State of Iowa
1934

TWENTIETH BIENNIAL REPORT

of the

ATTORNEY GENERAL

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 1934

EDWARD L. O'CONNOR
Attorney General

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REPORT OF THE ATTORNEY GENERAL

January 4, 1935.

To the Honorable Clyde L. Herring,
Governor of Iowa.

My dear Governor Herring:

I have the honor to submit herewith a report of the condition of the Attorney General's office, the opinions rendered and business of a public interest transacted for the years 1933 and 1934, all as provided by law.

The work of this department has increased to the extent that it is impracticable to set out in detail all of the matters which have been presented and upon which this department has acted. However, I will attempt to set forth the important matters handled by this department during the preceding two years.

STATE POLICE RADIO BROADCASTING SYSTEM

This department has made progress in the development of a state police radio broadcasting system, which system was first authorized by chapter 241 of the acts of the forty-fourth general assembly. The legislature has wisely provided for such a system in order to more successfully combat organized crime of the major type. This system is calculated to assist law enforcement and police work by rapid and direct communication of information relating to crimes to various peace officers of the state. Due to the assistance and cooperation of the Iowa State Bankers Corporation, one broadcasting station had already been erected, installed and equipped in Des Moines, Iowa, and a remote control system had been installed in the department of justice at the state house prior to January 1, 1933. This first unit consisted of a 400-watt transmitter which was capable of broadcasting this information efficiently within a radius of 100 miles from Des Moines. This one small station, of course, could not and did not cover the entire state. It was found from tests that this system should be completed by the installation of other broadcasting units in the Northeastern, Northwestern, Southeastern and Southwestern portions of the state, all of which were to be connected into one unified system. The forty-fifth general assembly in extraordinary session, under the provisions of chapter 142 of their acts, provided for an appro-

priation of $15,000.00 for the installation of two additional units, one to be placed in northeastern Iowa and one in northwestern Iowa. These installations have already been made, one unit being placed at Waterloo and the other at Storm Lake. These stations were officially dedicated on December 28, 1934, and have been in official operation ever since. However, in order to complete this state-wide police radio broadcasting system, it will be necessary to install an additional unit in southeastern Iowa and another in southwestern Iowa. It is hoped that the forty-sixth general assembly will make adequate appropriation for the installation of these two additional units which will complete the state-wide police radio broadcasting system. Such a system is not only advantageous in disseminating rapidly information concerning crime, but also it will act as a deterrent to crime.

CIVIL CASES

During the last biennium, the department of justice has handled and disposed of approximately 250 civil cases in the district courts of the state. These cases involved the testing of many of the new laws passed by the legislature and also involved the collection of monies due and owing the state. One of the most important cases was the so-called Mona Motor Oil Company of Council Bluffs wherein the company sought to enjoin the collection of gasoline taxes, alleging that the state gasoline tax was unconstitutional. At the time this case was instituted, there was approximately $96,000,000.00 worth of primary road bonds outstanding, which were to be paid and retired largely from the collection of these gasoline taxes. If this law were declared unconstitutional, the bond holders would then be forced to collect their bonds from the different counties in the state that have authorized their issuance and sale. The result would have been an additional $96,000,000.00 tax burden on the property owners in these different counties. Such an additional tax burden falling upon the property owners of this state during the period of depression would practically amount to state bankruptcy. This case was first tried before a three judge federal court sitting here in Des Moines. This three judge federal court ruled that our tax law was constitutional and the case was then appealed to the Supreme Court of the United States. Upon presentation to the Supreme Court of the United States, this highest court of the land also held that our tax law was constitutional and the suit of the Mona Motor Oil Company

was dismissed at their costs. Since that time, the state has collected the total amount of taxes and penalties due from this company.

Another important case was a suit against the Standard Oil Company for the collection of gasoline taxes. This suit was also terminated in favor of the state with the result that more than $100,000.00 was collected in back taxes.

Approximately 35 civil cases were disposed of in the Supreme Court of Iowa during the last biennium.

CASES IN THE SUPREME COURT OF THE UNITED STATES

Two very important cases to the state of Iowa were successfully defended by the state in the United States Supreme Court. One of these cases, mention of which was made heretofore, was the co-called Mona Motor case.

The other case was the suit of the state of Alabama against Iowa and eighteen other states for an injunction to restrain Iowa and these other states from enforcing the provisions of their state laws relative to the sale of prison-made goods. On January 19, 1929, the Congress of the United States passed the Hawes-Cooper act taking prison-made goods out of the protection of the laws relating to interstate commerce. This federal law was to take effect on January 19, 1934. The national congress, thus, gave each state five years in which to make the necessary adjustments of their policies with reference to the sale and disposal of goods made in their prisons. The forty-fifth general assembly of the state of Iowa passed the so-called Topping bill which required all prison-made goods to be labeled as such before being offered for sale in the state of Iowa. It was the enforcement of this Topping bill that the state of Alabama sought to enjoin in the United States Supreme Court. As soon as the notices of this suit were served upon the Governor and the Attorney General, arrangements were made with the attorneys general of the states involved for a preliminary conference to be held in Chicago, Illinois, for the purpose of preparing a proper defense to this action. This conference was held in Chicago during the summer of 1933, at which time thirteen attorneys general were present. Another conference was held at Grand Rapids, Michigan, in connection with the American Bar Association, where final plans for the defense were perfected. On submission of this cause to the United States Supreme Court, the court held that Alabama did not have any legal right to impose its will

upon Iowa and other states and accordingly refused to permit Alabama to prosecute this suit.

LEGISLATIVE WORK

Under the provisions of section 149 of the 1931 code of Iowa, it is the duty of the Attorney General to give his opinions in writing to the legislature or either house thereof upon official request. In addition to this statutory requirement, it has been the policy of this office to aid and assist the legislators in the drafting of the bills which they desire to have presented to the legislature. Our office has assisted on many occasions in this respect for the purpose of having the proposed acts in proper legal form so that if they are passed, they will carry out the real intent of the legislature. This department has also passed upon all claims filed against the state for legislative appropriations to reimburse different persons who claim to have been injured by the state or its agencies for which no provision in law has been made.

BUREAU OF INVESTIGATION

For the past two years, the bureau of investigation has been kept very busy in investigating and assisting in the prosecution of major crimes throughout the state. This branch of the department of justice was organized and authorized by the legislature for the main purpose of combatting organized crime of the major type. The laws of this state contemplate that the local prosecuting officers should take care of local matters within their jurisdiction, but these local officials are handicapped in tracing organized crime which extends beyond the borders of one county. The state peace officers are authorized to operate throughout the state and can do so without friction between local officials. However, the bureau of investigation has assisted local officials in the prosecution of many local criminal cases whenever it is possible for them to do so. In connection with this report we will submit a detailed statement of the different types of crime that have been investigated by this department and the prosecutions and convictions that have resulted therefrom. This department has worked in close harmony and cooperation with the Attorney General's office and with other administrative branches of the state government.

On many occasions the state peace officers have had to face machine gun bullets from gangsters and are constantly assuming some of the most dangerous hazards in police work for the state. In

this age of organized crime and racketeering, it is necessary for the state to equip its peace officers with equal if not better equipment than that used by the criminal gangster. The state peace officers should be equipped with bullet-proof vests and other modern equipment in order to successfully meet the challenge of the underworld.

ASSISTANT ATTORNEYS GENERAL

It has been our policy wherever and whenever possible to send out assistant attorneys general to assist in the prosecution in district courts of important criminal cases and especially those wherein the state has a direct interest. The assistant attorneys general have also been sent out to different parts of the state to try state civil cases without authorizing special counsel for this purpose. However, the extra work that is placed on the Attorney General's office does not permit this department to assign assistant attorneys general to every prosecution of an important nature arising in the several counties. The important prosecutions in which we have directly assisted were the cases of *State v. Conway, et al.*, and *State v. Beddow, et al.* It is the duty of the attorney general to handle all criminal cases on appeal in the supreme court. During the period covered by this report, 170 cases have been thus disposed of in the supreme court.

In the submission of this report, I want to express my appreciation of the splendid cooperation that the department of justice has always received from all public officials, both state and local. It is also fitting and proper for me to express my sincere appreciation for those who have worked with me and assisted me in the department of justice for their loyal services which they have rendered to the people of the state of Iowa.

Respectfully submitted,

EDWARD L. O'CONNOR,
Attorney General.

SCHEDULE "A"—CRIMINAL CASES, SUPREME COURT OF IOWA

Title	County	Decision	Nature of Action
Albro, Ray T. and Myers D.	Henry	Affirmed 6/ 6/34	
Abbott, Dan	Guthrie	Affirmed 6/20/33	Entering bank with intent to rob
Anderson, Ralph Albert	Boone	Affirmed	Illegal transportation of intoxicating liquor
Ayers, Charles	Lucas	Affirmed 9/29/33	Robbery with aggravation
Busing, August	Marshall	Affirmed 12/12/34	Carrying concealed weapons
Brown, Paul	Cerro Gordo	Affirmed 5/31/33	Rape
Black, Mary	Linn	Affirmed 6/ 6/34	Larceny by embezzlement
Brewer, Elmer	Black Hawk	Affirmed 3/31/34	Wilful murder
Bliss, Clarence	Woodbury	Affirmed	
Blackledge, H. E.	Polk	Affirmed 6/24/32	Conspiracy
Bland, Christina	Woodbury	Affirmed 6/ 6/34	
Bever, Forrest	Appanoose	Affirmed 9/25/34	Burglary
Bevens, H. S.	Henry	Affirmed 3/16/34	Illegal possession of intoxicating liquor
Cambridge, Roy	Madison	Affirmed 10/24/33	Bootlegging
Campbell, James S.	Johnson	Reversed 12/12/33	Murder
Cape, Morris	Plymouth	Affirmed 3/16/34	Assault with intent to inflict great bodily injury
Casper, Ed.	Plymouth	Affirmed 3/16/34	Assault with intent to inflict great bodily injury
Carr, Eddie and Fred Sherman	Webster	Affirmed 10/31/33	
Chrysler, One Coupe and Bert Baber	Wapello	.....	Forfeiture—illegal use
Cooley, Ed	Polk	Affirmed 10/31/33	Murder
Cooper, Orval L.	Polk	Dismissed 10/17/33	Manslaughter
Claussen, Floyd	Clay	Affirmed 2/18/33	Assault with intent to rob
Christofferson, Robert	Pottawattamie	Affirmed 4/ 4/33	Breaking and entering railroad car
Dailey, Archie	Clay	Affirmed 11/17/33	
Davis, David	Carroll	Affirmed 3/20/33	Indecent exposure
Davis, James vs. Hollowell, Warden	Madison	Affirmed 10/19/33	Bank robbery
Dedina, Albert	Cerro Gordo	Affirmed 11/17/33	
Dobry, D. A.	Scott	Affirmed 11/24/33	False rep. for registration of stock
Eagon, Leonard	Union	Affirmed 1/ 8/35	Illegal possession of intoxicating liquor

Edwards, Victor	Webster	Affirmed 6/ 6/34	
Elmers, Charles, et al	Madison	Reversed 10/24/33	Illegal sale and manufacturing of intoxicating liquor
Engler, Wm., et al	Polk	Affirmed 3/20/33	Entering bank with intent to rob
Ensminger, Roy	Henry	Affirmed 3/16/34	Illegal possession of intoxicating liquor
Essex, L. J.	Polk	Reversed 11/14/33	Making malicious threats to extort money
Flynn, Leo	Pottawattamie	Affirmed 6/26/34	Violation of chauffeurs' license law
Furlong, Melvin (See State vs. Kelso & Brown)	Wapello	Affirmed 3/20/33	Possession of burglar tools
Grattan, Marvin T.	Winneshiek	Reversed and remanded 9/25/34	Murder
Griffin, Pat.	Black Hawk	Affirmed 3/31/34	Murder
Grinstead, Glen	Henry	Affirmed 3/16/34	Illegal possession of intoxicating liquor
Grimes, James	Woodbury	Reversed 4/ 4/33	Adultery
Hamm, Charles	Page	Affirmed 3/ 9/33	Larceny of domestic fowls
Hammond, Albert	Mahaska	Affirmed 11/17/33	Breaking and entering
Harper, Amos	Buena Vista	Affirmed 2/12/35	Murder
Harvey, John	Pottawattamie	Affirmed 11/27/33	
Henderson, M. V.	Dickinson	Reversed and remanded 12/12/33	Accepting deposits while bank was insolvent
Healy, Tom	Cass	Affirmed 12/12/33	Illegal possession of intoxicating liquor
Hopkins, Rufus	Davis	Affirmed 1/12/34	Operating motor vehicle while intoxicated
Hubbard, T. Jay	Polk	Reversed 11/14/33	Rape
Huckins, Elmer	Linn	Reversed and remanded	False pretenses
Huff, C. W.	Harrison	Affirmed 10/24/33	Embezzlement
Howton, T. R.	Hamilton	Affirmed 6/11/34	Assault with intent to commit murder
Ingram, W. A.	Polk	Affirmed 1/ 8/35	Rape
Kelly, P. E.	Union	Affirmed 3/ 6/34	Maintaining a nuisance
Kelso, Robert Brown and Furlong	Wapello	Affirmed 6/20/33	Possession of burglary tools and implements
Klein, Tunis H.	Marion	Reversed 10/23/34	Making false report
Knowles, Earl	.....	Affirmed 11/27/33	Maintaining intoxicating liquor nuisance
Lattimer, Vern	Polk	Affirmed 6/ 6/34	

SCHEDULE "A"—Continued

Title	County	Decision	Nature of Action
Leftwich, Sam	Woodbury	Affirmed 10/17/33	Robbery with aggravation
Lenker, J. R. and Moore	Cedar	Affirmed 12/12/33	Conspiracy
Loucks, James	Cherokee	Affirmed 9/20/34	Burglary
Lowenberg, J. A.	Polk	Affirmed 4/24/32	Obtaining property by false and fraudulent representation
Madison, Alfred	Union	Affirmed 10/25/32	Bootlegging
Miller, Clyde L.	Polk	Affirmed 1/16/34	Forgery
Mitchem, John	Polk	Affirmed 11/14/33	Murder
Moore, Paul, see State vs. Lenker	Cedar	Affirmed 12/12/33	Conspiracy
Murphy, James	Polk	Affirmed 3/20/33	
Meyers, D. and Ray T. Albro	Henry	Affirmed 6/ 6/34	
Mutch, Alex	Black Hawk	Affirmed 6/23/24	Perjury
Nelson, Raymond W.	Hardin	Affirmed 2/16/34	Violation of state sec. act
Pherrin, J. B.	Polk	Affirmed 10/13/34	
Pinegar, Ed	Polk	Affirmed 5/17/33	Assault and battery
Russell, James	Scott	Affirmed 5/ 6/33	Entering a bank with intent to rob
Rentz, Charles	Sioux	Dismissed 5/11/33	Entering a bank with intent to rob
Richardson, Fred	Ida	Affirmed 6/20/33	Manslaughter
Rosburg, Martin	Plymouth	Affirmed 3/16/34	Assault with intent to do great bodily injury
Rounds, W. J.	Fayette	Reversed 5/ 9/33	Lascivious acts with children
Rowley, Carrie	Polk	Affirmed 5/ 9/33	Murder with abortion
Soeder, A. J.	Fayette	Affirmed 6/20/33	Selling securities without being registered as a dealer
Swolley, Claude	Woodbury	Reversed	Rape
Sanford, George	Woodbury	Reversed 10/16/34	Assault with intent to commit great bodily injury
Scarff, Merle	Henry	Affirmed 3/16/34	Illegal possession of intoxicating liquor
Schuling, Harry and Ray Luther	Madison	Reversed 10/24/33	Manufacturing and sale of intoxicating liquor
Severino, Charles	Woodbury	Dismissed 9/19/33	Murder
Shafter, Perry	Pottawattamie	Affirmed 3/ 9/33	Maintaining a liquor nuisance

Sherman, Fred	Webster	Affirmed 10/31/33	
Sigman, Clara	Webster	Affirmed 11/13/34	Illegal possession of intoxicating liquor and maintaining a liquor nuisance
Skipper, Jens	Pottawattamie	Affirmed 6/26/34	Maintaining a liquor nuisance
Small, James L.		Affirmed 10/31/33	
Smelcer, John	Page	Affirmed 11/27/33	Robbery with aggravation
Sullivan, P. D.	Page	Dismissed 3/16/33	Rape
Smith, George	Polk	Reversed 3/13/34	Intent to inflict great bodily injury
Tesch, Luther	Delaware	Dismissed 5/10/34	Murder
Van Vliet, J. H.	Marion	Dismissed 9/29/33	
Wall, Theodore	Polk	Reversed 4/ 3/34	Obtaining money under false pretenses
Watson, Edward	Carroll	Affirmed 11/27/33	Robbery with aggravation
Weiland, Jos.	Johnson	Reversed 12/12/33	Manslaughter
Welch, Harvey K.	Dallas	Affirmed 1/17/33	Procuring intoxicating liquor for a minor
Wilford, Jack	Webster	Dismissed 10/23/34	
Williams, Henry	Pottawattamie	Affirmed 4/ 3/34	Robbery with aggravation
Williams, Ralph	Story	Dismissed 7/20/33	Rape
Wheeler, Carl	Page	Reversed 6/20/33	Illegal possession of intoxicating liquor
Wheelock, Lewis	Polk	Affirmed 4/ 3/34	Operating motor vehicle while intoxicated
Wheelock, Lewis	Polk	Affirmed 10/24/33	Manslaughter
Woolman, Francis	Madison	Reversed 6/23/34	Assault with intent to commit murder
Xanders, Edgar	Hamilton	Affirmed 10/19/32	Robbery with aggravation
Ball, Roy	Pottawattamie	Pending	Breaking and entering
Butler, John E.	Hamilton	Pending	
Booker, Henry	Black Hawk	Pending	
Besch, Leo	Webster	Pending	
Breeding, Arch	Montgomery	Pending	
Buchan, Merle	Marshall	Pending	Robbery
Bilhorz, Harriet M. and E. F.	Cass	Pending	
Clarke, Joe	Polk	Pending	
Cooper, Willard	Polk	Pending	
Chapman, John	Wright	Pending	
Conway, T. M.	Jones	Pending	Embezzlement of county funds
Coppess, Elmer H.	Cedar	Pending	Illegal transportation of intoxicating liquors
Doe, John, et al.	Polk	Pending	

SCHEDULE "A"—Continued

Title	County	Decision	Nature of Action
Delevie, Barbara	Polk	Pending	Gambling device
Endorf, Raymond	Osceola	Pending	Larceny
Fador, John		Pending	Assault with intent to commit murder
Ferguson, Wesley	Woodbury	Pending	
Fisher, Paul and Bennie Keturakis	Polk	Pending	
Fanning, Homer	Johnson	Pending	Insanity
Gardner, Frank	Jefferson	Pending	Illegal possession of intoxicating liquor
Gardner, Fred	Polk	Pending	
Harrington, Joseph M.	Lee	Pending	
Huene, Earl C.	Henry	Pending	Diverting funds of bank
Hiviles, Nick	Marion	Pending	
Highley, Howard and Tom Sage	Jasper	Pending	
Johnston, Pearl	Ringgold	Pending	
Johnson, Gale H.	Cerro Gordo	Pending	
Johnson, Gale	Des Moines	Pending	
Kinney, Ray	Polk	Pending	
Kreichbaum, T. W.	Henry	Pending	Accepting deposits knowing bank to be insolvent
Kirkpatrick, W. C.	Woodbury	Pending	Uttering counterfeit public instruments
Landis, Arthur H.	Jasper	Pending	Rape
Luce, Norman	Scott	Pending	Murder—second degree
Matheson, George	Pottawattamie	Pending	Murder
Morgan, F. A.	Henry	Pending	
Murray, George	Pottawattamie	Pending	
McClurg, C. W.	Clay	Pending	
McCutchan, R. V.	Henry	Pending	False uttering of bank check
Nichols, Louis Arnold	Polk	Pending	Child desertion
Porter, Bryant	Woodbury	Pending	
Parks, Luther	Linn	Pending	
Phelps, Waldo E.	Henry	Pending	
Prochaska, John	Linn	Pending	
Ross, C. W.	Black Hawk	Pending	

Smith, Warren	Marion	Pending	
Sage, Tom and Howard Highley	Jasper	Pending	
Smith, Lester	Davis	Pending	Receiving stolen goods
Stang, Joseph C.	Polk	Pending	
Sampson, Teddy	Humboldt	Pending	Robbery
Schenk, Otto W.	Johnson	Pending	Failure to report auto accident
Siegel, Joe	Woodbury	Pending	
Sigman, Osman C.	Winnebago	Pending	Burglary
Stennett, Jud	Page	Pending	Breaking and entering
Thompson, George	Polk	Pending	
Thompson, Tony	Louisa	Pending	Murder
Thompson, Russell	Ida	Pending	Robbery with aggravation
Tracy, Reginald S.	Delaware	Pending	Murder
Twine, Missouri	Polk	Pending	Assault with intent to commit murder
Warneke, George	Page	Pending	Robbery with aggravation
Wilbourn, Rollie	Cass	Pending	Malicious threat to extort money—maliciously injured
Young, Elmer	Page	Pending	

SCHEDULE "B"—CIVIL CASES—SUPREME COURT OF IOWA

Case	County	Notation
Clint A. Allen vs. Wegman	Polk	Reversed. With direction to quash write. Soldiers' preference case
Bertha C. Horton, sole beneficiary of Estate of Sarah Lisle Horton, vs. Wegman	Polk	Affirmed. Inheritance tax refund
Estate of Octavia V. Irwin, Deceased, vs. Wegman	Polk	Affirmed. Inheritance tax refund
In the Matter of the Estate of Ralph Van Vechten, Deceased. Forman State Trust and Savings Bank, Trustee, vs. Wegman	Polk	Affirmed. Inheritance tax refund
In the Matter of the Estate of Arthur William Mann	Monona	Affirmed. Estate taxable. Inheritance tax. Application to have estate declared exempt
F. Price Smith vs. Lamar (Thompson)	Woodbury	Pending. On petition for rehearing. Constitutionality of salary bill
State of Iowa, ex rel. Adams, vs. J. A. Murray	Harrison	Decision for defendant. Quo warranto

SCHEDULE "C"—CRIMINAL CASES—SUPREME COURT OF UNITED STATES

Case	County	Notation
D. A. Dobry vs. State of Iowa	Scott	Case dismissed. Making and subscribing to false statement. State's motion to dismiss sustained for want of federal question

SCHEDULE "D"—CIVIL CASES—SUPREME COURT OF UNITED STATES

Case	County	Notation
Mona Motor Oil Co. vs. State of Iowa	Pottawattamie	Gasoline tax refund. Settled by payment of tax due state

SCHEDULE "E"—CIVIL CASES IN DISTRICT COURT

Case	County	Notation
Clint A. Allen vs. Wegman	Polk	Decree against state. Soldiers' preference case. Reversed in supreme court
D. W. Bates, Supt. of Banking, vs. Wegman	Polk	
Board of Review of the City of Waterloo vs. Iowa State Board of Assessment and Review.	Black Hawk	Dismissed. Appeal from action of board of assessment and review
Ed J. Dahms and Wm. Seyb vs. Derby Oil Company, et al	Lee	Appearance entered for state. Foreclosure of mortgage
Carrie Eva Drewery Miller, et al., vs. Wegman.	Linn	Decree in favor of plaintiffs. Escheat
The Prudential Insurance Company of America, a corp., vs. Henry O. Thompson, et al	Woodbury	Decree to plaintiff. Foreclosure of mortgage
Paul W. Sims vs. Wegman	Polk	Dismissed. Soldiers' preference
F. Price Smith vs. Lamar	Woodbury	Decree for defendant. Constitutionality of salary bill. Pending supreme court
State of Iowa, ex rel. Wright, vs. John P. Tinley, Sr.	Pottawattamie	Judgment for state. Testing title to office of judge
Elton Worth vs. The State of Iowa	Jasper	Decree for state. Action to cancel personal taxes
In Relation to the Estate of John Corbin	Dubuque	Pending. Escheat
First Nat'l Bank of Mason City vs. State Board of Assessment and Review	Cerro Gordo	Appearance entered for state. Appeal from ruling of state board of assessment and review
J. W. Holmes vs. James R. Reese	Woodbury	Compromised. Soldiers' preference
N. Y. Life Ins. Co. vs. Wegman	Polk	Pending. Suit on taxes illegally collected
N. Y. Life Ins. Co. vs. Wegman	Polk	Pending
George W. Patterson vs. Central States Electric Co.	Emmet	Pending. Temporary injunction. Sales tax suit

SCHEDULE "E"—Continued

Case	County	Notation
Mary Chesire vs. Iowa State Reformatory	Polk	Compromised. Workmen's compensation
Rose Duffy vs. R. E. Johnson, as Treasurer of State	Polk	Decree against state. Escheat
Sever L. Peterson vs. John A. Soals, et al.	Winnebago	Appearance entered for state. Foreclosure of mortgage
State of Iowa, ex rel. Adams, vs. J. A. Murray.	Harrison	Judgment for defendant. Quo warranto
City of Spencer, Iowa, vs. Frank E. Wenig, as Labor Commissioner	Polk	Pending. Action to enjoin enforcement of law relative to fire escapes
State vs. Silas J. Beddow, Irene Olson	Clayton	Conviction. Uttering counterfeit public securities
C. A. Salter vs. Edward L. O'Connor, et al.	Woodbury	Pending

CIVIL CASES

State vs. Ben Hughes	Buena Vista	Action to restrain from practicing medicine without a license
Francis S. Mason vs. Crane, D. C., Steelsmith, et al.	Polk	Action and mandamus to compel defendants to grant license to practice embalming
John R. Van Osdol vs. Crane, D. C., Steelsmith, et al.	Polk	Action and mandamus to compel defendants to grant license to practice embalming
C. H. Hanson vs. State Board of Medical Examiners	Polk	Action to compel defendants to issue license to practice medicine and surgery
C. D. Royal, Trustee, vs. Central Iowa Fuel Company	Lucas	Workmen's compensation
Ray Pittington vs. Clyde L. Herring, et al.	Polk	Certiorari under soldiers' preference law
Dollie Lawton vs. Lee County, State of Iowa, et al.	Lee	Workmen's compensation

State of Iowa vs. Charles J. Boston	Scott	To restrain from the practice of medicine without a license
State of Iowa vs. Louis Noah Smernoff	Lyon	An action to revoke license to practice medicine and surgery
State of Iowa, ex rel. Ray Murray, vs. Board of Supervisors	Winneshiek	Action for writ of mandamus compelling the levy of a tax as provided by section 8626
Nettie Mae Bennett vs. C. B. Murtaugh	Polk	Action and mandamus to compel issuance of warrant
State of Iowa vs. Ewell Neil	Cherokee	Action to restrain defendant from practicing dentistry without a license
State of Iowa vs. Hugh Smith Detchon	Iowa	To revoke license to practice medicine and surgery
State of Iowa vs. Ira LeMuel Christy	Van Buren	To restrain defendant from practicing medicine and surgery without a license
State of Iowa vs. Guy C. Trimble	Poweshiek	To restrain defendant from practicing medicine and surgery without a license
State of Iowa vs. Oscar J. Bjerke	Franklin	To revoke chiropractor's license
State of Iowa vs. Mrs. Joseph Frier	Greene	To restrain from practicing medicine and surgery
L. E. Goode Produce Co. vs. Ray Murray, et al.	Davis	To enjoin defendant from enforcing rules
State of Iowa, ex rel. Walter L. Bierring vs. Fred William Benz	Buchanan	To restrain defendant from practicing medicine and surgery without a license
Johanson, Ed, Deceased, in the Matter of the Estate	Dallas	To establish escheat to state
A. C. Johnson vs. Herring, et al.	Polk	Certiorari under soldiers' preference law
State of Iowa vs. E. W. Wagner (Board of Health)	Polk	To restrain the defendant from practicing medicine and surgery without a license
State of Iowa vs. John Rettenmaier	Dubuque	Information charging unlawful sale of oleomargarine
State of Iowa, ex rel. Dr. Walter L. Bierring, vs. Henry H. Koller	Mitchell	Medicine and surgery
State of Iowa, ex rel. Dr. Walter L. Bierring, vs. George W. Doxsee	Scott	To revoke barber's license

SCHEDULE "E"—Continued

Case	County	Notation
State vs. Banner Howard	Linn	Action to restrain from practicing medicine and surgery without a license
State of Iowa vs. Henry	Cherokee	Practicing medicine and surgery
Dr. Myrtle E. Long, Sec'y, Chiropractic Board.	Polk	Investigation of accounts of board secretary
State of Iowa vs. W. E. Thomas	Greene	To restrain from the practice of optometry without a license
Burton L. Chase, Katy Schneider, Rose Walton (Insane)	Clay	Determination of residence of indigent
Joseph Corso and Catherine Corso vs. State of Iowa	Supreme Court	Attorney fees in condemnation case
Melvin Fitzgerald vs. State of Iowa	Supreme Court	Attorney fees in condemnation case
Board of Education vs. Edward McCabe	Johnson	Mortgage foreclosure
State of Iowa vs. Floerschinger	Johnson	Mortgage foreclosure
Federal Surety Co.	Scott	Receivership
Midwest Mutual Ins. Ass'n	Polk	Receivership
National Surety Co. of N. Y.	Polk	Receivership
Farmers Union Mutual Ins. Co.	Polk	Receivership
Board of Control—Thelma Dillard	Audubon	Guardianship matter
Iowa Electric Co. vs. Board of Control	Supreme Court	Title to real estate
Marathon Matter—Pickerell Lake	Buena Vista	Sinking fund matter
Ind. School Dist. of Fort Dodge vs. T. J. Brennan, et al.	Webster	Mortgage foreclosure
In the matter of the condemnation of certain lands for benefit of Board of Control for use of State Quarry	Jones	
In the matter of the condemnation of certain lands for benefit of Board of Control for use of State Penitentiary at Fort Madison	Lee	
In the Matter of Mary E. Gross Estate (Board of Control)	Story	Construction of will
Register Life Insurance Co.	Scott	Receivership

Metropolitan Life Ins. Co. vs. John F. Deveny, et al.	Pocahontas	Mortgage foreclosure
Board of Control—Iowa Training School for Boys, Eldora (Spur Track, M. & St. L. R. R.).	Fed. Court, Minneapolis	Claim in receivership for refund for repairs
Radio Matter	Federal Communications Commission	Re: Station WOI at Ames
Ind. School District of Ogden vs. Agnes Samuelson, et al.	Supreme Court	Certiorari
National Life Insurance Co.	Polk	Receivership
Lincoln Natl. Life Ins. Co. vs. Herbert White, et al.	Polk	(Mortgage foreclosures)
Elizabeth McNulty Smith vs. Marguerite Weber, State of Iowa, et al.	Polk	
Madge Young Macy vs. Paul A. Korab, et al.	Johnson	
American Savings Bank vs. Fred F. Pease, State of Iowa, et al.	Polk	
Alva Aldridge vs. W. L. Bywater and W. H. Cobb	Johnson	Action for damages for discharge as civil works administration investigator

SCHEDULE "F"—CIVIL CASES DISPOSED OF

State of Iowa vs. R. C. Mann	Pottawattamie	To restrain defendant from practicing barbering without a license. (Defendant's appeal pending)
H. A. Statter vs. Clyde L. Herring	Polk	Certiorari under soldiers' preference law
Duke Davis vs. Clyde L. Herring	Polk	Certiorari under soldiers' preference law
B. W. Miller vs. Ray Murray, Secretary of Agriculture	Polk	Mandamus action to compel approval of bonds
State of Iowa vs. Carl Percival	Polk	Action for injunction to restrain manufacture of tankage, etc.
Arthur Swenson vs. Executive Council	Polk	Certiorari
Roberts vs. City of Colfax	Jasper	Workmen's compensation. (On appeal in supreme court)
Theo. Hunt vs. Clyde L. Herring, et al.	Polk	Certiorari under soldiers' preference law
State of Iowa vs. Smith(Robert H. Smith)	Floyd	Injunction to restrain defendant from practicing optometry

SCHEDULE "F"—Continued

Case	County	Notation
State of Iowa vs. Kapfer (Theodore Alvine)	Adair	Injunction to restrain from practicing medicine
Sidney C. Smith vs. Clyde L. Herring, et al.	Polk	Certiorari under soldiers' preference law
State of Iowa vs. Lester Tilton	Clinton	Action to restrain from practicing medicine and surgery
State of Iowa vs. Floyd Barber	Jones	To revoke license of pharmacist
H. B. Wilson vs. Clyde L. Herring, et al.	Polk	Certiorari under soldiers' preference law
State of Iowa vs. W. J. Laughlin	Scott	Action for injunction to restrain defendant from practicing optometry without a license
State of Iowa vs. D. A. Seaman	Cherokee	To restrain defendant from practicing medicine and surgery without a license
Daniel E. Peterson vs. City of Panora, State of Iowa	Guthrie	Workmen's compensation
Ray Wilson (Wilson and Wilson) vs. Ray Murray, Secretary of Agriculture	Polk	Mandamus action to compel approval of bonds
W. K. Clark vs. City of Carroll, and State of Iowa	Carroll	Workmen's compensation
Disbarment of Vernon L. Sharp	Johnson	Disbarment of the respondent
Disbarment of C. J. Ruymann	Scott	Disbarment of the respondent
Lake Wapello Area—Davis County Condemnation for Fish and Game Commission	Davis	Appeal from condemnation award
Jones vs. Dunkelberg	Floyd	Appealed to supreme court. (Old age assistance commission)
DeVotie vs. Cameron	Polk	Pending. Iowa state fair board
Goode vs. I. T. Bode, Warden, Fish and Game Commission	Polk	Injunction granted
State vs. Groves	Emmet	Pending
City of Des Moines vs. A. R. Corey, Iowa State Fair Board (Walkathon matter)	Polk	Dismissed by plaintiff in municipal court
State of Iowa vs. Prudential Ins. Co., et al. (Brown's Lake)	Woodbury	Decree quieting title issued in state of Iowa in January, 1934

Holmes vs. Reese (Iowa Employment Service)	Woodbury	Pending
Backbone State Park—Condemnation proceedings	Delaware	Pending
Palisades Condemnation	Linn	Pending
Goose Lake Condemnation	Kossuth	Appeal from condemnation award pending in district court

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Clarkson vs. Board of Health (2)
Clarkson vs. Board of Health (2)
Cheshire vs. State Reformatory (3)
Hicks, Mary (Insane) (4)
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Curly vs. Executive Council (9)
Boughey, J. H., vs. Motor Vehicle (10)
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Mona Motor Oil Cases (14) (121) (121)
Baker Remedy Co. (15)
State vs. Geo. Logsdon (18)
State, ex rel., vs. Van Dyke Studios (19)
State, ex rel., vs. Slazier Cloak Co. (20)
State, ex rel., vs. Glen Smith Fuel Co. (21)
State vs. A. D. Harmon (22)
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State vs. Sam Cook (25)
State vs. William Brown (28)
State vs. H. H. Nichols (31)
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State vs. Johnson (33)
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Emmet County vs. Daley (45)
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Board of Education vs. Patrick Donohoe (46B)
Board of Education vs. Prybil (46E)
Board of Education vs. McChesney (46F)
Nelson Glider (46G-2)
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Iowa National Guard vs. Allan L. Gregory (75)
Iowa National Guard vs. James G. Haines (75)
Iowa National Guard vs. Guy H. Hobbs (75)
Iowa National Guard vs. C. E. Hull (75)
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SCHEDULE "G"—GASOLINE TAX CASES

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State of Iowa and Johnson vs. Atl. & Pac. Oil Co.	Polk	Gasoline tax case
State and Wegman vs. J. R. Casey Oil Co.	Black Hawk	Gasoline tax case
Grover C. Crossley vs. Leo J. Wegman	Polk	Gasoline tax case
State and Johnson vs. Consumers Oil Co.	Linn	Gasoline tax case
State and R. E. Johnson vs. L. L. Coryell & Sons	Polk	Gasoline tax case
State and Johnson vs. D. M. Ind. Oil Co.	Polk	Gasoline tax case
State and Leo J. Wegman vs. Farmers Supply Co.	Clinton	Gasoline tax case
State of Iowa and Wegman vs. T. R. Gurney Oil Co.	Woodbury	Gasoline tax case
State and Johnson vs. Farmers Community Oil Co.	Boone	Gasoline tax case
State of Iowa and Johnson vs. Iowa Southern Oil Co.	Wapello	Gasoline tax case
State of Iowa and Wegman vs. Independent Oil Co.	Union	Gasoline tax case
State of Iowa and Wegman vs. Johnson Oil Company	Emmet	Gasoline tax case
State of Iowa and Johnson vs. L. L. Lavalleur & Co.	Madison	Gasoline tax case
State of Iowa and Johnson vs. Levin Oil Co.	Woodbury	Gasoline tax case
Lavalleur, L. L., vs. R. E. Johnson	Polk	Gasoline tax case
State of Iowa and Johnson vs. S. L. Miller	Woodbury	Gasoline tax case
State and Johnson vs. McCurnin Oil Co.	Polk	Gasoline tax case
McCurnin Oil Co. vs. R. E. Johnson	Polk	Gasoline tax case
State and Johnson vs. Northwestern Oil Co.	Linn	Gasoline tax case
State and R. E. Johnson vs. Pennsylvania Oil Co.	Delaware	Gasoline tax case

State and Wegman vs. Primary Oil Co.	Louisa	Gasoline tax case
E. G. Roark vs. R. E. Johnson, et al.	Polk	Gasoline tax case
State and Johnson vs. E. G. Roarke Oil Co.	Polk	Gasoline tax case
State of Iowa vs. Superior Oil Co.	Polk	Gasoline tax case
Superior Oil Co. vs. R. E. Johnson, et al.	Polk	Gasoline tax case
State and Johnson vs. Spencer and Perry Oil Co.	Union	Gasoline tax case
A. W. Snook vs. R. E. Johnson, et al.	Polk	Gasoline tax case
Spencer and Perry Oil Co. vs. R. E. Johnson, et al.	Polk	Gasoline tax case
Simmer Oil Corp. vs. R. E. Johnson, et al.	Polk	Gasoline tax case
State of Iowa and Johnson vs. Allen W. Snook & Co.	Polk	Gasoline tax case
State of Iowa and Johnson vs. Tomes Service Co.	Pottawattamie	Gasoline tax case
State of Iowa and Johnson vs. Western Oil Co.	Clinton	Gasoline tax case
Waukee Oil Co. vs. R. E. Johnson	Dallas	Gasoline tax case
State of Iowa and Johnson vs. Waukee Oil Co.	Dallas	Gasoline tax case
State of Iowa and Johnson vs. Wapello Oil Co.	Wapello	Gasoline tax case
State and Johnson vs. Western Refining Co.	Scott	Gasoline tax case
State of Iowa and Johnson vs. Wittman Oil Co.	Humboldt	Gasoline tax case
State and Johnson vs. Yegge Oil Co.	Clinton	Gasoline tax case
State of Iowa and Wegman vs. Waverly Oil Co.	Bremer	Gasoline tax case
State of Iowa and Johnson vs. Ames Grain & Coal Co.	Story	Gasoline tax case
State of Iowa and Wegman vs. Bemis & Schlick.	Polk	Gasoline tax case
State of Iowa and Wegman vs. Beebee Oil Co.	Harrison	Gasoline tax case
State of Iowa and Wegman vs. City of Des Moines, et al.	Polk	Gasoline tax case
State of Iowa and Wegman vs. J. A. Carlson Const. Co.	Page	Gasoline tax case
State of Iowa and Wegman vs. Carlson Const. Co.	Marshall	Gasoline tax case
Chicago, Milwaukee, St. Paul & Pac. R. R. Co. vs. Leo J. Wegman	Polk	Gasoline tax case

SCHEDULE "G"—Continued

Case	County	Notation
State of Iowa and Wegman vs. Highway Const. Co.	Polk	Gasoline tax case
State of Iowa and Wegman vs. Elmer LaGrange	Buena Vista	Gasoline tax case
J. F. Lineberger vs. Ray Johnson	Polk	Gasoline tax case
State of Iowa and Wegman vs. Guy Longerbone.	Polk	Gasoline tax case
Frank O. Lowden, et al., vs. Leo J. Wegman...	Polk	Gasoline tax case
State of Iowa vs. Clyde E. Miller	Shelby	Gasoline tax case
State of Iowa and Wegman vs. E. V. Martin...	Polk	Gasoline tax case
State of Iowa and Wegman vs. The Minn. Gas & Oil Co.	O'Brien	Gasoline tax case
State of Iowa and Wegman vs. Nebraska-Iowa Oil Co.	Harrison	Gasoline tax case
State of Iowa and Wegman vs. Phillips Petroleum Co.	Polk	Gasoline tax case
State of Iowa and Wegman vs. E. L. Warnecke and Royal "400" Oil Co.	Hamilton	Gasoline tax case
State of Iowa and Wegman vs. Standard Oil Co.	Polk	Gasoline tax case
State of Iowa vs. Smith Bros., Inc.	Mills	Gasoline tax case
State of Iowa and Wegman vs. Story Co., Iowa, and others	Story	Gasoline tax case
State of Iowa and Wegman vs. J. W. Ault	Polk	Gasoline tax case
State of Iowa vs. Collins & Taylor	Mahaska	Decree in favor of state
State of Iowa and Wegman vs. Lawler Oil Company	Pottawattamie	Gasoline tax. Case dismissed
State vs. Zahller Bros. Oil Co.	Union	Gasoline tax. Tax paid
State vs. Mona Motor Oil Company	Pottawattamie	Gasoline tax case
Mona Motor vs. State	Pottawattamie	Tax paid
State and Johnson vs. Northern Iowa Oil Co...	Howard	Tax paid
Imperial Oil Co. vs. Johnson	Polk	Tax paid
State and Wegman vs. Pilicer Pet. Co.	Linn	Tax paid
State and Wegman vs. Personal Service Oil Co..	Plymouth	Tax paid
State and Wegman vs. Pioneer Oil Co.	Dallas	Tax paid

SCHEDULE "H"—INHERITANCE TAX CASES—DISTRICT COURT

Title	County	Decision	Notation
John Hancock Mutual Life Ins. Co. vs. Elvene Robins Jackson, et al.....	Palo Alto.....	Appearance entered for state	Inheritance tax. Foreclosure action
In the Matter of the Estate of Joseph W. Bettendorf	Scott.....	Appearance entered for state	Inheritance tax. Objection to appraisement
Anyke S. Cornell, et al. vs. Wegman.....	Polk.....	Statutory refund allowed	Inheritance tax
Mrs. Margaret Davis vs. Wegman.....	Polk.....	Statutory refund allowed	Inheritance tax. Refund
Mrs. P. F. Flanagan, Exec. of Estate of Martin J. Casey, vs. Wegman.....	Webster.....	Decree	Inheritance tax. Decreed subject to collateral inheritance tax
Charles A. Frazer, Exec. of Estate of Thompson D. Frazer, vs. Wegman.....	Polk.....	(Case dropped)	Inheritance tax refund. Refund issued
Estate of Albert Faust.....	Dubuque.....	Statutory refund allowed	Inheritance tax
Emma Gresslin, as Exec. of Estate of John L. Gresslin, vs. Wegman.....	Hardin.....	Decree against state..	Inheritance tax exemption
Catherine Hanthorn vs. David P. Cherniss, Admr. of Estate of Etta Cherniss, et al.....	Pottawattamie....	Appearance	Inheritance tax. Appearance entered for state
In the Matter of the Estate of Peter A. Hickey	O'Brien.....	Appearance	Inheritance tax. Action to set aside collateral inheritance appraisement
Estate of Joseph Hodgson.....	Muscatine.....	Compromised	Inheritance tax. Objection to appraisement
Bertha C. Horton, sole beneficiary of Estate of Sarah Lisle Horton, vs. Wegman	Polk.....	Decree against state. Affirmed	Inheritance tax refund

SCHEDULE "H"—Continued

Title	County	Decision	Notation
Robert Huisman vs. Gepkea Huisman, et al.	Osceola	Appearance	Quiet title. State made party for inheritance tax
Estate of Octavia V. Irwin vs. Wegman	Polk	Decree against state. Affirmed	Inheritance tax refund
In the Matter of the Estate of Iver Johnson, Deceased	Woodbury	Compromised	Inheritance tax. Objection to appraisement
In the Matter of the Estate of Andreas Kristensen	Grundy	Compromise	Inheritance tax
Jorgen C. Mathisen, Adm. of the Estate of Christian Callesen, vs. Wegman	Polk	Statutory refund allowed	Inheritance tax refund
In the Matter of the Estate of Clark McLain	Story	Statutory refund allowed	Inheritance tax refund
Metropolitan Life Ins. Co. of the City of New York vs. C. C. Rucker, et al.	Palo Alto	Appearance	Inheritance tax. Appearance entered for defendant
In the Matter of the Estate of William Musser	Johnson	Appearance	Inheritance tax
In the Matter of the Estate of A. Gordon Norrie. Ruth Morgan, et al., vs. Wegman	Polk	Statutory refund allowed	Inheritance tax refund
In the Matter of the Estate of Mary Russell. American Security & Trust Co. vs. Wegman	Polk	Statutory refund allowed	Inheritance tax refund
In the Matter of the Estate of George B. Simmons	Wapello	Decree against state.	Inheritance tax. Objection to appraisement. Items of advancement adjudged free from inheritance tax
State of Iowa vs. Jacob H. Kendig and Mrs. Nellie Hoopes	Muscatine	Stipulation. Case settled	Inheritance tax

State of Iowa and Wegman vs. Mary Elizabeth Wolber	Dallas	Judgment in favor of state	Inheritance tax
Minnie Stempfel vs. Wegman	Polk	Decree against state	Inheritance tax refund
In the Matter of the Estate of Richard C. Stewart, Deceased	Clinton	Decision against state.	Inheritance tax
C. A. Tilles vs. Wegman	Polk	Decree against state	Inheritance tax. Refund allowed
In the Matter of the Estate of Ralph Van Vechten	Polk	Decree against state. Affirmed	Inheritance tax refund
William J. Goodwin, Jr., vs. Central National Bank & Trust Co.	Polk	Appearance	Inheritance tax involved
John Hancock Mutual Life vs. Carl Amundson	Plymouth	Appearance	Inheritance tax involved. Appearance entered for defendants
In the Matter of the Estate of Arthur William Mann	Monona	Decree for state	Inheritance tax. Application to have estate declared exempt
Metropolitan Life Ins. Co. vs. Oscar Worlie	Kossuth	Appearance entered for state	Inheritance tax. Suit on note and mortgage. Appearance entered for state
In the Matter of the Estate of Townsend Nichols	Muscatine	Compromised	Inheritance tax. Objection to appraisement
In the Matter of the Estate of D. H. Rinehart	Appanoose	Appearance entered for state	Inheritance tax. Objection to appraisement
The United States Trust Co. vs. Wegman.	Polk		Inheritance tax. Check for refund issued

SCHEDULE "I"—BANK CASES SINCE JANUARY, 1933

RECEIVERSHIPS AND UNDER SENATE FILE NO. 111

Rath Exchange State Bank, Ackley, Iowa
Adel State Bank, Adel, Iowa
Albion Savings Bank, Albion, Iowa
Alexander Savings Bank, Alexander, Iowa
Kossuth County State Bank, Algona, Iowa
Farmers Savings Bank, Alleman, Iowa
(James E. Wilson vs. John Wartburg, et al.)
State Bank of Allison, Allison, Iowa
Anderson Savings Bank, Anderson, Iowa
Alton Savings Bank, Alton, Iowa
(Council of Hope College vs. Roelof Van Zyl, et al.)
Shaffer State Bank, Altoona, Iowa
State Bank of Arcadia, Arcadia, Iowa
Argyle Savings Bank, Argyle, Iowa
Farmers State Bank, Audubon, Iowa
Auburn Savings Bank, Auburn, Iowa
Bassett Savings Bank, Bassett, Iowa
Peoples State Savings Bank, Baxter, Iowa
Farmers Savings Bank, Beaconsfield, Iowa
Bettendorf Savings Bank, Bettendorf, Iowa
Farmers Savings Bank, Blairsburg, Iowa
(Metropolitan Life Ins. Co. vs. Robert Pelz, et al.)
Davis County Savings Bank, Bloomfield, Iowa
City Trust & Savings Bank, Boone, Iowa
Securities Savings Bank, Boone, Iowa
Farmers State Bank, Boone, Iowa
Braddyville State Bank, Braddyville, Iowa
Brayton Savings Bank, Brayton, Iowa
Bronson Savings Bank, Bronson, Iowa
Bussey Savings Bank, Bussey, Iowa
Farmers Savings Bank, Calamus, Iowa
State Bank of Cantril, Cantril, Iowa
American Savings Bank, Carroll, Iowa
(Dennis E. Hayes vs. St. Patrick's Church)
Farmers & Merchants State Bank, Cascade, Iowa
American Trust & Savings Bank, Cedar Rapids, Iowa
(Paulson Electrical Const. Co. vs. Larimer & Shafer, et al.)
Cedar Rapids Savings Bank, Cedar Rapids, Iowa
Iowa State Savings Bank, Cedar Rapids, Iowa
Merchants National Bank, Cedar Rapids, Iowa
South Side Savings Bank, Centerville, Iowa
Wooden State Savings Bank, Centerville, Iowa
Wapsie Valley State Bank, Central City, Iowa
Chapin Savings Bank, Chapin, Iowa
State Savings Bank, Chariton, Iowa
Clarence Savings Bank, Clarence, Iowa
Union Trust Company, Clarinda, Iowa (Trusteeship)
Cerro Gordo State Bank, Clear Lake, Iowa
(Herrick vs. J. M. Slosson, et al.)
Farmers Savings Bank, Colwell, Iowa
Conroy Savings Bank, Conroy, Iowa
Corley Farmers Savings Bank, Corley, Iowa
Conrad State Bank, Conrad, Iowa
Coulter Savings Bank, Coulter, Iowa

Council Bluffs Savings Bank, Council Bluffs, Iowa
(Lincoln Joint Stock Land Bank vs. Geise, et al.)
Farmers Savings Bank, Craig, Iowa
Farmers & Merchants Savings Bank, Creston, Iowa
Cromwell State Savings Bank, Cromwell, Iowa
(The Mutual Benefit Life Ins. Co. vs. Adelbert F. Bayles, et al.)
Union Savings Bank & Trust Co., Davenport, Iowa
(George J. Carpenter vs. A. O. Lothringer, et al.)
American Savings Bank & Trust Co., Davenport, Iowa
(L. A. Andrew vs. Alice Willett, et al.)
Dean Savings Bank, Dean, Iowa
Defiance Savings Bank, Defiance, Iowa
Winneshiek Co. State Bank, Decorah, Iowa
Dedham Savings Bank, Dedham, Iowa
State Savings Bank, Deloit, Iowa
Delta Savings Bank, Delta, Iowa
Farmers & Merchants State Bank, Delta, Iowa
Valley National Bank, Des Moines, Iowa
Iowa State Bank, Dexter, Iowa
Dinsdale Savings Bank, Dinsdale, Iowa
Downey Savings Bank, Downey, Iowa
Federal Bank & Trust Co., Dubuque, Iowa
Dunlap Savings Bank, Dunlap, Iowa
Durant Savings Bank, Durant, Iowa
Farmers & Merchants Savings Bank, Durant, Iowa
Farmers State Bank, Earlville, Iowa
State Bank of Edgewood, Edgewood, Iowa
Farmers State Bank, Elberon, Iowa
(Barbara Skrable vs. Edw. R. Upah, et al.)
Eldridge Trust & Savings Bank, Eldridge, Iowa
Ellston Savings Bank, Ellston, Iowa
State Bank of Ellsworth, Ellsworth, Iowa
(Bates, Rec., vs. Gilbert Knudson, et al.)
Ely Trust & Savings Bank, Ely, Iowa
Exchange State Bank, Exira, Iowa
Peoples Savings Bank, Exline, Iowa
Iowa Loan & Trust Co., Fairfield, Iowa
Farmers State Bank, Fairfield, Iowa
(L. A. Andrew vs. Farmers State Bank, J. M. Blough, et al.)
State Bank of Farley, Farley, Iowa
Fairbanks State Bank, Fairbanks, Iowa
Iowa State Savings Bank, Fairfield, Iowa
Festina Savings Bank, Festina, Iowa
Fairburn State Bank, Fonda, Iowa
First State Bank & Trust Co., Fort Dodge, Iowa
Farmers Savings Bank, Frankville, Iowa
Farmers State Savings Bank, Fremont, Iowa
Galva State Bank, Galva, Iowa
Farmers State Bank, Garnavillo, Iowa
Farmers Savings Bank, Gilbertville, Iowa
(Union Central Life Ins. Co. vs. Charles F. Bonorden, et al.)
Farmers & Merchants Savings Bank, Glenwood, Iowa
Gowrie Savings Bank, Gowrie, Iowa
Exchange Bank, Granville, Iowa
Farmers Savings Bank, Gray, Iowa
(Aetna Life Ins. Co. vs. Steere)
Grimes Savings Bank, Grimes, Iowa
Citizens State Bank, Griswold, Iowa
Grundy Co. Savings Bank, Grundy Center, Iowa
First Trust & Savings Bank, Grundy Center, Iowa
Farmers Bank, Halbur, Iowa
Farmers Savings Bank, Hamlin, Iowa

Franklin County State Bank, Hampton, Iowa
(The Federal Land Bank of Omaha vs. Edwin M. Moore, et al.)
State Bank of Harpers Ferry, Harpers Ferry, Iowa
Botna Valley State Bank, Hastings, Iowa
Farmers Savings Bank, Havelock, Iowa
Holstein Savings Bank, Holstein, Iowa
Citizens State Bank, Humeston, Iowa
Home State Bank, Humeston, Iowa
Citizens Savings & Trust Co., Iowa City, Iowa
Johnson County Savings Bank, Iowa City, Iowa
Iowa City Savings Bank, Iowa City, Iowa
Peoples Trust & Savings Bank, Iowa Falls, Iowa
Security Savings Bank, Iowa Falls, Iowa
Security Savings Bank, Ireton, Iowa
Savings Bank of Janesville, Janesville, Iowa
Jackson Junction Savings Bank, Jackson Junction, Iowa
Jerome Savings Bank, Jerome, Iowa
Farmers Savings Bank, Keswick, Iowa
Farmers Savings Bank, Ladora, Iowa
Ladora Savings Bank, Ladora, Iowa
Farmers State Bank, Lamont, Iowa
State Savings Bank, Lanesboro, Iowa
State Bank of Lansing, Lansing, Iowa
Peoples State Bank, Lansing, Iowa
Farmers Savings Bank, LaPorte City, Iowa
Savings Bank of Larchwood, Larchwood, Iowa
Farmers Savings Bank, Larchwood, Iowa
Peoples Savings Bank, Laurel, Iowa
Farmers Trust & Savings Bank, Laurens, Iowa
State Bank of Laurens, Laurens, Iowa
Leland Cooperative Bank, Leland, Iowa
LeMars Loan & Trust Co., LeMars, Iowa
American Trust & Savings Bank, LeMars, Iowa
Citizens Savings Bank, Lester, Iowa
Letts State Bank, Letts, Iowa
Citizens State Bank, Lewis, Iowa
Linby Savings Bank, Linby, Iowa
Farmers State Bank, Linden, Iowa
Citizens Savings Bank, Little Cedar, Iowa
Logan Trust & Savings Bank, Logan, Iowa
Farmers State Bank, Logan, Iowa
The Commercial Savings Bank, Lohrville, Iowa
Stockmen's Savings Bank, Long Grove, Iowa
(D. W. Bates vs. Ernest Arzberger, et al.)
Farmers & Merchants Savings Bank, Lovilia, Iowa
(Duinink vs. J. C. Keeton, et al.)
Lyons Savings Bank, Lyon, Iowa
Macedonia State Bank, Macedonia, Iowa
Farmers Savings Bank, Madrid, Iowa
(Prudential Ins. Co. vs. Sam Bryant, et al.)
Madrid State Bank, Madrid, Iowa
Farmers State Bank, Malcom, Iowa
Mallard Trust & Savings Bank, Mallard, Iowa
Delaware County State Bank, Manchester, Iowa
Maloy Savings Bank, Maloy, Iowa
Calhoun Co. State Bank, Manson, Iowa
American Savings Bank, Maquoketa, Iowa
Marion Savings Bank, Marion, Iowa
(McGrew Guardianship)
Commercial Savings Bank, Marion, Iowa
(Estate of James Oxley, Deceased)
Iowa Savings Bank, Marshalltown, Iowa

Peoples State Bank, Maxwell, Iowa
State Bank of Maxwell, Maxwell, Iowa
Helmer & Gortner State Bank, Mechanicsville, Iowa
Mediapolis State Bank, Mediapolis, Iowa
State Savings Bank, Missouri Valley, Iowa
Valley Savings Bank, Missouri Valley, Iowa
State Savings Bank, Monroe, Iowa
Monteith Savings Bank, Monteith, Iowa
Moorland Savings Bank, Moorland, Iowa
Moravia State Savings Bank, Moravia, Iowa
Farmers & Merchants Savings Bank, Moravia, Iowa
Farmers Savings Bank, Morrison, Iowa
Moulton State Savings Bank, Moulton, Iowa
Mt. Hamill State Savings Bank, Mt. Hamill, Iowa
State Trust & Savings Bank, Mt. Pleasant, Iowa
Murray State Bank, Murray, Iowa
(First Trust Joint Stock Land Bank of Chicago vs. Glen E. Smith, et al.)

First Trust & Savings Bank, Muscatine, Iowa
Mystic Industrial Savings Bank, Mystic, Iowa
Farmers Trust & Savings Bank, Nevada, Iowa
Farmers Savings Bank, New Albin, Iowa
New Hartford Savings Bank, New Hartford, Iowa
Providence State Bank, New Providence, Iowa
Citizens Savings Bank, New Virginia, Iowa
North Buena Vista State Bank, North Buena Vista, Iowa
Olds Savings Bank, Olds, Iowa
Peoples Trust & Savings Bank, Oskaloosa, Iowa
Mahaska County State Bank, Oskaloosa, Iowa
(Equitable Life Assur. Society of U. S. vs. F. A. Kelley, et al.)

Oxford Junction Savings Bank, Oxford Junction, Iowa
Farmers Savings Bank, Oxford, Iowa
Oxford State Bank, Oxford, Iowa
Palmer Savings Bank, Palmer, Iowa
(Metropolitan Life Ins. Co. vs. Michael Quinn, et al.)

