 1090-a7 which limits the amount of interest to be diverted or collected for the sinking fund to two and one-half per cent per annum. This we construe to be upon the full amount of the deposit where the interest received is in excess of two and one-half per cent on ninety per cent of the daily balance. Otherwise, there would be no reason for the provisions of this section.

COMMITMENTS—JUVENILE HOME—BOARD OF CONTROL: Under Section 3703, Code of 1927, a county who commits a juvenile to a juvenile home is liable for its share of the expenses of said juvenile whether or not the parents of said juvenile are residents of said county.

April 4, 1928. *Auditor of State:* We are in receipt of your letter under date of March 28, 1928, requesting an opinion of this department on the following question:

Bennie Callahan was committed by the District Court of Mahaska County, Iowa, to the Juvenile Home at Toledo, Iowa. At the time he was committed his parents were residents of Mahaska County, Iowa. In the latter part of the year of 1925 he was paroled to his father. Later his parole was revoked and he was returned to the Juvenile Home.

During his absence from the home Mahaska County was not charged for any part of his care and keep. However, when he was returned to the home Mahaska County was charged with expense. The County Auditor of Mahaska County is now refusing to pay the amount of his expenses chargeable to Mahaska County on the grounds that boy's parents are no longer residents of Mahaska County.

Is Mahaska County chargeable with this expense?

Under Section 3703, Chapter 187 of the Code of 1927, the county is made liable for all sums paid by the home in support of all children committed or received from said county to the extent of one-half of the per capita costs per month for each child.

There is no dispute but that the juvenile was a resident of Mahaska County at the time he was committed and that he was committed by the District Court of Mahaska County, Iowa. This being the case under Section 3703 the county would be liable for one-half of the child's support incurred under the original commitment.

From the facts in this case it appears that the juvenile was never discharged from the home but was only paroled and was not re-committed but was surrendered and committed under the original commitment.

We are, therefore, of the opinion that Mahaska County is liable in accordance with Section 3703 for the support of said juvenile. This notwithstanding the fact that his parents are no longer residents of Mahaska County.

TAXATION—MERCHANDISE—ASSESSMENTS: Under Section 6972, Code of 1927, the assessment stocks of merchandise must be made at the average value of the stock during the year preceding the time of assessment.

April 4, 1928. *Auditor of State:* We are in receipt of your letter under date of April 4, 1928, requesting an opinion of this department on the following question:

"We would like to know the proper interpretation to place upon Section 6972, Chapter 331 of the Code of 1927, as to the assessment of stocks of merchandise. May the assessor, under this section, take a January first invoice for the assessed value."

Section 6972 of the Code of 1927 provides as follows:

"Stocks of Merchandise. In assessing such stocks of merchandise, the assessor shall require the production of the last inventory and enter the date thereof in the assessment roll. If, in the judgment of the assessor, the inventory is not correct, or if it was taken at such time as to render it unreliable as to the amount or value of such merchandise; he shall assess the same by personal examination. The assessment shall be made at the average value of the stock during the year next preceding the time of assessment, and if the merchant has not been engaged in business for one year, then the average value during

such time as he shall have been so engaged, and if commencing on January first, then the value at that time."

Under the above section in making an assessment of stocks of merchandise the assessment must be made at the average value of the stock during the year next preceding the time of assessment, and if in the judgment of the assessor the last inventory value is not correct or if it was taken at such a time as to render it unreliable as to the amount of value, the assessor shall assess same by personal examination. This would mean that if the average value of the merchandise for the year last preceding the assessment is greater than that shown by the inventory he must make a personal examination in order that he may determine the true average value during the preceding year. The assessor would be authorized to inspect the files, books and records as well as the merchandise.

BUDGET LAW — TRANSFER OF FUNDS — MUNICIPALITIES — TUBERCULOSIS: 1. Municipalities may with the consent of the budget director make temporary transfers from one fund to another providing the levying or certifying board makes provision for the return of the money transferred. 2. Where the fund from which a transfer is requested has been raised illegally or without authority no temporary transfer may be made but a transfer must be made from said fund of the money raised illegally to the general fund of said municipality.

April 5, 1928. *Budget Director:* We are in receipt of your letter under date of March 27, 1928, requesting an opinion of this department on the following question:

A county has exhausted the Tuberculosis Eradication Fund and desires to continue the work of eradication. For this purpose they propose and have requested the approval of this department of a transfer from other funds of the county in the sum of ten thousand dollars ($10,000.00) to the Eradication Fund.

It appears that the authorized levy for tuberculosis eradication purposes is approximately twenty-four thousand dollars ($24,000.00) per year.

The question has arisen as to whether or not in view of Section 2686, Code of 1927, which limits the tax levy for eradication purposes to three mills and Section 380, which seems to limit expenditures for any specified purpose to the amount estimated, a transfer could be made from the eradication fund.

The question has also arisen as to whether or not funds which have been illegally raised may be transferred to a depleted fund.

Section 380 of Chapter 24 of the Code of 1927 provides as follows:

"Tax limited—No greater tax than that so entered upon the record shall be levied or collected for the municipality proposing such tax for the purpose or purposes indicated; and thereafter no greater expenditure or public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in Sections 373 and 381."

Section 388 of Chapter 24 of the Code of 1927 provides as follows:

"Return of funds. 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 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 would appear from reading the two sections above set out that one contradicts the other, for Section 380 seems to limit the expenditure that may be

made by a municipality for any purpose to the amount estimated and appropriated for such purpose, and Section 388 seems to authorize the municipality to transfer from one fund to another for temporary purposes providing the certifying or levying board provide for the return of the money transferred to the fund from which it was taken.

These two sections, however, are contained within the same title and were passed by the same legislature. They must, therefore, be construed together so that the intention of the legislature may be determined.

If it was the intention of the legislature in passing Section 380 to limit the expenditures which a municipality could make in any year for any specific purpose to the amount estimated and appropriated for that purpose, then there would be no need for transfer from any other fund of the county and there would, therefore, be no need for the authority granted in Section 388.

The legislature clearly intended to permit municipalities to temporarily transfer from one fund to another with the approval of the budget director. Of course, these sections of the budget law are made subject to the provisions of any law relating to municipalities, meaning, of course, any law relating to the subject of transfer of funds which was in force and effect at the time the budget law was passed.

We are of the opinion that the legislature in passing Section 380 intended to place the municipality upon a cash basis so far as its expenditures were concerned, and that if the municipality had used all of the funds appropriated for any specific purpose for any year that they could not incur indebtedness without having money in said fund with which to pay the same.

Section 388 authorizes transfer from one fund to another providing the levying or certifying board, as the case may be, makes provision for the return of the money transferred to the fund from which it was transferred.

This section would seem to authorize a municipality to anticipate its revenue for it contemplates that when a particular fund has been depleted and there is necessity for more money in said fund that such municipality may temporarily transfer from another fund to the depleted fund providing provision is made for the return of said transferred money.

The amount which may be transferred from one fund to a depleted fund is limited by Section 388 in that provision must be made for the return of the money transferred and if the authorized levy for the depleted fund would not be sufficient to raise enough money so that the amount transferred to it could not be returned then the amount would have to be reduced.

We are, therefore, of the opinion that while Section 380 limits the expenditures that may be made by a municipality for any purpose to the amount estimated and appropriated for such purpose that it does not prohibit such municipality from anticipating the revenue which may be received into said fund providing the municipality has on hand funds which it may transfer to the depleted fund.

We are, therefore, of the opinion that in accordance with Section 388 of the Code of 1927, temporary transfers from one fund to another may be made by a municipality providing the levying or certifying board, as the case may be, makes provision for the return of said money and said transfer is approved by the budget director.

We are also of the opinion that where the governing body of a municipality has continued to make levies for certain specified purposes when there is no

necessity for the continued levy that the funds so raised have been raised illegally and that a temporary transfer could not be made from such a fund to another fund, but a transfer must be made of the unnecessary funds to the general fund of the county.

SEIZURE OF FIREARMS—FISH AND GAME: Under Section 1715 of the Code of 1927 a firearm may be seized as an unlawful device when it is being used in violation of any of the provisions of Chapter 86 of the Code of 1927. Section 1789, Code of 1927, does not authorize the seizure of firearms which are being used in violation of the above, but simply imposes a penalty and fixes the punishment for such violation.

April 5, 1928. *State Game Warden:* We are in receipt of your letter under date of March 23, 1928, requesting an opinion of this department on the following question:

"We would like to have an opinion from your office giving us your construction of Sections 1789 and 1715 so that we may know and advise our wardens exactly when seizures of fire arms may lawfully be made."

Under Section 1715 a fire arm may be seized as an unlawful device when it is being used in violation of any of the provisions of Chapter 86 of the Code of 1927.

For example, if one of your wardens were to arrest a man who was caught in the act of shooting game birds between sunset and thirty minutes before sunrise of the following morning the gun or fire-arm used by said party would be subject to confiscation in accordance with the provisions of Section 1715 and the party would be subject to punishment in accordance with the provisions of Section 1789.

However, possession of a gun or fire-arm in operation is not sufficient to warrant or justify its seizure. You are only justified in seizing such fire-arms when you find them being used in an unlawful manner, that is contrary to the provisions of Chapter 86.

Section 1789 merely prescribes the penalty and the punishment for the use of fire-arms contrary to the provisions of Chapter 86. Section 1789 does not authorize the seizure of a fire-arm which is being used contrary to the provisions of Chapter 86, but simply imposes a penalty and fixes the punishment for such violation.

A fire-arm might be seized when it is being used contrary to the provisions of Chapter 86 and might be sold and the party who was using it might also be punished, in accordance with the provisions of 1789.

TAXATION—EXEMPTION: Pension money in the hands of pensioner to meet his daily wants and necessities exempt from taxation; not exempt when invested by the pensioner.

April 5, 1928. *County Attorney, Bedford, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

Is a mortgage held by a Civil War pensioner and which represents a loan of money received from the United States Government as a pension exempt from taxation in the same manner as the pension fund itself would be were it held by the pensioner?

We believe this question is answered by the case of *Manning vs. Spry*, 121 Iowa 191, at page 194, being one of the cases cited by you.

In the cited case the court said:

"Construing these sections (Section 4747, Revised Statutes of the United States, and Section 1309, Code of Iowa 1897) together it is manifest that pension money is exempt not only from execution but also from taxation SO LONG AS IT REMAINS IN THE SHAPE OF MONEY TO MEET THE DAILY WANTS AND NECESSITIES OF THE PENSIONER."

The court, however, said further:

"Had he, instead of holding the money, loaned it out, and taken bonds or mortgages as security, it may be that the state would have had power to tax these securities."

The court added, however, that it did not decide that question although the quotation above might inferentially so indicate.

In *Bednar vs. Carrol*, 138 Iowa 338, the court held that the interest on pension money was not exempt from taxation. In the cited case the court said:

"We find no authority for exempting to the pensioner the interest and interest upon interest derived from investments of pension money. If the profits derived by the investment of pension money in property are not exempt from execution, there seems to be no reason for holding that interest derived from the loaning of pension money shall be exempt from taxation."

There could be no question but that under the statute, Section 11761, Code of Iowa 1927, such fund even invested would be exempt from execution or that, as the court said in *Beers vs. Langenfeld*, 149 Iowa at 582:

"It may be conceded that pension money in the hands of the pensioner is exempt from taxation under the provisions of Section 1309 of the Code."

The cited section, Section 1309, Code of 1897, is identical with Section 6984, Code of 1927. This section merely provides that pensions of the United States, or any of them, shall not be deemed credit within the meaning thereof.

The last pronouncement of our court upon this question is *Beers vs. Langenfeld*, 149 Iowa 581, where the court speaking through Mr. Justice Sherwin said:

"They (Section 4747 Revised Statutes of the United States and Section 4009 Code of 1897) exempt such property (purchased with pension money) from sale to satisfy judgments against the pensioner but they do not thereby necessarily exempt it from sale to satisfy a tax that has been levied on the property itself."

The court in this case went on to state the general rule as follows:

"It is the general rule that all property is subject to taxation except such as has been specifically exempted therefrom by the legislature. In fact, the assessment statute expressly declares that all property which is not therein specifically made exempt from taxation shall be subject thereto.

"Another significant fact is this. Section 1304, Code Supplement 1907 (Sections 6944-6946 Code of Iowa 1927) enumerates the property that shall be exempt from taxation and the seventh paragraph (Section 6946 Code of Iowa 1927) relates exclusively to the property of soldiers and sailors but it does not exempt from taxation property purchased with pension money."

In a recent decision just rendered by our supreme court in the case of *Andrew vs. Cole Savings Bank*, the court held that the statutes relative to exemption from execution against pension moneys would not apply where the pension fund was placed in a bank on a time certificate of deposit and that such pension moneys lost their character as such upon such deposit.

We are, therefore, of the opinion that pension moneys which, in the language of the court, have not been retained in "the shape of money to meet the daily wants and necessities of the pensioner", or "received and not expended

out of his total moneys and credits", would not be exempt from taxation. Such moneys have lost their character as pension funds and are, in fact, moneys and credits which should be taxed as other such property. The exemption from taxation which is intended to be extended to soldiers and sailors is enumerated in the tax exemption statute and we are of the opinion that it cannot be held that pension money after having been invested in a mortgage is exempt from taxation without adding to the exemptions made in the statute.

TAXATION—WAR VETERAN—EXEMPTION: Compensation received by world war veteran is exempt from taxation so long as it is held by him to meet his daily wants and necessities; real estate purchased therewith not exempt.

April 6, 1928. *County Attorney, Marshalltown, Iowa:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following proposition:

"A World War veteran receives $2,600.00 as adjusted compensation for disability incurred in service during the World War, he invests this money in real estate, he claims that this property is exempt from taxation under the provisions of Section 618 of Title 38, U. S. Code Annotated."

We believe that this question is ruled by the case of *Beers vs. Langenfeld*, 149 Iowa 581, where the court construed Section 4747, Revised Statutes of the United States, and Section 4009 of the Code of Iowa 1897, the latter being Section 11761 of the Code of Iowa 1927, and held:

"They (the cited statutes) exempt such property from sale to satisfy judgments against the pensioner but they do not thereby necessarily exempt it from sale to satisfy a tax that has been levied on the property itself. No judgment or execution against the owner is necessary in such case. The taxation statute creates a lien for the tax, and provides that it may be enforced against the property without a formal judgment against the owner or an execution against the property. It is the general rule that all property is subject to taxation, except such as has been specifically exempted therefrom by the legislature. In fact, the assessment statute expressly declares that all property which is not therein specifically made exempt from taxation shall be subject thereto. * * * Section 1304, Code Supplement 1907, enumerates the property that shall be exempt from taxation; and the seventh paragraph thereof (Section 6946, Code of 1927) relates exclusively to the property of soldiers and sailors but it does not exempt from taxation property purchased with pension money."

The cited section, Section 4747, Revised Statutes of the United States provided as follows:

"No sum of money due or to become due to any pensioner shall be liable to attachment levy or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or in the course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."

Under that section and Section 1309, Code of Iowa 1897, the court held that pension money in the hands of a pensioner for his daily wants and necessities is exempt from taxation. However, the court held that real estate purchased with pension money was not exempt from taxation.

The statutes of the United States Code Annotated, Title 38, Section 618, provides as follows:

"No sum payable under this chapter to a veteran or his dependents, or to his estate, or to any beneficiary named under Part V of this chapter, no adjusted service certificate, and no proceeds of any loan made on such certificate,

shall be subject to attachment, levy, or seizure under any legal or equitable process, or to National or State taxation."

From these sections we conclude that the latter statute merely exempts the proceeds of adjusted compensation allowed by the United States Government in express terms in the same manner as the courts had so held the proceeds of pension money to be exempt from taxation under the previous statute.

We are, therefore, of the opinion that real estate purchased from the proceeds of adjusted compensation made by the government of the United States to veterans of the World War is not exempt from taxation.

BOARD OF ARBITRATION—ARBITRATION: State should comply with provisions of Chapter 74, Code of Iowa 1927, relative to settlement of labor disputes although the state is not specifically named in the persons described as employers therein.

April 10, 1928. *Governor of Iowa:* I have your communication of the 3rd instant with reference to a question of the appointment of a Board of Arbitration in connection with certain improvement at the State University. You state the facts as follows:

"A petition has been filed with me by the Painters and Decorators Union No. 915, and the Associated Buildings Crafts representing Carpenters, Plumbers and Electricians, in which they ask the invoking of the provisions of Chapter 8-B, Title XII, Supplement of the Code, 1913, and ask the appointment of a Board of Arbitration and Conciliation, copy of which petition is handed you herein.

The controversy, as I understand grows out of the State Board of Education taking over some work in the way of construction of buildings, having the work done under the direction of J. M. Fisk, Superintendent of Grounds and Buildings at the State University of Iowa."

Your inquiry is whether Chapter 74 of the Code of 1927 authorizes the appointment of a Board of Arbitration for settlement of a dispute of this character.

Chapter 74 of the Code provides a method of arbitration of labor disputes arising "between any person, firm, corporation, or association of employers and their employees or association of employees, of this state,". It is quite apparent from the classification of persons enumerated in the statute to whom the arbitration law shall apply that the state and the various municipalities of the state do not fall within the class of employers affected.

Your particular inquiry with reference to the interpretation of this chapter is in the closing paragraph of your letter, which reads as follows:

"Does the chapter apply to this controversy, or is this controversy of such a nature that the Governor would be unnecessarily interfering with the duties of a Board appointed by him and confirmed by the Senate, through the instrumentality of machinery which can be rendered wholly futile by the mere will of either party to the controversy, and whether or not the controversy is within the spirit of the statute."

The State Board of Education being an arm or branch of the state government would not come within the strict provisions of the statute, as I have above indicated. However, the state has set a policy in dealing with disputes between employers and laborers by providing a method by which they may submit their differences to arbitration. While the state may not be legally bound under the statute to submit any difference between it and its employees to arbitration, it should use every honorable means within its power to adjust differences that may arise, and if no agreement can be reached between the board or department

and the employees affected it would be good policy on the part of all parties concerned to permit an impartial board, by agreement, to make findings and recommend an adjustment and thus the state carry out, as suggested in your letter, the *spirit* of arbitration which the legislature has set up and recommended to private employers and employees for the settlement of their differences.

COUNTY OFFICERS—COUNTY ATTORNEYS: Not entitled to fee for proving claim for school district or of a municipality except cities against public sinking fund; is entitled to an office if none in the court house; may have stenographer or clerk with approval of board of supervisors.

April 11, 1928. *County Attorney, Sac City, Iowa:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon various matters as follows:

"1. In Section 5228 Code 1927 under Section 8 thereof it states that in addition to the salary stipulated, County Attorney shall receive the fees now allowed to attorneys for suits upon written instruments where judgment is obtained, for fines collected, where he appears for the state and on school funds, mortgages foreclosed and criminal fees allowed in criminal cases.

"Does this provision apply to money held in closed banks where under the previous sinking fund law the County Attorney brought action in the District Court for the recovery of money?

"Does this section apply to fines collected in Justice Court where the crime or misdemeanor is a violation of the State Law and where the County Attorney appears for the State?

"2. Under Section 5180 (5) where the duties of the county attorney are set forth and the County Attorney is authorized and empowered to enforce the recovery of debts and revenues to the State, County, School District or Road District.

"Does this mean as against Section 5228 that the fees allowed in 5228 are not to be charged?

"3. Under Section 5133 wherein said Section designates that the Board of Supervisors shall furnish the County Attorney with offices.

"Does said section mean provide office where there is no office available in the Court House and is a rental fee of $15.00 per month a reasonable amount for a Board to pay under such circumstances, if private offices are furnished?

"4. Section 5238 provision is made for deputies or assistants for County Attorney to be appointed by the Board of Supervisors.

"Does this section mean that the Board may appoint a stenographer assistant for the county attorney and set the amount to be paid such assistant?

"5. Certain sections pertaining to the enforcement of the intoxicating liquor laws provided for an attorney's fee to be paid as part of the costs in case the costs are not paid by the defendant upon conviction.

"Are these costs to be paid by the Board of Supervisors where the Court or Justice assesses the same?"

We shall answer your inquiries in the order submitted.

1. The cited Section 5228 Code of Iowa 1927, sub-section 8, provides in part as follows:

"In addition to the salary above provided he shall receive the fees as now allowed to attorneys for suits upon written instruments where judgment is obtained, for all fines collected where he appears for the state, but not otherwise, and school fund mortgages foreclosed, and attorney fees allowed in criminal cases."

We are of the opinion that this provision does not cover funds deposited in a bank since closed and that such funds come under Section 5180, sub-section

5, under debts, revenues, and moneys and that the fee could not be charged as provided in Section 5228.

2. This question is disposed of by our answer to question No. 1. This is in accordance with a former ruling of this department.

3. It is provided in Section 5133, that the board of supervisors shall furnish the county attorney with an office. If there is no office in the court house the county must furnish such office and the rental of the office is to be determined by the board of supervisors. It must, of course, be suitable for the needs of the county attorney.

4. We are of the opinion that the board of supervisors under the provisions of Section 5238 has the power to appoint a stenographer or clerk to the county attorney and fix the amount to be paid such clerk.

5. This question is ruled, we believe, by the opinion of this department, Report of the Attorney General 1925-1926, page 197, and page 268.

SCHOOLS AND SCHOOL DISTRICTS: Where two school corporations unite by elections the consolidation becomes effective upon the certification by the board holding the last election that the proposition has carried.

April 12, 1928. *Department of Public Instruction:* This will acknowledge receipt of your letter in regard to the consolidation of the Kenwood Park School District with that of Cedar Rapids.

Under date of May 12, 1927, we rendered to your department an opinion to the effect that these districts could organize under Section 4133, 4134 of the Code. They preferred, however, to proceed under the provisions of Section 4153 and have both held elections in which the propositions carried.

The latter section provides that if a majority of the votes cast at the election in each district shall be in favor of uniting the said districts that the secretaries shall give notice of a meeting of electors as provided by law for the organization of independent districts.

The provisions for the organization of an independent district are found in Sections 4144, 4144-a1, 4144-a2, and 4155. Without question the districts under consideration come under these provisions and the board of the former Cedar Rapids district is the board of the newly formed district.

The statute then provides, Section 4136, Code of Iowa 1927, that the board in the new district shall organize under the provisions of the cited sections and further provides as follows:

"Upon the election and organization of the new boards the old boards shall cease to exist except for the purpose specified in the two following sections."

The two sections referred to apply to the division of assets and distribution of liabilities.

Since no election is required in view of Section 4144-a1, the board of the Kenwood Park School District ceased to exist upon the canvass of the votes and the finding of the board of the Cedar Rapids School District that such proposition had carried in that district. Inasmuch as the Kenwood Park District had already voted and the board had found that the proposition carried.

We are, therefore, forced to the conclusion that since the districts have chosen this means of uniting that they are governed by the statute and that all actions of the Kenwood Park board are void subsequent to the finding of the board in the Cedar Rapids district that the proposition had carried therein and had communicated such result to the board in the Kenwood Park School District

It necessarily follows that the county treasurer should pay the taxes paid in subsequent to that time to the Cedar Rapids School District.

WORKMEN'S COMPENSATION: Section 1392 (6) providing that 50% of compensation where dependents are non-resident aliens shall be paid into the state treasury, is constitutional.

April 12, 1928. *Iowa Industrial Commissioner:* This will acknowledge receipt of your letter of recent date enclosing letter of certain attorneys with reference to the constitutionality of Section 1392 (6) which provides, in substance, that where dependents of a person entitled to compensation under the workmen's compensation statutes are non-resident aliens, then fifty per cent of the compensation shall be paid into the state treasury.

In the letter aforesaid are cited three authorities relied upon by Messrs. Royal & Royal. They are as follows:

Yosemite Lumber Co. vs. Indus. Acc. Com., 204 Pacific (Cal.) 226;
Peoples vs. Yosemite Lumber Company, 216 Pacific (Cal.) 39;
Bryant vs. Lindsay, 110 At. (N. J.) 823.

We have examined the authorities cited and are of the opinion that they do not apply to a statute which does not provide an arbitrary sum but simply provides that the compensation instead of being paid to the non-resident alien dependent shall be paid in part to such dependent and in part to the state treasury.

The two California cases construe a statute which provides that an employee who "does not leave surviving him any person entitled to a death benefit the employer shall pay into the treasury of California the sum of $350.00", likewise, the New Jersey case cited provides that where an employee leaves no dependents the employer shall pay into the state treasury the sum of $400.00 to support the State Labor Bureau.

While these two jurisdictions hold thus, the supreme court of Wisconsin has held in the case of *Sturtevant vs. O'Brien*, 202 N. W. 324, that a statute which provides that where an employee met with death through accident in the course of employment left no dependents, the employer shall pay into the state treasury the sum of $1,000.00, was not in violation of the due process and equal protection clauses of the federal constitution.

It has also been held by the supreme court of the United States in the case of *Sheehan vs. Shuler*, 265, U. S. 371, as follows:

"The payments thus required are not unfair and unreasonable in amount. The aggregate for the two funds is a thousand dollars. This is much less than the maximum payment that may be required according to the scales in case the employee leaves survivors entitled to death benefits and seems not to exceed if it equals the average amount of the payments required in such cases. Nor are these provisions in conflict with the equal protection clause. The contention of the companies is that the prescribed awards are in the nature of a tax imposed upon the happening of a contingency and are of unequal application; that is, that they are imposed only upon such employers as happen to have employees who are killed without leaving survivors entitled to compensation. However, this is not a discrimination between different employers, but merely a contingency on the happening of which all employers alike become subject to the requirements of the law."

The court also held that the requirement of such payment into the state treasury was not in violation of the due process clause.

It will thus be seen that there is a division of authority even upon the propo-

sition of paying an arbitrary sum by the employer into the state treasury in case there are no dependents.

We are of the opinion that the provision of our statute which merely provides that the same compensation shall be paid by each employer in each instance but that the dependents if they are non-resident aliens shall receive but one-half of the compensation and the other half be paid to the state treasury, does not deprive the employer of property without due process of law or of the equal protection of the laws and that the statute is entirely uniform in its operation.

There are numerous cases holding that the non-resident alien cannot complain. Upon this proposition we cite the following:

Maryland Casualty Company vs. Chamos, et al., 263 S. W. (Ky.) 370;
Maryland Casualty Company vs. Vidigoj, 270 S. W. (Ky.) 472;
Zancanelli vs. Central Coal & Coke Company, 173 Pacific (Wyo.) 981.

SCHOOLS AND SCHOOL DISTRICTS: A board may enter into contracts with teachers prior to the March organization of the board "for the ensuing year" only.

April 14, 1928. *County Attorney, Estherville, Iowa:* We have had a conference with Mr. Smith and Mr. Hanson of the Halfa Consolidated School District in regard to contracts entered into by the board of that district for the school year beginning September, 1928, which contracts were entered into prior to the school election and the organization of the new board in March, 1929. The question arises whether the board could, prior to such election or prior to such organization, enter into such contract.

This question is ruled by the statute, Code of Iowa 1927, Section 4229, which provides as follows:

"Contracts with teachers must be in writing and shall state the length of time the school is to be taught, the compensation per week of five days, or month of four weeks, and that the same shall be invalid if the teacher is under contract with another board of directors in the state of Iowa to teach covering the same period of time, until such contract shall have been released, and such other matters as may be agreed upon, *which may include employment for a term not exceeding the ensuing school year, except as otherwise authorized*, and payment by the calendar or school month, signed by the president and teacher, and shall be filed with the secretary before the teacher enters upon performance of the contract."

This section has been interpreted by the supreme court holding that a rural school board cannot employ a teacher under a contract which calls for performance wholly within the terms of office of the board thereafter to be organized.

Independent School District vs. Pennington, 181 Iowa 933;
Burkhead vs. Independent District, 107 Iowa 29.

The opinion in the Pennington case was rendered November 26, 1917. The Burkhead case was, of course, prior to that time.

Since those opinions were rendered the legislature has amended the statute by the passage of Senate File 101, Section 23 of the Extra Session of the Fortieth Extra General Assembly, by amending the statute as it then existed by the insertion of the following words:

"Which may include employment for a term not exceeding the ensuing school year except as otherwise authorized and payment by the calendar month."

The general rule of construction is that the legislature intends to change the law when it passes an amendment to the existing statutes.

It then becomes a question of interpretation of the term "ensuing school year".

Under the common dictionary terms "ensuing" means "following". The term "ensuing year" was under construction in the case of in Re Chester County Republican Nominations, 62 Atl. (Pa.) 258, where the court said:

"Ensuing year meant by the rule not the calendar year but the political; that is, the interval between one election and the next annual election which might be more or less than twelve calendar months."

If the legislature in amending the statute had said the ensuing year the term would have been limited by the period beginning with the organization of the next board subsequent to the election of the teacher and the awarding of the contract. Since the legislature inserted the word "school" also in the amendment it can mean only the following school year or the next school year beginning after the election and after the termination of the school year then in progress.

We are, therefore, of the opinion that the contracts entered into by the board of the Halfa Consolidated School board in March 1928 prior to the election and organization of the board of that month as provided by statute to begin in September of the school year 1928 and 1929, are valid contracts and that in the absence of termination by agreement or in the manner provided by law can be enforced.

ROAD DRAINAGE LEVY—TOWNSHIP: The road drainage levy provided for in Section 4895, Code of 1927, can only be used for the payment of the township's portion of the cost of a drainage district. See Section 4795-b1 of the Code of 1927.

April 18, 1928. *County Attorney, Indianola, Iowa:* We are in receipt of your letter under date of April 11, 1928, requesting an opinion of this department on the following question:

"Whether the road drainage levy as provided by sub-division three of Section 4795, of the 1927 Code, may be used for ordinary road drainage purposes, or must it be used only to pay assessments against the township for benefited drainage districts."

Paragraph 3 of Section 4795, Code of 1927, authorizes the township trustees, if necessary, to make a levy of not to exceed five mills for road drainage purposes, and Section 4795-B-1, provides in substance that in any township where the road drainage fund has charged against it the township's portion of the costs of a drainage district which is in excess of the amount which can be produced by the maximum levy authorized by the preceding section in any one year that the trustees may levy such additional tax as they may determine not exceeding eight mills.

We are, therefore, of the opinion that in construing both sections together the levy provided for in Paragraph 3, Section 4795, of the Code of 1927, can only be used for the payment of the township's portion of the cost of a drainage district. This is true for the legislature has so interpreted in Section 4795-B-1 of the Code of 1927.

COUNTIES—DRAINAGE FUNDING BONDS—ISSUANCE: Board of Supervisors may proceed at issuing and selling funding bonds in accordance with the provisions of Section 7663, Code of 1927, without regard to the provisions of Chapter 358-b1 of the Code of 1927, or they may proceed in accordance with the provisions of said chapter.

April 20, 1928. *County Attorney, Spencer, Iowa:* We are in receipt of your letter of April 20, 1928, requesting an opinion of this department on the following question:

In two drainage districts in this county some of the land owners have failed to make payment of assessments.

The Board of Supervisors desire to issue and sell refunding bonds to purchasers in this community at five per cent to take care of these deferred assessments. They desire to proceed under Sections 7509-a-1 and 7663.

There has been recently enacted a new law Chapter 358-B-1, of the Code of 1927, with reference to drainage refunding bonds.

Have Sections 7509-A-1 and 7663 in any way been affected by the enactment of Chapter 358-B-1, as far as the question of issuing refunding bonds is concerned? That is, to say, can the board proceed under Section 7663 as they have done heretofore without regard to the provisions of Chapter 358-B-1?

Section 7714-B-24, Chapter 358-B-1, provides as follows:

"Interpretative clause. This chapter shall be construed as granting additional power without limiting the power already existing for the extension of the time of payment of drainage assessments and the issuance of drainage bonds."

It would appear from reading the above section that the legislature did not intend to change, alter, or limit in any manner the provisions of Chapter 357, but only intended to grant to the board additional powers.

We are, therefore, of the opinion that the board may proceed in issuing and selling funding bonds in accordance with the provisions of Section 7663 without regard to the provisions of Chapter 358-B-1 or that they may proceed in accordance with the provisions of Chapter 358-B-1 without regard to the provisions of Section 7663.

OFFICES AND OFFICERS—CITIES AND TOWNS—INCOMPATIBILITY: Office of mayor and justice of peace are incompatible.

April 21, 1928. *County Attorney, Spencer, Iowa:* This will acknowledge receipt of your letter of recent date relative to incompatibility of the office of mayor and the office of justice of the peace.

We believe this case is ruled entirely by *State ex rel Crawford vs. Anderson*, 155 Iowa 271, where the court held as follows:

"It is a well-settled rule of common law that if a person, while occupying one office accept another incompatible with the first, he ipso facto vacates the first office, 'and his title thereto is thereby terminated without any other act or proceeding.'" Citing *Bryan vs. Cattell*, 15 Iowa 538.

It was further held that the office of mayor and justice of the peace are incompatible. On that question the court said:

"We think not, because the two offices are, in our judgment incompatible when viewed in the light of the public policy expressed in the statutes creating them and defining their powers and duties."

We have followed this case in the Citator and find no deviation from the rules hereinbefore expressed. We are, therefore, of the opinion that when the justice of the peace accepted the office and qualified for mayor the office of the justice of the peace became ipso facto vacant, and that the board of supervisors should proceed under Section 1152 (4) to fill the vacancy.

TAXATION: A local board of review does not have authority to correct assessments of real estate at their meeting in April in the year when real estate is not assessed.

April 27, 1922. *County Attorney, Independence, Iowa:* We are in receipt of your letter under date of April 26, 1928, requesting an opinion of this department on the following questions

A property was assessed in 1927 at a value of one thousand dollars. The law provides that the 1927 assessment of real estate carry over and be the valuation of 1928. It is discovered that the assessor made an error in putting the valuation on the roll in 1927 and that the valuation should have been one hundred dollars instead of one thousand dollars.

Can the Board of Review at their meeting the first of April, 1928, lower or correct this valuation?

We find no statute which would authorize the Board of Review to correct an assessment of real estate in the year following that which the assessment was made.

We are, therefore, of the opinion that local Boards of Review do not have authority to correct assessments of real estate at their meeting in April in the even numbered years when real estate is not assessed.

COUNTIES—BOARD OF SUPERVISORS—SCHOOL FUND MORTGAGE: Counties may purchase at execution sale property sold under school fund mortgage foreclosure for county purposes.

May 1, 1928. *County Attorny, Fort Dodge, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

Is it within the authority of the board of supervisors of a county to purchase real estate under foreclosure of a school fund mortgage at execution sale and use the same for county purposes, to-wit, as storage for equipment owned by the county and used for the purpose of highway improvements?

The powers and duties of the board of supervisors are prescribed by statute. It is provided by statute, Section 5130, (12), Code of Iowa 1927, as follows:

"The board of supervisors at any regular meeting shall have power:

* * * "12. To purchase for the use of the county any real estate necessary for county purposes. * * *"

It is then further provided by statute, Sections 10246-9 of the Code, in substance, that the board of supervisors whenever it is necessary to secure the state or county from loss to take real estate on account of a debt by bidding the same in at execution sale or otherwise and that the conveyance shall vest in the grantee as complete a title as if it were a natural person; that such property shall be bid in if for the county by the county attorney; and that the cost accrued shall be paid from the county treasurer.