First Trust & Savings Bank, Preston, Iowa
United Bank & Trust Company, Preston, Iowa
Quandahl Savings Bank, Quandahl, Iowa
First Savings Bank, Reinbeck, Iowa
Farmers Savings Bank, Rhodes, Iowa
First Savings Bank, Richland, Iowa
State Savings Bank, Rolfe, Iowa
Security Trust & Savings Bank, Ryan, Iowa
Sabula Savings Bank, Sabula, Iowa
Farmers Savings Bank, Salem, Iowa
Bank of J. C. Currier & Sons, Salix, Iowa
Shannon City Savings Bank, Shannon City, Iowa
Shell Rock Banking Co., Shell Rock, Iowa
Woodbury County Savings Bank, Sioux City, Iowa
Sloan State Bank, Sloan, Iowa
Ulch Bros. State Bank, Solon, Iowa
Farmers State Bank, Solon, Iowa
Sperry Savings Bank, Sperry, Iowa
First Savings Bank, Spring Hill, Iowa
Farmers Savings Bank, Stanhope, Iowa
Stanhope State Bank, Stanhope, Iowa
Farmers Trust & Savings Bank, Stout, Iowa
St. Charles Savings Bank, St. Charles, Iowa
Farmers Savings Bank, Stratford, Iowa
Thornburg Savings Bank, Thornburg, Iowa
Tiffin Savings Bank, Tiffin, Iowa
Union Savings Bank, Toeterville, Iowa

Toronto Savings Bank, Toronto, Iowa
Traer State Bank, Traer, Iowa
Underwood Savings Bank, Underwood, Iowa
(Lincoln Joint Stock Land Bank vs. Geise, et al.)
Farmers Savings Bank, Vincent, Iowa
(Metropolitan Life vs. Fallon, et al.)
Farmers Savings Bank, Wallingford, Iowa
Farmers Loan & Trust Co., Waterloo, Iowa
Waterloo Bank & Trust Co., Waterloo, Iowa
Webster Savings Bank, Webster, Iowa
Security Savings Bank, Wellman, Iowa
(N. W. Mutual Life Ins. Co. vs. Eardley Bell, Jr., et al.)
First State Bank of Wellsburg, Wellsburg, Iowa
State Savings Bank, Westgate, Iowa
Iowa State Bank, West Liberty, Iowa
Peoples State Bank, West Liberty, Iowa
West Point State Bank, West Point, Iowa
(L. A. Andrew vs. West Point State Bank)
Farmers Savings Bank, Wheatland, Iowa
Farmers Savings Bank, Williamsburg, Iowa
Williamsburg Savings Bank, Williamsburg, Iowa
Union Savings Bank, Wilton Junction, Iowa
Winfield State Bank, Winfield, Iowa
Madison County State Bank, Winterset, Iowa
(Aetna Life vs. Anna C. Hartsook, et al.)
Madison County Savings Bank, Winterset, Iowa
Woodburn Savings Bank, Woodburn, Iowa
D. W. Bates vs. United States of America, State of Iowa, et al.

SCHEDULE "J"—REPORT LEGAL DIVISION OF HIGHWAY COMMISSION

CONDEMNATION CASES

Old cases pending January 1, 1933	19
New cases begun during said period	236
Fifteen of the old cases and 182 of the new cases have been disposed of, leaving pending for disposition	58

It might be well to state that more than two-thirds of the new cases pending were commenced just shortly before the first of January, 1935, and it was impossible to get them tried or otherwise disposed of before that date.

RETAINED PERCENTAGE CASES

Old cases pending January 1, 1933	15
New ones commenced during period covered hereby	35
	50
Disposed of during period	40
Leaving still pending	10

FORECLOSURES

Being foreclosures of mortgages upon land a portion of which has been obtained for right of way.

Old cases pending January 1, 1933	4
New cases commenced during period	44
	48
Disposed of during period	24
Leaving still pending	24

It might be well to say that many more of these cases would probably have been disposed of were it not for the moratorium statutes and the slow procedure now being conducted relative to mortgage foreclosures.

MISCELLANEOUS CASES

Old cases pending January 1, 1933..... 4

Two of the above were certiorari cases and have been tried and disposed of. The other two were cases seeking to set aside settlements in condemnation; one of which has been tried, submitted, and the judge defeated for re-election without rendering an opinion, so we have these cases still pending.

Other miscellaneous cases commenced against the commission since January 1, 1933..... 14
We have disposed of..... 4

Leaving pending 10

A large majority of these suits are suits commenced asking for injunctive relief, and among the four disposed of was the Wisconsin Bridge & Iron Works vs. Highway Commission, involving the Euclid Avenue Bridge in Des Moines; the Mississippi Valley Iron Company vs. Highway Commission involving prior condemnation proceedings in Allamakee county; Williams vs. Highway Commission, a case involving to condemn the right of way within the corporate limits of Cedar Rapids, Iowa; Maxwell vs. Highway Commission, involving the question of the right of the Highway Commission to construct Highway No. 88 as a part of the Primary Road system.

All of the last above were decided and determined in favor of the Highway Commission.

Two cases, Hicks vs. Highway Commission and Reed vs. Highway Commission, Story county, involved the right to take land for making improvement of highways at corners where the improvements were in the corner of the land. The lower court ruled against the Commission and the same have been appealed.

McGavic vs. Highway Commission and Pierce vs. Highway Commission, Wapello county, question the authority of the Highway Commission to construct, and the city of Ottumwa to contribute to the bridge and viaduct contemplated for the city of Ottumwa.

SUMMARIZING

We have handled cases aggregating..... 373
Tried and disposed of..... 267

Leaving still pending..... 106

Fifty-eight of the pending cases are condemnation appeals, mostly taken during the last six months of the year 1934.

If we charged all of the cost, expense and expenditures of this Department to the cases disposed of it would be an average cost of $76.68 per case. If all of those handled were included, it would be an average cost of $54.89 per case.

EXAMINATION OF TITLE FOR LANDS, AND EASEMENTS

During the year 1933 there was acquired by purchase 2,318.13 acres; 6,200 cu. yds. for borrow; 17,000 cu. yds. gravel and 93 city lots; and by condemnation 87.13 acres and 9 city lots.

During the year 1934 there was acquired by purchase 2,568.10 acres; 7,403 cu. yds. for borrow; 56.90 acres of gravel and 17,000 cu. yds. gravel; 51 city lots; 23 parts of lots and 41 parts of lots with buildings. There was acquired by condemnation 451.16 acres and 24 lots.

Total expended for right of way during said period.....$1,213,996.74

If the entire cost and expense of this Department was charged to right of way and land it would amount to an increase of only 1½ per cent.

MISCELLANEOUS MATTERS HANDLED

This Department has made its headquarters at Ames and has been in constant touch with the legal matters of the Commission and has rendered unnumbered opinions, the value and importance of which it is impossible to estimate.

In March, 1933, this Department insisted upon an arrangement for funds to meet bond maturities and interest due May 1, 1933, and as a result of such insistence, and legal services rendered in connection therewith, there was no default in the payment of Primary Road maturities and interest May 1, 1933, when about $4,175,000.00 of Primary Road Bond money was tied up in closed banks. Warrants were stamped unpaid for want of funds in said amount, funds furnished and warrants fully paid before November, 1933.

Again this Department participated in the legal activities required, and helped to secure the enactment of chapter 48 of the Forty-fifth General Assembly authorizing a comprehensive plan for refinancing Primary Road bonds, and subsequently prepared proceedings and legal documents, etc., for refinancing fifteen million dollars of Primary Road bonds in 1934, at a saving to the state of approximately $174,000.00 per annum. These refunding bonds brought a premium of $240,000.00; showing that the action taken in 1933 had given to Iowa high credit standing. These bonds were issued by fifty different counties and sales were made and redemption secured without a hitch. Chapman and Cutler, bond attorneys of Chicago, accepted the work and opinions of this Department and approved them as to their legality.

This Department suggested the enactment of a statute giving the Highway Commission authority to advance Primary Road funds and do other acts necessary in order to secure grants from the Federal Government resulting in the state securing ten million dollars of grants for road projects and the expenditure of the money within the state in a lawful manner.

This Department assisted in a negotiation of the state's riparian rights along the Missouri river in Sioux City for right of way across the golf links and public park of the city in the improvement of Road No. 75, and conducted the legal proceedings connected therewith, securing deeds from the Executive Council, and city of Sioux City, et al., preparing records, etc., saving the state from the purchase of right of way in the city of Sioux City that would have cost approximately $15,000.00.

The matter of the construction and proceedings relative to the construction of the Ottumwa bridge and viaduct officially came to this office December 26, 1934, and is still pending at the close of the year.

EXPENSES

Salary, C. E. Walters	$ 7,100.00
Expense	1,754.53
Transportation	1,323.53
Stenographer	2,309.16
Library	916.47
Miscellaneous	370.00
Litigation; consisting of attorney fees, witness fees, etc.	7,069.09
Total cost of Department for two-year period	$ 20,475.58

It is only fair to state, that the cost of litigation, the last item above, will be materially increased during the first six months of 1935, because many of the appeals and causes were tried late in 1934 and the early part of 1935, and said causes had not been disposed of, or expenses paid in connection therewith prior to December 31, 1934.

During the above two-year period the Highway Commission expended approximately $6,000,000.00 for maintenance; approximately $21,000,000.00 for construction, and approximately $17,000,000.00 to meet bond maturities and interest. These expenditures or disbursements were made under

the direction or supervision of the Legal Department in so far as the legality thereof was concerned, and without public criticism or comment.

In closing I wish to again express to all those associated with me my appreciation of their full and hearty cooperation.

Yours truly,

C. E. WALTERS,
Special Assistant Attorney General and
Counsel to the Iowa State Highway Commission.

SCHEDULE "K"—REPORT OF BUREAU OF INVESTIGATION

PARK A. FINDLEY, Chief

The following report is a consolidated report of the coroners of the various counties of the state showing the number of accidental deaths, suicides, murders and justifiable homicides for the years 1933 and 1934 as per chapter 143 of the Forty-third General Assembly of the state of Iowa.

County	1933				1934			
	Accidents	Suicides	Murders	Justifiable homicides	Accidents	Suicides	Murders	Justifiable homicides
Adair								
Adams	1				1	2		
Allamakee	11	2			4	1		
Appanoose			1					
Audubon	1	3			4	1		
Benton	6	1			15	2	1	
Black Hawk	6	2	1	1				
Boone								
Bremer	12	1				2		
Buchanan								
Buena Vista	6	5			3	2		
Butler	2	2			1	1		
Calhoun	5	6			1	1		
Carroll		1				1		
Cass	3	8			5	2		
Cedar								
Cerro Gordo		2						
Cherokee	2	2				1		
Chickasaw								
Clarke	2	1			2			
Clay								
Clayton								
Clinton	12	8	1	1	20	5		
Crawford								
Dallas	5	5	1		4	1	1	1
Davis								
Decatur	1	2						
Delaware								
Des Moines	9	6	1		7	10	1	1
Dickinson								
Dubuque	18	5			27	13		
Emmet	1	1	1					
Fayette	1	1	1					
Floyd								
Franklin	7	4			2			
Fremont	2				2			1
Greene								
Grundy								
Guthrie	3	4			1	3		
Hamilton	1	2						
Hancock								
Hardin								

SCHEDULE "K"—Continued

County	1933				1934			
	Accidents	Suicides	Murders	Justifiable homicides	Accidents	Suicides	Murders	Justifiable homicides
Harrison								
Henry	5	2						
Howard								
Humboldt								
Ida								
Iowa	7	1			12	3		1
Jackson	2	2			3	3		
Jasper	1							
Jefferson	1	2						
Johnson	2							
Jones	12	4			4	2		
Keokuk								
Lee	9	3			9	3		
Kossuth								
Linn								
Louisa	6		1		2	3	1	
Lucas	2	4			1	2		
Lyon	2	2			5	3		
Madison	1	2				3		
Mahaska	4	4	2		3			
Marion								
Marshall								
Mills	1	1			2			
Mitchell	1	1			6			
Monona								
Monroe	1							
Montgomery	2		1		1	6	1	
Muscatine	4	1			13			
O'Brien	4	4			3	5		
Osceola								
Page	1	1						
Palo Alto	2				2			
Plymouth	7	3			4	1		
Pocahontas	1							
Polk	102	41	11	1	65	30	1	2
Pottawattamie	13	5	1		11	5		
Poweshiek	1	1			2			
Ringgold								
Sac		2						
Scott	48	28	2		38	18	1	1
Shelby	1	2			1	1	1	
Sioux								
Story	7	3	1		5	6	1	
Tama	10	10			8	8		1
Taylor	1	1				2		
Union	7	2			2			
Van Buren		1						
Wapello								
Warren	3	2			7	2		
Washington								
Wayne								
Webster								
Winnebago	2				3	2		
Winneshiek								
Woodbury	28	20	5	2				
Worth								
Wright					1			
Totals	417	228	30	5	312	156	9	8

LIST OF PERSONS COMMITTED TO FORT MADISON FOR MURDER DURING THE YEARS 1933-1934

Name	Degree	County	Date
Pat Griffin	First	Black Hawk	Jan. 17, 1933
Elmer Brewer	First	Black Hawk	Jan. 17, 1933
Norman A. Luce	Second	Scott	Jan. 23, 1933
Roy Kinney	First	Polk	Feb. 1, 1933
Ed J. Farrant	First	Polk	Feb. 13, 1933
William E. Kelly	First	Harrison	Aug. 26, 1933
Willard Cooper	First	Polk	Oct. 9, 1933
George Matheson	First	Pottawattamie	Oct. 11, 1933
Marvin T. Grattan	First	Winneshiek	Oct. 28, 1933
Bert G. Smith	Second	Scott	Oct. 28, 1933
Rolly Blackburn	Second	Woodbury	Nov. 15, 1933
Frank Harris	Second	Woodbury	Nov. 15, 1933
Louis Hamann	First	Crawford	Jan. 14, 1934
Edward Tallent	First	Wapello	May 4, 1934
Don Lee	Second	Woodbury	June 11, 1934
John M. Roth	Second	Harrison	Sept. 22, 1934
E. C. Watson	First	Polk	Sept. 27, 1934
Tony Thompson	First	Louisa	Sept. 29, 1934
Charley James	Second	Louisa	Oct. 6, 1934
Ben Angel	Second	Henry	Oct. 9, 1934
Reginald S. Tracy	First	Delaware	Oct. 24, 1934
Arch Breeding	First	Montgomery	Oct. 27, 1934
Paul Hake	First	Louisa	Nov. 16, 1934
Gale Johnson	First	Des Moines	Dec. 10, 1934

FOR MANSLAUGHTER

Name	County	Date
Elva L. Long	Polk	Jan. 14, 1933
William R. Crandall	Floyd	Jan. 17, 1933
Fred J. Bregenzer	Lee	Jan. 30, 1933
Charles Pickett	Dallas	Feb. 4, 1933
Joseph B. Wieland	Johnson	Feb. 22, 1933
Virgil Lent	Pottawattamie	May 21, 1933
William Morris	Woodbury	May 25, 1933
Fred Richardson	Ida	Oct. 3, 1933
Walter Bailey	Dubuque	Dec. 20, 1933
Bartley Jones	Woodbury	April 4, 1934
Everett Howe	Benton	May 15, 1934
Fred Gardner	Polk	June 12, 1934
Milton H. Cheney	Howard	Sept. 20, 1934
Mike Serdes	Linn	Dec. 5, 1934
Ernest Dibrell	Monroe	Dec. 12, 1934

AT ANAMOSA FOR MURDER

Name	Degree	County	Date
Harry Smith	First	Plymouth	Jan. 9, 1933
George Austin	First	Montgomery	Jan. 29, 1933
Joe Berven	First	Emmet	April 5, 1933
Joe Paterno	First	Polk	Oct. 5, 1934

AT ANAMOSA FOR MANSLAUGHTER

Name	County	Date
Glenn James	Woodbury	Jan. 28, 1933
H. E. Margerum	Union	April 21, 1933
John Murphy	Union	April 21, 1933
Burtis Sear	Clinton	May 3, 1933
Archie Farlow	Washington	Oct. 7, 1933
Clarence Varner	Linn	Nov. 22, 1933
Ray C. Garrison	Polk	Feb. 14, 1934
Forest Sterling	Dallas	Mar. 12, 1934
James Cooley	Woodbury	April 10, 1934

AT ROCKWELL CITY FOR MURDER

Name	Degree	County	Date
Christina Bland	Second	Woodbury	June 2, 1933
Pearl Johnston	First	Ringgold	July 16, 1934
Jessie Hopkins	First	Guthrie	July 21, 1934
Flossie Fear	First	Delaware	Oct. 25, 1934

AT ROCKWELL CITY FOR MANSLAUGHTER

Name	County	Date
Mary Alice Randol	Black Hawk	Oct. 24, 1934

CONVICTIONS FOR COMMITMENTS FOR FELONY

The following is a summary of the convictions and commitments for felons to the Penitentiary and Reformatories of this state as a result of the work of the sheriffs and peace officers of Iowa assisted by the Iowa Bureau of Investigation. This does not include a record of convictions involving jail sentences or fines:

ANAMOSA—1933

Adultery	1
Arson	1
Assault with intent to commit rape	7
Assault with intent to do great bodily injury	2
Assault to commit felony	2
Assault to commit manslaughter	1
Assault to maim	1
Assault to rob with aggravation	2
Assault with intent to rob	7
Attempt to break and enter	1
Attempted burglary	1
Attempted jail break	1
Bigamy	1
Bootlegging	1
Breaking and entering	54
Breaking and entering dwelling—night time	1
Breaking and entering a car	2
Burglary	10
Carrying concealed weapons	3

Conspiracy	7
Defrauding—insurance	1
Desertion	2
Embezzlement	1
Embezzling mortgaged property	1
Extortion	1
Escape	9
False pretenses	2
False drawing and uttering of checks	3
Forgery	12
Great bodily injury	1
Illegal possession of intoxicating liquor	1
Jail break	1
Larceny	67
Larceny at night time	6
Entering bank to rob	4
Larceny of domestic animals	10
Larceny of motor vehicle	31
Larceny of motor vehicle and breaking and entering	1
Larceny by trick	1
Larceny of property	19
Lascivious acts with child	3
Larceny from person	1
Malicious injury to railroad property	2
Manslaughter	6
Murder—first degree	3
Operating motor vehicle without owner's consent	14
Operating motor vehicle while intoxicated	3
Rape	5
Receiving stolen property	8
Return from escape	9
Returned from Fort Madison as insane	1
Robbery	24
Robbery with aggravation	11
Safe keeping	2
Seduction	2
Uttering forged instrument	7
Violation of parole	49
Total	430

FORT MADISON—1933

Adultery	1
Arson	5
Assisting prisoner to escape	1
Assault with intent to commit great bodily injury	15
Assault with intent to commit felony	2
Assault with intent to commit manslaughter	8
Assault with intent to maim	1
Assault with intent to commit murder	5
Assault with intent to commit rape	9
Assault with intent to commit robbery	3
Attempted arson	2
Attempted breaking and entering	3
Bank embezzlement	2
Breaking and entering	53
Breaking and entering a car	2
Breaking and entering a freight car	3
Breaking and entering jail	4
Breaking and entering—night time	1
Breaking and entering and possessing burglar's tools	1
Breaking jail	6

Burning building and inj. insurance	1
Burglary	8
Cheating by false pretenses	1
Child desertion	3
Child stealing and breaking and entering jail	1
Carrying concealed weapons	2
Concealing stolen property	1
Conspiracy	10
Conspiracy to commit public offense	2
Counterfeiting	2
Desertion	3
Embezzlement	1
Embezzlement of mortgaged property	1
Embezzlement P. O.	1
Entering bank with intent to rob	5
Entering dwelling—night time	2
Escape from Iowa state penitentiary	1
Escape jail	2
Escape penitentiary	1
Extortion	2
Failure to give aid to injured	1
Failure to report an accident	1
False pretenses	1
False statements	3
Forgery	17
Illegal transportation of intoxicating liquor	1
Illegal use of license plates	1
Incest	4
Improper display of license plates	1
Keeping house of ill fame	1
Kidnapping	1
Larceny	48
Larceny by bailee	1
Larceny D. A.	8
Larceny domestic fowls	15
Larceny day time	1
Larceny night time	1
Larceny night time from building	1
Larceny motor vehicle	20
Larceny motor vehicle and breaking and entering	1
Larceny motor vehicle and carrying concealed weapons	1
Larceny motor vehicle, robbery and attempt to commit murder	1
Larceny from person	2
Lascivious acts	9
Liquor nuisance	3
Malicious mischief	4
Manslaughter	9
Murder—first degree	9
Murder—second degree	4
Obtaining money by false pretense	3
OMVWI	3
OMVWOC	4
Possession of burglar tools	1
Possession of counterfeit papers	1
Possession of liquor	1
Rape	16
Receiving stolen property	10
Resorting to house of ill fame	1
Returned by order of Board of Control	1
Returned from escape	7
Returned by order of court	20
Returned from insane ward	1

Robbery	24
Robbery with aggravation	16
Robbery and larceny	1
Selling securities without being registered	1
Sodomy	2
Uttering false checks	2
Uttering forged instruments	9
Violation of parole	20
Total	491

ROCKWELL CITY—1933

Adultery	2
Assisting felons to escape	2
Assault with intent to commit great bodily injury	1
Assault with intent to commit robbery	1
Attempt to produce abortion	1
Breaking and entering	1
Bootlegging	1
Cheating by false pretense	1
Child stealing	1
Counterfeiting	2
Escape jail	1
Extortion	1
False pretenses	2
Forgery	3
Grand larceny	2
House of ill fame	1
Illegal possession of intoxicating liquor	6
Larceny	3
Larceny from building in night time	1
Larceny domestic fowls	1
Larceny in day time	1
Larceny in night time	1
Larceny from person	1
Larceny of property	1
Lewdness	3
Liquor nuisance and illegal possession	1
Maintaining liquor nuisance	3
Murder, second degree	1
Nuisance	2
Operating motor vehicle while intoxicated	1
Obtaining money by false pretenses	1
Perjury	1
Prostitution	10
Receiving and aiding in concealing stolen property	1
Returned from parole	1
Robbery with aggravation	1
Transmitting venereal disease	3
Vagrancy by habitual drunk	1
Violating intoxicating liquor laws	1
Total	69

Anamosa	430
Fort Madison	491
Rockwell City	69
Grand total	990

ANAMOSA—1934

Adultery	1
Assault to commit rape	2
Assault with intent to commit manslaughter	1
Assault with intent to commit murder	3
Assault with intent to maim	1
Assault with intent to rob	8
Attempt to break and enter	5
Bigamy	1
Breaking and entering	83
Breaking and entering a car	6
Burglary	3
Carrying concealed weapons	2
Conspiracy	6
Concealing stolen motor vehicle	1
Criminally insane	1
Desertion	2
Embezzlement	2
Entering bank with intent to rob	4
Entering dwelling, night time	2
Embezzlement by bailee	2
Escape	13
Escape from officer	1
Executing false papers and false entry	1
Extortion	1
False pretenses	4
False drawing and uttering of checks	2
Failure to report auto accident	1
Forgery	20
Great bodily injury	8
Illegal possession of license plates	1
Incest	1
Interfering with the administration of justice	1
Injuring and terrifying inhabitants	1
Jail break	7
Larceny	47
Larceny at night time	9
Larceny of domestic animals	1
Larceny of motor vehicle	29
Larceny in the day time	1
Larceny from building	1
Larceny of motor vehicle and breaking and entering	1
Larceny and breaking and entering	1
Larceny of property	7
Lascivious acts with child	1
Larceny from person	1
Leaving accident without aiding injured	1
Liquor nuisance	1
Malicious injury to railroad property	1
Manslaughter	3
Murder, first degree	1
Operating motor vehicle without owner's consent	14
Operating motor vehicle while intoxicated	1
Rape	5
Receiving stolen property	2
Return from escape	10
Robbery	18
Robbery with aggravation	19
Robbery with deadly weapon	1
Safekeeping	3
Seduction	1

Uttering forged instrument	4
Violation of parole	40
Total	422

FORT MADISON—1934

Adultery	3
Arson	1
Aiding in concealing stolen property	1
Assisting prisoner to escape	1
Assault with intent to do great bodily injury	10
Assault with intent to commit felony	4
Assault with intent to commit manslaughter	2
Assault with intent to commit murder	5
Assault with intent to commit rape	5
Assault with intent to commit robbery	4
Breaking and entering	54
Breaking and entering a car	2
Breaking and entering a freight car	6
Breaking and entering a jail	1
Breaking and entering and habitual	2
Breaking jail	5
Bootleg	2
Burglary	2
Burglary with aggravation	3
Cheating by false pretense	1
Child desertion	2
Carrying concealed weapons	9
Conspiracy	8
Conspiracy to commit public offense	1
Desertion	4
Diverting bank funds	1
Embezzlement	6
Embezzlement by bailee	1
Embezzling mortgaged property	1
Entering bank with intent to rob	2
Entering dwelling, night time	1
Escape from Iowa State Penitentiary	1
Escape jail	1
Escape penitentiary	5
Extortion	3
False entry	1
False pretenses	6
False statements	1
Forgery	17
Forgery and larceny	1
Grand larceny	12
Habitual criminal	1
Illegal possession of intoxicating liquor	2
Incest	4
Improper display of license plates	1
Interfering with administration of justice	1
Keeping a house of ill fame	1
Kidnap	1
Larceny	44
Larceny of domestic animals	1
Larceny of domestic fowls	14
Larceny in day time	1
Larceny in night time	6
Larceny and escape	1
Larceny of motor vehicle	13
Larceny and breaking and entering	1

Larceny from person	1
Lascivious acts with child	9
Liquor nuisance	4
Malicious intent to building	1
Manslaughter	6
Murder, first degree	8
Murder, second degree	4
Obtaining money by false pretense	2
Operating motor vehicle while intoxicated	6
Operating motor vehicle without owner's consent	6
Possession of counterfeit papers	1
Rape	14
Receiving stolen property	5
Received for safekeeping	7
Recommitted as sane	1
Resorting to house of ill fame	3
Returned from escape	13
Returned by order of court	33
Robbery	13
Robbery with aggravation	13
Selling securities not properly registered	1
Sodomy	2
Uttering false checks	3
Uttering forged instruments	4
Violation of parole	24
Total	474

WOMEN'S REFORMATORY, ROCKWELL CITY—1934

Adultery	2
Assault with intent to commit great bodily injury	1
Breaking and entering	1
Bigamy	1
Bootleg	2
Cheating by false pretense	1
Burglary	2
Carrying concealed weapons	1
Contributing to delinquency	1
Concealing stolen property	1
Escape—jail	1
Forgery	7
Indecent exposure	1
Illegal transportation of liquor	1
Larceny from building in night time	1
Larceny of domestic fowls	1
Larceny of embezzlement	2
Larceny of motor vehicle	2
Larceny of property	1
Lewdness	6
Maintaining liquor nuisance	3
Manslaughter	2
Murder, first degree	3
Nuisance	1
Operating motor vehicle while intoxicated	1
Prostitution	8
Receiving and aiding in concealing stolen property	3
Resorting to house of ill fame	3
Returned from parole	2
Soliciting	1
Soliciting for prostitution	1
Transferred from Mitchellville	2
Transmitting venereal disease	1

Vagrancy	1
Uttering and drawing false check	1
Uttering and drawing false instrument	2
Total	71
Total for year at Anamosa	422
Total for year at Fort Madison	474
Total for year at Rockwell City	71
Total prisoners received in 1934	967

SUMMARY OF STOLEN AUTOMOBILES

Summary of automobiles reported to this Department as stolen and recovered, showing estimated value and total estimated loss:

1933

	Total Number	Average Estimated Value	Average Total Estimated Value	Total Number Not Recov.
Number of cars stolen	1,357	$400.00	$542,800.00	
Number of cars recovered	1,251	$400.00	$500,400.00	
Number of cars stolen, not recovered				106

Estimated value of cars stolen and not recovered during 1933...$42,400.00

1934

	Total Number	Average Estimated Value	Average Total Estimated Value	Total Number Not Recov.
Number of cars stolen	1,222	$400.00	$488,800.00	
Number of cars recovered	1,097	$400.00	$438,800.00	
Number of cars stolen, not recovered				125

Estimated value of cars stolen and not recovered during 1934...$50,000.00

PAROLES

The following is a summary of paroles granted from the different penal institutions of the state for the years 1933 and 1934:

ANAMOSA		
Paroled—1933	283	
Paroled—1934	334	
		617
FORT MADISON		
Paroled—1933	142	
Paroled—1934	165	
		307
ROCKWELL CITY		
Paroled—1933	16	
Paroled—1934	19	
		35
Grand Total		959

ABSCONDERS FROM PAROLE

ANAMOSA—1933 AND 1934

No. 12637.....Fred Laskowski
No. 13132.....Kenneth Brewer
No. 12735.....Raymond Page
No. 12365.....Howard D. Wilcox
No. 13775.....Dale Palmer
No. 12622.....Stanley Nawrockie
No. 13191.....Bob Reese
No. 12567.....John Parrick
No. 13914.....Kenneth Peterson
No. 12178.....Leslie Pearson
No. 12297.....Walter Seabloom
No. 12796.....Henry Entner
No. 13451.....Allen Fox
No. 12953.....Paul Calhoun
No. 13321.....Floyd Hoover
No. 13836.....M. O'Shaughnessy
No. 13737.....George A. Munday
No. 13260.....Earl Kinney
No. 12964.....Wilbur Oaks
No. 12932.....Ben Satterlee
No. 13273.....Harold Farr
No. 13510.....Henry Palmer
No. 13946.....Howard Riche
No. 13157.....Ray Mays
No. 12658.....Ernest Mathies
No. 12559.....Robert Williams
No. 13821.....Carl Fry
No. 13931.....Tony Puscio
No. 14806.....Forest Ashburn
No. 14496.....Charles Davis
No. 14551.....Ossie Davis
No. 13602.....Albert Maker
No. 14788.....Lawrence Davis
No. 13167.....George Webb
No. 14363.....Leo Lanton
No. 13241.....Frank Speer
No. 14375.....Elmer Maas
No. 13257.....Claire Allard
No. 13326.....Clifford Sederberg
No. 14253.....Elmer Cook
No. 13439.....Floyd Webber
No. 13067.....George Beltz
No. 12627.....Charles Lauderback
No. 13852.....Vernon Wright
No. 12676.....Arthur Evans
No. 13296.....Harley Borders
No. 13911.....Harold Hipp
No. 14257.....Ben Kluever
No. 14506.....Wallace Richardson
No. 14826.....Wilfred Lang
No. 13848.....Charles Lewis
No. 13820.....James Morris

SOME OF THE

IMPORTANT OPINIONS

OF THE

ATTORNEY GENERAL

FOR

Biennial Period
1933-1934

OPINIONS OF THE ATTORNEY GENERAL

BOARD OF SUPERVISORS: May appoint assistant county attorneys to advise and counsel board of supervisors.

January 3, 1933. *County Attorney, Sioux City, Iowa:* In answer to your inquiry, or that of your board of supervisors, as to whether or not they have a legal right to enter into a contract with an attorney to handle all legal matters for them as counsel under separate contract for a period of years, it is the opinion of this office that the county attorney is, under Section 5180 of the 1931 Code, the legal adviser of the board of supervisors—subsection 7 specially requiring his services in the matter of advice and opinions at the request of the board. We are unaware of any provision authorizing the board of supervisors to employ counsel under contract for a period of years.

Section 5238 of the 1931 Code provides that the county attorney may appoint one or more deputies or assistants, respectively, for whose acts he is responsible. The number of such 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, by resolution, be made of record in the proceedings of such board. This apparently requires the approval of the board of supervisors of your appointments, if any, and the board may limit the number.

From the foregoing it is the opinion of this office that you may appoint assistant county attorneys to advise and counsel the board of supervisors of your county, the number and persons to be approved by resolution of your board of supervisors. Compensation shall be fixed by Section 5229 as per the class of population to which your county belongs.

January 4, 1933. *Auditor of State, Des Moines, Iowa:*

Does the State Board of Audit have the power to fix the mileage allowance to judges of the district court, where they use an automobile for their transportation in the discharge of their duties, at less than seven cents per mile and does it have power to fix such mileage allowance at five cents per mile?

The pertinent sections of the Code bearing on this proposition are as follows:

Section 10805. "Expenses. Where a judge of the district court is required, in the discharge of his official duties, to leave the county of his residence or leave the city or town of his residence to perform such duties, he shall be paid such actual and necessary hotel and living expenses not to exceed the sum of three dollars per day and transportation expenses as shall be incurred."

Section 1225-d1. "Charge for use of automobile. When a public officer or employee, except sheriffs or their deputies, is entitled to be paid his expenses in performing a public duty, no charge shall be made, allowed, or paid for the use of an automobile in excess of seven cents per mile of actual and necessary travel."

Section 394. "Duty in auditing claims. Said board of audit before approving a claim, shall determine:

1. That the creation of the claim is clearly authorized by law.
2. That the claim has been authorized by an officer or official body having legal authority to so authorize and that the fact of such authorization has been certified to said board of audit by such officer or official body.
3. That all legal requirements have been observed, including notice and opportunity for competition, if required by law.

4. That the claim is in proper form and duly verified.
5. That the charges are reasonable, proper, and correct, and no part of said claim has been paid."

From an examination of these statutes we conclude that:

First: A district judge in the discharge of his official duties outside of the city or town of his residence, is entitled to the actual and necessary transportation expenses as shall be incurred, subject however, to this limitation, that if he uses an automobile he shall not be allowed in excess of seven cents per mile for the miles actually traveled.

Second: The State Board of Audit has the power and the duty to pass upon the correctness and reasonableness of all such claims for actual and necessary traveling expense and to allow such claims in such amounts as they deem correct, proper, and reasonable.

It follows that the State Board of Audit is not required to allow seven cents per mile to district judges for use of an automobile for transportation in the discharge of their official duties but may allow such amount not exceeding seven cents per mile as it deems reasonable, proper, and correct to cover the actual and necessary expenses of transportation incurred by district judges in the discharge of their official duties and may allow only five cents per mile for such transportation if the Board of Audit finds from the conditions and circumstances that such amount is reasonable and proper and all that is necessary. In other words, it is the duty of the Board of Audit to pass upon and determine the reasonableness and correctness of claims for use of an automobile, and the only statutory limitation placed upon the exercise of that power is that it must not allow more than seven cents per mile.

January 5, 1933. *Auditor of State:* You have requested the opinion of this department on the following proposition:

"A pay roll claim for Sunday, January 1, 1933 and Monday, January 2, 1933, has been filed in the office of the Auditor of State by former Attorney General, John Fletcher, for the payment of salaries for these two days for the following assistant attorneys general and clerical force in the former attorney general's office, as follows:

Neill Garrett, Asst. Atty. Gen.—2 days, annual rate, $4,000.00	$ 21.50
Earl Wisdom, Asst. Atty. Gen.—2 days, annual rate, $4,000.00	21.50
Carl J. Stephens, Asst. Atty. Gen.—2 days, annual rate, $3,600.00	19.35
Oral S. Swift, Asst. Atty. Gen.—2 days, annual rate, $3,600.00	19.35
Hazel Webster Gross, Secretary—2 days, annual rate, $2,000.00	10.75
Mary Ward, filing clerk, 2 days, annual rate, $1,500.00	8.06
Lois Grimm, clerk, 2 days, annual rate, $1,500.00	8.06
Emma Carlson, clerk, 2 days, annual rate, $1,500.00	8.06
Loyat Bland, stenographer, 2 days, annual rate, $1,200.00	6.45
Ethel Pickard, stenographer, 2 days, annual rate, $1,200.00	6.45
Total	$129.53

"The Auditor of State would like an opinion from this department as to whether or not this claim should be allowed and warrants drawn therefor."

In the first place, your attention is called particularly to Article 5, Section 12 of the Constitution of the State of Iowa, and Section 511 of the 1931 Code of Iowa which are as follows, to-wit:

"Article 5, Section 12, of the Constitution of Iowa. The General Assembly shall provide, by law, for the election of an attorney general by the people, whose term of office shall be two years, and until his successor shall have been elected and qualified."

Section 511 of the 1931 Code of Iowa: "Term of office. The term of office of all officers chosen at a general election for a full term shall commence on the second secular day of January next thereafter, except when otherwise provided by the Constitution or by statute; that of an officer chosen to fill a vacancy shall commence as soon as he has qualified therefor."

The Constitution provides a different time for the commencement of the term of a governor or lieutenant governor, and of the judges of the Supreme Court and district courts. They, therefore, will not be affected by this opinion.

Section 153-c1 of the 1931 Code of Iowa, has the following provision for the fixing of the salary of the Attorney General which is as follows, to-wit:

"153-c1. Salary. The salary of the attorney general shall be $6,000.00 per annum and the salaries of the first assistant attorney general and other assistant attorneys general shall be such as may be fixed by law."

This statute was passed by the 43rd General Assembly and has been in full operation and effect since July 1, 1931.

Chapter 257 of the Acts of the 44th General Assembly, known as the Appropriation Acts, provides for the salaries for the attorney general and his assistant attorneys general and clerical force, as follows, to-wit:

Attorney General	$6,000.00
First Assistant	4,000.00
Second Assistant	4,000.00
Assistant	3,600.00
Assistant	3,600.00
Assistant	3,600.00
Secretary	2,000.00
File Clerks (not to exceed three)	4,500.00
Stenographers (not to exceed two)	2,400.00

The salaries provided for in this Act apply for each year of the biennium beginning July 1, 1931, and ending June 30, 1933.

Section 1218 of the 1931 Code of Iowa provides for the payment of the salaries of all officers authorized by the 1931 Code, as follows, to-wit:

"1218. Salaries paid monthly. The salaries of all officers authorized in this Code shall be paid in equal monthly installments at the end of each month, and shall be in full compensation for services, except as otherwise expressly provided."

It will be observed from the above and foregoing provisions of law that the term of office for the Attorney General shall be for two years, commencing with the secnd secular day of January next following his election and qualification, and that the term of office for the assistant attorneys general mentioned in the Appropriation Acts and for the clerical force provided for in said Appropriation Acts, shall not be for a longer period than the term of the Attorney General who has the power to make said appointments. All of the salaries of the assistant attorneys general and clerical force mentioned in the Appropriation Acts and for which this claim was filed for salaries for Sunday, January 1, and Monday, January 2, 1933, have all been authorized by law. It also should be observed that the Code of Iowa provides that all such salaries shall be paid in equal monthly installments at the end of each month and shall be in full compensation for all services except as otherwise expressly provided. There is no express provision in the Code or the Appropriation Acts for additional compensation for any special days within the term of office of said officers or appointees.

Your attention is called to a previous opinion of the Attorney General's office filed on February 6, 1922, wherein a similar question was raised by the Hon. Glenn C. Haynes who was Auditor of State at that time. In this opinion the Attorney General ruled that such officers holding over until January 3rd shall receive no additional compensation and the officer qualifying on January 3rd, shall receive the full salary provided by statute for that particular office. It should also be noted that this opinion was recalled by the Attorney General on December 16, 1932.

Your attention is further called to an opinion of the Attorney General's office filed on January 12, 1927, by Attorney General John Fletcher, and given to the Hon. J. W. Long, who was Auditor of State at that time, wherein Attorney General Fletcher concurred in the former opinion and held that state officials shall receive no additional compensation for January first, second, and third. This opinion was recalled by the Attorney General on December 16, 1932.

Your attention is further called to another opinion filed December 16, 1932, from the office of Attorney General Fletcher and given to the Hon. C. Fred Porter, acting Auditor of State, wherein the Attorney General ruled that employees and officers of the state government are entitled to compensation for January first and second, 1933, if their services are terminated with the commencement of the terms of newly elected officers on January 3, 1933. In this latest previous opinion furnished by the Attorney General's office, I cannot concur and it is therefore recalled. The laws of the State of Iowa with reference to the terms of office and the manner in which the salaries shall be paid have not been fundamentally changed. It is the law of Iowa and has been the law of Iowa for many years last past that the salaries of all officers shall be paid in equal monthly installments at the end of each month and shall be in full compensation for all services. An examination of the records in your office will disclose that all of the assistant attorneys general and clerical force of the Attorney General's office for the years 1931 and 1932 have been paid in full and that the last payment for same was made on December 31, 1932. To allow this claim for services for Sunday, January first and Monday, January second, 1933, would in law and in fact be paying said officers sums in addition to the salaries provided for by the laws of this state. These assistant attorneys general and members of the clerical force of the Attorney General's office did not hold over after their regular terms had expired. The term of Attorney General John Fletcher did not expire until January 3, 1933. On January 3, 1933, the new Attorney General qualified and assumed the duties of the office. If any services were performed by the assistant attorneys general and the clerical force of the Attorney General's office on Sunday, January first, and Monday, January second, 1933, said services were under and within the period of their regular term of office.

Therefore, it is the opinion of the Attorney General's office that the assistant attorneys general and members of the clerical force of the Attorney General's office are not entitled to compensation for January first, and January second, 1933.

COUNTY RECORDER: A charge should be made for all certified copies.

January 7, 1933. *County Attorney, Oskaloosa, Iowa:* You ask for an opinion as to the authority of the County Recorder to charge for certified copies of chattel mortgages which are filed in her office.

I wish to refer you to Paragraph 2 of Section 10031 of the Code of 1931. This section was mentioned in your letter of January 3rd. Under the provisions of Paragraph 2, your County Recorder is not only justified in charging, but according to law, should make a charge for all certified copies. It makes no difference whether the copy of the instrument is furnished for her or whether she prepared it herself.

COUNTY RECORDER: No charge for marginal release.

January 7, 1933. *County Attorney, Muscatine, Iowa:*

"Should the County Recorder charge a fee for a marginal release of a chattel mortgage which has been filed but not recorded?"

We are of the opinion that the County Recorder has no right to make such charge. Section 5177 of the Code of 1931, prior to the Forty-third General Assembly, did not contain any provision for a fee on marginal assignments or releases. The bill by which that section of the Code was amended by the Forty-third General Assembly, being House File No. 186, is as follows:

"An Act

Amending sections fifty-one hundred seventy-seven (5177) and ten thousand one hundred fifteen (10115) of the Code, 1927, relating to Marginal Assignments or Releases of mortgages, contracts or other instruments constituting encumbrances on real estate.

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

Section 1. That section fifty-one hundred seventy-seven (5177) of the Code, 1927, be amended by adding thereto the following:

'3. For every marginal assignment or release (except those made by the Clerk of the District Court) twenty-five (25) cents.'

Sec. 2. That section ten thousand one hundred fifteen (10115) of the Code, 1927, be amended by adding thereto the following: 'As soon as a marginal assignment or release has been witnessed by the County Recorder, the County Recorder shall forthwith index the same just as though such assignment or release had been by separate written instrument."

You will note that House File No. 186, an Act of the Forty-third General Assembly, provides in the title that it amends Code Sections 5177 and 10115 relating to Marginal Assignments or Releases of *Mortgages, Contracts or other instruments constituting encumbrances on real estate.* This Act does not pretend to amend any part of Chapter 437 of the Code of 1927.

We wish also to call your attention to Section 10031 of the Code of 1931 which fixes the fees to be collected by the County Recorder under Chapter 437. This section reads as follows:

"10031. *Fees.* The fees to be collected by the County Recorder under this chapter shall be as follows:

1. For filing any instrument affecting the title to or incumbrance of personal property, twenty-five cents each.
2. For recording or making certified copies of such instruments, fifty cents for the first four hundred words and ten cents for each one hundred additional words or fraction thereof."

It will also be noted that in House File No. 186, the Acts of the Forty-third General Assembly, no reference is made to Chapter 437 of the Code of 1927. The title expresses the purposes of the Act, that is, that it is an amendment to certain Code Sections relating to *marginal assignments or releases of certain instruments constituting encumbrances on real estate.*

This office is therefore of the opinion that the County Recorder is not permitted to make any charge for a marginal release of a chattel mortgage which

was only filed and not recorded. She would, however, be entitled to charge for the filing of a release contained in a separate instrument.

BOARD OF SUPERVISORS: Board of Supervisors may abolish office of County Engineer.

January 7, 1933. *County Attorney, Osceola, Iowa:* You asked for an opinion on Section 4644-C-19 of the Code of 1931, that is, whether the board of supervisors has authority to do away with the office of county engineer.

It is the opinion of this office that the board does not have such authority under the law. We wish to call your attention to Section 4644-C-19 wherein it provides as follows:

"The board of supervisors shall employ one or more registered civil engineers who shall be known as county engineers. The board shall fix their term of employment which shall not exceed three years, but the tenure of office may be terminated at any time by the board."

This section I have quoted makes it mandatory on the board to employ a registered civil engineer. They have no other choice in the matter.

The last one and one-half lines of said section apply only to the tenure of office of the particular person employed by the board. It does not provide for discontinuing the office. If the board terminates the contract with any particular engineer employed by them, they must employ another.

NEWSPAPER MEN ARE NOT EXEMPT FROM JURY SERVICE.

January 9, 1933. You ask whether or not newspaper men are exempted from jury service. We wish to call your attention to Code Section 10843 of the Code of 1931, which reads as follows:

"10343. Exemption. The following persons are exempt from liability to act as jurors:

1. Persons holding office under the laws of the United States or of this state.
2. Practicing attorneys, physicians, licensed embalmers, registered nurses, chiropractors, osteopaths, veterinarians, registered pharmacists, dentists, and clergymen.
3. Acting professors or teachers of any college, school, or other institution of learning.
4. Persons disabled by bodily infirmity.
5. Persons over sixty-five years of age.
6. Active members of any fire company.
7. Persons conscientiously opposed to acting as a juror because of religious faith."

In addition to the exemptions above mentioned, members of a voluntary fire department and members of the militia are exempted from jury service.

COUNTY OFFICER: County officer may reduce his own salary.

January 9, 1933. *County Attorney, Oskaloosa, Iowa:* We wish to acknowledge receipt of your letter of January 6th in which you ask for an opinion on the following proposition: Does the County Auditor have a legal right to pay the county officials of his county ten per cent less than the salary allowed by statute, provided he has received written instructions from said county officials to make such reductions?

There is no law in this state which prohibits county officials from voluntarily reducing their salaries, and if they do this, the County Auditor has a legal right to pay them the salary as reduced.

DUTIES BOARD OF SUPERVISORS: Relative to the deposit of public funds.

January 9, 1933. *County Attorney, Mount Pleasant, Iowa:* You ask for an opinion in regard to the duties of the board of supervisors under Chapter 352-D1 relative to the deposit of public funds.

If Mr. Wisdom stated, as noted in your letter, that the treasurer and his bondsmen might be personally liable for funds deposited in a bank which he knew was not paying its outstanding obligations, regardless of Section 7420-D8, we positively agree with him. There is no question but what a County Treasurer can be liable because of negligence regardless of the provisions of the section above referred to.

However, it is the duty of the supervisors to approve the depositories for the county funds, and the supervisors should use utmost care in designating these depositories. It is the opinion of this office that if local banks are not paying their outstanding obligations, they should not be named as depositories.

COUNTY AUDITOR: Proper to issue warrants against the poor fund after the fund was overdrawn.

January 9, 1933. *County Auditor, Cedar Rapids, Iowa:* Is it lawful for you as County Auditor to issue warrants on the poor fund after it is exhausted? We have gone into the question and find that it has been the consistent ruling of this department that it was proper to issue warrants against the poor fund after the fund was overdrawn and that in that emergency, the proper procedure is for the holder of the warrant to present it to the treasurer and have it stamped "not paid for want of funds." This is the procedure outlined by Sections 5258 and 5259 of the Code. I am enclosing a copy of an opinion written on the 30th day of June, 1932, covering this question. There are a number of opinions in this department to the same effect, and it seems to have been the settled practice during all the time these laws have been in effect and I see no reason for a change in opinion on the procedure at this time.

I am not unmindful of the fact that there appears to be some conflict between the sections above referred to and Section 380 of the Code and yet, Section 380 has nothing to do with the question of issuing warrants nor of having them stamped "not paid for want of funds," and it would seem to us that said Section 380 can be given, and should be given, under the circumstances, a construction that will make it possible to reconcile Sections 5258 and 5259. In any event there is nothing in Section 380 which repeals or modifies the law authorizing the auditor to issue warrants against the poor fund as provided in Section 5259.

AUDITOR OF STATE: Section 7268 of the 1931 Code of Iowa.

January 10, 1933. *Auditor of State, Des Moines, Iowa:* We are in receipt of your letter of January 6th relative to the situation in Clarke county and in which you ask for an opinion on the following:

"On September 25, 1907, the school fund loan was made on Lots 77, 78, 79, 80, 108, 109 and 110, in the town of Jamison, Clarke County, Iowa. Since that time, the property has changed hands several times and the taxes were not paid, and a Treasurer's Deed was issued to Mr. Pankhurst June 26, 1930, and the school fund loan of $100.00 was never satisfied. The interest was not paid for the last eight years. The question is whether the school fund loan is still a lien on this real estate."

It is the opinion of this office that this loan is still a valid and existing

lien on the real estate above described. Section 7268 of the Code of 1931 contains the following provision:

"In all cases where the real estate is mortgaged or otherwise encumbered to the school, agricultural college, or university fund, the interest of the person who holds the fee shall alone be sold for taxes, and in no case shall the lien or interest of the State be affected by any sale thereof. The foregoing provision shall include all lands exempt from taxation by law, and any legal or equitable estate therein held, possessed, or claimed for any public purpose, and no assessment or taxation of any such lands, nor the payment of any such tax by any person, or the sale and conveyance for taxes of any such lands, shall in any manner affect the right or title to the public therein, or confer upon the purchaser or person who pays such taxes any right or interest in such land."

We also call your attention to Section 4495 of the Code of 1931, which provides as follows:

"Lapse of time shall in no case be a bar to any action to recover any part of the school fund, nor shall it prevent the introduction of evidence in such an action, any provision in this code to the contrary notwithstanding."

In view of the provisions of the two sections above cited, this office is of the opinion that your mortgage is still a valid and existing lien on the real estate hereinbefore described and that the sale of the land for taxes does not in any way destroy or impair the validity of your mortgage.

January 10, 1933. *Auditor of State, Des Moines, Iowa:* You ask for an opinion from this office on the right to pay salary to the Hon. Hubert Utterback, who holds a certificate from the Secretary of State to show that he was elected Justice of the Supreme Court of this state, and also the right to pay salary and traveling expense to the Hon. J. P. Tinley, who holds a certificate of election from the Secretary of State to show that he was elected Judge of the 15th Judicial District of the State of Iowa.

The general rule is that one who holds a certificate of election to office, regular on its face, and who has duly qualified, is prima facie entitled to the office at the beginning of the term for which he holds the certificate of election, as against the incumbent holding over from the preceding term, even though a proceeding to contest the legality of his election is pending.

DeShazo vs. Davis, 157 Va., 517, 162 S. E., 320. 81 A. L. R., 614.

In connection with the case above cited, a lengthy and interesting annotation is given on page 620 and following of Vol. 81, A. L. R. I have read several of the cases cited in this annotation, all of which follow the rule above stated.

The general rule also prevails, as laid down by the great majority of our courts, that the payment of the salary to a de facto officer is a good defense to a later suit commenced by the de jure officer to recover said salary or compensation from the public body, after establishing his title to the said office.

Hittell vs. City of Chicago, 327 Ill., 443, 158 N. E., 683, 55 A. L. R., Page 994. Also see annotation in 55 A. L. R., Page 997, and following.

The Iowa courts have followed this general rule, but have not gone quite as far as the Hittell case. In Iowa, the rule seems to be that a *good faith* payment to the de facto officer is a valid defense. In other words, they recognize that a payment in bad faith would preclude the public body from relying on the defense of payment.

Brown vs. Tama County (1904), 122 Iowa, 745, 98 N. W., 562.
101 Am. St. Rep., 296.

The courts, however, seem to agree that mere knowledge of a contest is not bad faith, and that payment of the salary to the de facto officer regardless of notice of the contest is not such bad faith as would preclude the defense of payment in a later suit brought by the de jure officer who has been successful in the election contest. It has been held, however, in the case of Luth vs. Kansas City, 203 Mo. App., 110, 218 S. W., 901, that the city did not act in good faith in paying to a de facto officer back salary, which had accrued for several months, after regular payments had been stopped by an injunction pending a decision by the Supreme Court as to which of the two claimants were entitled to the office.

It has been stated, "that the public body is not interested in the outcome of the contest, which is merely the private and individual concern of the parties thereto, and that it is not so much interested in who should draw the salary as in having the duties of the office faithfully discharged; that disbursing officers are not clothed with judicial power to determine whether or not a person vested with the indicia of an office and performing the duties of such office is, in fact, a de jure officer, where there has been no judicial determination of such fact. To require the public authorities to withhold the pay of an incumbent or public officer until a judicial decision, or pay the same at the peril of having to pay the same a second time, would be a source of much embarrassment and greatly tend to impair the efficiency of the public service.

In addition to these rules as laid down by the courts, Section 12427 of the Code of 1931 provides as follows:

"When judgment has been rendered in favor of the claimant he may, at any time within one year thereafter, bring an action against the defendant, and recover damages he has sustained by reason of the act of the defendant."

Under this section, anyone who has been prevented from holding an office and who later under contest establishes his right to the office may sue the person who deprived him of his right to the office for damages. There is no question but that an element of damage would be the amount of compensation, salary, or other remuneration which he would have received, had he not been deprived of holding said office.

This office is of the opinion that you should be concerned with the following:

1. Does the person asking the salary have a certificate of election, proper on its face, entitling him to hold the office for which he seeks to draw the salary?
2. Is that person actually serving in said office?
3. Have you been enjoined from making such payment?

If the officer does hold a certificate of election, proper on its face, has qualified for the office, and is serving in such capacity, you have a right to pay his salary, unless you have been enjoined from so doing.

SHERIFF: A minor may be appointed deputy sheriff.

January 10, 1933. *County Attorney, Kanawha, Iowa:* We are in receipt of your letter of January 4th in which you ask us to advise you whether or not a minor is eligible to qualify for the office of deputy sheriff of this state.

We know of no law preventing a minor from acting as deputy sheriff. Whether or not it is good policy to appoint a minor is a matter for your sheriff to decide.

January 11, 1933. *County Attorney, Mason City, Iowa:* We are in receipt of your letter of January 5th with which you enclose a copy of a letter of December 6th forwarded to Attorney General Fletcher, and in which you ask for an opinion on the care required in storing dynamite when sold by hardware store.

There is no state law fixing any particular requirements in connection with the storing of dynamite or other explosives, with exception of the care to be exercised in connection with mines. However, Sections 5763 and 5764 of the Code of 1931 provide that cities and towns shall have power to provide for the inspection of all places used for the storage of explosives or inflammable substance or materials, and also to regulate the transportation and keeping of gun powder, etc.

Of course any store keeper or seller of dynamite or other high explosive must use due care, otherwise he would be liable because of negligence. You are no doubt in as good a position as we are to say what the due care shall consist of. The due care required of anyone depends on the business he is engaged in or the duty he is performing. Greater care of course is required in connection with the handling of dynamite or other explosives than would be required in handling other materials. Anyone handling dynamite or other explosives should take such precaution as will protect the general public.

NOTARY PUBLIC.

January 11, 1933. *Governor of the State of Iowa, Des Moines, Iowa:* We are in receipt of the letter of January 10th addressed to you by Mr. Brayley of Washta, Iowa, relative to a commission as notary public.

It is the opinion of this office that it is legal for an agent of the Sinclair Refining Company to take acknowledgments on gas tax refund applications when acting as a salesman for the company.

It will not be necessary for him to buy a new stamp for the reason that the stamp which he used in Cherokee, we assume is similar to the stamps used all over the State of Iowa, in that it does not have the name of the county on it.

BOARD OF SUPERVISORS: Farm Bureau dues must be paid in January.

January 11, 1933. *Attorney at Law, Leon, Iowa:* We are in receipt of your letter of January 7th in which you ask for the opinion of this office on the following proposition:

When does the Farm Bureau have to have its 200 paid-up members, in order to draw money from the County for any particular year?

Section 2926 of the Code of 1931 contains the following:

"Article 4. The yearly dues of the members of this corporation shall be not less than one dollar, payable at the time of applying for membership and on the first Monday in January of each year thereafter. No member having once paid his dues shall forfeit his membership until his subsequent dues are six months in arrears."

Under this section, the dues are payable at the time of applying for membership and on the first Monday in January of each year thereafter.

Section 2930 of the Code provides that in order to obtain the appropriation from the county, the organization must have at least 200 *bona fide members*, whose aggregate yearly membership dues and pledges to such organization, amount to not less than $1,000.00.

It is the opinion of this office that when the dues are required to be paid in January, the membership list does not contain a list of bona fide members,

if the dues are not collected until December. It would seem that the reason for collecting those dues in December would be for the sole purpose of obtaining this $2,000.00.

We also wish to call your attention to Section 2938 of the Code of 1931, which provides that the books, papers and records of the association shall at all times be open to the inspection of the Department and to the board of supervisors, or anyone appointed by the board, to make such inspection. We are of the opinion that this section should be construed with all of the other sections of this chapter, and that the board of supervisors has a right to satisfy itself whether or not the membership of the corporation is a bona fide membership before making the appropriation.

GASOLINE TAX—Refund, Section 5093-a8.

January 12, 1933. *Treasurer of State, Des Moines, Iowa:* We are replying to your request of January 11th for an opinion on Section 5093-a8 of the Code of 1931 relative to claims for refunds or reimbursements on account of license fees paid by him for gasoline not used upon public streets of the city or town in the state.

This office is of the opinion that these claims should not be allowed by you or paid by you until referred to and passed upon by the State Board of Audit. Section 393 of the Code of 1931 contains the following provision:

"All claims for money due from the state, to be paid from the state treasury, except the monthly or annual salaries of the various officers and employees whose salaries are fixed by law, shall be approved and certified by the State Board of Audit before warrants in payment of the same are drawn."

It was undoubtedly the intention of the legislature relative to Section 5098-a1 that these claims be referred to the State Board of Audit, for the reason that there is no provision in Section 5093-a8 for any rules or regulations or for any hearing in said claims. Under Section 395 of the Code of 1931, provision is made for rules and regulations to be adopted by the Board of Audit, in order to determine the absolute accuracy of every claim, and said section provides that the board may require such further information as will enable it to discharge its duty and fully protect the state. It further provides for the examination of claimants under oath.

Section 5093-a8 does not, nor does any other section contained in Chapter 251-A1, make any provision for such hearing or for the adoption of rules and regulations concerning said claims.

This office is therefore of the opinion that all of these claims should be referred to the State Board of Audit.

January 12, 1933. *City Solicitor, Keokuk, Iowa:* We are in receipt of your letter of January 10th with enclosed copy of the proposed ordinance relative to the sale and weighing of coal.

This office is of the opinion that such an ordinance could not be enforced against persons who have complied with Chapter 165 of the Code of 1931. You will note that Section 3274 of the Code provides as follows:

"Commodities weighed upon any scale bearing the inspection card, issued by the department, shall not be required to be reweighed by any ordinance of any city or town or city under special charter or under the commission form of government, nor shall their sale, at the weights so ascertained, and because thereof, be, by such ordinance, prohibited or restricted."

January 13, 1933. *Amana Society, Amana, Iowa:* Your letter of January 10th asks for an opinion from this office on the following matter:

"Would it be legal for the Amana Society to operate the physicians' and dentists' offices as a corporation business?"