We are of the opinion that the statute first cited above gives the board the power to purchase and if it has the power to purchase it could, of course, purchase at execution sale. There is, however, the additional power granted in the statute cited secondly above where it is necessary to bid at execution sale where there is a debt. Since this is a school fund mortgage foreclosure the county must protect its general fund by bidding because any deficiency is required to be supplied from the general fund of the county. Section 4505 of the Code.

We are therefore of the opinion that the board of supervisors has the power to purchase at execution sale property under school fund mortgage foreclosure and that the title to the real estate should be taken in the name of the county. The title then vests in the county as fully and as completely as though the purchaser were a natural person.

SCHOOLS AND SCHOOL DISTRICTS: Authority to levy a tax must be specifically stated in ballot submitted to electors. School district may erect school buildings if authorized by the people if the money is on hand although the proposition stated does not authorize the levy of a tax.

May 2, 1928. *Department of Public Instruction:* This will acknowledge receipt of your letter of recent date in which you set out the following facts:

A school board submitted the following proposition to the electors at the annual election:

"Do you favor a building program not to exceed five years for the purpose of building five new schoolhouses in Sugar Grove Township, the anticipated amount to be expended on each house not to exceed three thousand dollars?"

The proposition received 44 votes for and 40 votes against it.

The ballots were not kept under lock and key and about three weeks later were voluntarily recounted by three members of the board at which time it was found that there were forty ballots for the proposition and forty-three against it.

Upon this statement of facts you request the opinion of this department upon the following questions:

1. "Would the favorable vote on the above proposition authorize the board of this school township to estimate and certify a tax of $3,000 each year for a period of five years for the purpose of erecting and equipping five schoolhouses?

2. "Would the voluntary recount have any effect upon the election?"

The laws relating to the submission of a proposition at an election to authorize the levy of a tax have been by the courts strictly construed. This is contrary to the general rule that the intent of the voters may be ascertained by a liberal construction of the proposition as submitted. In the proposition submitted there was no mention of the levy of a tax or of delegating to the board of directors the power to certify a tax or the board of supervisors to make such levy. It is therefore our opinion that this proposition was not sufficiently stated to authorize the levy of a schoolhouse tax in order to build school buildings. It would, we believe, authorize the board to build the buildings if the funds were on hand; therefore, the board may proceed with the building this year under the proposition as adopted by the electors.

The count of the ballots by the election board is final unless a contest is instituted. This count cannot be overturned except upon the grounds of fraud or other misconduct of the election board. A false report on the election would, of course, be such misconduct as would sustain a contest on the election if proven. However, the fact that upon a voluntary recount made three weeks afterwards a different result was found, would not affect the finding of the election board especially in view of the fact that the ballots were not kept under lock and key.

We are, therefore, of the opinion that upon the facts stated the recount would not in any way affect the election.

POLICE POWER—CITIES AND TOWNS: A city or town council has the power to pass an ordinance regulating the keeping of bees within the corporate limits, such an ordinance being a proper exercise of the police power.

May 3, 1928. *County Attorney, Logan, Iowa:* We are in receipt of your letter under date of May 1, 1928, requesting an opinion of this department on the following question:

Has the city or town council the power as a police regulation or otherwise

to enact an ordinance prohibiting the keeping of bees within the corporate limits, of such city or town?

We have been unable to find any statute applying to this question nor have we found any cases. It is, however, our opinion that bees might become a nuisance and the same might be abated by a civil action.

We are of the opinion that a city or town council might properly pass an ordinance regulating the keeping of bees within the corporate limits of such city or town and that such an ordinance would be a proper exercise of the police power providing, of course, that such regulation was a reasonable one.

SCHOOLS AND SCHOOL DISTRICTS: School treasurer must live in and be a qualified voter of the school corporation.

May 3, 1928. *County Attorney, Atlantic, Iowa:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following proposition:

"Can a school treasurer be elected or appointed to the office of school treasurer when he is not a resident or qualified voter of the school district?"

It is provided by statute, Section 4213, Code of Iowa 1927, as follows:

"A school officer or member of the board shall, at the time of election or appointment, be a qualified voter of the corporation or subdistrict."

A treasurer is, without question, a school officer and would come within the above classification.

The provisions governing the election of treasurer in a district composed in whole or in part of a city or town are contained in Section 4200 of the Code and no exception is made of the treasurer. The provisions governing the appointment of the school treasurer in other districts are contained in Section 4222 of the Code wherein no exemption is made as to the residence of the treasurer.

We are, therefore, of the opinion that the statutory requirement that all school officers must be qualified voters of the district applies to the school treasurer.

CRIMINAL LAW: The mortgagor of an automobile must have a felonious intent to conceal or destroy the property and act wilfully in that respect before he is guilty of violating the statute in regard to removal of mortgaged property from the state.

May 3, 1928. *County Attorney, Burlington, Iowa:* Confirming our telephone conversation in reply to your telegram of the 27th, in which you inquire:

"'A' buys car, mortgaging to 'B', the seller. 'A' leaves state without consent of 'B'. 'A' is located in Washington state. Does mere removal from state constitute offense under 13037?"

The statute you refer to reads as follows:

"If any mortgagor of personal property or purchaser under a conditional bill of sale, while the mortgage or conditional bill of sale upon it remains unsatisfied, wilfully and with intent to defraud, destroys, conceals, sells, or in any manner disposes of the property covered by such mortgage or conditional bill of sale without the written consent of the then holder of such mortgage or conditional bill of sale, he shall be guilty of larceny and punished accordingly."

The only decision applicable to the question you submit is that of *State vs. Julien*, 48 Iowa, 445, and the exact proposition is not raised in that case. What the court says is only dictum. The prosecution in the cited case arose under this very statute, but the defendant has disposed of the property. The court,

in regard to the removal of the property from the county where the mortgage was given, at page 446, said:

"We do not understand that the defendant would be guilty if he openly, and in the usual and ordinary course of business, removed the property from Plymouth county. The mortgage does not prohibit such a removal, and in the absence of such a provision such a removal would not be a concealment or disposal of the property. What the effect of such a provision would be we do not determine. By the terms of the mortgage in question the only effect of a removal of the property from the county is to give the mortgagee the right to take possession, and sell the property before the debt becomes due."

From the language contained in the cited case and a reading of the statute, we believe it plain that the mortgagor must have a felonious intent to conceal or destroy mortgaged property, and must act wilfully in that respect in order to be guilty of the violation thereof. We are of the opinion that the mere removal from the State, in the absence of any other showing, would not be sufficient to constitute a violation of this statute.

BUILDING AND LOAN ASSOCIATION — CONTRACT OF MEMBERSHIP—CONTRACT TO BORROW: Contract to membership and contract to borrow of a building and loan association are separate and independent contracts. The articles of incorporation and by-laws of a building and loan association are part of the contract of a member of such association but are not a part of the contract to borrow unless specifically so made.

May 4, 1928. *Auditor of State:* We are in receipt of your letter under date of April 13, 1928, requesting an opinion of this department on the following questions:

1—Is the contract of membership and the contract to borrow from a building and loan association to be construed as one contract or are they to be construed as separate contracts each wholly independent of the other?

2—If the contract of membership is to be construed independently of the contract to borrow what is the contract of membership?

3—If the contract to borrow is one contract independent of the contract to become a member what is the contract?

4—If a member of a building and loan association borrows money from said association at a rate of interest fixed in accordance with the articles and by-laws of said association can the association at some future date raise or increase the rate of interest by amendment to the articles or by-laws and thereby increase the rate over and above that which the borrower had originally agreed to pay? Or does the borrower have such a contract with the association that it can be changed or altered in any respect without his consent by amendment to the articles or by-laws?

5—Would a provision in the notes and mortgages of a building and loan association to the effect that the rate of interest provided for in said note and mortgage might be raised or lowered from time to time, in accordance with the terms and conditions of the articles of incorporation and by-laws, and to the effect that the borrowing member agrees and consents that the rate might be changed, provided the same would not exceed the maximum of 8%, be legal?

1.

From an examination of Chapter 417 of the Code of 1927 it would appear that building and loan associations are organized for two main purposes, first, to loan money to its members under such terms, conditions and securities as the articles of incorporation and by-laws provide. Second, to offer an investment in which small investors may invest their savings.

One may become a member of such association without becoming a borrower. Or he may become a member and then may become a borrower. Membership

is pre-requisite to borrowing but borrowing is not a pre-requisite to membership. The membership contract is one thing and the borrowing contract is another. That is, they are both independent and separate contracts.

2.

When one becomes a member of such association his contract consists of the application and his certificate of stock or membership subject to the terms and conditions of the articles of incorporation and by-laws of the said association as they existed at the time the contract was consummated.

This is the general rule as applied to membership in any corporation. That is, the contract of a stockholder in any corporation is made subject to the terms and conditions of the articles of incorporation and by-laws. A member is presumed to have knowledge of the articles of incorporation and by-laws of the company of which he is a member and is, therefore, bound thereby. Our own Supreme Court has so held in the case of *Walsh vs. The Aetna Life Insurance Company*, 30 Iowa, 144.

The presumption that the members or stockholders of the corporation have knowledge of the articles of incorporation and by-laws is not always and invariably regarded as conclusive. It has been held that such presumption is rebutted in the case of a member by proof that the corporation itself gave to him by-laws other than those in force. Thus a person becoming a member of a loan association is entitled to treat the by-laws handed to him exclusive of all others which the association has adopted, and in the absence of notice is not bound by notification thereof which appear merely in the association's records.

If the certificate which the corporation issues to its members contains a copy of the articles of incorporation together with the by-laws and a statement to the effect that the certificate constitutes the contract between the corporation and its members, and no right is reserved by the corporation to amend, alter or change either, then the corporation cannot affect the contract by subsequent amendments.

3.

When the member secures a loan from such association and thereby becomes a borrower the contract, as a borrower, consists of the application for the loan, the note and the mortgage securing the same. And if either the application, note or mortgage provides that the contract is made subject to the terms and conditions of the articles of incorporation and by-laws of such association then the borrower takes his contract subject to the terms and conditions of the articles of incorporation and by-laws as they existed at the time the contract was consummated.

4.

It does not follow, however, that the borrower will be bound by any amendment to either the articles or the by-laws that may be adopted thereafter. Whether he will be bound by any amendment to either the articles or by-laws or not will depend upon the terms of his contract. If the contract of the borrower provides that he shall be bound by the terms and conditions of the articles of incorporation and by-laws in force at the time his contract was consummated or which may be adopted at any time in the future, then the borrower would be bound by any amendment to either the articles or by-laws which might be adopted subsequent to the execution of the contract, for this then would be in harmony with his contract.

This rule has been adopted by our Supreme Court in the case of *Hobbs vs. Iowa Benefit Association*, 82 Iowa 111. Also in the case of *Carnes vs. I. S. T. M. Association*, 106 Iowa 281. The same rule was adopted by our Supreme Court in the case of *Field vs. Eastern Building and Loan Association*, 117 Iowa 185. The court there said at page 199, speaking through Justice Weaver,

"There is nowhere any reservation to the association of a right to modify such contract by an amendment to its by-laws nor any consent by the plaintiff to be bound by such amendment. This court has already held that in the absence of such express reservation on the one part and express consent on the other a change in the by-laws of a mutual association affecting its contracts with its members will not be given retroactive effect. * * * It is repugnant to every accepted definition of 'contract' that one party thereto shall be clothed with a right to repudiate its obligations in whole or in part, while holding the other to strict compliance with its terms; and if, as has been held, such anamalous right may be reserved, we are disposed to confine it to cases where the reservation is unequivocally expressed in the original undertaking".

While the Field case, above referred to, applied to the contract of membership it would, doubly apply to the contract to borrow, but if there was no provision in the contract to borrow to the effect that the articles of incorporation and the by-laws as they then existed and as they might exist in the future, should be a part of said contract, then of course, the terms and conditions of the articles and by-laws of such association would be no part of the contract to borrow and they would not be binding upon the borrower.

The member of the corporation when he makes a contract with the corporation as a borrower deals with the corporation as a stranger, so to speak.

From what has been said heretofore in this opinion it would necessarily follow that if the contract of the borrower had a provision in it in which the corporation reserved the right to raise or lower the rate of interest provided for in said contract at any time, in accordance with the terms and conditions of the articles of incorporation and by-laws, and to which the borrower consented and agreed to be bound thereby, then of course, this being a part of the borrower's contract the corporation could raise or lower at any time the rate of interest which the borrower agreed to pay, provided such rate would not exceed a maximum of 8%.

This is true for then the raising or lowering of the interest would be in harmony with the borrower's contract and any subsequent raising or lowering by the corporation would not be retroactive or conflict with the statutes.

COUNTIES—WORKMEN'S COMPENSATION INSURANCE: Counties cannot pay workmen's compensation insurance premium out of road or bridge fund.

May 4, 1928. *County Attorney, Perry, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

May the county board of supervisors legally pay the premium on workmen's compensation insurance for employees working on roads and bridges out of the bridge fund or the road fund?

The county road and bridge funds are special levies for certain specified purposes. Those purposes are specified in the statute and in the absence of a specific provision the premium on workmen's compensation insurance even of those employees who are working on road and bridge projects could not be paid out of such funds.

We have searched the statutes carefully and we fail to find any provision

which authorizes the payment of premium on workmen's compensation insurance out of the road fund. There is an additional reason why such premiums cannot be paid and that is that the obligation for caring for an injured person is a general obligation of the county since the county is the employer and is not an obligation of the road fund which has no separate existence from the county.

We are, therefore, of the opinion that the premium on workmen's compensation insurance for employees employed on road and bridge projects in the county cannot be paid from the county road fund or the county bridge fund, as the case may be, but that such premium must be paid from the general fund of the county.

LICENSES—ENGINEER: Non-residents given a reasonable time in which to comply with securing license.

May 4, 1928. *State Board of Engineering Examiners:* We desire to acknowledge receipt of your request of April 27 which is as follows:

"BE IT RESOLVED that the Attorney General be asked to advise the State Board of Engineering Examiners as to what can be done to correct the following condition: Some cities and counties in Iowa are employing as City or County Engineers, persons not registered to practice Engineering in Iowa. In some instances they are calling them 'Temporary City or County Engineers', but no time limit for securing registration is stipulated. Some definite steps should be taken to correct this abuse of the law, and require all cities and counties in the State of Iowa to see that their City or County Engineer is registered before occupying office."

In reply we will say that if the Temporary City or Temporary County Engineers to whom you refer in your request are and have been residents of the State of Iowa, they are violating the provisions of Chapter 89 and become liable for such violation and are subject to the penalty set up in Section 1875.

However, I presume that the difficulty has been caused from engineers coming into this state from other states and not having secured a license or becoming registered in Iowa. This is taken care of under the last provisions of Section 1876 which are as follows:

"This chapter shall not apply * * *, nor to any professional engineer or land surveyor from without this state until a *reasonable* length of time as prescribed by the rules of the Board shall have elapsed to permit the registration of such a person under this chapter, provided that, before practicing within this state he shall have applied for the issuance to him of a certificate of registration and shall have paid the fee prescribed in this chapter."

In view of the above quoted Section, we are of the opinion that the Board of Engineering Examiners should, in the event that they have not already done so, prescribe a rule setting out a reasonable length of time in which to permit the registration of an engineer coming into Iowa from some other state.

However, it is necessary that the applicant shall at once before practicing any engineering within this state pay the fee prescribed in Chapter 89; in the event that the Temporary Engineers have not already done so, they are practicing in violation of this statute.

It will be seen that the first requisite is the payment of the fee prescribed. They may then practice engineering temporarily for the reasonable length of time prescribed by the rules of the Board, after which time they would be violating the engineering statute.

ELECTIONS: In determining the last day for filing nomination papers for county officers the rule is to exclude the first (primary day) and count thirty days including the last, which falls on Saturday.

May 4, 1928. *Assistant County Attorney, Waterloo, Iowa:* In response to your request over the telephone with reference to the last day for filing nomination papers for county office, we made a careful study of the statutes and the opinions of the court and of this department with reference to the method of counting time to determine such last day.

We reach the conclusion that Saturday, May 5th, is the last day for filing nomination papers in the office of the county auditor for nominations for county offices at the primary June 4, 1928.

The rule for counting time is that the first day shall be excluded and the last included (Section 63, sub-section 23, Code of Iowa 1927). The date sought is a day thirty days prior to the primary date, June 4, 1928. Applying this rule then with June 4th as the starting point we exclude June 4th and count thirty days, which day falls upon May 5, 1928.

This has been the universal rule in this department since the primary law has been in effect. A like method of procedure has been adopted by the Secretary of State under advice of this department for the filing of nomination papers by candidates for state offices.

A similar construction has been placed upon the rule for filing for nominations for city officers where the fifteenth day falls on Sunday. In an opinion of this department rendered March 16, 1916, Attorney General Fletcher, then Assistant Attorney General, ruled that where the fifteenth day fell on March 12th, Sunday, that the last day for filing nomination papers for city offices was Saturday, March 11th.

We are therefore of the opinion that the last day for filing nomination papers for the primary election June 4th is Saturday May 5th.

TAXATION: Holder of tax sale certificate cannot pay subsequent taxes until delinquent; first half April 1st, second half October 1st.

May 4, 1928. *Auditor of State:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following propositions:

"1. Can the purchaser at tax sale pay subsequent taxes before same become delinquent?

"2. Under Section 7214, can the whole amount of taxes assessed be paid by the purchaser as soon as the first payment becomes delinquent, or must the subsequent taxes be paid in two installments?"

The amendment to the statute, Chapter 179, Acts of the Forty-second General Assembly, changed the date on which the penalty attaches to provide that the penalty should attach to the first half if not paid by April 1st and to the second half if not paid by October 1st.

The statute applies "in all cases" which makes it all inclusive and the holder of a tax sale certificate would be entitled to the benefits of its provisions and subject to the burdens thereof.

We are of the opinion that the holder of a tax sale certificate who pays the subsequent taxes would be entitled to collect all of the penalties to which the law subjects the owner if the owner does not pay the taxes. However, the owner, though the property has been sold at tax sale, has the right to pay the

taxes if he does so without prejudice to the holder of the tax sale certificate. Such holder is not prejudiced until the tax becomes delinquent and cannot, therefore, pay it until such time. Therefore, he would not be entitled to pay the first half of the taxes until that penalty would by law exist, to-wit, April 1st of each year, and the last half until October 1st of each year.

We are enclosing an opinion heretofore rendered which applies to the question submitted.

FISH AND GAME—COUNTY RECORDER—HUNTING AND FISHING LICENSE: County recorder has no authority to delegate to anyone, save and except his deputies, the authority to issue hunting and fishing licenses.

May 8, 1928. *County Attorney, Algona, Iowa:* We are in receipt of your letter under date of May 1, 1928, requesting an opinion of this department on the following question:

Has the county recorder the right to delegate the authority to individuals, other than his deputies, to issue hunting licenses, provided, of course, the individual accounts to the recorder for all licenses issued?

We refer you to that part of Section 1724 of the Code of 1927, which reads as follows:

"* * * The application shall then be presented to the county recorder who *shall issue* all hunting and fishing licenses. * * *"

It would seem from reading the above that the county recorder is the only one who is authorized to issue hunting and fishing licenses, and we do not find any other statute which would delegate him to authorize this power.

We are, therefore, of the opinion that the county recorder has no authority to delegate any individual, save and except his deputies, the authority to issue hunting and fishing licenses.

CORPORATIONS—ATHLETIC CLUB—BILLIARD HALL—MINORS: Where an athletic club is organized in accordance with Chapter 394 of the Code of 1927 for non-pecuniary profit and operates only a billiard hall it is a violation of 13219, but where the athletic club is in every sense of the word an athletic club and billiards are only an incident of the club it is not a violation of Section 13219.

May 8, 1928. *County Attorney, Sidney, Iowa:* We are in receipt of your letter under date of May 4, 1928, requesting an opinion of this department on the following question:

Whether or not one may incorporate as an athletic club in accordance with the provisions of Chapter 394 of the Code of 1927, and operate a billiard hall charging a membership fee of fifty cents and a monthly dues of fifty cents, which entitles the members to the privilege of playing pool and billiards at any time they desire without further cost. And whether or not male persons of the age of twelve or over, who are minors, can become members of such a club.

Corporations organized in accordance with the provisions of Chapter 394, Code of 1927, are non-pecuniary corporations, and if the particular corporation about which you write is collecting a membership fee and dues and the directors or incorporators are appropriating these dues and fees to their own use, then, of course, they are not operating as a corporation for non-pecuniary profit and would be violating the terms of Chapter 394 of the Code of 1927.

If the corporation was organized for the sole purpose of evading the ordinances of your city with respect to the operation of billiard halls then, of course, you could prevent the operation of the same.

If the corporation is a strictly non-pecuniary corporation and is in good faith operating an athletic club and has billiard tables along with its other equipment which may be used by its members, there perhaps would be some doubt as to whether or not you could prevent the operation thereof.

If the athletic club operates only a billiard hall and nothing else it is an attempt to evade the law. Of course, if it is strictly an athletic club and operating in good faith section 13219 would not apply to the minors. This section applies to billiard halls in the strictest sense of the word.

ELECTION—CANDIDATES—COUNTY SUPERVISORS—NOMINATION: In a county where supervisoral districts have been established a candidate for county supervisor is only required to have his nomination papers signed by ten qualified voters of such supervisoral district. This in accordance with Section 547 of the Code of 1927.

May 8, 1928. *County Attorney, Perry, Iowa:* We are in receipt of a letter from Mr. B. F. Pringey, County Auditor of your county, requesting an opinion from this department and inasmuch as we are not permitted to render opinions to anyone except state officials and county attorneys we are, therefore, addressing this opinion to you.

The question about which this inquiry was made is as follows:

Whether candidates for the office of county supervisor must have 2% of your county votes at the last county election on nomination papers or 2% of the supervisoral district from which he is to be elected, or whether it is only necessary to have ten signers as in the case of township officers.

We refer you to Section 547 of the Code of 1927. It would appear from reading this section that a candidate for an office to be filled by the voters of any sub-division of a county is required to have his nomination papers signed by only ten qualified voters of the sub-division.

We are, therefore, of the opinion that in a county where supervisoral districts have been established that a candidate for county supervisor is, therefore, only required to have his nomination papers signed by ten qualified voters of such supervisoral district. This for the reason that the supervisoral district is a sub-division of a county.

SCHOOLS AND SCHOOL DISTRICTS: Cannot operate a high school and charge tuition without approval of Department of Public Instruction; organization must be under absolute control of board elected by electors; but may be outside the territorial limitation of the school district.

May 8, 1928. *Department of Public Instruction:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following proposition:

Sharon Township, Johnson County, Iowa, has nine independent school districts. For the past few years district No. 5 has operated a high school financing it from the tuition received from pupils enrolled or rather, from the districts from which the pupils come, and voluntary contributions. This district desires to discontinue the high school and district No. 2 which adjoins district No. 5 on the north desires to continue the work in the building which is now located in district No. 5. This school has been financed by tuition of the students enrolled and not by public taxation directly placed upon the property in district No. 5.

Upon this statement of facts you submit the following inquiries:

"1. Is the high school organized and maintained in Independent District No. 5, as outlined by Mr. Leeper, legal?

"2. If legal, could the Independent District No. 2 assume the operation of the high school, and maintain it in a building outside the boundaries of its district?

"3. Would a high school maintained as outlined constitute a home district high school, so far as the outlying independent districts are concerned? In other words, could students from 1, 3, 4, 6, 7, 8, and 9 attend high school outside the township at the expense of their home district on the grounds that their home district did not maintain an approved high school?"

If the high school in district No. 5 has been maintained under the actual bona fide control of the board of that district and not by such board acting merely as an intermediary for or agent of a high school organization or association exercising a control over the discretion of the board, we are of the opinion that such school would come within the authority contained in Section 4267 of the Code which provides as follows:

"The board may establish graded and high schools and determine what branches shall be taught therein, but the course of study shall be subject to the approval of the superintendent of public instruction."

Unless it is so maintained it could not collect tuition from any of the other districts in the township, nor could it collect such tuition unless it has complied with the provisions of Sections 4275-6-7-8 of the Code relating to attending high school in another corporation. Any tax levied for the purpose of paying such tuition by the other districts in this township would be illegal and void.

Although it is entirely extraordinary, we know of no provision which would prohibit a school district from maintaining a school in a building outside the territorial limits of its own district.

In answer to your third inquiry, we shall say that there is no provision for the cooperation of independent districts in the operation of a high school. Therefore, the pupils in the other districts which you designate as districts No'd. 1, 3, 4, 6, 7, 8 and 9, could attend any other high school which would receive them and the district of their residence, whether it be 1, 3, or any other district, could be required to pay the tuition under Sections 4275-9 of the Code of Iowa 1927.

Answering Mr. Leeper's last question, we shall say that the power of the school board in the selection of teachers is entirely discretionary and no appeal can be taken from the consideration or failure of consideration of any particular teacher whether under contract or not at the time of the board's consideration.

BOARD OF SUPERVISORS—COUNTY AUDITOR—TAXATION: Board of Supervisors or the county auditor does not have power to correct the assessed valuation on property where the tax-payer has failed to appear before the Board of Review, and make objection, tax-payer having waived any right by not appearing to object to the value.

May 9, 1928. *County Attorney, Clinton, Iowa:* We are in receipt of your letter under date of May 7, 1928, requesting an opinion of this department on the following question:

"A Clinton county assessor assessed real estate, for the year 1927, at the value of $2,500.00. This assessment has gone through the proper channels and now exists as a properly assessed tax in the office of County Treasurer and County Auditor. The assessor now appears and makes written statement under oath to the effect that this property should have been assessed at the valuation of $1,000.00"

Do the Supervisors or County Auditor, or either, have the power under the statute to correct this mistake?

When property is assessed at an excessive value the statute provides that the taxpayer may appear before the Board of Review and make objection and that in the event that said taxpayer does not appear he waives any right to object to said value.

The property owner in the present case, not having appeared before the Board of Review in April, 1927, has waived any right to object to the value placed upon said property, and the Board of Supervisors or the County Auditor have no authority to grant such property owner any relief.

As authority for this we refer you to the case of *Polk County vs. Sherman*, 99 Iowa 60; 68 N. W. 562.

GRAVEL—LEASING OF LAND—BOARD OF CONTROL: The Board of Control may, with the approval of the Executive Council, lease to individuals property under its supervision for the purpose of taking gravel therefrom provided said gravel is to be used for public purposes, and provided that the taking of such gravel does not destroy the land so as to make the land unfit for the purpose for which it was acquired.

May 9, 1928. *Board of Control:* We are in receipt of your letter under date of April 28, 1928, requesting an opinion of this department on the following question:

Can the Board of Control, with the approval of the Executive Council, lease property under its supervision to an individual for the purpose of taking off the gravel; said gravel to be used by the State Highway Commission for primary road purposes?

We are of the opinion that the Board of Control, may, with the approval of the Executive Council, lease to individuals property under its supervision and control for the purpose of taking the gravel from said property, said gravel to be used by the Highway Commission for primary road purposes, provided, of course, the property leased is not now needed for the purposes for which it was acquired and provided that the purposes for which it is leased does not interfere with or destroy the property to such an extent that it cannot be used in the future for the purposes for which it was acquired, and provided further the use for which said property is to be subjected is for the benefit of the public and the state in general.

COUNTIES—ANTICIPATION OF REFUND PROVIDED FOR IN CHAPTER NO. 3 OF THE ACTS OF THE 42ND GENERAL ASSEMBLY: Counties may issue certificates in anticipation of refund due the county in accordance with the provisions of the above named chapter.

May 9, 1928. *County Attorney, Charles City, Iowa:* We are in receipt of your letter under date of May 5, 1928, requesting an opinion of this department on the following question:

Chapter Three, Acts of the 42nd General Assembly, Special Session, provides for refunds to the counties of all amounts paid out of the county road or bridge funds since April, 1919, for right of way, culverts and bridges, and also provides that the Board of Supervisors may issue certificates anticipating the amount to be received from the primary road fund.

Our county is indebted up to the 5% constitutional limitation. The question now arises, in view of this fact, as to whether this county may issue said certificates, that is, would the issuance of said certificates create a debt within the meaning of constitutional limitation?

To begin with the provisions of the Tuck law, Section 5258, of the Code of 1927, do not apply to the issuance of the certificates contemplated for the reason that under paragraph 8 of Section 5259, of the Code of 1927, such expenditures are specifically excepted. Under Chapter Three of the Acts of the 42nd General Assembly, Special Session, counties are specifically authorized to issue such certificates in anticipation of the refund. The only question left is whether or not the issuance of such anticipatory certificates creates a debt within the meaning of constitutional limitation.

We are of the opinion that the issuance of such certificates does not create a debt within the meaning of the constitutional limitation for the reason that the funds which are being anticipated are in praesenti and there is no general obligation of the county created by the issuance of such certificates.

BOARD OF CONSERVATION—FISH AND GAME: Under Section 1799-b1 of the Code of 1927, the board of conservation is authorized to make such rules and regulations as are necessary to regulate or restrict the use by which the public may make of any state park or water under the jurisdiction of the board.

May 9, 1928. *The Board of Conservation:* We are in receipt of a letter under date of April 15, 1928, from William E. G. Saunders, requesting an opinion of this department on the following question:

Can pole and line fishing and boating be prohibited on lakes under the control of the Board of Conservation?

We refer you to Section 1799-b1 of the Code of 1927. It would appear from reading that section that the Board of Conservation is specifically authorized to make rules and regulations such as are necessary to regulate or restrict the use by the public of any state parks or state owned property or water under the jurisdiction of the Board.

We are, therefore, of the opinion that the Board of Conservation may adopt such rules and regulations restricting the use to which the Round Lake may be subjected by the public.

ADOPTION—CLERK OF DISTRICT COURT—FEES: Copy of decree required under Section 10501-b5 charged as other certified copies.

May 10, 1928. *County Attorney, Mapleton, Iowa:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the construction of Section 10501-b5, particularly, with reference to whether the clerk is entitled to charge a fee for the delivery of the decree provided for in said section.

The cited statute provides in part as follows:

"* * * The clerk shall deliver to the foster parents a certified copy of the decree. * * *"

It is provided by statute, Section 1220, Code of Iowa 1927, as follows:

"Any officer legally called on to perform any of the following services, in cases where no fees have been fixed therefor, shall be entitled to receive:

"1. For drawing and certifying an affidavit, or giving a certificate not attached to any other writing, twenty-five cents.

"2. For affixing his official seal to any paper, whether the certificate be under seal or not, thirty-five cents.

"3. For making out a transcript of any public papers or records under his control for the use of a private person or corporation, or recording articles of incorporation, for every one hundred words, ten cents."

We are of the opinion that this section would apply to the certified copy of the decree which the clerk is legally called upon to deliver to the foster parents of such adopted child and that the fee should be ten cents per one hundred words of the copy furnished plus the fee of thirty-five cents for the certificate.

MOTOR CARRIERS—PRIMARY ROADS—LICENSE: License tax should be placed in the primary road fund for that part which is required by the statute to be expended upon primary roads. This fund is under the direction and supervision of the State Highway Commission.

May 10, 1928. *Iowa State Highway Commission:* We wish to acknowledge receipt of your favor of the 4th in which you request our opinion as follows:

"Pursuant to the provisions of Chapter 252-A2 the Railroad Commission is collecting motor vehicle carrier tax running into a considerable amount, and this money is being paid over to the county treasurers in accord with Section 5105-a54-55.

"Section 5105-a56 reads:

"'Such funds shall be used by each county board of supervisors for the maintenance and repair of highways over which motor carriers operate.'

"Our thought is that since practically the entire mileage of roads traversed by motor carriers is on the primary road system, and since the Highway Commission maintains not only primary roads but also the extensions through cities and towns, this tax should be remitted by county treasurers to the Highway Commission, credited to the primary road fund, and used to defray in part the cost of maintenance of the roads and streets over which these motor carriers operate.

"We will be pleased to have a ruling from your office which will serve to advise both the county treasurers and the Highway Commission as to the procedure we should follow in the handling and use of these funds derived from the M. V. C. tax."

Section 4755-b36, Code, 1927, provides:

"The powers and duties of the board of supervisors with respect to the construction and maintenance of primary roads are hereby transferred to the state highway commission."

Under the provisions of this statute all the duties of the board of supervisors in respect to primary roads is now vested in the Highway Commission. The primary road fund is under the control of the Highway Commission for the purposes stated in the statute.

The motor carrier license tax remitted to the counties under the provisions of Chapter 252-A2 of the Code, 1927, must be expended upon the roads over which the carriers paying the tax operate. If these roads, or any part of them are primary roads, the proper proportion of this tax is to be expended upon such primary roads for their maintenance and repair. As we have pointed out, the primary roads are under the sole supervision of the State Highway Commission, who is charged with the administration and expenditure of the primary road fund. We are, therefore, of the opinion that the part of the motor carrier license tax which is required by the statute to be expended upon the primary roads should be placed in the primary road fund and expended under the direction and supervision of the State Highway Commission. That part of this license tax which is not required to be expended upon primary roads would be administered by the board of supervisors, under the provisions of Chapter 252-A2 of the Code, 1927.

SELLING OR SHIPPING OF PARROTS, CANARIES OR OTHER CAGE BIRDS: Under Section 1777, of Code of 1927, it was the intention of the legislature to prevent evasion of violation of the game laws with respect to wild birds and, therefore, to prevent the importation from any country of birds which were native to any part of the United States.

May 11, 1928. *County Attorney, Cedar Rapids, Iowa:* We are in receipt of your letter under date of May 9, 1928, requesting an opinion of this department on the following question:

What construction should be placed on Section 1777 of the Code of 1927, which section reads as follows:

"This chapter shall not be construed to forbid the selling or shipping of parrots, canaries or any other cage birds which are imported from other countries *or* not native to any part of the United States."

We are of the opinion that the word "or", which is in italics in the section set out above, is not used in said section as a disjunctive but as a conjunctive, that is with the same force and effect as if *and* were used instead of "or." This for the reason that it was clearly the intention of the legislature to prevent the evasion or violation of the game laws with respect to wild birds and, therefore, to prevent the importation from any country of birds which were native to any part of the United States.

If birds which were native to the United States were permitted to be imported from other countries it would be a very easy matter to evade the law, for all that would be necessary to defeat any prosecution would be to state that the birds that were caged had been imported.

FISH AND GAME—GAME BREEDER'S LICENSE: Section 1706, Code of 1927, was intended to govern and regulate the possession, propagation and sale of game birds and animals at all seasons of the year and no one is authorized to propagate or sell game birds without such a license. Game birds remain such so long as they retain any of the distinctive features of the species regardless of how long they may have been domesticated.

May 11, 1928. *Fish and Game:* We are in receipt of your letter under date of April 30, 1928, requesting an opinion of this department on the following questions:

"1. This department is authorized under Section 1706, Code, 1927, to issue Game Breeder's Licenses under certain conditions. We feel that the intent of this section is to regulate the possession, propagation, sale, etc., of game birds and animals at all seasons of the year. Is this correct?

"2. Would not a license be necessary for the possession of wild mallard ducks or any other wild species, even though they are not disposed of but merely possessed (a) at all seasons of the year? (b) when used for decoy purposes?

"3. Would a license be necessary regardless of the number of years stock was in possession and domesticated?

"4. If wild stock is crossed with tame stock, at what point can it be considered as tame stock?"

Section 1706 of the Code of 1927, provides as follows:

"Any person desiring to engage in the business of raising and selling game birds or animals in a wholly inclosed preserve or inclosure, of which he is the owner or lessee, may make application in writing to the state game warden for a license so to do. The state game warden, when it shall appear that such application is made in good faith, shall upon the payment of an annual fee of two dollars issue to such applicant a breeder's license permitting him to breed and raise any of such game birds or animals on such preserve or inclosure, and to sell the same for breeding or stocking purposes on or within such

preserve or inclosure, and kill, use, or sell the same for food. Such license must be renewed annually upon payment of the fee as above provided, and the possession of such license shall exempt the licensee from the penalties of this chapter for killing, having in possession, or selling such game birds or animals, or any of them; provided such licensee shall raise or breed such birds or animals upon or within such preserve or inclosure, or secure the same by purchase from without the state, or from a licensed breeder within the state."

1.

We are of the opinion that Section 1706, of the Code of 1927, was intended to govern and regulate the possession, propagation and sale of game birds and animals at all seasons of the year. We find no section of the game laws which would authorize the propagation or sale under any other conditions than those contained in Section 1706.

2.

We are of the opinion that in order to have possession of game birds or animals at any other time than during the open season on game birds and animals it would be necessary for the possessor thereof to have a license, in accordance with the provisions of Section 1706, and before anyone would be authorized at any season of the year to propagate and sell game birds or animals it would be necessary to have such a license.

3.

It would be necessary for one who desired to propagate and sell game birds or animals to have a license before he would be authorized to do so, this regardless of the number of years such game birds or animals had been in his possession, and regardless of how tame or domestic such game birds or animals might be.

Game is generally defined to mean animals or birds ferae naturae, or wild by nature. It makes no difference that said animals or birds were raised in captivity and have become tame, if they are naturally wild they are game.

Section 1704 of the Code of 1927, places the title to all game animals and birds in the state, and it may be said that the recognized doctrine is that the title to all game belongs to the state in its sovereign capacity and that the state holds this title in trust for the use and benefit of the people, and that the legislature has the right to control the killing, taking, possession, sale and use of all game, and it is also generally recognized that while game, animals or birds ferae naturae belong to the state, yet when they are re-claimed by the art and power of man they are then the subject of property and a property right may be acquired. There is no property right in game, animals or birds, until they have been subjected to the control of man. If one secures and tames them they are his property; if he does not tame them, they are still his so long as they are kept confined and under his control.

If they are permitted to escape the control of man then the property right in them ceases. Of course, no one gains any property right in game birds or animals which animals have been taken from the wild during the closed season, as the statutes forbid possession of such animals and birds during any other time than the open season, except when such animals or birds are possessed in accordance with the provisions of Section 1706.

For authority for what has been said heretofore in this opinion we refer you to the following authorities:

Graves vs. Dunlap, 152 Pacific, 532;
State of Missouri vs. Webber, 102 S. W. 955;
10 L. R. A. (n. s.) 1155; also see note 10 L. R. A. 1155.

4.

It is almost impossible for anyone to say at just what point game which has been crossed with tame stock may be considered as tame or domestic stock. It is largely a question of fact. The general rule which is ordinarily used as a test applied to such cases, is that so long as the game retains the distinctive marks of the original breed of game, then it is to be considered as game which is wild by nature. Caution, however, should be used in applying this test, and if the birds or animals are of a breed which is not native to this country, but are imported, it should first be determined whether or not such animals or birds are game birds or animals in the country from which they came, and if they are not, of course the provisions of the game laws do not apply.

For other cases discussing the matters herein concerned see

20 Annotated Cases, 619;
12 American and English Annotated Cases, 382 (also see note at 386).

CITIES AND TOWNS—TAXATION—PARK COMMISSIONERS—ANTICIPATORY CERTIFICATES: Boards of park commissioners do not have authority to issue anticipatory certificates in contemplation of the tax levy authorized under Section 5792 of the Code of 1927.

May 11, 1928. *County Attorney, Clinton, Iowa:* We are in receipt of your letter under date of May 8, 1928, requesting an opinion of this department on the following question:

Has the Board of Park Commissioners authority under the statutes to issue tax anticipatory certificates in anticipation of taxes which have been levied?

We call your attention to Section 5795, Chapter 293, of the Code of 1927. It will be noted from reading this section that the Board of Park Commissioners may issue park certificates or bonds in anticipation of the additional authorized tax where the electors have so authorized the levy of the same in accordance with the provisions of Section 5793. It would, therefore, follow that unless the park commissioners were authorized to issue anticipatory certificates in contemplation of the tax levy authorized by Section 5792 that said Board would not have authority to so do.

We find no statute which would authorize such a procedure and are, therefore, of the opinion that Boards of Park Commissioners do not have authority to issue anticipatory certificates in contemplation of the tax levy authorized under Section 5792.

We call your attention, however, to Section 5800, of the Code of 1927, which section authorizes the issuance of bonds in payment of real estate under certain conditions therein named.

SCHOOLS AND SCHOOL DISTRICTS: Have same right to purchase musical equipment as equipment for chemistry, physics, biology, or any other subject.

May 17, 1928. *Department of Public Instruction:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

"Does a school board have the same authority to furnish equipment for music orchestra, etc., that it has to purchase equipment for chemistry, physics, biology, or any other subject the board places in the curriculum?"

The Supreme Court of this state in the case of *Bellmeyer vs. School District*, 44 Iowa 564, had under consideration the question of whether or not the board of the Independent School District of Marshalltown, Iowa, had the power to

bind the district by a contract for the purchase of a musical instrument, in that instance an organ for the school. At that time the statute did not require the teaching of music in the schools. In its opinion the court said:

"We are of the opinion that, under these provisions of the statute, the independent district, defendant, had the power to determine that music should be taught in the schools as a branch of education, and as it appears from the record before us that a music teacher was employed, and all of the schools but one were supplied with a musical instrument, we must presume, in the absence of evidence to the contrary, that the proper order and direction were made.

"Having found that the power existed, it will certainly be conceded that a musical instrument is properly connected with a musical education so as to be denominated apparatus in the language of the statute above quoted."

In the cited case no record of the action of the board was made but the court held that this would not invalidate the contract as the organ was actually placed in the school room and put in use by the district.

The foregoing case was cited with approval in *Ries vs. Hemmer, et al.*, 103 N. W. 346 at 347.

We have searched the Citator for cases involving this question but find that the opinion of the court in the Bellmeyer case has not been reversed, modified, or distinguished upon this point.

It is further provided by statute, Section 4250 as follows:

"The board shall prescribe courses of study for the schools of the corporation."

Under these statutes and decisions we are of the opinion that the board of education of a school district has the same power to purchase equipment for instruction in music, both vocal and instrumental, if these subjects are by the board included in its course of study that it has to purchase equipment for chemistry, physics, or biology or any other subject which the board has included in its curriculum.

DRAINAGE DISTRICT—BOARD OF SUPERVISORS: Board of Supervisors may purchase mill dam in order to remove obstruction from ditch.

May 18, 1928. *County Attorney, Newton, Iowa:* I desire to acknowledge receipt of your request of May 16 which is as follows:

"Drainage District No. 17, of Jasper County, Iowa, has been, within the last two years, fully established, under Chapter 353 of the Code of Iowa; it is about 25 miles in length, extending from near the southeast corner of said county northwesterly, through the towns of Lynnville and Kellogg, Iowa, and straightens, widens, deepens, and changes North Skunk river; said Drainage Ditch consists of one main ditch only, without any laterals; there is a mill dam in said river and drainage ditch at Lynnville, Iowa, some two miles north from the southern end of said drainage ditch, this mill dam obstructs and slows up the flow of water through said drainage ditch and backs up the water quite a distance above this mill dam; the ditch is gradually filling up with dirt and silt for a considerable distance north of the mill dam, and this filling up and backing up of the water and silt renders the ditch inefficient for side-drainage and tiling and other drainage purposes, for such distances above said mill dam; there is much complaint of these matters by said land owners, and the mill owner is also complaining of the effect thereof upon his flow of water; it appears that this mill dam can be bought and destroyed; the funds in said Drainage District are now probably sufficient to do this; and the said Board of Supervisors wishes to know: Has the Board of Supervisors of Jasper County, Iowa, the authority and power, under above conditions, under Code, Sections 7556-7560, or other Drainage Laws of Iowa, to buy and destroy said mill dam, to render said Drainage Ditch efficient for better service, with the said drainage funds now on hand and not otherwise needed, or by said funds and other funds from a new assessment over said entire Drainage District?"

In reply we refer you to Section 7569, Code of Iowa 1927, which reads as follows:

"Removal of obstructions. The board shall cause to be removed from the ditches, drains, and laterals of any district any obstructions which interfere with the flow of the water, including trees, hedges, or shrubbery and the roots thereof, and may cause any tile drain so obstructed to be relaid in concrete or any other adequate protection, such work to be paid for from the drainage funds of the district."

Under the provisions of Section 7421 the Board of Supervisors are given jurisdiction, power, and authority to straighten, widen, deepen or change any natural water course; and it is evident that under Title 17, Code of 1927, every contingency was provided for to the best of the ability of the legislature so far as it pertains to levee and drainage districts.

We are, therefore, of the opinion that under the general authority of Title 17 and special authority as outlined in Section 7569 the Board of Supervisors would be authorized to purchase a mill dam and remove the same where it constituted an obstruction to a drainage ditch.

SCHOOLS AND SCHOOL DISTRICTS: School board cannot delegate authority to the superintendent to sign contracts for the district.

May 19, 1928. *Department of Public Instruction:* This will acknowledge receipt of your letter of recent date in which you request an opinion of this department upon the following propositions:

"1. Does a school board have authority under the law in this state to delegate to its superintendent in lieu of the president of the board the power and authority to sign a written contract with a teacher?

"2. Would a written contract signed by the superintendent and teacher, but not by the president of the board, be binding upon the teacher, and have the effect of making any contract she might enter into with another board for the same period of time invalid, as provided for in Section 4229?"

It is provided by statute, Code of Iowa 1927, Section 4229, as follows:

"Contracts with teachers must be in writing, and shall state the length of time the school is to be taught, the compensation per week of five days, or month of four weeks, and that the same shall be invalid if the teacher is under contract with another board of directors in the state of Iowa to teach covering the same period of time, until such contract shall have been released, and such other matters as may be agreed upon, which may include employment for a term not exceeding the ensuing school year, except as otherwise authorized, and payment by the calendar or school month, signed by the president and teacher, and shall be filed with the secretary before the teacher enters upon performance of the contract."

It will be noted that this section specifically requires that the contract shall be signed by the president of the board and the teacher. The contract must then be filed with the secretary and while it is not required to be signed by him specifically, such officer usually signs the contract.

We are of the opinion that this statute is mandatory and that a contract signed by the superintendent would not be a valid contract and that such contract would not come within the provisions which would render it a bar to a teacher's entering into a contract with another board of directors in the state of Iowa.

APPROPRIATIONS: General Budget under Chap. 275, 42nd G. A. should be set up on yearly basis. Unexpended balance from first year may be expended in second year of biennium.

May 21, 1928. *Auditor of State:* You have requested the opinion of this department upon the following proposition:

"Under Chapter 275 of the 42nd General Assembly regulating appropriations, it will be noted that the appropriation was made for the biennium beginning July 1, 1927, and ending June 30, 1929. The last part of Section 1 of this chapter states 'in the following manner and have the following uses to-wit:' and at the heading of each department it specifies that for each year of the biennium there is a certain amount of money appropriated for the department.

"The question comes up now that in setting up the accounts on our books, shall we use the annual appropriation of the amount specified for one year which will be July 1, 1928, or shall we carry the unexpended balance for the year 1927 forward and credit the appropriation for the year 1928, using the unexpended balance and the new appropriation as a total to be expended in the fiscal year beginning July 1, 1928, and ending June 30, 1929? Or should the balance for the year 1927 simply stand as an unexpended balance and if it is needed by the department, forward it by transferring under Section 55 of Chapter 275, 42nd General Assembly, to the particular appropriation that the department specifies?"

You are advised that it is the opinion of this department that you should set up the accounts provided in Chapter 275, Acts of the Forty-second General Assembly, on a yearly basis, and that the balance of the first year of the biennium, if any is left at the expiration thereof, should stand as an unexpended balance which may be used if needed during the second year of the biennium.

ABSENT VOTERS—BALLOTS—ELECTION:

May 22, 1928. *County Attorney, Red Oak, Iowa:* We desire to acknowledge receipt of your oral request as follows:

"May application and ballot be obtained by a resident voter for the use of some absent voter?"

In reply we desire to quote Section 936, Code of Iowa, 1927.

"Application mailed with ballot. If the voter is absent from the county and requests said application by letter, or someone makes the request for him, after the ballots are printed, then the auditor may send him both the application and ballot at the same time."

It is the opinion of this department that any qualified voter may make a request upon the county auditor for blank forms of application for ballot to be used by some absent voter, and upon such request the county auditor give to the party making the request both blank application and the blank ballot, and upon their return the county auditor should see that both the application and the ballot are properly filled out and verified by the necessary affidavit as by statute provided.

Under the provisions of Section 930:

"Said officers shall furnish to any qualified voter of the county, city, or town of which they are such officers, blanks on which to make application for such ballot"

Any citizen would be entitled to secure blanks from the county auditor and distribute them among those who would be unable to attend the election and who might qualify under the provisions of Section 927.

The parties to whom such applications were given should after filling them out mail or send them to the county auditor who would then mail a blank ballot to the applicant.

WORKMEN'S COMPENSATION: Deputy sheriff acting without his county and not in pursuit of a fugitive fleeing from the county not entitled to workmen's compensation.

May 23, 1928. *Industrial Commissioner:* This will acknowledge receipt of your request for an opinion upon the question whether or not the state should accept obligation of the above named claimant, a deputy sheriff who was injured while attempting to arrest a person for whom he had a bench warrant, the attempt being made outside of his own county and without the assistance of a peace officer with power to act therein.

According to the sworn statement of the sheriff the claimant, a deputy sheriff, accompanied the sheriff who had a bench warrant for one, Harry Phillips, who had been indicted by the grand jury of Louisa County. Said deputy sheriff accompanied the sheriff to Muscatine County, Iowa, and there, without calling to his aid or assistance a peace officer with power to act in Muscatine County, Iowa, attempted to arrest said Phillips and in the attempt suffered the injury for which compensation is sought.

These facts are supported by the sworn statement of George W. Oakes, Sheriff of Louisa County.

The powers of a sheriff or his deputy to act are limited to the county for which he is elected under the provisions of Section 13405-b1, Code of Iowa 1927. We are, therefore, of the opinion that this officer was not injured in the line of duty as is required for compensable cases for public offices under the provisions of Section 1422, Code of Iowa 1927.

SCHOOLS AND SCHOOL DISTRICTS: Cannot discriminate in the matter of tuition charged between pupils resident and pupils non-resident of the state of Iowa.

May 24, 1928. *Department of Public Instruction:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

May a school board legally charge an Iowa school corporation that did not maintain a high school $12.00 per month under the statute for pupils attending school in said high school and at the same time charge individuals who reside in the state of Missouri $5.00 or $8.00 per month for the same school advantages?

While there is no precedent upon such a proposition we are clearly of the opinion that a school corporation cannot discriminate in the rate of tuition which it charges pupils for the same school advantages. This would be true whether the discrimination worked in favor of pupils who live within the state of Iowa or without the state.

RENEWAL AFTER DISSOLUTION—VOLUNTARY DISSOLUTION—CORPORATIONS: After a corporation has been voluntarily dissolved by the vote of a majority of its stockholders said corporation cannot be renewed.

May 24, 1928. *Secretary of State:* We are in receipt of your letter under date of May 24, 1928, requesting an opinion of this department on the following question:

"A corporation chartered November 10, 1923, recited in its Articles of Incorporation that, 'This corporation shall continue for a period of twenty years with the right of renewal, unless sooner dissolved by a majority vote of the stockholders at a meeting called for said purpose.' On March 3, 1928, the corporation filed its notice of dissolution with the Secretary of State.

"The corporation now desires to renew its corporate period for another twenty years from March 3, 1928.

"Can this be done under the provisions of Section 8365 of the Code?"

Section 8365 of the Code of 1927 provides so far as is material to the question as follows:

"In either case they may be renewed from time to time for the same or shorter periods (meaning corporations whose charter period is twenty or fifty years) within three months before or after the *time for the termination thereof.* * * *"

We are of the opinion that Section 8365 of the Code of 1927, applies only to the renewal of corporations whose charter period has expired, and does not apply to corporations who have voluntarily dissolved and surrendered their charter.

Section 8392 of the Code of 1927, referred to in your letter, applies only to the continuance of the corporation after dissolution, whether by limitation or voluntarily, in order to wind up the affairs of the corporation and does not in any way apply to the question herein involved.

If the majority of the stockholders of said corporation, at a regular or special meeting called for that purpose, voted to dissolve and wind up the affairs and business of the corporation, and notice of such dissolution, as is required by Section 8363 of the Code of 1927, was given of such action then the corporation immediately ceases to exist except for the purpose specified in Section 8392 of the Code of 1927, and the members of said corporation would thereafter have no authority to vote for a renewal of the chartering of the corporation for they are no longer members of such corporation and their action would have no effect.

We, therefore, refer you to the case of *Rossing vs. State Bank*, 181 Iowa, 1013, at 1023.

BOARD OF HEALTH—CONTAGIOUS DISEASES: Board of health has authority to instruct health physician to visit families where illness exists and no regular physician is in attendance and the cost of such inspection should be paid by the county board of supervisors.

May 24, 1928. *County Attorney, Jefferson, Iowa:* This will acknowledge further receipt of your inquiry in regard to the expense of establishing, maintaining and terminating a quarantine under Chapters 107 and 108, Code of Iowa 1927. You present the following specific questions:

"1. Are bills incurred in establishing, maintaining and terminating quarantine as provided in Section 2274, payable by the county, irrespective of the financial ability of the person quarantined?

"2. Is an examination of a health physician, upon order of the local board of health, of a person reported to be sick, for the purpose of placing said person under quarantine, if necessary, come within the meaning of the establishing of a quarantine?

"As I stated in my previous letter, during a recent small-pox epidemic, whenever sickness was reported and no physician was in attendance, the local board of health sent the city health officer to make an examination. The majority of cases these persons were found to have small-pox and were placed under quarantine. It is for this service that the city health officer is making claim against the county. Many of these persons are able to pay their own bills. The city health officer takes the position that he was not employed by these persons and therefore should not present a bill to the parties examined."

In recodifying the statutes of this state the Fortieth Extra General Assembly of Iowa specified the duties of the health officer (Sections 2237-8, Code of Iowa 1927) as follows:

"* * * In case of sickness where no physician is in attendance, the health officer shall investigate the character of such sickness and report his findings to the local board.

"In addition to his statutory duties the health officer shall perform such other duties as the local board may assign to him."

From your statement of the facts it appears that the investigations made by the city health officer in the case before us were made under both the statutory authority and the authority of the local board of health.

We are of the opinion that these matters were enacted into law for the purpose of aiding, assisting, and rendering more effective the quarantine provisions of the statute in the interest of the public health and to protect the public from the ravages of contagious and infectious diseases.

We are, therefore, of the opinion that both of your questions must be answered in the affirmative and that the inspection made by the city health officer should be paid for by the county under the provisions of Section 2275 irrespective of the financial ability of the person quarantined or of the finding of a contagious or infectious disease existent if there were illness in the family and an epidemic of such disease existed in the community.

TAXATION—ASSESSMENT: Where there is a contract of sale the real estate should be assessed to the vendee thereunder; where there is a contract to sell it should be assessed against the vendor.

May 25, 1928. *County Attorney, Clarinda, Iowa:* We are in receipt of your letter under date of May 11, 1928, requesting an opinion of this department on the following question:

The owner of a farm on the first day of November, 1927, sells on contract said farm to another. The contract provided that settlement was to be made March 1, 1928, and deed conveying same to be delivered to new purchaser at that time. The question is, in whose name the real estate should be assessed January 1, 1928, and in whose name the money which the purchaser intends to pay for said farm should be assessed.

It would depend upon whether the contract was a contract to sell or a contract of sale. If it was a contract of sale the Supreme Court has held that the equitable title passes immediately to the vendee, under said contract, and that the vendor of said contract holds the bare-naked legal title as security for the payment of the purchase price. This being the case we are of the opinion that the real estate, in such a case, should be assessed against the vendee under the contract of sale.

However, if the contract was a contract to sell and only the deal to be completed March 1, 1928, then the real estate should be assessed against the owner as shown on record January 1, 1928.

Under the contract of sale the assessor shall assess the contract as against the vendor. The contract to sell, the vendee therein would have to list for assessment purposes the money which he intended to pay as the purchase price of said farm.

CONDEMNATION—COUNTIES AND COUNTY OFFICERS—GRAVEL PITS: Under Sections 4657-58, Code of 1927, board of supervisors has authority to condemn any land located within the confines of a county for the purpose of obtaining gravel with which to improve the highways of said county, and it would not make any difference whether the real estate was or was not, at the time of condemnation a gravel pit.

May 25, 1928. *County Attorney, Orange City, Iowa:* We are in receipt of

your letter under date of May 16, 1928, requesting an opinion of this department on the following question:

Sections 4657-58 of the Code of 1927 provide for the condemnation of land for the purpose of obtaining gravel with which to improve the highways of the county.

Proceedings are about to be commenced in this county for the condemnation of certain gravel pits from which gravel has been sold during the past few years. The owners of the pits contend that the county cannot condemn such pits.

The question then is: Has the county the power under Sections 4657-58, to condemn land for the purpose of obtaining gravel with which to improve the highways of the county, regardless of whether or not the land, which is to be condemned is already a gravel pit or not?

We are of the opinion that under Sections 4657-58 of the Code of 1927, that the Board of Supervisors has the authority to condemn any land located within the confines of the county for the purpose of obtaining gravel with which to improve the highways of said county and that it would not make any difference whether the real estate to be condemned was or was not a gravel pit.

DISSOLUTION—CORPORATIONS: Under Section 8363, Code of 1927, it is not mandatory that the notice of dissolution be signed by all of the officers of a corporation.

May 25, 1928. *Secretary of State:* We are in receipt of your letter under date of May 24, 1928, requesting an opinion of this department on the following question:

"Under Section 8363 of the Code of 1927 shall this department accept for filing notice of dissolution which comply with the law in every respect, except said notice is signed by just one officer? You will notice that Section 8363 states that such dissolutions shall be deemed sufficient if signed by the *officers*."

Section 8363 of the Code of 1927 so far as it is material to the question provides as follows:

"* * * Provided, however, that the notice of such dissolution shall be deemed sufficient if signed by the officers of such corporation and published, as required by law."

We are of the opinion that under that part of Section 8363, above set out, that it is not mandatory that the notice of dissolution, provided for therein, be signed by all of the officers of the corporation. The only effect that said provision has is to make the notice of such dissolution, when signed by the officers, presumptive evidence of the sufficiency of same.

We are of the opinion that if the majority of the stockholders of a corporation voted to dissolve the corporation and directed its officers to proceed to carry out such dissolution, and the officers in doing so permitted or directed the secretary or any other officer to sign and publish the notice of dissolution, as required in Section 8363 of the Code of 1927, and the secretary or other designated officer did proceed in compliance with said section that such notice would be a valid and legal notice and would be binding upon the corporation and its members. Of course, if the act of the secretary or other designated officer in publishing the notice was wholly unauthorized and contrary to the will of the corporation, then such notice would have no force and effect. But if the corporation had, by a majority of the stockholders, voted to dissolve and had directed the officers to carry out such dissolution, then we are of the

opinion that it is wholly immaterial whether one or more of the officers sign the notice.

The only mandatory provisions of the statute being that a notice be given by publication and we cannot see wherein the signatures of all of the officers would make it any more effective than the signature of only one, especially so far as creditors of the corporation were concerned.

TRUSTEE—TOWNSHIP TRUSTEES: A township trustee may employ his son as road superintendent if such employment is made in good faith and the father does not directly or indirectly profit by the same. Road superintendent may employ his son or the son of a township trustee where there is no coercion or fraud.

May 31, 1928. *County Attorney, Mount Pleasant, Iowa:* We are in receipt of your letter under date of April 28, 1928, requesting an opinion of this department on the following questions:

1. Is there anything in Code, Sections 4685 and 13327 which prohibits a township trustee from hiring his own son as road superintendent?
2. The road superintendent from hiring his son to do road work?
3. The road superintendent from hiring the son of a trustee for road work?

We are enclosing herewith copy of an opinion rendered you under date of April 17, 1928. From reading this opinion it will be noted that Section 13327 prohibits members of the township trustees from buying, selling to or in any manner becoming parties, either directly or indirectly, to any contract to furnish supplies, material or labor to the township in which they are members of such board.

We are of the opinion that a township trustee may employ his own son as road superintendent if such employment is made in good faith and there is no collusion whereby the father may directly or indirectly profit. We cannot, however, see any reason why the road superintendent, who has been employed by the township trustees, could not hire his own son to do road work for we can see no way in which the statute will prohibit same.

We are of the opinion that there is nothing in the statutes of this state which would prohibit the road superintendent from hiring the son of a township trustee for road work if the employment is actually made in good faith and there is no fraud or coercion connected with such employment so far as the trustee himself may be concerned.

The matter is very ably discussed by our own Supreme Court in the case of the *State vs. York*, 131 Iowa, page 638.

COUNTY OFFICERS—CLERK DISTRICT COURT—FEES: Clerk of District Court must collect $1.50 filing fee on petition for adoption of children.

June 1, 1928. *County Attorney, Carroll, Iowa:* This will acknowledge receipt of your favor of recent date requesting the opinion of this department upon the following proposition:

In case of the filing of a petition for adoption under Chapter 473 of the 1927 Code, should the Clerk of the District Court require the person filing the petition to pay the filing fee of $1.50?

In the absence of a specific exemption in this chapter we are of the opinion that the general rule would apply and that a petition filed with the clerk of the district court in such a case would be governed by the provisions of Section 10837 of the Code which provides as follows:

"The clerk of the district court shall charge and collect the following fees, all of which shall be paid into the county treasury:

"1. For filing *any* petition, appeal, or writ of error and docketing the same, one dollar and fifty cents.

"* * * *"

LIABILITY OF STATE FOR IMPROVEMENT—ROADS AND STREETS—EXECUTIVE COUNCIL: Under Section 4634 the state is liable for the payment of its share of the costs of improving roads or streets which abut or run through state property.

June 1, 1928. *Executive Council of Iowa:* We are in receipt of a letter addressed to you from the State Fair Board regarding the payment of the state's assessment for the oiling of Dean Avenue, and in reply we refer you to Section 4634 of the Code of Iowa, 1927, which section reads as follows:

"When a city, town, special charter city, or county shall drain, oil, pave, or hard surface a road which extends through or abuts upon lands owned by the state, the state, through the executive council, shall pay such portion of the cost of making said improvement through or along such lands as would be legally assessable against said lands were said lands privately owned, which amount shall be determined by said council, or board."

It will be noted from reading said section that the state is required to pay their portion of the assessment against any state lands, and that said payment is to be made through the Executive Council.

We, however, do not find where any appropriation was made by the Forty-second General Assembly for such purposes. It will, therefore, be necessary to have the matter presented to the next legislature so that a special appropriation may be made to take care of this obligation. We might also suggest that the obligation is still an obligation of the state.

FIREMEN'S COMPENSATION: The surviving mother of a deceased fireman is entitled to the compensation while confined in an asylum. The children are also entitled to the benefits of the statute, the money being paid to their guardian.

June 4, 1928. *Auditor of State:* We wish to acknowledge receipt of your favor of the 26th in which you request our opinion on the following question:

"In the month of March, 1928, the city of Muscatine, Iowa, suspended one of its firemen temporarily until his domestic troubles were settled. Some time later in the month he took his own life and left surviving a widow and two children of the age of eleven and fourteen. About six weeks later his wife re-married.

"At the time of his death he was supporting an aged mother about sixty-five years old who was committed to the insane asylum two days before he committed suicide. The deceased also has two sisters and two brothers still living.

"I would like an opinion as to whether the mother is entitled to pension under 6318 even though she was dependent upon the deceased at the time of his death and she has one son and one daughter still living.

"It is my opinion the children are entitled to a pension but as to the mother there is some doubt."

Section 6318, Code, 1927, to which you refer, provides for pensions to the widows, children and dependents of any active or retired member of a fire or police department. The order in which the pension is to be paid is fixed in this statute to be, first, to the widow, so long as she remains unmarried; second, to the surviving dependent father or mother; third, to the guardian of each surviving child under sixteen years of age. The aggregate of all pay-

ments is not to exceed one-half the amount of the salary of such member at the time of his death, otherwise $30.00 per month to the widow or surviving parents.

Under the provisions of this statute we are of the opinion that the surviving mother of the deceased fireman would be entitled to the pension and that during the time she is confined in an asylum this money should be paid to her guardian. The surviving children are each entitled to the benefits of this statute, the money to be paid to their guardian as long as they are under the age of sixteen years. The statute does not deprive the children of the benefits of the pension in the event their mother remarries.

PASTERS—IDENTIFICATION MARK—ELECTIONS—BALLOTS: 1. Where any mark other than the one authorized by Sections 809-16 inclusive, is used on a ballot the question as to whether or not said ballot should or should not be rejected is determined by deciding whether or not the mark was intended as an identification mark. If it was the ballot should be rejected, if not it should be counted. 2. Pasters or stickers may be used on a ballot in the space provided for writing in names.

June 7, 1928. *County Attorney, Algona, Iowa:* We are in receipt of your letter under date of June 6, 1928, requesting an opinion of this department on the following questions:

1. "Where a voter drew a line through the names of the candidate apparently wishing to scratch it off the ticket, should this ballot be counted, or does it vitiate the whole ballot?"
2. "Where pasters with names of the candidate for office were printed before election and were pasted on the ticket for township or county offices and a cross made opposite them, this being done in the vacant space where names could legally be written in, would this vitiate and spoil the ballot?"

1.

Sections 809-16, Code of 1927, apply to the marking and counting of ballots. Section 815, so far as is material to the question, reads as follows:

"* * * Any ballot marked in any other manner than as authorized in the six preceding sections, and in such manner as to show that the voter employed such mark for the purpose of identifying his ballot, shall be rejected."

It would, therefore, appear that if the line drawn through the name of the candidate was intended for the purpose of identifying the voter's ballot that the whole ballot should be rejected. But, however, if the line through the candidate's name was not intended as a mark for the purpose of identifying his ballot the ballot should be counted.

The question as to whether or not a mark other than that authorized in Section 809, Code of 1927, was made by the voter for the purpose of identifying his ballot is one for the election judges to determine and for the court in case the matter reaches the court. For answer to your question we also refer you to the opinions of the Attorney General 1923-24 at page 159.

2.

Our Supreme Court has held in the case of *Barr vs. Cardell*, 173 Iowa, 18, that the voter has a right to write or paste upon his ballot the name of any person for whom he desires to vote. This decision is based upon the authority of Section 816 of the Code of 1927. The court having held that the word "writing," as used in Section 816, was susceptible of more than one meaning and that under the rule of construction provided for in Section 63, Code of 1927,

that it properly included various modes of representing words and letters in which would be included printed words.

If a paster or sticker is used it must be pasted upon the ballot in the proper place and a cross must be placed in the square opposite the name of the person written or printed thereon. If this is not done then the elector has not voted for such party.

We call your attention to the fact that if a paster is used and no cross is marked in the square opposite the name that no vote should be counted for the person or persons whose names are contained on said sticker.

For another opinion covering this question we refer you to Attorney General's opinions for the years 1925-26 at page 253.

TAXATION—FORECLOSED MORTGAGE—REAL ESTATE: The mortgagee, which is the certificate holder on the 1st of January should be assessed on the value of the mortgage as monies and credits and the real estate, securing the mortgage, should be assessed against the mortgagor or the owner thereof as real estate.

June 8, 1928. *Auditor of State:* We are in receipt of your letter under date of May 26, 1928, requesting an opinion of this department on the following question:

"A party held a mortgage on a farm and had to foreclose. At the sale he bid the farm in. Should the mortgage be taxed as of January 1st or would the purchaser (which, of course, is the mortgagee) be entitled to deduct same from his monies and credits when assessment was made?"

We are of the opinion that the mortgage should be assessed against the mortgagee as monies and credits up until the time said mortgagee receives a deed for the premises on which the mortgage is given. After which time, of course, the real estate should be assessed against said party as such.

It would, therefore, follow that if, on January first, mortgagee was only a certificate holder that the same should be assessed against him as monies and credits and the real estate should be assessed as such against the mortgagor. The mortgagee would not be entitled to deduct the amount of the mortgage from his monies and credits at the time of the assessment.

HIGHWAYS—INTER-COUNTY: Held that where two counties desire to improve an inter-county highway that after a suitable division of the cost of said improvement has been made in accordance with Sections 4661-4662 A 1-2-3, Chapter 240, Code 1927, that said county might proceed with the establishment of assessment districts in the respective counties as is provided for in Chapter 241 of Code 1927.

June 8, 1928. *County Attorney, Winterset, Iowa:* We are in receipt of your letter under date of June 6, 1928, requesting an opinion of this Department on the following question:

The Madison County and Dallas County Supervisors are desirous of establishing a gravel district on a county road between the towns of Earlham and Dexter. Part of this road is in Madison County, part on the county line and part of it in Dallas County. That part which is on the county line does not cross it but runs directly on the line for a distance of several miles. The road is not a primary road.

What procedure should the Board of Supervisors take in connection with the improvement of this road?

You are referred to Sections 4661-62 a1-2-3, Chapter 240 of the Code of 1927, which sections apply to the improvement of inter-county highways. These

sections are the only sections which apply to the improvement of county highways which are a part of the secondary road system.

We are of the opinion that the boards of the two counties should proceed in accordance with said sections and that after an equitable division has been made that they might then proceed with the establishment of assessment districts in the respective counties as is provided for in Chapter 241 of the Code of 1927.

PRINTING—ARCHITECTURAL EXAMINERS: Section 183, Code 1927, with respect to printing applies to the Board of Architectural Examiners in the same manner as it applies to all other departments.

June 8, 1928. *Auditor of State:* We are in receipt of your letter under date of June 7, 1928, requesting an opinion of this department on the following question:

Does the provision of Chapter 42, Section 12, Acts of the 42nd General Assembly, regarding printing, come under the general statute as set out in Section 183 of the Code of Iowa 1927?

The facts are that the Architectural Examiners ordered five hundred booklets printed containing the laws relative to architectural examinations without going through the Printing Board.

We are of the opinion that the provisions of Section 183, Code of Iowa 1927, with respect to printing, applies to the Board of Architectural Examiners in the same manner as it applies to all other departments, and that Chapter 42, Section 12, Acts of the 42nd General Assembly, does not in any way relieve said board from complying with the provisions of Section 183, Code of 1927.

SCHOOLS AND SCHOOL DISTRICTS: A pupil attending high school at the expense of the district of his residence is not entitled to such privilege after he reaches the age of twenty-one years.