In giving you this opinion, we would first quote to you Section 2439 of the Code of 1931, which provides as follows:

"No person shall engage in the practice of medicine and surgery, podiatry, 'osteopathy,' 'osteopathy and surgery,' chiropractic, nursing, dentistry, dental hygiene, optometry, pharmacy, cosmetology, barbering, or embalming as defined in the following chapters of this title, unless he shall have obtained from the state department of health a license for that purpose."

In the case of People vs. Painless Parker, Dentist, 275 Pac., 928, at pages 930 and 931, the Supreme Court of Colorado made the following statement:

"Law, medicine, and dentistry are generally considered as learned professions. Neither is an ordinary trade or calling which all citizens alike may pursue. The state in its sovereign capacity is vested with the indefinable police power, which includes the power to conserve and protect the public health. Only those who are qualified by statute and experience to practice dentistry may do so, if the Legislature sees fit so to ordain. That body may lawfully provide, as it has done in Colorado, that only those who by study of the science and art of dentistry show that they are properly qualified may practice dentistry. * * * * And if a natural person, a human being, or a private corporation, an artificial person, is unable to meet or fulfill the reasonable conditions by compliance with which only the state confers a right to engage in the practice of a profession, he or it may not be heard to complain. He is deprived of no constitutional or statutory right whether the inability to comply with the regulations of the Legislature is due, as in the case of a corporation, to natural or inherent difficulties or inability, or in the case of a natural person or a human being, to bring himself within the requirements because of his mental or moral unfitness."

In the State of New York, it was held that the denial of the application filed by a corporation organized to do a general law and collection business was proper. The court placed the denial upon the ground that the corporation was not one whose existence, organization, or incorporation it was authorized to approve and said that it was not necessary to determine just what portion of its business the statute prohibited.

In re Associated Lawyers Company. 134 App. Div., 350, 119 N. Y. Supp., 77.

It was also held in the same state that since the corporation is not an attorney at law, it could not practice law through lawyers employed by it.

In re Cooperative Law Company. 198 N. Y., 479, 92 N. E., 15.

You will note that Section 2439 of the Code makes no provision for firms or corporations obtaining licenses. It provides that no person shall engage in the practice of certain professions without first having obtained the license. The courts in holding that corporations were not entitled to practice these professions have generally supported their decisions on the theory that the public should be protected from unlicensed persons practicing such professions, and further that the granting of licenses to corporations would leave the field open to quacks and other persons who would not be interested in the advancement of the medical profession, or the protection of the public, but merely interested in their own financial gain.

In case any member of the corporation desires to carry on the profession of physician and surgeon or dentistry, such person should secure the proper

license therefor and should operate and carry on such profession as an individual, the same as any other professional man does under our law.

It is, therefore, the opinion of this office that the medical, surgical and dental professions could not be carried on in your society as a corporation business.

The County Board of Supervisors have authority to approve the number and to dictate the number that may be employed in recorder's office.

January 13, 1933. *County Attorney, Greenfield, Iowa:* We are in receipt of your letter of January 11th in which you ask for an opinion from this Office on the following proposition:

"Does the Board of Supervisors of Adair County have authority to discontinue the office of Deputy County Recorder?"

Section 5238 of the Code provides as follows:

"Each county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, coroner, 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 is clear that under the provisions of the section above quoted, the board has authority to order the County Recorder not to employ a deputy. Section 5238 must be construed to mean that the recorder may appoint one or more deputies, with the approval of the Board of Supervisors. This means that the Board of Supervisors have authority to approve the number and to dictate the number which may be employed.

COUNTY RECORDER: Should charge a fee for filing satisfaction or releases of mortgages and seed liens held by the Crop Production Loan office.

January 13, 1933. *County Attorney, Webster City, Iowa:* We are in receipt of your letter of January 11th along with the copy of a letter received by your County Recorder from the Crop Production Loan Office. We note that you desire an opinion on the following proposition:

"Should the County Recorder make a charge for filing the satisfaction or releases of mortgages and seed liens held by the Crop Production Loan Office, Minneapolis, Minnesota?"

A few days ago, this Office gave out the opinion that no charge should be made by the County Recorder for a marginal release of a chattel mortgage which had not been recorded but merely filed. However, if this is a written release forwarded to your County Recorder, he should charge the ordinary fee as provided by statute, regardless of who was the holder of the mortgage.

Municipal electric company or public utility does not have legal right to furnish electric energy to the U. S. Postal Department.

January 14, 1933. *County Attorney, Maquoketa, Iowa:* We are in receipt of your letter of January 12th asking for an opinion on the following proposition:

"May a municipal electric company or public utility company offer bids or furnish electric energy to the United States Postal Department at a lower rate than fixed by ordinance enacted under Section 6143 of the Code of 1931?"

It is the opinion of this office that the company does not have the legal

right to furnish electric energy at a lower rate than fixed by the city ordinance enacted under Section 6143. If you will read the case of Incorporated Town of Mapleton vs. Iowa Public Service Company, 209 Iowa, 400, 223 N. W., 476, you will find the authority for our opinion.

ELECTION: Special election to fill vacancies.

January 14, 1933. In regard to the manner and method of filling vacancies of state senators, I beg to advise that it is my opinion that Section 12 of Article 3 and Section 1158 of the Code are controlling. Section 12 of Article 3 is as follows:

"When vacancies occur in either house, the Governor or the person exercising the functions of Governor shall issue writs of election to fill such vacancies."

Section 1158 is as follows:

"*Special Election to Fill Vacancies.* A special election to fill a vacancy shall be held for a representative in Congress, or Senator or Representative in the General Assembly when the body in which such vacancy exists is in session or will convene prior to the next general election and the Governor shall order such special election at the earliest practicable time, giving 10 days' notice thereof."

It therefore seems clear that it is both the privilege and the duty of the Governor to order a special election to fill the vacancy.

TAX EXEMPTION: Civil War Veteran.

January 16, 1933. *County Attorney, Boone, Iowa:* We are in receipt of your letter of January 11th in which you ask for an opinion from this office on the following proposition:

"A widow of a veteran of the civil war, who was entitled to the tax exemption of her husband, died on the 1st day of July, 1932. The treasurer and auditor now seek to collect from the heirs, the taxes which would have been assessed on said property for the year of 1932, had it not been for the exemption to which the widow was entitled. The question is whether or not the taxing body has a right to collect the taxes for the year of 1932 from the heirs or from the property which they inherit."

Section 6943 of the Code is in part as follows:

"The following exemptions from taxation shall be allowed:

1. The property, not to exceed $3,000.00 in actual value, and poll tax of any honorably discharged union soldier, sailor, or marine of the Mexican War or the War of the Rebellion."

The widow of this veteran was alive on January 1, 1932, and her property was assessed as of that date. On that date, she was exempted from the payment of the tax on the $3,000.00 in actual value of her property. The heirs were not the owners of the property on January 1, 1932. The taxing body cannot now levy a tax against those heirs against the property which they did not own on that date.

COUNTY AUDITOR: Funds received from redemption from tax sale is *not* a public fund.

January 16, 1933. *County Attorney, Oskaloosa, Iowa:* We are in receipt of your letter of January 12th in which you ask for the opinion of this office on the following subject:

"(1) Is money which was paid to the County Auditor in redemption of land from a tax sale to be construed as public funds?

"(2) Is the County Auditor personally liable in case this deposit is not construed as a public fund under Section 352-D1 of the Code of 1931?"

Answering your first proposition, this office is of the opinion that the fund is not and cannot be held to be a public fund. The statute provides that redemption may be made at any time before the right of redemption is cut off, *by the payment to the auditor*, to be *held by him subject to the order of the purchaser* of the amount for which the same was sold, etc. This money is merely paid to the auditor for the benefit of the purchaser and cannot be considered as a public fund.

In view of the opinion that we have given you relative to your first proposition, we do not feel that we should give an opinion on the second, except to say that if an action is commenced against your County Auditor in his individual capacity, he could not be held personally liable, unless he was negligent in the handling of these funds.

Board of Supervisors may raise or lower the salary of the County Superintendent of Schools.

January 16, 1933. *County Attorney, Orange City, Iowa:* This office is in receipt of your letter of January 12th in which you ask for an opinion on the following subject:

"Has the Board of Supervisors power and authority on its own motion to reduce the salary of the County Superintendent from $2,400.00 to $1,800.00?"

Section 5232 of the Code of 1931 provides as follows:

"Each county superintendent of schools shall receive an annual salary of not less than eighteen hundred dollars, and such additional compensation as may be allowed by the board of supervisors in each particular county, but in no case to exceed three thousand dollars."

Under this section, the Board of Supervisors can raise or lower the salary for that office at any time, provided they do not go below the minimum or above the maximum. We wish to call your attention to the case of Morris vs. Hosmer, et al., 182 Iowa, 883, 166 N. W., 295. Although this case was decided under a prior statute, yet the statute was similar and in the opinion the court does not question the authority of the board to raise or lower the salary so long as it stays within the statutory limit.

COUNTY TREASURER: Section 7412 of 1931 Code.

January 16, 1933. *County Attorney, Red Oak, Iowa:* We are in receipt of your letter of January 13th in which you ask for the opinion of this office on the following proposition:

"Is it legal for the County Treasurer to keep the county funds in a safe or vault, or is he compelled to deposit them in banks approved by the Board of Supervisors?"

Section 7412 of the Code of 1931 provides as follows:

"The state treasurer and each county treasurer shall at all times keep all funds coming into their possession as public money, in a vault or safe, to be provided for that purpose, or in some bank legally designated as a depository for such funds."

Under this section above quoted, the treasurer shall keep all funds either in a vault or in the legally designated depository.

Section 7420-d1 provides in part as follows:

"Shall deposit all funds in their hands in such banks as are first approved by the Executive Council, Board of Supervisors, etc."

If all of these funds belonging to the county were kept in a vault which was not properly equipped with devices for protection, there might be a question

of negligence arise, in case the funds were lost. We can see no reason why the Board of Supervisors or the County Treasurer would want to take such chance when they are protected by Chapter 352-D1 of the Code of 1931.

Special election to fill a vacancy.

January 16, 1933. I submit the following opinion of this Department with regard to the manner and form of filling the vacancy in the 4th Senatorial District created by the untimely death of the late Senator Judd.

When vacancies occur in either house, the Governor or the person exercising the functions of Governor, shall issue writs of election to fill such vacancies.

Article III, Section 12, Constitution of Iowa.

A special election to fill a vacancy shall be held for a representative in Congress, or senator, or representative in the General Assembly, when the body in which such vacancy exists is in session * * * * * and the Governor, at the earliest practicable time, shall order such special election giving 10 days' notice thereof.

Section 1158 of the 1931 Code of Iowa.

As soon as the Governor issues his proclamation for this special election, the sheriff in Lucas county and the sheriff in Wayne county shall give at least 10 days' notice thereof by causing a copy of such proclamation to be published in some newspaper printed in the county; or, if there be no such paper, by posting such copy in at least five of the most public places in the county.

Sections 508 and 509 of the 1931 Code of Iowa.

The next step would be for the calling of a district convention for the purpose of making nominations to be voted upon at this special election. The District Central Committee, through its chairman, shall, as soon as practicable after the necessity for such convention is known, issue a call for such senatorial * * * * * convention, and immediately file a copy thereof with each county auditor in the district. Said call shall state the number of delegates to which each county will be entitled, the time and place of holding the convention and the purpose thereof.

Section 629 of the 1931 Code of Iowa.

The county auditor, in case the district delegates for his county have not been selected, shall deliver a copy of said call to the chairman of the convention which selects said delegates.

Section 630 of the 1931 Code of Iowa.

The organization of the district convention and the procedure therein shall be substantially the same as in the state convention.

Section 631, 1931 Code of Iowa.

A nomination to be voted upon at a special election and occasioned by a vacancy in the office of * * * * *, senator in the General Assembly for a district composed of more than one county, shall be made by a convention duly called by the District Central Committee.

Section 610 of the 1931 Code of Iowa.

When a nomination is directed to be made by a district convention composed of more than one county, and the county convention, in any county of the district, has adjourned without selecting delegates to such convention, the county convention shall be re-convened for the purpose of making such election.

Section 612, Code of Iowa, 1931.

In case the county conventions, which were held last summer, adjourned

without selecting delegates to the senatorial district conventions, each one of said conventions will now have to be re-convened for the purpose of selecting such delegates. In case the delegates had already been selected it would not be necessary to re-convene said conventions. In the latter case the call should be directed to the delegates selected by the respective county conventions to assemble at the place and time directed by the senatorial district central committee for the purpose of making the nomination to fill this vacancy.

Section 612, Code of Iowa, 1931.

It would not be possible or legal to hold a mass convention of the district for the purpose of selecting delegates. The nominations must be made by delegates to the district convention selected by each county convention.

As I understand the situation, your county has already elected a member of the party central committee for the 4th senatorial district. This was in accordance with paragraph 5 of Section 624 of the Code of 1931. I have been informed that the other county in this district did not elect a senatorial district committeeman. This vacancy in the district senatorial committee should not prevent the operation of the law with respect to calling of this district convention. It is our opinion that the member of this district central committee selected by your county may act as chairman for the purpose of issuing the call for the district convention.

Former county officers are not entitled to additional pay for services performed on January 1 and 2, 1933.

January 17, 1933. *County Attorney, Tipton, Iowa:* We are in receipt of your letter of January 12th in which you ask for an opinion from this office on the following proposition:

"The newly elected county officials in this county qualified and started in the performance of their duties at noon of the second secular day of January, 1933, the former officials continuing to discharge the duties of the office until that time. Are the former county officials entitled to pay for January 1 and 2, 1933?"

On January 5, 1933, this office rendered an opinion relative to the salaries of state officers, in which opinion it was ruled that the outgoing state officers should not draw pay for the first and second days of January.

We feel that this rule applies equally to the county officers.

Section 1218 of the Code provides for the payment of the salaries of all officers authorized by the Code of 1931 as follows:

"The salaries of all officers authorized in this code shall be paid in equal monthly installments at the end of each month, and shall be in full compensation for all services, except as otherwise expressly provided."

Section 511 of the 1931 Code of Iowa provides as follows:

"The term of office of all officers chosen at a general election for a full term shall commence on the second secular day of January next thereafter, except when otherwise provided by the constitution or by statute; that of an officer chosen to fill a vacancy shall commence as soon as he has qualified therefor."

Section 520 of the 1931 Code of Iowa provides as follows, to-wit:

"There shall be elected in each county, at each general election, an auditor, a treasurer, a clerk of the district court, a sheriff, a recorder of deeds, a county attorney, and a coroner, who shall hold office for the term of two years."

Section 521 of the 1931 Code of Iowa provides as follows, to-wit:

"There shall be elected, biennially, in counties and townships, members of the board of supervisors and township trustees, respectively, for a term of

three years to succeed those whose terms of office will expire on the second secular day of January following said election; there shall also be elected a member or members for a term of three years to succeed those whose terms will expire on the second secular day in January one year later than the aforesaid date. It shall be specified on the ballot when each shall begin his term of office."

Section 1145 of the 1931 Code of Iowa provides as follows, to-wit:

"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."

The above quoted sections of our law are controlling with reference to the tenure of office and payment of salaries of all county officials. It will be observed that the term of office for said officials begins on the second secular day of January next following their election and continues for a period of two years thereafter. Therefore, the term of office of the former officials of your county did not expire until the second secular day of January, 1933. These officials were required to serve under their term of office for January 1st and 2nd, 1933, and cannot be considered to be holding over after their term had expired. Their full term of office was from the second secular day of January, 1931, until the second secular day of January, 1933. The fact that January 1, 1933, was Sunday and that January 2, 1933, was observed as a holiday cannot make any legal difference. These officials were paid, or should have been paid, their annual salary in equal monthly installments at the end of each month during their term of office. Their last monthly installment warrant, which they received on December 31, 1932, paid them in full for their services.

Therefore, it is the opinion of this Department that these former officers would not be entitled to any additional pay for any services that they might have performed on January 1st and 2nd, 1933.

Husband and wife who have actually served and were honorably discharged are entitled to the benefits granted under Par. 3 of Section 6946.

January 18, 1933. *County Attorney, Vinton, Iowa:* We are in receipt of your letter of January 5th asking for an opinion from this office on the following proposition:

"Is Mabel E. Smith, who served in the U. S. Naval Reserve, Bureau of Navigation, Yeoman (F) Third Class, and was in actual duty at the Great Lakes, entitled to the benefits under Paragraph 3 of Section 6946 of the Code of 1931?"

Upon investigation, this office learns that persons who served in the capacity in which Mabel E. Smith served were actually enlisted. That when they were discharged, they received the $60.00 bonus. That they also received the adjusted compensation under the federal laws and are entitled to the benefits of the disability compensation.

We are reliably informed that such persons were actually in the Navy, although they were enrolled for land duty and did clerical work in the offices.

We are therefore of the opinion that she is entitled to the benefits granted under Paragraph 3 of Section 6946.

Your second proposition is:

"Is the husband of Mabel E. Smith, who also served in the War with Germany, and who was honorably discharged, entitled to the benefits under this Section. In other words can the husband and wife each take advantage of this provision?"

It is the opinion of this office that, if the husband and wife both actually served and were honorably discharged, each of them is entitled to the benefits under the law.

Membership and appropriation for Farm Aid Associations.

January 18, 1933. *County Attorney, Bedford, Iowa:* A few days ago you were in this office requesting an opinion on the following proposition:

"Is it mandatory on the Board of Supervisors to make the appropriation provided for in Section 2930 of the Code of 1931, when the Secretary and Treasurer of a Farm Aid Association, organized under Chapter 138 of the Code of 1931, have certified to the Board of Supervisors that the organization has at least 200 bona fide members, whose aggregate yearly membership dues and pledges to such organization amount to not less than $1,000.00?"

Section 2930 of the Code of 1931 provides in part as follows:

"When Articles of Incorporation have been filed as provided by this Chapter and the Secretary and Treasurer of the corporation have certified to the Board of Supervisors of such county that the organization has at least 200 bona fide members, whose aggregate yearly membership dues and pledges to such organization amount to not less than $1,000.00, the Board of Supervisors shall appropriate to such organization from the general fund of the county a sum double the amount of the aggregate of such dues and pledges. * * *"

Article 4 of the Articles of Incorporation, contained in Section 2926 of the Code, provides as follows:

"Article 4. The yearly dues of the members of this corporation shall be not less than One Dollar, payable at the time of applying for membership and on the first Monday in January of each year thereafter. No member having once paid his dues shall forfeit his membership until his subsequent dues are six months in arrears."

Section 2938 of the Code of 1931 provides for the filing of detailed reports with the County Auditor, and further provides that the books, papers, and records of the association shall at all times be open to the inspection of the Department of Agriculture and to the Board of Supervisors, or anyone appointed by the board to make such inspection.

Article 4 of the Articles of Incorporation provides that the dues shall be payable at the time of applying for membership and on the first Monday in January of each year thereafter. Section 2930 provides that the board shall make the appropriation when it is certified that the organization has at least 200 bona fide members, *whose aggregate yearly membership dues and pledges to the organization amount to not less than $1,000.00.*

This office is of the opinion that all of the sections of Chapter 138 of the Code of 1931 must be construed together. It was not the intention of the legislature to require the Board of Supervisors to make such an appropriation merely upon the certification by the secretary and treasurer of an organization that said organization has 200 bona fide members. The term "bona fide," as used in said section, means that the membership of the organization must be actual members in good standing. This term is used for the protection of the county and the taxpayers, and in order that there may be no misunderstanding as to the membership list.

Again, in said Section 2938, the Board of Supervisors is given authority by itself, or by a committee duly appointed, to inspect the books, papers, and records of such an association. Construing this section with Section 2930 and with Article 4, as contained in Section 2926 of the Code, this office is of

the opinion that the Board of Supervisors is authorized to inspect the said books and records and to ascertain whether or not the list of members, as certified by the secretary and treasurer, is a list of bona fide members in good standing.

Cities and towns may pass ordinances providing for the license of dogs.

January 20, 1933. We are in receipt of your telegram of January 20th in which you ask for an opinion on the following:

"Can an incorporated town legally establish dog tax additional to the county dog tax?"

To this question, we would refer you to Section 5446, which provides that cities and towns may license dogs in addition to the license by the county.

In addition to the above reference, we refer you to Section 5745, sub-paragraph 4 of the Code of 1931, which provides as follows:

"The running at large of dogs within their limits, and to require them to be kept upon the premises of the owners thereof unless licensed to run at large, and to provide for the destruction thereof when found at large contrary to and in violation of the provisions of any ordinance passed pursuant to the power herein granted."

It is therefore the opinion of this office that cities and towns may pass ordinances providing for the license of dogs.

Building and loan or savings and loan association have the power to borrow money for the conduct of their business.

January 20, 1933. *Auditor of State, Des Moines, Iowa:* This office acknowledges receipt of your oral request for an opinion on the following question:

"Do building, loan and savings associations, organized under the laws of this state, have authority to borrow money and pledge for security therefor, their assets, whether they be real estate, mortgages, or other personal property?"

Along with this request you handed us two opinions which had been directed to your office under dates of October 8, 1931, and May 11, 1932. After going over the matter carefully, we have concluded that the opinion of May 11, 1932, is good authority for the question presented by you, and we see no reason for changing that ruling.

In other words, this office is of the opinion that building and loan or savings and loan associations, organized under the laws of this state, in the absence of any restriction either in the articles or by-laws, have the power to borrow money for the conduct of their business, and to pledge or encumber their assets as security for the same, whether said assets be real estate, mortgages or other personal property.

LIABILITY OF COUNTY: Section 5542 of Code 1931.

January 20, 1933. *County Attorney, Carroll, Iowa:* We are in receipt of your letter of January 17th in which you ask for an opinion on the following:

"(1) Is the County liable for rabies due to the bite of a dog?
"(2) How far does this circle of injuries and damages follow?"

We will answer your propositions in the order above stated.

(1) Section 5452 of the Code of 1931 provides:

"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."

Section 5453 provides in substance:

"Claims aforesaid shall state the amount of damages, a detailed statement of the facts attending the killing or injury and be verified by affidavit of at least two distinterested persons not related to claimant."

This office is of the opinion that those two sections of the Code answer your questions completely. The county is not liable for the damage, but the claim may be filed and should be allowed out of the domestic animal fund for either an injury or the killing of an animal. The claim, though, should be in the proper form, as provided by law.

(2) We are of the opinion, in answer to your second question, that the rights under Chapter 277 of the Code of 1931 do not extend to further than the first animal, in so far as the county is concerned.

NEPOTISM.

January 20, 1933. *County Attorney, Centerville, Iowa:* We are in receipt of your letter of January 18th, in which you ask for an opinion on the statute concerning nepotism, your proposition being as follows:

"The deputy sheriff is a brother-in-law of the sheriff, and the question is raised whether or not a brother-in-law is a relative within the third degree of affinity."

"Consanguinity" means related by blood, while "affinity" means related by marriage. The proper method of determining the degrees of relationship by consanguinity is to count up the ladder to the common ancestor, and then descend to the other relative. For example, in the case of sons of two brothers, if you start with one of them and ascend to his father, thus making the first degree; from the father to the grandfather is the second degree; then descending from the grandfather down the other line to his other son is the third degree; then from this son down to his son is the fourth degree. In other words, brothers are within the second degree, while first cousins are related within the fourth degree. In order to explain affinity, it is first necessary to explain consanguinity.

A husband and wife are not related to each other by affinity, but are regarded in law as one person. The husband is related by affinity to his wife's blood relatives in the same degree that she is related to them by consanguinity. In other words, the daughter is related to the mother within the first degree of consanguinity. Therefore, a man is related to his mother-in-law within the first degree of affinity. The sister is related to her brother by the second degree of consanguinity. Therefore, the sister's husband would be related to her brother within the second degree of affinity. It is therefore seen that, if the sheriff married the deputy's sister, or if the deputy sheriff married the sheriff's sister, the sheriff and deputy would be related by the second degree affinity, and the deputy would be prohibited from holding the office under Chapter 61, of the Code, without the approval of the Board of Supervisors.

It is therefore the opinion of this office that brother-in-laws are related by affinity within the degree specified in Chapter 61, and that one of them as sheriff could not appoint the other one as his deputy without approval of the Board of Supervisors.

Compensation of the members of the legislature.

January 20, 1933. In accordance with your request of the 19th inst., I have examined Section 25, Article 3 of the Constitution of the State of Iowa, and

Section 14 of the Code of 1931, relative to the compensation of the members of the General Assembly.

You will note that Section 25 of Article 3 of the Constitution states:

"Each member of the First General Assembly under this Constitution, shall receive three dollars per diem while in session; * * * but no General Assembly shall have the power to increase the compensation of its own members. And when compensated in extra session they shall receive the same mileage and per diem compensation, as fixed by law for the regular session, and none other."

Section 14 of the Code states:

"The compensation of the members of the General Assembly, except the speaker, shall be: to every member, for each full, regular session, One Thousand dollars, and for each extra session the same compensation per day while in session, to be ascertained by the rate per day of compensation of the members of the General Assembly in the preceding regular session; * * * but in no case shall the compensation for any other session exceed ten dollars per day exclusive of mileage."

As you know, the compensation, as fixed in the above section, is the latest pronouncement or statutory provision in the matter of compensation for members of the General Assembly. On several occasions, in the intervening period of time, since the adoption of the Constitution and Section 14 of the Code of 1931, the amount of compensation has been raised from three dollars per day to the present rate of one thousand dollars for the full session.

A search of the library reveals that there have been no decisions rendered by our Supreme Court with reference to this matter until the case of Gallarno vs. Long, State Auditor, et al. (Pritchard, Intervener) 243 N. W., page 719, rendered on June 24, 1932, and I wish to call your particular attention, in that case to Subdivision 9 at page 726, which states, as dicta, but in the opinion of the writer, shows the trend of thought of the Supreme Court upon the question under consideration:

"But it is said by appellees that the Legislature in 1872, and again in 1911, abandoned the per diem basis of compensation and adopted in lieu thereof fixed salaries, and, because that system of compensation has been enforced so long, it amounts to a construction of the Constitution by the Legislature and the departments of the government that a per diem compensation is not essential. As before said, the legislature in 1872, and again in 1911, did change the compensation for a regular session from a per diem to a salary basis. Likewise, it may be conceded that a long continued, uniform construction of the Constitution by administrative officers and boards is entitled to great weight with the Court when interpreting that instrument. See Atwell vs. Parker, 93 Minn. 462, 101 N. W., 946; Field vs. Samuelson (Iowa) 233 N. W., 687. Per diem as set out by Webster's New International Dictionary means 'by the day.' To the same effect see 48 Corpus Juris, 807. It was said in Peay vs. Nolan (7 S. W. 2d 815, 817), supra, by the Tennessee Court on Page 817, 157 Tenn. 222, 60 A. L. R. 408: 'The term per diem (under some circumstances) is synonymous with salary.' Perhaps a salary under the Iowa Constitution may be equivalent of a per diem. There is much indicating that this is true. But this question is not before us for discussion, and whether the salary is equivalent to a per diem compensation under the Iowa Constitution need not be, and is not, now decided. However, for the purpose of this discussion it may be assumed without deciding that the salary fixed by the Legislature is equivalent to the per diem required by the Constitution. Nevertheless, if such salary is the equivalent of the constitutional per diem, that would not mean that the expense provided by Chap. 1, Acts of 43rd General Assembly are likewise equivalent to the per diem. The per diem basis for compensation is fixed and definite. So, too, the salary basis for figuring such compensation is fixed and definite.

The question arises if it were decided that Section 14 of the Code is in conflict with the constitutional provisions in this matter, as to what would be the compensation of the members of the General Assembly now in session and the writer is of the opinion that they would receive no compensation whatsoever as the constitutional provision fixes the per diem compensation at three dollars per diem for the *First* General Assembly, which, of course, is a limitation, and the constitutional provision further states:

"But no General Assembly shall have the power to increase the compensation of its own members."

The dicta, above set out in the case of Gallarno vs. Long, in the opinion of the writer, gives a definite view of the feeling of the court in a recent pronouncement and it would seem without doubt that if such a question was raised that such would be the holding of the court.

LOTTERY.

January 21, 1933. *County Attorney, Osage, Iowa:* Under date of January 3rd you asked this Department for an opinion upon the following state of facts:

"A merchant of this city desires to give a ticket to every party who makes a purchase in his store. Tickets will also be given to all who enter the store. A candle will be placed in the window and every party holding a ticket will be entitled to a guess as to how long the candle will burn. A guess for each ticket held.

In your opinion, does this sufficiently eliminate the element of chance so as to not constitute a lottery?"

Upon the foregoing state of facts and under the definition of a lottery as defined by our Supreme Court in *Brenard Mfg. Co. vs. Jessup & Barrett Co.*, 186 Iowa, 872 (173 Northwestern, 101) it is our opinion that a lottery within the meaning of the law does not exist.

In the foregoing case our Supreme Court defined the three elements to constitute a lottery, the first being a consideration; the second, the element of chance, and the third, a prize.

It would seem from the facts stated in your letter that two of the necessary elements are lacking, to-wit: First, a consideration, and second, a prize. Whether or not the element of chance would exist under such circumstances would therefore be immaterial.

LIABILITY OF COUNTY.

January 21, 1933. *County Attorney, Bloomfield, Iowa:* We are in receipt of your letter of January 18th, in which you ask for an opinion on the following:

"A claim has been filed with the Board of Supervisors of Davis county asking for damages for sheep killed. The owner of the sheep has 70 acres of land in Davis county and 240 acres in Appanoose county. All personal property tax, as well as dog tax, is paid in Davis county. The sheep, however, were killed in Appanoose county on the land owned by the claimant. The question is whether or not the Board of Supervisors of Davis county should pay the claim."

Section 5452 of the Code of 1931 answers your question fully. It provides 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."

It is the opinion of this office that the Board of Supervisors of Davis county should not allow the claim under the statement of facts which you have furnished us.

OFFICIAL NEWSPAPER.

January 21, 1933. *County Attorney, Boone, Iowa:* We are in receipt of your letter of January 18th in which you ask for an opinion on the following proposition:

"The Merchant's Messenger is published at Boone, Iowa. It does not have a paid subscription list, but is circulated by mail and carrier to each house in the city of Boone and to most of the smaller towns and the majority of the rural residences in the county. The total of its circulation is approximately 5,700 per week. It is published as a regular weekly paper and conducted along the same lines as any other weekly paper, with the exception that no charge is made for subscriptions. It also contains local and general news. The question is whether or not the ordinary and usual legal notices, such as notices of Articles of incorporation, probate notices, etc., may be published in this paper."

Corpus Juris defines "circulation" as the extent to which a thing circulates or is diffused or distributed; an act by which a literary proprietor parts with possession of the original manuscript, or a written or printed copy, for any purpose not exclusively confidential.

This office is of the opinion that wherever the law provides that a notice be published in a newspaper of general circulation published in the county, notices could be legally published in the Merchant's Messenger. However, this is a matter which the lawyers in your community should decide for themselves as the legality of such notices will undoubtedly be raised in civil matters and not by the State of Iowa.

However, we will say, that in view of Chapter 274 of the Code, it would not be proper for the Board of Supervisors to designate the Merchant's Messenger as an official newspaper, for the reason that it does not have a "bona fide" yearly subscription list, as required by Section 5398 of the Code of 1931.

EACH SHARE OF STOCK OF A STATE BANK IS ENTITLED TO ONE VOTE IN ALL STOCKHOLDERS' MEETINGS AND ALL ELECTIONS.

January 23, 1933. We have your request for an opinion on the following matter:

"May a State Bank, by proper motion, amend its Articles of Incorporation to limit the number of shares any stockholder may vote to five?"

Section 9175 of the Code provides as follows:

"At all stockholders' meetings, and all elections held thereat, each share of stock shall be entitled to one vote. Any stockholder may vote upon his shares in person, or by proxy in writing. Shares belonging to an estate may in like manner be voted by the administrator thereof, and shares belonging to a corporation, association, or society may be voted by any person authorized by its board of directors to do so, but no stockholder shall be entitled to vote who owes the bank any past due indebtedness."

The above section is a part of Chapter 413 pertaining to Savings Banks. There is no similar provision in Chapter 414 pertaining to State Banks, nor in Chapter 384 pertaining to Corporations for Pecuniary Profit.

The general rule is stated in Fletcher on Corporations, Volume 3, page 2816, wherein it is said:

"The common usage in giving a vote for each share would seem to be sufficient ground for implying an intention on the part of the legislature, in the absence of expressed provisions, to give each share a vote."

The above statement of the author is sustained by the authorities cited by him, these authorities being in re: Alleged Election of Directors of Rochester District Telegraph Company, 40 Hun (N. Y.) 172 and also in re: Mathiason Manufacturing Company, 99 S. W. 502.

Our legislature in its only statutory enactment on this proposition followed this general rule, and in the case of savings banks gave the holder of each share of stock, one vote. This shows the intention of the legislature on the proposition. There is no reason for a distinction between State and Savings Banks on voting power of stockholders. Each is entitled to one vote for each share held. Most courts hold that a limitation of voting power of a stockholder is contrary to public policy and therefore void.

It is therefore the opinion of this office that at all stockholders' meetings of a State Bank and all elections held thereat, that each share of stock is entitled to one vote.

STATE SENATOR: ORDER OF NAMES ON BALLOT—"In the holding of a special election for State Senator, in what order shall the names of the political parties appear on the ballot?"

January 25, 1933. *Secretary of State, Des Moines, Iowa:* You asked for an opinion on the following proposition:

"In the holding of a special election for State Senator, in what order shall the names of the political parties appear on the ballot?"

We are of the opinion, in view of the fact that the office of State Senator is an office for which the Secretary of State is required to certify the names to the County Auditors of the different counties in the senatorial district, that the Secretary of State is the one who controls the order in which the names of the candidates or the political parties should appear on the ballot.

This opinion is based on Section 769 of the Code of 1931, which reads as follows:

"For all elections held under this chapter, except those of cities or towns, the county auditor shall have charge of the printing of ballots in his county, and shall cause to be placed thereon the names of all candidates which have been certified to him by the secretary of state, in the order the same appear upon said certificate, together with those of all other candidates to be voted for thereat, whose nominations have been made in conformity with law."

Section 760 of the Code means just what it says, that is, that the ballot shall be *substantially* in the form as given below. It is not mandatory on the Secretary of State to place the names on the certificate in exactly the order as set out in Section 760 of the Code, that is, with relation to the position of the political parties on the ballot.

January 27, 1933. *Superintendent of Banking, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

If the Superintendent of Banking takes over the management of any bank pursuant to Senate File No. 111 of the Forty-fifth General Assembly and during said time, the bank is reorganized pursuant to said Act, should the proceeds of the deposits received since the management of the bank was taken over by the Superintendent of Banking be turned into the reorganized bank and credited to the depositors' accounts therein, or should the said deposits be held by the Superintendent of Banking subject to the order and direction of the depositor or someone acting for him?

Senate File No. 111 of the Forty-fifth General Assembly intends the creation of two trusts, one trust to consist of the assets of the bank at the time of the taking over of the management by the Superintendent of Banking, and the other trust, consisting of the new deposits received after the date of the taking over of the management by the Superintendent of Banking.

Under the reorganization plan suggested in the Act, the bank need only obtain the agreement of the creditors existing prior to the date of the taking over of the bank by the Superintendent of Banking, as manager, and in event of reorganization, only the obligations of the bank to such creditors will be affected, and the obligation to the so-called new depositors will not in any wise be affected, as that is a separate and distinct trust. In the event of reorganization, the so-called new depositors are entitled to advise the trustee as to the disposition of the funds of the trust in his hands at said time.

It is therefore the opinion of this department that in event of reorganization of a bank, pursuant to Senate File No. 111 of the Forty-fifth General Assembly, that the proceeds on hand of all deposits received by the Superintendent of Banking, as manager, from the date of the taking over of management of said bank, should be held by him as trustee, subject to the order of the depositor, or anyone acting for him, and should not be turned into the reorganized bank except at his direction.

CITY EMPLOYEES: SALARIES: FIXED BY ORDINANCE—"Should the salaries of all permanent city employees (employed for 60 days or more) be fixed by ordinance or resolution and the salary be provided by appropriation?"

January 27, 1933. *Auditor of State, Des Moines, Iowa:* On January 25th you asked for an opinion on the following:

"Should the salaries of all permanent city employees (employed for 60 days or more) be fixed by ordinance or resolution and the salary be provided by appropriation?"

Section 5670 of the Code of 1931 provides that the City Council may by ordinance provide that any city or town officer elected or appointed shall receive a salary in lieu of all other compensation.

Section 5671 provides that all officers in any city or town, whose compensation is not fixed by law, shall receive as compensation the fees of his office or a salary, or both the fees and salary, as the council may prescribe.

It is not necessary, regardless of these two sections, for the city to fix the salary of city employees by ordinance or resolution. These two sections apply principally to such offices as clerk, marshal, and similar offices. It has been held, however, in the case of Kinnie vs. Waverly, 42 Iowa, 486, that where neither the duties nor the compensation of the city solicitor are fixed by council, he should, unless otherwise instructed, perform such duties, within the usual scope of the authority of such officer, as the interests of the city may require; and that he may recover reasonable compensation therefor.

It is the opinion of this office, therefore, that it is not necessary for the council to fix the salaries by resolution or ordinance. However, it would be better, and might save some disagreement in the future, if all of said salaries were fixed by resolution.

SUPERVISORS: TRIM TREES: Without notice to land owners.

January 27, 1933. *County Attorney, Anamosa, Iowa:* We are in receipt of your letter of January 20th, wherein you ask for an opinion on the following:

"The county would like to clear some of its roads of trees and hedges by

giving the unemployed some work to do. The Supervisors wish to know if they can trim the trees and clear up the ditches and roads in general without giving notice to the land owners, provided they do not assess any of the costs of the work to the respective land owners; and also if they would have to offer the wood or timber cut to the land owners, or if it could be used in poor relief."

Under the provisions of Chapter 247 of the Code of 1931, the supervisors could not assess any of the costs to the respective land owners without complying strictly with the provisions of the chapter. The could, however, have the roads cleared at the county's expense without the necessity of the service of notice, but in such case they would have to offer the wood to the land owner.

TAX SALE POSTPONED: 1% Penalty for January.

January 27, 1933. *County Attorney, Waverly, Iowa:* We are in receipt of your letter of January 20th, in which you ask for an opinion from this office on the following:

"The outgoing Treasurer of Bremer county postponed the usual tax sale, which was to have been held in the month of December. Several delinquent taxpayers are now desiring to pay their taxes. Your question is whether or not the Treasurer should charge the 1% penalty for the month of January, 1933, and subsequent."

Section 7214 of the Code of 1931 provides as follows:

"If the first installment of taxes shall not be paid April 1st, said installments shall become due and draw interest, as a penalty, of 1% per month *until paid*, from the 1st day of April following the levy; and if the last half shall not be paid by October 1st following such levy, then a *like interest* shall be charged from the date such last half became delinquent."

Under the provisions of this section, the treasurer must charge the 1 per cent a month until the taxes are paid.

TAX SALE: Real estate sold for delinquent special assessments: Not advertised.

January 27, 1933. *County Attorney, Ottumwa, Iowa:* We are in receipt of your letter of January 19th, in which you ask for our opinion on the following:

"Wapello county is scheduled to have a tax sale on the first Monday in February, at which time real estate, upon which delinquent taxes remain unpaid, will be offered for sale. The delinquent lists were published, as provided by law, but did not include delinquent personal or special assessments. The question has arisen whether or not this real estate can be sold for the delinquent personal and special assessments, when they have not been advertised. If the property is sold for the delinquent real estate taxes, will the delinquent personal and specials that were not advertised remain a lien on this property in the hands of a purchaser at the tax sale?"

You are advised that Section 7244 of the Code of 1931 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."

We might also call your attention to the following quotation:

"Assuming that the delinquent personal tax on the bank stock for the year of 1924 became a lien upon the real estate in controversy, the lien, if any, for said taxes became extinguished by the tax sale of December 5, 1928. See Huff vs. Easley, 47 Iowa, 330. Section 7244 of the Code of 1927 makes it the duty of the County Treasurer to offer at his office, at the annual tax 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 thereof."

In re Estate of Hager, 212 Iowa, 851, Point 5, on Page 865; 235 N. W., 563, Point 11.

Quoting from the case of Huff vs. Easley, referred to in the opinion in the Hager case, the court says:

"The sale discharges, is in payment of, all taxes—not of taxes for which the land is sold, but of all taxes due and unpaid."

This office is therefore of the opinion that when the land is sold for taxes, it is sold for all of the taxes which are a lien on that particular piece of real estate, regardless of whether or not the personal taxes were advertised.

ALIEN, ADULT UNNATURALIZED: Poor relief.

January 27, 1933. *County Attorney, Iowa City, Iowa:* We are in receipt of your letter of January 20th, in which you ask for an opinion from this office as to whether or not an adult unnaturalized alien can acquire a legal settlement and be entitled to poor relief thereunder.

The case of the Village of Litchfield vs. County of Meeker (Minn.), 233 N. W., 804, is good law for the proposition that an adult unnaturalized alien can acquire such settlement. In the Minnesota case, under a statute which is quite similar to ours, one in which the wording, although not exactly the same, has the same meaning, the court said:

"The charity of our poor laws makes no distinction on the ground of nationality. Aliens are as much entitled to relief as our own citizens, and, in proportion to their numbers get it as commonly and as freely."

We have been unable to find any Iowa case on this question, but in view of the holdings in the Minnesota case under a similar statute, we are inclined to believe that our courts would rule along the same line.

It is therefore the opinion of this office that an adult unnaturalized alien can acquire a legal settlement and be entitled to poor relief under the laws of this state.

TOWNSHIP CLERK: HOLD OFFICE OF TOWN ASSESSOR.

January 27, 1933. *County Attorney, Pocahontas, Iowa:* We are in receipt of your letter of January 21st in which you ask whether a township clerk duly elected can also hold the office of town assessor from the same township, the town being located in the township.

Under the holding in the case of State, ex rel. Banker, vs. Bobst, 205 Iowa, 608, one of the tests of incompatibility depends not so much upon the incidents of the office, as upon the physical inability to be engaged in the duties of both at the same time.

We are of the opinion that the duties of these two offices are such that a situation might arise where one person could not perform the duties of both offices at the same time. For instance, there are meetings in the two separate corporations which he might be required to attend on the same day. If he is township clerk, he attends the meetings of the Board of Review, as well as the meetings of the Fence Viewers. The meetings which he might be required to attend by virtue of the two different offices might conflict.

We are therefore of the opinion that the two offices are incompatible.

COUNTY SUPERVISOR—SCRIPT MONEY: Payroll published.

January 27, 1933. *County Attorney, Greene, Iowa:* A few days ago, you were in our office, asking for an opinion on the following question:

"Your County Supervisors are planning on using script money to pay for labor performed in the county by persons who are entitled to poor relief. This money will be paid in compliance with the payroll furnished by the County Engineer, and the money will be accepted by the merchants in your county in payment of necessaries, and later redeemed by the county on the first of each succeeding month. The question is whether or not the payroll furnished by the County Engineer should be published with the proceedings of the Board."

It is the opinion of this office that it is not necessary to publish these whole proceedings in full each time. In other words, if the payroll is published with the proceedings of the board, it would not be necessary to publish a full itemized statement of the claim filed by the merchant, when he asks the county to redeem the script money. The payment of the claim itself should be published, but it would not be necessary to itemize it.

It is, however, our opinion that it would be better to publish the proceedings of the board, showing the payroll than to publish the itemized statement of the claims filed.

SUPERVISOR: OFFICER ELECTED DIED—Incumbent holding over or new appointment?

January 27, 1933. *County Attorney, Belmond, Iowa:* We are in receipt of your letter of January 21st, in which you ask for an opinion on the following:

"At the general election held in November, 1932, W. W. Frakes was elected to the office of Supervisors of Wright county for a term which will commence January 1, 1934. O. F. Gunderson is the present incumbent, and his term will expire January 1, 1934. On January 13, 1933, W. W. Frakes died without having filed a bond or oath for the office to which he was elected. The question is, how should that office be filled after January 1, 1934, whether by Mr. Gunderson holding over, or by a new appointment?"

Section 1146, sub-paragraph 4, provides that every civil office shall be vacant upon the resignation or death of the incumbent, *or of the officer elect before qualifying.*

For this reason, we are of the opinion that this is not a case in which O. F. Gunderson would hold over, but a case in which there is a vacancy for the term of office commencing in January, 1934.

You are further advised that this vacancy should be filled by the Clerk of the District Court, the County Auditor and the County Recorder, who will be holding office after January 1, 1934, not by the officers who hold office at the present time.

GASOLINE: ROAD AND BRIDGE WORK: Advertise bids.

January 27, 1933. *County Attorney, Harlan, Iowa:* We are in receipt of your letter of January 19th, in which you ask for an opinion on the following:

"Shelby county will use more than $1,500.00 worth of gasoline, in road and bridge construction work, during the year. It will be purchased as needed and paid for monthly. Will it be necessary to advertise for bids on it, as provided in Section 4644-C42 of the Code of 1931?"

Section 4644-c42 provides as follows:

"All contracts for road or bridge construction work and materials therefor of which the engineer's estimate exceeds fifteen hundred dollars, except surfacing materials obtained from local pits or quarries, 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."

In the case of State vs. Garretson, the Court said:

"This statute cannot be avoided by the subterfuge of buying, in disregard of the statute, material in quantities much exceeding said amount, on the plea that the amount used on each subsequent, individual work of repair will be much less than $1,000.00 in value."

State vs. Garretson, 207 Iowa, 627; 223 N. W., 390.

In the above cited case, this question came up in a hearing on a petition to remove supervisors from office. There was mention made in the opinion relative to purchasing supplies from the Standard Oil Company, but there is nothing stated as to the amount. However, in view of the fact that the amount of gasoline which your county will use in this particular construction can be furnished under a contract on competitive bids, with the provision in the contract that the number of gallons may be increased or diminished by, say 20 per cent, we see no reason why it should not be purchased under this contract on competitive bids, the same as other materials used in that particular construction, provided for in Section 4644-c42.

BANKS AND BANKING.

January 27, 1933. *Superintendent of Banking, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

If the Superintendent of Banking, pursuant to Senate File No. 111 of the Forty-fifth General Assembly, takes over the management of any state bank, savings bank, trust company or private bank doing a banking business, and thereafter, and during the time that he is managing said bank pursuant to Senate File No. 111, he proceeds to wind up the affairs of the said institution as provided in Section 2 of the said Act, should the deposits on hand received after the date that the management of the institution was taken over by the Superintendent of Banking be turned to the receiver or should they be turned back to the depositor, or held for his order?

This banking act sets up two separate and independent trusts, one for the depositors and creditors of the bank prior to the taking over of the management by you, and a second trust for the benefit of the new depositors and creditors, or those that have entered into relationship with the bank after you have taken over the management.

Under the provisions of said act, the Superintendent of Banking as manager, is directed to segregate all of the new deposits and new assets acquired on account of said deposits and hold the same in trust especially for such deposits. It was clearly the intention of the legislature that in event of receivership of a bank during the time that it was managed by the Superintendent of Banking pursuant to said act, that the proceeds of the second trust consisting of the new deposits should not enter into the receivership and should not be considered as part of the assets of the estate, as they are only to be held by the Superintendent of Banking, as manager, for a special purpose, viz., to be held by the manager subject to withdrawal by the depositor, and are not to become part of the assets or property of the bank, and the relation of debtor and creditor is not to exist as to such deposits.

It is therefore the opinion of this department that the proceeds of the new deposits in the hands of the Superintendent of Banking, as manager, in the event of receivership, should not be turned to the receiver, but should be held subject to the order of the depositor or someone acting for him. We understand that in the rules and regulations made by you pursuant to the act that you have set up a charge system sufficient to take care of the expense of the trust, so that in the event of receivership, as hereinbefore stated, you would

probably not be able to return the full amount of the deposit less withdrawals as you would also be entitled to deduct therefrom all service charges and the pro rata expense of administering the trust.

We would suggest that the deposit slips for the so-called new deposits show that the money was deposited with the manager of the bank and not with the bank itself, so that there can be no question in distinguishing the two trusts, as the one trust will be where the money was deposited and relationship arose prior to the time of assuming the management by the Superintendent of Banking, and the other trust arose subsequent to the assuming of management of the bank by the Superintendent of Banking.

We would also suggest that the proceeds of the trust arising out of the so-called deposits be kept liquid so that in event of receivership, the trust could be distributed to said new depositors without delay.

BOARD OF SUPERVISORS: School fund mortgages.

January 28, 1933. *County Attorney, Knoxville, Iowa:* We are in receipt of your letter of January 19th, in which you ask for an opinion from this office on the following proposition:

"Where school fund mortgages are past due and the interest thereon and the taxes on the real estate are delinquent, and a foreclosure of the school fund mortgage is contemplated by the Board of Supervisors, is it proper for the Board to compromise the matter by accepting a deed in the premises for the cancellation of the school fund mortgage?"

You are advised that the Board of Supervisors has authority to do acts which, in the exercise of wisdom and care, men of affairs ordinarily do for the security and collection of debts. Therefore, if the board is of the opinion that the real estate is worth less than the amount of the mortgage, and that a deficiency judgment could not be collected, and it would be to the best interests of the county to compromise the matter, they have authority to make such a compromise. The authority for this ruling is found in the case of Poweshiek County vs. Buttles, 70 Iowa, 246; 30 N. W., 558.

Of course you understand that this deed when taken should be taken in the name of the state, as provided in the chapter of the Code pertaining to school funds. No doubt you are also aware of the fact that when this land is sold, as required by law, within the two-year period, the deficiency, if any, is charged to the county.

FIRE CALLS: Beyond corporate limits of town.

January 28, 1933. *County Attorney, Primghar, Iowa:* We are answering your letter of January 2nd, in which you ask for an opinion on the following:

"The town of Primghar, in your county, has a modern fire engine, motor driven. It has been the custom for a fee of $25.00 to permit the fire engine and local volunteer firemen to drive this truck out into the countryside, beyond the corporate limits of the town, to answer fire calls. Three questions are presented, as follows:

"(1) Is such a practice legal?

"(2) Is or is not the town liable for loss that results from fire in town, while the fire-fighting equipment is away under orders of the town mayor and council?

"(3) Fire insurance rates have been reduced since the purchase of the equipment. Have the owners of the property, and the insurance companies, a right to insist upon such a practice being stopped?"

We will answer these questions in the order in which they are listed above.

(1) It is the opinion of this office that the practice listed under Section 1 is illegal, and that the City Council is without authority to send its fire-fighting equipment into the country. This equipment is purchased as a result of a direct tax levied against the property in the city or town, and the council has no authority to rent or furnish it to persons outside the county.

(2) In answer to your second question, we will say that the city is not liable under such a situation. The city is not legally bound to furnish adequate equipment for fire protection, and is therefore not liable, if such equipment is not furnished. In one case, our Supreme Court held that the city was not liable for failure to furnish adequate water supply, even though the city had contracted with the water company, whereby the water company was to pay all damages for which the city was held liable on account of the inadequate supply.

(3) In answer to your third proposition, we will say that the property owners might take action to stop the practice of sending the fire truck into the country, but the insurance companies have no rights in the matter.

January 30, 1933. *Superintendent of Banking, Des Moines, Iowa:* In re: School Savings Fund in American Trust & Savings Bank, Cedar Rapids, Iowa.

In response to your query regarding the legality of the payment to the school children in Cedar Rapids, Iowa, whose funds were held by the American Trust and Savings Bank of that city, this Department has the following opinion to present.

That prior to the closing of this bank there was an organized system among the public schools of Cedar Rapids, Iowa, whereby the pupils in said schools were encouraged to make school savings deposits through the teacher for the purpose of training and encouraging the school children in thrift and savings, and that said teacher collected these savings from their pupils, kept records thereof and then, from time to time, as these funds were accumulated they were turned over to the American Trust and Savings Bank of Cedar Rapids, Iowa, under an agreement and arrangement with this bank and the managing officers thereof whereby said school savings were received and were held individually for each separate school child as to the amount each child had, from time to time, paid into such school savings. That said agreement and arrangement was followed out as to such school savings and the records of said bank show the individual and separate name of each child having amounts of such school savings together with the name and address of each child and also showing the aggregate total of all such school savings funds and at all times up to the closing of said bank, there was maintained school savings, separate and distinct as to the respective amounts each child had contributed to said school savings but with the records therein showing the total of said school savings.

It should be borne in mind that the teachers were the ones that collected these monies from the different school children under this arrangement and that said teachers were the ones that caused these funds to be deposited with the American Trust & Savings Bank of Cedar Rapids, Iowa. These deposits were not made by the parents as the natural guardians of said school children nor were they made by the legal guardians of said children. It also should be borne in mind that many of these accounts perhaps will show only small sums of a few cents up to several hundred dollars, depending upon the financial status of the parents of the children and also upon the varying habits of said

children with respect to their thrift and savings. Under the usual administration of funds in said bank, extra expense of clerical work, postage, and incidental matters would be involved which would make the administration of all of these minor accounts very burdensome. It also appears that these funds were left with this bank without any authorization from any court.

The question now arises:

"Are such funds, belonging to minors where the deposits have been made by school teachers who are not legal guardians or natural guardians of said minors, held in trust by said bank and entitled to a preference in the payment of same?"

It is the opinion of this department that these school funds so deposited in and held by the American Trust and Savings Bank of Cedar Rapids, Iowa, are to be considered as trust funds and should be paid in full to each child through their natural or legal guardian. In support of this rule, I wish to call your attention to enrolled order No. 25106 which was issued by the Honorable H. D. Evans, Judge of the 8th Judicial District of Iowa, on December 5, 1931, in connection with the receivership of the Johnson County Savings Bank of Iowa City, Iowa, wherein this district placed its stamp of approval upon a similar proceeding. There was no appeal taken from the order of the Honorable H. D. Evans and therefore this decision of the District Court of Johnson county, Iowa, can be and should be considered as binding in law and equity and in good conscience.

CHILD LABOR.

January 30, 1933. *County Attorney, Des Moines, Iowa:* I have your request for an opinion of the law based upon the following statement of facts:

"The Marjorie Young School of Theatrical Art proposed to permit its pupils trained in the art of singing and dancing to give, without compensation, either to the school itself or to the pupils, a program in the Paramount Theatre on the afternoon and evening of March 1, 1933, in connection with the regular show of the aforesaid theatre. The pupils will be accompanied both by their tutors and parents."

Your inquiry is directed as to whether or not these stated facts will be in violation of the Iowa Child Labor Law as defined in Section 1526 of the 1931 Code.

The section above referred to reads as follows:

"No person under 14 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 8 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."

The pronouncement of the Supreme Court of Iowa in the case of State vs. Earle, 210 Iowa, 974, is authority for the proposition that the above statement of facts does not violate the Iowa Child Labor Law. The tutors or directors of the dancing academy have no financial interest or control over the operation of the Paramount Theatre; the children appear solely for the purpose of giving an exhibition of their skill and art; they are accompanied by both tutors and their parents. Obviously, these children are not employed within the meaning of the statute. They are not subject to the control or management of the theatre; their program is carried out under the direction and supervision of the theatrical school which they attend; and they receive no compensation of

any kind for the program which they give. In the case above cited, the Supreme Court of Iowa referred to and quoted with approval a Supreme Court decision from the State of Nebraska—Taylor vs. State, 112 Neb., 112 (199 N. W. 22).

In the Taylor case the defendant operated two motion picture theatres in Omaha. Occasionally, in entertaining the people who paid admission fees, the defendant permitted girls of good character between the ages of 10 and 14 to appear on the stage to dance, act, or sing. These performances were casual. The girls were pupils of an instructor in dancing, acting or singing and the performances were lessons in those arts. While about the theatre these girls were in the care of their teacher or some other proper person and they received no compensation. The appearances before the public were voluntary and performance was not improper. The Supreme Court of the State of Nebraska upon the above described state of facts said as follows:

"It is the unanimous opinion of the court that the Legislature did not use language forbidding what defendant did when he permitted the girls to appear on the stage under the circumstances shown in this prosecution. 'Be employed' and 'to work' as those terms are used in the statute, when the entire act and the purposes of the legislation are considered, imply a contract of employment for compensation and work for hire pursuant to such a contract. This is the sense in which such legislation is generally understood. The girls in performing their little tasks in public were not under the control of defendant as master or employer. They were directed by their own teacher in studying and exhibiting their art, or by some other proper person, and were thus protected from the evil influence against which the statute is directed."

In this sense there is no evidence that would violate the law.

In permitting the above program to be carried out under the terms and conditions outlined we find no wrong.

COUNTY ATTORNEY: Claim for representing attorney general.

January 31, 1933. *Auditor of State, Des Moines, Iowa:* This office is in receipt of your request for an opinion as to whether or not William M. Tatum, County Attorney of Harrison county, is entitled to have his claim for $50.00 allowed by the state for representing the Attorney General in a hearing concerning the objections to the appraisement for inheritance tax purposes of the real estate in the Estate of Minnie E. Huber, said hearing having been held on January 20, 1933, at Logan, Iowa.

You are advised that Section 5180, sub-paragraph 2, of the Code of 1931 provides as follows:

"Appear for the state and county in all cases and proceedings in the courts of his county to which the state or county is a party, except cases brought on change of venue from another county, and to appear in the supreme court in all cases in which the county is a party, and also in all cases transferred on change of venue to another county, in which his county or the state is a party."

It is therefore the opinion of this office that the said William M. Tatum is not entitled to a fee of $50.00 for representing the state in said hearing.

BANKS AND BANKING—CHARTER.

February 1, 1933. *Superintendent of Banking, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

"During liquidation of a bank by the Superintendent of Banking, as receiver, pursuant to statute, is the corporate charter still in existence and may the purchaser of the entire assets of the receivership operate said bank under said charter?"

It is the opinion of this Department that even though the affairs of a closed bank are in the hands of the Superintendent of Banking, as receiver, and is being liquidated by him pursuant to statute and under orders of court, that unless it is otherwise provided in the Articles of Incorporation, the corporation has not been dissolved, but maintains its corporate charter existence and the purchaser of the entire assets of the receivership may thereafter operate the bank under said charter pursuant to law if the purchaser has complied with and is complying with the provisions of your Department.

BANKS AND BANKING.

February 1, 1933. *Superintendent of Banking, Des Moines, Iowa:* We have your request for an opinion on the following proposition pending in the Farmers State Bank of New London, Iowa:

"May the trustee of a fund for the benefit of the poor, which trust is under the direction of the District Court in the county wherein the said trustee is residing, withdraw any part of the trust funds from said bank wherein it was deposited with approval of the court and Certificate of Deposit issued to the trustee, said bank being now managed by the Superintendent of Banking pursuant to Senate File No. 111 of the Forty-fifth General Assembly?"

We wish to call your attention to Section 1 of Senate File No. 111, which provides:

"During the period of such management and possession by the Superintendent of Banking, all the remedies at law or in equity of any creditor or stockholder against such bank or trust company shall be suspended, and the statute of limitations against such claims shall be tolled during such period," and we wish to also call your attention to the following provision of Section 2 of the Act:

"or may continue the operation of the same, holding all deposits in the same."