June 11, 1928. *County Attorney, Allison, Iowa:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following proposition:

If a pupil who is attending a high school at the expense of the district of his residence for tuition reaches the age of twenty-one years five months prior to his graduation or completion of the course is the district liable for his tuition after he reaches the age of twenty-one years?

It is provided by statute, Section 4273, Code of Iowa, 1927, that, "Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years, * * *"

It is then provided by statute that a pupil may attend high school at the expense of the district of his residence if that district does not furnish a high school course. Section 4275.

From these sections it will be seen that the school board is required to furnish educational facilities for a child up to a four-year high school course and until he reaches the age of twenty-one years. We are, therefore, of the opinion that after a pupil reaches the age of twenty-one years that the district has furnished to him all of the education that can be required of it and that where such pupil is attending a high school outside his district the district of his residence would not be liable for tuition after he reaches the age of twenty-one years.

SHERIFF—FEES — AUTOMOBILE ACCIDENT — STOLEN AUTOMOBILE — SUICIDE: 1. Sheriff or any other peace officers does not have the right to charge mileage for going to the scene of an accident in which an automobile was involved. 2. There is no duty imposed by statute upon the sheriff or any other peace officer to go to the scene of an automobile accident, nor is it the duty of the county attorney. 3. The sheriff has the right to charge a reasonable fee for going after and returning a stolen automobile and the mileage charge would be a reasonable charge. There is no duty imposed upon the sheriff to visit the scene of a suicide except, of course, the general statute which makes it the duty of peace officers to enforce the criminal law and to ferret out and punish criminals.

June 12, 1928. *County Attorney, Oskaloosa, Iowa:* We beg to acknowledge receipt of your letter under date of June 11, 1928, requesting an opinion of this department on the following questions:

"1. Does a sheriff have the right to charge mileage for going out to the scene of an accident in which an automobile was involved, after having been notified of the accident in accordance with the provisions of Code, Section 5073?

2. Is it incumbent upon the sheriff to go out to the scene of an auto accident after being notified, if so, is it not also incumbent upon the county attorney to go out, and 'the nearest practicable peace officer'?

3. Does a sheriff have the right to charge mileage for going after a stolen automobile, which has been recovered some distance from the county seat?

4. Is there any duty upon a sheriff to visit the scene of a suicide, and can he charge mileage for the trip?"

1.

We are of the opinion that a sheriff or any other peace officer does not have the right to charge mileage for going out to the scene of an accident in which an automobile was involved, after having been notified of the same in accordance with the provisions of Section 5073 of the Code of 1927. The purpose of said section being only to place the responsibility on the parties to the accident and not imposing any duty upon the peace officer to make any investigation.

2.

We are of the opinion that there is no duty imposed by statute or otherwise upon the sheriff or any other peace officer to go to the scene of an automobile accident of which he has been notified, nor is it the duty of the county attorney.

3.

Under Section 12219, Chapter 516, Code of 1927, the owner of a stolen automobile, upon satisfactory proof of his title to the same and upon payment of the necessary expenses incurred in its preservation, is entitled to the delivery of the stolen car. It would seem from reading this section, therefore, that the owner must pay the necessary expenses incurred in preservation and recovery of the car. We are, therefore, of the opinion that the sheriff would have the right to charge a reasonable amount for going after and returning the stolen automobile, and that the mileage charged would be a reasonable charge.

4.

We do not find any statute which would impose a duty upon the sheriff to visit the scene of a suicide except, of course, the general statute which makes it the duty of peace officers to enforce the criminal law and to ferret out and punish criminals.

We are, therefore, of the opinion that the sheriff is not entitled to charge mileage for a visit to the scene of a suicide, unless he has reason to believe that a crime may have been committed and is investigating said matter.

We call your attention to Section 5184, Chapter 259 of the Code of 1927. It will be seen from reading said section that the sheriff, when directed by the county attorney, must make an investigation of any violation of the law within the county, and the sheriff may charge for such services and the necessary expenses incurred in connection with such investigation.

TOWNSHIPS—CEMETERIES: Under Section 5558, Chapter 283, Code 1927, township trustees are authorized to purchase or condemn land for cemetery purposes within the territorial limits of such township, but there is no authority for purchasing or joining in the purchase of land in a township located without the territorial limits of the township.

June 13, 1928. *County Attorney, Sibley, Iowa:* We beg to acknowledge receipt of your letter under date of June 7, 1928, requesting an opinion of this department on the following question:

The town of Harris is located in Fairview Township. Allison Township joins Fairview on the south. The town of Harris, Fairview Township, and Allison Township desire to join in the purchase of land for cemetery purposes. The land desired is located in Fairview Township. The question is whether or not the three municipalities have the right or authority to purchase such ground jointly.

Section 5558, Chapter 283 of the Code of 1927, authorizes the township trustees to purchase or condemn land *within the territorial limits* of such township for the use of cemeteries. We do not find any authority in the Code which would authorize a township to make a joint purchase of land for cemetery purposes without the limits of the township. We do, however, find in Section 5560, Code of 1927, authority for levying of a tax for the maintenance and improvement of cemeteries established in adjoining townships, and also in Section 5565 we find authority for joint boards composed of city or town councils and the trustees of a township for the common purpose of improving and maintaining cemeteries.

We suggest, therefore, that the township of Allison could assist in the maintenance and improvement of a cemetery located in Fairview Township and that Fairview Township would have to buy or condemn the land in its own right.

BUDGET LAW—BOND AND CONTRACT PROVISIONS—PARK BOARD: Held that under Chapter 23, Code 1927, that a Park Board was an arm or agency of the city and would, therefore, have to comply with the provisions of Chapter 23, with respect to the letting of contracts for public improvements which cost more than $5,000.00.

June 14, 1928. *Director of the Budget:* We beg to acknowledge receipt of your letter under date of June 1, 1928, requesting an opinion of this department on the following question:

"A park board wishes to let a contract for paving within the city park. Must they comply with the bond and contract provisions of the budget law?"

We refer you to Section 351, Chapter 23, Code of 1927, which, so far as material to the question, reads 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."

It will be noted from reading the above definition that a city or town is

within the meaning of the word "municipality" as used in Chapter 23. Section 352, Code of 1927, provides in substance that no municipality shall enter into any contract for any improvement to cost $5,000.00 or more without first adopting plans and specifications, form of contract and fixing the time and place of hearing and giving notice thereof by publication in at least one newspaper of general circulation in such municipality at least ten days before the hearing.

Section 353 of Chapter 23, Code of 1927, provides for the filing of objections and Section 354 provides method an appeal may be made to the Director of the Budget.

A park board is an agency or arm of a city or town there being delegated to such board a part of the duties with respect to parks, that is ordinarily exercised by city or town councils and when such board functions it does so in behalf of the city or town.

We are, therefore, of the opinion that a park board, being an agency of a city or town, must comply with the provisions of Chapter 23, Code of 1927, with respect to the entering into contracts for a public improvement which is to cost $5,000.00 or more.

ELECTIONS—PERMANENT REGISTRATION — COUNTIES — CITIES — EXPENSE: Under the provisions of Chapter 39 and 39-b1, Code 1927, counties may pay one-half the cost of the expense of carrying out the provisions of Chapter 39-b1 pertaining to permanent registration. Section 718-b18, Chapter 39-b1, authorizes a city to pay the necessary expenses in connection with the carrying out of the provisions of Chapter 39-b1, Code 1927.

June 18, 1928. *County Attorney, Sioux City, Iowa:* This will acknowledge receipt of your letter under date of May 24, 1928, requesting an opinion of this department upon the following question:

Whether or not the county may bear half the cost of the installation of a permanent registration system in the city of Sioux City?

It is provided by statute, Section 688, Chapter 39, Code of Iowa 1927, as follows:

"Said registry book and all blanks and materials necessary to carry out the provisions of this chapter shall be furnished by the city clerk and shall be printed at the equal expense of the city and county. Registers shall be paid by the city in city elections and in all other cases by the county."

It is then provided by Section 718-b18, Chapter 39-b1, of the Code 1927, as follows:

"The necessary expense in each city for carrying out the provisions of this chapter (Chapter 39-b1) shall be paid by such city, and the city council of such city shall provide out of the current revenues of the city sufficient funds based upon the estimate prepared by the commissioner of registration and subject to the approval of the city council. * * *"

It is further provided by statute, Section 718-b23, Chapter 39-b1, Code 1927, as follows:

"All acts or parts of acts in conflict or inconsistent with the provisions of this chapter are hereby repealed in so far as they apply to cities under the provisions of this chapter."

It will be noted from reading Section 688, above set out, that before the adoption of Chapter 39-b1, the expense of registration should be paid one-half by the county and one-half by the city. It will also be noted from reading Section 718 b18, above set out, that under Chapter 39 b1, permanent registration,

the necessary expense in each city for carrying out the provisions of the chapter should be paid by the city out of the current revenues of the city. The question then is, under said section, whether or not said section requires cities in which permanent registration is adopted to pay all of the expense of registering the voters, and thus in conflict with the provisions of Section 688, Chapter 39, of the Code of 1927.

We are of the opinion that the legislature in adopting Section 718 b18, Code of 1927, intended to authorize a city to pay the cost of carrying out the provisions of Chapter 39 b1 of the Code of 1927 (permanent registration), and that they did not intend, by the adoption of said section, to prevent a county from paying part of the cost of carrying out the provisions of Chapter 39 b1, Code of 1927, if said county chose to do so.

In other words it is not mandatory that a city or town, which adopts permanent registration, shall pay the entire cost of putting the same into effect. They are authorized to pay whatever expense may be necessary, but are not precluded from cooperating with the county and in sharing the expense.

We are, therefore, of the opinion that there is no conflict between Section 718 b18, Chapter 39 b1, Code of 1927 and Section 688, Chapter 39, Code of 1927, and that where any city adopted the provisions of Chapter 39 b1, that the county in which said city is located may pay one-half of the expense of carrying out the provisions of said chapter if the county desires to cooperate with the city.

BOARD OF SUPERVISORS—CEMETERY ASSOCIATIONS—MAINTENANCE OF SOLDIERS' GRAVES—EXPENSE: Under Section, 5396-a-1, Code 1927, Board of supervisors are required to pay for the care and maintenance of soldiers' or sailors' graves where no provisions have otherwise been made and it would make no difference whether the bill was paid annually or was paid biennially.

June 21, 1928. *County Attorney, Burlington, Iowa:* We are in receipt of your letter under date of June 13, 1928, requesting an opinion of this department on the following question:

Sections 5396-a1 and a-2, Chapter 273, of the Code of 1927, provides for the payment for the care and maintenance of cemetery lots of soldiers, said payment to be made each year.

A claim is now presented by one cemetery association of this county for maintenance for two years.

The question arises as to whether or not the board of supervisors are compelled to allow a claim for two years' care of soldiers' graves prior to the current year.

Section 5396-a1 provides as follows:

"Maintenance of graves. The board of supervisors of several counties in this state *shall each year*, out of the general fund or soldiers' relief fund of their respective counties, appropriate and pay to the owners of, or to the public board or officers having control of cemeteries within the state, in which any deceased soldier or sailor of the United States is buried, a sum sufficient to pay for the care and maintenance of the lots on which they are so buried, in any and all cases in which provision for such care is not otherwise made."

It would appear from reading the above section that it is mandatory that the board of supervisors pay to the proper officer or governing body the cost of the maintenance and care of the lot of a soldier in all cases where no other provision for payment has been made. The board of supervisors having no discretion in the matter.

The intention of the legislators, as expressed in such statutes, was that the county pay for the care and maintenance of such graves. We are, therefore, of the opinion that the board of supervisors under said section are required to pay for the care and maintenance of all soldiers' and sailors' graves where no provision otherwise has been made, and that it would make no difference whether the bill was paid annually or was paid biennially, this being simply a matter of detail and the county would not be injured in any manner.

We think, however, that the better procedure would be to have such claims presented annually and that the boards should have cemetery associations of the county notified so that there would be no misunderstanding and the procedure would be uniform.

THRIFT BOND—BLAZER COAL COMPANY: Held that the sale of such bonds would come under the provisions of Chapter 392, Code 1927, and that said company would have to qualify in accordance therewith.

June 21, 1928. *Auditor of State:* We beg to acknowledge receipt of your letter under date of June 14, 1928, requesting an opinion of this department on the following question:

I am enclosing herewith "Subscription for Thrift Bond" and "Thrift Bond" which the Blazer Coal Company Inc., of Davenport, Iowa, propose to issue and desire to know whether or not such corporation should qualify and come within the provisions of Chapter 392, Code of 1927.

We are of the opinion that the Blazer Coal Company Inc., are selling thrift bonds on the partial payment plan, for they are taking subscriptions for the same, collecting part of the cost of the bond at the same time the subscription is taken, and delivering the bond when the balance of the purchase price is paid for, and that they would, therefore, come within the provisions of Chapter 392, Code of 1927, pertaining to the sale of stock on the installment plan.

FISH AND GAME—HUNTING AND FISHING LICENSES—COUNTY RECORDER: County Recorder, under the statutes, is charged with the duty of collecting hunting and fishing license fees collected, and if he accepts other than money in payment of the fee and there is a loss sustained he must stand the loss.

June 21, 1928. *Fish and Game Warden:* We beg to acknowledge receipt of a letter from the County Recorder of Lyon County, Rock Rapids, Iowa, under date of June 12, 1928, which letter was handed to this department by you.

The letter requests an opinion of this department on the following question:

Under the statutes the county recorders are authorized to issue hunting and fishing licenses and to collect $1.00 for each license issued.

The county recorder of Lyon County, in issuing certain licenses, accepted bank drafts in payment thereof. Some of these drafts were drawn on Chicago banks and others, and before they had cleared the issuing bank had closed on account of insolvency.

The question is whether or not the recorder has to make these drafts good.

While it may seem to be a hardship under the statute the county recorders are directed to collect the sum of $1.00 for each hunting and fishing license issued, and are required to account to the State Treasurer therefor.

We are, therefore, of the opinion that if the recorder accepted drafts in payment of such licenses that he does so at his own risk, and that he must look to the party to whom he issued the license and must account to the State Treasurer for each license issued.

It would, therefore, follow that if he is unable to collect from the party to whom the license was issued and from whom he accepted the draft, that the county recorder must turn over to the State Treasurer $1.00 for each license which he issued.

SECONDARY ROADS—HIGHWAYS: Commission to be appointed under Chapter 4, 42nd G. A., cannot include members of the 42nd G. A.

June 22, 1928. *Governor:* I am in receipt of your communication of the 21st inst., in which you call attention to Chapter 4, Acts of the Forty-second General Assembly Special Session, providing for the appointment of a commission to secure information relative to the maintenance and construction of secondary roads. Your inquiry is as to whether members of the General Assembly who were in the session when this bill was enacted, are eligible to appointment on the commission.

The Chapter to which I have referred, provides that the members of the commission shall receive actual and necessary expenses and $10.00 per diem for time actually spent in performing their duties as members of the commission, and the bill carries with it an appropriation of $2,500.00 for the purpose of meeting the expense. Section 21, of Article III, of the Constitution, reads as follows:

"No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office of profit under this State, which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by elections by the people."

In view of the fact that the members of the commission are to be paid a per diem for their services, it is my opinion that members of the legislature who served in the Forty-second General Assembly Special Session, are disqualified for appointment to the commission.

TOWNSHIPS—TRUSTEES—MEETINGS: Held that township trustees may hold meetings other than those specified in the statute when it is necessary to properly carry on the business of the township.

June 22, 1928. *County Attorney, Britt, Iowa:* We beg to acknowledge receipt of your letter under date of June 18, 1928, requesting an opinion of this department on the following question:

Section 5542, Code of 1927, provides that the trustees shall meet on the first Monday in February, April and November each year. The question is, whether or not the township trustees may have special meetings, that is meetings other than those specifically mentioned in the statute, and if so who calls the meeting and what notice, if any, should be given the trustees of such special meeting.

We are of the opinion that township trustees may hold such meetings in addition to those specified in Section 5543, Code of 1927, as may be necessary to properly carry on the business of the township. The fact that three meetings only are mentioned in Section 5543 does not preclude the holding of other meetings. Of course, when a special meeting is called a reasonable notice must be given to each of the trustees of the township so that all of the trustees may have an opportunity to be present at such meeting and to transact such business as may come before it.

We are of the opinion that if a special meeting is called and all of the trustees of the township have not received a reasonable notice of the time and place of such meeting that any action which the trustees present at such meeting might take would be of no validity, that is, their action would be unauthorized.

CORPORATIONS—BURIAL ASSOCIATION ORGANIZED UNDER CHAPTER 390, CODE 1927—RIGHT TO PRACTICE A PROFESSION: A corporation cannot practice a profession such as law, medicine, dentistry and embalming and, therefore, a corporation which is being organized within the scope of Chapter 390, whose articles provide for the practice of embalming is not entitled to be granted a charter the same not being within the contemplation of the provisions of such chapter.

June 22, 1928. *Secretary of State:* We beg to acknowledge receipt of your letter under date of May 29, 1928, requesting an opinion of this department on the following question:

"The Varina Co-operative Furniture and Burial Association has this day submitted its proposed articles of incorporation under Chapter 390, Code of Iowa, for filing in this department."

"The question is, does this association come within the scope of Chapter 390, Code of Iowa, and are they entitled to be granted a charter?"

Section 8486, Chapter 390, Code of 1927, provides as follows:

"*Organization.* Any number of persons, not less than five, may associate themselves as a cooperative association, without capital stock, for the purpose of conducting any agricultural, live stock, horticultural, dairy, mercantile, mining, manufacturing, or mechanical business, or the constructing and operating of telephone and high tension electric transmission lines on the cooperative plan and of acting as a cooperative selling agency. Cooperative live stock shipping associations organized under this chapter shall do business with members only."

Section 8487, Code of 1927, provides as follows:

"*Terms defined—products of nonmember.* For the purpose of this chapter, the words 'association', 'exchange', 'society', or 'union', shall be construed to mean the same and are defined to mean a corporate body composed of actual producers or consumers of the given commodity handled by the association, whose business is conducted for the mutual benefit of its members and not for the profit of stockholders, and control of which is vested in its members upon the basis of one vote to each member. Associations shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."

It would appear from reading the above sections that the cooperative associations contemplated by Chapter 390 are associations organized for the purpose of marketing agricultural, live stock, horticultural, dairy, mercantile, mining, manufacturing, or mechanical business, or the construction and operating of telephone and high tension transmission lines on the cooperative plan, and for the purpose of acting as a selling agency.

From an examination of the articles of incorporation submitted by the Varina Co-operative Furniture and Burial Association it would appear that such corporation intends to not only operate a cooperative association for the purpose of dealing in household furniture, caskets, burial vaults, and other burial supplies, but to operate a hearse and to furnish embalmers and funeral directors to the members thereof.

Generally speaking, a corporation is not such a person as can engage in the carrying on and operation of a profession such as law, medicine, dentistry, etc. The practice of law, medicine, dentistry, etc., by a corporation is held by the great weight of authority to be against and contrary to public policy and that a corporation cannot either directly or indirectly engage in the practice of such a profession. There is no authority in the statutes of this state for licensing, as an embalmer, anyone other than an individual.

The practice of embalming is not within the contemplation of the provisions of Chapter 390, Code of 1927. We are, therefore, of the opinion that the charter of the Varina Co-operative Association should be denied. The purposes for which it is organized not having been contemplated within the meaning of Chapter 390, Code of 1927.

TAXATION: Delinquent personal taxes, when entered upon the delinquent personal tax list, become a lien on all real estate owned or acquired thereafter by the delinquent tax payer in accordance with the provisions of Section 7192, and under Section 7203 the lien on said taxes when so entered is limited to a period of ten years.

June 23, 1928. *County Attorney, Keosauqua, Iowa:* We beg to acknowledge receipt of your letter under date of June 18, 1928, requesting an opinion of this department on the following question:

I am unable to construe Section 7192 and Section 7203, Code 1927, so that each section will be in harmony with the other.

Will you not, therefore, please advise what construction should be placed on said sections?

It is provided by Section 7192, Code of 1927, as follows:

"*Lien on real estate.* Personal tax entered on delinquent personal tax list, as provided in the two preceding sections, shall constitute a lien on any real estate owned or acquired by any such delinquent, and so remain until the same has been paid or legally canceled, and taxes not so entered for each year shall cease to be a lien."

It is provided by Section 7203, Code of 1927, as follows:

"*Lien of personal taxes.* Taxes due from any person upon personal property shall, for a period of ten years after December thirty-first following the levy, be a lien upon any and all real estate owned by such person or to which he may acquire title. At the expiration of said period said lien shall cease. This section shall apply to all taxes on personal property whether levied prior or subsequent to July 4, 1927."

It will be seen from reading Section 7192 above that when delinquent personal taxes have been entered upon the delinquent personal tax list that they shall become a lien upon all real estate owned or acquired by the delinquent tax-payer.

It will be seen from reading Section 7203, above set out, that personal taxes are a lien upon any and all real estate owned by a tax payer for a period of ten years from and after the thirty-first day of December following the levy thereof, and that such lien shall cease at the expiration of such ten-year period. The ten-year period of limitation, as provided for in Section 7203, was added to said section by the Forty-second General Assembly and it appears as Chapter 178, Acts of the Forty-second General Assembly.

Said section does not in any manner do away with the necessity of entering delinquent personal taxes on the delinquent personal tax list before they become a lien upon any real estate owned or acquired by the tax payer. Said section does, however, amend and qualify that part of Section 7192 which reads as follows:

"* * and so remain until the same has been paid or legally canceled, and taxes not so entered for each year shall cease to be a lien."

The amendment, Section 7203, provides that personal taxes shall be a lien for a period of ten years. Section 7192, which makes them a lien until paid or legally canceled, would, therefore, be inconsistent with the provisions of Section

7203 as amended and the limitation provided for therein would govern, said amendment being a later enactment than Section 7192.

EXEMPTIONS—IOWA-WISCONSIN BRIDGE COMPANY—CORPORATIONS—SECURITIES: Held that the Iowa-Wisconsin Bridge Company organized for the purpose of constructing a toll bridge across the Mississippi River was a public utility corporation, operating within the State of Iowa, and that its securities would come within the exemption provided for in Paragraph 9, Section 8526, Code 1927.

June 26, 1928. *Secretary of State:* We beg to acknowledge receipt of your letter under date of June 26, 1928, requesting an opinion of this department on the following question:

"The Iowa Wisconsin Bridge Company, a Delaware corporation, is about to construct a toll bridge across the Mississippi River from Lansing, Iowa, to the Wisconsin side and proposes to sell its stocks and bonds in Iowa

The question presents itself as to whether it is necessary for this corporation to qualify its securities for sale in this state. In view of the provisions of Sub-division 9, Section 8526 of the Code, may we ask that you kindly advise us as to whether we should treat such securities as exempt or non-exempt?"

Section 8526, so fas as material to the question provides as follows:

"Exceptions. The provisions of this chapter shall not apply to:

'9. Securities of corporations operating railroads, public or quasi-public utilities, the issue of whose securities is regulated by the interstate commerce commission or by a railroad or public service commission, board or similar body of any state or territory, of the United States or of any province of the Dominion of Canada, and securities of all other corporations operating public utilities in this state.' * * *"

The first question to be answered is whether or not a corporation which operates a toll bridge across the Mississippi River from the Iowa to the Wisconsin side is a public utility.

It is generally held that to constitute a public use all persons must have an equal right to the use and must be in common upon the same terms and conditions, however few the number who avail themselves of it.

It is not essential to a public use that its benefits should be received by the whole public or even a large part of it, but that they must not be confined to specified privileged persons. The fact that a corporation is organized for private gain does not prevent it from being a corporation for a public utility or public improvement, but a private business does not become effective with public interest merely from its extent.

The following corporations have specifically or in effect been held by various courts to be public utilities:

Corporations created for the purpose of constructing and maintaining a pipe line in an oil district for the conveyance or transportation of petroleum for the public generally; also a corporation maintaining a pipe line for the conveyance of natural gas to consumers; a gas line or water company organized for the purpose of constructing and maintaining works and supplying a city and its inhabitants with gas or water; corporations establishing and maintaining a wharf-boat and steam elevator for a general storage or forwarding business; corporations for improving the navigation for the water power for the state; corporations for the construction and maintenance of railroads, turnpikes, canals, ferries, telegraph lines, wharves, basins, etc.

The toll bridge to be constructed and maintained by the Iowa Wisconsin Bridge Company is to be constructed and maintained for the use of the public

generally, that is, its use is not restricted to any particular persons or class of persons but to the public generally.

We are, therefore, of the opinion that the Iowa Wisconsin Bridge Company is a public utility corporation.

The next question to be determined is whether such public utility is being operated by the Iowa Wisconsin Bridge Company in this state in view of the fact that part of the bridge would be located in Wisconsin.

We are of the opinion that a corporation, such as this, would be one that would be operating a public utility within this state within the meaning of Section 8526, Code of 1927. It would, therefore, follow that the securities of the Iowa Wisconsin Bridge Company and such would come within the exemptions provided for in Paragraph 9 of Section 8526 of the Code of 1927.

OSTEOPATH—INDIGENT PERSONS: An osteopath cannot make the examination of indigent persons under the provisions of Chapter 199, not being a physician and surgeon.

June 26, 1928. *Deputy County Attorney, Keokuk, Iowa:* I wish to acknowledge receipt of your favor of the 18th in which you inquire in substance whether or not an osteopath may sign blanks and make the examination, under the provisions of Chapter 199 of the Code, 1927, in reference to medical and surgical treatment of indigent persons. Section 4008 of the chapter referred to provides:

"Upon the filing of such complaint, the clerk shall docket the same and shall appoint a competent physician and surgeon, living in the vicinity of the patient, who shall personally examine the patient with respect to his malady or deformity."

Section 4009 requires that the physician appointed make a report which is to be filed with the clerk of the District Court. It is to be noted that Section 4008, supra, requires the appointment of "a competent physician and surgeon."

Section 2181, Code, 1927, paragraph 5, provides:

" 'Physician' shall mean a person licensed to practice medicine and surgery, osteopathy and surgery, osteopathy, or chiropractic under the laws of this state; but a person licensed as a physician and surgeon shall be designated as a 'physician' or 'surgeon', a person licensed as an osteopath and surgeon shall be designated as an 'osteopathic physician' or 'osteopathic surgeon', a person licensed as an osteopath shall be designated as an 'osteopathic physician', and a person licensed as a chiropractor shall be designated as a 'chiropractor'."

The term used in Section 4008, supra,—"physician and surgeon", under the definition just quoted would not include an osteopath, and we are, therefore, of the opinion that an osteopath cannot make the examination or report required in the sections referred to.

SCHOOLS AND SCHOOL DISTRICTS: No provision for transferring library fund withheld in one county to the county auditor of another county.

June 26, 1928. *Department of Public Instruction:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

Where the administration of the school district is within the jurisdiction of one county but where the territory thereof is situated in four counties, must the county board of education draw requisitions upon the county auditor of each of four counties; or may such county board authorize the county auditors in the three outlying counties to transfer the library fund withheld by each to the county auditor of the county in which the administration of the school is located; after which the county board of education may draw requisitions upon the county auditor of the county in which the administration is located?

The procedure for collection, distribution, and expenditure of the library fund has been agreed upon between departments affected thereby. This agreement and interpretation of the law adopted by this department provides that such funds as are withheld by the county auditor shall be paid by him upon the requisition of the county board of education. There is no provision whatever in the law for this fund to be transferred from one county to another.

We are therefore of the opinion that under the interpretation we have placed upon this statute, the county board of education should draw a requisition upon the county auditor of each county where pupils reside for the funds which such county auditor has withheld under the provisions of Chapter 93, Acts of the Forty-second General Assembly.

SCHOOLS AND SCHOOL DISTRICTS: Pupil entitled to tuition in an adjoining district only when he lives nearer a school in such adjoining district and one and a half miles or more from the school in his own district.

June 26, 1928. *County Attorney, Mount Ayr, Iowa:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following propositions:

"Delphos, in our county is in a consolidated school district. One 'A' lives 3¼ miles from Delphos and the closest school in his own district is 3 miles. He sends his children to Delphos. Question: Can he require his own district to pay the transportation to the Delphos district. Question: Can he force his own school district to pay transportation to the school in his own district it being three miles to his own school in his own district? His district is not consolidated.

"One 'B' lives 3½ miles from the consolidated school at Delphos, Iowa. It is three miles to his own school and perhaps a little farther. He has been sending his children to Delphos. In the absence of any agreement with the two boards or one board and the Superintendent can he require his own district to pay the tuition for his children in the other district? Can he require his own district to pay the tuition he has spent during the past three years under the same condition? His own district is not consolidated."

It is provided by statute, Section 4274, that a child residing in one district nearer a schoolhouse in the adjoining corporation and one and one-half miles or more from any public school in the corporation of his residence may attend school in such adjoining school corporation if the two boards so agree or, in the absence of agreement between such boards, with the approval of the county superintendent and the consent of the board in the receiving corporation. Notice must be given to the corporation of the child's residence before the order is entered authorizing the attendance.

In the cases you cite "A" lives three and one-fourth miles from the school in Delphos and three miles from his own school. "B" lives three and one-half miles from the school in Delphos and three miles, or perhaps a little farther, from his own school.

Under these conditions neither can require the school board to pay his tuition because neither complies with the conditions prescribed in the statute.

In neither instance could the county superintendent authorize the attendance because the conditions of residence are not met. In the absence of agreement the board cannot be required to pay the tuition or transportation to Delphos school.

The Department of Public Instruction has ruled upon the advice of this department that transportation charges to his own school can be required of

the district where the pupil resides at an unreasonable distance from school. This distance, however, is not measured merely in mileage but by the additional conditions of the road and age and condition of the child. The proper way to raise this question is by application to the board for the payment of transportation and thereafter appeal to the county superintendent and the Superintendent of Public Instruction upon the grounds that the board has abused its discretion in the matter.

PRISONER: A prisoner does not acquire a residence for voting purposes because of incarceration in the county jail. A prisoner cannot vote at the county jail.

ELECTION: A student in a college town is presumed not to have the right to vote in that town, although rules for determining his residence apply as in any other case.

June 26, 1928. *County Attorney, Waterloo, Iowa:* We wish to acknowledge receipt of your favor of the 18th in which you inquire concerning the right to vote at the last primary election. I am enclosing herewith copy of a letter written by this department May 31, 1928, to Honorable Byron W. Preston of Oskaloosa, which answers your inquiry concerning the right of prisoners to use the absent voters' ballot.

There is no question but that a prisoner does not acquire a residence in the precinct in which the jail is located because of his incarceration. *People vs. Kady*, 143 N. Y. 100.

The general rule is that a student in college is presumed not to have the right to vote in that town, although the same rules for determining residence apply to students as to other persons, and the question as to whether a college student has a voting residence at the place where the college is situated depends on the facts and circumstances of the case. Our Supreme Court has passed upon this proposition and held in substance that to constitute a residence, the fact of residence and the intent to remain must concur. *Vanderpoel vs. O'Hanlon*, 53 Iowa, 246.

TAXATION—ASSESSMENT: Transmission lines taxed in cities and towns in same manner as outside.

June 28, 1928. *Auditor of State:* This will acknowledge receipt of your letter of recent date enclosing a communication from Mr. H. O. Hansen, Dubuque, Iowa, with reference to the assessment and taxation of transmission lines within cities and towns.

You are referred to Section 7101, Code of Iowa 1927, which governs the assessment of such lines within the limits of an incorporated town or city. From this section it will be noted that all lands, buildings, machinery, poles, towers, wires, station and sub-station equipment, and other construction owned or operated by such company referred to in Section 7090 located within any city or town within this state shall be listed and assessed for taxation in the same manner as provided in Sections 6979-6980 of the Code for listing such property outside of a city or town. The opinion cited by Mr. Hansen, being the opinion of this department found in the Report of the Attorney General 1923-1924, page 395, holds that the legislature intended that everything except what can be strictly construed to be personal property should be assessed as real estate. Under Section 7101, all personal property of every company used or purchased by it for the purpose of such transmission line shall be listed and assessed in

the assessment district where usually kept and housed and the listing and levy are made under Sections 6981-6982.

MOTOR VEHICLES—LICENSES: Personnel at army post not entitled to reciprocity under Sections 4865-6 of the Code.

July 2, 1928. *Secretary of State:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following proposition:

The Commanding Officer of the Military Reservation at Fort Des Moines, Iowa, has under general order No. 6 prescribed a method of licensing automobiles owned by the military personnel actually on duty and living on the Military Reservation. Under this plan a license plate is issued by the Post Adjutant and such plate is carried upon the automobiles owned by such military personnel in the same manner as license plates are applied to motor vehicles operated under license by the state of Iowa. These cars are used by such military personnel in their private capacity and are in no wise used in an official capacity as an officer, board, or department of government of the United States.

Your inquiry is whether motor vehicles owned, licensed, and used in the above manner are entitled to be operated upon the highways of the state of Iowa without application and registration by the owners thereof under the terms and provisions of Chapter 251, Code of Iowa 1927.

The contentions made by the applicants for use of the highways of the state of Iowa upon this basis are as follows:

1—That the license fee provided by Section 4863 (10) and 4864, Code of Iowa 1927, is a tax upon personal property and cannot, therefore, be levied against the owner of personal property situated upon the aforesaid Military Reservation.

2—That the said Military Reservation is a "Federal District" under the provisions of Sections 4865-6, Code of Iowa 1927.

We shall treat the contentions in the order above set out.

The license fee provided by statute is not a tax and the mere exemption of the automobile from personal taxation does not make it so. The supreme court of this state has held in an early case, *State vs. Gish*, 168 Iowa, 70, at page 81, as follows:

"The main ground of attack has been upon that feature of the statute which imposes a registration fee in lieu of all other forms of taxation. The argument is that this adopts a special method of taxation for this particular property and a special method of distribution of the taxes thus collected, so as to deprive certain municipalities from all benefits of such taxation. The objectionable features of the statute in this regard are all contained in Sec. 9. This section provides for the cancellation of all assessments of motor vehicles upon the assessors' books, and provides for an exemption from all taxation except the registration fee. If appellant's contention were sustained in this regard, it would avail him nothing in this case. Our pronouncement, therefore, would be mere dictum. The statute in question involves not only the taxing power, but the police power of regulation as well. *If we were to strike down Sec. 9, which section alone involves the exercise of the taxing power, it would still leave the remainder of the act quite intact and independent and involving only an exercise of the police power. That a reasonable fee may be imposed as an incident to the exercise of the police power of regulation is too well settled to require citation of authorities.*"

That such license fees are paid for the privilege of using the roads and highways of this state has been accepted over so long a period of time that we do not deem it necessary to cite further authority upon this question.

Upon the second question the statute provides as follows:

"A motor vehicle shall not, in the following cases, be operated by its own power upon any public highway of this state unless, at the time of such operation, it is registered and licensed, as hereinafter provided, to wit:

1. When such vehicle is kept in this state and the owner is a resident of this state.

2. When such vehicle is kept and used in this state a majority of the time, by a non-resident.

3. When such vehicle is used in this state and not properly licensed under the laws of another state or country."

Section 4864, Code of Iowa, 1927.

"The provisions herein relative to registration and display of registration numbers shall not apply to a motor vehicle owned by a non-resident of this state, other than a foreign corporation, manufacturer, or dealer doing business in this state, provided that the owner shall have complied with the provisions of the law of the foreign country, state, territory, or federal district of his residence relative to registration of motor vehicles and the display of registration numbers thereon and shall conspicuously display his registration numbers as required thereby."

Section 4865, Code of Iowa 1927.

"The provisions of the last preceding section shall be operative as to a motor vehicle owned by a nonresident of this state to the extent that under the laws of the foreign country, state, territory, or federal district of his residence like exemptions and privileges are granted to motor vehicles duly registered under the laws, and owned by the residents of this state."

Section 4866, Code of Iowa 1927.

It is evident from General Order No. 6 hereinbefore mentioned, that applicants have endeavored to bring themselves within that provision of the statute referring to nonresidents who have paid a license fee in a "federal district of his residence". It is, therefore, necessary for us to place a construction upon this section of the statute.

It will be noted that the statute refers to a nonresident owner who has complied with the provisions of the law of the foreign country, state, territory, or federal district of his residence relative to registration of motor vehicles and the display of registration numbers thereon.

It is quite evident, we think, that the legislature did not have in mind a federal district created by order of a Commandant of a Military Reservation. It is quite apparent that there is no federal law governing the question because applicants have found it necessary to issue a general order to apply specifically to the circumstances which exist.

We are forced to the conclusion that the legislature did not have in contemplation such a "federal district" as a Military Reservation and that the Military Reservation of Fort Des Moines, Iowa, does not come within that term as used in the statute. We are constrained to hold that the construction of a state law is for state authorities and we quote the following from the opinion of the Judge Advocate General in this regard relative to a similar situation in the state of Minnesota:

"The construction of a State law is, of course, primarily for the State authorities, and as the Assistant Attorney General of Minnesota has held that privately owned motor vehicles of members of the military personnel stationed at Fort Snelling are not exempted by any provision of the Minnesota Motor Vehicle Law from the payment of the automobile registration tax when they are driven upon the State Highways, there is no occasion for the statement of the views of the War Department, no Federal question being involved. Any

person taking a contrary view of the State law would have the privilege of testing his position in the courts of Minnesota.

"These views have been communicated to the Commanding Officer, Fort Snelling, for his information, with instructions to publish them to his command. Further than that it is not believed proper for the War Department to go, for as to what is compliance with State law in a matter of personal taxation is a question for each individual to determine on his own responsibility on which the War Department does not purpose to pass an opinion."

Moreover, the supreme court of the United States in the case of *Hendrick vs. Maryland*, 235 U. S. 610 at 622, held that in the absence of national legislation governing the subject the licensing of motor vehicles is within the exercise of the police power of the state. The court, speaking through Mr. Justice McReynolds, said:

"In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horsepower of the engines—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the State's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress." (Citing cases).

Since no federal legislation has been enacted governing the regulation of motor vehicles on military reservations and since the courts uniformly hold that the regulations relating to the operation of motor vehicles upon the highways of the state is a power belonging to the states and essential to their preservation of the health, safety, and comfort of their citizens, we are of the opinion that the application of members of the military personnel of Fort Des Moines, Iowa, to operate their motor vehicles upon the highways of the state of Iowa under the terms and conditions hereinbefore set out cannot be sustained under the law and that such applications should be by you denied.*

CHILD LABOR LAW: Discussion of Sec. 1537, Code, 1927, relative to street occupations under certain conditions.

July 6, 1928. *Commissioner of Labor:* You have requested the opinion of this department on a number of propositions arising under the Child Labor Laws. Your propositions arise principally from a situation involving the Girl Scouts' Summer Camps, for girls under eighteen years of age.

You state that it has been the practice for a number of these girls who reside in cities of ten thousand or more inhabitants, who come from poor families, to earn a part of their fees and part of the charges for attending these summer camps, by selling merchandise, such as five cent candy bars, ten cent jelly powder, thirty-five cent cake flour, and brick ice cream, the girls taking orders and delivering the merchandise the following day. Under the statement of facts submitted by you these girls are required to remain in their own immediate neighborhood, being given strict orders not to go more than six blocks from their homes. It is also represented that these girls earning this money, in every case act with their parent's consent. It is stated that when they have

*Sustained: *Bailey vs. Smith*, U. S. Dist. Court, S. D. of Iowa.

earned the required amount of money, which in the instant case, is $6.00 per week, they quit and permit another girl in the neighborhood to have the opportunity of earning her way into the camp.

We will undertake to state and answer your questions separately and in the order in which they come.

1. Question: "Assuming that the merchandise is bought outright, would the solicitation of orders and delivery of goods bring these girls under the provisions of the Street Trade Law, Section 1537 of the Code?"

Answer: Section 1537 of the Code insofar as applicable, provides as follows:

"No boy under eleven years of age nor girl under eighteen years of age shall be employed, permitted, or suffered to work at any time in any city of ten thousand or more inhabitants within this state in or in connection with the street occupation of peddling, bootblacking; the distribution or sale of newspapers, magazines, periodicals, or circulars, nor in any other occupations in any street or public place, * * *"

It is our opinion that the foregoing provisions of law do not apply to the particular situation presented by you, provided, however, that the merchandise sold by the girls is not such as come within the descriptions of the occupations of peddling, bootblacking, the distribution or sale of newspapers, magazines, periodicals or circulars, nor "in any other occupations in any street or public place". There is no question but what none of the articles of merchandise mentioned in the statement of facts, come within the purview of this statute, unless it be in the phrase "in any other occupations in any street or public place".

It is then necessary to determine what is an occupation. Turning to Words and Phrases, we find that the term "occupation", is synonymous with calling, trade, business, or profession. It is also stated that the word "occupation", is a generic term, and is that to which ones time and attention are habitually devoted, vocation, calling, trade, business, and a "vocation" is an employment, occupation, calling, trade, including professions as well as mechanical occupations. Again it is stated that "occupation" as commonly understood, signifies vocation, calling, trade, the business which one principally engaged in to secure a living or obtain wealth. Citing a long line of cases.

We are of the opinion that an occasional solicitation for the purpose of obtaining money for a vacation or recreation, such as is the case under the statement of facts submitted, is not an occupation in any street or public place such as is intended by the provisions of this statute. It was intended, undoubtedly, by the framers of this statute, that girls under eighteen years of age should be protected from the common things and opportunities for indecent advances which might be made to them by the general riff-raff frequenting public streets and places. This restriction is made by the state as a part of the police power. Surely no one will contend that the mere solicitation on a few occasions by girls of their neighbors, to buy some little article of merchandise such as is described in the statement of facts submitted, and which is not of the class listed in the statute, would be against public morals or in violation of the restrictions of this statute. We hold that this section of the law does not cover the situation described herein.

2. Question: "If orders are taken and turned over to merchants for delivery, the girl receiving remuneration in the form of a commission or rebate, would

such transaction bring her in the position of employe, and subject to the Child Labor law, Section 1526 and following?"

Answer: Section 1526 of the Code, insofar as applicable, provides as follows:

"No person under fourteen years of age shall be employed * * * in the distribution or transmission of merchandise or messages; * *"

It will be noted from the language of the question submitted that the girls do not deliver the merchandise, they merely solicit the sales receiving remuneration in the form of commission or rebate. The only part of Section 1526 of the Code, which might be thought to be applicable, is that portion set out. We have omitted the other portions which clearly have no bearing upon the question. It will be noted that the violation, if any, is for a child under fourteen years of age to be employed in the distribution or transmission of merchandise or messages, such as operating a delivery service or telegram messenger service or something of that character. Under the statement of facts submitted, we cannot conceive that the situation comes within the purview of this statute. Our answer is that none of the facts submitted by you are a violation of the provisions of Section 1526 of the Code, et seq.

3. Question: "If the sale is made by the merchant to girl direct with the knowledge that goods are to be resold, is the merchant liable under the provisions of second from last paragraph of Section 1540 of the Code?"

Answer: The paragraph from Section 1540 of the Code referred to, reads as follows:

"Whoever furnishes or sells to any minor any article of any description with the knowledge that said minor intends to sell said article in violation of the provisions of this chapter relating to street occupations, shall be punished by a fine of not less than fifteen dollars nor more than one hundred dollars for each offense."

Having held under Question 1. that the situation presented is not affected by the provisions of the so-called Street Trade law, Section 1537 of the Code, it therefore must necessarily follow that the merchant referred to in the question last above set out, is not a violator of any law, because the paragraph of the law quoted refers particularly to violations of the street occupation law as defined in Section 1537. Our answer is that the merchant is not liable under the circumstances stated.

4. Question: "Does the purpose for which the money is earned by such sales, or the length of time required to earn it, make any difference under Section 1537 in determining the establishment of an occupation?"

Answer: As stated in answer to the first question, and in the definitions of the term "occupation" therein referred to, we are of the opinion that if the purpose of the solicitation or orders and sales by the girls, is to continue persistently in the business of soliciting such orders for the purpose of earning a livelihood for the family or for the girl herself, and is not limited to her immediate neighborhood, but takes on the nature of a general solicitation, and is a regular vocation to which she is habitually devoted, then it would be a violation of the law. It is our understanding under the facts submitted that the girls in question make these sales over only a sufficiently long enough time to obtain a few dollars to defray the expense of their attending a summer camp for girls. The work is done in a manner which might be termed as occasional.

5. Question: "Does the third paragraph from end of Section 1540 apply to parent or person in charge of girl selling under plan?"

Answer: The provision of law referred to is as follows:

"The parent or person in charge of any child who shall engage in any street occupation in violation of any of the provisions of this chapter shall be punished by a fine of not more than fifteen dollars."

Likewise as we answered Question 3, before the parent or person in charge of the child would be liable, it must first be found that the child is engaged in a street occupation in violation of Section 1537 of the Code.

6. Question: "Does the Girl Scout, incorporated, or any other similar association, stand in position of employer when buying goods in bulk and disposing of it through these girls under their general plan of solicitation of orders, delivering or peddling?"

Answer: We are unable to answer the foregoing question because of the indefiniteness of the same. It would be necessary to know the terms of the plan and the nature of the goods being sold and distributed and all of the facts incident thereto. However, the question is one largely of fact and each case submitted must be decided according to its own facts.

TAXATION—MONIES AND CREDITS—REAL ESTATE: Held that if a person had on deposit in bank $15,000.00 on Jan. 1, 1928, and later in May of same year bought a farm, paying as part of purchase price the said $15,000. that under the statutes the $15,000.00 on deposit in the bank should be assessed as monies and credits against him, and that the lien of the tax assessed against the real estate would have to be paid by said person as he assumed and agreed to pay the same, and that there was no relief from such taxation, same not being a double taxation.

July 12, 1928. *County Attorney, Pocahontas, Iowa:* We beg to acknowledge receipt of your letter under date of July 3, 1928, requesting an opinion of this department on the following question:

"A" on January 1, 1928, has $15,000.00 in the bank which is assessed as monies and credits. In May, 1928, "A" bought a farm and paid this $15,000.00 as part of purchase price. "A" assumed and agreed to pay the taxes on the farm, which he purchased, which would be due and payable March, 1929. In March, 1929, "A" will have to pay taxes on the $15,000.00 as monies and credits, and also on the farm.

Is there any way in which "A" may secure relief from the apparent double taxation?

We beg to advise that there is no way in which "A" can secure any relief. When the $15,000.00 was assessed as monies and credits it was a valid assessment and when the land was assessed in 1928 it was a valid assessment, and as "A" assumed and agreed to pay the taxes on the land as a part of the purchase price he, of course, will not be relieved from paying the taxes on the monies and credits.

The tax on the land is a lien and can only be satisfied by the payment of the same. This is not a case of double taxation. Both taxes were valid when made and there is no way in which relief may be secured, both taxes being just.

SCHOOLS AND SCHOOL DISTRICTS—TAXATION: Proceeds of tax under Section 4403 to retire bonds should be credited to the schoolhouse fund.

July 12, 1928. *Department of Public Instruction:* You have requested the opinion of this department upon the following proposition:

Should the proceeds of the seven mill tax raised under the provisions of Section 4403 be placed in the schoolhouse fund of a school district or in the general fund?

It is provided by statute, Section 4317, as follows:

"The money collected by tax voted or the proceeds of the sale of bonds valid for the purpose of building schoolhouses shall be called the schoolhouse fund, and all other moneys received for any other purpose shall be called the general fund, and he shall keep a separate account with each fund, paying no order that fails to state the fund upon which it is drawn and the specific use to which it is to be applied."

Under this provision the money collected by tax voted or the proceeds of the sale of bonds valid for the purposes of building schoolhouses shall be called the schoolhouse fund.

Under the statutes there are two methods of financing the building of schoolhouses. One is a ten mill tax voted under the provisions of Section 4217 (7) of the Code; the other is by the issuance of school bonds under the provisions of Section 4406 of the Code.

These methods are, in fact, but one method, and constitute the voting of a tax. In the first instance, it is usually in a small amount for the immediate and direct purpose of erecting a building, procuring sites and equipment or improvements; and in the second instance, for the same purpose, but in larger amounts; and the immediate use of the money is secured by anticipation of the tax through the sale of the bonds. We reach this conclusion for the reason that the money raised under the provisions of Section 4403 of the Code is, in fact a tax voted and authorized at the same time as the bonds and for the purpose of paying the debt created by the bonds which must be authorized by the electors.

The tax levied under Section 4403 can be used only for the purpose of paying the interest and maturing principal upon lawful bonded indebtedness which has been authorized by the electors. When the proceeds of the sale of bonds is used it in fact creates an overdraft in the schoolhouse fund in that it leaves an outstanding indebtedness against that fund. Therefore, since the seven mill tax to which you refer can be levied only when bonds have been authorized by vote of the electors and is levied to take up this overdraft or indebtedness in the schoolhouse fund, we think, without question that it comes under the term of "money collected by tax voted" as that language is used in Section 4317 of the Code.

It is therefore the opinion of this department that the seven mill tax or any portion thereof levied under the provisions of Section 4403 of the Code should be placed in the schoolhouse fund in order to take up the indebtedness which was created when the tax was authorized and anticipated by the voting and issuance of bonds. It is further the opinion of this department that the interest and maturing principal on bonds issued cannot be paid from the general fund of the school district.

FAIRS—STATE AID—COUNTY AID: Fair society is entitled to proportionate share of county tax in a given year whether a fair is conducted or not. Failure to hold a fair in a given year forfeits the right to state aid until showing of three successive fairs has been held.

July 13, 1928. *Iowa State Fair Board:* This will acknowledge receipt of your letter of recent date enclosing a letter from R. E. Bucknell, Secretary Cedar Rapids Fair Society, in which you request the opinion of this department upon the following proposition:

May the Cedar Rapids Fair Society receive aid for permanent improvements

from a tax levied in 1927 and collected in 1928 where such society is not holding a fair in the year 1928 but expects to continue its operation beginning in the year 1929?

There is no reason why the Cedar Rapids Fair Society should not be allowed its proportionate share of the tax levied for permanent improvements for the year 1928 despite the fact that no fair will be held in this year. The county aid is not dependent upon continued consecutive expositions.

However, such society, having failed to conduct a fair or exposition in the year 1928, would not be entitled to state aid for the years 1929 and 1930 under the provisions of Section 2902 (6). This section definitely provides that if there is one society receiving state aid in a county no aid shall be given any other society in said county until it has filed the proper annual report with the Secretary of the State Fair Board for three consecutive years showing compliance with all of the provisions of law governing societies entitled to receive state aid. Therefore, a break in any one year would forfeit the right of such society to receive state aid until it had again complied with this provision.

BOARD OF SUPERVISORS—COUNTIES—INSANE CASES: Board of Supervisors of a county does not have authority to allow claims filed by attorneys to represent defendants in insane or inebriate cases before the Commissioner of Insanity.

July 17, 1928. *Auditor of State:* We beg to acknowledge receipt of your letter under date of July 2, 1928, requesting an opinion of this department on the following question:

"Is it possible for the Board of Supervisors to allow claims for an attorney to represent the defendant in an insane case or an inebriate case brought before the commission of insanity?"

We beg to advise that we find no statute which would authorize the payment, as a part of the cost, of attorney fees for the attorney for a defendant insane or inebriate patient.

There being, therefore, no authorization, we are of the opinion that the Board of Supervisors of a county would not have authority to allow claims filed by attorneys to represent defendants in insane or inebriate cases before the Commission of Insanity.

CRIMINAL LAW—SENTENCES: Where a defendant is convicted and sentenced to imprisonment in the county jail by the district courts of two counties and nothing is said in either judgment as to whether or not the sentences should be concurrent then they are concurrent.

July 18, 1928. *County Attorney, Waterloo, Iowa:* We beg to acknowledge receipt of your letter under date of July 14, 1928, requesting an opinion of this department on the following question:

A man is convicted and sentenced to imprisonment in the county jail by the District Court for a crime committed in that county and while serving said sentence he is tried, convicted and sentenced in another county for another offense and sentenced to imprisonment in the county jail.

In neither judgment was anything made with reference as to whether or not said sentence should run concurrently or not.

The question then is, do these two sentences run concurrently?

We refer you to the case of *Dickerson vs. Perkins*, 182 Iowa 871. The Supreme Court in that case, in construing Section 13959, Code 1927, held that if the defendant was convicted and sentenced by the District Courts of two different

counties and nothing was said in the judgment of either as to whether or not the sentences should run concurrently that said sentences would run concurrently In other words, the judgment must state to the contrary if the sentences are not to run concurrently. It is true that the above case considered the case in which the defendant was sentenced to be imprisoned in both instances in the penitentiary. Yet, from reading Section 13959, Code 1927, it will be seen that it refers only to imprisonment and does not restrict itself to imprisonment in the penitentiary.

We are, therefore, of the opinion that where a defendant is convicted and sentenced to imprisonment in the county jail by the District Courts of two counties and nothing is said in either judgment as to whether sentences should be concurrent or not then they are concurrent within the decision above referred to.

SPANISH AMERICAN WAR VETERANS AUXILIARY NATIONAL CHAMPION DRILL TEAM—APPROPRIATION: Appropriation by 42nd G. A. for expenses of sending champion team to Havana was for personnel of original team and not for a team of a different personnel.

July 19, 1928. *Governor:* This department is in receipt of your communication of the 19th instant in which you refer to what is known as Chapter 9, Acts of the Forty-second General Assembly, Special Session, being an act providing for paying the expenses of the National Champion Drum Corps of the Spanish-American War Veterans, and the expenses of the National Champion Drill Team of the Spanish-American War Veterans Auxiliary, to their national convention at Havana. The inquiry propounded by you is as follows:

"Some question has arisen as to what should be the personnel of this team at this time,—whether it should be a new team made up or whether it should include as nearly as possible the membership of the team which went to Detroit a year ago. Your opinion in this matter is desired by the Executive Council in order that we may determine to whom this appropriation should be paid."

I first wish to call your attention to the fact that the appropriations under this chapter were made through the Executive Council; therefore the expenditure of the fund may be made under such restrictions as the council may prescribe.

Your inquiry pertains alone to the question of the membership of the National Fancy Drill Team of the Auxiliary of the United Spanish War Veterans of America. The Legislature made the appropriation of $2,500.00 for the purpose, to quote the express language of the Legislature, "to pay the expenses of the National Champion Fancy Drill Team of the Auxiliary." The word "champion" presupposes some formerly acknowledged supremacy. A champion in any branch of athletics is a person who has been formerly acknowledged by an organization as the best athlete in that particular class. By the use of the words "National Champion Fancy Drill Team," the Legislature must have had in mind an organization made up of individuals that had formerly been acknowledged by the organization to which it belonged as being the best drill team in the organization, or at least the best drill team competing in the organization. Webster has defined a champion as "anything that has been awarded the first prize or place in competition." So that the use by the Legislature of the word "champion" presupposes recognition of a particular organization made up of certain individuals as being the drill team whose expenses should be defrayed in attending the national convention for this year. If the

Legislature simply had in mind to defray the expenses of a drill team of the auxiliary, without regard to its membership, it would simply have provided for the payment of expenses of a fancy drill team. As a matter of history, it is well known that a certain drill team in the auxiliary received first prize at Detroit during the last annual national convention. It could not be said that a team made up of entirely new members would be the champion drill team which obtained the prize a year ago, for if the entire membership of the organization was changed there could not be said to exist a national champion drill team, and therefore there would be no justification for the Executive Council defraying the expenses of a new drill team to Havana.

It is not a question of whether the former members of the championship team will win a prize at Havana, or whether it is the best drill team on exhibition at Havana: it is a question of paying the expenses of an organization in its original membership which has already won recognition in the order. Therefore, it is my opinion that those members of the National Champion Drill Team of the Auxiliary who are in a position to attend the convention at Havana are the persons whose expenses should be paid by your honorable body, under the appropriation provided for in this chapter.

CITIES AND TOWNS—SALARIES: City councils do not have authority to increase their own salaries.

July 21, 1928. *County Attorney, Waterloo, Iowa:* We beg to acknowledge receipt of your letter under date of July 18, 1928, requesting an opinion of this department on the following questions:

"1—Can the town council pass an ordinance fixing salaries for themselves, and other officers of the town, when there was no salary ordinance in effect when they were elected? To just what extent does Section 5672 of the Code apply?

"2—Section 5720 of the Code provides for publication by posting in three public places within the town, one of which shall be at the post office and the mayor's office. What will constitute proper posting when there is no post office in said town, said town being served by rural delivery?"

For answer to your first question we are of the opinion that a city or town council cannot pass an ordinance providing for the payment of salaries to themselves, which ordinance would increase the salary over the amount fixed at the time they qualified for office. They might, however, pass an ordinance fixing the salary of councilmen, but those who were in office at that time would not be entitled to receive the benefits of any increase, this for the reason that the same would be against public policy, and contrary to the provisions of Section 5672.

Neither can a city council pass an ordinance which would increase the salary or compensation to be received by a city or town officer during the term for which said officer was elected. They could, however, pass an ordinance which would fix a salary for city or town officers to be elected or appointed in the future, this for the reason that Section 5672 so provides. We also refer you to authorities for this, case of *Council Bluffs vs. Waterman*, 86 Iowa at 688; *Bryan vs. Des Moines*, 51 Iowa, at 590.

For answer to your second question we are of the opinion that notwithstanding the provisions of Section 5720 with respect to the public posting of notices at the post office, that in a city or town where there should happen to be no post office that the only requirement would be to post three notices, one at

the mayor's office and the other two in two conspicuous places. This, we think, would be a substantial compliance with said statute.

BONDS—INSURANCE—SCHOOLS: Public officials cannot take advantage of their positions to write bonds or insurance for contracts.

July 25, 1928. *County Attorney, Mapleton, Iowa:* Desire to acknowledge receipt of your request of July 23, which is as follows:

1st. Would the writing of the bond required of a contractor for the erection of a school building by a partnership of which the President of the Board was a partner be a violation of Section 13317 of the Code, where the President shared in the commission on the bond premium?

2nd. Would the writing, as agent, of the performance bond required of a contractor for the erection of an improvement being made by a city, by the Mayor of said city be a violation of said Section 13317?

3rd. Would the writing of insurance, as agent for a school district by the President of the Board be a violation of said Section 13317, or any Section of the Code?

4th. Would the writing of insurance, as agent for a city by its mayor be a violation of said Section 13317 or any other Section of the code?

And, in reply, we would say that any public officer, acting in behalf of his principal in any public transaction, receiving for his own use, directly or indirectly, any commission bonds, etc., relating to or going out of such business transaction should be condemned from the standpoint of public policy.

The writing of a bond or a policy of insurance is a contract between the company and the city or school board and Section 5673 specifically states that no officer, including members of the city council shall be interested directly or indirectly in any contract and it is evident that the Mayor of a town writing either a bond or policy of insurance would be interested to some extent.

And it was clearly not the intention of the legislature to permit members of the school board to use their office to their own financial advancement as Section 4468 specifically prohibits any director or teacher from acting as agent for any firm selling school books and the Supreme Court of this state has condemned and held invalid, contracts between the school board and any individual member of that board.

This is held in the case of *Moore vs. Toledo City Independent District 55*, Iowa 654, and *Weitz vs. Des Moines Independent District 87*, Iowa 81. In the last case it was said, "A contract with a member of the Board of Directors to render services for the district for a compensation is invalid and any money paid to him under such contract may be recovered back."

And while strictly speaking, a bond or policy of insurance would not be a contract between the school board and the individual member, nevertheless, the individual member acting as an agent for the company, would derive certain financial benefits and we feel should be condemned.

And in a later case, *Kagy vs. The Independent District of West Des Moines*, 117 Iowa, Page 698, the Supreme Court says: "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."

We are, therefore, of the opinion that the question submitted by you, particularly questions two and four follow within the propositions of Section 5673 and that questions one and three would be answered by saying that practices of this character are strictly against the policy of law and should be severely condemned.

TAXATION—SPECIAL ASSESSMENTS—INSTALLMENTS INTEREST—PENALTY: Special assessment installments classified as to penalty.

July 27, 1928. *Auditor of State:* We beg to acknowledge receipt of your recent request for an opinion of this department on the following question:

There seems to be some misunderstanding as to whether installments of special assessments levied for various purposes draw interest as a penalty after they become delinquent or whether they only draw 6% interest and no penalty.

We shall consider the question with respect to the various special assessment levies which may be made for different purposes under the statutes pertaining to such matters.

I.

Cities and towns, special assessments for street and sewer improvements including paving, curbing, guttering, oiling, gravelling, etc.

The statute pertaining to assessments for such improvements was Section 825, Code 1897, up until April 17, 1924. This section provided as follows:

"Levy of assessment—installments. The special assessments made in said plat and schedule, as corrected and approved, shall be levied at one time, by ordinance or resolution, against the property abutting on such street improvement or sewer, and, in case of sewers, upon adjacent property, and, when levied and certified, shall be payable at the office of the county treasurer. If the owner of any lot or parcel of land or railway or street railway, the assessment against which is embraced in any bond or certificate provided for in chapter eight of this title, shall, within thirty days from the date of such assessment, promise and agree in writing, indorsed on such bond or certificate, or in a separate agreement, that, in consideration of having the right to pay his assessment in installments, he will not make any objection of illegality or irregularity as to the assessment or levy of such tax upon and against his property, and will pay said assessment with interest thereon at such rate, not exceeding six per cent per annum, as shall by ordinance or resolution of the council be prescribed, such tax so levied against the lot or parcel of land or railway or street railway of such owner shall be payable in seven equal installments, the first of which, with interest on the whole assessment, shall mature and be payable on the date of such assessment, and the others, with interest on the whole amount unpaid, annually thereafter, at the same time and in the same manner as the March semiannual payment of ordinary taxes; but where no such promise and agreement in writing shall be made by the owner of any lot or parcel of land or railway or street railway within said time, then the whole of said special assessment so levied upon and against the property of such owner shall mature at one time, and be due and payable, with interest, on the date of such assessment, and shall be collected at the next succeeding March semiannual payment of ordinary taxes. All such taxes with interest shall become delinquent on the first day of March next after their maturity, and shall bear the same interest with the same penalties, as ordinary taxes."

This section provided for the waiver plan. That is, the property owner was given the right to waive any objections which he might have to any illegality or irregularity in making the assessment and in consideration for such waiver he was granted the privilege of paying his share of the cost of the improvement in seven installments. In the event he did not sign a waiver the whole amount of the assessment became due and payable with interest at 6% and penalties after it became delinquent.

The question as to whether or not, where a waiver has been signed, the delinquent installments carry a penalty as well as interest, is we think definitely decided by the terms of the statute itself. The signing of the waiver by the owner of the property, against which a special assessment has been made, is the signing of a contract the consideration of which, on the part of

the owner, is his waiving the right to object to any irregularity or illegality in the manner of making the assessment and levy, in return for which he, the owner, is to receive the right to pay the special assessment in seven annual installments with interest at 6%.

By signing the waiver the owner is only given the right to pay the total assessment in seven annual installments. Exemption from the payment of penalty after the installments are delinquent is not a part of the consideration of the waiver contract. The statute itself provides that all such taxes (referring to special assessments) with interest shall become delinquent on the first day of March next after their maturity and shall bear the same interest with the same penalties as ordinary taxes. This language can only mean one thing, and that is that when an installment of the assessment is delinquent or when the total assessment, where there is no waiver, is delinquent such installments and assessments shall bear the same interest and penalties as ordinary taxes. This being true installments of special assessments for street improvements and sewers, after they become delinquent, bear the same interest and penalties as ordinary taxes.

We are, therefore, of the opinion that all installments of assessments made under the provisions of Section 825, Code 1897, bear the same interest and same penalties as do ordinary taxes after their delinquency.

When the Code of Iowa was re-codified and re-arranged the above section was changed and appears in the Code of 1924 as Section 6032, which section now reads as follows:

"Maturity under implied waiver. 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 objection 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 objections 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 or chloriding the streets may not be paid in installments."

It will be noted that Section 6032, Code 1924, above set out, changes the provisions of Section 825, Code 1897, and provides that unless objections are made in writing by the owner of property, against which an assessment is made, within thirty days after the date of the levy that such owner shall be deemed to have waived all objections as to the illegality or irregularity of the assessment and levy, and that he had the right to pay said assessment, with interest thereon not exceeding 6%, in ten equal annual installments. The waiver contract by the provisions of said section has thus been disposed of and the owner is now given, by statute, the right to pay his special assessment in ten equal annual installments. Under the re-codification, as it appears in the Code of 1924, we find Section 6033, which provides as follows:

"Installments—payment—delinquency. The first installment, with interest on the whole assessment from date of levy by the council, shall mature and be payable thirty days from the date of such levy, and the others, with interest on the whole amount unpaid, annually thereafter at the same time and in the same manner as the March semiannual payment of ordinary taxes.

Any and all installments not yet paid together with accrued interest thereon may be paid on the due date of any installment.

All such taxes with interest shall become delinquent on the first day of

March next after their maturity, and shall bear the same interest with the same penalties as ordinary taxes.

Upon the payment of any installment, there shall be computed and collected interest on the whole assessment remaining unpaid up to the first day of April following."

We call your attention to that part of the above section which is in italics. It will be seen that all special assessments with interest shall become delinquent on the first day of March next after the maturity date, and that they shall bear the same interest with the same penalties as ordinary taxes. The change in the provisions, as found in Section 825, Code 1897, was made in the re-codification by the Fortieth Extra General Assembly, and became effective as of date of April 17, 1924. The above section specifically specifies the date at which such taxes shall become delinquent and provides that they shall bear the same interest and penalties as ordinary taxes.

We are, therefore, of the opinion that delinquent installments of any special assessment levies made under the provisions of Sections 6030-31-32-33 of the Code of 1927, bear the same interest and penalties as ordinary taxes; as to the interest and penalties of ordinary taxes we refer you to Sections 7214-15, of the Code of 1927. It will be seen from reading these sections that the interest as penalty on delinquent taxes is 1% per month until paid, and from referring to Section 6033, Code of 1927, above set out, we find that the first installment, with interest on the whole assessment from the date of levy, is to be made thirty days after the date of levy, and that the subsequent installments with interest on the whole amount are to be paid annually thereafter at the same time and in the same manner as the March semiannual payment of ordinary taxes.

It would, therefore, follow that if the owner of property, against which a special assessment levy has been made, fails to pay an installment during the month of March that on or after the first day of April said installment, which is made due at said time, would be delinquent and a penalty would be collectible thereon. The penalty being 1% per month from and after April first.

Your attention is called to the fact that Sections 6030-31-32-33, Code of 1924, appear in the Code of 1927 as they appeared in the 1924 Code, no change having been made.

II.

Assessment for street opening.

Under Section 5938, Code of 1927, cities and towns have the power to establish, lay-off, open, widen, straighten, narrow, vacate, extend, improve and repair streets, highways, avenues, alleys, etc., within their territorial limits and under the provisions of Section 5942 b-5, Chapter 307, Code 1927, the provisions of Chapter 308, relating to street improvements and special assessments in which chapter we find Sections 6030-31-32-33 are made applicable. It would, therefore, follow that installments of any special assessments made for street opening, etc., would bear the same interest and penalties as is provided for in Section I hereof.

III.

Assessment for joint municipal sewers under the provisions of Chapter 308 a-1 Code of 1927.

Section 6066 a-3, of said chapter, provides that special assessments for the purpose of constructing and repairing of joint municipal sewers shall be made

in the same manner as provided for in Chapter 308, and all amendments thereto.

It would, therefore, follow that where special assessment has been made for a joint municipal sewer under the provisions of Chapter 308 a-1 that the installments of said assessment would bear the same interest and penalties as would ordinary taxes in conformance with Division I hereof.

IV.

Special assessments in cities under commission form of government.

Under Section 6075, Chapter 326, Code 1927, with reference to government of cities by commission it is provided that special assessment shall be made in the manner provided for assessing the cost of street improvements and sewers, that is in the same manner as is provided in Chapter 308, Code 1927. We are of the opinion, therefore, that installments of special assessments made for street and sewer improvements in cities under commission plan shall bear the same interest and penalties as do ordinary taxes, and as explained in Division I hereof.

V.

Cities under special charter. Special assessments for street improvement and sewers.

Section 6907, Chapter 329, Code 1927, pertaining to street improvements in special charter cities, provides that installments of a special assessment and all interest due and unpaid shall become delinquent at the time fixed by the ordinance or resolution and shall bear such interest from the time of becoming delinquent as ordinary taxes.

We are of the opinion that under the provisions of such section installments of special assessments made for street and sewer improvements in special charter cities bear interest at the rate of 1% from and after the time they become delinquent, said interest being the interest which ordinary taxes bear after they become delinquent, and being in the nature of a penalty for such delinquency.

We find also in referring to assessments made for sewers in cities under special charter that Section 6923, Code 1927, provides that the special assessment installments shall bear the same interest and penalties as ordinary taxes after they become delinquent. The same rule, therefore, as to penalties would apply as is suggested in Division I hereof.

VI.

Cities and towns—assessments for sidewalks.

In Section 5964, Code 1927, we find provisions for waiver by the owner somewhat similar to that found in Section 825, Code 1897. We also find in Section 5965 the same provisions as is contained in Section 825, Code 1897, with respect to the interest and penalties, that is assessments for sidewalks shall bear the same interest and same penalties as do ordinary taxes.

We are, therefore, of the opinion that installments of special assessments for sidewalks bear the same interest and same penalties after delinquency as do special assessments for street improvements and sewers.

The same rule applies as was set out in Division I hereof.

The same rule would apply to special assessments for sidewalks in cities under commission and special charter, for both provisions pertaining to such cities provides that the provisions of Chapter 308 should apply to the assessments made in such cities where no other special provisions were adopted. We do not find any special provisions.

VII.

Drainage assessments.

Under Chapter 353, Code 1927, with respect to drainage assessments, we find that where the owner waives the right to object because of any illegality or irregularity in the manner of making assessment that he is given two options with respect to the manner of paying the installments.

In the first he is given the right to pay one-third of the amount of the assessment at the time of signing the waiver and then one-third within twenty days after the improvement is one-half completed and the remaining one-third within twenty days after such improvement has been completed and accepted. Under said option all installments are to be without interest if they are paid at the time specified. However, if they are not paid by such time said assessment shall bear interest from the date of levy at the rate of 6% per annum, payable annually, and be collected as other taxes on real estate with like penalties for delinquency. Under this option delinquent installments bear the same penalties as ordinary taxes.