It will be seen from the above that the legislature did not differentiate in any way between various kinds of deposits, but directed you as manager of the bank to hold all deposits in the bank at the time of the taking over of the management by you, and it is therefore the opinion of this Department that the withdrawal of this fund or any part thereof by the trustee cannot be permitted by you as manager of the said bank.

We wish, however, to call your attention to the fact that as the trustee is acting under orders of court, it may be possible for the trustee to secure an order of the court in the Poor Fund Trust, directing you to turn to the trustee, such funds of this trust as are necessary at the present time, and, if such an order is so made and entered, you will be obliged to obey the order.

BANK OPERATING UNDER WAIVER PLAN: Depository for town funds.

February 3, 1933. *County Attorney, Sioux City, Iowa:* We are in receipt of your letter of January 25th, in which you ask for an opinion on the following proposition:

"What is the status of a bank operating under a waiver plan in regard to its being a proper depository for town funds?"

Of course different banks and different communities have waiver plans which are somewhat similar but not alike. We draw the conclusion that the bank in this case has waivers from its depositories, whereby the depositors agree not to draw out more than a certain per cent of funds during a certain period.

This office is of the opinion that, if the treasurer of the town has information, or if it is a matter of general knowledge in the community, on account

of the bank being on a waiver plan, that a particular designated bank is in such financial condition that the deposits belonging to the town might be lost, and he, regardless and notwithstanding this knowledge which he has, deposits the funds in that bank, he might be liable for the funds because of his negligence.

Ordinarily, the officer would not be personally liable for the funds which are lost through a bank failure, if he has complied with the law governing deposits of public funds. However, he might be liable on his bond, unless he uses reasonable care and diligence in depositing the money. You understand of course that we are not saying he would absolutely be liable, if he deposits the money in a bank which is operating on the waiver plan. In fact, the presumption would be in his favor, and in order that he could be held liable, it would be necessary to prove that he had had utter disregard for the question of financial responsibility of the depository.

BANKS AND BANKING—SENATE FILE 111.

February 4, 1933. *Superintendent of Banking, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

Where a bank has been taken over by the Superintendent of Banking pursuant to Senate File No. 111 of the Forty-fifth General Assembly, and the bank later desires to secure depositors' agreements in order that it may re-open or re-organize pursuant to said Act, may public bodies enter into such depositors' agreements, and how must said depositors' agreements by public bodies be agreed to?

This act of the General Assembly provides at Section 3 that a banking institution may reorganize under certain conditions and Section 4 of the act adopts the percentages in Section 9239-a-1 of the 1931 Code of Iowa. Under the provisions of the act, when the Superintendent of Banking takes over the management of a banking institution, he must hold all deposits in the bank at the time of the take-over. This includes deposits by public bodies. The legislature in adopting the percentages of 9239-a-1 of the 1931 Code, clearly intended to adopt also 9239-a-2 of the 1931 Code, so as to give public bodies the right to enter into depositors' agreements with the other depositors of the bank.

It is therefore the opinion of this Department that Section 9239-a-2 of the 1931 Code is fully applicable to Senate File No. 111 of the Forty-fifth General Assembly, and that where the management of a bank has been taken over by the Superintendent of Banking pursuant to Senate File 111 of the Forty-fifth General Assembly and public bodies who are depositors of the said bank desire to enter into depositors' agreements so that the bank may reorganize or reopen pursuant to said act, the said public bodies must enter into such depositors' agreements in the manner provided in Section 9239-a-2 of the 1931 Code.

RAILROAD COMMISSION: Transfer from motor carrier fund to truck operators' fund.

February 7, 1933. *Auditor of State, Des Moines, Iowa:* This office is in receipt of your request for an opinion on the following proposition:

"The Railroad Commission has made an application for permission to transfer $486.01 from the motor carrier fund to the truck operators' fund under Chapter 257, Section 61, Acts of the 44th G. A. The request has been considered and approved by the Governor and the Director of the Budget under

date of January 19, 1933. Your question is whether or not this transfer can legally be made."

The distribution of the proceeds of the money collected under Chapter 252-A2, pertaining to the taxation of motor vehicle carriers, is provided for in section 5105-a54, which reads as follows:

"All moneys received under the provisions of this chapter shall be distributed as follows:

1. For the administration and enforcement of the provisions of this chapter and the regulation of motor carriers one-fifth or so much thereof as may be necessary shall be paid to the commission by warrant drawn from time to time by the auditor of state upon the treasurer of state.

2. The balance shall be allocated each month by the commission to the various counties in the proportion that the number of ton-miles of travel in the respective county bears to the total number of ton-miles of travel within the state."

It will be noted that under sub-section 1 of this paragraph only one-fifth, or so much of that one-fifth as is necessary, is to be used for the administration and enforcement of the provisions of the chapter and the regulation of motor carriers. The balance of the fund is to be allocated each month by the commission to the various counties. It cannot be proper or legal to transfer a part of the funds which should go to the various counties to the fund provided for in Chapter 252-C1.

We also call your attention to the fact that Section 61 of Chapter 257 of the Acts of the 44th General Assembly has no application to the funds mentioned in Sections 5105-a54 and 5105-c12 of the Code of 1931.

Chapter 257 of the Acts of the 44th General Assembly is entitled, "Appropriation Acts." The title to the bill reads as follows:

"An Act to establish the general fund for the state of Iowa, for the biennium beginning July 1, 1931, and ending June 30, 1933, and to appropriate therefrom for all departments and various divisions thereof, of the state of Iowa, for all purposes provided by law, for the said biennium."

Section 61 of Chapter 257 provides as follows:

"The governing board of any state department, institution, or agency, or, if there be no governing board, the head of any department, institution or agency, in the interest 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.*"

This section makes provision for the using of unexpended appropriation for purposes properly within the scope of such Department, the word "appropriations" meaning appropriations under that act.

We are therefore of the opinion that the transfer which has been applied for is improper and cannot legally be made from the motor carrier fund.

INSANE COMMISSIONERS: Expenses in connection with arrest: Claim.

February 8, 1933. *Auditor of State, Des Moines, Iowa:* We are in receipt of your request for an opinion concerning the advisability of allowing a claim of the Auditor of Benton county for expenses in connection with the arrest and investigation of Blanchard E. Orth, whose case was investigated before the Commissioners for the Insane.

You are advised that the certificate which you have handed to us purports to be an amendment to the clerk's certificate to the County Auditor. We have

nothing in connection with this amendment which shows that the legal settlement of Blanchard E. Orth was outside of the State of Iowa or unknown.

You are therefore advised that so far as the items of expense are concerned they are proper, if the patient's legal settlement was unknown and if he was committed to the hospital for the insane.

TAX OF 1931: Stock of goods.

February 8, 1933. *County Attorney, Marshalltown, Iowa:* We wish to acknowledge receipt of your letters of January 21st and February 4th relative to the taxes which are claimed to be a lien on stock of goods owned by Dorosin Brothers. The facts as stated by you are as follows:

"On April 18, 1931, the actual assessment was made against the running stock of goods for the year of 1931. However, on March 18, 1931, the Trustee in Bankruptcy for the Iowa Bargain Store and the Golden Rule Store sold the stock of goods in bulk to Dorosin Brothers, of Marshalltown, Iowa. Your question is whether or not either Dorosin Brothers or the stock of goods in their hands is liable for the tax of 1931."

As to the question of the personal liability of Dorosin Brothers, it is our opinion that they are not personally liable. The case of Iowa Mercantile Company vs. Blair, et al., 123 Iowa, 290, holds with us on that question.

As to just when the tax on a stock of goods or merchandise becomes a lien, there is some question. The writer had occasion to go into this question carefully several years ago, and had the impression that the tax became a lien at any time there was an attempt to dispose of the goods in bulk after the assessment. However, he is unable at this time to locate a case holding squarely on that point. However, there are two cases in which the court has discussed this question, and although the cases were not decided on that point alone, yet the inference to be drawn from the opinion is that there would be no lien until after the assessment, and that although the lien might not attach until the levy, yet there is such a lien as soon as the assessment is made as will become effective upon an attempt to dispose of the goods. In connection with this, it might be well for you to read Larson vs. Hamilton County, 123 Iowa, 485; 99 N. W., 133, and Iowa Mercantile Co. vs. Blair, 123 Iowa, 290; 98 N. W., 789.

According to your letter, the sale in your case took place prior to the assessment. It is therefore the opinion of this office that these taxes would not be a lien on the stock of goods, and that although the person owning this stock on January 1, 1931, would be personally liable for the tax, yet the tax could not be collected from Dorosin Brothers or by a levy on the stock of merchandise.

SCHOOL DISTRICT: Refund bonded indebtedness.

February 8, 1933. *County Attorney, Marshalltown, Iowa:* We are in receipt of your letter of January 27th with reference to the Albion School District, in which letter you ask for an opinion on the following:

"The School District has no funds on which to operate, on account of said funds being in closed banks, or banks operating under the new law. The District has bonded indebtedness, which, however, does not represent the total amount of bonds which they might legally issue. Your question is whether or not the District might legally refund their present bonded indebtedness, but instead of using the money received from the sale of the new bonds, to completely retire the old bonds, use only what would be necessary to retire the bonds in their ordinary course of maturity, holding in their school fund the remainder of this money."

It is the opinion of this office that the School Board could not legally take such action. In the first place, the money obtained from the sale of the refunding bonds would have to be used for the purpose for which the bonds were issued. There could be no authority for holding that money and using it for some other purpose.

Why would it not be better, if the district has money in the closed banks, to issue the warrants and have them stamped "not paid because of insufficient funds," and then later fund that indebtedness evidenced by these warrants.

This office has recently ruled that warrants may be issued where the money is in a closed bank, or where taxes are delinquent, provided that the officer does not issue warrants in excess of the amount of the anticipated revenues.

WARRANTS: NO FUNDS: CLOSED BANK: NEW BANKING LAW.

February 8, 1933. *Assistant County Attorney, Mason City, Iowa:* We are in receipt of your letter of February 4th, in which you ask for an opinion on the following:

"(1) Where the warrants are drawn and there are no funds.
"(2) Where warrants are drawn and the funds are in a closed bank.
"(3) Where warrants are drawn, but the only funds belonging to the county are in a bank operating under the new banking law."

We will answer these questions in the order stated.

(1) If there are positively no funds, meaning if your funds are all expended, then it is not legal to issue the warrants. If, however, there is a shortage in funds on hand because of the fact that the taxes are delinquent, then it is not illegal to issue the warrants. In other words, your officer can issue the warrants so long as he does not exceed the amount of the anticipated revenue, which should be collected for that particular fund.

(2) Where the funds of the county are in a closed bank and no other fund is available, the warrants may be issued, and they will draw interest from the date they are stamped "No funds."

(3) If the funds are in a bank which has been taken over by the Banking Department under the new law, the answer is just the same as to Question No. 2.

SCHOOL DISTRICT: Issue warrants.

February 8, 1933. *County Attorney, Eldora, Iowa:* We are in receipt of your letter of February 4th, in which you ask for an opinion on the following:

"A School District has sufficient money with which to pay their operating expenses, but said money is in closed banks. Can the District legally issue warrants to the teachers and stamp them 'No Funds,' and if so, after being stamped, do the warrants draw interest?"

You are advised that Section 4318 of the Code answers this question. Whenever a warrant or order cannot be paid in full out of the fund on which it is drawn, partial payment may be made. It is further provided that all school orders draw lawful interest after being presented to the Treasurer and by him stamped "Not paid for want of funds."

If these funds are tied up in a closed bank, the warrant cannot be paid, even though the books of the Treasurer may show the funds on hand.

Therefore, if the amount of these warrants does not exceed the amount of anticipated revenue, it is legal to stamp them "Not paid for want of funds," and from that date on they draw interest.

INSANE: Costs of commitment of one not having legal settlement in Iowa: Liability of state.

February 8, 1933. *Auditor of State, Des Moines, Iowa:* We are in receipt of your letter of January 27th, with which you enclose a copy of the transcript from the Clerk of the District Court of Cerro Gordo county to the Auditor of Cerro Gordo county, showing expense in connection with the arrest of Wm. A. Johnson, who was investigated before the Commission for the Insane. Your question is whether the State of Iowa is liable for the expense of the hearing.

Section 3591 of the Code of 1931 provides as follows:

"Costs and expenses attending the arrest, care, and investigation of a person who has been committed to a state hospital for the insane and who has no legal settlement in this state or whose legal settlement is unknown, including cost of commitment, if any, shall be paid out of any money in the state treasury not otherwise appropriated, on itemized vouchers executed by the auditor of the county which has paid them, and approved by the board of control."

According to the provisions of the above section, if a patient is committed to the hospital for the insane, and has no legal settlement in this state, or if his legal settlement is unknown, the costs are to be paid by the state. However, this section does not provide that the state shall pay the costs, unless the patient is actually committed.

Therefore, if the Commissioners for the Insane have made an order of commitment, and the patient has appealed to the District Court, the costs and expenses are not due from the state until the case is definitely determined on the appeal.

COLLECTIBLE REVENUES: Section 5258 of Code of 1931.

February 8, 1933. *County Attorney, Fort Dodge, Iowa:* On January 20, 1933, you wrote this office asking for an opinion on the meaning of collectible revenues, as contained in Section 5258 of the Code of 1931, and also for an interpretation of Exception 2 under Section 5259 of the Code of 1931.

It is the opinion of this office that the words "collectible revenues," as used in Section 5258 of the Code, should be interpreted to mean revenues that could be collected from a given tax levy. Words and Phrases defines "collectible" as meaning legally demandable, and not that it will actually be paid when demanded.

So far as the interpretation of sub-paragraph 2 of Section 5259 is concerned, we must interpret it to mean just what is stated in the law. Expenses incurred in connection with the operation of the courts are excepted from the operation of Section 5258. This means all expenses incurred in connection with the operation of the courts.

CLERK OF LINN COUNTY COURT: Deposit in Bank, Source Unknown.

February 9, 1933. *County Attorney, Cedar Rapids, Iowa:* We are in receipt of your letters of January 26th and February 6th, in which you ask for an opinion on the following:

"The Clerk of the Linn County District Court has on deposit in the Cedar Rapids Savings Bank & Trust Company approximately $1,100.00. This bank is now operating under the new banking law, and consequently is not paying depositors. The Clerk is not able to trace the source from which the $1,100.00 came that was deposited in this bank. It is probable that in the final liquidation of the bank there will be some loss on this deposit. The question now arises as to what action the Clerk shall take in the matter, whether he shall refuse to pay out any money until the amount of the loss is finally determined."

It is the opinion of this office that, if some funds can be definitely traced into other banks, as stated in your letter, he should pay those in full.

However, where receipts cannot be traced into any of the other banks, or where the clerk is positive that any certain receipts went into this Cedar Rapids Savings Bank & Trust Company, that money should not be paid from the other funds. Of course the question of the liability on his bond might be raised by the persons entitled to receive the funds, but it is not a matter which would have to concern either your office or ours.

FARM BUREAU: Entitled to 1933 appropriation.

February 9, 1933. *County Attorney, Kanawha, Iowa:* We are in receipt of your letter of February 6th, in which you ask for an opinion on the following:

"Is the Farm Bureau organization of Hancock county entitled to receive the 1933 appropriation provided for in Section 2930 of the Code of 1931 based on the membership for the year of 1932?"

You are advised that the Board of Supervisors does not have authority to make this appropriation for 1933, based on the 1932 membership.

BAR DOCKET: Mimeographed or printed.

February 9, 1933. *County Attorney, Forest City, Iowa:* We are in receipt of your letter of February 2nd, in which you advise us that the Clerk of the Court of your county, in the interests of economy, caused the court calendar, generally known as the Bar Docket, to be mimeographed, when in fact Section 11441 of the Code of 1931 uses the word "printed."

You are advised that the word "printed" should not be interpreted in any technical sense, and that what Section 11441 of the Code provides for is the furnishing of a calendar or Bar Docket to the Court and the Bar. It does not mean that it must be furnished in any exact form.

It is therefore the opinion of this office that a mimeographed Bar Docket can be furnished just as well as a printed one.

POOR RELIEF: Proper residence.

February 9, 1933. *County Attorney, Eldora, Iowa:* We are in receipt of your letter of January 25th, in which you state the following:

"A pauper from Hardin county, Iowa, moved with her family to Missouri and stayed there more than a year, except for three weeks that she came back to Iowa on a visit, leaving her children in Missouri during her visit to this state.

"Your question is whether the visit of three weeks is such a break in the residence in Missouri as to permit the woman to legally retain her residence in Iowa for the purpose of poor relief."

You are advised that this three weeks' visit to Iowa would not prevent her from acquiring a legal settlement in Missouri, and that she properly has a legal settlement in that state.

BOARD OF SUPERVISORS: Waiver agreements.

February 9, 1933. *County Attorney, Council Bluffs, Iowa:* We are in receipt of your letter of February 6th, in which you ask whether or not the Board of Supervisors may legally enter into waiver agreements relative to the Avoca State Bank and the Citizens Savings Bank of Avoca.

You are advised that under Section 9239-a1 of the Code of 1931, the Board of Supervisors would have authority to enter into such an agreement, were these banks in the hands of the Banking Department under receivership. The

section of the Code does not include banks which have declared a holiday, nor does your letter state whether these banks at Avoca had merely declared a holiday, or whether they desired to reopen. However, the Banking Department has ruled that this same provision shall apply to the banks operating under the new law and also to those operating on a holiday.

COUNTY RECORDER: Permitted to operate office without deputy.

February 9, 1933. *County Attorney, Independence, Iowa:* We are in receipt of your letter of January 23rd, in which you inform us that your County Recorder desires to know whether or not she could be permitted under the law to operate her office without a deputy.

You are advised that there is nothing in the law to prevent her from doing this. Of course, if she should become ill, the Code provides what county officer shall handle the office for her and perform her duties. She could then, along with this other county officer, name someone to do the stenographic work, but all official acts would have to be performed by the county officer designated under the law to act in her place.

BANKS: Declared holiday: Townships, etc., executive agreements the same as other depositors.

February 9, 1933. *County Attorney, Iowa City, Iowa:* We are in receipt of your letters of January 18th and February 7th, in which you ask for an opinion on the following:

"A number of the local banks in the smaller towns of your county have declared a holiday. Various townships, school districts, towns and the county had public funds on deposit in these banks. The governing bodies of some of the corporations desire to know whether or not they will be authorized to execute agreements in connection with the public funds the same as other depositors of the banks referred to."

This Department is of the opinion that such governing bodies are authorized to execute such agreements and still be protected under the provisions of Chapter 352-A1 of the Code of 1931. In fact, the Banking Department has adopted this rule.

ASSESSOR: Appointment of: Approval of bond.

February 9, 1933. *County Attorney, Mount Ayr, Iowa:* We are in receipt of your letter of January 26th, in which you ask for an opinion on the following:

"C. S. Palmer, Jr., was elected Assessor for the town of Mount Ayr, at the election held in March, 1932, and failed and refused to qualify. Had he qualified, he would have been successor to one C. M. King, the incumbent in office before that election. The Town Council at their regular meeting in December, 1932, appointed one Homer A. Foster as Assessor to take the place of Palmer, who did not qualify. The Mayor approved Foster's bond. The Assessor was a Town Officer, although the township was co-extensive with the town.

"King's bond the year before when elected at the town election was approved by the Board of Supervisors rather than by the Mayor of the town.

"As Palmer did not qualify within the ten days provided by law, King now presents his bond to the Board of Supervisors during the ten days after January 1, 1933. He claims to be entitled to the office as a hold over. His bond was approved by the Board of Supervisors, who had also approved Foster's bond just a day or so before King's bond was approved. The Board then rescinded its action in approving both of the bonds. The Assessor's books were turned over to Foster by the Board of Supervisors, and Foster is at work as such Assessor.

"Your question is relative to who appoints in such cases and who approves the bond, and when this Assessor takes his office."

Section 5632 of the Code provides that the Mayor, Treasurer and Assessor shall be elected by the entire electorate of the city or town.

Section 5663 provides for the filling of vacancies in cities and towns.

Section 1046 of the Code provides that city and town officers shall qualify within ten days after their election has been declared by the Board of Canvassers.

Section 1073 provides that bonds shall be approved by the Mayor, or as may be provided by ordinance, in the case of city and town officers.

You are therefore advised that:

(1) The City Council appoints to fill such vacancies.

(2) The bond of the city or town assessor is approved by the Mayor.

(3) The Assessor takes his office immediately after qualifying, although he has no work to do until the next January.

COUNTY TREASURER: State funds *unavailable.*

February 10, 1933. *Treasurer of State, Des Moines, Iowa:* We are furnishing you with an opinion on the following proposition:

"You make demand on the County Treasurer of Warren County, Iowa, by sight draft for certain state funds in an amount exceeding $2,000.00. The County Attorney of Warren county, S. E. Prall, wrote you, advising that a considerable portion of the taxes which have been collected is tied up in closed banks and is thus *unavailable* to the County Treasurer at this time, and her report of February 2, 1933, shows that the percentage of the available money which belongs to the state, according to her method of figuring, has been overdrawn to the extent of $1,379.77."

You are advised that this office does not agree with the County Attorney of Warren county. Section 5167 of the Code provides that the Treasurer of each county shall, at any time when directed by the Treasurer of State, as provided in Section 142, forthwith pay into the State Treasury any or all of said money due the state and remaining in his hands.

Section 7398 provides as follows:

"Each county is responsible to the state for the full amount of tax levied for state purposes, excepting such amounts as are certified to be *unavailable*, double or erroneous assessments."

The question that we have to decide is just how the word "unavailable" should be interpreted. In order to give this word the proper interpretation, one must take into consideration the other laws of the state which apply to funds in the custody of the County Treasurer. For instance, Chapter 352-A1, being entitled State Sinking Fund for Public Deposits, considers all of this money as though it were deposited by the Treasurer of the county, and when the claims are filed, they are filed by the Treasurer of the county. The legislature, in enacting the laws, never considered that these deposits covered by Chapter 352-D1 and 352-A1 should be considered as belonging partly to the State of Iowa, when the funds were actually deposited by the County Treasurer. The claims are filed by the County Treasurer, and when the money is paid out under the sinking fund law, it is paid to the County Treasurer.

This is because of the fact that the legislature considered that under Section 7398 each county is responsible to the state for the full amount of tax levied for state purposes.

It is the opinion of this office that the word "unavailable" should be inter-

preted to mean unavailable because of the fact that the taxes have not been collected, and that it was never intended by the legislature that it should include funds which had been collected and lost through deposits in a bank.

You are therefore advised that the Treasurer of Warren county should honor your draft, provided the taxes collected on behalf of the state and not yet paid to the state amount to as much as the face of the draft.

February 11, 1933. *Superintendent, Motor Vehicle Department, Des Moines, Iowa:* Acknowledgment is made of receipt of your letter of the 7th inst., requesting an interpretation of House File No. 26 and an opinion upon the following proposition:

"This department at the present time has a car which is at the disposal of the superintendent for use in the course of business through the state and it is customary for him to use it in driving to his home in the evening and returning in the morning. During these trips it is usual to make observations of traffic conditions and traffic violations. This has never been considered 'private use.' Will you please render us an opinion as to what your ruling in this matter is?

"All motor vehicles in this department are assigned to the superintendent and inspectors for the purpose of getting information as to violations of the Motor Vehicle laws. As we interpret this Section, this unquestionably is assigned for police duty. Would you be good enough to render an opinion on this matter as you see it?"

Section 1 of House File No. 26 is as follows:

"No public officer, deputy or employee of any governmental subdivision, having charge or custody of any automobile, machinery, equipment, or other property, owned by a governmental subdivision of this state, shall use or operate the same, or permit the same to be used or operated for any private purpose."

The first question which arises in any effort to interpret this section is what is meant by "governmental subdivision." We have made some investigation and are unable to find where the term has been judicially defined. The word, "subdivision," has been defined to mean a division into smaller parts of the same thing or subject matter. Kansas City vs. Neal, 122 Missouri, 232.

The word, "governmental," has been held to mean, pertaining to government.

Our consideration of this matter forces us to the conclusion that a governmental subdivision of the state is a part of the state or a subdivision thereof, exercising powers of government such as a county or a city, and this interpretation of the words in this particular bill is strengthened by the fact that it refers to automobiles owned by a governmental subdivision of the state. If the term, "governmental subdivision," had been intended to mean a department or bureau of the state government, this phrase could hardly occur because in that case, the title to the automobiles would be in the State of Iowa, whereas, a subdivision, such as a county or city, could hold title to such automobiles. Our conclusion, therefore, is that Section 1 of House File No. 26, does not apply to automobiles owned by the State of Iowa.

Section 2, of House File No. 26, requires that all publicly owned motor vehicles shall bear two labels in conspicuous places on each side of the vehicle and the bureau, department or commission using it, but provides,

"This section shall not apply to any motor vehicle which shall be specifically assigned by the head of the department or office owning or controlling it, to enforcement of police regulations."

The term, "police regulations," is a very comprehensive one and in general may be said to include any regulations that are made by the state under its

police powers. These refer to all regulations made to protect the public health and the public safety and to prevent the perpetration of frauds. A few quotations from the decisions of the courts as set out in First Series of Words and Phrases will illustrate the scope of the term.

"Police regulations are such provisions of law as are designed to protect the lives, limbs, health, comfort, and quiet of citizens and secure them in the enjoyment of their property which can be invoked only for an interference with one's dominion over his own property to prevent such use of it by him or its continuance in such conditions as would be detrimental to the community." State, ex rel, Haeussler vs. Greer, 78 Mo. 188.

"Laws and ordinances relating to the safety, comfort, health, convenience, good order, and welfare of the inhabitants, are styled police regulations." Roanoke Gas Co. vs. City of Roanoke, 14 S. E. 665.

" 'Police regulations,' says Judge Cooley, 'must have some reference to the comfort, safety or welfare of society'." Sloan vs. Pacific R. R. Co., 21 American Reports, 237.

It is obvious from the foregoing that any person using an automobile for the purpose of enforcing regulations concerning motor vehicles and their use upon the public highway is engaged in enforcing police regulations, and therefore, Section 2, of House File No. 26, requiring the labels would not apply to such automobiles.

BANKS UNDER SENATE FILE 111.

February 11, 1933. *Treasurer of State, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

"Should claims be filed against the State Sinking Fund for Public Deposits for public funds on deposit in a bank affected by Senate File No. 111 of the Forty-fifth General Assembly?"

Section 7420-a9, Code of Iowa, 1931, is as follows:

"Whenever any such depository bank is hereafter closed and placed in the hands of a receiver or trustee in bankruptcy, and the amount of the several deposits of public funds deposited therein by authority of and in conformity with the direction of the legal governing council or board which is by law charged with the duty of selecting depository banks for said funds and fixing the amount thereof has been ascertained and fixed by an order of court, the Superintendent of Banking shall then certify such list of public deposits so approved by the court to the Treasurer of State and the Auditor of State."

Section 7420-b1, Code of Iowa, 1931, is in part as follows:

"Immediately upon the closing of a bank, the treasurer having public funds on deposit therein under this chapter, and amendments thereto, shall furnish to the Treasurer of State, a statement of the amount of the deposit, a certified copy of the resolution under which the deposit was made, and any other information demanded by him."

Section 2 of Senate File No. 111, Forty-fifth General Assembly, is in part as follows:

"The Superintendent of Banking, whenever he shall have taken over the management of any such banking institution as provided in Section 1, shall have the right and power, with the approval of the executive council, to proceed to wind up its affairs as provided by law; or may continue the operation of the same, holding all deposits in the same, taking in deposits and carrying on the same under such rules and regulations as he, with the approval of the executive council, may make for the conduct of its business and deemed for the best interests of the debtors and creditors of such institution, including the right to compromise any rights, claims and liabilities of such institution."

It is apparent then, that under Senate File No. 111, Forty-fifth General Assembly, the bank is not closed or placed in the hands of a receiver or trustee

in bankruptcy, but the Superintendent of Banking merely takes over the management of the institution pursuant to the act and to certain rules and regulations made by him for the conduct of business and this management does not place a bank in the status contemplated by Section 7420-a9, Code of Iowa, 1931, and during such management, claims should not be filed against the State Sinking Fund for public deposits. Of course, if it is determined as provided in Section 2 of Senate File No. 111, Forty-fifth General Assembly, that the affairs of the institution should be wound up according to law and a bank is placed in the hands of a receiver, then claim should be made pursuant to Chapter 352-a1, Code of Iowa, 1931.

It is therefore the opinion of this Department that during the period of management of an institution pursuant to Senate File No. 111, Forty-fifth General Assembly, no claim should be filed against the State Sinking Fund for public deposits for public funds on deposit in the institution.

MARGINAL RELEASE OF CHATTEL MORTGAGES: Charge of 25c: County Recorder.

February 11, 1933. *County Attorney, Onawa, Iowa:* We are in receipt of your letter of February 9th, in which you state that the County Recorder of your county has asked you to obtain a ruling from this office regarding the question of whether or not the charge of 25 cents should be made by the County Recorder for marginal release of chattel mortgages. We are herewith enclosing a copy of an opinion furnished by this office since the first of the year.

The writer also notes with interest the second paragraph of your letter, in which you state as follows:

"I advised her that under the provisions of Section 5177 (3) of the 1931 Code of Iowa she should charge 25c for each marginal release, whether of real estate mortgage or chattel mortgage. While it is true that Chapter 142 of the 43rd general assembly, under which this charge for marginal release is provided for, applies in the caption of that Chapter to instruments affecting real estate, it is my opinion that when the law was codified in the 1931 Code and that Code enacted as the stautory laws of Iowa, Section 5177 (3) applied alike to marginal release of both real estate and chattel mortgages. However, I would like your ruling on this question if you are willing to furnish the same to me as County Attorney of Monona county. I think that the ruling of Attorney General on this question should be known so that a uniform understanding of the same may be had in all County Recorders' offices."

In answer to this portion of your letter, I might state that the Code of 1931 has never been adopted by the legislature and that it is only furnished for the convenience of lawyers and other persons who desire to use them. The law, as it appears in the Acts of the 43rd General Assembly, is the real law, and although the codification raises a presumption of the law, yet one has a right to go behind that presumption, in order to determine what the law actually is.

This opinion may not coincide with the writer's idea of what the law should be. However, we must make our rulings on what the law is and not what we think it should be, and for that reason the opinion herewith enclosed was written.

We thank you, however, for the suggestions made in your letter.

TAX SALES CERTIFICATES: Cancellation.

February 11, 1933. *Treasurer of State, Des Moines, Iowa:* You have handed to us a letter dated January 20, 1933, written by C. E. Smith, Deputy Treas-

urer of Scott county. This letter is addressed to you, and asks for an opinion on the following:

"(1) When the new Treasurer went into office on January 1st, he found a check for $5,451.69, issued by the Union Bank & Trust Company, for tax certificates which were delivered to that bank by the former Treasurer. That said Treasurer did not present the check for payment, and that the bank is now in the hands of a Receiver. The letter also calls attention to the fact that these certificates have now been pledged to the R. F. C. at Chicago.

"Your question is, what is the proper method of procedure?"

"(2) The letter from the Deputy Treasurer also advises that he holds an expense voucher check for $151.67, drawn by the Northwest Davenport Savings Bank, covering tax sales certificates."

We will answer Proposition 1 first. We are of the opinion that when the check for $5,451.69 was given by the Union Bank & Trust Company, it was given by the cashier or some other officer of that institution, and that it was not the check of some third party who purchased the real estate at tax sale and issued the check on the bank. Having in mind that this check was issued by the bank itself, it had no right to transfer those certificates to the R.F.C. until the check was paid. The giving of the check was not the payment of the purchase price until the check cleared. Regardless of this fact, it is a question of where more than $5,000.00 is concerned, and although it may result in a lawsuit, it is worth having for that amount.

You are therefore advised that you should immediately cancel the certificates under Section 7257 of the Code of 1931 and resell the real estate. When you cancel these certificates, you should notify the proper persons that the certificates have been cancelled or are being cancelled.

In answer to Proposition 2, we will say that, if this check for $151.67 represents the purchase price of the real estate at tax sale, you should follow the same method as advised in answer to Proposition 1. If, however, this represents items of expense, about the only thing you could do would be to file a claim with the Receiver.

We do not feel that either of these items would entitle the county to come in under the Brookhart-Lovrien law.

SPECIAL SESSION.

February 17, 1933. *Senate Chamber, Des Moines, Iowa:* You requested of me the other day an opinion upon the following proposition:

"Can the General Assembly, when convened in special session, act upon a constitutional amendment with the same force and effect as at a regular session?"

The Constitution of the state in Article 10, Section 1, provides as follows:

"Any amendment or amendments to this Constitution may be proposed in either House of the General Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two Houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the Legislature to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice; and if, in the General Assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to, by a majority of all the members elected to each House, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people, in such manner and at such time as the General Assembly shall provide; and if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become a part of the Constitution of this State."

It will be noted from the foregoing that a proposed amendment, if agreed to by a majority of both Houses of the General Assembly, it shall be referred to the General Assembly elected at the next general election and if agreed to by a majority of both Houses of that General Assembly, it shall be submitted to the people.

The question arises as to what is the General Assembly. The Constitution, after providing in Article 3, that the legislative authority of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives, then provides in Section 2, as follows:

"The sessions of the General Assembly shall be biennial, and shall commence on the second Monday in January next ensuing the election of its members; unless the Governor of the State shall, in the meantime, convene the General Assembly by proclamation."

It is obvious from the foregoing that a General Assembly lasts for a period of two years and that whether convened in regular session or by a proclamation of the Governor, it is still the same General Assembly during that two-year period, and that when convened by proclamation of the Governor it has all the power that it would have in regular session. It follows, therefore, that a General Assembly, meeting in special session, could initiate and pass a resolution amending the Constitution of the state and pass it on to the next General Assembly with the same force and effect as though passed in regular session. In the same connection, it might be borne in mind, that the Constitutional Amendment authorizing the one hundred million dollar road bond issue was initiated at a special session of the 42nd General Assembly. It was agreed to by both Houses of the 43rd General Assembly and subsequently submitted to and approved by the people. An attack was made upon the amendment and the court found the amendment invalid but lays no stress whatever upon the fact that it was initiated at a special session.

EMBEZZLEMENT OF COUNTY FUNDS: County Treasurer and bond liable.

February 17, 1933. *County Attorney, Davenport, Iowa:* On January 28th you wrote this office for an opinion on the following:

"A former Deputy County Treasurer and a man employed as extra help embezzled some of the funds from the office of the Scott County Treasurer, and both of these men are now in the penitentiary in Fort Madison. The man employed as extra help was not bonded. The Deputy Treasurer was bonded for $5,000.00, and the Treasurer for $10,000.00. The embezzlement was discovered in April, 1932. The Federal Surety Company of Davenport, Iowa, was surety on the bonds of both the Treasurer and Deputy up to September 11, 1931. This Company is now in the hands of a Receiver, and it is doubtful if general claims will receive any substantial dividend.

"After September 11, 1931, the Treasurer was bonded by the Hartford Accident & Indemnity Company, and the Deputy Treasurer, by the Massachusetts Bonding & Insurance Company, both of these bonds specifically stating that they would have no liability for anything done prior to September 11, 1931. The Treasurer, the Deputy Treasurer, and the man employed as extra help are all judgment proof."

Your questions will be answered in the order hereinafter stated.

"(1). Do we concur in the opinion given by a former Assistant Attorney General on November 17, 1932, to Fred Porter, the then acting Auditor of State, to the effect that the County Treasurer is liable for the amount embezzled by a Deputy?"

Answer: We concur with the former assistant, in so far as the liability of

the Treasurer is concerned, but if the former opinion also holds that the Treasurer's bondsman is liable, then we would have to disagree to that extent.

We are of the opinion that the County Treasurer is liable under Section 5238 of the Code of 1931, for the reason that under that section he is permitted to appoint one or more deputies or assistants, *for whose acts he shall be responsible.* This section of the Code does not say *for whose official acts,* but merely states for whose acts.

However, we do not say that the Treasurer's bondsman would be liable for defalcations or embezzlements on the part of the deputy. After reading the case of Rose vs. Hatch, 5 Iowa, 149, and most of the Iowa cases since that time relative to the liability of public officers, and their bondsmen, we are convinced that the bondsman is not liable for funds embezzled by the deputy or the clerk, who was employed as extra help, if the Treasurer used reasonable care and diligence in the selection of the deputies and clerks.

We find no case in the Iowa reports directly on the question of embezzlement by a deputy. However, in the case of Rose vs. Hatch, the action was to recover money belonging to the school fund of Allamakee county, which money the defendant had received as Treasurer of the county and failed to pay over to the plaintiff, the School Fund Commissioner. The answer admitted the failure to pay the money to the plaintiff, but alleged that, after the defendant had received the money, it was stolen from the treasury of said county, without any want of reasonable care and diligence on the part of the said defendant in the care and preservation of said money. A demurrer to this answer was overruled by the court, from which ruling the plaintiff appealed. The Supreme Court affirmed the District Court.

In this Rose case, it was held that the duties and responsibilities of the County Treasurer were fixed by his official bond, and that where he shows that he has used reasonable care and diligence in the preservation of the public funds, but, notwithstanding such care, the funds had been stolen, he is not liable for the amount taken. In this case, the bond of the County Treasurer was exactly in the same form as prescribed by Section 1059 of the Code of 1931.

After the decision in the Rose case, several other cases were decided by our Supreme Court, in which the Treasurer was held liable, most of them being cases involving school treasurers. However, those cases were decided under different circumstances and on different provisions contained in the bonds. In none of those cases do we find the bond, which was similar in form to the bond prescribed in Section 1059 of the Code. In most all of the school cases, the case of Rose vs. Hatch is mentioned and distinguished. After several of those cases had been decided against the public officials and their bondsmen, our Supreme Court took a different stand.

One of the latest cases is the case of Prudential Insurance Company of America vs. William S. Hart, et al., 205 Iowa, 801. In that case, the contention of the appellants was that the Clerk of the Court was liable as a public officer for any funds received by him by virtue of his office, as an insurer. The Court said, however, that the officer is not absolutely liable, and is not an insurer of funds in his hands, and that if he complies with the requirements of his bond as to the use of reasonable care, he is not liable.

As hereinbefore stated, we do not find a case in Iowa involving the question of embezzlement by a deputy. We do, however, find the following statement in Corpus Juris, in so far as the surety is concerned:

"The liability of sureties on official bonds extends to the acts of the Deputies and agents of their principal, the negligence or malfeasance of such Deputies and agents being imputed to the principal, *but sureties on official bonds are not liable for the acts of Deputies or agents, not performed within the scope of their official authority.*"

46 C. J., 1071, Section 406.

We also quote from R. C. L. the following:

"The exemption of public officers from responsibility for the acts and defaults of those employed by or under them in discharge of their public duties is allowed in a great measure from considerations of public policy. From like considerations it has been extended to the case of persons acting in the capacity of public agents engaged in the service of the public, and acting solely for the public benefit, though not strictly filling the character of officers or agents of the government."

22 R. C. L., Page 488, Section 166.

"(2). Would the County Treasurer and his surety be liable for the shortage of the man employed as extra help?"

We feel that this question is settled by our answer to the prior question. The Treasurer would be liable, but the surety on his bond would not be liable.

"(3). What procedure should be taken and what steps are necessary in order to start in operation the provisions of Section 5169-a1 to 5169-a10, inclusive, to recover for Scott county some of the funds embezzled, and how should Section 5169-a1 be interpreted with reference to the amount Scott county should be able to recover?"

The proper procedure would be to notify the State Auditor and have a detailed examination made by him, or under his authority, for the purpose of ascertaining the amount of the loss.

You also ask how Section 5169-a1 should be interpreted with reference to the amount Scott county should be able to recover. It is the opinion of this office that Scott county should recover all of the losses, except the amount of the Treasurer's bond. In other words, if the loss was less than the amount of the Treasurer's bond, the county would not be entitled to recover anything under the provisions of Section 5169-a1 and following. However, if the amount of the loss is more than the amount of the Treasurer's bond, the county is entitled to recover all of the loss over and above the amount of the said bond.

THE LEGISLATURE may reduce the salary of elective officers after the term for which they were elected has commenced, and make such reduction of salary applicable to that term.

February 17, 1933. *Senate Chamber, Des Moines, Iowa:* You requested of me the other day, an opinion upon the following proposition:

"Can the Legislature reduce the salary of elective officers after the term for which they were elected has commenced, and make such reduction of salary applicable to that term?"

It should be noted that the Constitution of the state provides in Article 5, Section 9, that the salary of each Judge of the Supreme Court and of the District Court shall not be increased or diminished during the term for which they have been elected. With reference to the compensation of members of the Legislature the Constitution contains this limitation in Article 3, Section 25:

"but no General Assembly shall have power to increase the compensation of its own members."

These are the only limitations in the Constitution upon the power of the Legislature to change the compensation of public officers during the term for which they have been elected and under common rules of construction, a failure to mention such other elective officers gives rise to the inference that

it was not the intention to place any limitation upon the right to increase or decrease their salary. Moreover, the Supreme Court of the state in the case of Iowa City vs. Foster, et al., 10 Iowa, 189, where an attempt was made to change the compensation of a city treasurer during the term for which he had been elected held that such compensation could be changed. The court said:

"The principal question presented in the foregoing facts, is whether the council of Iowa City had the authority, the legal power, to change the compensation of the treasurer of that corporation, during the term of office for which he had been elected. The answer to this question depends upon another, which is, whether he is a public officer, or an officer of a public corporation, or whether he is the officer of a private corporation. That a town or city is a public corporation, there can be no doubt. Nor can there be any that the office and the compensation of such officers are subject to the control of the body which creates or controls the office and the officer, such as the legislature, or the municipal council, or the like, according to the nature of the case. The principle is that public officers, and the officers of public corporations, are created for the public benefit, and that they and their offices, duties and emoluments, are governed by considerations relating to the common good, and that there is nothing in the nature of contract pertaining to them, in the sense of the constitution."

It seems clear that the Legislature of the state, acting in the public interest and for the public good, has complete power over all the officers of the state, whether elective or appointive and has the power if it desires to abolish the office entirely except for the limitation placed on the exercise of that power by the Constitution itself and that limitation, so far as salary is concerned, applies only to the judges and to the increase of compensation of members of the Legislature.

NOTE: Check given: Payment value.

February 18, 1933. *County Attorney, Dubuque, Iowa:* We are in receipt of your letter, in which you ask for our opinion on the following proposition:

"A issued a check to B for $4,000.00 in payment of A's note. B had possession of the note, agreed to and did mark the same paid, presented the check for payment, and the check was returned marked 'Insufficient Funds.' A promised to call on B for his note, which was marked 'Paid,' but did not do so. Your question is whether, under Section 13047 of the Code of 1931, A received a payment value for which it could be prosecuted."

You are advised that our Supreme Court has held, under facts similar to those stated by you, that when A gave the check as a payment on an account, he did not receive a thing of value. The reason for this holding is that under former holdings the giving of a check as a payment on an account or on a note did not constitute a payment until the check cleared. In other words, if I owed you an account and gave you a bad check in settlement of the account, you should sue me on the account, rather than on a check.

SHERIFF: Mileage and expense fees.

February 20, 1933. *County Attorney, Centerville, Iowa:* We are in receipt of your letter of February 9th, in which you ask for an opinion on the following:

"(1). Is the Sheriff allowed to collect mileage and also necessary expenses, such as for meals and lodging, in conveying a prisoner to the penitentiary at Ft. Madison in his automobile?

"(2) Is the Sheriff entitled to collect mileage and hotel bill for attending an annual meeting of Sheriffs at Des Moines in December, 1932, which meeting you say was called by the Attorney General?"

We will answer these propositions in the order stated.

(1) Section 5191 provides:

"The Sheriff shall charge and be entitled to collect the following fees:

10. Mileage in all cases required by law, going and returning, ten cents per mile, provided that this subsection shall not apply where provision is made for expenses, and in no case shall the law be construed to allow both mileage and expenses for the same services and for the same trip.

14. For conveying one or more persons to any state, county, or private institution by order of court, or commission, he shall be allowed his necessary expenses, for himself and such person or persons, and in addition thereto, forty cents per hour for the time necessarily employed in going to and from such institution, same to be charged and accounted for as fees. Should the sheriff need any assistance in taking any person to any such institution, the same shall be furnished at the expense of the county."

According to the first of these sub-paragraphs, it is provided that mileage shall not be charged where provision is made for expenses. Sub-paragraph 14 provides for the paying of expenses on a trip to the penitentiary. Therefore, the Sheriff is entitled to his actual expenses in making that trip. He is not entitled to mileage. However, if he has two or three prisoners to take to the penitentiary, it would be cheaper to pay him the mileage and also his necessary expenses, such as meals, than it would be to pay the actual expenses and take into consideration railroad fare.

(2) Under Chapter 615 of the Code, the Attorney General has authority to call the peace officers to any part of the state. Therefore, if the meeting of the Sheriffs was called by the Attorney General, they are entitled to the reasonable and actual expenses of the trip.

TAX EXEMPTION: Civil War Veteran.

February 20, 1933. *County Attorney, Mount Pleasant, Iowa:* We are in receipt of your letter of February 9th, in which you ask concerning the property of a civil war veteran.

We take it from your letter that this civil war veteran died in November, 1932, and although you do not state whether or not he had been allowed an exemption, we assume that the exemption had been allowed to him as of January 1, 1932, on taxes which would be due in 1933.

"Your question then is whether or not taxes would have to be paid on this property."

This Department just recently ruled that the exemption being allowed to the veteran as of January 1, 1932, and during his lifetime, it could not be affected by his death later in the year. The exemption was allowed to him, because he was alive and owned property on January 1, 1932. It was the 1932 tax on which he was allowed the exemption, and because he later died during that year, it would not give the County Auditor or any other officer the right to charge that tax up against the property and collect it from the heirs of the deceased veteran.

SCHOOL FUND MORTGAGES DELINQUENT: Action in re mortgagors.

February 20, 1933. *County Attorney, Osage, Iowa:* We are in receipt of your letter of January 27th, in which you state that several school fund mortgages in your county are delinquent, in so far as interest is concerned, and that the taxes are unpaid, and you ask for our opinion in the matter.

You are advised that Sections 4498, 4499 and 4500 of the Code of 1931 state the law concerning these mortgages. You are also advised that, if some

arrangement can be made with the mortgagors for a payment of the interest in small installments, it might be well to be lenient with them, especially in view of the present depressing times. However, if you are satisfied that the mortgagors expect to continue in the occupancy of the real estate as long as possible without paying interest or taxes, and then throw up the land whenever an action is commenced, you might just as well commence the action now.

You are advised, however, that school fund mortgages do not outlaw, and further that the lien of the school fund mortgage is superior to a tax lien, and superior to any rights obtained by purchasers of the real estate covered by such mortgages at the tax sale.

BOARD OF SUPERVISORS: Bank under supervision of state banking department: Designate as depository for county funds.

February 20, 1933. *County Attorney, Bloomfield, Iowa:* We are in receipt of your letter of January 28th, in which you ask for an opinion on the following:

"On the 27th day of January, 1933, the Davis County Savings Bank was taken over by the State Banking Department under Senate File No. 111, and said bank is now under the supervision of the State Banking Department. The Board of Supervisors of Davis county, Iowa, would like to know as to whether it would be legal for them to designate the Davis County Savings Bank, which is now under the supervision of the State Banking Department as a depository in which to place county funds, and if so, whether it would be the proper thing to do to draw a resolution designating this bank as a depository."

You are advised that it would be legal for the Board of Supervisors to designate the Davis County Savings Bank operating under Senate File 111 as a depository of public funds. However, under the rule of the Banking Department, it would not receive any interest on these funds. This might mean that the County Treasurer or other officers would be personally liable to the state sinking fund for the 2 per cent interest, as provided in Section 7420-a14.

SCAVENGER SALE PROPERTY: Time limit.

February 20, 1933. *County Treasurer, Marengo, Iowa:* We are in receipt of your letter of February 9th, in which you ask for an opinion on the following:

"Our attorneys seem to differ in their opinion as to the limit of time on scavenger sale property. Some of them hold the property so sold remains in possession of the former owner for three years more before a deed could be issued. Others hold that the three years redemption period had expired before the scavenger sale was made, and all that is required is a ninety-day notice of intention to take deed."

We take it that you mean by scavenger sale, the ordinary tax sale, which is held on the first Monday in December, as provided by Section 7244 of the Code of 1931.

Section 7279 provides that after two years and nine months from the date of the sale, the holder of the certificate of purchase may proceed with the proper notice, in order to be in a position to obtain his deed. In other words, under Chapter 348 of the Code of 1931, the holder of the certificate must wait at least two years and nine months before giving his ninety-day notice. This would mean that three years from the date of the sale must elapse before he is entitled to a deed.

There is no provision in the law which allows the purchaser the use of the real estate during that three years. That right remains in the former owner or anyone to whom he might transfer or convey the property or use thereof.

TAX PENALTY: Waive penalty on personal taxes.

February 20, 1933. *County Attorney, Mason City, Iowa:* We are in receipt of your letter of January 24th, in which you state the following:

"We have waived the sale of property under tax rights until February 28 instead of December 5th as has been the prior custom. For that reason, the penalty does not attach until after the sale has taken place. Persons owing personal tax are now complaining that they have been assessed a penalty of five per cent on December 1st and another five per cent on January 1st, and the board of supervisors are asking whether it is possible for them to waive the penalty on personal taxes in the same manner that they have on land tax."

Will you please advise us where you would find any authority for assessing a penalty of 5 per cent on December 1st and another 5 per cent on January 1st? We find no such provision in the Code.

We do find, however, that under Section 7215, on all personal tax not paid on or before the first Monday in December, a penalty of 5 per cent shall be added and collected, in addition to the 1 per cent per month penalty herein provided. We do not find any authority for adding another 5 per cent on the first day of January.

MANDATORY ROAD LEVIES: Refund: Board of Supervisors.

February 20, 1933. *County Attorney, Humboldt, Iowa:* We are in receipt of your letter of February 17th, in which you ask whether or not, since the Legislature has passed an act by which the so-called mandatory road levies are made optional, the Board of Supervisors could refund these levies.

Of course you understand that to refund the tax means to pay back money which has already been collected, while to remit a tax means to waive the collection of one which has not yet been collected.

However, this office is of the opinion that the levy having once been made, the Board of Supervisors could not waive or cancel it, especially since we are now on the new year, while the levy was made in 1932.

CIGARETTE PERMIT: Moving business next door: Forfeit permit?

February 20, 1933. *County Attorney, Mason City, Iowa:* We are in receipt of your letter of January 28th, in which you ask whether or not a person operating a store and holding a cigarette permit, by moving his place of business to the next door, forfeits his permit.

You are advised that he does not forfeit the permit, nor is it necessary for him to pay any additional sum for a new permit. He should take this permit to the city clerk and have a new permit issued in lieu of the old one, showing the change of address, and then forward the blue copy to the Cigarette Department at the State House.

PARTNERSHIP: Personal tax assessment: Partners liable.

February 20, 1933. *County Attorney, Mason City, Iowa:* We are in receipt of your letter of January 28th, in which you ask for an opinion on the following:

"The personal tax assessor made an assessment against the partnership entitled 'Block Motor Sales Company.' The Treasurer of the county recorded the lien under Block Motor Sales Company, and under the name of Jones, one of the partners, she makes a notation, 'See Block Motor Sales Company'."

You are advised that partnership property should be listed in the name of the partnership. There is nothing else necessary, in order to make the partners liable. It should not be listed in the names of the individual partners.

CLERK OF COURT: Liable for money lost in bank failure.

February 20, 1933. *Mr. E. P. Murray, LeMars, Iowa:* We are in receipt of your letter of January 31st, in which you ask whether or not the Clerk of the Court is personally liable for money deposited by him and lost through a bank failure.

Without taking a lot of time to discuss this question, I believe that the case of Prudential Life Insurance Company vs. Hart, et al., 205 Iowa, 801, will answer your question fully. In that case, there is a very good discussion of the law, and our Supreme Court there held that, if the Clerk of the Court used due care and diligence in designating the depositories for his funds, he is not liable.

SCHOOL TREASURER: Bill for tuition.

February 21, 1933. *County Attorney, Pocahontas, Iowa:* We are in receipt of your letter of February 16th, in which you submit to us the following question for an opinion:

"The local Board of Supervisors is taking care of a family who are residents of your county, but have moved to the town of Early, Iowa, in another county. The Board is paying house rent in that county to which they have moved. The School Treasurer of the District, into which this family has moved, has now filed a bill for the tuition of the children.

"The question is, must your county pay the tuition?"

You are advised that settlement and residence do not mean the same, and one may have a residence in a county, without having a legal settlement. This family moved into the adjoining county, and the children started to school in that district. The fact that your county is assisting in the payment of the rent does not deprive the children of the right to attend school in that district without paying tuition.

It is the opinion of this office that the school district, into which this family has moved, does not have a right to collect tuition from your county nor from the district, from which the family moved. If there were any possible way of collecting any tuition, it could not be collected from the county, but would have to be collected from the school district. However, we do not feel that it could even be collected from the school district.

TAX FERRET: Collect taxes on property listed with assessor.

February 21, 1933. *County Attorney, Montezuma, Iowa:* We are in receipt of your letter of February 14th, in which you ask whether or not the Board of Supervisors has authority to hire a tax ferret and pay him for collecting taxes on property which he found had been listed with the assessor, but not brought forward on the tax books.

In connection with this question, you state the facts concerning the contract of one T. E. Graham. As we understand from your letter, this matter has been before the State Auditor and the Attorney General during prior administrations, and that this fee has already been paid to Mr. Graham.

You also inform us that Mr. Graham was working on a contract which provided for compensation per diem. We are of the opinion that this money could not be recovered from him. In the first place, the taxes had not been brought forward on the tax books. In the second place, he was working on a per diem for salary and earned his money regardless of this particular item. In the third place, your county paid him the compensation and cannot now recover it.

COUNTY TREASURER: License fees as cash items.

February 21, 1933. *Superintendent of Motor Vehicle Department, Des Moines, Iowa:* We are in receipt of your request for an opinion on the following:

"Mr. Frank T. Metcalf, who was Treasurer of Marion county from 1929 to 1932 inclusive, carried certain checks which he had received during those four years as cash items, said checks being given to him in payment of license plates and automobiles, and totaling $110.00.

"You inform us that his contention is that the automobile department of the State of Iowa should accept these checks and carry them as cash items.

"Your question is whether or not this money can be collected from the said Frank T. Metcalf or from the County of Marion."

Section 4904 of the Code of 1931 provides that the license fees shall be paid to the County Treasurer at the same time the application is made for the registration or re-registration of said motor vehicle or trailer.

Section 4999 of the Code of 1931 provides how the money received from license fees shall be distributed.

Section 5003 of the Code of 1931 provides as follows:

"The treasurer of state shall maintain in the state treasury, of the money collected as in this chapter provided, a cash balance sufficient to pay the anticipated expenditures by the highway commission for the ensuing month, exclusive of the amount in the funds provided for in subsections 1 and 2 of section 4999. When necessary to restore the cash balance in the state treasury, he shall draw upon the treasurer of each county of the state in proportion to the amounts in their possession, respectively, a sum sufficient in the aggregate to restore said cash balance. Such drafts shall be honored by the treasurer of each county upon presentation."

You will note from the reading of these three sections above referred to that it is the duty of the County Treasurer to collect the fees at the time the vehicles are registered. It is also his duty to honor such drafts as shall be drawn by the Treasurer of the State. There is no question but what the bond of the County Treasurer is liable for the payment of these checks. However, we do not believe that it is necessary for you to look to that bond. You are entitled to hold the county of Marion for this money, and the county of Marion can then collect the $100.00 from Metcalf or his bondsmen, if it so desires.

BALLOT, ORDER OF NAMES:

February 22, 1933. *County Attorney, Eagle Grove, Iowa:* We are in receipt of your letter, in which you ask for an opinion on the following:

"One candidate for mayor left his nomination papers with the clerk several days before the time for filing, with the request to file them the first thing on the first day for filing, and the other candidate was present when the clerk arrived at his office on the first day for filing. Your question is, who would be entitled to have his name appear first on the ballot?"

You are advised that under Section 771, the City Clerk has charge of the printing of the ballots which would include the placing of the names on the ballot in the form substantially as provided under Section 760 of the Code, the word "substantially" meaning as to form only, and not as to the position of the political parties on the ballot. We do not believe it makes any difference which one of the candidates filed first.

BANKS AND BANKING: Rules and regulations as to banks operating under Senate File 111, 45th G. A.

February 24, 1933. *Superintendent of Banking, Des Moines, Iowa:* We hereby confirm and approve the following opinions given you verbally concerning

the management of banks operating under Senate File No. 111, Acts of the Forty-fifth General Assembly:

1. That trust funds set up in the bank by an order of court and accepted by said bank, with the provision that certain moneys should be paid out for support, taxes and ordinary expenses of the beneficiaries at regular intervals, should be paid, and the Superintendent of Banking, as Manager, has the right to continue said payments while operating the said bank whenever there is cash on hand available for such purposes.

2. That savings accounts may be transferred from one person to another as security for money advanced, provided it is all kept in the old account and the party transferring the account does not owe the bank.

3. That all drafts outstanding at the time the bank is taken over, shall be paid.

4. That a customer of the bank having a deposit and owing the bank, shall have the right to an offset in his personal account carried in the same way. However, he does not have the right to purchase over accounts for that purpose nor to use accounts of his family or anyone else.

5. That the Superintendent of Banking, as Manager, has the right to preserve the assets of the bank at book value which were put up as security under Section 9222-c3 of the Code of Iowa, 1931, and which might otherwise be sacrificed at a price the Superintendent deemed unsatisfactory, by the exchange of other securities, or cash, to the end that there be no sacrifice of a bank's assets which might in the future be worth more than could be obtained under a forced sale.

6. If a majority of depositors and 75 per cent of the total deposit liability of said bank desire to reorganize the bank under Section 4 of Senate File No. 111, Acts of the Forty-fifth General Assembly, compromise of claims and liabilities of such institution may be made in accordance with said Depositor's Agreement (Sec. 4). If the officers and stockholders of any of said banks fail to work out a plan of reorganization that is properly approved and accepted as provided in the said Senate File No. 111, Acts of the Forty-fifth General Assembly, within six months from the date that the management of such bank was taken over by the Superintendent of Banking, then the Superintendent of Banking with the approval of the Executive Council, may order the winding up of the affairs of such bank as provided by law, or may propose a plan of reorganization which he deems to the best interests of the depositors.

7. Depositors shall have the right at all times to be represented by men of their choice in all negotiations regarding the plan of reorganization. The proposed plan of reorganization may or may not include the statutory assessment liability on stockholders since any reorganization plan is contingent, among other things, upon the approval of the majority of the depositors holding 75 per cent of the deposits, and they have it in their discretion to ask for such assessment. The said statutory assessment on stockholders is not waived by the Department of Banking by the approving of a plan of reorganization and the assessment provided by law on stockholders of a bank may be enforced, if necessary, at any time.