Under the second option the owner who signs a waiver is given the right to pay in not less than ten nor more than twenty equal installments, the interest to be fixed by the board and not to be for more than 6% per annum. The first installment is payable at the March semi-annual taxpaying date in each year, provided, however, that the county treasurer shall at the March semi-annual taxpaying 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.

After the first installment has been paid the remaining installments are to be collected at the same time and in the same manner as are ordinary taxes, with interest at the rate fixed by the board not exceeding 6%, and after delinquency carry the same penalty as do ordinary taxes.

VIII.

County road improvement assessments.

In Chapter 241, Code of 1927, under the provisions of Section 4753 a-3, with respect to the assessments for improvement of county highways, we find a provision for waiver by the owner of land against which an assessment is levied. We also find a provision that the same interest and penalties shall be collected on the installments after delinquency.

We are, therefore, of the opinion that installments of special assessments for improvement of county roads after delinquency bear the same interest and penalties as do ordinary taxes, and that the same rule as was set down in Division I hereof would apply.

TRANSFER—COUNTIES: Under Section 7172 counties are authorized to pay the court expenses out of the ordinary revenues and are also authorized to make an additional levy of not to exceed 3 mills where the ordinary revenues are not sufficient to take care of said court expenses. Where a transfer has been made from the county general fund to the court expense fund it is not necessary to transfer back from the court expense fund to the county general fund.

July 31, 1928. *County Attorney, Marshalltown, Iowa:* We beg to acknowl-

edge receipt of your letter under date of July 27, 1928, requesting an opinion of this department on the following question:

It seems that for a number of years in the past the treasurer's office of this county without any authority had made transfers from the general fund to the court fund to take up deficit in said fund.

When the State checkers were here and made their report they recommended that the Board order the County General Fund reimbursed in the sum of $23,825.77, to cover the transfer previously made to the court fund.

Will you not kindly advise us what procedure should be taken in connection with this matter?

Section 7172, Code of 1927, reads as follows, to which we call your attention:

"Court expense. In any county where, by reason of extraordinary or unusual litigation the rates herein fixed for ordinary county revenue are found to be insufficient to pay the same, the board of supervisors may create an additional fund to be known as court expense fund, and may levy for such fund such rate of taxes as shall be necessary to pay all court expenses chargeable to the county. Such fund shall be used for no other purpose, and the levy therefor shall be dispensed with when the authorized levy for the ordinary county revenue is sufficient to meet the necessary county expenditures including such court expenses. Provided, further, that the levy for the purpose of providing an additional fund shall not exceed three mills on a dollar."

It will be noted from reading the above section that where, in any county, by reason of extraordinary and unusual litigation, the rates fixed for ordinary county revenues are found to be insufficient to pay the court expenses that the Board of Supervisors are authorized to make an additional levy for such purposes, not exceeding three mills on the dollar. In other words, the usual court expenses are payable out of the ordinary revenues of the county when such revenues are sufficient, and when they are not an additional levy is authorized to take care of any deficiency therein.

It would seem, therefore, that where the county has used the additional levy made by reason of the provisions of Section 7172, Code 1927, and have paid any deficiency out of the ordinary revenues that there could be no need for a transfer from the court fund to the ordinary revenues, for the counties are authorized by said section to pay court expenses out of the ordinary revenues. We are, therefore, of the opinion that in the present situation there is no need for any transfer from the court fund to the ordinary revenues of the county to reimburse the same for the money transferred out to take care of the court expenses.

The proper way, of course, to have handled the matter would be to have the warrant drawn directly payable out of the ordinary revenues, but where the transfer has been made for the purpose of accounting to the court expense fund we can see no irregularity which would be objectionable.

CITIES AND TOWNS: Excepting first class, entitled to pay council only one dollar per week.

August 1, 1928. *Auditor of State:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

May the town council of the town of Richland, Iowa, pay to the councilmen under its ordinance a salary of $50.00 per year in lieu of the provisions of Section 5664 of the Code of Iowa 1927?

The cited section provides in part (applicable to Richland, a town of 552 population according to the 1925 census) as follows:

"* * * and in all other cities and towns (excepting cities of the first class) they (councilmen) shall receive not to exceed one dollar each for every regular or special meeting, and in the aggregate not exceeding fifty dollars in any one year; * * *"

From this it will be seen that the statute provides no salary for councilmen in such town but does provide for compensation at the rate of one dollar per meeting, regular or special, held during the year with a maximum compensation of $50.00 in any one year.

We are, therefore, of the opinion that the ordinance providing for a salary of $50.00 per year is in conflict with the provision of the statute and therefore void.

INSANE—COUNTIES: The provisions of Chapter 178, Code 1927, contain the remedy which govern in all cases with respect to the support of the insane by the various counties.

August 1, 1928. *County Attorney, Corydon, Iowa:* We beg to acknowledge receipt of your letter under date of June 13, 1928, requesting an opinion of this department on the following question:

A patient was committed to the State Insane hospital prior to the enactment of House File No. 84, Acts of the 40th General Assembly, now Sections 3589-90-91 Code of 1927.

The question is whether or not the provisions of said sections or whether the provisions of Section 2270, Code 1897, would govern with respect to the support of such insane patient.

It is the opinion of this department that the state may, at any time, pass laws which with respect to itself are retroactive and that, therefore, the provisions of Chapter 178, Code of 1927, would now apply and would be the remedy which would govern in all matters with respect to the support of the insane by the various counties.

DIVORCED WOMEN—WIDOWS' PENSION: A divorced woman with children cannot, under any circumstances, qualify as a widow under Section 3641, Code 1927.

August 1, 1928. *County Attorney, Iowa City, Iowa:* We beg to acknowledge receipt of your letter under date of June 26, 1928, requesting an opinion of this department on the following question:

May a divorced woman, under any circumstances, qualify as a widow under Section 3641, Code of 1927?

We are of the opinion that under the decision of *Debrot vs. Marion County*, 164 Iowa 208, a divorced woman cannot, under any circumstances, qualify as a widow under the provisions of Section 3641, Code of 1927. The divorced husband is not her husband after the divorce has been granted.

A divorced woman with dependent children might, however, be the subject of poor relief and would, we think, be entitled to such relief if her circumstances were to justify the same.

SOLDIERS' BONUS BONDS—INHERITANCE TAX—TAXATION: Soldiers' bonus bonds issued by the State of Iowa are subject to inheritance tax where the bonds are owned by non-residents.

August 2, 1928. *Treasurer of State:* We beg to acknowledge receipt of your letter in which you request an opinion of this department on the following question:

"Are Soldier Bonus Bonds of the state of Iowa subject to the inheritance tax where the bonds are owned by a non-resident?"

We are of the opinion that Soldier Bonus Bonds issued by the State of Iowa are subject to inheritance tax where the bonds are owned by non-residents.

BANKS AND BANKING: Small loan licensee may employ appraiser outside the city where it is licensed to do business but such appraiser cannot solicit business or make commissions.

August 7, 1928. *Department of Banking:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

May a licensee doing business under the provisions of Chapter 419, Code of Iowa 1927, employ an out of town man to make appraisals in connection with chattel loans made to borrowers outside the city where the licensee is authorized to do business; it being understood that such appraiser is not to solicit business or make collections for the licensee?

So long as the licensee complies with Section 9417, Code of Iowa 1927, there is no legal barrier to his employment of an out of town man to make the appraisal of the security for the loan. We are of the opinion, however, that any solicitation of business by him or any collections made by him would constitute doing business within the provisions of Section 9417, above cited.

BOARD OF SUPERVISORS — TOWNSHIP CLERK — INCOMPATIBILITY: Offices of township clerk and a member of the board of supervisors are incompatible and cannot be held legally by the same person at the same time.

August 8, 1928. *County Attorney, Sidney, Iowa:* We beg to acknowledge receipt of your letter under date of August 4, 1928, requesting an opinion of this department on the following question:

Can the office of township clerk and that of a member of the Board of Supervisors be held legally by the same person at the same time? That is, are the two offices incompatible?

We are of the opinion that the offices of township clerk and a member of the Board of Supervisors are incompatible and cannot be held legally by the same person at the same time.

TAXATION: A purchaser at foreclosure or sale of property upon which the taxes had been suspended must pay all such suspended taxes.

August 8, 1928. *County Attorney, Audubon, Iowa:* We beg to acknowledge receipt of your letter under date of August 4, 1928, requesting an opinion of this department on the following question:

Where taxes on real estate have been suspended and at the time of suspension there was a mortgage on such real estate and after suspension the mortgage is foreclosed can the suspended taxes be collected from the purchaser at foreclosure sale?

We refer you to Section 6950, Code 1927, which provides in substance as follows: that whenever a person by reason of age or infirmity is unable to contribute to the public revenue, upon the filing of petition duly sworn to by the board of supervisors, stating the facts and describing the property owned by the petitioner, the board may either suspend the collection of the taxes assessed against such petitioner for the current year or may cancel and remit said taxes providing, of course, that the petition shall first have been approved

by the council of the city or town in which the property is located or by the township trustees of the township in which same is located.

Section 6951, Code 1927, also provides that after the taxes have been suspended the board may cancel them and remit.

Section 6952, Code 1927, provides as follows:

"In the event that the petitioner shall sell any real estate upon which the tax has been suspended in the manner above provided, or in case any property, or any part thereof, upon which said tax has been suspended, shall pass by devise, bequest, or inheritance to any person other than the surviving spouse or minor child of such infirm person, the taxes, without any accrued penalty, that have been thus suspended shall all become due and payable, with six per cent interest per annum from the date of such suspension, and shall be enforceable against the property or part thereof which does not pass to such spouse or minor child."

It will be noted from reading the above quoted section that in the event the petitioner shall sell any real estate on which the tax has been suspended, or any part thereof or in the event that said property should pass by devise, bequest or inheritance to any person than the surviving spouse of such deceased infirm person, or minor child, the taxes without any accrued penalty that have been suspended all become due and payable with 6% interest per annum from the date of the suspension, and shall be enforceable against the property or part thereof which does not pass to such spouse or minor child.

We are, therefore, of the opinion that the purchaser at a foreclosure sale of property, upon which the taxes have been suspended, must pay all such suspended taxes and too the lien on taxes is not cancelled by foreclosure because Section 6952 specifically makes the property liable for such taxes.

HIGHWAYS: State Highway Commission has authority to spend primary road fund in the construction of grades for sidewalks and lateral intersections.

August 10, 1928. *Iowa State Highway Commission:* We wish to acknowledge receipt of your favor of the 9th in which you request our opinion in substance as to whether or not the State Highway Commission has authority to expend primary road funds for grading and construction of intersections for sidewalk along a primary road, under the provisions of Chapter 250, Code, 1927. The proposition in question is the proposed sidewalk to be located in Polk County along a portion of Primary Road No. 28, which is a continuation of Southwest Ninth Street, in the vicinity of the Fort Des Moines Army Post. Conditions at this point have caused a large number of accidents to pedestrians and motorists using the primary road in question. A school is located at an intersection and children habitually use the pavement on the primary road, rather than the ditches or embankments, for a walk. A number of these children have been struck by motorists, and in avoiding pedestrians motorists have had collisions and other accidents.

Under the provisions of the primary road law, the State Highway Commission has general authority, supervision and control over these roads and their improvement. Any condition arising that makes the use of the road dangerous for the public, or that causes dangerous conditions to exist, may, under this general authority, be remedied by the Commission.

We are, therefore, of the opinion that under the conditions existing in the cited instance the State Highway Commission would have authority to expend primary road funds for the construction of the necessary grade for a sidewalk and to construct lateral walks or intersections therewith.

BUILDING AND LOAN ASSOCIATIONS: Have no authority to loan money to a corporation, association, individual, or person for the purpose of constructing a swimming pool.

August 15, 1928. *Auditor of State:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following propositions:

"1. Would a building and loan association have the power to loan funds of its association to the American Legion which is contemplating building a swimming pool?

"2. Would an association have the right to loan money to an individual for the same purpose?

"3. Are building and loan associations permitted to loan money to a corporation?"

Building and loan associations have the authority under the statute to make loans to members on real estate security or on the security of their own shares of stock. See Section 9329 (5) Code of Iowa 1927. If the title to the real estate was pledged as security for the loan and the person or corporation owning the real estate were a member of the association, the association would, in our opinion, have the authority to make such loan. This would depend, however, upon the power granted a corporation in its articles of incorporation to become a member of such building and loan association.

However, while the statute does not limit the use of the funds loaned, the supreme court of this state has established the rule that such funds are to be used only for the purpose of building homes. The question was before the court in the case of *Home Savings & Trust Company vs. Fidelity & Deposit Company of Maryland*, 115 Iowa, 394, where the court, speaking through Mr. Chief Justice Ladd, at page 397, said:

"While the use of the money by the borrower is not by statute restricted, the nature of such corporations and their history leave no doubt that the fundamental purpose of their existence, aided by the privileges granted and exemptions allowed, is to assist members, by small periodical payments, to acquire homes. Ordinarily, they have little or no means out of which to buy these ready for occupancy, or to purchase the land and erect buildings thereon. The money to do this is necessarily advanced by the association, and usually not to buy with improvements made, but to procure the lot and to enable the borrower to construct a dwelling suitable to his own needs and tastes. From their inception in this state it has been the practice of such associations to aid members in constructing dwellings and other buildings, which in large measure will become security for the money advanced."

Since this pronouncement of the court in 1902 the legislature has amended, revised, and recodified the law relating to building and loan associations. This action was taken with at least constructive knowledge of the construction placed upon the law by the court in the foregoing opinion. It may therefore be held that the legislature, by failure to amend the statutes with reference to the purpose for which the funds loaned may be used, has adopted the view of the court hereinbefore set out.

We are therefore of the opinion that a building and loan association cannot loan its funds to a corporation or other organization or person or individual for the purpose of constructing a swimming pool.

SCHOOLS AND SCHOOL DISTRICTS: Transportation charge in a consolidated school district may be computed in figuring the cost of tuition.

August 27, 1928. *County Attorney, Manchester, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

"I have been asked by the Delhi Consolidated School to get your opinion as to whether or not they can charge transportation to pupils attending school from outside of the district where the parents own real estate and pay taxes in the district which amount to more than the tuition which they are allowed to have offset against transportation according to Section 1469 of the 1927 Code of Iowa."

It is provided by statute with reference to offsetting tax as follows:

"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." Section 4269, Code of Iowa 1927.

To determine the question submitted it is necessary to define tuition. This question has been ruled upon by the department as applied to independent school districts not required by law to furnish transportation. The definition adopted is found in the opinion of this department rendered to the Department of Public Instruction January 4, 1926, and found on page 238 of the Report of the Attorney General 1925-1926. Inasmuch as you may not have a copy of the volume at hand we are enclosing herewith a copy of that opinion.

It will be noted that the cost of instruction includes the cost of stationery, salaries of teachers and janitors, the cost of fuel, light and heat and any other expenses that are annual.

In a consolidated school district transportation is required for all pupils living more than one mile from the school building. It is, therefore, one of the usual required annual expenditures of the school district and in a consolidated school district, in our opinion, one of the items to be considered in computing the tuition in such consolidated district.

We are therefore of the opinion that under the quoted section, a parent is entitled to offset the tax paid by him in a district other than that of his residence and in which his children or wards attend school against the tuition charged against him, which tuition should include transportation charges for such services rendered him.

SCHOOLS AND SCHOOL DISTRICTS: A school board, where the school is closed, cannot pay tuition for pupils to attend private or parochial schools. Injunction is the proper remedy.

August 27, 1928. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following proposition:

"Can a school board use the funds of the district to pay tuition to a private or parochial school? If this is illegal what steps would be necessary to prevent the board from violating the law?"

This matter is covered by Section 5256 of the Code of Iowa 1927, and of Iowa School Laws & Decision 1925, which provides as follows:

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

The proposal to pay tuition from the funds of a school district to a private or parochial school is in direct violation of the above provisions of the statute. This opinion is in harmony with the former rulings of this department and with the opinions of the supreme court of this state, notably, in the case of *Knowlton vs. Baumhover*, 182 Iowa 691.

The proper remedy where a board is acting illegally or is threatening to pay out public funds in violation of the law is a restraining order or injunction issued by a court upon the application of any taxpayer in the district.

ELECTIONS—PRESIDENTIAL ELECTORS: Vacancies in nominations after State Convention may be filled by State Central Committee.

August 31, 1928. *Chairman, Republican State Central Committee:* You have requested the opinion of this department upon the question as to whether or not the State Committee has authority to fill vacancies occurring after the state convention in nominations for presidential electors from congressional districts.

Section 963 of the Code, 1927, provides as follows:

"At the general election in the years of the presidential election, or at such other times as the congress of the United States may direct, there shall be elected by the voters of the state one person from each congressional district into which the state is divided, and two from the state at large, as electors of president and vice president, no one of whom shall be a person holding the office of senator or representative in congress, or any office of trust or profit under the United States."

It will be observed that all of the presidential electors including those from congressional districts, and the two at large, are elected by the voters of the entire state. The provision of law relative to the nomination of presidential electors is contained in Section 636 of the Code, which provides as one of the duties of the state convention that it shall nominate "presidential electors in those years when presidential candidates are to be voted on." Hence it will be observed that the presidential electors of any party are in effect in the same category and position as state officers and are elected by the voters of the state as a whole.

In the Code Revision it seems that no specific provision was made for the filling of vacancies in nominations of presidential electors occurring after or subsequent to the state convention. However, we do have a provision of law relative to vacancies in nominations made in the primary election occurring subsequent to the convention and which we believe is applicable to the situation presented by you. Section 606 of the Code, provides as follows:

"Vacancies in nominations made in the primary election when such vacancies occur after the holding of a * * *, state convention, shall, * * *, be filled by the party central committee for the * * * state * * *."

Thus it will be seen that it was the intention of the legislature that where a vacancy occurs in a nomination for a state office after the holding of the state convention, the same should then be filled by the State Central Committee.

In view of the evident intent of the legislature gleaned from the entire primary election law and from the specific provisions of the law relative to presidential electors, we are of the opinion that vacancies in nominations for presidential electors occurring subsequent to the state convention, may be filled by the State Central Committee.

BUDGET DIRECTOR—JUDGMENTS — FUNDING BONDS — CITIES AND TOWNS: Funding bonds may be issued by a city or town in satisfaction of a judgment, which judgment was the result of a tort by the city notwithstanding the fact that the city had, at the time of the rendering of the judgment, exceeded its constitutional debt limit.

September 7, 1928. *Director of the Budget:* Pursuant to your request we are herewith handing you an opinion on the following question:

The City of Hartley, some years ago, carried on an extensive paving program, improvement bonds were issued in payment for said improvements. Most of these improvement bonds were payable by the special assessments against the benefited properties, these bonds, therefore, not being general obligations of the city at the time they were issued.

The bonds were not paid when due and suit was commenced by the holders of some of the bonds and judgment was rendered against the city on the ground that the city was negligent in making the assessment and in misappropriating some of the funds which were pledged to the payment of said bonds.

It appears from the facts that the city of Hartley has now exceeded its constitutional debt limitation. The City of Hartley now proposes to issue funding bonds in satisfaction of the judgment.

The question now arises as to whether or not satisfaction of said judgment, that is, whether the obligation created by the judgment is an obligation which is void, it being an obligation in excess of the constitutional limitation.

The Supreme Court of Iowa in the case of *Fort Dodge Electric Light & Power Company vs. City of Fort Dodge*, which was a case in which the facts were identical to those stated above, held that the constitutional limitation does not apply to an indebtedness arising out of a tort committed by the city. In the case of Hartley the court held that the city had been negligent in making its assessments and in failing to comply strictly with the provisions of the statutes pertaining to such matters. The city of Hartley, therefore, committed a tort and the constitutional limitation did not apply to that part of the indebtedness which was the result of the negligent acts of the city.

The general rule with respect to whether or not a debt is one which is within the meaning of the constitutional limitation seems to be that where the obligation is a voluntary obligation then the provisions of the constitutional limitation apply, but if the debt is an involuntary one then the constitutional limitation does not apply. For other cases supporting this rule see:

Bartle vs. City of Des Moines, 39 Iowa 414;
Rice vs. Rice, 40 Iowa 638 at 646;
The Sioux City & St. Paul Railroad vs. Osceola County, 45 Iowa 168;
Same vs. Same, 52 Iowa 26;
Thompson vs. District of Allison, 102 Iowa 94.

We are, therefore, of the opinion that funding bonds may properly be issued by the City of Hartley in satisfaction of the judgment which was represented by the improvement bonds which were payable by the assessments against the benefited property, which, by the judgment of court, were declared to be general obligations of the city because of the wrongful act of the city in not making the proper assessment and in not carrying out the provisions of the law pertaining to such matters.

TOWNSHIP: The trustees must take official action before a contract will be binding upon the township. The records of the township trustees meetings may be corrected subsequent to the official action, so as to conform to the facts.

September 11, 1928. *County Attorney, Manson, Iowa:* We wish to acknowl-

edge receipt of your favor of the 8th in which you request our opinion on the following proposition:

"An outlying Township Board of Trustees held a meeting at Rockwell City, Iowa, the county seat, having advertised for bids to construct a township road. The Township Clerk was not present and the County Engineer acted as clerk, although so far as I can learn, there was no formal action to that effect. The bids were opened, but as to whether or not any were formally accepted, I do not know, as no minutes of the meeting were kept. The meeting then adjourned, and I understand that the same day or a few days later, the Chairman of the Board signed a contract with the lowest bidder.

"There seems to be a good deal of doubt as to whether or not this contract should be carried out. Do you think the contract binding on the Township, in view of the fact that so far as I can learn, no formal action was taken at the Board's meeting in Rockwell City?"

We are of the opinion that there must have been some official action taken by the township trustees before the contract would be binding and effective upon the township. However, if the township trustees at their meeting did take action but did not make it of record, this record could be made up or amended subsequent to the meeting, to conform to the facts. *Beatle vs. Roberts*, 156 Iowa, 575. The legality of the contract, as far as its binding effect upon the township is concerned, depends on whether or not the trustees actually took official action. If they did so, the contract would be binding and the minutes of the meeting could be made at this or some subsequent time.

SCHOOLS AND SCHOOL DISTRICTS: While school board cannot lease quarters for basketball only, it may lease property for general school purposes and, incidentally, use them for basketball.

September 17, 1928. *County Attorney, Glenwood, Iowa:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following proposition:

"The Board of Education of the Malvern Public Schools is considering the renting of the Liberty Memorial Building in Malvern for use by the school for the following purposes:

1. Physical training (There being no adequate place for such subject in the present school building).
2. High school cantatas, operettas, declamatory contests, dramatic and class plays, commencements, and other school activities (not including athletics)
3. Basket ball.

"Can the Board contract for the use of such building for the above purposes, agreeing to pay therefor a lump sum, and charging to and paying out of the general fund such portion of the rental as the Board, in its discretion, feels should be paid for use of such buildings for physical training, high school cantatas, operettas, dramatic and class plays, declamatory contests, commencements, and other school activities, not including athletics, and paying the balance of such rental out of the athletic fund for the use of such building for basketball?"

Physical training is required by statute, (Sections 4263-4, Code of Iowa 1927). Music, declamatory, and dramatic productions and commencements are properly within the discretion of the school board as a part of the prescribed course of study (Sections 4250 and 4262).

It is therefore within the discretion of the school board to lease proper quarters for these activities where they are not available in the school buildings which are the property of the district. Section 4374 of the Code.

While this department has held that basketball, football, and other athletics not required or properly belonging to the curriculum of the public schools are

voluntary activities and that the board cannot rent or lease property for these purposes only, we are of the opinion that if the property were leased for other purposes and the use for basketball were incidental only, that the board could pay the cost of maintaining such quarters out of the general fund at its discretion. There could be no question but that the board could rent such quarters and apportion the rental between the general fund for the physical training, music, dramatic and other activities which are within the province of the board and the athletic fund for such use for athletic purposes as the board should permit.

TAXATION: Interest and penalty upon omitted property collected under Sections 7155-6 is apportioned ratably as the taxes would have been apportioned if paid as provided by law.

September 17, 1928. *County Attorney, Sioux City, Iowa:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following proposition:

Shall the interest collected under Section 7155, Code of Iowa 1927, be credited to the general fund of the county under the provisions of Section 7232 of the Code, or is it to be apportioned in the same manner as the tax itself collected upon omitted property?

It is provided in Section 7156 of the Code as follows:

"Upon failure to pay such sum within thirty days, with all accrued interest, he shall cause an action to be brought in the name of the treasurer for the use of the proper county, to be prosecuted by the county attorney, or such other person as the board of supervisors may appoint, and when such property has been fraudulently withheld from assessment, there shall be added to the sum found to be due a penalty of fifty per cent upon the amount, which shall be included in the judgment. The amount thus recovered shall be by the treasurer apportioned ratably as the taxes would have been if they had been paid according to law."

From the above section it will be observed that if the tax is collected together with the accrued interest and penalty it is to be apportioned ratably as the taxes would have been if they had been paid according to law.

We are of the opinion that this section would apply whether the taxes were paid with the interest as provided in Section 7155 or with the interest and penalty if collected by action of the county treasurer.

If the property had been duly assessed and the taxes paid under that assessment the taxes would have been paid according to law and would have been apportioned ratably among the various funds for which they were levied. We are therefore of the opinion that the amount recovered by the treasurer for taxes on omitted property and the interest, with the interest and penalty if suit is brought, should be apportioned in its entirety to the various funds for which the taxes were levied and that neither the interest nor the interest and penalty would accrue to the general fund of the county.

ELECTIONS: In cities where permanent registration has been adopted an absent voter can vote only by complying with the provisions of Section 718-b12.

September 17, 1928. *County Attorney, Sioux City, Iowa:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following proposition:

Are absent voters entitled to receive absent voters' ballots upon request if

they have not been registered under the permanent registration plan provided in Chapter 39-b1, Code of Iowa 1927?

It is provided by Section 718-b3 of said chapter as follows:

"From and after July 1, 1928, no qualified voter shall be permitted to vote at any election unless such voter shall register as provided in this chapter."

It is further provided in Section 718-b19, as follows:

"The provision of Chapter 39, and lines 6 to 10, inclusive, of section 795, shall not be applicable to sections 718-b1 to 718-b18, inclusive, of this chapter."

The manner of registration and casting of ballots by absent voters in cities operating under the permanent registration plan is as follows: (Section 718-b12)

"Any person entitled to vote at any primary, general, school, municipal, or special election who is permanently disabled by sickness, or who is absent from the election precinct in which he maintains his legal residence and is entitled to vote, may, up to and including the tenth day next preceding any such primary, special, school, municipal, or general election, make application in writing to the commissioner of registration to have his name entered upon the poll list and register of the precinct of his said residence, * *"

Were it not for the special provision contained in Section 718-b12 we should say that the failure to exclude the operation of the permanent registration chapter, being Chapter 39-b1, from the operation of the absent voter's law would render the latter applicable. But since the manner of voting by absent voter's ballot under the provisions of Chapter 39-b1 for permanent registration are specified in that chapter, it would govern over the provisions of Chapter 44 relative to absent voters' rights because of its subsequent enactment.

We are therefore of the opinion that one who is absent from a city operating under the permanent registration plan prescribed in Chapter 39-b1 cannot cast his ballot unless he makes application for registration up to and including the tenth day next preceding the election.

The plan in use and adopted by the county auditor of Polk County is to forward an application for permanent registration under the provisions of Section 718-b12 to any person who makes application for an absent voter's ballot. This, under the provisions of the above statute, may be done if the application is made up to and including the tenth day next preceding such election. Of course if the registration were not completed in time to receive the ballot, mark it under the provisions of the statute, and return it in time to be counted, the vote would be lost.

DAMS—CITIES AND TOWNS—MUNICIPALITIES: Municipalities are exempt from the payment of the license fee or tax under the provisions of Section 7775 even though surplus power is sold.

September 20, 1928. *Executive Council:* We wish to acknowledge receipt of your favor of the 19th in which you inquire in substance whether or not municipalities that have contracts for the sale of some part of surplus electric power generated in the municipal plant, under the provisions of Chapter 363 of the Code, 1927, are exempt from the license fee and tax provided for by Section 7775 of said chapter. The provisions of the section referred to are as follows:

"Permit fee—annual license. Every person, firm, or corporation, excepting a municipality, to whom a permit is granted to construct or to maintain and operate a dam already constructed in or across any stream for the purpose herein specified, shall pay to the executive council a permit fee of one hundred

dollars and shall pay an annual inspection and license fee, to be fixed by the executive council, on or before the first day of January, 1925, and annually thereafter, but in no case shall the annual inspection and license fee be less than twenty-five dollars. All fees shall be paid into the general fund of the state treasury.

"The provisions of this section shall not apply to dams already constructed having less than twenty-five horsepower capacity."

It is to be noted that municipalities are expressly exempt from the payment of this tax. The fact that the municipality sells some part of its surplus power would not make it subject to the tax, in the absence of a statutory enactment so providing.

BOARD OF CONTROL—CHILDREN: Children born to wards of the state do not by reason of this fact alone become state wards and subject to jurisdiction of the board for placement.

September 24, 1928. *Board of Control:* I wish to acknowledge receipt of your favor of the 21st in which you inquire in substance whether or not children born to State wards who are inmates of maternity homes, are by reason of this circumstance also wards of the State and subject to jurisdiction of the Board of Control for placement.

The statutes do not provide that children born under the above circumstances become wards of the State, and in the absence of such statutory provision the mere fact that the mother was a ward of the State would not make the child a State ward and subject to jurisdiction of the Board of Control for placement.

You also inquire what you can demand in the way of medical care for wards placed in Christian Science homes. There is no different statutory provision in regard to wards of the State placed in Christian Science homes than wards in other homes. We assume, however, that when the Board of Control places wards of the State in Christian Science homes they are fully conversant with the practice of such institutions. It is hardly reasonable to expect different treatment for a State ward than for the members of their own denomination. It would seem that this situation can be readily remedied by the Board when the State wards are placed.

ELECTIONS: Elector must reside in county sixty days and, if former residence abandoned, cannot vote there.

September 26, 1928. *Auditor of State:* You have requested the opinion of this department upon the following proposition:

"Where a citizen moves from one county to another county and has not lived in the county to which he moved sixty days before election, so that he would not be entitled to vote in that county, can he vote in the county of his former residence?"

The right to vote is determined by the residence of the elector. Iowa State Constitution, Article III, Section 1. The question of residence is one of intent but the expression by the voter as to his intent in the matter of residence is not conclusive and the contrary may be proven. State ex rel *Keary vs. Mohr*, 198 Iowa, 89.

Our court has had the question submitted before it in the case of *Taylor vs. Independent School District*, 181 Iowa 544, in which case the court held that a citizen who wholly abandons his residence in one county with no intention to return thereto and with his family moves to another county with the good

faith intention to there take up his home becomes a resident of the latter county at once upon his arrival at his intended abiding place. However if there be a purpose to retain the former residence as a legal residence one who removes from the county may retain the right to vote there.

From this it will be seen that one who actually removes from a county and who has no intention to return to his residence thus abandoned loses his right to vote in such county and does not gain a right in the county of his new residence until he has lived therein for a period of sixty days.

ELECTIONS—VOTING MACHINE: Voting machine may be used to vote upon the constitutional amendments and public measures providing the will of the voters can be properly shown thereon and the ballot contained in the machine.

September 26, 1928. *Secretary of State:* I wish to acknowledge receipt of your favor of the 25th in which you ask our opinion on the following question:

"While this department does not have supervision of election supplies, we are daily receiving inquiries as to the legality of the use of voting machines to handle the special ballot to be voted on November 6th. This ballot will be approximately 17x22" in size, and carries both the Constitutional Amendment and the Public Measure, the law requiring both to be placed on one ballot."

The question submitted appears to be more a mechanical than legal question. If the ballot containing the constitutional amendment and public measure to be voted upon can be contained in the voting machine, there is nothing in the statute to prohibit the use of the machine if the will of the voter can be properly registered thereon. The statute, however, in the chapter relating to the use of voting machines, does provide for and authorizes the use of separate ballots for constitutional amendments and other public measures. We refer you to Section 926, Code, 1927. It would appear that the legislature contemplated the use of separate ballots for constitutional amendments and other public measures in precincts where voting machines are used.

ELECTIONS: Where there are two independent candidates at the general election the names of the candidates must be placed in separate columns under appropriate headings.

September 26, 1928. *Auditor of State:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

We have a request from the auditor of Kossuth County, Iowa, with reference to placing the names for candidates for board of supervisors on the Independent ticket. There are as candidates for this office a Republican candidate and two candidates nominated by groups of petitioners as candidates on a so-called Independent ticket.

Your query is whether the names of these candidates should be placed on the ballot in alphabetical order or alternated in the respective precincts.

Section 557 of the Code of Iowa 1927, applies to primary elections only and has no applicability to candidates in the general election. The question of printing the ballots for a general election are governed by Chapter 40, Code of Iowa, 1927, Section 749, which provides as follows:

"All nominations of any political party or group of petitioners, except as provided in the preceding section, shall be placed under the party name or title of such party or group, as designated by them in their certificates of nomination or petitions, or if none be designated, then under some suitable

title, and the ballot shall contain no other names, except as provided in the following section."

It is further provided by statute, Section 753 of the Code as follows:

"Each list of candidates for the several parties and groups of petitioners shall be placed in a separate column on the ballot, in such order as the authorities charged with the printing of the ballots shall decide, except as otherwise provided, and be called a ticket."

We are therefore of the opinion that where there are two Independent candidates for the same office their names must be arranged in separate columns on the ballot under the above provisions and that if the group of petitioners sponsoring the Independent candidate does not designate a name for such ticket, that the county auditor shall designate some suitable name for the head of the column under which the candidates' name shall be placed. In other words, in the above situation, if there were no other parties having candidates at the election there would be a column for the Republican candidates, a column for the Democratic candidates (since there are Democratic candidates on the ballot for other offices), a column for one candidate on the Independent ticket for county board of supervisors, and the fourth column for the other Independent candidate.

BRIDGES—COUNTY—BOARD OF SUPERVISORS: Under Section 4678, Code 1927, when a petition is presented to the Board of Supervisors they are required, 1st, to determine whether the requisite number of persons have signed the petition, 2nd, whether they are legal voters of the county, 3rd, whether the petition has been filed within the time provided for in Section 4679, Code 1927, and that if such conditions precede it have been complied with then it is mandatory upon the Board to submit the proposition to the voters at the next general election.

September 28, 1928. *County Attorney, Council Bluffs, Iowa:* We beg to acknowledge receipt of your letter under date of September 17, 1928, requesting an opinion of this department on the following question:

A petition has been presented to the Board of Supervisors of this county in accordance with the provisions of Section 4678, Code, 1927. The Board desires an opinion from your department as to their duty in the matter under the law. That is, whether, under the law, they should submit in accordance with Section 4679, Code, 1927, to the voters and place on the ballot the proposition set out in the petition.

Section 4678, Code, 1927, provides as follows:

"Bridges over state boundary line streams. Ten per cent of the legal voters, as shown by the returns of the last general election of any county bordering upon a stream of water which forms the boundary line of this state, may petition the board of supervisors to submit to the voters the question whether such county shall be authorized to construct and maintain a foot and wagon bridge extending from such county across such boundary line river. Said petition shall state the amount to be expended for said purpose."

Section 4679, Code, 1927, provides as follows:

"Submission of question. The board shall submit such question at the first general election occurring not less than sixty days after the filing of said petition."

Under Section 4679, Code, 1927, a ten per cent of the legal voters of a county bordering upon a stream of water which forms a boundary line of the state may petition the board of supervisors to submit to the voters the question whether such county shall be authorized to construct and maintain a foot and wagon bridge extending from such county across the boundary line river.

When a petition is presented to the board of supervisors of a border county the board of supervisors must determine (1) whether the requisite number of persons have signed the petition, and (2) whether said signers are legal voters as shown by the returns of the last general election; these being the only conditions precedent to the submission of the question. After they have been determined and if answered in the affirmative, that is if the petition is sufficient, then under Section 4679, Code, 1927, it is mandatory that the board submit such question at the first general election occurring not less than sixty days after the filing of said petition. Of course under this section the petition must be filed sixty days or more before the date of the next general election in order that the board be authorized to submit said question at said election. If it is not filed sixty days or more before said election it cannot then be submitted until the succeeding general election.

Our Supreme Court in the case of *Munn vs. School Township of Soap Creek*, 110 Iowa, 657, held in construing the following section of the law which was then in force,

("'Upon the written petition of any ten voters of a city, town or village of over one hundred residents to the board of the school township in which the portion of the town plat having the largest number of voters is situated, such board shall establish the boundaries of a proposed independent district, including therein all of the city, town or village, and also such contiguous territory as is authorized by a written petition of a majority of the resident electors of the contiguous territory proposed to be included in said district, in not smaller subdivisions than entire forties of land, in the same or any adjoining school townships, as may best subserve the convenience of the people for school purposes, and shall give the same notices of a meeting, as required in other cases, at which meeting all voters upon the territory included within the contemplated independent district shall be allowed to vote by ballot for or against such separate organization. * * '")

that the desirability or necessity for an independent district is for the people to determine and not the board of directors. It is incumbent on that body to say whether the village contains one hundred residents and the requisite number of electors have signed the respective petition and, having so found, *no option is left save to fix the boundaries of the proposed district and order the election.*

In the case of *McNees vs. School Township*, 133 Iowa, at 122, the Supreme Court in a case in which upon the receiving of a petition the school board was directed to submit a proposition to the people, held that the board upon receiving such petition has authority to determine (1) whether the requisite number of persons have signed the petition, and (2) whether these are voters of the district.

In the case of *Gallager vs. School Township*, 173 Iowa, at 616, the Supreme Court again held that when the conditions precedent, as provided for in the statute, have been complied with the matter of ordering an election is not discretionary, the statute being mandatory and in such circumstances no other course is open save that of calling the election.

This holding was again re-affirmed in the case of *Heaton vs. Consolidated Independent School District*, 178 Iowa 1230.

We are, therefore, of the opinion that the board of supervisors of Pottawattamie county, under Section 4678, Code 1927, are required (1) to determine whether the requisite number of persons have signed the petition, (2) whether they are legal voters of the county, and (3) whether the petition has been

filed within the time provided for in Section 4679, Code 1927, and that if such conditions precedent are decided by said board in the affirmative that it is then mandatory upon it to submit the proposition to the voters at the next general election.

In passing on the above question we do not, in this opinion, pass upon the following questions:

1. Whether or not the one mill levy, authorized by Section 4682, Code 1927, would raise sufficient money so that the bonds proposed to be issued might be retired within the twenty year limit provided in Section 4682 and the mandatory provisions provided for in Sections 1179-b1 and 1179-b2 of the Code of 1927.

2. Whether or not the proposition to be submitted to the people shall be accompanied by a provision to levy a tax for the payment of the bonds in addition to other taxes as is provided for in Chapter 265, Code 1927, Section 5265.

3. Whether or not the board of supervisors of a county has any jurisdiction over the bridges and culverts in a city of the first class.*

SCHOOLS AND SCHOOL DISTRICTS: Section 4250 of the Code applies to high schools as well as graded schools.

September 29, 1928. *Superintendent of Public Instruction:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

"'When children live at an unreasonable distance from their own school the board may contract with boards of other school townships or independent districts for the instruction of children thus deprived of school advantages in any school therein, and the cost thereof shall be paid from the general fund.'

"Is the application of this provision confined to the first eight grades, or is it also applicable in a particular corporation to any portion of the high school course offered in that corporation, providing the portion offered is approved by the Department of Public Instruction?"

A school corporation is empowered by statute to conduct schools. The power to prescribe courses of study is vested in the board of education. Section 4250, Code of Iowa 1927. The corporation is also authorized through its board to establish graded and high schools and to determine what branches shall be taught therein subject to the approval of the Superintendent of Public Instruction. Section 4267 of the Code.

There is nothing in Section 4375, which is the subject of your inquiry, which limits it to the operation of any particular grade. We are, therefore, of the opinion that the said section applies to any grade in the course of study, including the high school, if such high school course is offered by the corporation.

TAXATION—EXEMPTIONS: Beneficiary of tax exemption under Section 6948 must file written statement with the assessor; after which the assessor should list the exemption until he has knowledge that the person is no longer the owner of the property.

September 29, 1928. *County Attorney, Fort Dodge, Iowa:* This will acknowledge receipt of your letter of recent date relative to the interpretation of Sections 6947-8 of the Code of Iowa governing the list of persons entitled to tax exemption and the right of one who has purchased real estate on contract to the exemption specified in the statute.

*Sustained Pottawattamie Co. Dist. Ct.

The general rule is that tax exemptions are to be construed strictly as against the taxpayer. Section 6948, above cited, provides as follows:

"The beneficiary of exemptions allowed by the two preceding sections shall file with the assessor a written statement that he is the owner of the property on which the exemption is claimed, and every assessor shall annually make a list of persons entitled to such exemptions and return such list to the county auditor upon forms to be furnished by the auditor for that purpose; but the failure on the part of any assessor so to do shall not affect the validity of any exemption."

From this section it will be observed that the beneficiary *shall* file with the assessor a written statement that he is the owner of the property on which the exemption is claimed. It is then further provided by Section 6949, that if no such statement is filed, no exemption shall be allowed by the assessor.

We are, therefore, of the opinion that the list which the assessor is required to make should consist of those who have filed written statements with him claiming the exemption. After the exemption is once granted we are of the opinion that it should be continued so long as the assessor have knowledge that the taxpayer is the owner of the property. This information can be gathered at the time of the annual assessment.

Upon the question of the right of a contract purchaser of real estate to the exemption, we are enclosing opinion of the department heretofore rendered, which holds that if the purchaser under a contract is liable for the taxes he is entitled to the exemption; otherwise he is not so entitled.

ELECTIONS: Registration statutes are directory except as to constitutional requirements.

October 1, 1928. *Mrs. Gordon L. Elliott, Des Moines, Iowa:* This will acknowledge receipt of your request for an opinion of this department upon the following proposition:

Must a voter, when registering in order to be entitled to vote, give his or her exact age to the registrar?

It is provided by statute in cities where registration is required as follows: (Section 687, Code of Iowa 1927)

"Registry books shall be *substantially* in the following form:
"Number, Residence, Name, Age, etc."

In view of the above wording of the statute it is our opinion that, since the purpose of the inquiry is to determine whether or not the voter is of legal age, that the age may be given as "legal" or "over twenty-one."

Under the statute providing for permanent registration in cities the statute provides as follows: (Section 718-b6, Code of Iowa 1927)

"The following information concerning each applicant for registry *shall be entered* on the card:
* * *
"c. Age and date of birth.
* * *"

It is provided by the constitution of the state of Iowa, Article II, of Section 1, as follows:

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

It has been held by the courts generally that the legislature has the power to enact reasonable provisions for the purpose of requiring persons offering to vote to show that they have the necessary qualifications and that in order to prevent fraud and other irregularities in the conduct of an election registration of voters may be required. It is also held that where the right of suffrage is conferred by the constitution and the qualification of electors are therein fully defined, a registration law which prescribes any additional qualification as a condition precedent to the right to vote is unconstitutional and void.

The question then is whether the provisions of Section 718-b6, Code of Iowa 1927, are mandatory and must be complied with fully in order to permit the voter to cast his or her ballot at the election; or whether the statute is merely directory except as to proof of the constitutional qualifications prescribed by Section 1, Article II, of the constitution above quoted.

The evident purpose of registration is to determine what voters are qualified to exercise the ballot. The legal age qualification is twenty-one years and any age beyond that, or the exact date of birth, is entirely immaterial so far as the records are concerned. We are therefore of the opinion that the statute cited is directory insofar as it prescribes requirements in addition to those specified in the constitution and that a substantial compliance with the statute is sufficient. Therefore, if the registrant satisfies the registrar that he or she is of legal age, the further requirement of giving the exact age and date of birth cannot be made and it is sufficient if the registrant make affidavit that he or she is of "legal age."

SUNDAY OBSERVANCE—CITIES—MOVIES: A city council may submit to the voters an ordinance that provides a different penalty than the state law having to do with Sunday movies.

October 1, 1928. *County Attorney, Fairfield, Iowa:* We wish to acknowledge receipt of your favor of the 25th in which you ask our opinion on the following proposition:

"Must the city council submit an ordinance to the vote of the people as provided by Section 6557, when said ordinance is in violation of a penalty statute of this state, to-wit: Section 13227? The proposed ordinance has to do with Sunday movies."

This very proposition was passed upon by our Supreme Court in the case of *City of Ames vs. Gerbracht*, 194 Iowa, 267. One of the objections in the cited case to the ordinance which prohibited the operation of picture shows on Sunday was void because it attempted to legislate on the general subject matter of Sunday observance, covered by Section 5040, Code, 1897, which is now Section 13227 to which you refer. The Court in the cited case, addressing itself to this objection said:

"There is no inconsistency between this general statute pertaining to Sunday observance and the ordinance in question, regulating the conduct of a specific business, like a moving picture show. Whether or not one who labors on Sunday in connection with the operation of a moving picture show might be liable for a violation of the general statute pertaining to Sunday observance, is not before us, and upon that question we express no opinion; but we are very clear upon the proposition that the ordinance in question, pertaining to the regulation of a business regarding which power has been specifically conferred upon the municipality by the legislature, is not inconsistent with the general statute of the state respecting Sunday observance."

It would thus appear from the decision referred to that an ordinance regu-

lating the operation of picture shows on Sunday, even though it provides a different penalty than the general statute of this state to which we have referred, is not in conflict therewith, and may be legally enacted as an ordinance of a city.

TAXATION—BANKS AND BANKING—PUBLIC FUNDS: Where a county treasurer sends tax receipts to a bank for collection the taxes are not collected until the bank actually receives the cash and interest should not be computed thereon until such cash is received. The record should show the date received and the date collected.

October 5, 1928. *County Attorney, Carroll, Iowa:* This will acknowledge receipt of your request for an opinion upon the following proposition:

Where the county treasurer sends tax receipts to a bank for collection and the bank in its reconcilement sheets and reports to the county treasurer shows the amounts thereof as a deposit, when in fact the money has not been collected, is interest to be computed from the date of the receipt of the tax receipt or from the date of the collection of the amount thereof?

The general rule is that taxes are not paid until the county treasurer actually receives the cash therefor. Therefore, we are of the opinion that interest can be figured on the deposits only from the time the bank actually received the cash represented by the tax receipt, and that the mere holding of the tax receipt as a cash item and the false report by the bank of the deposit to the county treasurer when the money has not, in fact, been collected, would not constitute a deposit upon which the county would be entitled to interest.

However, if this tax receipt is held beyond the date on which the same becomes delinquent and no interest thereon is paid to the county treasurer by the bank, we are of the opinion that the county is entitled to the penalty for the failure to pay the taxes. Also, if the bank should fail, we are of the opinion that the taxes would not be paid and that the county treasurer would not be protected on his deposit in the bank except for the amount of the cash actually deposited exclusive of any tax receipts which the bank may be holding as cash items at the time the bank closes.

ELECTIONS—PUBLICATION: County Auditors are not required to publish the constitutional amendment and road bond measure as the publication of these are taken care of by the Secretary of State.

October 12, 1928. *Secretary of State:* We beg to acknowledge receipt of your letter under date of October 10, 1928, requesting an opinion of this department on the following question:

Are the county auditors required to publish the constitutional amendment and road bond measure as are to be submitted to the voters on November 6th?

We are of the opinion that the publication made of the constitutional amendment and road bond measure by the Secretary of State is all that the constitution and laws of this state require with respect to publication. We find no authority in the Code which would justify or require the publication of either measure by a county auditor.

ABSENT VOTER'S—ELECTIONS: Absent voter's law so framed that a person who is unable to get to the polls on election day may vote the absent voter's ballot.

October 15, 1928. *County Attorney, Sidney, Iowa:* Replying to your communication of the 13th instant, will say that the absent voter's law is so framed

that a person who is unable to get to the polls on election day may vote by absent voter's ballot. A representative of the auditor's office may take the ballot to the absent voter for the purpose of having him vote. This is the practice that has been in use for some time in this state.

SOLDIERS' RELIEF COMMISSION cannot employ a secretary to be paid from public funds. This duty rests upon a member of the commission.

October 16, 1928. *County Attorney, Waverly, Iowa:* We wish to acknowledge receipt of your favor of the 13th in which you request our opinion in substance on the following proposition:

Can the deputy county auditor be appointed secretary for the Soldiers' Relief Commission, or can the deputy auditor act as secretary for the commission and be paid for his services?

Chapter 273, Code of Iowa, 1927, provides for the organization, duties and compensation of the Soldiers' Relief Commission. Section 5388-b1 thereof authorizes the payment of a certain sum to members of the commission for each day actually employed in their work. Section 5389 of said chapter provides:

"They shall qualify by taking the usual oath of office, and give bond in the sum of five hundred dollars each, conditioned for the faithful discharge of their duties with sureties to be approved by the county auditor. The commission shall organize by the selection of one of their number as chairman, and one as secretary."

There is no provision in the chapter for the employment by the commission of a secretary and no authorization for the payment of salaries other than to the members of the commission. The statutes specifically provide that a member of the commission shall be secretary. It also provides his compensation, and we are, therefore, clearly of the opinion that a member of the commission must perform the duties of secretary at the compensation prescribed by statute, and that the commission does not have authority to employ some other person to act as its secretary and pay him from public funds.

COUNTY OFFICERS—BOARD OF SUPERVISORS — BONDS: Board may purchase outstanding bonds at a premium if interest may be saved thereby.

October 18, 1928. *County Attorney, Carroll, Iowa:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following proposition:

Is it within the authority of the county board of supervisors to purchase its outstanding bonds at a premium if such bonds are not due and the funds are on hand levied for the purpose of paying them and if the purchase can be made at a saving of interest; and whether or not this premium can be paid from the county bond fund itself?

The county board of supervisors are the fiscal agents of the county and, as such, have general management of its financial affairs. If there will be a saving of interest and if the fund used for the purpose of retiring the bonds before a maturity was levied for the purpose of maturing those bonds and such use of the funds will not prejudice any other serial bonds which may have been issued, we are of the opinion that the county board of supervisors may retire such bonds before maturity and may pay a premium therefor. This premium would be in the nature of a substitution for interest on the bonds and we are of the opinion that it may be paid out of the county bond fund since it is

being used for the very purpose for which it was levied, namely, the retirement of the bonds.

CONTRACTS FOR SALE OF FUR-BEARING ANIMALS AND SQUABS — CORPORATIONS—BLUE-SKY LAW—PERMIT: Corporations engaged in the sale of fur-bearing animals or squabs to the investing public upon a conditional sale and partial payment plan are engaged in such a business as comes within the provisions of Chap. 393, Code 1927, and are required to secure a permit.

October 23, 1928. *Secretary of State:* We have your letter requesting an opinion of this department on the following questions:

1—a number of silver fox companies are engaged in the business of selling foxes to the investing public, sometimes for cash and sometimes on a conditional sales contract on partial payment plan. Do said companies come within the provisions of Chapter 393, Code 1927, and, therefore, required to secure a permit in accordance with said chapter?

2—There are also certain companies engaged in raising and breeding squabs and selling them to the investing public, either for cash, or a conditional sales contract on partial payment plan, with a provision for division of the proceeds, etc. Do such companies come within the provision of Chapter 393, Code 1927?

Section 8525, Code of Iowa 1927, provides as follows:

"Permit to sell stock. 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, contracts, memberships, or certificates for a consideration, to sell merchandise at cost or at a stipulated percentage or price above or below cost or market price, investments, contracts, unit interests in property, estates, shares of participation, common law trust agreements or real estate, oil, gas or mineral leases, provided, however, that this shall not apply in whole or in part to mineral leases in Iowa lands; and notes or other evidences of indebtedness, and evidence of, title to, interest in or liens upon any or all of the property or profits of an individual or company, hereinafter referred to as 'stocks, bonds or other securities', shall be subject to the provisions of this chapter, 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."

I.

We are of the opinion that silver fox companies who are engaged in the business of selling foxes to the investing public upon a conditional sales and partial payment plan are engaged in such a business as comes within the provisions of Chapter 393, Code 1927, and should, therefore, be required to secure a permit to do business in accordance with said chapter.

II.

We are of the opinion that companies engaged in the business of selling squabs to the investing public upon a conditional sales and partial payment plan are engaged in such a business as comes within the provisions of Chapter 393, Code 1927, and should, therefore, be required to secure a permit to do business in this state in accordance with said chapter.

SCAVENGER SALE—TAXATION: Under Section 7255, Code 1927, a county treasurer is authorized to hold a scavenger tax sale and may, if he proceeds in accordance with said Section, sell property for less than the amount of the taxes assessed against it.

October 24, 1928. *County Attorney, Clarinda, Iowa:* We beg to acknowledge

receipt of your letter under date of June 28, 1928, requesting an opinion of this department on the following questions:

1—Property was assessed for the purpose of paving city streets. Some of the property owners refused to pay the assessment claiming that the property was assessed for more than it was worth. The property was offered for sale in compliance with the Section 6037, Code 1927, but no bid was received for the amount of the assessment.

The county treasurer would like to know if there is any way that this property could be sold for whatever it would bring?

2—A plot of ground is assessed against one owner and it develops that this owner does not own all of said property, part of it belonging to another. The owner against whom the tax was assessed has paid it.

The question is can there be a refund to him of the taxes erroneously paid?

For answer to your first question we refer you to Section 7255, Code of 1927. This section provides for the scavenger tax sale and the treasurer may proceed in accordance therewith to sell property for less than the amount of the taxes assessed against it.

For answer to your second question we refer you to the case of *Hawkeye L. & B. Company vs. Marion*, 110 Iowa, 468, and advise that we know of no case in which a refund could be made to the owner.

CITIES AND TOWNS—FIRE DEPARTMENT—UNIFORMS: Cities and towns are not authorized to furnish uniforms to the members of a fire department.

October 24, 1928. *Auditor of State:* We beg to acknowledge receipt of your letter under date of October 9, 1928, requesting an opinion of this department on the following question:

"Is it legal for a city or town council to authorize the purchase of uniforms for the regularly employed members of the fire department? Such members receive a stated amount of salary fixed by the council and payable semi-monthly. The council proposes to purchase the uniforms and pay for same from the fire fund."

Section 5766, Code 1927, provides as follows:

"Fire Department. They shall have power to organize, keep, and maintain a fire department and fire companies; to purchase or lease necessary ground and construct or lease buildings therefor; provide engines, apparatus, and such other instruments as may be necessary; pay for services rendered by members of the fire department at any fire; and cities having a population of five thousand or more may maintain a paid fire department."

It will be noted from reading said section that cities and towns, under their general powers, are authorized to organize, keep and maintain a fire department and fire companies, and to provide engines, apparatus, and other instruments as may be necessary and to pay for the services rendered by the members of said fire department.

We are of the opinion that said section cannot be in any way interpreted to authorize a city or town to purchase uniforms for the members of its paid fire department.

EPILEPTIC—VOTING—ELECTIONS: Inmates of the epileptic institution at Woodward are entitled to vote providing they possess the legal qualifications and may vote at the place of their residence.

October 24, 1928. *Board of Control:* We beg to acknowledge receipt of your letter of October 22, 1928, requesting an opinion of this department on the following question:

"Are the inmates of the epileptic institution at Woodward entitled to vote and if so, where must they vote, at Woodward or from the place they are committed?"

We are of the opinion that the inmates of the epileptic institution at Woodward, possessing the necessary qualifications for voting, are entitled to exercise such right of franchise, epilepsy not being a disqualification.

The question where they may vote is a question of residence and this is determined largely by the intent of the voter together with the circumstances surrounding said individual's status.

We are of the opinion that the inmates of the epileptic institution of Woodward are primarily temporary residents of Woodward and that their real homes and residences are the places from whence they were committed and that they are entitled to vote only at such places. In other words, we do not believe that such inmates have acquired such a residence at Woodward as would entitle them to vote there. These inmates may vote by absent voters' ballot at the place of their residence which is usually the place from whence they were committed.

TAXATION—EXEMPTION—GOLF COURSE: Land within the limits of a city used for golf course is not entitled to exemption under the provisions of Section 6210, Code of Iowa, 1928.

October 27, 1928. *Auditor of State:* We wish to acknowledge receipt of your favor of the 24th in which you request our opinion on the following proposition:

"Is land situated within the corporate limits of a city or town and used as a golf course entitled to be exempted from city taxes, as provided by sections permitting such exemption from city taxes for agricultural and horticultural land?"

We assume that in your inquiry you refer to the provisions of Section 6210, Code of Iowa, 1927, that provide as follows:

"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."

The statute is plain and clearly states that only land which is used in good faith for agricultural or horticultural purposes shall be entitled to the exemption. Land used for a golf course is certainly not used for agricultural or horticultural purposes and is, therefore, not entitled to exemption.

COUNTY OFFICERS—BOARD OF SUPERVISORS—PRISONERS: 1—Board of supervisors may use prisoners at county farm and confine them there if proper place is provided and custody of sheriff maintained. 2—Cannot secure private employment and apply wages collected on fine.

November 3, 1928. *County Attorney, Jefferson, Iowa:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following proposition:

1. May the board of supervisors place prisoners confined in the county jail and sentenced to hard labor at work on the county farm and house them there over night rather than transport them back and forth each day?

2. May the sheriff secure private employment for prisoners who are able to earn $4.00 to $4.50 per day and apply the wages collected upon the fine?

We are of the opinion that the statute, Section 5513, which provides that such prisoners may be employed on or about public buildings or grounds or such other places as the person having custody of them may direct, would permit your using them for labor at the county farm. We are also of the opinion that they could be housed at the county farm if proper cells for their confinement were made and proper precautions taken to prevent their escape. It is within the power of the board of supervisors to determine the place of confinement and that place may be either in the regular county jail or any other place of confinement which the board provides.

Upon the second proposition, we are of the opinion that the prisoners could not be given over to private employment under our statutes.

ELECTIONS—BALLOTS — ABSENT VOTERS — CHALLENGES: Absent Voters Ballot may be challenged for cause when opened.

November 3, 1928. *County Attorney, Mapleton, Iowa:* We beg to acknowledge receipt of your letter under date of November 2, 1928, requesting an opinion of this department on the following question:

When is a voter entitled, in this state, to vote an absent voter's ballot, and when may an absent voter's ballot be challenged?

Section 927, Code of 1927, provides as follows:

"Right to vote—conditions. Any qualified voter of this state may, as provided in this chapter, vote at any general, municipal, special, or primary election, or at any election held in any independent town, city, or consolidated school district:

1. When, through the nature of his business, he is, on election day, absent from the county in which he is a qualified voter, or when he expects, in the course of said business, to be so absent.
2. When, through illness or physical disability, he is prevented from personally going to the polls on election day and voting."

The above section is clear and unambiguous and a qualified voter of this state is entitled to vote by absent voter's ballot when any of the conditions contained in said section exist.

Section 957, Code of 1927, provides as follows:

"Challenges. The vote of any absent voter may be challenged for cause and the judges of election shall determine the legality of such ballot as in other cases."

Section 959, Code of 1927, makes the provisions with respect to challenges of Sections 796, 797, 798, Code of 1927, applicable to absent voters' ballots insofar as they are not inconsistent with the law pertaining to absent voters.

It will be seen from reading Section 957, Code of 1927, that the vote of any absent voter may be challenged for cause and that it is a matter for the judges of the election to determine the legality of such ballot. Said absent voter's ballot may be challenged any time before the ballot is opened.

Section 960, Code 1927, provides as follows:

"False affidavit. Any person who shall wilfully, swear falsely to any of such affidavits shall be guilty of perjury, and punished accordingly."

Under this section if a voter wilfully swears falsely to the required affidavits in connection with absent voters' ballots he is guilty of perjury and may be punished accordingly.

If a person has sworn falsely to the affidavits in connection with the absent voter's ballot, any person knowing the facts in connection therewith, may file an information against said person so swearing falsely charging said person with perjury.

COUNTY OFFICERS—SCHOOLS AND SCHOOL DISTRICTS: Under Section 4278, it is the mandatory duty of the county auditor to issue an order upon the treasurer upon receipt by him of a statement certified by the president of the creditor school corporation for tuition.

November 6, 1928. *Auditor of State:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following proposition:

"Under Chapter 215, providing for the transfer of funds from one school district to another, is the Auditor required to issue transfer order on the sole evidence of certificate signed by president and secretary of a creditor corporation, or should he have further proof that the claim is legitimate?"

Under the cited statute, and especially Section 4278, it is the mandatory duty of the county auditor to make the order upon the treasurer upon the receipt by him of a statement certified by the president of the creditor corporation. The debtor corporation has its remedy by injunction if there is a defense to the claim. The county auditor, however, has no discretion in the matter and he should act upon receipt of the statement as provided by statute.

SUPPLIES—BOARD OF CONTROL: Where goods may be delivered by the board of control at a price equal to or lower than outside bidders and the same can be furnished promptly, then under section 3762 it is mandatory for public officials and political subdivisions to purchase those articles and supplies sold by the board of control.

November 7, 1928. *Auditor of State:* We desire to acknowledge receipt of your request of November 6, 1928, which is as follows:

"Is Section 3762 mandatory and whether mandatory when a competitive bid is filed with a lower price than the price of the goods itemized by the State?"

In reply we desire to set out fully Sections 3762 and 3763 which are as follows:

"No articles or supplies so listed, except in case of emergency, shall be purchased for public use by the aforesaid public officials, bodies, and departments from any private source unless the board of control is unable to promptly furnish such articles or supplies." (3762)

"Such supplies, material, and articles manufactured by convict labor within the state shall be furnished by the board of control to the state, its institutions and political subdivisions, and the road districts of the state at a price not greater than that obtaining for similar products in the open market." (3763)

In view of the above cited sections, we are of the opinion that the purchase of articles and supplies now manufactured and sold by the State of Iowa where the same can be furnished by the state promptly and at a price equal to or lower than outside bidders that it is mandatory upon public officials, bodies and departments and political subdivisions of this state to make said purchases of those articles and supplies sold by the board of control under the provisions of Chapter 187, Code 1927. But in order to make the two above sections cited operative, it is necessary that the board of control comply with the two requirements which are prompt delivery and an equality or lower price for the articles or supplies to be purchased.

ELECTIONS—OFFICIAL PUBLICATION: Publication of the official ballot, including constitutional amendment and other public measures should be paid under the provisions of Section 772, each being figured as a separate ballot.

November 9, 1928. *Assistant County Attorney, Waterloo, Iowa:* We wish to acknowledge receipt of your favor of the 8th in which you inquire concerning the payment for the publication in official newspapers of your county of the public measures and constitutional amendment that were submitted to the voters at the last general election.

In this connection you are advised that if your auditor authorized the publication of these measures and the constitutional amendment they should be paid for, under the provisions of Section 772, Code of Iowa, 1927; each of the measures and the constitutional amendment being figured as a separate ballot, and in each case the cost of the publication shall not exceed the sum of $70.00, as provided in said section. This fee is in addition to the fee authorized under the same section for the publication of the regular official ballot.

APPRAISERS—CITIES AND TOWNS—COMPENSATION: Where Statute does not specify compensation to be paid appraisers city or town is authorized to pay reasonable compensation for such service.

November 14, 1928. *Auditor of State:* We beg to acknowledge receipt of your letter under date of October 17, 1928, requesting an opinion of this department on the following question:

Where appraisers are appointed under the authority of Section 5953-54 Code of Iowa 1927 what compensation are they entitled to?

We call your attention to the fact that neither Sections 5953 or 5954 specify the amount of compensation that should be paid appraisers in connection with the appraisement of damages resulting from a change or establishment of a grade.

In view of this we are of the opinion that appraisers appointed under authority of said sections are entitled to receive a reasonable compensation for their services, that is, such compensation as is commensurate with the services rendered.

It would, therefore, follow that if the compensation paid to appraisers, appointed under authority of said sections, is reasonable that the city or town would be authorized to pay the same.

FISH AND GAME—LICENSE: Within power of County Recorder to issue a duplicate license.

November 14, 1928. *Fish and Game Department:* You are advised that the opinion of this department rendered on June 4, 1926, holding that duplicate hunting or fishing licenses cannot be issued is hereby withdrawn and the following issued in lieu thereof.

Under the general law any public document which is lost may be replaced by a duplicate upon proper showing that the original has been lost.

We are, therefore, of the opinion that if the applicant satisfy the county recorder by affidavit that the license issued has been lost or destroyed it is within the power of the county recorder to issue a duplicate license. However, the county recorder should require proper evidence that the original hunting or fishing license issued has been lost or destroyed.

SCHOOLS AND SCHOOL DISTRICTS—BOARD OF SUPERVISORS—POOR RELIEF: Board of supervisors may, upon the certificate of township trustees, provide school books for indigent persons but cannot pay bills contracted by such persons.

November 14, 1928. *County Attorney, Mount Ayr, Iowa:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following proposition:

"One 'A' sells school books to a poor family in the sum of $38.00. He secures the approval of the school board of that school which they attend and then files claim for the above amount with the Board of Supervisors for his pay. Neither the Board or supervisors or trustees had notice or knowledge until afterwards. Question as to whether the Board has the right to pay such a claim so filed even if they had the disposition to so do?"

The provisions of the statutes with reference to poor relief are quite broad and leave large discretion in the hands of the board of township trustees and the board of supervisors. We are of the opinion that it is within the discretion of the board of supervisors to allow a claim if properly presented to the board of trustees and through that board to the board of supervisors. However, in the instant case, the debt was contracted before any application was made to the board of trustees and with only the approval of the president of the school board as was stated in your letter of September 8, 1928. Therefore, we are of the opinion that the board of supervisors cannot allow the bill presented.

If the poor person should make application to the township trustees for poor relief and the trustees should find the family was so entitled the board of supervisors would have discretionary power to grant the relief and the family could then pay for the books.

The statute also provides that the board of education of the school district may furnish books under such conditions and it is usually handled in that manner.

SCHOOL FUNDS—MORTGAGES: One who has borrowed the maximum of $5,000 on real estate security but who has sold the same and the purchaser has agreed to assume and pay the mortgage is not a borrower within the statute and he may borrow again up to the maximum of $5,000.

November 14, 1928. *County Attorney, Maquoketa, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon the following proposition:

Where a borrower procures a loan of five thousand dollars upon a school fund mortgage, sells the property and the purchaser agrees to assume the mortgage, is the borrower precluded by the limitation in the statute from further borrowing from the school fund?

It is provided by statute that the maximum sum which one person or company may borrow from the permanent school fund shall be five thousand dollars. Section 4487, Code of Iowa 1927. This provision is of long standing in the laws of this state.

We are of the opinion that while the borrower is still liable upon the sum borrowed until that debt is paid and the mortgage released, yet he would not be termed a borrower within the meaning of the statute for the reason that his liability upon the existing mortgage is merely secondary and the real estate should be sufficient security for the loan.

We are, therefore, of the opinion that the vendor of property under such circumstances would be entitled to loan subject to the statutory limitation of

five thousand dollars after the sale of the property and the assumption of the existing mortgage by the purchaser.

ELECTIONS: Minority candidate who is qualified cannot be declared elected over a majority candidate who is unqualified.

November 17, 1928. *County Attorney, Clarinda, Iowa:* We wish to acknowledge receipt of your favor of the 15th in which you request our opinion on the following proposition:

"A few days before the recent election, J. A. Cheney of Shenandoah, who was a candidate for Justice of Peace on the Republican Ticket, for re-election, died but his name was on the ticket and he received more than 2,000 votes. Some people wrote in the name of E. E. Reisner for Justice of the Peace and he received 26 votes. The question has arisen as to whether E. E. Reisner was elected."

The question submitted by you resolves itself into whether or not a candidate receiving a minority of the votes cast for an office can be declared elected when the candidate receiving a majority of the votes cast for the office is ineligible; in this case, by reason of his death.

There are two rules of law in matters of this nature—the English rule and the American rule. The English rule is that where the majority candidate is ineligible and sufficient notice of his ineligibility has been given, the person receiving the next highest number of votes, being eligible, is declared elected. Great stress is laid upon the fact of notice having been given, and the reason of the English rule is said to be that it is wilful obstinacy and misconduct in a voter to give his vote for a person laboring under a known incompetency (Southwark on Elections, page 259). In a number of English decisions, however, it was declared that there was no election on the ground that there was not sufficient notice of the incompetency of the successful candidate. The courts of the United States and the House of Representatives of the United States have refused to adopt this rule, and it is said that the English rule is wholly inapplicable to the system of government under which we live. Thus in *Commonwealth vs. Couley*, 56 Pa. St., 270, the Supreme Court of Pennsylvania held that where at an election a majority of the votes are cast for a disqualified person, the next in vote is not to be returned as elected, and the Supreme Court of California in *Saunders vs. Haynes*, 13 Cal., 145, holds the same doctrine, as does Wisconsin in *State vs. Giles*, 1 Chand. 112, and *State vs. Smith*, 14 Wisconsin, 497. There are a number of decisions from various states following this rule.

The weight of authority in this country is decidedly against the adoption of the English rule. We believe that sound policy, as well as reason and authority, forbid the adoption of the English doctrine in this state. It is one of our fundamental principles that a majority shall rule, and that a majority or at least a plurality shall be required to elect a person to office by popular vote. Another rule would open the way for minority rule, which is contrary to the American principle. The American principle was followed in the Senate of the United States in the case of Joseph Abbott of North Carolina. It was there determined that Abbott, who not withstanding receiving only a minority of the votes cast claimed a seat upon the ground that he was the only eligible candidate, was not elected, and it was there said that the fact that the voters, at the time they cast their vote for him, knew of his ineligibility made no difference. (Senate Report No. 58, 42d Congress, 2d Session.)

The case squarely in point with the one presented for our consideration was passed upon by the Supreme Court of Kentucky in *Howes vs. Perry*, 92 Ky., 260. In the cited case one Bayes and the appellant were candidates for the same office. Bayes died the day of the election before the polls closed. The count showed that Bayes had received a majority of the votes cast. The court, in refusing to allow appellant's claim to the office said:

"It is a principle of free elections by the people, firmly fixed and understood, that no person is or can be regarded duly elected to an office unless when only two persons are voted for he receives a majority of the votes cast for them, or receives a plurality in case there are more than two voted for. Any other rule would be subversive of the fundamental idea of elections by the people under our form of government, which is that only that person shall be entitled to hold an elective office who appears, from the record of votes cast, to have been the choice of a majority or plurality of those voting in such election."