8. Salaries to employees and officers of such banks under Senate File No. 111, Forty-fifth General Assembly, must be decreased and reduced in proportion to the decrease in earnings which may result from the change and operation, and if the Superintendent of Banking, as Manager, believes that any salary is too high or that the services of any officer or employee is not necessary, then the Superintendent of Banking, as Manager, shall immediately reduce salaries and remove any officers and employees from active duties in the bank, not by him deemed necessary.

9. During the period of management by the Superintendent of Banking, new deposits of public funds shall not draw interest. The public funds on deposit when the bank was taken over by the Superintendent of Banking, shall draw interest and the interest shall be paid as provided by law in the event the income of the bank on old assets is deemed by the Superintendent of Banking, as Manager, as sufficient.

10. Safety Deposit Box rentals may be charged against the old account

provided they go into the profit account of the old bank and accrue for the benefit of the depositors of the same.

11. Cashier's checks and certified checks which represent an actual transfer of funds, and purchased and used in place of a draft, shall be paid by the Manager of such bank. However, if there is any question at all, each check must be considered separately.

12. Where a depositor of the bank is in possession of space in the bank's building under written lease and the lease is between such bank and the depositor, all rent accruing thereunder during the term of said lease may be offset against the deposit of the lessee in such bank, the offset to be made on the due date of each installment under the said lease and during the time that the lessee is in actual possession of the premises under said lease. If, however, there is no written lease for a definite term, then there is to be no offset allowed.

13. Where such bank is holding certain funds as agent for a customer and was before the date the management of the bank was taken over by the Superintendent of Banking, ordered by the customer to do and perform certain things and acts involving the payment of money, and such payment was not made, then the fund shall be returned to the customer upon his demand. When, through neglect or fault on the part of the bank, it failed to set aside funds when it was so acting as agent and directed to do so by its customer, and the said fund has not been paid out as directed, then the same is to be turned to the customer.

EXEMPTION FROM TAXATION: Barber.

February 28, 1933. *County Attorney, Indianola, Iowa:* We are in receipt of your letter of February 20th, in which you ask for an opinion on the following:

"Is a barber entitled to an exemption from taxation to the amount of $300.00 on his tools?"

Section 6944-17 provides that the tools of any mechanic, not to exceed $300.00 in actual value, shall be exempted from taxation.

In view of the fact that the Supreme Court has, in the case of Hoyer vs. McBride, 202 Iowa, 1278, classed a barber chair, case, etc., as tools, it almost makes it mandatory on us to rule that they are exempted from taxation to the amount of $300.00.

SOLDIERS' RELIEF COMMISSION FUNDS: Commissioner liable when bank closes?

February 28, 1933. *State Bonus Board, Des Moines, Iowa:* We are in receipt of your letter of February 24th, in which you ask for an opinion on the following proposition:

"When the Soldiers' Relief Commission Funds are deposited in a bank to the credit of the County Soldiers' Relief Commissioner, by name, but as County Soldiers' Relief Fund, subject to checks drawn by this Commissioner on this fund for the purposes provided by law, is this Commissioner liable for these funds when the bank closes?"

Section 5389 of the Code of 1931 provides, with reference to the Soldiers' Relief Commission:

"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."

Section 5392 provides for disbursements as follows:

"The fact that the commissioner is required to give bond does not mean that he is an insurer of the funds. He must, as in the case of other officers, use reasonable care and diligence in the preservation of the funds."

Section 5392 provides that the Auditor shall issue a warrant to the Commission for the sums awarded, and that the Commission shall proceed to disburse the same to the parties named in the list, or that the disbursements may be made in any other manner the Commission may direct. Under this section, it stands to reason that the Commissioner would either have to deposit the funds in a bank, lock them in a vault, or carry them on his person. If he used reasonable care and diligence in depositing these funds in the bank, and was not negligent in disbursing the same, then it is our opinion that he would not be liable for the funds so deposited. There is no question but what he is a public officer, and that one of the duties in connection with his office was handling these funds. For that reason, he can only be held to the reasonable care and diligence which is required of other officers.

SOLDIERS' RELIEF FUND: Issue warrants.

February 28, 1933. *State Bonus Board, Des Moines, Iowa:* We are in receipt of your letter of February 22nd, with which you enclosed a request from F. R. Purinton of Maquoketa for an opinion on the following:

"1. Can the Auditor refuse to issue warrants during any current year from the soldiers' relief fund, if overdrawn, in anticipation of taxes to be collected the following year?

"2. Can the Auditor refuse to issue warrants against any current year's anticipated fund?

"3. In case insufficient amount of taxes are paid during any current year to raise the full amount of the soldiers' relief fund, which has been levied, are we in a position to require them to raise this amount through some other method?"

We will answer these questions in order.

1. If the soldiers' relief fund is overdrawn by reason of the fact that all of the money anticipated for that particular year has been spent, then it is our opinion that the Auditor can refuse to issue warrants on the fund in anticipation of the taxes to be collected the following year.

2. If all of the revenue anticipated has not been spent, but if there is not sufficient money in the fund because of the fact that taxes have not been paid, then the Auditor has authority to issue warrants up to the amount of the anticipated revenue for that particular year. In other words, if the taxes for 1933 are not being paid, or if paid into the treasury, and are tied up in a closed bank, then the Auditor would have authority to issue warrants up to the amount of the collectible or anticipated revenue.

3. We really believe that our answers to the first two questions will answer your third question. However, if the taxes are not paid during the year and your fund does not receive as much as anticipated, we know of no way by which this money could be raised for that particular year, except by issuing the warrants in anticipation of the payment of taxes.

LICENSE FEE: Restaurants and drug stores: Unincorporated towns.

March 1, 1933. *County Attorney, Mason City, Iowa:* We are in receipt of your letter of February 21st, in which you ask for an opinion on the following:

"The Trustees in a township in your county have required a license fee from restaurants and drug stores on the theory that they come within the provisions of Section 5582-C1. Your question is whether or not a drug store selling soft drinks and restaurants selling prepared foods and drinks, but which furnish no entertainment, would be subject to Section 5582 of the Code of Iowa, such restaurants and drug stores being located in unincorporated towns."

An unincorporated town is defined by Section 5623, and is by that section placed in the class of villages.

Section 5582 of the Code of 1931 provides for the licensing of road houses, etc.

Section 5582-c1 defines a road house as follows:

"A roadhouse, for the purpose of the preceding section, shall be construed to mean any building or establishment open to the public and located on or accessible to a road or public highway outside the limits of an incorporated town or city where entertainment, prepared food or drink is furnished to the public generally for hire, sale or profit."

Under the provisions of this section, we can say that the township trustees would have a right to require such license.

EXEMPTION FROM TAXATION: Widow of Civil War Veteran.

March 2, 1933. *County Attorney, Montezuma, Iowa:* We are in receipt of your letter of February 16th, in which you ask for an opinion on the following:

"The widow of a civil war veteran was drawing a pension and was entitled to the soldiers' exemption. She remarried, and after her second husband died, she again claims an exemption from taxation. The question is whether or not she is entitled to receive it."

That part of Section 6946 of the Code of 1931 applying to this particular case reads as follows:

"The following exemption from taxation shall be allowed:

5. The property to the same extent of the widow remaining unmarried * * *."

The Federal Government recognizes the fact that, if the widow remarries and the second husband dies, she is entitled to again claim rights to a pension by virtue of being a widow of the first husband.

This exemption law is one which is entitled to a broad practical construction, and for that reason it is our opinion that, when the second husband dies, the widow is entitled to again ask for, and receive, benefits under the exemption statute, by virtue of her being a widow of the first husband, who was a civil war veteran.

LEVY: Diversion of funds.

March 2, 1933. *County Attorney, Marshalltown, Iowa:* We are in receipt of your letter, in which you ask for an opinion on the following:

"1. What is the meaning of the last clause of Section 5839, reading as follows:

'No further levy for said purpose shall be made'?"

This clause means that no further levy shall be made until the question is again submitted to the voters, as provided in the other sections of that chapter.

"2. A levy was spread a year ago, and the funds are now collectible and are being collected. No band is under a regular contract in the city, except as to payment for actual services made, with exception of the director, who is hired until 1934. The question is, can this money be diverted to some other purpose?"

Section 5839 provides for the submission to the voters of the following question:

"Shall the power to levy a tax for the maintenance or employment of a band be cancelled?"

This provision just quoted makes no provision, nor does any other part of Chapter 296 provide for diverting funds in case such a proposition is submitted and carried.

We do not believe it would be absolutely necessary for the city council to employ or maintain a band during that year, but we are of the opinion that the funds could not be diverted to some other purpose, unless the law provides for a transfer.

FARM BUREAU: Certified statement filed: Paid up membership.

March 2, 1933. *County Attorney, Denison, Iowa:* We are in receipt of your letter of February 10th, in which you submit to us the two questions relative to the Farm Bureau. Your questions and our answers are as follows:

"1. The Farm Bureau certifies to the Board of Supervisors it has 200 or more bona fide members. Does this mean the members must be paid up at the time this certified statement is filed?"

It does not mean that the membership dues must be paid at the time the statement is filed. It does mean, however, that the members should be bona fide members for the year in which the statement is filed. In other words, if this certified statement is filed in January of 1933, it is not necessary that the membership dues actually be paid at that time. It is necessary, however, that the association and the officers certifying to the membership list know that the members are good faith members for the year of 1933. The certificate should not be made from the 1932 membership list. I might renew my membership in the Farm Bureau for the year of 1933 on January 15th, and promise to pay my dues on February 1, 1933. If on January 15th I actually renewed my membership in good faith, and did not allow my name to be placed on the list for the mere purpose of assisting the Bureau in getting its 200 members, and there was no conspiracy between the Bureau and myself that my name was merely being placed on the roll for the purpose of assisting in getting the appropriation, then I am a bona fide member, regardless of the fact that I did not have the money to pay my dues on January 15th.

"2. The Bureau certifies in this statement that it has pledges which, together with the dues, aggregate $1,250.00. Is it necessary that this money be in the hands of the Bureau at the time the certified statement is filed with the Board of Supervisors?"

It is the opinion of this office that this money does not have to be collected prior to the filing of the certified statement. The word "dues" means sums required to be paid in support of the society and for the purpose of retaining membership therein. The word "pledge" means a promise to pay, and is interpreted by this office to mean about the same that the word "subscription" meant under the old law, which was in force at the time the case of Jefferson County Farm Bureau Association vs. Sherman was decided. Therefore, if the aggregate of the dues and pledges totals $1,000.00, the Bureau has a right to its appropriation, regardless of whether or not all of the money has been collected. The principal thing is that the members must be members in good faith and the pledges should be made in good faith.

MEANING OF DUES AND PLEDGES: Board of Supervisors: List of members filed as basis for appropriation.

March 2, 1933. *County Attorney, Waterloo, Iowa:* We are in receipt of your letter of February 17th, in which you ask for an opinion on the two questions herein set out:

"1. What is the meaning of dues and pledges, as used in Section 2930 of the Code of 1931?"

a. The word "dues," as defined in the case of Jefferson County Farm

Bureau vs. Sherman, means the amount which one is required to pay, in order to retain his membership in a society or club.

b. The word "pledge" is defined as a promise or an agreement by which one binds himself to do or refrain from doing something. It has also been defined as a solemn promise or a contract.

It is therefore the opinion of this office that dues and pledges are not synonymous and that "pledges," as used in Section 2930 does not mean dues pledged. On the other hand, we think it means about what "subscription" meant under the old law, which was in force at the time the Jefferson County Farm Bureau case was decided.

We are therefore of the opinion that the section means that there should be 200 members, and that the aggregate of the dues paid, or which the member is legally obligated to pay, and sums pledged or subscribed to the association totals $1,000.00.

"2. Does the Board of Supervisors have a right to require that, in addition to the certificate, a list of the individual members be filed therewith as a basis for the appropriation?"

There is nothing in the law which requires a list of the individual members to be filed along with the certificate as a basis for making the appropriation.

FARM BUREAU: Board of Supervisors: Appropriation provided for in Section 2930: Right to inspect membership list.

March 2, 1933. *County Attorney, Indianola, Iowa:* We are in receipt of your letter of February 20th, in which you ask for an opinion on two questions, as follows:

"1. When the Farm Bureau Corporation is organized in compliance with Chapter 138 of the Code of 1931 and has filed the certificates required by Section 2930 with the Board of Supervisors, is it mandatory that the Board of Supervisors make the appropriation provided for in that Section?"

In answer to this question, we will say that on January 18th this office furnished an opinion to Roger Warren, County Attorney at Bedford, Iowa, in which it was stated that the Board of Supervisors had certain rights under this law. There is no question but that the word "shall," as used in Section 2930 makes it mandatory that such appropriation be made, provided certain other requirements have been complied with.

These requirements are:

a. The articles of incorporation outlined in Section 2926 must be filed.

b. The certificate of the Secretary and Treasurer to the effect that the organization has at least *200 bona fide* members, whose aggregate yearly dues and pledges to such organization amount to not less than $1,000.00 must be filed.

c. The association must be one organized to cooperate with the United States Department of Agriculture, the State Department of Agriculture, and the Iowa State College of Agriculture and Mechanical Arts.

In addition to this, it is our opinion that the Board of Supervisors have certain rights. Section 2930 of the Code should be construed with the other provisions of Chapter 138. Section 2938 gives the Board authority by itself, or by a person duly appointed, to inspect the books, papers and records of such an association. We therefore rule that the Board has authority to make such investigation as it would make in regard to any other appropriation, and finding that the law has been complied with and that the members as shown by the books of the association are actually bona fide members, it becomes mandatory on the part of the Board to make the appropriation. We

might add that the Board should in this matter, as well as in all other matters, maintain a neutral attitude. Its duty is to carry out the mandate of the law as enacted by the legislature without regard to the person's or organization's interest. The personal feelings of the Board, or of any of its individual members, in regard to the wisdom or justice of the law is immaterial.

The whole question is whether or not the members are actually good faith members, and if they are, it is the duty of the Board to make the appropriation.

"2. When a corporation is organized under Chapter 138 of the Code, does the Board of Supervisors of the county have a right to inspect the membership list; and if so, may the Board copy the same or divulge the membership list to a taxpayer or anyone else upon demand or otherwise; or must such information be held confidential by the Board and any person appointed by it?"

It is the opinion of this office that the Board of Supervisors has a right to inspect the membership list, in order to be assured that no fraud is committed. In other words, it has a right to know that all of the persons named on the membership list are good faith members. There is, however, no reason why they should copy this list for the purpose of exhibiting it to the public or for the purpose of divulging the names of the members.

FARM BUREAU: Dues for 1933 not paid: Entitled to be considered member?

March 2, 1933. *County Attorney, Jefferson, Iowa:* We are in receipt of your letter of February 14th, in which you ask for an opinion on the following:

"Is a Farm Bureau member, whose dues were paid for the year of 1932, but whose dues for the year of 1933 have not been paid at the January meeting, when the certificate is made to the Board of Supervisors, as provided by Chapter 138 of the Code of Iowa, entitled to be considered a member?"

Article 4, as contained in Section 2926, and cited by you, applies to the member as far as his relation to the association is concerned. It has no reference to the membership list, in so far as the dealings between the association and the county are concerned.

It is the opinion of this office that, if the member, whose dues were paid for 1932, is a bona fide member for 1933 and has merely delayed in payment of his dues, he can be counted as a member. If, however, there is no condition existing which entitles the association to count him as a member for 1933, then he is not a bona fide member and his name cannot be used for the purpose of obtaining the appropriation.

DEPUTY OR CLERK: The County Auditor has a right under the law to name a fourth deputy in a county having a population in excess of that provided by Section 5221, Division Three, of the Code of Iowa, 1931.

March 2, 1933. *County Attorney, Sioux City, Iowa:* You ask (1) an opinion regarding the right of the auditor under the law to appoint four deputies and (2) whether or not, if he has such a right, it is necessary to submit the appointment to the Board of Supervisors for approval in the case where the person appointed has been, prior to this time, approved as a clerk in the office of the auditor.

In the opinion of the writer, under Section 5221, Division Three, Code of Iowa, 1931, the wording would indicate that the auditor requiring four deputies would be entitled to them under this section. The statute provides:

"If more than four deputies are required, or additional clerks, the Board of Supervisors shall fix the amount of their compensation."

This would give the right to the auditor, under the law, to name a fourth deputy.

You will note that the word "or" is used—"or additional clerks." This would give the right to the four deputies and the number of clerks required.

Also in Section 5238 of the Code, the wording is as follows:

"* * * may, with the approval of the Board of Supervisors, appoint one or *more* deputies or assistants.

This section also provides, as follows:

"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 a record in the proceedings of such board."

The definition of "clerk" in Funk & Wagnalls New Standard Dictionary is, as follows:-

"An officer of the court, legislative body, corporation society, or the like, charged with the care of its records, correspondence and accounts; a secretary."—p. 500.

The definition of "deputy" is, as follows:

"One authorized to act for or in place of another, especially in official relation."—p. 685.

To be on the safe side, the writer is of the opinion that Section 5238, Code of Iowa, 1931, should be followed and the approval of each appointment be by resolution made of record in the proceedings of the Board of Supervisors, if there is to be any difference in the amount of salary received.

As you know all the circumstances and, if there is any reason why the status of the person under consideration should be designated as a deputy and not as a clerk, then the appointment should be approved. Otherwise, if the status is not changed and the salary is the same, I would be unable to see any difference as to whether the designation is deputy or clerk.

EXEMPTION FROM TAXATION: Building partly used for lodge.

March 3, 1933. *County Attorney, Storm Lake, Iowa:* We are in receipt of your letter of March 2nd, in which you ask for an opinion on the following:

"The Masonic Lodge at Alta, Iowa, owns a building, the lower half of which is used partly for business purposes, leases having been entered into with the several tenants, while the upper half is used purely for lodge purposes. All of the receipts of the Masonic Lodge are used for charitable or benevolent purposes. Because of that fact, the members of the lodge want to know if they can secure an exemption of the building from taxation."

You are advised that the case of Fort Des Moines Lodge No. 25, I. O. O. F., vs. the County of Polk, 56 Iowa, page 34, answers your question. It would not be proper to exempt the building from taxation.

It is also provided in Code Section 6944, sub-paragraph 9, that certain property, the property mentioned in your letter, is exempt from taxation, when it is not leased or otherwise used with a view to pecuniary profit.

SUPERINTENDENT OF BANKING.

March 6, 1933. *Superintendent of Banking, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

May the Superintendent of Banking restrict withdrawals by depositors in banks and trust companies under his supervision after the lifting of the Governor's proclamation of March 4, 1933?

In giving this opinion, this Department has in mind the fact that pursuant to Senate File No. 111, Forty-fifth General Assembly, many banks have made

and will continue to make application to the Superintendent of Banking to take over their management, and this opinion is not intended to apply to such banks during the period of management by the Superintendent of Banking pursuant to said act.

Prior to the enactment of Chapter 40 of the Acts of the Thirty-seventh General Assembly, banks and loan and trust companies incorporated under the laws of the state, were under supervision of the Auditor of State. The Banking Department was created by that chapter, and to it were transferred all matters concerning such corporations formerly dealt with by the Auditor of State. The chief officer of the Department is styled Superintendent of Banking. The Legislature at that time intended to give to the Superintendent of Banking broad powers, Section 7 of the act providing in part as follows:

"The Superintendent of Banking shall be the head of the Banking Department of Iowa and shall have general control, supervision and direction of all banks and trust companies incorporated under the laws of the State of Iowa, and shall be charged with the execution of the laws of this state relating to banks and banking."

This act of the General Assembly was codified as Section 9140 of the Code. The broad power thus given by the Legislature to the Superintendent of Banking was recognized but not discussed by the Supreme Court of Iowa in *Vale vs. Messenger*, 184 Iowa, 553.

Some time later, however, an action was brought in the Keokuk District Court by the Superintendent of Banking as Receiver, on a certain guaranty arrangement entered into between the officers of a certain bank and the then Superintendent of Banking. The Supreme Court affirmed the lower court in that case, entitled *Andrew vs. Breon*, 208 Iowa, 385, and in affirming the lower court, our Supreme Court held that the superintendent of Banking as a statutory officer, could in the performance of his duties, follow only the statutory course, viz.:

1. Close and liquidate a bank.
2. Levy an assessment.
3. Demand removal or strengthening of questionable paper.

The decision of the lower court was made before the meeting of the Legislature in the Forty-third General Assembly and that Assembly evidently sensing the restrictions that the courts were throwing about the Superintendent of Banking after he had been given the broad powers of "general control, supervision and direction of all banks," decided to so extend his powers that henceforth he could without question, do all things necessary to so control, supervise and direct all banks.

The Forty-third General Assembly then amended Section 9140 of the Code by adding thereto, the following:

"He shall have the power to adopt and promulgate such rules and regulations as in his opinion will be necessary to properly and effectually carry out and enforce the provisions of this Section."

It is apparent then, that since this amendment to Section 9140 of the Code, the Superintendent of Banking has not been restricted to the three statutory courses provided in Chapter 415 of the Code, but might adopt and promulgate any necessary rules and regulations looking toward the general control, supervision and direction of banks under his jurisdiction.

It is therefore the opinion of this Department that "general control, supervision and direction" as used in Section 9140 of the Code includes the right

to restrict the withdrawals of deposits, and the Superintendent of Banking may adopt and promulgate such rules and regulations as in his opinion will be necessary to properly and effectively restrict the withdrawals of deposits in banks under his jurisdiction after the lifting of the Governor's Proclamation of March 4, 1933, and that such rules and regulations may provide and regulate the percentage and period of withdrawals.

Nothing in this opinion, however, shall affect the relationship of the Superintendent of Banking as Manager of certain banks pursuant to Senate File No. 111, Forty-fifth General Assembly, and depositors of such banks.

WARRANTS: School Board: Banks under new law.

March 6, 1933. *County Attorney, Creston, Iowa:* We are in receipt of your letter of March 2nd, in which you ask for an opinion on the following:

"1. Should a school corporation issue warrants to the school teachers, when its funds are tied up in banks that are now operating under Senate File 111, and will the School Board be personally liable on such warrants, if they draw them?

"2. Does the city of second class have authority under Section 5645 to provide by resolution that warrants issued on funds that were tied up in banks under the new law should draw less than six per cent interest?"

In answer to the first question, you are advised that the School Board has authority to issue warrants, if its funds are tied up in closed banks, or if the shortage of funds is due to the fact that taxes are not being paid. In other words, if they do not issue warrants in excess of the anticipated revenue for that particular year, there is no person liable.

In answer to the second question, you are advised that under Section 5645 of the Code of 1931, the School Board does have authority to pass a resolution providing for the payment of interest at a lower rate than six per cent.

INCOMPATIBILITY: County Board of Supervisors: Member City Council.

March 6, 1933. *County Attorney, Marshalltown, Iowa:* We are in receipt of your letter of March 3rd, in which you ask for an opinion on the following:

"Would the fact that one person was elected and holding office as a member of the Board of Supervisors of a county, and at the same time elected and holding office as a member of the City Council of a town in the same county, cause a conflict which would disqualify them from holding one of these offices?"

There seems to be three tests relative to the incompatibility of public office. The first question is whether or not one office is subordinate and accountable to the other office. The second is whether or not the duties of the one office conflict with the duties of the other office, while the third is the question of whether or not the party holding the office can physically fill both offices at the same time. Any one of these three situations would cause such an incompatibility that the person could not hold both offices at the same time.

It would seem to us that where the City Council acts as a local Board of Review and the Board of Supervisors acts as a County Board of Review, it would create an incompatibility. It is also true that there might be a litigation between the county and the city on some other question, and in view of this fact the situation could easily arise where the duties of the two offices might conflict. If this is true, then the office for which he last qualified would automatically cause his resignation as to the prior office.

I would suggest that you read the following cases:

State ex rel Crawford vs. Anderson, 155 Iowa, 271.
State ex rel Banker vs. Bobst, 205 Iowa, 608.

R. F. C. LOANS: Claim of appointee against poor fund. Board of Supervisors.

March 6, 1933. *County Attorney, Spencer, Iowa:* We are in receipt of your letter of March 3rd, in which you ask for an opinion on the following:

"In connection with the granting of R. F. C. loans to Clay county for the purpose of taking care of the poor, an individual was appointed by the governor. This appointee has now filed a claim against the poor fund for allowance by the Board of Supervisors. The board takes the position that he was appointed to assist the welfare worker and other county officers, and they understood that his work was to be done without salary or any additional costs for administration."

You are advised that this Committee, which is appointed by the governor in each county, is supposed to work without charge. It is true, however, that in some counties the Board of Supervisors has employed some member of that Committee to make investigations and assist the welfare workers. If the appointee in your county has actually been designated by the Board of Supervisors as a welfare worker, or if he has been appointed to make investigations, the Board has authority to pay him, if it so desires. He cannot be paid, however, out of the R. F. C. money.

CORONER: Claims for making post mortem examinations.

March 7, 1933. *County Attorney, Davenport, Iowa:* We are in receipt of your letter of February 25th, in which you ask for an opinion on the following:

"The coroner of Scott county is a physician and surgeon. Under the law previous to the 44th General Assembly, he performed post mortem examinations himself and filed claims with the county, which claims were allowed and paid. The examiners from the State Auditor's office in checking over the records of Scott county have called the attention of the Board of Supervisors to the fact that such claims were not according to law as stated by a ruling from the Attorney General's office in the report of the Attorney General of Iowa in 1928, page 197. The coroner collected such fees in the years 1928, 1929, and 1930.

"At the request of the Board of Supervisors, we started an action against the coroner asking for judgment against him for the amount paid by virtue of these claims, to which the defendant demurred. The demurrer was argued before Judge W. W. Scott of our District Court on a question of law and which required an interpretation of Section 5218 of the Codes of 1924 and 1927 and prior to the amendment by the 44th General Assembly. Judge Scott sustained the defendant's demurrer and held in substance that from the wording of Section 5218 the Legislature intended that the last statement of Section 5218 as follows: 'If the coroner is also a physician he may make such scientific examination', he would be entitled to reasonable compensation for conducting scientific examinations as well as other physicians or surgeons who might make these scientific examinations at his request."

We have read your letter very carefully, and we have also read the opinion furnished by the Attorney General's Office in 1928. We are inclined to agree with the person who wrote that opinion.

We quote from the case of Sanford vs. Lee County, 49 Iowa, page 148, and cited in the opinion of the former Attorney General, as follows:

"The examination and writing required to be done in connection therewith should be done by the magistrate, and for such services certain fees or compensation are provided by law, and it never was contemplated that the magistrate, for his personal services in conducting the examination, and performing all services required by the statute, should charge or receive any fees or compensation other than that provided by statute."

Although the case of Sanford vs. Lee County is not a case involving the scientific examination made by a coroner, nevertheless it is a case involving

the fees to which a coroner is entitled, and the above quotation applies to the services rendered by the coroner and the fees to be charged therefor.

We feel that your decision to appeal should be governed by the amount in controversy and the probable expenses of the appeal. In your case, the amount in controversy is $1,338.00, and the expenses of an appeal from the ruling on the demurrer would not amount to more than $50.00 or $60.00. It seems to us, using the language which has often been used, "It is a good bet, if you lose." In other words, spending $50.00 in an effort to recover $1,338.00 is always advisable, especially when the Supreme Court has not passed squarely on the question.

We also call your attention to the fact that the Legislature saw fit in the 44th General Assembly to add a provision allowing the coroner to pay for this particular work. Undoubtedly, it had never been so interpreted prior to that time as to allow him to collect for those services.

Assessment of persons outside of corporation limits but inside of township boundaries.

March 7, 1933. *County Attorney, Hampton, Iowa:* We are in receipt of your letter of March 4th, in which you ask for an opinion on the following:

"Prior to December 19, 1932, the city of Hampton and Washington township were the same areas exactly, or, in other words, had the same boundaries. On that date, a decree was entered in the District Court setting certain farm property, which was prior to that time inside of the corporation, outside of the city limits, and outside of the corporation limits of Hampton. The township boundaries were not, of course, altered.

"The question has now arisen as to who shall make the assessment of those persons who are now outside of the corporation limits but inside of the township boundaries, in view of the fact that there are no township officials."

This appointment could not be made under the chapter governing appointments to fill vacancies, because there is no such vacancy as contemplated in that chapter. We feel, in view of the fact that not very much property is involved, that the best way to assess it would be under Section 7149 of the Code of 1931, that is, to have the County Auditor assess it as omitted property.

March 7, 1933. *County Attorney, Chariton, Iowa:* We have your request for opinion on the following matter:

Where a bank is under the management of the Superintendent of Banking pursuant to Senate File No. 111, Forty-fifth General Assembly, how must it enter into extensions, releases and satisfactions of mortgages wherein the bank is mortgagee?

Senate File No. 111, Forty-fifth General Assembly, provides that during the period of management of such banks by the Superintendent of Banking, he may carry on the same under such rules and regulations as he, with the approval of the Executive Council, may make for the conduct of its business and pursuant to this provision, the following rule has been properly made:

"During the period of management of these banks by the Superintendent of Banking, all releases, satisfactions and extensions of mortgages wherein the bank is mortgagee, must be executed by the proper officers of the bank and the Superintendent of Banking, as Manager, shall join in such extension, release or satisfaction of the mortgage and show therein that he is joining in the instrument pursuant to Senate File No. 111, Forty-fifth General Assembly, and the rules and regulations adopted thereunder."

It is therefore the opinion of this Department that all extensions, releases and satisfactions of mortgages during the period of management by the Superintendent of Banking wherein the bank is mortgagee, shall be executed by the

proper officers of the bank and shall be joined into by the Superintendent of Banking, as Manager, the said joinder reciting that it is executed pursuant to Senate File No. 111, Forty-fifth General Assembly and the rules and regulations adopted thereunder, and as this right is statutory, it is not necessary to place on file in the Court House any instrument showing the power of the Superintendent of Banking, as Manager, to so enter into such instruments.

AGRICULTURAL DEPARTMENT.

March 9, 1933. *Secretary of Agriculture, Des Moines, Iowa:* Reference is made to your inquiry as to whether a poultry show held as a district show with two counties participating can also be a state-wide show and obtain the $200.00 provided for district shows and in addition the $300.00 provided for state-wide shows.

The provisions of the statutes relating to this proposition are as follows:

Section 2958. "An annual state-wide poultry show is hereby authorized. Such show shall be conducted or managed by the officers of the local poultry association of the place at which such show is held."

The sections with reference to district shows are as follows:

Section 2962-d1. "Poultry associations in counties where no local poultry show is held, may affiliate with associations in adjacent counties and hold a district poultry show at some location that is mutually satisfactory."

Section 2962-d2. "Each county poultry association affiliating with a district show shall form a county association as set forth in this chapter, and notify the department, on or before October first, of its intentions of affiliating with other counties in the holding of a district poultry show. The president, vice president, secretary and treasurer of such affiliating county poultry associations shall meet and elect officers who shall manage and conduct the district poultry show."

It will be observed from a reading of the foregoing sections, first, that a state-wide show "shall be conducted or managed by the officers of the local poultry association," second, that the "president, vice president, secretary and treasurer of such affiliating county poultry associations shall meet and elect officers who shall manage and conduct the district poultry show." In other words, a state-wide show is held by a local poultry association, whereas, a district show is put on and managed by officers elected by the local poultry associations of the counties of the district, and it follows necessarily, that they cannot be the same show. Moreover, a district show managed as the statute provides by officers elected by the poultry associations of the counties in the district could not be a state-wide show.

You are therefore advised, that in cases where district shows are held the show is entitled only to the state aid provided for district shows and cannot receive the aid provided for a state-wide show.

SPECIAL ELECTION.

March 13, 1933. *Governor of Iowa, Des Moines, Iowa:* In reply to your query as to whether or not it was your mandatory duty under the law to call a special election for the purpose of filling the vacancy created by the death of Senator O. P. Myers of Newton, Iowa, we hereby submit the following opinion of this Department:

Article 3, Section 12, of the Constitution of Iowa, provides as follows:

"Vacancies, Section 12. When vacancies occur in either house, the governor or the person exercising the functions of governor, shall issue writs of election to fill such vacancies."

Section 1158 of the 1931 Code of Iowa, provides as follows:

"1158. Special election to fill vacancies. A special election to fill a vacancy shall be held for a representative in congress, or senator or representative in the general assembly, when the body in which such vacancy exists is in session, or will convene prior to the next general election, and the Governor shall order such special election at the earliest practicable time, giving ten days' notice thereof."

Senator O. P. Myers of the 29th Senatorial District died while the 45th General Assembly of the State of Iowa was in session. The 45th General Assembly of the State of Iowa is still in session. In all likelihood there will be an adjourned or special session of the 45th General Assembly. The 29th Senatorial District of the State of Iowa should be represented in the State Senate of Iowa during the deliberations of this present session and also in any adjourned or special session. The Constitutional and statutory provisions make it the duty of the Governor to call a special election as soon as practicable when a vacancy occurs during a legislative session.

Therefore, it is the opinion of this Department that it is your duty, under the Constitution and laws of this state, to call a special election as soon as practicable for the purpose of filling the vacancy which now exists in the 29th Senatorial District of the State of Iowa.

IOWA STATE FAIR: Acts of the 44th General Assembly, Page 225, Section 51 and the second paragraph of Section 63, Page 229.

March 13, 1933. *House of Representatives, Des Moines, Iowa:* Your inquiry, of this date, relative to the authority to transfer funds by the Executive Council to take up the 1931 and 1932 deficiency of the Iowa State Fair has been referred to the writer for attention.

If you will refer to the Acts of the 44th General Assembly, on page 229, Section 63, you will find that the second paragraph of said section, states, as follows:

"When the appropriation of any department, institution or agency is insufficient to properly meet the legitimate expense of such department, institution or agency of the state, the governor, with the approval of the director of the budget, is authorized to transfer from any other department, institution or agency of the state having an appropriation in excess of its necessity, sufficient funds to meet that deficiency."

Also refer to page 225, Acts of the 44th General Assembly, Section 51, entitled "General Contingent Fund," which provides, as follows:

"For the purpose of establishing a general contingent fund for the state, there is hereby appropriated for each year of the biennium beginning July 1, 1931, and ending June 30, 1933, the sum twenty thousand dollars ($20,000.00) or so much thereof as may be necessary, to be administered by the committee on retrenchment and reform for contingencies arising during the biennium, which are legally payable from the general fund of the state; provided, however, that no part of said fund shall be available to the state board of education or the board of control of state institutions."

The above sections give the authority for the transfer of funds to take up a deficiency for the years of 1931 and 1932 for the State Fair.

Investigation shows that the following, on the specific funds from which the deficiency, for these two years, was taken care of and it is as follows:

On September 2, 1931, the Governor and the Budget Director, in conference with the Executive Council, at which meeting the Attorney General was also present, authorized the transfer of $75,000 from the corn borer eradication fund to the Iowa State Fair Board for the purpose of taking care of the deficit in the operating expense. On October 5, 1931, the Iowa State Fair Board

refunded to the State Treasurer, to be credited to the corn borer fund, the sum of $15,000 and on December 31, 1931, the Fair Board refunded to the State Treasurer, to be credited to the corn borer fund, the sum of $25,000, making the net transfer of funds in 1931 from the corn borer fund to the Iowa State Fair Board, $35,000.

On August 31, 1932, the Retrenchment and Reform Committee transferred $20,000 from their contingent fund to the Iowa State Fair Board on order No. 8. On September 1, 1932, the Budget Director and the Governor authorized the transfer of $20,000 from the state aid fund to county fairs and on September 2, 1932, they transferred $35,000 from the corn borer fund to the Fair Board for the purpose of taking care of the maintenance of grounds and buildings in 1932 and taking up part of the deficit in the operating expense of the 1932 State Fair, making the total of $75,000 transferred to the Iowa State Fair Board in 1932.

VOCATIONAL TRAINING.

March 15, 1933. *Treasurer of State, Des Moines, Iowa:* Referring to your request for an opinion as to the status of funds now on deposit in the Valley National Bank which represent the fund set aside by the National Government to aid vocational training education in this state.

You are advised that under the statutes of the United States and particularly, Sections 191 and 192 of the U. S. C. A., Title 31, debts due the United States are entitled to priority. These sections are as follows:

"Section 191. Priority established. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

"Section 192. Liability of fiduciaries. Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

It is well settled under the decisions of the courts in applying these sections that any money belonging to the United States or any debt due the United States in insolvency proceedings must be first paid. The rule is applied to the deposits of postmasters and it is also applied to cases where an agent of the Federal Government holds Indian funds, and the policy of the courts has been to give these statutes a liberal construction for the purpose of protecting United States funds.

The question then arises as to whether this particular deposit represents a fund belonging to the United States or a debt due the United States. As I understand the situation, the fund was advanced to the Treasurer of State merely as custodian and with authority to draw upon it and use it to meet state funds in equal amounts to aid vocational training, and if that is true, the fund still belongs to the United States and is held by the Treasurer of State merely as a trustee with authority to use it for a specific purpose only. It follows that under the statutes the claim for that deposit would be entitled to priority of payment in an insolvency proceedings.

COUNTY RECORDER: Chattel mortgages: Fees.

March 16, 1933. We are answering your questions in the order in which you ask them, and where you have used the words "County Clerk," we are substituting the words "County Recorder." Your questions and our answers are as follows:

"1. Is a County Recorder required by law to make a chattel mortgage abstract upon request?"

Yes. He would be entitled, however, to make a reasonable charge for this service.

"2. If the County Recorder is required by law to make such abstract, is he required to attach his seal to such certificate, and if so, what should be his charge for such certificate under seal?"

There is no provision of the Code which fixes the fee for the County Recorder for attaching his certificate. However, the usual fee for that is 50 cents.

"3. What is the filing fee required by law for filing a chattel mortgage with the County Recorder?"

You understand there is a difference in this state between "filing" and "recording." For filing, the Recorder receives only 25 cents, while for recording, he receives 50 cents for the first 400 words, and 10 cents for each additional 100, or fraction thereof.

"4. Is the County Recorder required by law to make a showing on the back of one or more copies of the chattel mortgage that a copy has been filed, above showing to be made on his signature?"

Section 10025 of the Code of 1931 provides as follows:

"A duplicate or copy of such mortgage, bill of sale, or other instrument, filed under the provisions of this Chapter, shall be supplied by the County Recorder upon the request of any party in interest, and the payment of fees therefor. Such duplicate or copy shall be duly certified by the County Recorder, and may be filed in any other county in the state in the same manner as herein provided."

This does not mean that the County Recorder is entitled to charge 50 cents for the first 400 words, and 10 cents for each additional 100, for making certificate on the back of a copy, when as a matter of fact the copy is in printed form and properly prepared, when presented to the Recorder for such certificate. The Recorder in this case would be entitled to charge the usual fee for the certificate only, but would not be entitled to make a charge as though he had copied the entire chattel mortgage or bill of sale.

"5. Is the County Recorder required to charge a fee for such showing on the back of one or more copies of the chattel mortgage, and is he required to attach his seal to such showing?"

We believe that our answer to Question No. 4 completely answers your question. The Recorder is entitled to charge the usual fee for this certificate, but is not entitled to make the charge which he is authorized to make for the complete certified copy, where he makes the complete copy.

We understand, of course, that in connection with your office, the person procuring the loan must pay the incidental expenses, and although we feel that the Recorders of this state are entitled to be paid for their services, yet we feel that the person who finds it necessary to borrow on his crops and live stock, in order to be able to continue his farming operations during the coming season, should not be required to pay exorbitant charges for abstracts of the record, etc. We do not believe that under the present conditions the County Recorders of this state will insist on excessive charges in connection

with any of these items, as they realize only too well what the financial condition of the average renter is at the present time.

SCHOOL BOARD: Hire teachers.

March 16, 1933. *County Attorney, Pocahontas, Iowa:* We are in receipt of your letter of March 8th, in which you ask for copies of the opinions regarding the Farm Bureau. We are herewith enclosing them.

You also ask for an opinion on the following question:

"Can the present school boards hire teachers for the coming year before the new board takes office?"

The case of Consolidated School District of Glidden vs. Griffin, 201 Iowa, page 63, answers your question. According to this case, the Board has authority to take such action.

You also ask for an opinion on the following proposition:

"The Board of Supervisors, after legal notice served by publication, platted a road and the improvement on the same, and went ahead and improved the road, although they had made adjournments relative to the platting and improvement in their meetings as to the final date when hearing should be had on the same, and that no entry has ever been made in the record showing any final action. No objection appeared on the date to which the meeting had been adjourned."

The facts relative to this matter are not fully enough set out to enable us to answer your question. You do not say whether this proceeding was commenced by the filing of a petition under Section 4562, or whether it was commenced under Section 4607. You also state that no objection appeared on the date to which the hearing was adjourned in July, 1931, but you do not state whether or not objections had been filed.

If this proceeding was commenced under Section 4562 on the filing of a petition, and if no objections were ever filed, it was the County Auditor's duty to establish the road under Section 4577, and it would still not be too late for them to do that.

If, however, objections were filed, the Board might find itself in an entirely different predicament.

BAND TAX: Notice by publication: Section 5265 of Code of 1931.

March 17, 1933. *County Attorney, Newton, Iowa:* We are in receipt of your letter of March 13th, in which you ask for an opinion on the following:

"Section 5839 of the Code of 1931 provides for filing a petition with the City Council, asking that the following proposition be submitted, to-wit: 'Shall the power to levy a tax for the maintenance or employment of a band be cancelled?' Said submission shall be made at any municipal election as heretofore provided, etc.

"In case such petition is filed with the City Council at Newton, must notice by publication once each week for four weeks be given prior to the election, as provided in Section 5265 of the Code of 1931?"

You are advised that Section 5265 of the Code of 1931 comes under the title of county and township government, and does not apply to cities or towns.

Chapter 296 of the 1931 Code of Iowa makes provision for the levy of a band tax and also for revocation of the same. This chapter contains no provision for the publication of a notice for the revocation of such a tax at the general municipal election.

Section 5839 of the 1931 Code provides that when the proper petition for the revocation of authority to levy this tax is presented to the City Council, that

it becomes the duty of the City Council to submit this question at any general municipal election, as heretofore provided. The previous provision for the submission is contained in Section 5837 of the 1931 Code of Iowa, which is as follows, to-wit:

"When such petition is filed, the council or commission shall cause said question to be submitted to the voters at the first following general municipal election."

From the language used in this statute, it is apparent that it is the duty of the City Council at Newton to cause this question to be submitted to the voters at the first following general municipal election after such a petition has been presented to the Council.

The matter of the publication of notice of an election is not controlling in determining the validity of matters voted upon and settled by an election. The want of notice will not invalidate an election. In matters of such a public nature, the observance of each particular is not held a prerequisite to validity. It is the general rule of law that statutes directing the mode of proceeding of public officers relating to time and manner as directory.

The People vs. Cook, 14 Barb., 261-290.
Marchant vs. Langworthy, 6 Hill, 642.
The People vs. Peck, 11 Wend., 604.
Disholde vs. Smith, County Judge, 10 Iowa, 212, on Page 218.

The people should not be disfranchised nor deprived of their voice in the settlement of public questions by the omission of some duty by an officer, if an election has in fact been held at the proper time.

This matter of whether or not the voters and taxpayers of the city of Newton should continue this levy for the support of a band is a public one, and the people should have the opportunity of expressing their will, in case a proper petition with sufficient signers has been presented to the Council.

Chapter 296 of the 1931 Code of Iowa contains full and complete provisions for the levying and revocation of such a band tax. Nowhere in this chapter is there any provision for the publication of a notice of the presentation of such a question to the voters. The chapter is apparently full and complete in itself, and definitely prescribes what shall be done, when a proper petition is presented to the Council. It is definitely expressed that, when such a petition is presented, it then becomes the duty of the Council to submit this question at the next general municipal election. The general rule of law expressio unius est excludio alterius has been followed by our Supreme Court.

Talbott vs. Blackledge, 22 Iowa, 572-579.
Vale vs. Messenger, 184 Iowa, 553.
State vs. Hansen, 231 N. W., 428-430.

Therefore, in the absence of any city ordinance prescribing publication of notices for city elections, it is the opinion of this Department that the four weeks' notice of publication, as provided for by Section 5265 of the Code of Iowa, does not apply, and that this question may be properly voted upon by the people of the city of Newton at the next general municipal election, in case a proper petition with the statutory number of signers has been presented to the City Council of Newton, Iowa.

NEW BOND ON EACH NEW LICENSE ISSUED.

March 17, 1933. *Superintendent of Securities Department, Des Moines, Iowa:* You have asked this Department for an opinion on the validity of continuation certificates to certain dealer's bonds filed in your department by certain dealers

in securities. As we understand it, in most of these cases the licenses have expired prior to, or during and between the recent legal holiday. Your inquiry is two-fold—whether or not a continuation certificate, issued after the legal holiday is closed, would revive the obligations set forth in the dealer's bond which unquestionably terminated with the license, either prior to or during the legal holiday. It is the opinion of this department that it did not and our reasons are based, among others, upon the following provisions of the dealer's bond itself:

In the next to the last paragraph these words are found in the dealer's bond:

"THIS BOND is a continuous obligation and shall cover the full period, or periods of registration of the above named principal obligor as a dealer in securities under the provisions of the Iowa Securities Law, including the present registration and all renewal or new registrations which said principal obligor may be granted upon written application therefor."

Notwithstanding the flexibility of this provision, the import of the bond itself is clear that it attempts to cover the responsibility of the dealer during the time his license is in force. When the license expires, the liability on the bond expires. The provisions of the above quoted paragraph with reference to future registration or renewals is too uncertain or indefinite to predicate legal liability against the surety company.

Referring now to the continuation certificate and the words set forth in the last paragraph, as follows, to-wit:

"It is expressly understood and agreed that the renewal of said bond is with the same force and effect as though a new bond were executed and filed."

The clear import of this paragraph would seem to limit the liability of the surety company to the obligations of a new bond.

In view of the fact that a large number of licenses expired during the legal holiday, or prior thereto, and that they have now made application for a new license or renewal license, it is the opinion of this Department that the only safe procedure to follow would be to require the execution of a new bond on each new license issued.

Publication clause on acts passed by legislature.

March 17, 1933. *Deputy Secretary of State, Des Moines, Iowa:* You have asked this Department for an opinion on the following state of facts:

Where an act is to take effect from and after publication in two designated papers on a Saturday and one of the papers does not publish on the Saturday designated and the act is to go into effect on the Monday following publication, can the paper failing to publish on Saturday make the publication on Sunday so as not to invalidate the statute concerning publication of acts and the designation of papers?

I have failed to find any authority for the publication of a public act in a newspaper on Sunday. It would seem that the paper which cannot publish on Saturday should decline the publication and the Secretary of State should then designate another paper in which the publication will be made on Saturday at the same time the publication is made in the other paper originally designated. There would then be no possible question about the legality of the publication.

IOWA BARTERING ASSOCIATION: An organization selling membership certificates for sick benefit, medical attention, and a right to buy a casket; certificates for gas, oil and tires; for barter of commodities and labor comes under the Supervision of the Superintendent of Securities.

March 17, 1933. *Superintendent of Securities Department, Des Moines, Iowa:* Your inquiry, to this office, relative to the Iowa Bartering Association, with offices at 728 First Avenue East, Cedar Rapids, Iowa, has been referred to the writer for attention.

You desire to know if an organization selling membership certificates for sick benefit, which furnishes medical attention and also giving the right to buy a casket; selling membership certificates for gas, oil and tires; membership for barter comes under the supervision of your department, as provided by Chapter 393-c1, Iowa Securities Act.

In the opinion of the writer, it does.

Refer to Section 8581-c3 of the 1931 Code of Iowa, Division (1), which states, as follows:

"'Security' shall include any note, *stock*, treasury stock, bond, debenture, *evidence of indebtedness*, certificate of interest in an oil, gas, or mining lease, collateral trust certificate, pre-organization certificate, *pre-organization subscription, any transferable share, investment contract, or beneficial interest in title to property, interest in or under a profit-sharing or participating agreement or scheme, or any other instrument commonly known as a security.*"

The sections italicized correctly designate such a scheme as the one under consideration.

I have examined Section 8581-c5 of the 1931 Code of Iowa, which deals with the exempt transactions and I find nothing in that section which would relieve this company from the responsibility under the Iowa Securities Act.

WIDOWED MOTHER'S PENSION: INTERPRETATION OF SECTION 3641. "No payment shall be made after said child reaches the age of sixteen years, or after the mother has remarried, or after she has acquired a legal residence in another county, or *after she has become a non-resident of the state.*"

March 20, 1933. *County Attorney, Belmond, Iowa:* We are in receipt of your letter of March 9th, in which you ask for an interpretation of Section 3641 of the Code of 1931, and particularly that portion, which is as follows:

"No payment shall be made after said child reaches the age of sixteen years, or after the mother has remarried, or after she has acquired a legal residence in another county, or *after she has become a non-resident of the state.*"

It is the opinion of this office that the clause, "after she has become a non-resident of the state," has nothing to do with what we term a legal settlement under the pauper laws. That said payments should be discontinued as soon as she moves outside of the state with intent to change her residence.

SCHOOL FUND MORTGAGE FORECLOSURE: Release from personal liability.

March 20, 1933. *County Attorney, Greenfield, Iowa:* We are in receipt of your letter of March 6th, in which you ask for an opinion on the following:

"Adair county, for the benefit of the school fund of the State of Iowa, is foreclosing the school fund mortgage against the Estate of John C. Hoyt, et al. Foreclosure has been commenced for the March Term, which will convene on the 14th. There are two years of unpaid interest on the loan, and the costs of the foreclosure will amount to $150.00 to $200.00. The land has been rented, and none of the land notes has been disposed of. The Administrator of the Estate advises that, if you will take no personal judgment, he will obtain possession of the note, which has been sold, and will turn both of these notes over to the county, in consideration for a release from personal liability. The Board of Supervisors doubts whether or not this can legally be done."

You are advised that under the holding of our Supreme Court in the case of Poweshiek County vs. Buttles, 70 Iowa, 246, 30 N. W., 558, the Board of Supervisors, in the management of the school funds, has authority to do acts which, in the exercise of wisdom and care, men of affairs ordinarily do for the security and collection of debts. In this case just cited, the Court held that a compromise in a particular case of a claim in behalf of the school fund was valid.

This office is of the opinion that the supervisors have a right to make the compromise mentioned by you. The question of liability of the county to the school fund is not determined by the amount which the land brings at the *Sheriff's sale.* It is determined from the amount for which the land sells when the county disposes of it within the next two years after having acquired title to it.

SCHOOL ELECTION: Contest.

March 21, 1933. *County Attorney, Osage, Iowa:* Your letter of the fourteenth inst., to the office of the Attorney General, has been referred to the writer for attention.

You inquire relative to the contesting of a school election and desire to know if action should be brought under the section relating to contests of county officers, as contained in Sections 1020-1044 of the Code of Iowa, 1931.

Your attention is called to Section 4216-c22 of the 1931 Code of Iowa which states, as follows:

"*Contested elections.* School elections may be contested as provided by law for the contesting of other elections.

As you know, the general grounds of contesting are provided by Chapter 47 of the Code of Iowa, 1931. It would seem to the writer that the use of this chapter on your general grounds, together with Chapter 52, as you suggest would give you the machinery for conducting such a contest. A reading of the chapter, last named, gives a comprehensive idea of the entire manner with which to proceed.

FISH AND GAME COMMISSION: Frozen game.

March 22, 1933. *State Fish and Game Warden, Des Moines, Iowa:* In answer to your inquiry of the third inst., with enclosure of letter from Getts Brothers & Company of San Francisco, California, will say that I have examined Chapter 86 of the Code of Iowa, 1931, and wish to call your attention to Section 1788, which reads as follows:

"*Game brought into the state.* It shall be lawful for any person, firm, or corporation to have in possession any fish or game lawfully taken outside the state and lawfully brought into the state, but the burden of proof shall be upon the person in such possesion to show that such fish or game was lawfully killed and lawfully brought into the state."

An examination of the new fish and game bill shows that this section has not been modified or changed.

It would seem to the writer that this presents a question which should properly come under the rules and regulations as allowed by the new fish and game bill. The Interstate Agreement and Lacey Bird Act should be taken into consideration in drafting the rules and regulations, regarding matters of this nature.

SALE OF BEER IN IOWA UNDER PRESENT LAWS: The sale of beer of

the alcoholic content of 3.2% by weight as prescribed in the so-called federal beer bill is prohibited in the State of Iowa under the present laws.

March 23, 1933. *To Whom It May Concern:* In answer to numerous inquiries, relative to the sale of beer in the State of Iowa of an alcoholic content of 3.2 per cent by weight, in the event that a so-called beer bill becomes the law of the United States, this Department renders the following opinion:

The fact that the alcoholic content, as fixed in the Volstead Act or the Federal Prohibition Enforcement Law, passed by the 66th Congress provides as follows:

"* * * The words 'beer, wine, or other intoxicating malt or vinous liquors' in the War Prohibition Act shall be hereafter construed to mean any such beverages which contain one-half of the 1 per centum or more of alcohol by volume:"

In Title II, of said Act, Section 1:

"The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes:

and that the new so-called federal beer bill raising this percentage 3.2 per cent by weight, does not permit the sale of such beverages in the State of Iowa or the transportation of such a beverage into the State of Iowa for the following reasons:

In Section 1923 of the Code of Iowa, 1931, entitled "Intoxicating Liquors," we find the following definition:

"The word 'liquor' or the phrase 'intoxicating liquor' when used in this title, shall be construed to include alcohol, brandy, whisky, rum, gin, *beer*, ale, porter, wine, spirituous, vinous, and malt liquor, and all intoxicating liquor whatever."

Section 1924 of the same chapter provides:

"No one, by himself, clerk, servant, employee, or agent, shall, for himself or any person else, directly or indirectly, or upon any pretense, or by any devise, manufacture, sell, exchange, barter, dispense, give in consideration of the purchase of any property or of any services or in evasion of the statute, or keep for sale, or have possession of any intoxicating liquor, except as provided in this title; or own, keep, or be in any way concerned, engaged, or employed in owning or keeping, any intoxicating liquor with intent to violate any provision of this title, or authorize or permit the same to be done; or manufacture, own, sell, or have possession of any manufactured or compounded article, mixture or substance, not in a liquid form, and containing alcohol which may be converted into a beverage by a process of pressing or straining the alcohol therefrom, or any instrument intended for use and capable of being used in the manufacture of intoxicating liquor; or own or have possession of any material used extensively in the manufacture of intoxicating liquor; or use or have possession of any material with intent to use it in the manufacture of intoxicating liquors."

Our Supreme Court has interpreted the words "intoxicating liquors" as follows:

"Alcohol is an intoxicating liquor, and however it may be diluted it is within the terms of the statute, when used as a beverage. Proof that liquor in question contains alcohol is sufficient to show that it is an intoxicating liquor." (See State vs. Yager, 72 Iowa 421; State vs. Intoxicating Liquors, 76 Iowa 243; State vs. Colvin, 127 Iowa 632.)

Also,

"If an article sold as a beverage contains any appreciable amount of alcohol, its sale is illegal, irrespective of the good faith of the seller." (See

Berner vs. McHenry, 169 Iowa 483; Halloran vs. Hutchinson, 170 Iowa 493; Nies vs. Anderson 179 Iowa 326.

Also in the case of State vs. Lindoen, 87 Iowa, 702, the Court states:

"The term intoxicating liquors includes beer without regard to the question whether or not beer is an intoxicating beverage."

Also see Milwaukee Malt Extract Co. vs. C., R. I. & P. R. Co., 73 Iowa, 98, which holds as follows:

"The inference from these provisions is that there is but one kind of beer and that it is intoxicating."

Also see State vs. Cloughly, 73 Iowa, 626, and State vs. Spiers, 103 Iowa, 711, which holds as follows:

"The statute classes beer as an intoxicating liquor; and if there are kinds of beer not in fact intoxicating, the burden is upon the person charged with the sale of such liquor to show that it is not in fact that kind, if he so claims."

The above cases conclusively prohibit the sale of beer as provided by the new federal legislation within the borders of the State of Iowa.

The question arising from the fact that under state laws in surrounding states, such as Illinois, Missouri and Minnesota, in which, upon the enactment of federal legislation, allowing the sale of beer of an alcoholic content of 3.2 per cent, also prohibits the importation of such beverages into the State of Iowa on another ground besides that which is outlined above and this ground is on the question of interstate shipment of alcoholic beverages. The so-called Webb-Kenyon law, which was passed in 1913, by Congress, and is entitled "An act divesting intoxicating liquors of their interstate character in certain cases," and provides that the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

Also the Reed "Bone-Dry" Amendment, passed by the 64th Congress, which provides, in part, as follows:

"* * * Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory the laws of which state or territory prohibits the manufacture of sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid; *Provided*, that nothing herein shall authorize the shipment of liquor into any state contrary to the laws of such state: *Provided*, that the Postmaster General is hereby authorized and directed to make public from time to time in suitable bulletins or public notices the names of states in which it is unlawful to advertise or solicit orders for such liquors."

This act was approved March 3, 1917.

Accordingly, because of the statutory provisions and the interpretation and construction of the words "intoxicating liquors" by the Supreme Court, beer cannot be sold of the alcoholic content in the federal beer bill and it cannot

be shipped into the State of Iowa because of the Webb-Kenyon Act and the Reed "Bone-Dry" amendment.

When beer becomes legalized and can be manufactured and contain 3.2 per cent alcohol, by the action of Congress, the only way that such beer can be sold in Iowa is by the action of the General Assembly of the State.

There is now pending, in the General Assembly, a bill, popularly known as the Cooney-Ditto Beer Bill, which is so-called because it is sponsored by Senator Matt Cooney, of Dubuque county, and Representative Ollie Ditto, of Osceola county, and is entitled, "An act to provide for the licensing and regulation of the manufacture and sale of beer, lager beer, ale, porter, stout and other fermented malt liquor, containing not more than three and two-tenths (3.2) per centum of alcohol by weight," and is designated as the Iowa Malt Beverage Act, House File No. 375. This bill provides for four kinds of licenses, designated as class A, class B, class C, and class D. A class A license shall permit the licensee to manufacture and sell at wholesale, beer, lager beer, ale, porter, stout and other fermented malt beverages, containing not more than three and two-tenths (3.2) per centum of alcohol by weight, for consumption *off the premises.*

The class B license permits the licensee to sell at wholesale, lager beer, beer, ale, porter, stout and other fermented malt beverages, containing not more than three and two-tenths (3.2) per centum of alcohol by weight, for consumption off the premises.

The class C license permits the licensee to sell at retail, beer, lager beer ale, porter, stout and other similar fermented malt beverages containing not more than three and two-tenths (3.2) per centum of alcohol by weight for consumption on or off the premises.

The class D license shall permit the licensee to sell in quantities of not less than seventy-two (72) ounces of beer, lager beer, ale, porter, stout and other fermented malt beverages, containing not more than three and two-tenths (3.2) per centum of alcohol by weight, not to be consumed on the premises.

Section 5 of the bill makes it unlawful for any person or persons to be either directly or indirectly interested in more than one class of license.