Our own Supreme Court in *State vs. Carvey*, 175 Iowa, 344, held that the death of the re-elected incumbent of a public office before entering upon the new term, created a vacancy in the term which he was serving at the time of his death, but not in the next term for which he had been elected, and that the duly qualified appointee to fill the vacancy possessed two rights: first, to serve the balance of the unexpired term; and second, to hold over until the next general election for the new term for which deceased was elected, provided he qualifies as provided by statute after the new term commences. This is the rule in America without exception, as far as we can ascertain. See *Blakey vs. Golladay*, 2 Bart. (Election Cases) 417; Reports of the Attorney General of Colorado, 1917-1926, page 169.

We are, therefore, of the opinion that Mr. Reisner was not elected and that a vacancy exists in the office held by Mr. Cheney for the office held by him at the time of his death, and that the appointee to fill this vacancy possesses the two rights stated in the decision of our Supreme Court in *State vs. Carvey*, Supra.

NUISANCE—FEES—COUNTY OFFICERS: County attorney's fees in liquor nuisance cases are a part of the costs and the same cannot be remitted or suspended by the district court.

November 19, 1928. *County Attorney, Sioux City, Iowa:* We desire to acknowledge receipt of your communication of November 17, 1928, in which you request an opinion as to whether or not the county attorney is entitled to the payment of his attorney's fees from the county where the trial court has in his order suspended the payment of costs of a defendant convicted of maintaining a liquor nuisance.

In reply we desire to quote Section 1930, Code 1927:

"Penalty for nuisance. Whoever shall erect, establish, continue or use any building, erection, or place for any of the purposes herein prohibited, is guilty of a nuisance, and upon conviction shall pay a fine of not less than three hundred nor more than one thousand dollars and costs of prosecution, which shall include a reasonable attorney's fee to be taxed by the court, and stand committed to the county jail until such fine and costs are paid, and be imprisoned in the county jail for a period of not less than three months nor more than one year."

And it will readily be seen that the costs of prosecution include the attorney's fees and the construction of the supreme court has been that attorney's fees

so taxed are a part of the costs. This is held in the case of *Newman & Blake vs. Des Moines Company*, 85 Iowa, 89.

Paragraph 3800, Code 1927, provides that the court may suspend the sentence of a person convicted under Chapter 6, Code 1927, but Section 3800 is not broad enough to permit the court to suspend the costs, as costs are not a part of the sentence or fine and it was evidently not the intention of the legislature that the trial court should have the authority to parole the prisoner and suspend the fine and costs but that they should only be permitted to make the parole and suspend the fine and this is borne out by the provisions of Section 1961, Code 1927, which provides that costs shall be enforced as a lien against any property of the defendant subject to execution.

And it is, therefore, our opinion that the present statutes of this state do not permit nor do they give authority to the trial court to suspend the payment of costs of a defendant convicted of maintaining a liquor nuisance.

However, in the event that the clerk of the district court refused to issue an execution against the defendant for the amount of the costs, we then believe it would be proper to bill the county for the amount of the attorney's fees assessed by the court attaching thereto a copy of the court's order, certified to by the clerk of the district court.

MULCT TAX—TAXATION: Mulct tax to be collected in the same manner as property taxes; homestead, therefore, not exempt; and automobile may be taken by distress and sale as other personal property.

November 20, 1928. *County Attorney, Estherville, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department upon questions relative to the collection of mulct tax.

It is provided by statute, Sections 2051-2, Code of Iowa 1927, that the mulct tax shall be imposed upon the building and upon the grounds upon which the same is located and against the persons maintaining the nuisance and that the tax shall be imposed and collected in the same manner as the tax in injunction proceedings against places used for the purpose of lewdness, assignation, or prostitution.

The provisions governing the imposition and collecting of the tax with reference to the latter offenses are found in Chapter 79, particularly, Sections 1613 to 1618. Under these sections it is provided that the levy, delinquency, collection and sale of property for taxes shall be the same as for the collection of general taxes of the state.

Therefore, the mulct tax may be enforced against the specific property on which it is by the court made a lien and since it is also entered against the property of the owner it may be collected by distress and sale against any personal property owned by the debtor taxpayer. It would be a part of the tax sale provided under Section 7244 for the particular real estate on which it is a lien but could not be enforced against other real estate owned by the debtor taxpayer until it had been entered upon the delinquent personal tax lists in Section 7190, thereby making it a lien upon other real estate under Section 7192.

We are also of the opinion that since it is a personal tax it could be enforced against an automobile since the automobile is not exempt from taxation as personal property but is merely licensed under the motor vehicle regulations to be used upon the highway.

BOARD OF SUPERVISORS: Board of Supervisors are not entitled to per diem and mileage paid from the county road funds for meetings held to establish a road.

November 28, 1928. *Auditor of State:* We wish to acknowledge receipt of your favor of the 27th in which you request the following information:

"When a Board of Supervisors meets for the sole purpose of establishing a secondary road district on petition, can the per diem and mileage of said board be paid from the County Road Fund and the compensation of said board be taxed as a part of the cost of the district?"

Chapter 237 of the Code, 1927, provides the procedure that shall be followed in the establishment of roads. Section 4580 thereof provides in substance that if a hearing on the application or petition for the road and claims for damages is required that it shall be held at "the next session of the Board of Supervisors held after the commissioners appointed to assess the damages have reported." There is no provision authorizing the payment of the per diem and mileage for members of the Board of Supervisors from the county road fund, or that the same may be assessed as part of the costs in the establishment of the district or road.

It is plainly one of the duties of the Board of Supervisors to act in cases of this kind and as no special provision is made for the payment of their per diem or mileage it should be paid in the usual manner, and not from the county road fund or as costs in the establishment of the road.

WORKMEN'S COMPENSATION—EXECUTIVE COUNCIL: Executive Council does not have authority to increase the maximum provided in Section 1387 for surgical and medical services to an employe of the state.

December 3, 1928. *Executive Council:* We wish to acknowledge receipt of your favor of the 26th in which you request our opinion upon the following proposition:

"At a meeting of the Executive Council, held this date, Mr. Funk, Industrial Commissioner, appeared before the Council regarding Section 1387 of the Code, in which an employer shall furnish $200.00 hospital expenses to a man injured in his employ.

"Beg to advise you that the State of Iowa carries insurance upon their own employes and Mr. Funk has two cases in which an employe of the State of Iowa was injured and in which the men will be able to return to work, but the expenses will be over $200.00. Can he legally pay this expense? The question arises as to whether or not the state could go ahead and pay more for its employes than the amount the statute requires for an outside individual."

Section 1362 of the Code, 1927, makes it compulsory upon the State of Iowa to comply with the Workmen's Compensation Law in respect to the payment and amount of compensation awarded, and that the amount of compensation paid such employe "shall be exclusive, compulsory, and obligatory upon both employer and employe, except as otherwise provided in the preceding section." There is no provision in the Workmen's Compensation Statute providing for additional compensation to state employes or giving the Executive Council discretion to increase the maximum provided in Section 1387, of $200.00 for surgical and medical services.

We are, therefore, of the opinion that the Executive Council cannot allow more by way of compensation or for surgical and medical services than that fixed by the Workmen's Compensation Statutes, to which we have referred.

WAREHOUSE: A bond required to be given by a public warehouseman is for the benefit of his creditors and the holder of a warehouse receipt has a right of action thereon in case he is damaged by unlawful or unfaithful performance of a warehouseman's duty, and the holder of a receipt can bring action on the bond. If the warehouseman becomes insolvent, title to the grain deposited with him would not be part of the bankrupt estate passing to the trustee. The creditor of the warehouseman cannot seize grain deposited with him for the warehouseman's debts. A bank taking a warehouseman's receipt for grain stored in his warehouse has a special property therein to the amount of the unpaid lien to which the receipt is collateral. A discharge in bankruptcy of a warehouseman does not discharge the sureties upon his bond.

December 6, 1928. *Board of Railroad Commissioners:* We wish to acknowledge receipt of your favor of the 28th in which you request our opinion on the following proposition:

"Chapter 426 of the 1927 Code of Iowa provides for bonded warehouses for agricultural products, and places the jurisdiction of these warehouses with the Railroad Commission. Section 9723 of Chapter 426 provides for a bond for the faithful performance of the obligations of the warehouseman. The question has arisen as to whether the holder of a warehouse receipt could collect under the bond as provided in the Section.

"In the event of the unfaithful performance of the duty of the warehouseman, can the holder of the receipt—a copy of which is attached, collect on the bond, or is the bond merely forfeited to the state?

"In the event that the stored grain is the property of the warehouseman, and the receipt is issued in favor of the bank from whom he borrows his money, would the same ruling with reference to the bond stand?

"Another question which has arisen is, if the grain is stored by the warehouseman for some particular party and receipt issued thereon, if the warehouseman should become insolvent, would this grain be considered a portion of the assets of the insolvent company?

"If the receipt is issued by the warehouseman in favor of the bank, and the grain is the property of the warehouseman and the warehouseman becomes insolvent, does the bank as the holder of the receipt have a first lien on the grain, or is the grain a part of the assets of the insolvent company to be divided in accordance with the bankrupt laws?"

Section 9723, to which you refer, requires in substance that each warehouseman applying for a license shall, as a condition to the granting thereof, give a bond "to the state to secure the faithful performance of his obligations as a warehouseman, under the terms of this chapter and the rules and regulations prescribed thereunder, and of such additional obligation as a warehouseman as may be assumed by him under contracts with the respective depositors of agricultural products in such warehouse."

Section 9749, Code, 1927, provides:

"Any person injured by the breach of any obligation to secure which a bond is given under the provisions of Sections 9723, 9725, 9726 or 9748, shall be entitled to sue on the bond in his own name in any court of competent jurisdiction to recover the damages he may have sustained by such breach."

We have examined statutes of other states providing for bonded warehouses and find in practically all of them provisions identical in effect with those of the statutes of this state above quoted. It is the rule of construction that statutes such as the bonded warehouse statute are remedial and should be liberally and not strictly construed.

First National Bank vs. Lincoln Grain Company, 219 Northwestern (Neb.) 192.

It was the undoubted purpose of the legislature to make such warehouse

receipts negotiable in the ordinary course of business and to secure the holder thereof not only by the obligation incurred by the warehouseman signing the receipt, but by the bond which the warehouseman is required to file with your commission as a condition precedent to the granting of a license. This bond is for the faithful performance of the obligations of the warehouseman under the terms of the bonded warehouse chapter and his common law obligations as a warehouseman, as well as those assumed by him under the contract with depositors of agricultural products in his warehouse. It is true that the bond runs to the state, but it is for the use and benefit and to indemnify those depositing grain in the warehouse and those holding warehouse receipts from any failure of the warehouseman to live up to his obligations.

Actions in a large number of states having bonded warehouse statutes have been brought by holders of warehouse receipts on the bond required to be deposited by the warehouseman as a condition to procuring his license.

In every instance the right of the holder of the receipt to sue upon the bond, which in every case is given "to the state," has been sustained. In a few of the cases the court has required that the suit be brought in the name of the state on relation of the person damaged. These decisions, however, are in states that do not authorize the bringing of the action in the name of the person damaged. Section 9749, supra, authorizes the bringing of suit in the name of the person damaged, and we are of the opinion that it need not be brought in the name of the State of Iowa on his relation, although it would probably be the better practice to do so. The decisions above referred to, which are so numerous that we will not lengthen this opinion by quotation therefrom, are as follows:

State vs. Broadwater Elevator Company, 201 Pac. (Mont.) 687;
State vs. Royal Indemnity Co., 175 N. W. (N. Dak.) 625;
Commonwealth vs. Market Warehouse Company, 146 N. E. (Mass.) 29;
Lacy vs. Globe Indemnity Co., 126 S. E., (N. C.) 316;
State vs. Interstate Surety Company, 201 N. W. (S. Dak.) 717;
State vs. Oakley, 225 Pac. (Wash.) 425;
Stutzman vs. Cook, 204 N. W. (N. Dak.) 976;
American Surety Company of New York vs. State, 277 S. W. (Texas) 790;
Bolen vs. Farmers Bonded Warehouse, 291 S. W. (Ark.) 62;
Anderson vs. Krueger, 212 N. W. (Minn.) 198;
Lacy vs. Hartford Accident & Indemnity Co., 136 S. E. (N. C.) 359;
Patrick vs. Farmers Corporation, 251 Pac. (Wash.) 872;
First National Bank vs. Lincoln Grain Co., 219 N. W. (Neb.) 192;
Phillips vs. Simingson, 142 N. W. (N. Dak.) 47;
Fissette vs. Sullivan, 99 Mo. App. 616.

We are, therefore, of the opinion that under the statutes of this state the holder of a warehouse receipt can bring action upon the bond required by Section 9723 and recover any damages suffered by him because of a breach by the warehouseman of his obligation.

In the event the holder of a warehouse receipt is damaged by the unfaithful performance by the warehouseman of his duty, he has his right of action on the bond as above stated.

The same ruling would be true in the event that the stored grain against which a receipt is issued is the property of the warehouseman.

The warehouseman has a special property in the grain stored with him by way of a lien for charges authorized under the statute, and in the event the warehouseman becomes insolvent and either voluntary or involuntary bank-

ruptcy proceedings are had against him, the title to the grain deposited with him in his warehouse would not be properly within the meaning of the bankruptcy act which passes to the trustee.

Collier on Bankruptcy, 13th Ed., Vol. 2, p. 1662.

It is the rule in bankruptcy that if the lien is established the trustee in bankruptcy of the pledgee will succeed to the pledgee's title, subject to the terms of the pledged contract.

Collier on Bankruptcy, supra;
Guaranty Title & Trust Co. vs. First National Bank, 185 Fed. (c. c. a) 373;
In re Elm Brewing Company, 132 Fed., 299.

The Supreme Court of Illinois has held that no title passes to a warehouseman of property stored with him, and that the creditor of the warehouseman, therefore, cannot seize and sell the property for the warehouseman's debts.

Yockey vs. Smith, 181 Ill., 564, 567, 569.

And it is the rule that a bailee cannot sell or encumber the bailed property.

Van Zile, Bailments and Carriers, 2d Ed. Sec. 21.

We are, therefore, of the opinion that if the warehouseman should become insolvent, the grain deposited with him as bailee would not be considered a portion of the insolvent's assets, except insofar as the claim of the insolvent became a lien against such grain for charges authorized by a warehouseman under the statute.

When a warehouseman gives a receipt for grain belonging to him and stored in his warehouse, to secure the payment of an obligation contracted by the warehouseman, the receipt passes title to the grain and is a valid pledge, so that a bank taking such a receipt as collateral security for the warehouseman's obligation would have a special property therein to the amount of the unpaid lien.

Merchants & Manufacturers Bank of Detroit vs. Hibbard, 48 Mich. 118.

We also wish to call attention to a decision holding that the bankruptcy of a warehouseman does not discharge the sureties upon his bond from liability thereunder.

State ex rel. First National Bank vs. Federal Union Surety Co., 156 Mo. App. 603, 609.

MOTOR VEHICLES—HIGHWAYS: "Highway" as used in Section 4943 includes public streets, alleys, parkways, and driveways intended or used by the general public.

December 10, 1928. *Secretary of State:* This will acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following proposition:

Does the term "Public Highway" as used in Section 4943, include such highways within cities and towns?

The section cited is used in the General Chapter 251 on Motor Vehicles and Law of Road. In the same chapter, Section 4863 (5), a highway is defined as follows:

" 'Highway' shall include any public highway, county road, state highway or state road, public street, avenue, alley, park, parkway, driveway, square or place, bridge, viaduct, trestle, or any other territory or structure, whether public or private, designed, intended or used by or for the general public for the passage of vehicles, in any county, or incorporated city or town within the state of Iowa."

We are of the opinion that the legislature in using the term "Public High-

ways" in Section 4943 intended to include all of the places on which an automobile can be driven as defined under Highways in Section 4863 (5). Otherwise, a very large portion of the law as it appears to chauffeurs would be null because practically all persons driving automobiles for hire in the state of Iowa use the streets and alleys within the limits of some incorporated city or town. We believe there can be no question but that such was the intent of the legislature.

TAXATION—MUNICIPALITIES—POWER PLANT: Where a municipal power plant has been sold on contract to a public utilities company the light and power plant should be assessed against the public utilities company as real estate in accordance with the provisions of Section 6983, Code of 1927.

December 11, 1928. *County Attorney, Mason City, Iowa:* We beg to acknowledge receipt of your letter under date of October 23, 1928, requesting an opinion of this department on the following question:

A town in this county has proceeded to build and construct an electric light and power plant issuing bonds therefor, and at the same time has made a contract with the Iowa Falls Electric Company wherein the said electric company has agreed to purchase the electric plant from the city for a sum equal to the cost of construction and erection of the same to the city.

The question has arisen as to whether or not this light and power plant should be assessed and taxed against the Iowa Falls Electric Company during the continuance of the contract of purchase or whether it is the property of the municipality for the continuance of the said contract and as such exempt from taxation.

Under the decisions of our Supreme Court the general rule is where real estate is sold on contract that the same should be assessed against the contract vendee as real estate and the contract assessed against the contract vendor as monies and credits.

Section 6983, Chapter 332, Code of 1927, provides in substance that all real estate owned by corporations shall be valued for assessment purposes as other real estate. Under the decisions of our Supreme Court land, buildings, and machinery of a public utility corporation are held to be real estate. We are, therefore, of the opinion that the land, buildings, and machinery of a light and power plant should be assessed as real estate against the contract vendee in the same manner as other real estate.

We are of the opinion that personal property sold on conditional sale contract should be assessed against the contract vendee as such.

LABOR COMMISSIONER—AGENCIES — EMPLOYMENT BUREAUS: Commissioner of Labor has authority under Section 1550, Code 1927, to inspect all employment agencies.

December 11, 1928. *Commissioner of Labor:* We beg to acknowledge receipt of your letter under date of October 27, 1928, requesting an opinion of this department on the following questions:

1. The Forty-first General Assembly, Chapter 39, enacted a section now known as Section 1546-a1 of the Code of 1927, limiting fees that may be charged by person, firm or corporation, for the furnishing or procurement of any situation or employment including registration and all incidentals. We have been advised that the Supreme Court of the United States has held that the statute limiting the amount of fees that may be collected in such cases is unconstitutional.

Will you, therefore, kindly advise whether this decision of the Supreme Court invalidates the above section? That is, is Section 1546-a1 unconstitutional in your opinion?

2. The provisions of Section 1546-a1 provides in part as follows:
"The provisions of this section shall not apply to the furnishing or procurement of employment by any voluntary association not operating for pecuniary profit, or in any profession for which a license or certificate to engage therein is required by the laws of this state."
Does this exception apply only to the section mentioned and in the regulation of fees, and not to any of the other sections of the Code regulating fee employment offices?
3. Under Section 1550, Code, 1927, does the labor commissioner have jurisdiction over all employment bureaus regardless of whether or not they are operated for pecuniary profit?

1.

Until the Supreme Court of this state has passed upon the question of the constitutionality of Section 1546-a1 we do not feel that this department should hold such law constitutional.

2.

It seems to us that the language used in the above quotation is very plain and clear. The exception provides that Section 1546-a1 does not apply to the furnishing or procurement of employment by voluntary associations not operating for profit or to professions for which a license or certificate to engage therein is required by the laws of this state. It would, therefore, follow that said section applies to all other employment agencies except those mentioned and to all other sections of the Code applying to such matters.

3.

Section 1550, Code of Iowa, 1927, clearly gives the labor commissioner, his deputy or inspectors, and chief clerk authority to examine the books, records, etc., which relate in any way to the conduct of any employment agency or bureau within the state.

We are, therefore, of the opinion that Section 1550 gives the labor commissioner the right and power to inspect and regulate employment agencies and bureaus regardless of whether or not they are operated for pecuniary profit.

FISH AND GAME—DEPUTIES—FEES FOR SERVICE OF PROCESS: Deputy and assistant game wardens are entitled to receive and collect same fees for service of process as is any other peace officer, the fee depending upon the court from which the process issues.

December 11, 1928. *County Attorney, Des Moines, Iowa:* We beg to acknowledge receipt of your letter under date of November 5, 1928, requesting an opinion of this department upon the following questions:

1—Where there has been an information filed by a deputy game warden for a violation of a game law or of any of the provisions of Chapter 86, Code of Iowa 1927, and a warrant has been issued and served by the deputy game warden what fees should be paid to the said deputy game warden for the service of said warrant?
2—Can a deputy state game warden collect the fee from the county for the cost of serving a warrant where the costs are taxed to the state in a case arising out of a violation of the game laws of this state?

1.

Section 1713, Code of Iowa 1927, provides as follows:

"Arrests—assistance of peace officers. Assistant and deputy game wardens may arrest without warrant any person violating the provisions of this chapter. *They may serve and execute any warrant or process issued by any court in enforcing said provisions, in the same manner as any peace officer might serve and execute the same, and they shall receive the same fee therefor.* They may

call to their aid any peace officer or other person, whose duty shall then be to enforce or aid in enforcing the provisions of this chapter."

It will be seen from reading the above section that a deputy state game warden is entitled to collect the same fee for serving and executing a warrant or process as a peace officer would be entitled to.

Section 13405, Code of Iowa 1927, defines peace officers and includes sheriffs, constables, marshals, policemen, special agents of the department of justice, and such other persons as may be otherwise designated by law.

We are of the opinion that under the above sections that the assistant and deputy state game wardens are entitled to collect the same fees in criminal cases involving the enforcement of the provisions of the game laws as a peace officer serving the same process or warrant would be entitled to receive or collect, that is, if the warrant issued out of a justice court the assistant or deputy state game warden would be entitled to receive, for the service and execution of said warrant, the same fee as would be payable to a constable. If a warrant issued out of a municipal court said assistant or deputy state game warden would be entitled to receive the same fee as would be payable to the bailiff of said court for the service of said process. If the warrant issued out of a district court of the state said assistant or deputy state game warden would be entitled to receive the same fee for the service of said process as the sheriff would be entitled to receive for the same.

The amount of the fee, therefore, which an assistant or deputy state game warden would be entitled to receive for the service of a process or warrant would depend upon the court from which the same was issued.

2.

Under Section 1713, Code of Iowa 1927, assistant and deputy state game wardens are entitled to receive the same fee for the service of process or warrants as peace officers would be entitled to receive under the laws of this state for like services. It will be noted that no distinction is made as to whether or not the costs are taxed to the state or to the defendant, that is, the right to receive the fees are not made dependent upon the success or failure of the state's case.

The fees which peace officers are entitled to receive for the service of process and the execution of warrants in criminal cases are not, under the laws of this state, made dependent upon the success or failure of the state's case..

We are, therefore, of the opinion that assistant and deputy state game wardens are entitled, under the laws of this state, to collect from the county the fees for the service and execution of process and warrants which they have served in cases where the violation of a game law is involved, regardless of whether or not the costs of said case are taxed to the state or to the defendant; provided, of course, the case was filed in good faith.

DEAD FUNDS—SURPLUS FUNDS—INVESTMENT—CITIES AND TOWNS: City or town does not have authority to invest surplus fund which is a dead fund.

December 11, 1928. *Director of the Budget:* We beg to acknowledge receipt of your letter under date of November 17, 1928, requesting an opinion of this department on the following question:

An Iowa town has recently sold its electric distributing system (municipal lighting plant) and, after paying all indebtedness against said system, has approximately $7,000.00 left as a profit. The distributing system was originally

paid for by the issuance of bonds which were retired as they became due from the earnings of the system and not from taxation. The town council now desires to invest this sum in bonds or certificates and use the interest received from the investment to pay the cost of lighting the streets and thus dispensing with the necessity of a tax levy for street lighting purposes.

The question arises as to the kind of securities in which the council is permitted to invest their surplus funds in order to comply with the law. If it is permissible to invest this money will the interest received be subject to the State Sinking Fund law, that is, will it be necessary to divert 2¼% interest to the State Sinking Fund?

We do not find any statute which would authorize a city or town to invest its surplus funds, except Section 12775 b1, Code of Iowa 1927. From examining this statute we find that the funds referred to in said section are nonactive funds which are not needed for current use and which are being accumulated as a sinking fund for a definite purpose.

Under the statement of facts set out in the question above it will be seen that the fund which was received from the sale of the electric distributing system is not such a fund, and under said section such a city or town would not be authorized to invest the proceeds of the sale of their electric plant. The purpose for which said fund was originally being accumulated has, by a vote of the people and by the sale of the electric plant, ceased to exist and it, therefore, becomes a dead fund, one for which there is no necessity for the municipality to maintain, the original purpose having ceased to exist.

Section 387, Chapter 24, Code of Iowa 1927, provides 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."

From reading the above section it will be seen that where the necessity for maintaining any fund of a municipality ceases to exist and a balance remains in said fund that the levying or certifying board, as the case may be, are directed by resolution to so declare and to transfer such balance forthwith to the general or contingent fund of the municipality. Of course, when this fund is transferred, pursuant to Section 387, to the contingent or general fund of a municipality it would be subject to the provisions of the State Sinking Fund Law in the same manner as would any other fund of the municipality.

ATTORNEYS—SPECIAL COUNSEL—SUPERVISORS—COUNTIES: Board of Supervisors of a county has power to employ special counsel on annual basis.

December 14, 1928. *County Attorney, Waterloo, Iowa:* We beg to acknowledge receipt of your letter of recent date requesting an opinion of this department upon the following question:

Has the board of supervisors of a county power and authority to employ a special counsel on an annual basis?

Section 5130, Paragraph 6, Chapter 254, Code of Iowa 1927, provides as follows:

"The board of supervisors at any regular meeting shall have power:
* * *
6. To represent its county and have the care and management of the property and business thereof in all cases where no other provision is made."

Construing the statutory provision above quoted the Supreme Court of the State of Iowa held that the board of supervisors of a county has the power to employ special counsel on behalf of the county. This decision was rendered in the case of *Taylor vs. Standley*, 79 Iowa 666. In that case at page 670 the court said,

"We are of the opinion that the board of supervisors was authorized to employ counsel on behalf of the county by virtue of the general powers given them by statute to manage the affairs of the county, and their right to do so and to cause proceedings to be instituted in the name of the county in cases of this kind does not depend upon the consent of the county attorney nor upon his willingness or ability to appear for the county."

The holding in the above case was followed in the case of *Bevington vs. Woodbury County*, 107 Iowa 424, and was cited with approval in the case of *Guinn vs. Mahaska County*, 155 Iowa 527.

It should be stated in passing that the decisions in the cases above referred to were based upon paragraph 11 of Section 422 of the Code Supplement of 1915 and that the language in said section and paragraph is identical with that of paragraph 6 of Section 5130, Code of Iowa 1927. These decisions are, therefore, applicable to paragraph 6 of Section 5130, Code of Iowa 1927.

The board of supervisors is the business manager of the county and necessarily have some discretion in connection with the exercise of this power.

Pursuant to the statute and decisions above cited we are of the opinion that the board of supervisors of a county as business managers of the county have power and authority to employ special counsel to act solely as legal advisor and attorney for the board in civil cases where the business of a county is such that there is a real necessity for such counsel and advisor. This power and authority must, however, be exercised with discretion by the board. It cannot act arbitrarily and without reason but must consider the necessity for such exercise. In other words, if the board of supervisors of a county, considering the business of the county from past experiences and contemplating what the future may demand, believe that the business of the county will require the services of a special counsel and advisor they may employ one. This employment may be only for one case or it may be on an annual basis if in their judgment, as business managers of the county, the business of the county may require.

In some cases it might be more economical for the county, having regard for the business that may come before it, to employ a special counsel on an annual basis than to employ one for each case as it arises.

The board of supervisors would not have the power to employ special counsel when such employment would have the effect of superseding the duly elected and acting county attorney for the reason that such action on the part of the board would be contrary to and a nullification of Chapter 258, Code of Iowa 1927, particularly Section 5180 which defines the powers and prescribes the duties of the county attorney.

This opinion is in conformity with the conclusions reached by this department in an opinion rendered by it to the County Attorney of Polk County, Iowa, under date of February 15, 1925, and in writing this opinion we have only explained the reasons for our conclusions.

INTOXICATING LIQUOR—SEARCH WARRANT: A search warrant may be issued in one county for premises within five hundred yards of the county line.

December 17, 1928. *County Attorney, Anamosa, Iowa:* We wish to acknowledge receipt of your favor of the 12th in which you request our opinion on the following proposition:

"Our sheriff desires to search certain premises situated in an adjoining county but within five hundred yards of the Jones County line which would be a place under the statute where our court would have con-current jurisdiction for the prosecution of crimes committed on such premises. We have evidence that a liquor nuisance is being maintained there and also a gambling house and we desire to have your opinion on these two propositions:

"(1) Can we proceed to search such premises under an intoxicating liquor search warrant issued by a Jones County Magistrate?

"(2) Would we be in any different or better situation and could we proceed under a search warrant issued by a Jones County Magistrate under the gambling statute?"

Section 13452, Code of Iowa 1927, reads as follows:

"When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county, except as otherwise provided by law."

There is nothing contained in the provisions of Chapter 617, Code 1927, in reference to search warrants that in any way modifies the provisions of Section 13452, supra. We have been unable to find any Iowa cases in regard to search warrants that answer your inquiry. Howover, the Supreme Court has passed upon a very similar proposition and we believe the rule therein controls and answers your inquiry. We refer to the case of *State vs. Seery*, 95 Iowa 652. In the cited case the prosecution was for resisting an officer. The facts disclosed that a warrant was issued by a justice of the peace in Jones County for the arrest of a defendant in Dubuque County, charged with the commission of a crime in Dubuque County but within five hundred yards of the boundary line between the two counties. A man was deputized to serve the warrant, and going across the line into Dubuque County attempted to arrest the defendant, who resisted him, resulting in the prosecution. The defense was that the justice in Jones County did not have authority to deputize a man to serve the warrant in Dubuque County for a crime committed in that county. At page 656 the Court says:

"It is further contended that Tiede was not a peace officer within the meaning of the statute, and that there is no authority of law to execute the warrant of a justice of the peace outside of the county unless the warrant is properly certified to by the Clerk of the District Court. Whatever may be said as to the capacity in which Tiede acted, there can be no question that the justice had authority to deputize him to act as constable. Nor have we any doubt that the justice had the same power and authority to make this arrest in Dubuque County within five hundred yards of the boundary line, as in his own county. A crime committed within the limits designated is, in legal effect, a crime committed in Jones County, the county of the officer's residence. (Citing cases). As was stated in *Floyd County vs. Cerro Gordo County*, 47 Iowa, 186:

" 'For all purposes connected with the prosecution, the spread of territory within the defendant and also within five hundred yards of the boundary of the plaintiff is as much a part of the latter as any other portion of territory embraced therein.' "

The Supreme Court has thus established the rule that the territory within five hundred yards of a county is as much a part of the county issuing the

process as any other territory therein. We are, therefore, of the opinion that a search warrant issued by a justice of the peace in Jones County would be valid and effectual to make a search within five hundred yards of the Jones County line but within Dubuque County.

POLICE JUDGE—SALARY FEES: Police judge is entitled to receive and collect same fees and salary as is a justice of the peace unless city ordinance provides to contrary.

December 22, 1928. *County Attorney, Mason City, Iowa:* We beg to acknowledge receipt of your letter of recent date requesting an opinion of this department on the following question:

Whether or not a police judge is entitled to receive and collect the statutory fees in state cases prosecuted before him where the city ordinance provides that he shall receive a salary of $600.00 and the statutory fees in all state cases prosecuted before him.

Section 5666, Code of Iowa 1927, provides as follows:

"Fees of police judge. The police judge shall be entitled, in all criminal cases prosecuted before him in behalf of the state, to the same fees, to be collected in the same manner, as a justice of the peace in like cases; in prosecutions before him in behalf of the city, to such fees, not exceeding those for services of like nature in state prosecutions, as the council may by ordinance prescribe."

Section 10636, Code of Iowa 1927, fixes the fees which a justice of the peace may charge and collect in all criminal cases which are prosecuted before him.

Section 10638, Code of Iowa 1927, provides that the fees shall be paid regardless of whether or not the prosecution is successful and regardless of whether or not the fees are collected from the person liable to pay the same. In both of which cases the fees are to be paid out of the county treasury.

Section 10639, Code of Iowa 1927, requires the justice of the peace to account for all fees and fixes the maximum amount of fees which he is entitled to retain, depending upon the population of the township and provides for the payment of all fees in excess of the maximum amount fixed.

It would, therefore, appear, under the sections above noted, that a police judge is entitled to collect and receive, in all criminal cases prosecuted before him, the same fees as a justice of the peace may collect and receive in like cases, unless, of course, a city ordinance provides to the contrary. He must, however, account to the county for all fees received and collected by him in criminal cases prosecuted before him and must turn over to the county all fees in excess of the maximum provided for in Section 10639, Code of Iowa 1927.

Under Section 5666, Code of Iowa 1927, a police judge is also entitled to collect and receive, in all prosecutions before him for violation of city ordinances, fees not exceeding those for services of like nature in state prosecutions as the council may by ordinance prescribe.

Section 5670, Code of Iowa 1927, provides in substance that the city council may, by ordinance, fix the salary of all municipal officers in lieu of all state compensation. It would, therefore, follow that if a city ordinance has fixed a salary for a police judge in lieu of other compensation then the police judge could only collect such salary and would have to account for and pay over all fees collected. If, however, a city ordinance provides that a police judge shall receive a certain fixed salary in lieu of all compensation for prosecution of

all cases before him for violation of city ordinances and provides in addition thereto that he shall receive the statutory fees in all state cases, then said judge would be entitled to collect and receive, in addition to the salary, all fees in criminal cases prosecuted before him under the same terms and conditions as a justice of the peace.

We are, therefore, of the opinion that under the sections referred to heretofore a police judge is entitled to collect and receive, in all criminal cases prosecuted before him, the same fees as a justice of the peace may collect and receive in like cases with the same limitations, however, meaning the maximum amounts as provided for in Section 10639, Code of Iowa 1927, unless, of course, the city ordinance provides otherwise.

TOWNSHIP CLERK—BOND: Township clerk may give a bond secured by private individuals or a surety company.

December 29, 1928. *County Attorney, Maquoketa, Iowa:* You have requested our opinion in substance as to whether a township clerk is required to give a surety company bond or if the bond can be executed by private sureties.

Section 1070, Code of Iowa, 1927, provides:

"Every bond required by this chapter, except as hereinafter specified, shall be executed with at least two sureties, each of whom shall be a freeholder in the state * * *."

Section 1071, Code, 1927, provides:

"Any association or corporation which does the business of insuring the fidelity of others and which has authority to do business in this state, shall be accepted as surety upon bonds required by law."

Section 1073, Code of Iowa, 1927, specifies who shall approve official bonds, and paragraph 2 thereof reads:

"By the Board of Supervisors, in case of county officers, township clerks, and assessors."

Section 1067-b1, Code of Iowa, 1927, provides:

"All bonds required of the township clerk shall be furnished and paid for by the township."

Under the provisions of the statutes above quoted we are of the opinion that the township acting through its trustees may determine whether the bond of the township clerk shall be secured by private individuals or a surety company. There can be no doubt but that a bond secured by private individuals is authorized and permissible under the provisions of Section 1070 supra, and may properly be approved by the Board of Supervisors if they find the sureties are qualified.

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