Section 6 of the bill provides for a written application, under oath, by the applicant, setting forth the residence and that he is a citizen of the United States, his place of birth and if he is a naturalized citizen, the time and place of such naturalization. The applicant must state that he has never been convicted of a felony and also give the location of the place or building where the applicant intends to operate. The applicant must establish that he is a person of good moral character and that the place or building where he intends to operate conforms to all the laws, health and fire regulations, applicable thereto, and is a safe and proper place or building. The application also must show that the proposed location is not within two hundred feet of any church, hospital, old peoples' home, soldiers' home, naval station, military station, federal building, public or parochial school. He must also furnish a bond with sureties to be approved by the Clerk of the District Court of the county in which the applicant for license resides, in the sum of ten thousand dollars ($10,000.00).

Section 14 of the bill provides that there shall be an investigation of the applicant and of the truth of the statements made in and accompanying the application and that the decision on the application shall be rendered within

thirty (30) days after it is received. The license fee for class "A" shall not exceed two thousand five hundred ($2,500.00) dollars per annum; for class "B" license, shall not exceed fifteen hundred ($1,500.00) dollars per annum; a class "C" license shall not exceed five hundred dollars ($500.00) per annum; class "D" license shall not exceed one hundred ($100.00) dollars per annum.

Section 15 of the bill provides for the revocation of license and is to the effect that under the provision of the act, if the licensee is convicted of a felony or is convicted of the sale of intoxicating beverages, contrary to the provisions of this act, his license shall be revoked and he shall not again be permitted to secure a license for the sale of such beverages.

Section 16 of the bill provides that the revenues obtained from license fees collected under the provisions of the act shall be distributed one-half by the municipality collecting the same to the Treasurer of the State of Iowa and shall be credited to the general fund and the remaining one-half shall be paid by the municipality collecting the same to the County Treasurer of the county in which said municipality is located and to be by said County Treasurer credited to the school fund of said county.

Section 17 of the bill provides for the violations of any provision of the act regarding false statements concerning any material fact in submitting an application for a license or for a renewal of a license or in any hearing concerning the revocation thereof, shall be punished by fine of not less than one hundred dollars ($100.00), and not more than five hundred dollars ($500.00), or by imprisonment in the county jail for not less than sixty (60) days, nor more than one (1) year, or both such fine and imprisonment.

Section 18 of the bill provides that cities and incorporated towns, including cities under special charter, are hereby empowered to enact ordinances for the enforcement of this act in conformity with the provisions of this act.

Section 20 of the bill provides that should the Congress of the United States by law fix another or different maximum alcoholic content limit than that fixed by this act, then and in that event the amount so fixed by the Congress of the United States shall prevail and be substituted for the maximum alcoholic content provided for in this act.

Section 21 of the bill provides that all acts or parts of acts not in conformity with the provisions of this act, are hereby repealed.

Section 22 of this act shall remain wholly inoperative so long as the manufacture, sale or transportation of intoxicating liquors for beverage purposes is prohibited under the laws of the United States of America, provided, however, that in the event the manufacture, sale or transportation of intoxicating liquors for beverage purposes is legalized in the United States of America the provisions of this act shall be in full force and effect.

The licenses shall be for one year and shall expire one year from the date of issuance.

MUNICIPAL COURT: Filing fee: Class A and B cases.

March 24, 1933. *Deputy Auditor of State, Des Moines, Iowa:* We are in receipt of your letter of March 7th, with which you enclose a letter received from the Clerk of the Municipal Court of Sioux City, asking for an opinion on the following:

"What fee should be charged as a filing fee in Class A and B cases in the Municipal Court?"

It is the opinion of this office that the Clerk should charge $1.50 filing fee. Section 10671 of the Code of 1931 provides in part as follows:

"If no provision is made in the laws applicable to the District Court for fees, costs, and expenses, they shall be the same as in Justice of the Peace Courts. * * *"

The laws applicable to the District Court provide for the filing fee of $1.50 for any case filed there, and it is therefore our opinion that the same charge should be made in the Municipal Court.

A corporation's chief engineer in charge of each division of engineering work should hold a certificate.

March 25, 1933. *Secretary, Iowa State Board of Engineering Examiners, Des Moines, Iowa:* Receipt is acknowledged of your letter of the 21st inst., in which you request, on behalf of the Board of Engineering Examiners, an opinion on the following:

"Whether every member of an engineering corporation practicing in the state of Iowa shall be required to be registered, or whether one of his corporation is sufficient to comply with the Iowa law.

"May any member of the firm or partnership with or without trusteeship operate in Iowa, or should each member practicing engineering in Iowa be required to be registered?"

You are advised that Section 1854 of the Code, prohibits the practice of professional engineering by any person unless he be a registered professional engineer as provided in Chapter 89, except as permitted in said chapter.

Section 1855, Code, defines professional engineering, and it is the opinion of this Department that a person doing the things therein defined as professional engineering is practicing engineering within the meaning of that section, irrespective of whether he is working independently or as an employee of some corporation or partnership.

The practice of engineering is a personal thing just as is the practice of medicine or any other profession. Any person who holds himself out to practice medicine and does, in fact, practice is engaged in the practice of medicine without reference to the fact as to whether he is operating independently or employed by some corporation or partnership. The same thing is true of professional engineering. The practice of professional engineering consists in doing the things that constitutes professional engineering within the state and any person who does those things which constitute professional engineering within the state is, within the meaning of chapter, practicing professional engineering. The only question which arises at this point is whether or not the individual is actually practicing engineering. There are a lot of things which may be, and in fact, must be done in connection with engineering work which is not, in fact, engineering in the professional sense, and the only test is whether or not the particular person is actually practicing the profession of engineering.

Chapter 89 does, however, contain an exception in the last section of the chapter, the exception being as follows:

"Corporations engaged in designing and building works for public or private interests not their own shall be deemed to practice professional engineering within the meaning of this chapter. With respect to such corporations all principal designing or constructing engineers shall hold certificates of registration hereunder."

It will be noted that this section is introduced as an exception to the general provisions of the law and its requirements are according to the language just noted, that all principal designing or constructing engineers shall hold certificates of registration.

In view of the exception contained in Section 1876, to which reference has just been made, it is the opinion of this Department that if a corporation is engaged in engineering that the chief engineer in charge of each division of the engineering work should hold a certificate.

REAL ESTATE COMMISSION:

March 25, 1933. *Real Estate Commission, Office of Secretary of State, Des Moines, Iowa:* Your letter, of recent date, to the Attorney General, has been referred to the writer for attention.

The question presented is an interesting one and I have read the case cited in your letter and have also read the cases cited in 18 Corpus Juris 361, 8 Ruling Case Law 115, and 9 American Law Reports 107.

The last named case is found in 275 Missouri, 573. The holding is, as follows:

"A condition in a deed against the transfer, lease, or renting of the property to negroes is not void as against public policy."

However, in 9 American Law Reports 115, in the case entitled, "Los Angeles Investment Company vs. Alfred Gary and Wife," also reported in 186 Pacific, 596, the holding is, as follows:

"*Covenant — condition against occupation by person of particular race — validity.*

"A condition in a deed in fee that the property shall not be occupied by a person other than of the Caucasian race is valid."

Most of these cases, as cited in the note on page 120, in 9 American Law Reports, are from southern states and deal with the colored race, or are Pacific coast cases, which deal with the Japanese and Chinese races.

There is also a Missouri case, in 196 Southwestern Reporter 1, where an owner of real estate made a contract for the sale of the same, to a white man, and after making the deed, discovered that the deed was made to a colored man, for whom the white man was only an agent, although he had told the agent that he would not sell the property to a negro because he did not want a negro in that location; and the court held that the contract was void on the grounds of fraud.

The Digests, such as is referred to above, do not cite any Iowa cases. However, there is a case in 146 Iowa, 333, which holds, as follows:

"There is an element of bad faith in the withholding, by a real estate broker, from the owner of the property, of the name of the prospective purchaser of the same."

I believe that a number of deeds, drawn in the city of Des Moines, have a clause prohibiting the sale to any persons other than those of the Caucasian race. A prohibition, of this nature, is considered valid. Also in restricted areas, restrictions have been held to be good, with reference to a certain type of building to be erected in the area.

In dealing with a situation, such as this, if you feel that the facts are such as would warrant an investigation, I wish to call your attention to Section 1905-c33 of the Code of Iowa, 1931, which deals with rules and regulations and reads, as follows:

"The commissioner is expressly vested with the power and authority to make and enforce any and all such reasonable rules and regulations con-

nected with the application for any license as shall be deemed necessary to administer and enforce the provisions of this chapter."

Also Section 1905-c34 which is, as follows:

"*Hearing.* The commissioner, after an application in proper form has been filed, shall, before refusing to issue a license, set the application down for a hearing and determination as hereinafter provided in section 1905-c49 to 1905-c56, inclusive."

Also see 1905-c39, which deals with re-investigation and recall of licenses and allows you, as commissioner, upon your own motion and upon a verified complaint, in writing, of any person, provided such complaint, or such complaint, together with evidence, documentary or otherwise presented therewith, shall make out a prima facie case that the registrant is unworthy to hold such certificate, that you may notify him, in writing, that the question of his honesty, truthfulness and integrity shall be reopened and determined de novo. It also provides for the giving of notice to the broker.

In case that no complaint, in keeping with the Code, is filed, it would seem that the time to deal with brokers, who deal in questionable practices, is when they make application for a renewal and at that time you can weed out those, who are giving you trouble.

Section 1905-c49 provides for hearings and you, undoubtedly, have gone into this and the following sections, relating to the procedure of conducting a hearing.

BOARD OF SUPERVISORS: Mileage: Session and committee work.

March 25, 1933. *County Attorney, Vinton, Iowa:* We are in receipt of your letters of March 2nd and March 16th, in which you ask for an opinion on the following:

"The Board of Supervisors in Benton county, apparently, when they met on Monday and had a letting or some other special work in the week, would adjourn on Monday night until the day for the letting or other session work, and, for instance, if they adjourned until Wednesday and had some special committee work, they would come back Tuesday, which was called a committee day. Therefore, if Monday was a session day, Tuesday a committee day, and Wednesday another session day, they would charge mileage for each of these days, and not as a continuous session.

"Your question is whether or not the Board had a right to charge mileage for three days."

You are advised that Section 5125 provides that, when the Board is in continuous session, mileage may be charged for only one trip in going to and from the session. This section also provides that members of the Boards of Supervisors shall receive, in addition to their per diem mileage in going to and from the regular, special, and adjourned sessions thereof, and in going to and from the place of performing committee service.

A continuous session is one in which the work of the regular or special session was not completed on the first day on which the Board met. If this Board met on Monday and did not complete its regular business on that day, then adjourned until Wednesday, and did committee work on Tuesday, it would be entitled to mileage for one day of session work and one day of committee work.

The special session is defined in Section 5119. An adjourned session is one to which the Board adjourned at the close of its regular session, and after the work of the regular session was completed.

NEPOTISM: Bus driver: Spouse of member of board.

March 30, 1933. *Deputy Superintendent of Public Instruction, Des Moines, Iowa:* We are in receipt of your letter of March 17th, in which you ask for an opinion on the following:

"Is Section 1166 in its present form broad enough to make it illegal for a school board to employ as a bus driver one who is the spouse of a member of the board or one who is related to a member of the board by consanguinity or affinity within the third degree?"

It is the opinion of this office that Section 1166 would not apply in this case, for the reason that the school board employs the bus driver. Such an employment by the board would be an approval of its own act, and could not therefore be questioned.

HEALTH OFFICER: CITY: An ostheopathic physician may be appointed to the position of the City Physician or City Health Officer.

March 30, 1933. *Councilman, Perry, Iowa:* Your letter of the twenty-sixth inst., to the office of the Attorney General, has been referred to the writer for attention.

Kindly refer to Chapter 107 of the Code of Iowa, 1931, and among other sections there set out, you will find in Section 2231, the following:

"*Health officer of local board.* Each local board shall have a health officer who shall be a physician, or one specially trained in public hygiene and sanitation. In cities and towns the health physician shall be such health officer. In every other case the local board shall appoint said health officer who shall hold office during its pleasure."

You will note that the health officer shall be a physician or one specially trained in public hygiene and sanitation.

In the opinion of the writer, relative to the clause regarding training in public hygiene and sanitation, it is broad and would undoubtedly allow the appointment of an osteopathic physician to this position.

BEER: Storage of beer in Iowa.

March 30, 1933. *Deputy County Attorney, Fort Madison, Iowa:* Your letter of the twenty-eighth inst., to the office of the Attorney General, has been referred to the writer for attention.

It would seem to the writer that the person, who desires to store beer in Iowa would be violating Section 1924 of the Code of Iowa, 1931. You should advise him of the so-called Webb-Kenyon Act, which was passed by Congress and is entitled, "An act divesting intoxicating liquors of their interstate character in certain cases," and provides, as follows:

"That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended' by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

Also, the Reed "Bone-Dry" Amendment, passed by the 64th Congress, which provides, as follows, in part:

"That no letter, postal card, circular, newspaper, pamphlet, or publication of any kind containing any advertisement of spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind, or containing a solicitation of an order or orders, for said liquors, or any of them, shall be deposited in or carried by the mails of the United States, or be delivered by any postmaster or letter carrier, when addressed or directed to any person, firm, corporation, or association, or other addressee, at any place or point in any state or territory of the United States at which it is by the law in force in the state or territory at that time unlawful to advertise or solicit orders for such liquors, or any of them, respectively.

"If the publisher of any newspaper or other publication or the agent of such publisher, or if any dealer in such liquors or his agent, shall knowingly deposit or cause to be deposited, or shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of the provisions of this section, or shall knowingly deliver or cause to be delivered by mail anything herein forbidden to be carried by mail, shall be fined not more than $1,000 or imprisoned not more than six months or both; and for any subsequent offense shall be imprisoned not more than one year. Any person violating any provision of this section may be tried and punished, either in the district in which the unlawful matter or publication was mailed or to which it was carried by mail for delivery, according to direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed. Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid; *Provided*, That nothing herein shall authorize the shipment of liquor into any state contrary to the laws of such state: *Provided further*, That the Postmaster General is hereby authorized and directed to make public from time to time in suitable bulletins or public notices the names of states in which it is unlawful to advertise or solicit orders for such liquors."

Accordingly, because of the statutory provisions and the interpretation and construction of the words "intoxicating liquors" by the Iowa Supreme Court, beer cannot be sold and by way of the same reasoning cannot be kept in the manner in which you suggest of the alcoholic content as provided in the federal beer bill. It cannot be shipped into the State of Iowa, because of the Webb-Kenyon Act and the Reed "Bone-Dry" Amendment.

For an interpretation and construction of the words "intoxicating liquors" you are referred to the Annotations of 1931 Code, as set out under Section 1923.

Until the Cooney-Ditto Beer Bill is passed by the General Assembly, it is the opinion of the writer that beer could not be stored in Iowa for sale in Illinois. With reference to the Cooney-Ditto Beer Bill, it is my understanding that it is being redrafted and that this new bill will be presented to the General Assembly within the next few days. If such a bill passes allowing beer to be kept and sold of the alcoholic content of 3.2 per cent by weight, as provided by the federal beer bill, then, of course, there would be no objection, as this act would supersede and repeal the Sections 1923 and 1924 of the Code of Iowa, 1931, and as long as this was allowed in Iowa, the Webb-Kenyon Act and the Reed "Bone-Dry" Amendment would not apply as to Iowa.

BEER: Advertising: Printing of hand bills.

March 31, 1933. *County Attorney, Spirit Lake, Iowa:* Under date of March twenty-seventh, this office received a letter from James L. Miller, editor of the Milford Mail, Milford, Iowa.

Enclosed herewith find copy of our answer.

Mr. Miller makes inquiry, relative to advertising beer in his newspaper and also the printing of hand bills (I assume, of course, that he means beer of the alcoholic content, as provided in the federal beer bill). Those desiring to advertise, and who ordered the hand bills and who ask the distribution of them, he states, are residents of Minnesota and he, Mr. Miller, desires information on whether or not he can print hand bills and whether or not they can be distributed in Iowa.

It is the opinion of this office that Sections 1923 and 1924 of the Code of Iowa, 1931, and the cases, as decided under the first named statute, giving an interpretation and construction of the words "intoxicating liquors," is such as to prohibit the keeping or sale of beer of the alcoholic content of 3.2 per cent by weight, in Iowa, at this time. Also, that the Webb-Kenyon Act, as passed by the national Congress in 1913, prohibits interstate shipment into dry territory such as Iowa is, at this time, and also that the Reed "Bone-Dry" Amendment, as set out in the letter to Mr. Miller, a copy of which is enclosed, prohibits other matters, with relation to liquor in a dry state.

This, however, would all be changed by the passage of the so-called Cooney-Ditto Beer Bill, Senate File 375, or the redraft of this bill, which is being done at this time, in that it would change the definition of the alcoholic content in beverages and would also do away with the Webb-Kenyon Act and the Reed "Bone-Dry" Amendment, with reference to Iowa, because the status of this state would be changed in this matter.

BOARD OF SUPERVISORS: Waiver: County funds.

April 3, 1933. *County Attorney, Shenandoah, Iowa:* We are in receipt of your letter of March 21st, in which you ask for an opinion on the following:

"There are two state banks at Clarinda, in which a considerable portion of the tax money collected since January 1, 1933, has been deposited. In July, 1932, both of these banks went on a voluntary waiver plan, and all private depositors waived 100% of their deposits. Public funds, however, were not tied up. Both of these banks are now under Senate File 111, and the officers now request the Board of Supervisors to waive 75% of the county funds, while funds of the private depositors, which were deposited since July, will not be waived.

"Your question is whether or not the Board of Supervisors have authority to make such waiver."

It is the opinion of this office that under Section 9239-a2 of the Code of 1931 and under the recent bill passed by both Houses of the Legislature, the Board of Supervisors have authority to enter into depositors' agreements, but we do not believe the Board has authority to waive the public deposits, when none of the private depositors are executing such waivers. This law does not contemplate a mere execution of a waiver. It contemplates, on the other hand, a depositors' agreement executed by more than 50 per cent of the depositors and involving 75 per cent of the deposits, as provided in said law.

We might also call your attention to the new banking bill which is being introduced. This bill contemplates stock assessments before such waivers are executed by depositors. We believe it would be advisable for you to wait a few days before any action is taken and see what happens to this bill.

CHECK: Given in payment of an account: Not thing of value.

April 3, 1933. *County Attorney, Dubuque, Iowa:* We are in receipt of your letter of February 24th, which reads as follows:

"I received your favor of the 18th instant in regard to the check matter.

Will you kindly give me the authority in which the Supreme Court has held that a check given as payment of an account did not constitute a thing of value?"

We might call your attention to the fact that this case, which was decided by the Supreme Court, was decided under the false pretense statute and prior to the enactment of the law relative to false drawing of checks. The false pretense statute does not use the word "credit," while Section 13047, relative to false drawing or uttering of checks, does use that word. However, in determining whether or not a check given in payment of an account, or to apply on an account, is a violation of that section would depend on the meaning of the word "credit."

After a careful study of the matter, we are of the opinion that a check given as a payment on an account is not credit, and that the word "credit," as used in Section 13047, does not mean "a credit on an account." It means to obtain credit through the giving of such check or "to purchase credit."

SCHOOL FUND MORTGAGE: Foreclosure: Board of Supervisors.

April 3, 1933. *County Attorney, Bedford, Iowa:* We are in receipt of your letter of March 30th, in which you ask for an opinion on the following:

"Last fall, September 2, 1932, my predecessor, by the direction of the Board of Supervisors foreclosed a school fund mortgage. The mortgage was $4,000.00 and the Auditor bid in the land at the foreclosure sale for $2,500.00, leaving a deficiency judgment of $2,071.00.

"At that time the Board offered to take a deed to the land as full satisfaction of the debt. Either through misunderstanding or ignorance of the law, Bruner, the mortgagor, failed to appear and proceedings went on as stated above. Now since the Holiday Association has become so prominent, they have decided that there should be no deficiency judgment against them. I took it up with the Board and suggested that if Bruner would give a quit claim deed that the Board might release said judgment.

"I would appreciate very much your opinion as to whether or not the Board or their bondsmen would be held responsible, if they should take a deed in this case."

It is true that the county is responsible on all school loans. The responsibility, however, does not reach the Supervisors personally, unless they are negligent in the preservation of the loans or funds. The responsibility of the county is provided for in Sections 4502 to 4505 inclusive, and especially in Section 4505, which provides as follows:

"Any excess over the amount of the unpaid portion of the principal, costs of foreclosure, and interest on the principal as above provided, shall inure to the state and be credited to the permanent school fund account. If the lands shall be sold for a less amount than the unpaid portion of the principal, the loss shall be sustained by the county, and the Board of Supervisors shall at once order the amount of such loss transferred from the general fund of the county to the permanent school fund account."

In so far as the Board of Supervisors having authority to make a settlement is concerned, this office is of the opinion they have authority to make a settlement, provided they use care and good judgment in the making of such settlement.

The Supreme Court of this state in one case held as follows:

"In the management of the school fund, the Board of Supervisors has authority to do acts which, in the exercise of wisdom and care, men of affairs ordinarily do for the security and collection of debts. Therefore, held, that a compromise, in a particular case, of a claim in behalf of the school fund was valid."

Poweshiek County vs. Buttles, 70 Iowa, 246; 30 N. W., 558.

We do not believe, however, that this would warrant the Board of Supervisors in satisfying a deficiency judgment without receiving any consideration from the judgment debtor. If they feel that the judgment debtor is insolvent, they would naturally have authority to satisfy the judgment in consideration of the payment of a lesser sum. They would not, however, be authorized to cancel the judgment, without any consideration of any kind passing to the county. However, it would seem that if the Board could obtain a quit claim deed, which should be taken in the name of the state, under Section 4502, provided the title to the land is clear, and could obtain immediate possession, or have the rent notes turned over to the Board, there would be no question but what such a settlement would be legal, provided the Board is satisfied that the judgment could not be collected from the judgment debtor.

The law provides that this land, after title is obtained, must be sold within two years. If it sells for less than the amount of the loan, the county is then responsible to the state school fund for any deficiency.

TRUST FUNDS: State sinking fund act: Length of time for clearance of check: Banks under Senate File 111.

April 4, 1933. *Auditor of State, Des Moines, Iowa:* We are in receipt of your communication of March 7th, with which you enclosed letter received from Irvin C. Nichols, Clerk of the District Court at Estherville. Your questions are as follows:

"1. What is the distinction between public funds and trust funds in the custody of public officials?

2. Are trust funds included under the protection afforded by the State Sinking Fund Act?

"3. What was the Supreme Court ruling on the time that was to be considered a reasonable length of time for the clearance of a check before responsibility for loss, due to the closing of a bank, was to fall on the recipient of the check and not on the maker?

"4. Would this apply to checks drawn on banks that have gone under Senate File 111?

"5. In the case where a Clerk of the District Court had on account trust funds of an estate, deposited in an authorized depository which has gone under Senate File 111, would the Clerk be compelled to pay the trust obligation from any funds in his possession, or would the party, for whose benefit the trust fund was held, be compelled to await the release of said funds by the State Banking Department and suffer his pro rata share of the loss?"

We will answer your questions in the order asked.

1. Public funds are those funds which belong to the public officers, designated in Chapter 352-a1, and it means funds which will go to the county, city or town, school district or other body protected by this chapter. For instance, in the Clerk's Office, it would include filing fees and all other money which belongs to the county.

The trust funds are funds which have been paid to the officers for some individual, partnership, or corporation, and would include such funds as tax redemption funds, money paid to the Clerk of the Court in settlement of a judgment, copy fees, witness fees, if not already paid by the county, and money paid into court under an agreement of parties or on an order of the court, and to be held by the Clerk for the successful party in some particular litigation.

2. Trust funds are not protected by the State Sinking Fund Act.

3. The Supreme Court of this state has held in several cases that it is the duty of one receiving a check to deposit the same or start it through for clearance before the close of the next business day, after receiving it. There-

fore, if you should receive a check on Saturday, Sunday being a legal holiday, it would be your duty to deposit it on Monday. If Monday should be a legal holiday, you would have until Tuesday. If this is done, the person who received the check has not been negligent, and if the check fails to clear, the maker of the check is still liable for the debt. In other words, it is the maker's loss and not the loss of the payee.

4. This office is of the opinion that this rule would also apply, if a bank on which the check was given went under Senate File 111 after the delivery of the check. The payee of the check would not be required to hold it for a year, in order to ascertain whether or not the bank would be able to pay it.

5. In answering Question No. 5, we will say that the Clerk is not required to pay the trust obligation from any funds in his possession. The party, for whose benefit the trust fund was held, would be entitled to participate in said deposits, but would be entitled to receive only a pro rata share of the funds deposited in the bank.

BOARD OF SUPERVISORS: Waiver: County funds: Appoint trustees: Deposits in bank.

April 4, 1933. *County Attorney, Guttenberg, Iowa:* We are in receipt of your letter of March 21st, in which you ask for an opinion on the following:

"1. Has the Board of Supervisors authority to sign a waiver as to fifty or seventy per cent of the county's funds deposited in any bank, and to remain in a trusteeship?

"2. Have they authority to agree to the appointment of certain trustees and to agree thereto for a period of three years, that is, that the property be tied up for three years in a trusteeship?

"3. May they waive the rights of the county, so that the county would be limited to participation as to said fifty or seventy per cent of its deposits to the property in said trusteeship, the same as other depositors signing such a waiver or agreement?

"4. May the Supervisors assign, transfer or set over their interest in such trust fund?

"5. May they assign, transfer or set over the county's interest in the other thirty or fifty per cent?"

Section 9239-a2 of the Code gives the Board of Supervisors authority to enter into a depositors' agreement relative to county funds deposited in a bank which is under receivership.

Just recently a bill was passed by both Houses and has become a law, giving the Board the same authority, where the funds are deposited in a bank which has gone under Senate File 111. Any depositor's agreement executed by the Board of Supervisors should be made in strict compliance with the terms of the statutes. If the depositor's agreement is one which was being entered into by more than 50 per cent of the depositors having control of 75 per cent of the deposits, and if all of said depositors are making such waivers, then the Supervisors may, on behalf of the county, join in the waiver.

However, we might call your attention to the fact that the Legislature is now laboring over a new banking bill, and we would suggest that it might be well to wait for a few days until this bill is disposed of, for the reason that it contains provisions with reference to the execution of waivers.

DRAINAGE DISTRICT NO. 3: County Auditor and Treasurer: Bonds and warrants paid from county funds.

April 4, 1933. *Auditor of State, Des Moines, Iowa:* We are in receipt of your letter of March 10th, in which you ask for an opinion on the following:

"Drainage District No. 3, in Mitchell county, was established on petition, in about the year of 1919. Contracts were let and bonds issued for the payment of the same. However, in making the assessments, they did not take into consideration the cost of the surveys and other preliminary expense, nor did they take into consideration the adjustments on several pieces of property. The drainage fund, as shown by the books of the County Auditor and County Treasurer, were overdrawn on June 18, 1921, in the sum of $1,541.82.

"When warrants or bonds were presented for payment, the same were paid from funds in the Drainage District, and, if insufficient, were paid from other funds belonging to Mitchell county. The Board of Supervisors made no assessment or other levies for the payment of costs, bonds, warrants, or expenses of said drainage after the first levy made on or about August 3, 1920, until November 9, 1931. On that date, a levy was made, but on a hearing in the District Court, it was held that such assessment was illegal and had to be set aside.

"Your question now is whether or not, by application to the Budget Director, any funds could be transferred to this Drainage District fund for the purpose of taking care of the deficiency."

It is the opinion of this office that such procedure would be illegal. If the County Treasurer paid these bonds or warrants out of county funds, rather than funds belonging to this particular Drainage District, it constitutes a misappropriation of funds. The wrong certainly cannot be righted by having the Budget Director approve an illegal transfer of funds. The funds of this particular Drainage District are raised by taxation on the property in that district, while the county funds are made up of monies collected from taxes levied on all property in the county.

The only suggestion we would make would be for the county attorney to make a careful investigation, and if the liability of the officers who made this illegal expenditure is not barred by the statute of limitations, he should proceed to collect at once. Notice should be immediately given to the surety on the bond. It is impossible to say, from a study of the facts as they are before me, whether or not the liability of the officers is barred. Undoubtedly, the first act in 1921 was barred. However, it may be that in taking care of this overdraft, other illegal acts have been committed since that time, which are not barred.

ADOPTION OF CHILD: Surety bond: Board of Control.

April 4, 1933. *County Attorney, Keokuk, Iowa:* Your letter of March 22nd, addressed to Mr. Walter F. Maley of this office, has been handed to me for attention, due to the fact that Mr. Maley will be occupied in the western part of the state for the next week or ten days.

The first paragraph of your letter I shall not attempt to answer, for the reason that I know nothing about the facts. The second paragraph, however, is one in which you ask for an opinion on the following:

"I wish you would please read Section 3661-A91. You will note that this section says only 'bond,' and I have a case at the present time in which a child came from Illinois and we are glad to furnish the bond demanded by the statute, but our Board of Control asks for a surety bond. The adoptive parents in the case are Mr. and Mrs. Henry G. Weirather, who are financially responsible, and I am willing to prepare a bond in double the amount of the statute, but I do not think that it is necessary that this party should be compelled to pay a premium for five years, and the statute does not require it. I would be pleased to have your opinion in regard to this matter."

It is the opinion of this office that Section 3661-a91 does not apply to persons bringing a child into this state, if they are taking immediate steps to adopt

the said child. It applies to the agency, as referred to in Section 3661-a90. There is nothing in either of those sections which provides that the adopting parents shall file a bond. This bond is to be filed by the agency bringing a child into the state.

(1) BANK: Funds received on new deposits: Senate File 111. (2) Board of Supervisors: Public depository: County Attorney: Liability of county officers.

April 4, 1933. *County Attorney, Tama, Iowa:* We are in receipt of your letter of April 3rd, in which you ask for an opinion on the following:

"1. Bank A, since the holiday, has been receiving money from individuals in that community, for the payment of taxes. The way these funds have been handled in the past is to credit the county on deposit for the funds collected for taxes. What it amounts to is that the county has started a new deposit account at Bank A. However, Bank A, operating under Senate File 111, cannot loan any of the funds received on new deposits. Is Bank A liable to the county for interest on the public funds deposited as a new account?

"2. Bank A was designated by the Board of Supervisors as a public depository for the year of 1933 at the proper time. Should I, as County Attorney, since it has opened restricted under Senate File 111, have the Board by resolution re-designate it as a public depository, stating in the resolution that county officials will not be liable for the interest on deposits made since the bank has reopened, or does the fact that the bank has once been designated as a public depository release any liability on the part of the county officers?"

We will answer your questions in the order asked.

1. There is a bill now pending in the Legislature to provide that these banks will not have to pay interest on public funds. The bill passed the Senate, but did not pass the House. However, it is now pending in the House on motion to reconsider. If it passes the House, there will be no interest paid. In view of this fact, we do not feel like giving an opinion for a few days, until we see what action is taken on the pending legislation. If this bill does not pass, we will then be glad to give an opinion on the existing law.

CITY COUNCIL: Tax certificates: Scavenger tax sales: Right to pay taxes; Right to employ council member as attorney and pay him for legal services.

April 4, 1933. *Auditor of State, Des Moines, Iowa:* We are in receipt of your letter of March 31st, in which you ask for an opinion on the two following questions:

"1. The City Council has purchased tax certificates at scavenger tax sales of property in Cedar Heights and spent hundreds of dollars for certificates and taxes on the properties. I would like to know just how extensive you would like for me to go into the purchase of the tax certificates. I would like to know if you think the council is in their legal rights of making so many purchases of tax certificates and having to pay the taxes on delinquent special assesments against the said properties.

"Has the City Council the legal right to pay taxes on property owned by residents of Cedar Heights who are not financially able to pay the taxes on said property? This has been done by the City Council. Has the City Council the right to employ one of their council members as an attorney and pay him for legal services rendered for the city?"

We will answer your questions in the order asked.

1. It is the opinion of this office that the City Council is within its legal rights in making purchases of tax certificates, provided the sale is held under Section 6039, or any like provisions of the statute. Section 6039 provides as follows:

"At any such sale, where bonds have been issued in anticipation of such special taxes and interest, the city may be a purchaser, and be entitled to all the rights of purchasers at tax sales."

This section of the Code has reference to tax sales of property, against which special assessment has been made for street improvements, etc.

2. There is nothing in the Code which gives the City Council the right to pay taxes on property. There are provisions, however, relative to the remission of taxes and also relative to the remission of special assessments. The City Council has the legal right to remit special assessments on application of persons who, through age or infirmity, are unable to make payments.

You also ask whether or not the City Council has authority to employ one of its members as attorney and pay him for legal services rendered for the city. We know of no law which would prevent a member of the City Council from appearing in a lawsuit for the city or taking care of some particular work for the city. We do not believe, however, that the city could appoint him as city solicitor.

EMERGENCY RELIEF ACT: Men employed under act: Workmen's compensation act.

April 4, 1933. We are in receipt of your letter of March 1st, in which you ask whether or not men employed under the Emergency Relief Act would be entitled to the benefits under the Workmen's Compensation Act, if injured in line of duty.

It is true that the money is received from the R. F. C., and that it is actually borrowed by the Governor. However, the money is borrowed for the county or municipality, and the persons employed are doing work for some of those taxing bodies. We are inclined to believe that they would come under the Workmen's Compensation Act, even though they are paid only in merchandise.

Of course it is true that, if one of these men is working under the direction of the county, he would have to be taken care of by the county, in case of injury, because of the fact that he is destitute and would not have sufficient money to pay his own expenses.

It is therefore the opinion of this office that, in case of injury, the laborer should be compensated under the Workmen's Compensation Act.

CLOSED BANK, FUNDS TIED UP IN: School district (consolidated): Refuse to open school for a year: Drop out school subjects.

April 4, 1933. *County Attorney, Greenfield, Iowa:* We are in receipt of your letter of March 31st, in which you ask for an opinion on the following:

"A certain School District (Consolidated) had drawn its funds just before a bank closed, tying same up. Promise of getting anything from this bank or from the State Sinking Fund seems remote and in the distant future. The treasury is empty, and the money due to pay the coming year's expenses has been used up as it comes in to pay the old year's debts. Bonds also have to be retired.

"Now, can this School Board, as an emergency measure, refuse to open this school up for a year, providing the teachers are not yet hired? Could the people living in that School District, at a special election, vote to keep the schools closed for a year or so? What about dropping out manual training, domestic science, and physical education, as a means of making the money reach?"

Certainly the School District would not have authority to close the schools. The School Board could, however, issue warrants in payment of its indebtedness up to the amount of its anticipated revenue, that is, up to the amount

that it would have received, if all taxes had been collected and none of the money tied up in the bank. After these warrants are issued and stamped "Not paid for want of funds," the School Board could then fund the warrant indebtedness by a bond issue.

With reference to your second question, concerning the authority of the Board to drop certain subjects, it is the opinion of this office that they can drop any subject, except those which are required by law to be taught.

Yeoman Life Insurance Company exempted from payment of premium tax.

April 5, 1933. *Commissioner of Insurance, Des Moines, Iowa:* Your letter of the 30th ult., concerning the Brotherhood of American Yeomen is received.

We note that the Brotherhood of American Yeomen operated as a fraternal beneficiary society under Chapter 402 of the Code until May 1, 1932, when it was transformed into a mutual legal reserve life insurance company, and your request for an opinion upon the following proposition:

"The Yeomen Mutual Life Insurance Company contends it is exempted from the payment of a premium tax under provision of Chapter 335 of the 1931 Code, on the assessment income from the certificates outstanding as of the date of transformation."

From an examination of your letter and the documents accompanying the same the following facts appear:

1. The Brotherhood of American Yeomen carried on its business in this state as a fraternal beneficiary society under the provisions of Chapter 402, Code, 1931, until the first day of May, 1932.

2. That on said first day of May, 1932, said company transformed itself into a mutual legal reserve life insurance company under the name of Yeomen Mutual Life Insurance Company, and all business written by it after that date was written on the mutual basis.

3. That said Company after this transformation and after the acquisition of the new and additional powers was but a continuation of the old corporation and continued to carry on the fraternal insurance business as to certificates in force on the date of the transformation exactly as it had done before such transformation, and the transformation was not an interference in any way with the fraternal insurance certificates previously issued by it and then outstanding.

4. That the Company is now properly carrying on two lines of insurance business, viz.: 1st, the fraternal insurance business written before the transformation, and second, the mutual business written after the transformation.

Chapter 335, providing for a tax on the premium income of insurance companies, exempts from its operation fraternal beneficiary associations and under the provisions of such exemption, as we understand it, no tax was levied against the assessment income of the Brotherhood of American Yeomen prior to its transformation and the question narrows down to this.

Does the transformation of the company into a mutual legal reserve life insurance company operate to make the income from the assessments on the death benefit certificates, which were outstanding at the date of transformation, subject to the tax imposed by Chapter 335?

In view of the fact that the company is still carrying on its fraternal insurance business which was in force at the time of the transformation exactly as it would have carried it on had there been no transformation; and in view of the fact that it is required to continue that business by the terms of its

contract with certificate-holders, by the provisions of its amended articles of incorporation and by the terms of the statute itself by which the transformation was made, we are forced to the conclusion that it should be treated, as to that part of its business as a fraternal beneficiary society as that term is used in Chapter 335, Code, 1931. As to that part of its business it is functioning identically as any other fraternal beneficiary society and its business to that extent is the business of a fraternal beneficiary society. It necessarily follows, in our opinion, that since the tax is not imposed on the assessment income from certificates of fraternal beneficiary societies, that that part of the income received by the Yeomen Mutual Life Insurance Company from assessments on beneficiary certificates is not subject to the tax, and that as to such business the Yeomen Mutual Life Insurance Company is still a fraternal beneficiary society as the term is used in Chapter 335, Code, 1931.

This conclusion finds support, not only in the fact that the business is actually carried on in the same way, but that under the reorganization or transformation, the company is charged with the duty of carrying on that business and under the statutes as well as the terms of the certificates or contracts, is required to continue it in the same way. The two classes of business which the company now carries on are distinct and must of necessity be kept entirely separate. As to the old business, it still functions as a fraternal beneficiary society. As to the new business, written after the date of transformation, it is a legal reserve life insurance company, and of course, the premium income received by it as a legal reserve life insurance company would be subject to the tax.

April 6, 1933. *Commissioner of Insurance, Des Moines, Iowa:* Acknowledgment is made of receipt of your letter of the 3rd inst., concerning the proposed financial operations of the Royal Union Life Insurance Company from which we note the following facts.

1. The Royal Union Life Insurance Company has a real estate account of about $6,700,000.00.

2. Deeds covering approximately $4,500,000.00 worth of this real estate are on deposit with the Department. The balance of real estate is not on deposit with the Department.

3. The Royal Union Life Insurance Company proposes to make a loan from the Reconstruction Finance Corporation in the amount of $3,000,000.00, using the real estate in its account as security.

The proposal is that the Insurance Company be permitted to withdraw the real estate, conveyances of which are now on deposit with the Department, for the purpose of creating a lien thereon as security for the loan from the Reconstruction Finance Corporation and then the Insurance Company to deposit the proceeds of the loan, together with deeds to the land with the Department; and in connection with this transaction, you desire the opinion of this Department on the following:

"As to whether or not the Commissioner of Insurance, under the laws of the State of Iowa, can permit the withdrawal of these deposited deeds for the purpose outlined and permit the company after re-depositing the proceeds of the loan to redeposit the real esate subject to the lien to the R. F. C. In other words, is the deposit of the insurance company a trust estate for the benefit of the policyholders which cannot be disturbed even considering the fact that the amount to be obtained from the Reconstruction Finance Corporation is probably a fair value."

Referring first to the latter part of your inquiry, viz.: "Is the deposit of the insurance company a trust estate for the benefit of the policyholders which cannot be disturbed?" It is the opinion of this Department that such deposit is not a trust estate in the hands of the Commissioner, and in support of this conclusion, attention is called to the fact that the responsibility for the management of life insurance companies rests primarily upon the officers and directors of the companies, and they are the ones who are responsible for the investment policy of the company. If securities deposited with the Commissioner became a trust estate in his hands the effect would be to freeze the account and prevent the sale by the company of securities which in its judgment were likely to depreciate and the reinvestment of the funds in other securities having a more staple value. It is well known to everyone that the proper preservation of an investment portfolio requires a great deal of care and skill and diligence and there is nowhere manifest in the statutes a legislative intention to prevent life insurance companies from freely using and exercising that skill and diligence which the circumstances of the case and the reasonable demands of their policyholders and stockholders require.

Moreover, Section 8739 provides that a life insurance company investing its funds in a home office building may use the value thereof as a part of the deposit of the legal reserve in which case it shall convey the same to the commissioner of insurance by trust deed, such property to be held by him in trust for the benefit of the policyholders or members of the company or association. It will be noted that there is a difference between the section with reference to the deposit of the home office building and the section dealing with the deposit of other investments, and that this difference is in complete harmony with the thought suggested in the preceding paragraph. The home office building, quite naturally, is not such an investment as the company would desire to change and the statute with reference to its deposit provides that it shall be held by the commissioner in trust. On the contrary, the statute, Section 8655, with reference to the deposit of other securities does not contain the statement that such securities are to be held in trust by the commissioner and we think the logical and necessary inference is that it was not intended that they should be held in trust by the commissioner.

This conclusion finds further support in the provisions of Section 8663 which in effect provides that in the event of insolvency proceedings against the company that

"Securities * * * * on deposit shall vest in the state for the benefit of the policies on which such deposits were made."

The fact that this section suggests a time when the interest of the state in the securities on deposit shall vest tends very strongly to preclude any inference that title vests prior to that time.

We also direct your attention to Section 8744 of the Code which is as follows:

"8744. Purpose of withdrawal. Any association making deposit with the commissioner as herein contemplated, shall at the time of making request for the withdrawal of any securities designate for what purpose the same are desired to be withdrawn."

This section is certainly inconsistent with the thought that those securities constitute a trust estate held by the commissioner of insurance for the benefit of the policyholders because it recognizes the right of the company to withdraw securities on deposit and does not provide that such right of withdrawal is contingent upon the immediate substitution of other securities. It requires

only that the purpose of the withdrawal be stated to the commissioner at the time request therefor is made.

Our conclusion is that the securities deposited with the commissioner, under the provisions of Section 8655, is not a trust estate and that the commissioner's relation to those securities is not that of a trustee in the ordinary sense but that on the contrary the statutes require life insurance companies to maintain a certain reserve, the size of which is to be determined by the cash surrender value of the policies outstanding, and further that the provision of the statute that such securities be deposited with the commissioner is for the purpose only of enabling the commissioner to keep a better and more accurate check upon the operations of the company and to enable the commissioner to definitely determine that the provisions of the statute are being observed by the company.

Now answering the other and more practical part of your inquiry, as to whether the commissioner "can permit the withdrawal of these deposited deeds for the purpose outlined and permit the company after redepositing the proceeds of the loan to redeposit the real estate subject to the lien to the R. F. C."

We have already called your attention to Section 8744 which is a part of the chapter dealing with life insurance companies and associations and which requires that at the time of the request for withdrawals the company or association shall state for what purpose the same are desired to be withdrawn. We have no doubt that under the provisions of this section the commissioner would be authorized to permit the withdrawal, for example, of a certain issue of bonds at the request of the company upon the company's statement that it was apprehensive as to the future of those bonds and desired to sell them and reinvest the proceeds in other bonds or securities, and that the company would be entitled to the possession of the bonds for that purpose and would be entitled to a sufficient time in which to complete the operation of selling the bonds, reinvesting the proceeds in other securities and depositing such other securities.

It would seem to this Department that in like manner the Royal Union Life Insurance Company should be permitted to withdraw the real estate now on deposit with the Commissioner for the purpose of creating a lien thereon as security for a loan from the Reconstruction Finance Corporation when it appears from its statement requesting such withdrawal that they propose to make this loan and deposit the proceeds thereof with the Commissioner, together with a redeposit of the real estate subject to the lien of the R. F. C. loan. The reserve fund is not in any way impaired by that operation. The Commissioner will hold all in the way of security belonging to that fund that he held before the operation was made, with this addition, that $3,000,000 of the fund will be liquid which had been previously frozen.

We assume from your letter that it is the judgment of the Commissioner that it would be an advantage to the company and to its policyholders to permit it to carry out this operation in order to enable the company to secure funds with which to meet the normal demands made upon it, and under those circumstances, we see no legal obstacle in the way of permitting the company to withdraw its deeds for the purpose of making the proposed loan to the Reconstruction Finance Corporation and then redeposit with the Commissioner, the real estate, together with the proceeds of the loan as a part of its reserve fund.

SOLDIER'S WIDOW'S EXEMPTION: Transferred property to trustee by deed.

April 6, 1933. *County Attorney, Montezuma, Iowa:* We are in receipt of your letter of April 1st, in which you ask for an opinion on the following:

"Can a soldier's widow, who has transferred her property to a trustee by deed, reciting that the income therefrom shall be paid to her during her life and at her death the property be sold and distributed among her heirs, and reserving control over the property, have a soldier's widow's exemption?"

This office is of the opinion that the widow in this case is entitled to an exemption, to be deducted at least from the life estate. If she retains control of the property, or if the trust is revocable, or if the conveyance to the heirs is not to take effect until after her death, she would be entitled to have this exemption deducted from the actual value of the real estate, rather than have it deducted from the value of the life estate.

BOARD OF SUPERVISORS: Bills on criminal investigation trips: Sheriff of Linn county: Mileage: Actual expenses.

April 6, 1933. *County Attorney, Cedar Rapids, Iowa:* We are in receipt of your letter of April 4th, in which you ask for an opinion on the following:

"The Sheriff of Linn county has rendered bills to the Board of Supervisors for trips made by him in investigating criminal complaints, and trips made at the request of citizens who thought that a crime was being or was about to be committed, these bills being based upon what the Sheriff terms actual expenses of the trips, rather than upon mileage. It is apparent, however, that in figuring his expenses he has used ten cents per mile as the basis for the actual cost of operating his automobile.

"1. Is he entitled to charge his actual expenses for these trips, rather than mileage?

"2. If he is entitled to charge actual expenses, how is such actual expense of operating an automobile to be determined?"

It is the opinion of this office that the Sheriff is entitled to mileage on such trips, rather than actual expense based on the cost of operating his automobile. In other words, whenever the Sheriff starts out on a trip in his automobile, he is entitled to mileage. If that trip should take him two or three days, there is no question but what he is entitled to his board and room, in addition to the mileage. For short trips made around the county, however, he is entitled to mileage and nothing more. This mileage should be paid at the rate of five cents.

You also ask for an opinion on the following question:

"The Sheriff of Linn county has billed the Board of Supervisors for actual expenses, rather than mileage on trips conducting persons to Independence. It is apparent that he has used ten cents a mile as a basis for figuring his expense of operating his automobile. His charge is therefore $10.00 per trip, Independence being approximately fifty miles from Cedar Rapids. If the trip were made by train, figuring the expense of the Sheriff and one other person, usually necessary to handle an insane person, together with the car fare of the patient one way, the cost would be something around $17.00. In addition to this, it would be difficult for the Sheriff and his deputy or other assistant to make the trip and return in one day, because of poor railroad connection.

"Is the Sheriff entitled to charge actual expenses on these trips, rather than mileage?"

We know of no case under the statute, where the Sheriff is entitled to charge for the use of his automobile what he would term actual expense of operating it. He is entitled to charge five cents per mile, if he drives his car. If he goes on the train, he is entitled to the actual expense, but we are not

so sure that he would be entitled to go on the train, when he could hire an automobile to make the trip in a half day.

MORTGAGED ASSESSMENT CANCELLED: Owner conveyed real estate to holder of mortgage for purpose of cancelling the mortgage: Board of Review.

April 6, 1933. *County Attorney, Manson, Iowa:* We are in receipt of your letter of April 4th, in which you ask for an opinion on the following:

"A was the owner of real estate on January 1, 1933. In the month of March, 1933, he conveyed this real estate to the holder of the mortgage for the purpose of cancelling the mortgage. The present owner of the real state, being the former mortgagee, now appears before the local Board of Review and asks that the assessment on the mortgage be cancelled."

There is no question but what you have advised the Board correctly with reference to this assessment. Under the law of this state, all property is assessed as of January 1st. A. was the owner of the real estate on that date, and it was assessed to him. The mortgage, on the other hand, was assessed to the mortgagee. The fact that he takes the land over after January 1st does not relieve him of the assessment of the tax on the mortgage.

PRIMARY ROAD FUND.

April 6, 1933. *Treasurer of State, Des Moines, Iowa:* Answering yours of April 3rd, addressed to the Attorney General, this Department says:

Section 4755-b3, Code, 1931, is as follows:

"There is hereby created a fund which shall be known as the primary road fund, which shall embrace all federal aid road funds, all funds derived from year to year by the state under acts regulatory of motor vehicles, (except such portion of such motor vehicle fees as may by law be set aside for the state highway commission support fund, the motor vehicle department support fund, the refund account, and the reimbursement of county treasurers for collecting the motor fees), all gasoline tax funds devoted to the primary road system, and all other funds that may by law be appropriated for the use of the primary road fund."

The second paragraph of Section 4755-b32 is as follows:

"Where primary road bonds have been issued by any county under Chapter 241 or Chapter 242, Code of 1924, before or after this chapter becomes effective, or where bonds have been issued to refund such primary road bonds, the state highway commission shall each year set aside from the primary road fund an amount equal to the interest and principal of such bonds maturing in such year. Provided, that the amount so set aside on account of any county in any year, plus the cost of maintaining the primary road system in said county during said year, shall not exceed the amount which such county would have received in said year had the primary road fund been allotted among the counties in the ratio that the area of each county bears to the total area of the state."

The third paragraph of the same section is as follows:

"The funds so set aside are hereby appropriated for the payment of the maturing principal and interest of primary road bonds issued by said county. Thirty days prior to the maturing of any of said bonds or the interest thereon the state highway commission shall prepare a voucher in favor of the county treasurer and drawn against the primary road fund in the amount set aside therefor. Said voucher shall be paid from the primary road fund in the same manner as other primary road claims. The funds so received by any county treasurer shall be used for paying the maturing interest and principal of such bonds, and for no other purpose."

From the above quoted sections of the Code, it would appear that the Legislature intended to give priority to the payment of maturing primary road

bonds and the interest on primary road bonds from the primary road fund as created in Section 4755-b3.

You will therefore have "*available*," primary road funds consisting of that portion of the motor fuel tax, which under the law becomes a part of the primary road fund, and the motor vehicle tax, to the full amount collected by the respective county treasurers, whether the same has been forwarded to you or remains in the hands of the respective county treasurers. For the purpose of issuing warrants, the full amount of the motor vehicle tax collected by the county treasurers, whether the same has been received by you or still remains in their hands, is available, although by reason of prevailing conditions a portion of the same in the hands of the county treasurers may *not be immediately available.*

Warrants may be drawn by the State Auditor upon the State Treasurer, payable to the respective county treasurers, in amounts sufficient to pay the maturing primary road bonds and the interest on all primary road bonds issued by the respective counties; which warrants will, as the law provides, be then presented to you for payment. You will then pay such warrants so long as you have primary road funds in your hands that are usuable therefor. That is, cash in your hands, or in banks against which you may draw with assurance that the same will be honored. Warrants presented in excess of the usuable fund just mentioned, up to the amount of the allotment made by the Highway Commission, as required in Section 4755-b32 may be stamped "not paid for want of funds." In other words, the total amount of warrants actually paid and those stamped "not paid for want of funds," required to pay the maturing primary road bonds and the interest thereon, must not exceed the actual aggregate allotments made by the Highway Commission. Nor, shall the aggregate amount of warrants for such purpose for any one county exceed the allotment for that county.

In other words, the total primary road fund in your hands, and that in county treasurer's hands, subject to draft, may be considered "available," against which warrants for the payment of maturing primary road bonds and interest on primary road bonds might be issued. The warrants issued for such purpose should in no case exceed in amount the allotment for any one county, nor in the aggregate the allotments for all of the counties. Any of these warrants, after you have exhausted your cash, as above referred to, may be stamped "not paid for want of funds," and become thereby a charge upon the primary road fund, as heretofore stated in an opinion rendered your Department on March 22, 1933.

Specifically answering your question, it is the opinion of this Department that the available primary road funds include motor vehicle taxes already collected by, and in the hands of, the treasurers of the respective counties of the state. Further specifically referring to the statement of your contention—"I can only stamp warrants for the difference between the amount we are able to collect from county treasurers and the amount that the county treasurers have collected"—it is the opinion of this Department that you are correct in your contention, provided, only that you may not be required to stamp warrants for the full amount of this difference by virtue of having used in payment of such primary road fund warrants that portion of the primary road fund heretofore collected by you.

Again referring to warrants issued for general purposes, it is the opinion

of this Department that the amount of primary road warrants issued, including those for the payment of primary road bonds and the interest on primary road bonds, and other purposes, may not exceed what is herein defined as the available funds, and the warrants stamped "unpaid," could be only the difference between the funds you had actually collected, and those that are remaining in the hands of county treasurers which you have been unable to collect.

The Legislature evidently intended that the maturing primary road bonds and interest thereon, should have a prior claim upon the primary road funds, and these should be paid in cash, in full, to the amounts of the allotments for the respective counties, if possible, and the balance of warrants issued stamped "not paid for want of funds." Other warrants issued against the primary road fund, subject to priority thereof, may be stamped "not paid for want of funds."

The total aggregate amount of all such warrants however, paid and stamped, shall not exceed the amount of primary road funds actually in your hands, and such funds as have not been collected and are in the hands of the respective county treasurers of the state.

COUNTY AUDITOR: Reduction of tax levies: Secondary road construction: Board of Supervisors.

April 6, 1933. *Auditor of State, Des Moines, Iowa:* We are in receipt of your request for an opinion relative to the condition in Guthrie county. You inform us that the minutes of the Board of Supervisors of Guthrie county, on page 491, read as follows:

"Auditor's office, December 5, 1932.

"The Board of Supervisors met with the committee on tax reduction and discussed the advisability and necessity of reducing the 1932 tax levies at this time, in that the calculation of the 1932 tax has been completed for the entire county by the County Auditor's office. After careful consideration, the board decides to lower the secondary road construction two mills and the secondary road construction or maintenance one mill, making a total reduction of three mills, and enters into an agreement for the alteration of the 1932 tax books and the refiguring of the 1932 tax. (Agreement on file)."

You inform us that the agreement which is on file is one entered into with W. C. Kimm, who was at that time County Auditor of Guthrie county, and that the agreement provided that he should commence work on January 3rd under the contract to refigure the 1932 tax, and that the county would pay him $500.00 for refiguring the same.

It is the opinion of this office that the Board of Supervisors had no legal authority to enter into such a contract. It is the duty of the County Auditor to prepare the tax books, and the Board of Supervisors certainly cannot agree to pay him for work which it is his duty to perform. The fact that the performance of the contract was not to commence until after January 3, 1933, makes no difference.

CLERK OF DISTRICT COURT: Liable for fees held longer than 6 months.

April 6, 1933. *Auditor of State, Des Moines, Iowa:* We are in receipt of your letter of March 8th, in which you quote the following statement from the report of your examiner, with reference to the Office of the Clerk of the District Court of Cherokee county:

"In regard to a Special Reserve Fund Participation Certificate, issued to F. J. Carpenter, Clerk of the District Court, in receipt of $633.00 in payment in full of the amount of 15% of fees deposited, subscribed by F. J. Carpenter,

Clerk of the District Court, holder hereof, to the Special Reserve Fund, provided by the depositors of the First National Bank of Cherokee, Iowa, to insure the Central Trust & Savings Bank, purchasers of the First National Bank, against any loss on certain assets, as provided by contract, and specifically set as a trust agreement, whereby it is agreed that the amount set out in said agreement, be paid to the holder of the Participation Certificate, on or before November 1, 1932, has been turned over to the present incumbent as a cash item, in payment of certain funds which were deposited in the name of F. J. Carpenter, Clerk of the District Court, Cherokee county, Iowa.

"The Board of Supervisors are in receipt of an opinion from the retiring County Attorney that the Clerk of the District Court would not be liable for the loss or depletion of any such funds or would the Sureties on his official bond be liable therefor in the absence of negligence on the part of the clerk in selecting the depository, and that the funds belong to individuals, and merely held by the clerk for distribution to the proper parties, and the loss should fall on the individual on a proportionate basis.

"This is true had the clerk complied with Sections 10838 and 12784, which provides that the clerk account for fees on the 1st Monday in January and July of each year, by paying to the County Treasurer all other fees in his hands, not otherwise ordered held by the court, which remain unclaimed on the above mentioned dates.

"It is my opinion that all fees held by the clerk for a longer period than six months unless otherwise ordered by the court, to be held; that the clerk or his bondsmen are liable.

"In this case it was the duty of the clerk to set aside the various fees or funds deposited in the closed bank, and those within the six-month period, the loss to be on a proportioned basis, and those held longer than six months the loss to be borne by the clerk or his bondsman."

With reference to the first paragraph, the statement is so indefinite that we cannot pass on it. For instance, your examiner does not state whether this certificate was issued under an agreement entered into by the depositors, as provided in Section 9239-a2, or whether it was under some other agreement executed by the depositors. The Clerk of the District Court certainly would not have authority to make such an agreement under the statute. The only agreement which could have been made at that time should have been made by the Board of Supervisors under authority granted them in Section 9239-a2 of the Code of 1931. We are forced to agree with your examiner, however, that the clerk, in failing to account for fees and pay them over to the treasurer, as required by statute, may be liable for such fees.

DOG TAX: Assessed under Section 5434: Dogs died after assessment: Correction of tax list.

April 7, 1933. *County Attorney, Logan, Iowa:* We are in receipt of your letter of April 3rd, in which you ask for an opinion on the following:

"The Assessor of Douglas township assessed certain dogs for taxation, in accordance with Section 5434 of the Code of 1931. After the assessment was made, the dogs died, and the Assessor has now written to the County Auditor, asking that the tax list be corrected."

It is the opinion of this office that such a correction cannot be made.

Section 5422 of the Code provides that the owner of the dog, for which the license is required, shall apply to the Auditor for said license on or before the first day of January of each year. From this section, it can easily be seen that the time for the assessment of dogs is January 1st, the same as any other property. If the dog dies after January 1st, it will not relieve the owner of his duty to pay the tax, nor would it give the County Auditor or the Assessor the right to change the tax list.

SCHOOL TOWNSHIP: Teacher in sub-district: Average daily attendance less than five.

April 7, 1933. *County Attorney, Oskaloosa, Iowa:* We are in receipt of your letter of April 3rd, in which you ask for an opinion on the following question:

"In one of the school townships of Mahaska county, in the fall of 1932, a contract was made with a teacher to teach a sub-district, where it was apparent that the average daily attendance in the school would be less than five, and where the actual daily attendance proved to be but two, due to the attendance of the other two children in another sub-district. The Board ordered the school to continue, and on an appeal to the County Superintendent, the action of the Board was reversed. Nevertheless, the Board ordered the teacher to teach, and ordered the President to sign and the Secretary to countersign and issue pay checks to the teacher."

The second paragraph of Section 4231 provides as follows:

"Nor shall any contract be entered into with any teacher to teach a school for the next ensuing term when it is apparent that the average daily attendance in such school will be less than five, or that the enrollment therein will be less than six resident pupils, regardless of the average daily attendance in such school during the last preceding term."

In view of the above quotation, this office is of the opinion that the contract made with such teacher was illegal, and that the School Board had no authority to enter into such a contract.

April 10, 1933. *Auditor of State, Des Moines, Iowa:* Acknowledgment is made of receipt of your letter of the 4th inst., regarding deposits made by treasurers of building and loan associations. We note from your letter that treasurers of building and loan associations are under bond, and that the association proper has no account with any bank; all of the funds of building and loan associations are deposited with the treasurer and payments are drawn on the treasurer, and you request the opinion of this Department on the following proposition:

"Can the treasurer, or any of the directors of an association, sign an agreement or waiver as to the funds of the association which ties them up under Senate File 111, or any other agreement? The question is, where does the responsibility rest for the safety of the money?"

The statutes require that all the officers of a domestic building and loan association who handle any funds or securities of the association shall furnish bond. See sections 9319 and 9323.

The responsibility for the government and management of a building and loan association rests with the board of directors. Section 9312 specifically provides that "such associations shall be governed by a board of directors."

We note from your letter the following statement:

"All funds of building and loan associations are deposited with the treasurer and payments are drawn on the treasurer."

We, of course, do not know what the practice has been in the particular association which you have in mind but as applied to all associations, the law does not contemplate any such procedure. In fact, Section 9340-b2 is as follows:

"9340-b2. Deposit of funds. Funds of such association may be deposited in any state or national bank on certificate of deposit, or the usual bank pass book credit, subject to check by the proper designated officers of such association."

This provision seems not to have been a part of the chapter on building and loan associations originally, but was added in comparatively recent years, but

it clearly recognizes and provides for the deposit by the association of their funds in state or national banks; and, whether or not the association, through its board of directors, directed the particular deposit to be made or not, if the association knew that the treasurer was, in fact, depositing the money in a particular bank, it is the opinion of this Department that the action of the treasurer in making the deposit would be ratified by the corporation, and that the deposit belongs to the association rather than to the treasurer personally.

It follows, that the waiver of any part of that deposit under any plan of reorganization would have to be made by the association itself through its board of directors. Of course, we do not mean that the board of directors would have to sign the waiver. On the contrary, the signing by the board of directors individually, probably would not be sufficient. The usual and proper proceedings in such cases would be for the board to pass a resolution authorizing certain of its officers to execute the waiver agreement on its behalf.

What has heretofore been said is applicable to that part of your inquiry which relates to the question as to whether the treasurer or the board of directors have control of the deposit in the bank, and we have concluded that such control is with the board of directors. There naturally arises the further question of whether the board of directors even, would be authorized to execute a waiver. The power of building and loan associations is very much restricted and the statutes specifically provide the character of investments which they may make. The effect of the waiver is to use a part of their funds to purchase some worthless securities out of the bank. The writer has some doubt as to whether a board of directors can properly execute such a waiver in view of the provisions of the statutes restricting the investments which they are authorized to make.

What we have heretofore said disposes of the inquiry contained in the last paragraph of your letter. We are satisfied that the treasurer, assuming that the association knew and approved of the deposits made by him in the bank, and assuming further that the treasurer made the deposits in good faith, although there was no formal authorization of the association to make them, would not be personally liable and of course, there would be no liability on his bond.

Whether the funds of the association will be tied up if 51 per cent of the depositors representing 75 per cent of the deposits sign waivers is a question on which the courts have not yet passed and upon which there may be grounds for legitimate differences of opinion. The writer's understanding is, however, that this Department has held that under such circumstances the deposits of depositors not signing the waiver are waived the same as those who do sign the waiver, and the writer in giving you that opinion gives it as that of the Department rather than his own.

BEER: Advertising: Outdoor.

April 10, 1933. *County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your letter to Edward L. O'Connor, Attorney General, of recent date, in which you ask for an opinion on the following proposition:

"Is it legal to advertise beer in the State of Iowa by means of out-door advertising?"

We assume of course that you mean 3.2 per cent beer, as passed by the federal Congress.

The so-called Reed "Bone-Dry" Amendment, as passed by the 64th Congress and approved March 3, 1917, provides, in part, as follows:

"That no letter, postal card, circular, newspaper, pamphlet or publication of any kind containing any advertisement of spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind, or containing a solicitation of an order or orders for said liquors, or any of them, shall be deposited by any postmaster or letter carrier, when addressed or directed to any person, firm, corporation, or association, or other addressee, at any place or point in any state or territory of the United States at which it is *by the law in force in the state or territory at that time unlawful to advertise or solicit orders for such liquors*, or any of them, respectively."

An examination of our Iowa Code and the cases decided under the same apparently does not prohibit this form of advertisement. However, Section 1927 of the Code provides, in part, as follows:

"* * * or who shall within this state, in any manner, directly or indirectly, solicit, take, or accept any order for the purchase, sale, shipment, or delivery of intoxicating liquor, in violation of law, or aid in the delivery and distribution of any intoxicating liquor so ordered or shipped, * * *"

Section 1923 of the Code defines "intoxicating liquor" and you are, no doubt, familiar with the cases under this section.

In order that a better understanding might be had of the origin and history of the Reed "Bone-Dry" Amendment, this office recently wrote to former Senator James A. Reed, who is the author of the Amendment and has just received an answer outlining the procedure and the intent of it.

As to the interpretation and construction of the meaning of the so-called Reed "Bone-Dry" Amendment in its application to the law in force in Iowa at this time, we are of the opinion that it does not prohibit the advertising of beer containing 3.2 per cent alcohol by weight.

Undoubtedly, the nature of the advertising, itself, would be somewhat controlling from the standpoint as to whether or not it was a direct solicitation.

It would be a strange and far fetched construction to hold that the word "soliciting," as used in our statute in connection with its use in the Reed "Bone-Dry" Amendment, to apply the same to the ordinary newspaper advertising and this is also our opinion regarding outdoor advertising.

TAX SALE PURCHASER: County Auditor: Rate of interest.

April 10, 1933. *County Attorney, Belmond, Iowa:* We are in receipt of your letter of April 6th, in which you ask for an opinion on the following:

"In the event a purchaser at tax sale, held in December, 1932, pays the 1932 taxes upon the real property purchased by him, which became due in 1933, and it became delinquent after the amendment to the statute became effective, and in the event, after such 1932 taxes have been paid by such purchaser, he only desires to redeem the property from tax sale, what rate of interest does the County Auditor charge the owner on the 1932 taxes paid by such purchaser?"

That part of Section 7272 of the Code, as amended, which would apply to the payment of taxes for subsequent years, is as follows:

"* * * and the amount of all taxes, interest, and costs paid by the purchaser, or his assignee, for any subsequent year or years, with a similar penalty added as before on the amount of the payment for each subsequent year, and *six* per cent per annum on the whole of such amount or amounts from the day or days of payment."

Section 7273 of the Code provides as follows:

"The penalty for nonpayment of taxes of any subsequent year or years shall not attach, unless the same shall have remained unpaid until the first day of April after they become due and have become delinquent, nor shall said penalties apply to taxes voted in aid of the construction of any railroad."

From the reading of these two sections, it can be seen that if the 1932 taxes are paid before April 1, 1933, the four per cent penalty will not be added, but only the six per cent interest. However, if the 1932 tax is not paid until after it became delinquent, it would draw the four per cent penalty and six per cent interest.

SHERIFF: Sheriff's certificate of sale or Sheriff's deed: Act relating to extension of time of redemption.

April 10, 1933. *County Attorney, Vinton, Iowa:* We are in receipt of your letter of April 6th, in which you ask for an opinion on the following:

"The Sheriff has asked me several times whether or not under the act relating to extension of time of redemption he could issue a Sheriff's certificate of sale or a Sheriff's deed."

It is the opinion of this office that he has the right to issue the Sheriff's Certificate of Sale, for the reason that under the act the Sheriff's Certificate is not held up. The act merely provides that no Sheriff's Deed shall be issued until March 1, 1935.

So far as issuing the Sheriff's Deed is concerned, this is a matter between the holder of the Sheriff's Certificate of Sale and the holder of the equity of redemption, and if trouble arises, it is a matter between the parties and not a question on which our office is required to express an opinion. However, the writer, so far as his personal opinion is concerned, agrees with you, that is, unless the owner or owners of the equity of redemption comply with the provisions of the act, the Sheriff should issue the deed. If, however, after the year of redemption has expired, but before the deed has been executed and delivered by the Sheriff, an application has been made by the holder of the equity of redemption, it might be well for the Sheriff to hold up the deed a short time until the Court passes on the matter.

DISTRESS WARRANT: County Treasurer: Sale of personal property legal.

April 10, 1933. *County Attorney, Britt, Iowa:* We are in receipt of your letter of April 6th, in which you ask for an opinion on the following:

"Would the sale of personal property, levied upon and sold under distress warrant, issued by the County Treasurer, pursuant to Section 7189 of the Code of 1931, for less than the full amount of the tax, due and delinquent at the time of issuing said warrant, be valid?"

You are advised that such sale would be valid. There is no reason why the sale should be declared illegal. This office is of the opinion that sale of personal property under a distress warrant is not the same as the sale of real estate at the December tax sale. When the real estate is sold, it is sold for the full amount of the tax. However, when the personal property is sold under a distress warrant, it is sold for whatever it will bring, and that amount is applied on the tax.

BOARD OF SUPERVISORS: District meetings: County Business: Claim for expenses.

April 11, 1933. *Auditor of State, Des Moines, Iowa:* We are in receipt of your letter of April 11th, in which you ask for an opinion on the following:

"It has been the practice of the Boards of Supervisors of the counties to assemble quarterly each year in district meetings, said districts drawn along the lines as established by the Highway Commission. At said meetings, matters pertaining to the general county business, as well as Road Maintenance and Construction matters, are discussed. These meetings are not called by the State Highway Commission, but are brought about through organizations

formed by the Boards of Supervisors, of the various districts and, in our belief, could be considered as conventions. In view of the statute existing, as under Section 5260 of the 1931 Code, we question whether or not it is permissible for the supervisors in attendance at such meetings, to file claims for the expenses involved and for their per diem while in attendance, against their respective counties."

Section 5260 of the Code of 1931 reads as follows:

"No claim shall be allowed or warrant issued or paid for the expense incurred by any county officer in attending any convention of county officials."

It is the opinion of this office that the above quoted statute makes the law just about as clear as it could possibly be stated. No interpretation that we could place on this section of the Code could make it any stronger. If the Boards of Supervisors of several different counties in one section of the state meet quarterly for the purpose of discussing matters pertaining to the general welfare of the county, such as road maintenance and construction, or for the purpose of discussing any matters of general interest to Boards of Supervisors, such meetings would be classed as conventions, and the Supervisors would not be entitled to pay, mileage, or expenses for attending such conventions.

If on the other hand the Boards of Supervisors of three or four particular counties touching each other should meet for the purpose of discussing some particular project which is being contemplated, such as a drainage district, affecting all four of the counties, such meeting would not be classed as a convention.

In other words, in order to take such a meeting out of the class of conventions, it would have to be held in connection with some particular project of interest to each and all of the counties, whose Supervisors are attending the meeting. If the meeting is for the purpose of discussing meetings, which are of general interest to all of the counties, it would be classed as a convention just as much as though it were a meeting of all of the Supervisors of the state.

SECURITIES.

April 11, 1933. *Securities Department, Des Moines, Iowa:* Acknowledgment is made of receipt of your letter of the 6th inst.

Answering the first query contained in your letter, it is the opinion of this Department that it is not permissible for a dealer to purchase stocks and to re-offer them for sale to the public where such stocks have been registered for sale in this state and where such registration has been subsequently withdrawn after a considerable amount of stock has been sold to residents of the state and such residents desire to dispose of the stocks which they have purchased. We can find nothing in the Securities Act, either in Section 8581-c3, sub-section 4, or elsewhere which would support the conclusion that such transactions would not be contrary to the terms of the act. It seems to us that such transactions would clearly be in violation of the act and would constitute purchases and sales to the public by dealers of unauthorized stock, and would be contrary to the terms of the act.

Answering your second inquiry, it is likewise our opinion that a dealer cannot purchase and resell stock owned by residents of the State of Iowa which has been purchased by them in good faith but which has never been registered for sale in this state at any time. We do not understand that the fact that residents of this state may be good faith holders of stock, exempts such stock from the provisions of the Securities Act nor abrogates the provision which requires a dealer to handle only such stocks as are approved.

As to the second part of your second query, viz.: as to whether a dealer can act "as the agent of the owner in the selling of such stock," we are inclined to believe that in such case the provisions of Section 8581-c5, sub-section c, would apply. This section specifies certain exempt transactions and among the transactions so exempt are

"isolated transactions in which any security is sold, offered for sale, subscription or delivery by the owner thereof, or by his respresentative for the owner's account, such sale or offer for sale, subscription or delivery not being made in the course of repeated and successive transactions of a like character by such owner, or on his account by such representative, and such owner or representative not being the underwriter of such security."

Under the provisions of this sub-section, we see no objection to a dealer in isolated instances acting as the agent of one who in good faith has acquired and holds stock in this state and who desires to sell the same. Of course, if these sales were carried on continuously so that they lost their character of isolated transactions, they probably then could not be regarded as exempt transactions within the meaning of the section above cited.

April 11, 1933. *County Attorney, Marshalltown, Iowa:* This will acknowledge receipt of your letter of the 7th inst., requesting the opinion of this Department on the following proposition:

"Supposing the County Treasurer receives a check for motor vehicle license fees and issues the plates and license of the motor vehicle on receipt of that check, and then subsequent and with no fault or negligence on his part the check going through the regular course of business, the bank on which the check was drawn fails. Does such an act create a responsibility against the treasurer and his bondsman for the payment or making good this check if the maker refuses or is not in position to do so, or may the treasurer cancel the application for and the license assigned by reason of the non-payment of this check and consider the car as unlicensed and certify the same on his listing to the Sheriff, and proceed under the provision entitled, penalties, costs and collections?"

In view of Section 4871 which requires that the treasurer "upon receipt of the application and license fee" shall file said application, etc., and in view of the further provision of 4874 that "the treasurer when the application and license fee is received shall forthwith assign," etc., and in view of the further provision of Section 5011, which is as follows:

"5011. Duty and liability of treasurer. The County Treasurer shall collect the license fee and penalties on each motor vehicle registered by him and shall be responsible on his bond for such amount. He shall remit such amount to the treasurer of state as herein provided."

This Department has held in advising the Motor Vehicle Department of the State that the county treasurers are personally responsible and his bond is liable for the failure of the treasurer to collect the motor vehicle license fee when issuing the license plates. In other words, the treasurer must either account for the plates or the appropriate amount of receipts arising from the issuance thereof.

It is possible of course, that these motor vehicle fees collected by county treasurers come within the provisions of Chapter 352 which provides that the county is responsible to the state for the full amount of tax levied for state purposes, excepting such amounts as are certified to be unavailable, double or erroneous assessments, and if that be true, as has frequently been contended, the county would have to make up the shortage.

Referring now to that part of your question with reference to whether or

not the treasurer may cancel the application for and the license assigned by reason of the non-payment of the check and consider the car as unlicensed, and certify the same on his listing to the sheriff, and proceed under the provision entitled "penalties, costs and collections."

We desire to advise that it is the view of this Department that the treasurer may so proceed, and further that if he recovers back the license plates and the license card so as to be in a position to account for them to the Motor Vehicle Department of the State, that he would not be chargeable with the license fee.

PUBLIC RECORDS.

April 12, 1933. *Secretary of State, Des Moines, Iowa:* Acknowledgment is made of receipt of your letter of the 5th inst., from which we note that a record of all articles of incorporation and amendments thereto and other important information as to such corporations, is made a part of a card index system in your office, and that the question has arisen as to whether you are under obligation to permit one not employed in the department to spend a week or ten days going through this card index for the purpose of listing the corporations named therein.

You are advised that we are unable to find any provision in the statutes requiring this index to be kept, and since there is no provision requiring it to be kept, it probably cannot be said that the index is a public record and if not a public record the public would not be entitled to access to it at all. But assuming, for the sake of argument, that it is a public record, it is the opinion of this Department that its use by the public would be limited to such use as would make it available to other members of the public and that no one could properly demand that he be permitted to take possession of the index for the purpose of copying it and to spend eight or ten days in the office using the facilities of the office for that purpose. We, of course, are not passing on the question of policy, but it is our judgment that you are within your legal rights in refusing anyone the right to take possession of this card index system for the purpose of making a copy thereof.

CERTIFIED COPIES.

April 12, 1933. *Commissioner of Health, Des Moines, Iowa:* Your letter requesting the opinion of this Department on the question as to what persons are entitled to free certified copies of death certificates seems to have been mislaid, and due to the press of legislative matters we have not been in position to give you an earlier reply.

You are advised that, in the opinion of this Department, under Section 5175, there are just two classes of persons to whom you are required to give free certified copies, viz.: soldiers, sailors, or marines in service or honorably discharged; and dependents of such soldiers, sailors or marines; and you are required to give such free certified copies to these classes only when they are making claim upon the government of the United States.

This, of course, excludes mail carriers, postal clerks and other government employees, and it excludes likewise, depositors in postal savings banks, and in fact, everyone who does not come within the limitations above indicated.

TAX EXEMPTION: Ex-service men. Philippine Insurrection.

April 12, 1933. *County Attorney, Cedar Rapids, Iowa:* We are in receipt

of your letter of April 10th, in which you ask for an opinion on the following:

"We have in Linn county a number of ex-service men who enlisted for the Philippine Insurrection and were sent to Alaska in the coast artillery. These men served for a period of approximately three years and all have official discharge papers. Their petitions for tax exemption for the years 1931 and 1932 were not allowed, due to a ruling on file in the Assessor's office that petitioners were not entitled to such exemption. These parties are again filing for exemption to the amount of $1,800.00 for the years 1931, 1932 and 1933. We would thank you for an opinion covering these cases."

That part of Section 6946, which applies to these particular applications, is as follows:

"6946. Military service—exemptions. The following exemptions from taxation shall be allowed:

"2. The property, not to exceed eighteen hundred dollars in actual value, and poll tax of any honorably discharged soldier, sailor, marine or nurse of the war with Spain, Tyler Rangers, Colorado volunteers in the war of the rebellion, 1861 to 1865, Indian wars, Chinese relief expedition or the Philippine Insurrection."

If these men enlisted for the Philippine Insurrection, they are entitled to the exemption provided in the section just quoted. Those men are not to blame, if they were sent to Alaska, rather than to the Philippines, and they would be entitled to the exemption just as much as an honorably discharged soldier of the World War, who spent all of his time at Camp Dodge, would be entitled to the exemption, under sub-section 3 of the same section of the Code.

We wish to call your attention, however, to Section 6949 of the Code, which provides as follows:

"If no such statement is filed, no exemption shall be allowed by the Assessor, but it may be allowed by the Board of Supervisors, if such statement is filed before September first of the year following the year, for which the same is claimed."

In your letter, you ask concerning the exemptions for 1931, 1932 and 1933. If such statements were filed with the Assessor at the time he was making the assessment, or if they were filed with the Board of Supervisors before September 1st of the year following, in the case of the 1931 tax, the exemption should have been allowed. If the statements were not filed with the Assessor for the 1932 tax, they may still be filed with the Board of Supervisors at any time before September 1, 1933, and the statements for the 1933 tax may be filed with the Board of Supervisors at any time prior to September 1, 1934.

AUTHORITY OF HIGHWAY COMMISSION.

April 14, 1933. *Iowa State Highway Commission, Ames, Iowa:* Replying to your letters of March 21st, 28th and 31st, relative to the final estimate for the O'Rourke Construction Company on Project FA-284D, Winneshiek county, wherein you ask for a written opinion on the legality of readjustment of basic prices, that is, as to whether or not the Commission has the power to adjust prices for certain of its work on said project; and also asking whether or not it is the duty of the Auditing Department to allow the same for payment, providing of course, that this Department holds that the Commission has the power to adjust prices in these matters, and as provided in the general specifications.

I have made a thorough investigation of this claim and the records attached to your letter of March 31st, and the plans and specifications on file in the office of the Engineer, as to said project; also the Standard Specifications for

Construction Work on the Primary Road System, contained in the Service Bulletin of the Iowa State Highway Commission, dated February, 1930, which is entitled, "Supplement to Vol. XVIII, No. 3, and I am of the opinion that the Commission did not have the power, under the law, to adjust the cost or price for moving stone, as sought to be done and evidenced by the records of the minutes of the meeting of the Commission of date February 15, 1933.

The Proposal Form for bids provides as follows:

"that an examination has been made of the plans, specifications, and contract form, including the supplemental specifications contained herein, and of the site of the work, and understand that the quantities of work as shown herein are approximate only and are subject to increase or decrease, and further understand that all quantities of work, whether increased or decreased, are to be performed at the unit prices stipulated herein;"

The Contract provides:

"That party of the second part, for and in consideration of seventy-three thousand seven hundred thirty-four and 46/100 dollars ($73,734.46) payable as set forth in the specifications constituting a part of this contract, hereby agrees to construct in accordance with the plans and specifications therefor, and in the location designated in the notice to contractors, various items of road work awarded said party of the second part on January 5, 1932, as follows:

"Earth excav. roadway and borrow	37,149 c. y.	0.20	$ 7,429.80
Earth excav. drives and side roads	200 c. y.	.35	70.00
Loose Rock excav.	100 c. y.	.70	70.00
Solid Rock excav.	25,414 c. y.	.70	17,789.80
Type A conc. pave., class 3 coarse aggregate, sq. yd.	42,718 s. y.	1.04	44,426.93
Type A flumes complete	14	70.00	980.00
Type B flumes complete	18	70.00	1,260.00
Finish earth shoulders, lin. ft.	21,349.1 ft.	.08	1,707.93
Add. or less curb than shown on plans		.05	per lin. ft.
Add. or less conc. slope drain than shown		1.50	per lin. ft.
Add. or less metal slope drain than shown		1.50	per lin. ft.

"Said specifications and plans are hereby made a part of and the basis of this agreement, and a true copy of said plans and specifications is now on file in the office of the Iowa State Highway Commission under date of January 2, 1932.

"That in consideration of the foregoing, the party of the first part (Iowa State Highway Commission) hereby agrees to pay to the party of the second part, promptly and according to the requirements of the specifications the amounts set forth, subject to the conditions as set forth in the specifications."

The plans referred to in said Contract provide for the nature of the construction, excavation and slopes of banks, etc. The Service Bulletin, containing "Standard Specifications for Construction Work on the Primary Road System,", which is a part of this Contract, provide on page 5, as follows:

"The engineer's estimate of quantities shown in the instructions to bidders and proposal are understood to be approximate only and will be used for comparing bids, for which purpose they are sufficiently accurate. The contractor will be paid for the actual amount of work performed as determined by the final measurements."

Said Service Bulletin containing said plans and specifications, again in Section 105.2, under head of "Plans" reads as follows:

"The official plans, profiles, and cross sections on file in the office of the commission, show the location, typical construction details, and dimensions of the work contemplated. The work is to be performed in conformity therewith except in case of error or unforeseen contingency.

"The plans are made up from careful surveys and represent the foreseen construction requirements. Any deviation from the plans made necessary by the exigencies of construction or because of error will be determined by the engineer, and if necessary, corrected or modified drawings will be provided."

And again, said Service Bulletin provides, in Section 109.2, as follows:

"The contractor shall accept the compensation as herein provided, in full payment for furnishing all materials, labor, tools and equipment and for performing all work under the contract; also for all costs arising from the action of the elements, or from any unforeseen difficulties which may be encountered during the prosecution of the work and up to the time of acceptance."

Section 109.3 provides:

"Should corrections or modifications of the plans or specifications require a different quality or class of work than that upon which the contract sum is based, or if modifications or corrections are required in parts of the work partially completed, and on that account result in an increased cost to the contractor, a fair and equitable amount in settlement shall be agreed upon by the contractor and the engineer, as provided for "extra work," paragraphs 109.3 and 109.4. If the modifications or corrections result in decreased cost to the contractor, a deduction shall be determined in like manner.

"(a) Upon the order of the engineer the contractor shall perform additional work of the same general character as that shown on the plans. If the contract includes an agreed price for additional work, the contract sum shall be increased at said price for the actual amount of additional work performed. If the contract does not provide an agreed price for additional work, the contract sum shall be increased at the unit prices named in the contract for the actual amount of such additional work performed, except that if the increase in any item of the contract exceeds twenty (20) per cent, an adjustment in unit prices shall be made by agreement between the contractor and engineer, as provided for "extra work" herein.

"(b) If alterations in the construction result in a decrease in the total quantities of the work as shown on the plans, deductions shall be made from the contract sum as follows:

"If the contract includes prices for additional work, deduction shall be made from the contract sum at seventy-five (75) per cent of the rate named for additional work of the same class.

"If the contract does not include prices for additional work, deduction shall be made from the contract sum at the contract prices for work of the same class, except that if said deduction results in a decrease in any item of the contract of more than twenty (20) per cent, an adjustment in unit prices shall be made by agreement between the contractor and engineer, subject to approval by the commission. If an adjustment cannot be agreed upon as provided above, the question shall be settled by arbitration as provided in paragraph 109.9."

I can find nowhere that the Engineer in charge ordered as "Extra Work" any of the excavation for which extra compensation is sought to be allowed in this claim. If it is sought to allow the same under Section 109.3 (b), I can find no alterations in the construction of the project which would result in a decrease in the total quantities of work as shown by the plans, for the reason that the plans showed the slope of banks and the manner in which the work was to be done, both as to excavation of solid rock and that of loose dirt. The only thing that appears to warrant this adjustment is that in the original estimate the solid rock was estimated at 25,000 yards, while it was found in actual construction to amount to only 8,000 yards. This is a mistake, if such it be, as to the nature of the soil and foundation, and it seems to me that an adjustment of unit prices for this service is clearly forbidden under Section 109.2, where it says:

"The contractor shall accept the compensation as herein provided, in full

payment for furnishing all materials, labor, tools and equipment and for performing all work under the contract."

If on the other hand, you view the adjustment as being based upon unforeseen difficulties, that is again prohibited by this same Section, 109.2.

In closing may I say, that were this a contract between individuals there would be no legal objection to their adjusting the cost of moving rock or any other article, but in view of the fact that it is a public project based upon advertisement for bids, proposals, and acceptance thereof by a public body acting in behalf of the state, in accord with the law, for the letting of public contracts, and in view of all the facts, it is my opinion that such an adjustment, as is attempted in this case, may not be made. I am also lead to believe that on the facts there was much merit in the adjustment the Commission attempted, and that the Commission has attempted to do only, what in its judgment, it considered equitable in the matter. The only matter however, with which I am concerned, is the legal question, and that is all I am passing upon.

I am therefore, returning to you all papers attached to your letters of inquiry, together with my opinion that the Commission has no legal authority to act as it did at its meeting of February 15, 1933.

TAX CERTIFICATES: Water board: Incorporated town: County Auditor.

April 14, 1933. *County Attorney, Council Bluffs, Iowa:* We are in receipt of your letter of March 22nd, with which you enclosed a letter from Thomas Maloney, asking for an opinion on the following:

"Some years ago, while the territory commonly known as East Omaha, but which is now incorporated as a separate town known as Carter Lake, was still a part of the city of Council Bluffs, Iowa, the water department of Council Bluffs, Iowa, extended its water mains in certain streets of said section of Council Bluffs under the provisions of what is now Chapter 314-a1 of the Code of 1931. The assessments were duly made as against the property, and the same were payable in annual payments and the water board is the owner of the certificates.

"Some years ago, some of the owners failed to pay their annual installments on such special assessment certificates. The properties were duly advertised and offered for sale at the regular tax sales, but were not sold for want of bidders. After a time, quite a number of the lots were sold to various persons at what we call the scavenger sales for a nominal amount.

"After this condition of affairs was discovered, the water department paid into the office of the County Auditor the amount to which the holder of the tax sale certificates would be entitled, in case of redemption, in accordance with Section 6041 of the Code, and demanded an assignment of the certificates, in accordance with the provisions of said section.

"Upon receiving notice from the County Auditor, the parties have refused to surrender the certificates, claiming that Section 6041 does not apply under the circumstances of this particular case, because of the fact that, since the water mains were put in, in accordance with Chapter 314-a1, said section of Council Bluffs, which is across the Missouri River, has been separated from the city of Council Bluffs, Iowa, and is now incorporated as a separate town in Pottawattamie county known as Carter Lake. After such separation, the water department of Council Bluffs, Iowa, by agreement ceased to furnish water to said territory, and the territory is purchasing its water from the city of Omaha, Nebraska.

"The holders of the tax certificates claim that Section 6041 does not apply, in view of the fact that the territory is not now within the city limits of Council Bluffs."

Section 6041 of the Code of 1931 provides as follows:

"Any holder of any special assessment certificates 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."

As we understand your letter, the city of Council Bluffs is the holder of the special assessment certificates. This being true, the city would have a right to an assignment of the certificate of tax sale, regardless of whether or not this territory is now embraced in a separate incorporated town. The section does not provide that any *person* holding the special assessment certificate shall certain rights. It provides that *any holder* of a special assessment certificate shall have a right to such assignment.

Even though the city of Council Bluffs were not the holder of these special assessment certificates, our opinion would still be that the city would be entitled to an assignment by paying the amount, to which the holder of the certificate of tax sale would be entitled, in case of redemption, this for the reason that Section 6041 was enacted for the protection of the holders of the special assessment certificates, and further for the protection of the cities and towns. The intent of the Legislature was that the city or town, in which these extensions were made, should have the right to such assignment, regardless of whether or not a part of that city or town later separated itself into a distinct corporation.

PAVING ASSESSMENTS: Senate File No. 473: Tax penalties.

April 15, 1933. *County Attorney, Burlington, Iowa:* This letter is written to confirm our telegram of April 14th and in answer to your telegram, in which you ask for an opinion on the following:

"Kindly advise whether or not Senate File No. 473 applies to penalties on paving assessments, which are delinquent after April 1, 1933."

We take it that by paving assessments you mean special assessments for street or sewer improvements.

For some purposes, special assessments have been called taxes, while at other times our Supreme Court has held that they are not taxes. Regardless of any of these decisions, this opinion must be based on the intention of the Legislature as it appears from the reading of Senate File 473.

The title of this bill provides that it is for the purpose of extending the time in which to pay, without penalty, the first installment of all taxes payable in 1933.

Section 1 of the bill itself provides as follows:

"Section 1. That the first half, or what is denominated in the statutes as the first installment, of all taxes payable in the year 1933, shall not be deemed delinquent until July 1, 1933, and may be paid at any time prior to said day without interest as a penalty. Any penalty paid prior to the taking effect of this act, shall be credited as a payment, on the second installment. If said installment be not paid prior to said July 1, 1933, it shall draw, from April 1, 1933, interest as a penalty, three-fourths (¾) of one per cent (1%) per month until paid."

From the reading of Section 1 of this bill, it will be noted that the taxes referred to are those payable in installments, that is, the first and second installments due in the year of 1933.

At no place in the bill is there any mention of special assessments. For this reason, we are compelled to rule that the bill does not apply to or affect special assessments in any way.

ROAD POLL TAX: House File 191: Change from $4.00 to $3.00: Refunds.

April 17, 1933. *Auditor of State, Des Moines, Iowa:* We are in receipt of your letter of April 12th, in which you ask for an opinion on the following:

"Under House File 191, the Legislature changed the road poll tax from $4.00 to $3.00. In view of the fact that the assessors have collected $4.00 on each collection heretofore made by them for the year of 1933, and further in view of the fact that some payments have been made to the County Treasurer under the old law, we would like your opinion concerning whether or not parties who have made such payments should be refunded the difference."

At the time these poll taxes were paid, the amount of the tax was $4.00. The parties paying the $4.00 cancelled their tax. The new law does not provide for a refund of $1.00 to those having already paid the tax. Certainly this office has no authority to rule that such refunds should be made.

We realize that under this bill a concession is practically being made to those who have not paid their taxes. However, the law is plain, and we cannot very well change it by opinions.

SCHOOL BOARD: Kindergartens: House File No. 42.

April 17, 1933. *Superintendent of Public Instruction, Des Moines, Iowa:* We are in receipt of your letter of April 11th, in which you ask for an opinion on the following question:

"House File No. 42, as enacted by the 45th General Assembly, repeals Section 4266 of the Code of 1931, and enacts a substitute Section, reading as follows:

"'The Board of any independent school district upon the petition of the parents or guardians of twenty-five or more children of kindergarten age, may establish and maintain such a kindergarten in said district. No petition shall be effective unless the school in connection with which such kindergarten is desired is named in the petition and all persons who shall be qualified to sign such petitions shall be residents of the section or neighborhood served by that school. The Board of Education shall be the judge of the sufficiency of the petition. Any kindergarten teacher shall hold a certificate certifying that the holder thereof has been examined upon kindergarten principles and methods, and is qualified to teach in kindergartens.'

"Question No. 1. Will this new enactment require a petition, in order to authorize a board to continue a kindergarten that was established prior to the enactment of this law?

"Question No. 2. When a sufficient petition has been presented to the Board, and the Board, in response thereto, has established a kindergarten, how long will such an establishment hold? In other words, must such petition be presented annually, if the Board is to continue the maintenance of the kindergarten?"

It will be easier to answer these two questions by answering both of them together, or really by answering the second question first. Under this new law, as well as under the old law, when a petition has been presented to the Board and the kindergarten established, in compliance with the request of the petitioners, it is not necessary that a new petition be presented each year. The kindergarten is established and continues until the School Board takes some action to discontinue it.

In view of the above answer given to the second question, it will be seen that where the Board had established a kindergarten under the old law, such kindergarten would continue until some action has been taken by the School

Board to discontinue it. There is no provision contained in House File No. 42, abolishing all kindergartens which have already been established, and they certainly would not be abolished in the absence of such provision.

BANKS AND BANKING: Money deposited in a bank under Senate File No. 111 during the period of management by the Superintendent of Banking, as Manager, cannot be applied to an indebtedness owed by the depositor to the bank prior to the period of management.

April 18, 1933. *Banking Department, Des Moines, Iowa:* We have your request for an opinion as to whether money deposited in a bank under Senate File No. 111 during the period of management by the Superintendent of Banking, as Manager, can be applied to an indebtedness owed by the depositor to the bank prior to the period of management.

Under the provisions of Senate File No. 111, the Superintendent of Banking, as Manager, may continue the operation of the bank, holding all deposits and carrying on the operation of the bank pursuant to rules and regulations adopted. Section 2 of the act further provides as follows:

"If such institution is kept open for business, under the management of the banking department, and new deposits are received, such deposits shall be segregated and any new assets acquired on account of such deposits shall be segregated and held in trust especially for such new deposits."

Under the above provisions and the rules and regulations adopted, there have been set up in these banks, two separate and distinct trusts or units, and these trusts or units are disconnected in the same way that two banking institutions doing business in the same bank building would be, and a deposit in one cannot be used in payment of an obligation owed to the other, except where legal proceedings are undertaken, such as would be required to levy on any fund or property.

It is therefore the opinion of this Department that a deposit in a bank during the period of management by the Superintendent of Banking pursuant to Senate File No. 111 cannot be taken or held by the bank or the Manager thereof, in payment of an obligation owing by the depositor to the bank, which obligation was incurred and owing to the bank prior to the period of management. In other words, a deposit in the second trust cannot be taken to pay an obligation owing the first trust by the same person. This, of course, would not affect the right of the bank holding an obligation of its debtor to take any legal steps authorized by law, to collect a debt.

SALARY OF ASSISTANT DISTRICT ENGINEER.

April 18, 1933. *Iowa State Highway Commission, Ames, Iowa:* Your inquiry of March 8th, relative to compensation of W. O. Price as a member of the Board of Engineering Examiners and salary as Assistant District Engineer, under the Iowa State Highway Commission, he filling two different positions, to-wit: A member of the Board of Engineering Examiners, appointed by the Governor, and Assistant District Engineer, under the Iowa State Highway Commission, at hand, and in reply I would say that:

1. As a member of the Board of Engineering Examiners Mr. Price may be regarded as a state officer, although Chapter 89 of the Code provides, after designating his compensation and authorizing payment of traveling expenses, that:

"but in no event shall the state be chargeable with any expense incurred under the provisions of this chapter."

and Section 1874 of the same chapter provides:

"Warrants for the payment of expenses and compensations provided by this chapter shall be issued by the Auditor of State and paid by the State Treasurer upon presentation of vouchers regularly drawn by the chairman and secretary of the board and passed by the State Board of Audit, but at no time shall the total amount of warrants exceed the total amount of the examination and registration fees collected as herein provided."

2. As Assistant District Engineer Mr. Price fills and occupies a position as an employee under the employment and direction of the State Board of Highway Commissioners, and its designated Chief and Assistant Engineers having charge of the Engineering Department. His salary, as such Assistant District Engineer, is not paid in the manner prescribed for the payment of salaries of public officers of the state, and he is clearly one of those whom Section 4626 of the Code authorizes the State Highway Commission to employ as an assistant necessary to carry out the work of the Commission, and whose "term of employment may be terminated by the Commission at any time and for any cause."

It is the opinion therefore, of this Department, that there is no incompatibility between the positions occupied or filled by Mr. Price, as employee of the Iowa State Highway Commission and as a member of the State Board of Engineering Examiners, and that he is entitled as such member of the Board of Engineering Examiners to receive the compensation and reimbursement for expenses provided in said Chapter 89 of the Code, and that as to any salary to be paid to him as Assistant District Engineer, it is entirely a matter within the discretion of the Iowa State Highway Commission as to what salary will be paid for his services as such Assistant District Engineer, and taking into consideration the fact that he is a member of said Board of Engineering Examiners, and as to whether or not it will permit him to attend such meetings, receive such compensation and reimbursements, without deducting the same from the salary agreed upon. It would be within the discretion of the Commission to make any satisfactory arrangement granting Mr. Price such vacation as the board might see fit to grant with full pay and charge as against this *period of vacation the days and time actually used* by him in the performance of his duties as a member of said Board of Engineering Examiners. In other words, it is, in the judgment of this Department, a matter of adjustment entirely between Mr. Price and the Iowa State Highway Commission as to the services to be rendered as such Assistant District Engineer and the salary to be paid, and the terms and conditions of the employment.

HIGHWAY COMMISSION: A bridge located on a state road within a state park, is not a part of the county bridge system.

April 18, 1933. *Iowa State Highway Commission, Ames, Iowa:* Answering your letter of April 10th, wherein you ask for an opinion on the following questions:

"(a) Is a bridge located on a state road within a state park a part of the county bridge system?

"(b) May funds from the said $30,000 appropriation contained in Section 9, Chapter 257, Laws of the 44th General Assembly, 'for the construction, maintenance, and improvement of roads and highways in said parks' be used for the construction or repair of necessary bridges on such roads in such parks?"

Answering your first question (a):

It is the opinion of this Department that the Legislature intended to create

separate or independent highway districts for highways on state lands, and such as shall abutt thereon, for each state institution or state park, in connection with which such lands are used, and that these highways in this district are under the control of the board having control of the state lands of the institution or state park. For authority for this conclusion we cite Section 4632, which reads as follows:

"The chief engineer of the State Highway Commission shall be ex officio general supervisor of said several road districts, and be under the direction of the board in control thereof, and shall have general charge of the maintenance and improvement of said roads, and perform such other duties and make such reports in reference thereto as may be required by said board. Said board may appoint a local supervisor for such district."

Section 4644-c2, provides as follows:

"The secondary road system of a county shall embrace all public highways within the county except primary roads, state roads, and highways within cities and towns."

Section 4644-c3, provides:

"The secondary bridge system of a county shall embrace all bridges and culverts on all public highways within the county except on primary roads and on highways within cities which control their own bridge levies, except that culverts which are thirty-six inches or less in diameter shall be constructed and maintained by the city or town in which they are located."

You will note that Section 4633 provides:

"The roads within any such district execpt county bridges shall be maintained, repaired and improved under the direction of the board which is in control of said lands * * * *."

Thus making it mandatory upon the board in control of such roads to maintain, repair and improve the highways on lands of the state, and highways on which such lands abutt, but it does not prohibit the board from maintaining, repairing and improving bridges in and upon such highways.

Section 4644-c3, as set out herein, states that the secondary bridge system of a county shall embrace all bridges and culverts on all public highways within the county, except on primary roads, etc.

It is the opinion of this Department that the words, "public highways," as used in this section was intended by the Legislature to be limited to the secondary road system of the county of which the state road district is not a part, and over which the board in control has been given jurisdiction.

It is therefore, the opinion of this Department that:

a. A bridge located on a state road, within a state park, is not a part of the county bridge system.

b. That funds from the said $30,000 appropriation, contained in Section 9, Chap, 257 of the Acts of the 44th General Assembly, for the construction, maintenance and improvement of roads and highways in said parks, may be used for the construction and repair of necessary bridges on such roads in such parks.

BANKS AND BANKING: Senate File 483.

April 18, 1933. *Superintendent of Banking, Des Moines, Iowa:* I have gone over Senate File 483, commonly referred to as the recent banking bill, with a view of interpreting the language used in the act as applied to the questions which you propounded to me when you were in the office a few days ago.

I

The first question which arises is as to the effect of the last sentence in section one of the act, which is as follows:

"Provided, however, that the banking department shall, with the approval of the Governor, have the right to waive or modify any of the provisions or requirements of this act where a bank is not to resume or continue banking operations, *and where waivers or depositors' agreements are taken as* a part of a plan for reorganizing and/or liquidating such bank."

It is claimed that the above quoted provision applies only where banks are "not to resume or continue banking operations" but if this construction were to be adopted, it would eliminate entirely the part of the provision which we have italicized above, and the meaning would be identically the same as though the sentence ended with the comma following the words "banking operations." It is an elementary rule of statutory construction that such construction should be adopted as will give effect to all parts of the statute and if the construction suggested were to be adopted, no effect whatever could be given to that part of the sentence which says "and where waivers or depositors' agreements are taken as a part of a plan for reorganizing and/or liquidating such bank." My conclusion is, therefore, on this particular provision of the act, that the Department of Banking, with the approval of the Governor, has the right to waive or modify any of the provisions of the act in two instances, first, where a bank is not to resume or continue operations, and second, where waivers or depositors' agreements are taken as a part of a plan for reorganizing and/or liquidating such bank.

II

The second question which arises is with reference to the proper construction of section three, and particularly that part of the section which reads as follows:

"A dividend shall be declared at the end of each year covering the entire net earnings of the bank and the earnings of and collections from the segregated assets, which dividend shall be applied pro rata to the payment of outstanding certificates of trust as herein provided, no dividends on any common stock in such bank shall be paid as long as any trust certificates are outstanding, unless otherwise agreed upon between such bank or trust company and a majority of the depositors holding direct, unsecured and unpreferred obligations of such bank in excess of ten dollars ($10.00) each, and totaling in the aggregate amount seventy-five per cent (75%) of the direct, unsecured and unpreferred obligations, and approved by the Superintendent of Banking."

It will be noticed that the foregoing quotation consists of one sentence and the question which is causing difficulty, as the writer understands it, is as to whether the phrase commencing "unless otherwise agreed upon, etc." refers to each of the preceding clauses in the sentence or only to the last clause. In other words, does that clause modify each of the statements in the sentence or only the statement with reference to the dividends on any common stock. An analysis of the sentence will show that this phrase "unless otherwise agreed upon, etc." must refer to each of the clauses of the sentence because only in that way can it be given any meaning or significance. If it were limited to the clause with reference to the payment of dividends on the common stock, it would be in direct conflict with the part of the sentence which says that the earnings of the bank shall be applied on outstanding certificates. And applying again the rule to which attention was earlier called in this opinion, that such interpretation of a statute will be adopted as will give effect to all of the language used, we are forced to the conclusion that it must have been the intention that the phrase "unless otherwise agreed upon, etc." modifies all of the preceding clauses. Reducing the sentence to simple terms then,

this is what it means. A dividend shall be declared each year covering the net earnings of the bank and the earnings and collections from the segregated assets and no dividends on any common stock shall be paid unless otherwise agreed upon between the bank and the depositors, subject to the approval of the Superintendent of Banking. It will be noticed that the phrase commencing "unless otherwise agreed upon, etc." cannot be applied to the statement that no dividends on the common stock shall be paid unless it also applies to the statement that the entire earnings of the bank shall be pro-rated among the certificate holders, for the obvious reason that if the earnings of the bank are applied to the certificates they will be unavailable to pay out as dividends. To adopt any other interpretation of the language used would simply result in rendering a part of the language meaningless.

III

The further question arises with reference to this same language, as to when the agreement contemplated by the phrase "unless otherwise agreed upon, etc." is to be made. It will be noted that the only limitation in the act is that contained in section one, viz.: that depositors' agreements shall not be taken until the stockholders of the bank have made to the bank the contribution required by the Banking Department. The inference from the act clearly is that when such contribution has been made that the depositors' agreements, that is the agreement between the bank itself and its depositors as to the basis on which the reorganization is to be had, may then be taken or entered into. There is nothing to indicate that more than one agreement with depositors is to be taken and the fact that the same language is used in specifying the percentage of depositors required as in the case of depositors' agreements generally, further suggests that it is to be a part of the same agreement. Furthermore, if a bank is to reopen and proceed under an agreement with its depositors as to what payments are to be made to the depositors, it certainly is to be assumed that the depositors, as well as the bank, would want to know what that agreement was at the outset. Moreover, these depositors' agreements, limited as they are to only a percentage of the depositors, must derive their validity as agreements from the fact that the bank, when they are taken, is operating under the Banking Department in pursuance of the provisions of Senate File No. 111; and after a bank has reorganized and is out from under the operations of Senate File No. 111, there is no provision in the law which would give force and validity to depositors' agreements signed by only a part of the depositors which would bind the remaining depositors. On account of these reasons, we are forced to the conclusion that whatever agreements are to be made between the bank and its depositors where an attempt is made to bind all depositors upon the signature of a percentage thereof, that such agreements must be made while the bank is operating under the provisions of Senate File No. 111, and therefore, it would be proper, if indeed not necessary, that such agreement be contained in the original agreement between the bank and the depositors on the basis of which the bank is reorganized.

IV

The other proposition upon which an opinion is sought, has reference to the interpretation of section twelve of the act which is as follows:

"Sec. 12. Until all trust certificates issued as provided herein, have been paid off and liquidated in full, no salary shall be paid to any officer, director,

or employee unless first approved by the Superintendent of Banking and the Governor of the State of Iowa, unless otherwise agreed upon between such bank or trust company and a majority of the depositors holding direct, unsecured and unpreferred obligations of such bank in excess of ten dollars ($10.00) each, and totaling in the aggregate amount seventy-five per cent (75%) of the direct unsecured and unpreferred obligations, and approved by the Superintendent of Banking."

Briefly stated, this section provides that until the trust certificates are paid in full, the bank shall pay no salary to its officers or employees unless approved by the Superintendent of Banking and the Governor unless otherwise agreed upon between the bank and its depositors and approved by the Superintendent of Banking. This section obviously applies only to the salary of the officers and employees of the bank. The real question at this point, as the writer understands it, is whether or not the bank and its depositors may, with the approval of the Superintendent of Banking, enter into a depositors' agreement which will change or modify the provision as to salary of officers and employees while any part of the trust certificates remain unpaid, and if so, when that agreement may be entered into. What has heretofore been said with reference to section three of the act is of equal application here. The provision in section twelve, commencing "unless otherwise agreed upon, etc.," if it means anything at all, means that the bank and its depositors may, with the approval of the Superintendent of Banking, enter into an agreement modifying or changing the provision as to the control of salaries of the officers and employees by the Superintendent of Banking and the Governor while the certificates remain unpaid. And our conclusion is that such agreement can be made with the approval of the Superintendent of Banking; and for all the reasons urged in connection with the agreement mentioned in section three, it is our opinion that such agreement may be made and possibly can only properly be made at the time that the depositors' agreements are being taken as a basis of the reorganization of the bank.

It has been urged upon the writer in support of a contrary interpretation of these provisions, that to adopt the interpretation which we have adopted in this opinion would be to nullify the act and defeat the obvious purpose of the act. It should be borne in mind that all these provisions were ingrafted on to the original bill by amendments in the General Assembly and that they were obviously intended to accomplish some purpose, and that if we were to refuse to give them the interpretation they have been given, it would be to deprive them of all force and effect. They were obviously intended to modify the bill as originally introduced; and, in the writer's opinion, it is equally obvious that they have that effect. Furthermore, the interpretation we have given these provisions is not inconsistent with the purpose of the act as hereafter pointed out in this opinion.

V

What has heretofore been said has reference only to the question of the proper interpretation of the particular provisions of the act and are only partial answers to the larger question with which you are concerned, and that is, how is the act to be applied and administered so as to preserve its obvious purpose of protecting the depositors in the reorganization of closed banks. On that broader question of interpretation and application the following observations are offered.

It will be observed that our interpretation of these provisions does not take

anything away from the power of the Superintendent of Banking acting with the approval of the Governor, but on the contrary, increases that power. The act, as it now stands, gives to the Banking Department the right and power to prescribe the contribution which the owners of the bank must make to the fund out of which trust certificates are to be paid. The Department may say, for example, that no depositors' agreements will be approved which do not provide for a contribution by the owners of the bank to the fund out of which trust certificates are to be paid of an amount equal to the capital stock of the bank and a one hundred per cent assessment thereon, or even a greater amount, if in the particular case it should be deemed advisable. There is no limitation on the power of the Superintendent of Banking in this respect. The depositors' agreement must be approved by him and he can refuse to approve any agreement which in his opinion is not perfectly fair to the depositors.

The general effect of the amendments or provisions quoted in this opinion is to give flexibility to the act and give discretion to the Superintendent of Banking in fixing the total contribution which the owners of the bank must make in any plan of reorganization; and permit the adoption of different plans of reorganization in order to meet the demands of particular situations. Without those provisions the owners of the bank could get no dividend until the trust certificates were paid in full. With those provisions it is possible for the bank and its depositors, with the approval of the Superintendent of Banking, to enter into an agreement which will limit the total contribution to be made by the owners, whether sufficient to pay the trust certificates in full or not, and after that total contribution has been made the earnings of the bank would belong to the bank and the bank would have the right, subject to the limitations of the general law, to fix the salary of its officers and employees. But it should always be borne in mind that this can result only from the agreement between the bank and its depositors *and approved by the Superintendent of Banking.*

In view of the rather general character of the inquiries which you made, we are not certain that they have all been definitely answered in this opinion, but we trust that we have answered the question as to the general effect of these provisions and will be glad to cover specific points as they arise.

In the writing of this opinion, we have dealt only with the question of the interpretation of the language used in the act because, as the writer understands it, that was the only question submitted for an opinion.

STATE BOARD OF ASSESSMENT AND REVIEW: Accessories kept by public utility companies: Local township or city assessor.

April 19, 1933. *State Board of Assessment and Review, Des Moines, Iowa:* Pursuant to our conversation yesterday, this office is furnishing you with an opinion on the following question:

"Please advise us whether or not, under the provisions of Sections 6979 and 6981, merchandise, such as gas stoves, light globes, and other accessories kept by public utility companies for sale in their stores, should be assessed by the State Board of Assessment and Review, or by the local township or city and town assessor."

Section 6979 provides that these companies shall be listed and assessed by the State Board of Assessment and Review. This section does not specifically state that stocks of merchandise owned by these companies shall be assessed by the State Board. However, Section 6981 provides as follows:

"All the personal property of such individuals and corporations used or purchased by them for the purposes of such gas or water works, electric light plants, electric or cable railways, elevated street railways or street railways operated by animal power, including the rolling stock of such railways and street railways, and the animals belonging to such street railways operated by animal power, shall be listed and assessed by the State Board of Assessment and Review."

It will be seen from the reading of this section that it covers "all personal property" of such individuals and corporations used or purchased by them for the purpose of such gas or water works, etc. There is no question but that the Legislature intended that stocks of merchandise owned by these companies, and all other property used or purchased by them for the purposes, for which said companies were organized, should be assessed by the State Board.

BANKS AND BANKING: Liability of preferred stockholders.

April 20, 1933. *Banking Department, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

Are the holders of preferred stock in the Farmers Loan & Trust Company, Waterloo, Iowa, liable for a statutory assessment where the company is insolvent and now in the hands of L. A. Andrew, Receiver?

Section 9251, Code of Iowa, 1931, provides:

"*Liability of Stockholders.* All stockholders of savings and state banks shall be individually liable to the creditors of such corporation of which they are stockholders over and above the amount of stock by them held therein and any amount paid thereon, to an amount equal to their respective shares, for all its liabilities accruing while they remain such stockholders."

Section 9259 of the Code makes the above section applicable to loan and trust companies.

Section 9304 of the Code makes the above section applicable to banks and trust companies as fiduciaries.

In Cyclopedia of the Law of Private Corporations, by Fletcher, in the 1932 Edition, as revised by Jones, at Volume 2, Section 5304, the author states the rule as follows:

"In the absence of express provision to the contrary, the holders of preferred stock in a corporation are subject to the same liability as the holders of common stock. Thus they are liable on the same principles upon their subscriptions for shares. And creditors, if the corporation becomes insolvent, may in equity compel subscribers to pay the full amount of their subscriptions, irrespective of any secret agreements with the corporation. So, where the statute makes the stockholders of a corporation individually liable to creditors beyond the par value of their shares, it applies to the holders of preferred stock."

To sustain the last sentence of the above quotation, the author cites *Railroad Company vs. Smith*, 31 N. E. (Ohio), 743, which was an action by creditors of an insolvent corporation to enforce the statutory liability of stockholders, and the Court there held:

"Holders of preferred stock are subject to the statutory liability, equally with the common stockholders."

I have examined the Articles of Incorporation and as amended and renewed, and I find no provisions therein exempting the holders of preferred stock from statutory liability in case of receivership. I find only that such holders are given a preference in dividends and in payment to stockholders in case of liquidation, and also a voting power; and I can find no language therein by which the holders of such preferred stock could be deemed creditors except,

of course, as to unpaid dividends like other stockholders, and it is clear that they must be either creditors or stockholders.

In the 1919 Edition of Cyclopedia of the Law of Private Corporations, by Fletcher, Volume 6, it is said at Section 4186:

"Holders of preferred stock in a corporation, when they are stockholders and not merely creditors, are within a statutory or constitutional provision imposing individual liability upon stockholders for corporate debts, and they cannot be exempted from such liability by any agreement with the corporation, unless by virtue of some valid statutory provision."

In Iowa, we have no statutory provision exempting preferred stockholders from such liability, and our court in *Wright vs. Johnston*, 167 N. W., 680, stated that the court would determine from the certificate and Articles of Incorporation and the By-Laws, the exact status of the holder of preferred stock, and the court said on page 682:

"What the certificates are, as evidenced by their terms and the Articles of Incorporation authorizing their issuance, and not what they are denominated, must determine their character. It may be that as between shareholders and the corporation one class, as those having preferred stock, may be accorded preferences, as that dividends be first paid from the profits, and if profits are not sufficient for this purpose, accumulated dividends be first paid from the assets on liquidation after satisfaction of all indebtedness, and even that the par value be returned to preferred shareholders before any of the assets are distributed to the holders of common stock."

And the court in answering directly the question that we have in this opinion and holding that the holders of preferred stock would be liable for their statutory liability in case of receivership, stated on page 682, as to the liability and risk of a preferred stockholder:

"The only risk is the possibility of a shareholder's liability in event of insolvency before he is repaid voluntarily or according to the terms of the Amendment to the Articles."

Under the Articles of the Farmers Loan & Trust Company, the holders of preferred stock were given all the rights of the holders of common stock and it will be well to note that from the letterhead of the company there is in bold type underneath the name, the following: "Capital, $100,000."

And when a corporation holds itself out to the world as possessed of a given capital, those who deal with it have a right to the application of such capital together with statutory liability to the payment of such debts as it may incur. It cannot be heard to say that of such advertised capital, only $25,000 is subject to statutory liability.

In Cooney vs. Arlington Hotel Co., 101 Atlantic (Delaware), 878, there was an action by the receiver for authority to collect from the stockholders certain moneys not paid on their shares of stock in order that the receiver might pay the debts of the company. The holders of the common stock there insisted that the preferred stockholders should be first required to make payment before any call was made on the common stockholders, and the court, on page 890, stated:

"But there is no foundation for the contention. In case of insolvency, all the money due from all kinds of stockholders constitute the trust fund for creditors, and the statute makes no difference between the several kinds of stock. The liability arises from the relationship of the stockholder, whether it be created by contract or be implied from ownership of shares."

And again on page 895, it is stated:

"I am clear that there should be no distinction between the delinquent hold-

ers of common and preferred stock, but that they should be treated as one class."

Our assessment statute makes no distinction between different classes of stockholders. It mentions neither common nor preferred. It says "all stockholders." There is likewise no exemption from liability in the Articles of Incorporation nor any renewal thereof or amendment thereto. It is clear to us that no distinction in liability in the two classes of stockholders exist.

It is therefore the opinion of this Department that the holders of preferred stock in the Farmers Loan & Trust Company, Waterloo, Iowa, are liable for a statutory assessment on their stock in a suit by the Receiver.

GAMBLING: LOTTERIES: TRADE SCHEMES: Trade stimulants that include the element of chance are prohibited.

April 20, 1933. *County Attorney, Forest City, Iowa:* This will acknowledge receipt of your favor of the 10th inst. with the request for an opinion as to whether or not the following state of facts would under the law constitute a lottery and therefore be illegal.

"A newspaper publisher of the county today asked my opinion on the following facts:—He wishes to increase his subscription list and as a means thereto, desires to sell annual subscriptions to his newspaper for $2.00 each; to every purchaser paying $2.00 for an annual subscription, he means to give two numbers. At the end of his campaign, which will run from ninety days to six months, a duplicate of all numbers outstanding in the hands of the subscribers will be placed in a container and one number selected from the mass. The holder of this number will be presented with an automobile without any charge or fee of any kind."

This department has no hesitancy in saying that upon the foregoing state of facts, and under the definition of a lottery as defined by our Supreme Court in Brenard Mfg. Co. vs. Jessup and Barrett Co., 186 Iowa, 872, that this would be a lottery. In the foregoing opinion, our Supreme Court pointed out the three elements which constitute a lottery, the first being a consideration; the second, the element of chance; and the third, a prize. It would clearly appear from your letter that the program contemplated would include all of these elements, and therefore, come clearly within the Supreme Court's definition.

FARM BUREAU: Itemized statement.

April 21, 1933. *County Attorney, Oskaloosa, Iowa:* We are in receipt of your letter of March 27th, in which you ask for an interpretation of Section 2938 of the Code of 1931, and especially asking for an opinion on the following questions:

"1. Does the detailed report of receipts showing from whom received require the name of the individual making the respective payment and the amount of the payment, or in other words, must that report contain a complete list of the members of the organization who have paid dues during the past year, with a statement of the amount of dues paid by each individual?

"2. If in your opinion such itemization is required, and a case arises where it has not been done in making the annual report, is such itemization a prerequisite to the payment of further appropriations to such association during the subsequent year, or is such appropriation and payment dependent only on the filing of the general affidavit of the certification of the number of members, under Section 2930?

"3. If such itemization is required, and if it is not a pre-requisite to the obtaining of the appropriation for the subsequent year, would an action in mandamus lie at the instance of the Board of Supervisors or at the instance of a taxpayer, to require such itemized statement?"

If the statute provided only for a "detailed report," this office might say that it would not be necessary to file a minute or itemized statement. We have gone into this matter carefully, and find only one case where the Supreme Court has defined "detailed report." In that case, the law provided that the County Commissioners shall file a detailed report. The Court said that it did not mean a minute itemized statement.

State vs. Washington County, 56 Oh. St., 631; 47 N. E., 565.

However, Section 2938 of the Code goes further than the statute in the Ohio case. The present Iowa statute provides as follows:

"The outgoing president and treasurer shall, on the first Monday of January of each year, file with the County Auditor *full and detailed reports* under oath of *all receipts and expenditures* of such association, *showing from whom received and to whom paid and for what purpose.* One duplicate of such report shall be forwarded to the Iowa State College of Agriculture and Mechanic Arts, and one duplicate shall be forwarded to the department of agriculture, together with such additional information as they may require. The books, papers, and records of the association shall at all times be open to the inspection of the department and to the board of supervisors or anyone appointed by the board to make such inspection."

This office is of the opinion that, when the statute says a full and detailed report, and further states that the report shall show from whom received and to whom paid, it cannot mean that the association, or the officers, have complied with the law in filing a report showing the total amount of dues, without showing from whom the dues were received. We believe the statute requires that the report shall show from whom each payment of money is received and to whom each expenditure or disbursement was made and the purpose of each expenditure or disbursement.

In answer to your second question, we do not believe that the failure to file the proper report is a prerequisite to the payment of further appropriation. The appropriations are made on a certificate on file in the new year. They are not made or contemplated on the report of the outgoing officers. We will say, however, that you have a right to compel the association or the officers to file this report, as provided by statute.

In answer to your third question as to whether or not an action in mandamus will lie to compel the filing of a report, our answer is that we believe you should be satisfied from your own investigation and not from a statement made by us as to whether or not this is the proper remedy.

GENERAL ASSEMBLY: Compensation.

April 21, 1933. *Auditor of State, Des Moines, Iowa:* Acknowledgment is made of receipt of your letter of even date herewith, requesting the opinion of this Department as to the compensation of members of the General Assembly, and we note particularly, the inquiry as to the manner in which such compensation should be computed.

You are advised that this Department has reached the conclusion that the members of the General Assembly are entitled to receive compensation at the rate of $10.00 per day while the General Assembly is in session but not to exceed a total of $1,000.00 for the regular session. It is perhaps unnecessary to point out the process by which this conclusion is reached. But it should be borne in mind that the statute, Section 14 of the Code, under which members of the General Assembly are now compensated has been in effect for a good many years and its constitutionality has never been challenged and that

the Supreme Court of the state in the case of Gallarno vs. Long specifically pointed out that the conclusion reached in that case was not to be interpreted as holding that a statute such as the one now under consideration is invalid. It also should be borne in mind that every presumption is indulged in favor of the constitutionality of a statute; and that this presumption, very properly, is particularly strong as applied to administrative officers. It would be a rare case indeed, where an administrative officer would be justified in refusing to follow the terms of a statute on the ground that the statute was unconstitutional, in the absence of an adjudication of the question by the court, and that is particularly so with reference to a statute that has been in effect as long as the present statute with reference to the compensation of members of the General Assembly.

The Constitution of the state requires that the compensation of the members of the General Assembly shall be at the same rate at the special session as at the regular session. The Supreme Court has said, in effect, that the compensation of members of the General Assembly must be on a per diem basis. It is a well settled rule that where more than one interpretation of a statute is possible, and one of the interpretations will render the statute unconstitutional and the other constitutional, that the court will adopt that interpretation which renders the statute constitutional. The provisions of the law as contained in Section 14 of the Code, with reference to compensation of members of the General Assembly are all part of one statute and should be construed together. The section specifically provides that the compensation per diem of members at a special session shall be at the same rate per diem as received at a regular session but not to exceed $10.00 per day. Since the compensation of members at the special session is limited to $10.00 per day and since the Constitution and the statute itself prescribes that the compensation per day at the special session shall be the same as that at the regular session, we reach the conclusion that the members of the General Assembly at the regular session are entitled to a maximum of $10.00 per day. And under the provisions of Section 14 of the Code, the total must not exceed $1,000.00, and therefore, if the session exceeds one hundred days, the per diem would be correspondingly reduced. In other words, the legislative intention as expressed in the statute, when read as a whole, is that the basis of compensation shall be $10.00 per day, with the limitation that the total shall not exceed $1,000.00 for a regular session, and the further limitation that the per diem for the special session shall not exceed that of the regular session. The historical development of the statute and the legislative tradition surrounding it confirms that view. And it will be noted that the terms of the regular sessions have almost always been approximately one hundred days. We conclude, therefore, that the General Assembly should be paid on the basis of $10.00 per day while in session, but not to exceed a total of $1,000.00.

The second question which you request is whether if the members are to be paid on the basis of a per diem, such compensation should be limited to the days in which they are in actual session. You are advised that a session of a legislative body, like that of a court, is the period of time between the convening and the termination of the session.

"Thus a session of parliament is opened by the speech from the throne and closed by prorogation." See Emerson vs. Missouri K. & T. R. Co. of Texas, 82 S. W., 1060.

Applying this rule to the compensation of the members of the General Assembly, you are advised that in computing the number of days the General Assembly was in session you should commence with the day the assembly convened and end with the day of the adjournment of the session. But under the provisions of Section 63, Code, as to computing time, the first day should be excluded and the last included.

You make inquiry also as to the effect of the provision contained in Senate File 479, known as the salary reduction act, directing that the compensation of members of the General Assembly shall be reduced five per cent. This act was passed just before adjournment. It has not yet gone into effect. Obviously, the compensation of the members of the Forty-fifth General Assembly, which becomes due at the time of adjournment, cannot be affected by an act which goes into effect after that date.

In view of the urgency of your request, we have not been able to give to the preparation of this opinion the time which the importance of the question deserves, but we trust that what is here said will be sufficient to indicate that there is nothing the administrative officers of the state can properly do under present circumstances, other than to follow the terms of the statute (Section 14) which the Supreme Court refrained from declaring unconstitutional, as that statute is herein interpreted.

TAXATION PENALTY: SPECIAL ASSESSMENTS PENALTY. Interpretation of Sections 2 and 3 of House File No. 69.

April 21, 1933. *County Attorney, Fort Dodge, Iowa:* We are in receipt of your letter of April 17th, with which you enclosed a copy of your opinion of April 3rd, addressed to Vern E. Hale, County Treasurer of Webster county, concerning House File No. 69 of the 45th General Assembly.

In order to make Mr. Burns' opinion clear, let us take a hypothetical case and go through the entire setup on Sections 2 and 3 of House File 69. I guess there is no disagreement, so far as Section 1 is concerned.

Suppose that the taxes for 1931 were not paid in the year of 1932 and that the real estate was sold in December of 1932 for the 1931 tax. It is then true that the laws which were in force at the time the property was sold would govern, and that the holder of the certificate was on that date entitled to have added a penalty of 8 per cent, and also to draw 8 per cent interest under Section 7272 of the Code of 1931. On March 31st, House File No. 69 went into effect. The holder of this certificate would have the right to pay the 1932 taxes either before or after April 1st. If he paid them before April 1st, he would not be entitled to an 8 per cent penalty under the provisions of Sections 7272 and 7273. If he paid them after April 1st, he would be entitled to an 8 per cent penalty, rather than the 4 per cent penalty, because he owned this certificate prior to the time that House File 69 became a law.

So far as this applies to Section 7214 is concerned the fact that the property was already sold in December, 1931, would have nothing to do with the penalty provided in Section 7214 on the 1932 tax, which is payable in 1933. The penalty provided in Section 7214 would not belong to the holder of the certificate but to the county. For instance, suppose that on August 1st the holder of this certificate went to the County Treasurer to pay the first half of the 1932 taxes, which were due March 1st, but the payment of which has been postponed to July 1st. In addition to paying the tax, the Treasurer would charge him three-fourths of 1 per cent a month, because the tax was not paid July 1st.

That three-fourths of 1 per cent a month belongs to the county, not to the holder of the certificate. However, in addition to this three-fourths of one per cent a month, there would be a penalty of 8 per cent added under the provisions of Sections 7272 and 7273. This 8 per cent would belong to the holder of the certificate, and in addition to that 8 per cent, the holder of the certificate would be entitled to interest at the rate of 8 per cent per annum on this payment.

When Mr. Burns mailed out the bulletin of April 15th, he was not discussing House File 69, but Senate File 473.

Now then, take the case of a special assessment which was due April 1, 1932, and for the payment of which the real estate was sold in December, 1932. If the special assessment, which is due in 1933, is not paid before April 1st, a penalty of three-fourths of 1 per cent a month will be added, for the reason that Section 6033 provides that all such taxes shall become delinquent on the first day of March next after their maturity and shall bear the same interest. However, if the holder of the certificate pays the special assessment after April 1st, he is entitled to the 8 per cent penalty, which is added, and also the 8 per cent interest under the law, which was in effect at the time the certificate of purchase was issued to him.

If after reading this letter you still disagree with me, I will be glad to discuss the matter with you the first time you are in Des Moines.

You understand of course that the reason for the bulletin of April 15th from the Auditor's Office was to advise the County Treasurers that under Senate File 473 the payment of special assessments is not postponed to July 1st, for the reason that the bill refers to taxes which are payable in the two installments.

Power of the Governor to grant a pardon effective prior or subsequent to commitment.

April 24, 1933. *Governor of Iowa, Des Moines, Iowa:* Request for an opinion has been made as to the power of the Governor to grant a pardon with particular reference as to whether or not the pardon would or could be effective prior or subsequent to commitment.

The executive right is a part of the Constitution of the State of Iowa and set forth in Section 16 of Article 4 which provides as follows:

"The Governor shall have power to grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and case of impeachment, subject to such regulations as may be provided by law. * * * * He shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law; and shall report to the General Assembly, at its next meeting, each case of reprieve, commutation, or pardon granted, and the reasons therefor; and also all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted."

By legislative enactment incorporated in Chapter 189 of the 1931 Code of Iowa are set forth the only regulations referred to in the above constitutional section as effecting the matter under consideration. Section 3812 of Chapter 189 provides as follows:

"Nothing in the preceding chapter (referring to paroles generally and the Board of Parole) 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."

Chapter 3817 of Chapter 189 provides as follows:

"After conviction of a felony, no pardon or commutation of sentence shall

be granted by the Governor until he shall have presented the matter to, and obtained the advice of, the Board of Parole, but he may commute a death sentence to imprisonment in the penitentiary for life, without making such reference or obtaining such advice."

Other sections contained in Chapter 189 provide that when applications are made to the Governor for pardons, reprieves, or commutations, he may require the Judge of the Court or the County Attorney to furnish him minutes of the evidence taken on the trial or the Governor may take testimony himself bearing upon such applications. He may, upon proper showing, restore to those who have lost it, their right of citizenship. When such pardon, reprieve, or commutation is given, copy of the same shall be forwarded to the officer having custody of the party, if the party is in custody, and if not in custody, a copy shall be delivered to the party and one to the Clerk of the Court where the judgment was entered.

In State of Iowa, ex rel. Preston, vs. Hamilton, 206 Iowa, 414, a review of the Iowa authorities bearing upon this question are somewhat fully set forth and the general statement of the law is declared to be as follows:

"No one but the Governor, under our system of government, has the power, right, or authority to thus remit, reprieve, commute, or pardon."

And the decisions of a number of prior Iowa cases are referred to.

It was said in Miller vs. Evans, 115 Iowa, 101:

"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 the purposes of appeal, is clearly obnoxious to the objection that it is an attempted exercise of power not judicial, but vested in the executive."

In the case of Iowa, ex rel. Preston, vs. Hamilton, above cited, the court, after conviction, entered a suspension of sentence during good behavior upon payment of costs and the jurisdiction of the court was challenged, and reviewed by the Supreme Court, to enter such a suspension. The Supreme Court in passing upon this question said:

"The trial court's action directly violated the constitutional provision, and usurped the prerogatives of the executive department of our government."

It is apparent from a reading of the constitutional provision and from the interpretation giving to the constitutional provision by the Supreme Court of this state that the Governor of the state unquestionably has the right of pardon *after conviction.* Nothing is said in Section 16 of Article 4, nor in the statutes set forth in Chapter 189 directly as to when this power may be exercised with reference to the matter of commitment. The express power being given to pardon after conviction would clearly support the legal conclusion that at any time after conviction the power to pardon becomes effective and this construction is clearly borne out by the regulations referred to in Chapter 189.

Section 3817 of Chapter 189 is in our opinion clearly an advisory statute and not restrictive in any sense, of the executive power in the granting of pardons, reprieves, or commutations.

BANKS AND BANKING: Depositors' agreements with banks under S. F. 111.

April 24, 1933. *Banking Department, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

"Would the entering into a depositor's agreement at this time by a public body with a bank operating under Senate File 111, Forty-fifth General Assembly, prejudice in any way its right to participate in any fund received from

the Reconstruction Finance Corporation or any other governmental agency as provided in Senate File No. 487, Forty-fifth General Assembly?"

The title to the act provides that it is an act to provide for the release of public funds in closed banks, and one of the purposes of the fund is to replace moneys of the State of Iowa and all taxing subdivisions, in banks operating under Senate File No. 111.

Our legislature, prior to the enactment of Senate File No. 111, gave to public bodies the right to enter into depositors' agreements and the clear intention of Senate File No. 487 is not to in any wise curtail the execution of the agreements, but to make available certain funds to public bodies, which they cannot receive at this time out of the State Sinking Fund; and as the execution of such depositors' agreements under the provisions of House File No. 541 is without prejudice to the right to participate in the State Sinking Fund, it is clear that the execution of such agreements will not in any wise prejudice the right to participate in this fund provided for in Senate File 487.

It is therefore, the opinion of this office that entering into a depositors' agreement at this time by a public body with a bank operating under Senate File 111, Forty-fifth General Assembly, would not prejudice in any way its right to participate in any fund received from the Reconstruction Finance Corporation or any other governmental agency as provided in Senate File No. 487, Forty-fifth General Assembly.

MOTOR VEHICLE LICENSE FEES. COUNTY TREASURER. LIABILITY OF COUNTY TREASURER FOR LICENSE FEES ISSUED ON BAD CHECKS. The County Treasurer is personally liable on his bond for bad checks taken in payment of automobile license fees. He is liable on his bond to the state. The county is not liable to the state for payment of motor vehicle license fees uncollected by county treasurer on bad checks. The County Treasurer cannot deduct amount of shortage of cash on account of bad checks from his report to the Motor Vehicle Department.

April 25, 1933. *County Attorney, Knoxville, Iowa:* Your letter of the 8th inst., addressed to the Attorney General, requesting an opinion upon four propositions connected with the administration of the automobile license laws, has been received and referred to the undersigned.

The first proposition upon which you desire an opinion is as follows:

"Is the County Treasurer personally liable on his bond for bad checks taken in the usual course of business without notice, in payment for automobile license fees?"

In answering this question as well as the other questions which you propound, it should of course, be kept in mind that we are expressing only the opinion of this Department. We recognize that the answer to some of these questions is not easy to ascertain and that the courts may ultimately adopt a different view. It is our position that the county treasurer is personally liable on his bond for bad checks taken in the usual course of business in payment for automobile license fees, and that the county treasurer is not authorized or permitted to issue licenses and license plates without receiving the license fees. Section 4904 of the Code, provides as follows:

"Said license fees shall be paid to the County Treasurer at the same time the application is made for the registration or reregistration of said motor vehicle or trailer."

And Section 5011 of the Code is as follows:

"The County Treasurer shall collect the license fee and penalties on each motor vehicle registered by him and shall be responsible on his bond for

such amount. He shall remit such amount to the Treasurer of State as herein provided."

It seems clear to this Department that the statutes contemplate that the county treasurer shall be held responsible for the license fees on all applications for registration granted by him. He certainly is given no right to extend credit and so far as the state is concerned, has no authority to accept credit in exchange for a license issued. If he indulges in the extension of credit he does so at his own risk and, of course, taking a check is accepting a form of credit in lieu of the cash.

The second proposition is as follows:

"If the County Treasurer is personally liable on his bond for these checks, to whom is he liable, the county or the state?"

It is our view that he is liable to the state. That these automobile license fees are state funds, and since the funds belong to the state, the state would be the proper party to enforce the claim against the bond.

The third proposition on which you desire an opinion is as follows:

"Your opinion of February 21, 1933, states, 'You are entitled to hold the County of Marion for this money, and the County of Marion can then collect the $110.00 from Metcalf or his bondsman, if it so desires.' Does this mean that the county through its Board of Supervisors has the authority to make good to the state this $110.00 item of bad checks and then from the treasurer or his bondsman, or relieve the treasurer and his bondsman from liability on said item as the county may see fit?"

The portion that you quote from a former communication from this Department was written in the belief that the provisions of Chapter 352 of the Code, applied to these motor vehicle license fees collected by the county. The first section of that chapter is as follows:

"7398. Each county is responsible to the state for the full amount of tax levied for state purposes, excepting such amounts as are certified to be unavailable, double or erroneous assessments."

The writer of this opinion is inclined to the view that that chapter has no application to the motor vehicle license fees and that it has reference only to property taxes levied by the state and collected by the county treasurers together with other taxes levied by local subdivisions, and that it does not have reference to license fees. In expressing this opinion, however, acknowledgment should be made of the fact that others, whose opinion is entitled to serious consideration, take a contrary view, and until the courts decide it none of us can say with any great degree of certainty. Perhaps your own judgment on the matter is as good as that of anybody else.

The fourth proposition on which you desire an opinion is stated as follows:

"The Motor Vehicle Department evidently has made a ruling that all bad checks received by the County Treasurer during the current month will be allowed as a deduction from the Treasurer's report for that month if included therein. Is there any law for this ruling, and if so, would not it also apply to bad checks received by the treasurer during prior months?"

In answering this proposition we desire to say that if the Motor Vehicle Department has made such a ruling there is no law for it. Perhaps what the Department had in mind was that they would permit the county treasurer a period of thirty days in which to collect such checks. In other words, that they would not insist that the treasurer have, at the end of each month, the exact amount of cash to equal the license fees on the applications granted by him during that month but would allow him thirty days in which to clear the cash items. I am quite certain that the Motor Vehicle Department never ruled

or intended to rule that checks would be accepted permanently as a part of the accounting of the county treasurer if reported during the month in which they were received. In any event, if such ruling was made it was in error.

We note the further statement in your letter that the Motor Vehicle Department is demanding that the present county treasurer list the amount of some bad checks in his returns. Of course, the records of the Motor Vehicle Department must correctly show the amount of motor vehicle license fees collected in the county by the county treasurer which have not been remitted to the state, but it would seem as though that report could be made up in such a way as not to involve the present treasurer. Would it not be possible to put an item in the report showing the amount of motor vehicle license fees chargeable to the preceding county treasurer and which have not been turned over to the present county treasurer and then proceed to report the collections which the present treasurer has made and the disbursements? Of course, the records of the Motor Vehicle Department must correctly reflect the amount of motor vehicle license fees which are supposed to be in your county collected and unremitted, but it would seem that it could be stated in such a way that the present treasurer clearly would not assume liability for the payment of collections made before his term of office began and which never were, in fact, turned over to him.

ASSESSOR: Poll tax: County Treasurer: Bank under S. F. 111.

April 25, 1933. *County Attorney, Sac City, Iowa:* We are in receipt of your letter of April 17th, in which you ask for an opinion on the following:

"Some of the assessors in this county, who had collected poll tax under Section 4644-c58 of the Code, but who had not turned it over to the County Treasurer under Section 4644-c61, not having completed their work, deposited the money so collected in a bank in a separate account showing it was an assessor's account, after which the bank went under Senate File 111. Please advise whether or not the assessor is personally liable for this money."

You are advised that Chapter 352-D1 of the Code of 1931 does not cover deposits made by assessors, and that there is no law in this state which requires him to deposit money collected by him in any particular bank.

Section 4644-c59 places the duty of collecting the road poll tax on the township assessor. Section 4644-c61 provides that he shall make a return to the County Treasurer upon the completion of his work, by preparing a list of all persons subject to said tax, and that at the same time he shall pay the entire proceeds of said collections to the County Treasurer. In view of these two sections just cited, the local assessor had to do something with that money. He could have either placed it in a safe in his home, or he could have deposited it in the bank. In any event, he was required to use reasonable care in the preservation of the fund. If he did use reasonable care in the selection of a depository, he certainly is not liable for the loss of the funds.

In the case of Rose vs. Hatch, 5 Iowa, 149, the funds were stolen from the Treasurer, and the Supreme Court held that he was not liable. In the case of Prudential Insurance Company vs. Hart, 205 Iowa, 801, the Supreme Court of this state held that the officer was not an insurer of the funds. In that case, the Court quoted from the case of Rose vs. Hatch, as follows:

"The state has not seen proper to require of the County Treasurer more than reasonable diligence and care in the preservation and disposal of the public funds; and when he shows that he has exercised this diligence and care, and that the monies have been stolen from him notwithstanding, he is discharged from all liability."

In view of these two cases just cited, this office is of the opinion that the township assessor is not liable for the funds lost in this bank failure, if he used reasonable care in the selection of the depositories. However, if he had reason to know that the bank was in financial difficulty and probably would be forced to close, he might then be held liable. This would be rather difficult though, unless it could be shown that he was an officer in the bank and had an opportunity to acquaint himself with its condition.

CLERK OF UNION COUNTY: Funds not turned over by previous clerk: Claim against bank or state sinking fund.

April 25, 1933. *County Attorney, Creston, Iowa:* We are in receipt of your letter of April 21st, in which you ask for an opinion on the following:

"The Clerk of Union county has asked me for an opinion on the question of funds that were not turned over by the previous Clerk. The bank records show that they have a balance of funds on hand in the name of the previous Clerk to the amount of $396.78 more than was turned over by her to the present Clerk, and he has no knowledge where that additional money comes from. Please furnish us with an opinion as to whether the Clerk should file a claim against the bank for this amount, and whether or not he should file a claim against the State Sinking Fund."

It is impossible to say whether or not the claim should be filed against the State Sinking Fund, for the reason that your Clerk does not know from what source these funds were derived. If they are funds belonging to the county, such as fees, then it would be proper to file a claim against the State Sinking Fund. However, if these funds are merely trust funds, such as copy fees, money paid in to apply on judgments, etc., then they could not be recovered from the State Sinking Fund.

So far as filing a claim against the Receiver of the bank is concerned, if the former Clerk had authority to deposit the funds in that bank, and if he did not violate the law governing the deposit of public funds, then such a claim should be filed. However, if the former Clerk violated the law in making such deposits, the present Clerk should not accept that fund being paid over to him by the former Clerk.

SCHOOL BOARD: Minimum wage law.

April 25, 1933. *County Attorney, Bedford, Iowa:* We are in receipt of your letter of April 22nd, in which you ask for an opinion on the following:

"Last fall, before the teachers were hired, the school board of a certain school district wrote into the teachers' contracts a clause which read: 'It is agreed that, if the legislature lowers the wages for teaching, that she will accept the same.' The teachers signed the contract with the clause so inserted. The school board, since the passage of the amendment to the minimum wage law, have endeavored to cut the teachers' salaries for this year. They are not asking that the teachers be cut to the minimum. The teachers are refusing to accept the cut. The question is whether or not the contract is binding on them."

It is difficult to state just what the School Board meant, when they inserted the clause in the contract. They were paying the teachers more than the minimum wage at the time the contract was entered into, and it is therefore rather difficult to believe that the Board meant by this clause that, if the minimum wage was reduced, the teachers would accept the minimum wage under the new law, when as a matter of fact they were paying them more than the minimum wage provided by the law which was in force at the time the contract was executed.

We wish to advise that, if the Board was paying the teachers the minimum wage under the contract, the clause in the contract providing for a reduction under that contract, in case the legislature lowered the minimum wage, would be valid, and could be enforced. However, it is difficult to understand just what the School Board did mean by the clause inserted in its contracts, when as a matter of fact it was paying the teachers more than the minimum wage.

POOL HALL LICENSES: City council.

April 25, 1933. *County Attorney, Emmetsburg, Iowa:* We are in receipt of your letter of April 14th, in which you ask for an opinion on the following:

"A city council in this county has been having trouble regarding pool hall licenses. One proprietor had not been conducting a respectable place of business and, in addition, had not been paying his license fees and was considerably in arrears. Therefore, the council refused to renew his license.

"This pool hall proprietor is now running his pool hall as before and charging for the use of cues, cue tips and chalk instead of charging for the use of tables. His place of business is of course open to the public the same as before, and the only difference in the way he is conducting it is that he purports to not charge anything for the tables, but does charge for the use of the cues, cue tips and chalk.

"The city council wishes to know two things:

"1. May a billiard *hall* be required to obtain a license, if no charge is made for the use of the tables or necessary equipment for using the tables?

"2. If a charge is made for cues, cue tips and chalk, is the billiard hall and the tables by reason thereof 'kept for hire'?"

We have read the case of City of Ida Grove vs. Smith, 167 N. W., 188, which case was cited by you in your letter of April 14th. We believe that the facts in your case, in so far as the city is concerned, are even stronger in favor of the city than the facts in the Ida Grove case.

Of course you understand that Section 5745 (2) of the Code of 1931 merely gives the City Council power to regulate license or prohibit. Under this section, the City Council passes its own ordinances regulating billiard halls. The city has a right to refuse to renew the license, if the proprietor has been violating the city ordinances or has been failing to pay his license fee. If he has any grievance, then it would be up to him to commence an action against the City Council to require them to issue the license.

According to the facts you have stated, we believe that the court would hold in favor of the city.

In so far as making a charge for the use of cues, cue tips and chalk is concerned, we are of the opinion that the proprietor is operating a parlor in which tables are kept for hire, and that making the charge for the cues is merely for the purpose of getting around the city ordinance, and we are inclined to believe that no court would uphold such conduct.

EXEMPTION FROM TAXATION: Federal land bank bonds.

April 25, 1933. *County Attorney, Logan, Iowa:* We are in receipt of your letter of April 19th, in which you ask for an opinion on the following question:

"Are the Federal Land Bank bonds exempt from taxation?"

We are quoting to you Section 931 of Title 12, United States Code Annotated, which reads as follows:

"Every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from federal, state, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section 761 and section 781 of this chapter.

First mortgages executed to federal land banks, or to joint-stock land banks, and farm loan bonds issued under the provisions of this chapter, shall be deemed and held to be instrumentalities of the government of the United States, and as such they and the income derived therefrom shall be exempt from federal, state, municipal, and local taxation."

We believe the reading of this section will answer your question to the effect that such bonds are not taxable.

BANKS AND BANKING: Depositors' agreements.

April 25, 1933. *County Attorney, Knoxville, Iowa:* We have your request for an opinion on the following proposition:

"Where a national bank seeks to reorganize under the National Emergency Banking Bill and especially Section 207 thereunder, and as a part of the reorganization, desires public bodies to enter into depositors' agreements, does the public body by entering into such depositors' agreements, lose any right to participate in the State Sinking Fund for public deposits?"

House File No. 541, Forty-fifth General Assembly, as amended by the Senate, makes Section 9239-a2 of the Code applicable to the reorganization of national banks, and Section 1 of the Senate Amendment provides in part, as follows:

"Any public body hereinbefore named may, with the depositors of any national bank, enter into a depositor's agreement with said bank, provided the form of said agreement shall be one that shall have been first approved by the Superintendent of Banking and the Executive Council of the State of Iowa."

Section 2 of House File No. 541 is as follows:

"Joining in such agreement shall not be a waiver of any preference or right to participate in the State Sinking Fund for public deposits, but after receipt of payment from such fund or assignment of deposit to the Treasurer of State, he shall represent the same and may with the approval of the Executive Council, join in such agreements,"

We understand that this bank is being reorganized pursuant to the National Emergency Banking Act, and Section 207 thereof is in part, as follows:

"In any reorganization which shall have been approved and shall have become effective as provided herein, all depositors and other creditors and stockholders of such national banking association, whether or not they consented to such plan of reorganization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization."

Our legislature then has given to public bodies the right to enter into these depositors' agreements where the form of agreement has been first approved by the Superintendent of Banking and the Executive Council. The legislature has further provided that the joining in such agreements shall be without prejudice to the right of the public body to participate in the Sinking Fund Act, and Section 207 of the National Banking Emergency Act provides that all depositors shall be bound by the reorganization irrespective of whether they enter into it or not, if the requisite number of depositors have approved the plan.

It is therefore, the opinion of this Department that the right of a public body as a depositor in a national bank, for which bank, a conservator has been appointed by the Comptroller of Currency to participate in the State Sinking Fund for public deposits, is not in any wise prejudiced by the public body entering into a depositor's agreement looking toward the reorganization of the bank pursuant to the National Banking Emergency Act, where the form

of agreement has been first approved by the Superintendent of Banking and the Executive Council.

BEER: Purchase by railway to be used in club cars and pullmans.

April 25, 1933. *Treasurer of State, Des Moines, Iowa:* In answer to your inquiry of the twenty-fourth inst., relative to the purchasing of beer by a railway company for club cars and by pullman companies for their cars, under the recent enactment of the General Assembly, legalizing and regulating the manufacture and sale of nonintoxicating liquors. Section thirty-five (35) provides:

"It shall be unlawful for the holder of any Class "B" or Class "C" permit issued under the provisions of this Act to purchase beer containing not more than three and two-tenths (3.2%) per centum of alcohol by weight for resale, from any person other than a person holding a subsisting Class "A" permit issued in accordance with the provisions of this Act."

The only theory on which an opinion can be rendered in the case of a railway company or a pullman company operating cars in the State of Iowa is that these companies are engaged in interstate commerce and when they purchase beer in the State of Iowa they must purchase the same from a Class "A" permit holder. The question arises, because of the interstate character of their business, where beer is legally purchased in another state, whether when the car reaches the Iowa state line, it is necessary for the operator of said car to segregate the beer purchased legally in such other state and replenish the supply for sale within the borders of the State of Iowa. We are of the opinion that this was not the intention of the Legislature with respect to this particular type of Class "B" permit. It is the opinion of this department that where the beer is legally purchased in another state that the sale of the same even though it is inside of the State of Iowa would not be illegal; provided, however, that any purchase made in this state must be made from a Class "A" permit holder in keeping with Section thirty-five (35) of this act.

OSTEOPATHIC PHYSICIAN AND SURGEON: EMPLOYMENT OF BY BOARD OF SUPERVISORS FOR CARE OF INDIGENT POOR. The Board of Supervisors cannot contract with an osteopathic physician and surgeon to care for indigent poor, but "any reputable and responsible person licensed to practice medicine or dentistry in this state to furnish medical or dental attendance or services required for the poor * *."

April 26, 1933. *County Attorney, Greenfield, Iowa:* We acknowledge receipt of your letter of the 14th inst., addressed to the Attorney General, and requesting an opinion upon the following proposition:

"Would it be legal for the Board of Supervisors, under Section 5334 of the Code of Iowa, 1931, to hire, as there provided, a licensed osteopath and surgeon to treat the indigent poor of their county, said osteopathic physician and surgeon to treat said indigent only as far as his license permits; especially when such services could be secured at a saving of about $800.00 per annum over letting all this work to regular physicians and surgeons?"

Section 5334-c1 of the Code, provides as follows:

"5334-c1. Medical and dental service. The Board of Supervisors may make contracts with any reputable and responsible person licensed to practice medicine or dentistry in this state to furnish medical or dental attendance or services required for the poor, for any term not exceeding one year, and shall require all such contractors to give bonds in a company authorized to do business in this state in such sum as it believes sufficient to secure the faithful performance of such contracts."

Under the provisions of this section the question as to whether an osteopathic physician and surgeon can be employed must be determined by the answer to the question as to whether or not such person can properly be described as a "person licensed to practice medicine." The practice of medicine certainly has a very definite meaning and has reference to the particular healing art that is accomplished by means of drugs and medicines, and the term, "Osteopathic Physician and Surgeon," does not come within its meaning. We conclude, therefore, that an osteopathic physician and surgeon is not a person licensed to practice medicine within the meaning of Section 5334-c1, and that the board of supervisors could not contract with such person under the provisions of that section.

MOTOR VEHICLE. TRACTOR. MOTOR VEHICLE FUEL. A tractor is not a motor vehicle within the meaning of Chapter 251-A1. A tractor is a piece of power machinery. If a tractor is used to transport freight or passengers then it can be classed as a motor vehicle. (Defines motor vehicle.) Also defines motor vehicle fuel.

April 27, 1933. *Treasurer of State, Des Moines, Iowa:* Acknowledgment is made of receipt of your recent communication in which you request the opinion of this Department on the following:

"Is a tractor a motor vehicle as defined in Chapter 251-A1, Code, 1931? Can so-called tractor fuel be sold in the State of Iowa tax free? Can any tractor fuel be sold in the state which does not conform to the specifications set out in Chapter 251-D1?"

I take it from the general provisions and tone of your letter that there is being offered for sale in this state under the name of "tractor fuel" certain petroleum products which do not meet the tests and standards of motor vehicle fuel prescribed by Section 5093-d2, and the question arises, first, as to whether or not such fuel can be lawfully sold at all in this state, and second, if it can be sold, whether it can be sold tax free.

As to the first question, Section 5093-d2 fixes and prescribes the tests and standards for motor vehicle fuel sold in this state and any person who sells, as motor vehicle fuel, a product which does not meet the standards of Section 5093-d2 violates the provisions of Chapter 251-D1, and becomes liable for the penalties imposed by that chapter. The question then arises as to whether a person may sell such fuel as "tractor fuel" without violating the provisions of that chapter. In other words, is tractor fuel equivalent to motor vehicle fuel within the meaning of Chapter 251-D1? This manifestly becomes a more difficult question and one for which it is not easy to find a satisfactory solution. The definition of motor vehicle fuel, as that term is used in Chapter 251-D1, is found in Section 5093-d1, and is as follows:

"1. 'Motor vehicle fuel' shall mean and include any substance or combination of substances which is intended to be or is capable of being used for the purpose of propelling or running by combustion any internal combustion engine and kept for sale or sold for that purpose. The products commonly known as kerosene and/or distillate or petroleum products of lower gravity. (Baume scale) when not used to propel a motor vehicle or for compounding or combining with any motor vehicle fuel, shall be exempt from the provisions of this chapter."

It will be observed that motor vehicle fuel is defined in the first sentence as any substance intended to be or capable of being used for the purpose of propelling or running any internal combustion engine. The second sentence provides that distillate and kerosene and petroleum products of lower gravity

shall not be regarded as motor vehicle fuel, except when used to propel a motor vehicle either alone or in combination with other substances. The question then arises, when is such products of lower gravity used to propel a motor vehicle? In other words, is the use of such products in a farm tractor a use to propel a motor vehicle. Expressed otherwise, is a tractor a motor vehicle within the meaning of that section.

Chapter 251-D1 does not contain any definition of a motor vehicle. There are, however, in the statutes in three separate sections definitions of a motor vehicle. The first definition occurs in the chapter on motor vehicles and law of the road and is contained in Section 4863 and is as follows:

"1. The term 'motor vehicle' shall include all vehicles propelled by any power other than muscular power except traction engines, road rollers, cranes, corn shellers, wood saws, sprayers, disc sharpeners, and other articles of husbandry of a like or similar nature, and such vehicles as are run only upon tracks or rails."

The second definition occurs in the chapter dealing with motor vehicle carriers and is contained in Section 5105-a1 and is as follows:

"1. The term 'motor vehicle,' shall mean any automobile, automobile truck, motor bus, or other self propelled vehicle including any trailer, semi-trailer, or other device used in connection therewith not operated upon fixed rails or track, used for the public transportation of freight or passengers for compensation between fixed termini, or over a regular route, even though there may be occasional, periodic or irregular departures from such termini or route; except those owned by school corporations or used exclusively in conveying school children to and from school."

The third definition occurs in the chapter dealing with the taxation of motor vehicle carriers and is contained in Section 5105-a40, and is as follows:

"1. The term 'motor vehicle' shall mean any automobile, automobile truck, motor bus, or other self propelled vehicle, not operated upon fixed rails or track, used for the public transportation of freight or passengers for compensation between fixed termini, or over a regular route, even though there may be occasional periodic or irregular departures from such termini or route; except those busses owned by school corporations and used exclusively in conveying school children to and from schools.

There is nothing in the definition of the term "motor vehicle" which suggests that a tractor not used on the highway could be classified as a motor vehicle under any one of these definitions. And while it is true that the statutory definitions set out above were probably designed and are by express terms limited to the definition of that term as used in the particular chapters, yet together they constitute all the types of motor vehicles mentioned in the statutes and known to the law of this state as motor vehicles. Moreover, if we were to disregard all of these statutory definitions and attempt to arrive at a definition independent of the statutes, we would be forced to arrive at about the same result. A motor vehicle certainly must be a vehicle driven by a motor. The question then is, what is a vehicle? The term is defined by Funk & Wagnalls Standard Dictionary, as follows:

"That in or on which anything is or may be carried; special contrivance with wheels or runners for carrying something; a conveyance, as a carriage, wagon or car; specif., in law, any artificial contrivance used or capable of being used as a means of transportation on land."

This definition embraces the idea that a vehicle is a contrivance for the transportation or carrying of passengers or freight and certainly that is the commonly accepted meaning of the term. A tractor would not be a vehicle within that definition. All it carries is the driver and it is not operated for

the purpose of carrying the driver. His presence on the tractor is merely incidental to its operation. The purpose of a tractor is to apply power either at the drawbar or the belt, and our conclusion is that under neither the statutory definition nor the ordinary definition of the term "motor vehicle," a tractor is not included. And therefore, that a product sold as tractor fuel and having a lower gravity (Baume scale) than distillate and kerosene is not motor vehicle fuel as that term is defined in Chapter 251-D1 of the Code, and may consequently be sold in this state as tractor fuel without violating the provisions of Chapter 251-D1 of the Code.

Referring now to that part of your inquiry as to whether such tractor fuel may be sold in the State of Iowa tax free. The chapter on motor vehicle fuel tax has its own definition contained in Section 5093-a2, and is as follows:

"'Motor vehicle fuel' shall mean and include any substance or combination of substances which is intended to be or is capable of being used for the purpose of propelling or running by combustion any internal combustion engine and kept for sale or sold for that purpose, except the products commonly known as kerosene and/or distillate or petroleum products of lower gravity (Baume scale) when not used to propel a motor vehicle or for compounding or combining with any motor vehicle fuel."

It will be noted that this definition is almost identical with the one given in Chapter 251-D1 of the Code, and from what we have heretofore said, it is our opinion that if a petroleum product is distillate or kerosene or of lower gravity, it is not subject to the tax unless intended to be used or actually used to propel a motor vehicle or combined with other motor vehicle fuel, and that the use of such petroleum products in a farm tractor or a tractor used off the highways, is not use in a motor vehicle, and therefore, not subject to the tax.

To summarize our conclusions and to apply them to the particular questions you ask, we repeat your questions and our answers, briefly, for your convenience.

Q. Is a tractor a motor vehicle as defined in Chapter 251-A1, Code, 1931?

A. A tractor is not a motor vehicle within the meaning of that chapter. A tractor is a piece of power machinery and is designed to apply its power either at the belt or drawbar and not for the purpose of carrying either passengers or freight. Of course, if a tractor should be used to transport passengers or freight it would become a motor vehicle.

Q. Can so-called tractor fuel be sold in the State of Iowa tax free?

A. Yes, if it is kerosene or distillate or a petroleum product having a lower gravity and sold only for use in tractors operating as power machinery and not engaged in the carrying of passengers or freight.

Q. Can any tractor fuel be sold in the state which does not conform to the specifications set out in Chapter 251-D1?

A. Yes. Chapter 251-D1 deals only with motor vehicle fuel and when a tractor is operating as power machinery, which it is primarily designed for and ordinarily engaged in, it is not a motor vehicle, and if the fuel sold as tractor fuel is distillate or kerosene or a petroleum product of lower gravity (Baume scale) and sold and used only in such tractors, it is not a motor vehicle fuel within the meaning of Chapter 251-D1.

BEER: Outdoor advertising. (Interpretation of beer bill as to meaning of outdoor advertising).

April 27, 1933. *Secretary, Executive Council, Des Moines, Iowa:* Referring to your recent request for the opinion of this Department concerning the proper interpretation of the provisions with reference to outdoor advertising contained in House File 587, commonly known as the Beer Bill, and for suggestions as to the proper procedure in the administration of the act as it relates to outdoor advertising, we submit the following opinion and suggestions.

I

SIGNS OR POSTERS WHERE BEER IS SOLD

The first question which arises is whether or not the great multitude and variety of signs which may be employed to indicate that beer is on sale at a particular place is "outdoor advertising" within the meaning of that statute. It will be noticed that Section 24 of the act provides:

"No holder of a permit under the provisions of this Act shall exhibit or display or permit to be exhibited or displayed on the premises any signs or posters containing the words 'bar' 'barrooms,' 'saloon' or words of like import."

This is a provision of the statute itself as to what signs or posters are to be permitted on the premises where beer is sold; and a regulation that certain types of signs and posters are excluded and made unlawful. The necessary and inevitable inference is that any sign or poster on the premises used merely for the purpose of indicating that beer is on sale at the particular place is not objectionable so long as it does not contain the words "bar," "barrooms," "saloon" or words of like import; and since the legislature chose to regulate the signs and posters which may be used on the premises where beer is sold without anything to indicate that such signs and posters had to be submitted to and approved by the Executive Council, as provided by Section 34 of the act, we are of the opinion that such signs and posters do not come within the definition of the words "outdoor advertising" as used in Section 34 of the act. Moreover, the words "outdoor advertising" have come to possess a rather definite meaning and various regulatory provisions and city ordinances dealing with signs, posters and advertising, clearly distinguish between the signs that are displayed at the place of business to advise the public that particular products are on sale at that place of business, and display advertising that is exhibited merely for the purpose of calling attention to a particular product, or the merits of a particular product, without reference to its being on sale at that particular place. We reach the conclusion, therefore, that all signs and posters displayed at the place beer is sold for the purpose of advising the public that beer is on sale at that particular place, is not outdoor advertising within the meaning of House File 587 and does not require the approval of the Executive Council.

II

NEWSPAPERS AND HANDBILLS

It seems clear to us that newspaper advertising could hardly, under any possible interpretation, be considered "outdoor advertising." The question has arisen, however, as to handbills that are distributed by being handed out to

people and placed in automobiles. We do not believe that this class of advertising comes within the accepted definition of "outdoor advertising," and therefore, that proposed newspaper advertising and proposed advertising by means of distributing handbills do not require submission to the Executive Council for approval.

III

SIGNS ON MOTOR VEHICLES

A more difficult question arises with reference to signs painted on automobiles and trucks or other motor vehicles operating on the highway. Literally, of course, this is "outdoor advertising," but it is the opinion of this Department that it does not come within the classification of "outdoor advertising" as that term is used in the statute known as the Beer Bill. The words, "outdoor advertising," as used in the trade, so far as we are able to discover, is limited to fixed displays of advertising matter outdoors. For instance, there is in existence an outdoor advertisers' association made up of people who make a business of maintaining such displays and facilities for such displays. "Outdoor advertising" has reference to those structures and signs which are a part of the landscape and designed to attract the attention of people who travel along the streets and public highways. A typical example, of course, is billboard advertising, and we think included also are paintings on the sides of buildings where the advertising is not limited to calling attention of the public to the merchandise on sale in the building. Our conclusion is that any advertising matter which is attached to any fixed structure and visible to people on the highways or on the streets and designed to promote the sale of a particular brand of beer, or even beer generally, is "outdoor advertising."

IV

STRUCTURES AND SUBJECT MATTER BOTH INCLUDED

A further question arises as to whether Section 34 refers merely to the structures or general plan of displaying the advertising matter, or whether it also includes the substance of the advertising. Our conclusion is that it refers to both. The obvious purpose of the act is to prevent the landscape in the country, as well as the general appearance of properties in the city, being marred by unsightly advertising displays, as well as to prevent the subject matter of the advertising being offensive; and it is our opinion that anyone contemplating that character of advertising should first submit their plan, showing the type of structure on which the advertising matter is to be placed and the character of the advertising matter itself, and its subject matter, to the Executive Council for approval.

V

COMPLIANCE WITH CITY ORDINANCE

Inquiry has been made as to whether the Executive Council might, by a general order, approve all outdoor advertising within the limits of cities and towns which complies with the city ordinances of such cities and towns. It is the opinion of this Department that such a general order might be issued and thus make it unnecessary for advertisers to submit to the Executive Council proposed advertising within the limits of cities and towns.

Attention should be called to the fact, however, that this whole situation is greatly complicated and made more difficult by the fact that the provision with reference to the approval of outdoor advertising by the Executive Council is contained in an act which provides rather severe penalties for its violation. What the act says is:

"No person within the state shall publish or display any outdoor advertising about or concerning such beer without first having obtained the written approval of such plan or form of advertising from the Executive Council of the State of Iowa."

And then in Section 38 the act provides:

"Any person who violates any of the provisions of this Act * * * * shall be punished by a fine of not less than three hundred dollars ($300.00) nor more than one thousand dollars ($1,000.00), or by imprisonment in the county jail for not less than three months nor more than one year, or both such fine and imprisonment."

In expressing our own opinion as to the proper interpretation of the provisions of the act with reference to "outdoor advertising," it should be borne in mind that if the courts do not adopt the same interpretation, an advertiser who is honestly seeking to obey the law might find himself in the position of having incurred the severe penalties of this act, and by reason of that fact, we hesitate to suggest to the Executive Council that they should not entertain applications for the approval of types of advertising which are not outdoor advertising within the meaning of this opinion or which may be in strict compliance with the city ordinances of the city where they are displayed.

BEATTY-BENNETT BILL (S. F. No. 131.) Construction and interpretation of certain parts of S. F. No. 131, Forty-fifth General Assembly, known as Beatty-Bennett Bill.

April 27, 1933. *Director of the Budget, Des Moines, Iowa:* We have your letter of April 20th in regard to the construction and interpretation of certain parts of Senate File No. 131, Forty-fifth General Assembly, known as the Beatty-Bennett Bill.

Our interpretation of Section 2 is that the taxing district make application to the Budget Director, setting out the facts of exemption and the reasons the exemption is required, and that upon receiving such application, the Budget Director fixes the time and place of hearing by so advising the taxing district; and notice of the hearing must be given as required in Section 2. The notice should advise all interested parties that the application has been presented to the Budget Director and will come on for hearing before the taxing body at a time and place designated, such place to be within the taxing district and to be duly published as provided in Section 2. The notice should also advise that at the hearing, any interested party may appear in person or by counsel and resist the application, either in writing or orally. If there is an oral resistance, the testimony of the parties resisting the application should be taken down in shorthand and transcribed, or the Board may designate its Secretary to prepare a summary of the testimony if a reporter is not secured for the hearing. As the taxing district has the burden of proof, it may also offer testimony at the hearing in rebuttal to this witness appearing in resistance to the application and such rebuttal testimony may either be oral or in writing. The witness need not be sworn nor must the written statements be in affidavit form, as the purpose is to secure the entire facts and any witness

may be allowed to testify fully without objection by the opposition and all witnesses desiring to be heard, must be given that opportunity.

At the conclusion of the hearing, the body should make its findings in writing and forward these findings together with transcript of all of the evidence at the hearing and any written statements filed with the body, to the Budget Director, who shall have retained the original application, and shall consider the application and all statements and testimony, and make his finding. The Budget Director, in making his findings, may accept or reject the findings of the local body and shall notify the local body promptly of his findings, submitting to the body a copy of the findings in writing. No additional testimony shall be submitted at the time of the review of the findings by the State Budget Director.

The reporter taking the testimony before the local body, need not be a certified shorthand reporter, but may be anyone who, in the judgment of the body, is competent to take down and transcribe the testimony. All expense of the application and hearing thereon shall be borne by the taxing district and shall be without costs to the State of Iowa or the office of the State Budget Director.

You called our attention to Section 1 of the act which exempts fire fund or fire department maintenance fund, and ask for our construction of Section 7 in view of the provisions of Section 1. It is our opinion that fire funds and fire department maintenance funds were exempted from the provisions of the act and that the purpose of Section 7 is to allow the levy for these funds not to exceed one-fourth of the total rate of millage levies made in the year 1930, so that in this way, these levies will conform to Senate File No. 1, Forty-fifth General Assembly, and thus allow a levy to the amount allowed and made in the year 1930.

Our construction of Section 5 of the act is that this gives back to the city and town the amount of levy that was taken from them in Section 1 of the act except that it is based upon the amount actually expended by it for the operation and maintenance of the police department during the preceding year, and that the city or town may make the levy for this fund as provided in Section 1 and have in addition thereto, the millage rate sufficient to raise the amount not exceeding twenty per cent of the amount actually expended during the preceding fiscal year.

Our construction of Section 3 of the act is likewise that the legislature here seeing the dire necessity in certain cases of the maintenance of this fund for these purposes, such as the maintenance of the fund for the fire and police departments, enacted Section 3 so as to counteract the provisions of Section 1 wherever necessary, and if a city or town is obligated as provided in Section 3, it may levy for such funds a sufficient millage rate to raise not more than twenty per cent of the amounts required to be paid in the fiscal year under the contract and this shall be in addition to the rates allowed to be levied under Section 1 of the act.

BOND: BLANKET BOND FOR DEALERS. Manufacturer of hog cholera serum having several dealers in Iowa cannot put up a blanket bond covering all of said dealers, the penalty of which would be less than $5,000 bond for each dealer.

April 28, 1933. *Chief, Division of Animal Industry, Des Moines, Iowa:* We have your recent inquiry requesting an opinion on the following proposition:

"May a manufacturer of hog cholera serum having several dealers in Iowa, put up a blanket bond covering all of said dealers, the penalty of which would be less than a $5,000.00 bond for each dealer?"

An examination of the statutes discloses that no such procedure seems to have been authorized or contemplated by the statutes. Section 2705 defines a dealer as follows:

"3. 'Dealer' includes every person who, for profit, sells, dispenses, distributes, or offers to do so, either as principal or agent, biological products, except:

a. A manufacturer selling direct to any person licensed under this chapter to sell, dispense, or distribute such biological products.

b. A regularly licensed veterinarian who uses such biological products in his professional practice and does not use it for sale or distribution to any other person."

And Section 2710 is as follows:

"2710. Application for dealer's permit. An application for a permit to deal in biological products shall be accompanied by a bond with sureties to be approved by the department, in the sum of five thousand dollars, which bond shall be conditioned: etc."

We do not see how it is possible, without ignoring the plain provisions of the statute, to issue a dealer's permit to any person who does not put up a five thousand dollar bond which the statute requires. In fact, there is no authority for the issuance of a dealer's permit to any person who does not tender such a bond, and our conclusion is, that each dealer to whom is issued a permit must first post a five thousand dollar bond conditioned as the statute requires.

BANKS AND BANKING: Reorganization of banks under S. F. No. 483. Claims of depositors under $10.00.

April 28, 1933. *Banking Department, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

In the reorganization of a bank pursuant to Senate File No. 483, Forty-fifth General Assembly, what should be done with the claims of depositors whose claims do not exceed $10.00?

There is no question in the writer's mind but what these amounts should be paid to the depositors on demand upon the reorganization of such a bank. I know that that was our original intention in preparing the original draft of the bill and that thought was always expressed in every meeting at which I was present, because it was suggested that the expense of issuing trust certificates or preferred stock or whatever was issued to depositors, would be very great if these smaller depositors were also to be issued these evidences.

You will note that through the entire bill the depositors holding $10.00 claims or under are not considered. You will notice that in Section 3 it provides that Trust Certificates be delivered to those depositors whose deposits exceed $10.00. Later on in the section, it is provided that no dividends are to be paid unless so agreed by the depositors over $10.00 who would be the certificate holders, and that the dividends shall be applied to the payment of outstanding certificates. And again in Section 4, it is provided that Trust Certificates shall have a preference unless otherwise agreed by the holders of the Trust Certificates. Then again, it is provided in Section 10, that if a majority holding seventy-five per cent of the depositors agree to a certain plan, all shall be bound by it and in that section, the $10.00 depositors are specifically excluded. Also Section 12 provides for agreement on the part of these same depositors excluding the voice of those holding $10.00 or under. Any

other construction of this act would be a clear case of taking something from a depositor without any representation or voice as to what shall be done. Any other construction would mean that dividends would be paid to the holders of trust certificates but that the depositor of $10.00 or under, not having a Trust Certificate, would not receive anything. This construction does not involve the question of constitutionality or the right to prefer one depositor over another, but is based on the right of contract in that these banks reorganize and must reorganize pursuant to Senate File No. 483, in which the above provisions are very definitely set forth. In their depositor's agreement pursuant to this act of the General Assembly, these depositors impliedly by the contract, authorizes the bank to pay to the depositors their money where the deposit does not exceed $10.00, and authorizes the issuance of Trust Certificates to depositors holding over $10.00.

The only other construction might be obtained out of Section 10 which states that if the percentage is obtained of depositors holding the proper amount, then all depositors of such bank are bound thereby, but you will note that the consent is not required of the depositors holding $10.00 or under, and in fact, if they did give consent or did refuse to give consent, it would not affect the reorganization one iota. Where Section 10 provides that all of the depositors are bound thereby, it means of course, and can only mean that all of the depositors in the bank who are asked to join in the reorganization, being those over $10.00, are bound. It should be construed as if the word "such" was after "of" so that the last of paragraph 10 would then read "then and in that event, all of such of the depositors of such bank are bound thereby." No other construction of the act would be either logical or in harmony with the intention of the legislature or the framers of the bill.

It is therefore our opinion that in the reorganization of a bank pursuant to Senate File No. 483, that depositors of a sum of $10.00 or less should be paid their full amount at once and upon demand.

BANKING AND BANKS: Paving and sewer certificates owned by bank under Senate File No. 111.

April 28, 1933. *Superintendent of Banking, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

"Where paving and sewer certificates are owned by a bank operating under Senate File No. 111, Forty-fifth General Assembly, and the County Treasurer who has a deposit in the old unit in the bank has collected both principal and interest on the certificates, can the Treasurer issue a check on his account in the old unit in the bank in payment to the bank of the moneys received on the certificates by the County Treasurer and would the bank be obliged to accept the check?"

Under Senate File No. 111, Forty-fifth General Assembly, the Superintendent of Banking, as manager, is required to hold all deposits in the bank and therefore, the bank has no authority to pay any money out of the checking account in the old unit and may not accept a check thereon even to itself. The only possible right the Treasurer here might have would be a right to offset, but in my opinion, he has no such right in this case for the following reason:

Section 6106 of the Code provides that these certificates may be paid by the taxpayer to the Treasurer and further provides that the Treasurer shall receipt for the same and cause the amount paid to be applied to the payment of the certificate issued therefor. He is required by law to make the collec-

tion as part of the duties of the office (Paving Company vs. Webster County, 143 Iowa, 255) but such money does not belong to the county (Paving Company vs. Woodbury County, 137 Iowa, 287). It belongs to the holder of the certificate and the Treasurer is liable to the holder for the amount so paid (Bank vs. Kelly, 159 Iowa, 312). The Treasurer is not liable to the county for county money duly deposited (Section 7420-d8 of the Code) but according to the above authorities, is liable to the holder of the certificate for money paid thereon and must apply the payment to the certificate. The position then, of the Treasurer in regard to the two accounts is wholly different, as the account in his hands belongs to the bank, and the account in the bank belongs to the county. He is not entitled to a setoff.

BEER: Club outside the territorial limits of the city, town, or special charter city may be issued a class B permit by local Board of Supervisors.

April 28, 1933. *County Attorney, Cedar Rapids, Iowa:* This will acknowledge receipt of your letter of the twenty-seventh inst., to Edward L. O'Connor, Attorney General.

You ask whether or not the Cedar Rapids Gun Club, which is an unincorporated association, operated outside the city limits of Cedar Rapids and not within the limits of any incorporated city or town and not operated for pecuniary profit, would be entitled to a permit to sell beer, under the recent enactment of the 45th General Assembly, legalizing and regulating the manufacture and sale of nonintoxicating liquors.

Please be advised that the only way, under this act, as we interpret it, that this club could be issued a Class "B" permit, would be under Section 19. The fact that it is a gun club would not interfere with the issuing of a permit. The section referred to above states, in part, as follows:

"* * * that a golf *or* country club located outside the territorial limits of the city, town, or special charter city may be issued a Class 'B" permit by the local Board of Supervisors. * * *"

This club could, undoubtedly, qualify as a country club. However Divisions b, c, d, e, and f of Section 19 are limitations as to qualifications, which such a club must possess in order to qualify under this section and Division c, as you undoubtedly know, states, as follows:

"Unless it is incorporated under the laws of the State of Iowa, and its charter is in full force and effect, and/or excepting regularly chartered branches of nationally incorporated organizations."

It would seem, to this department, that as this club is affiliated with a state organization and with a national organization, devoted to trap shooting interests, that an investigation should be made to learn if either organization is incorporated and if so, this club could qualify under this particular division of the act.

BEER: Answers eight questions with reference to sale, advertising, serving to occupants in automobile, etc.

April 29, 1933. *County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 27th inst., requesting the opinion of the Attorney General's Office on several questions which have arisen in connection with the proper interpretations of House File 587 as amended, commonly known as the Beer Bill.

The questions which you ask and our opinion as to the correct answers thereto, are as follows:

1. Q. Can the owner or owners of a barbecue, road house, tavern or restaurant, licensed as restaurants by the state, and as by law provided, and located within the corporate limits of a city and operating under Class B permits, serve beer with food to occupants of an automobile, said automobile standing still on the same premises, that is to say out on the lot surrounding the building licensed under Class B classifications?

A. Section 14 of the act defines what a Class B permit holder may do with reference to sales on the premises. It will be recalled that this section was amended by House File 611, and now provides, in substance, that a Class B permit shall entitle the holder to sell beer on or off the premises, "provided, however, that unless otherwise provided in this act, no sale of beer shall be made for consumption on the premises unless food is served and consumed therewith, and unless such place where such service is made is equipped with tables and seats sufficient to accommodate not less than twenty-five persons at one time." This amended Section 14, seems to be quite definite and specific in providing that the place where such service is made must be equipped with tables and seats sufficient to accommodate not less than twenty-five persons at one time. Of course, the rendering of such service to occupants of an automobile outside the building where the tables and seats for twenty-five persons are maintained, even though the automobile were on the premises, would not be in accordance with the language of this amended Section 14, and we are, therefore, of the opinion that a Class B permit holder cannot legally and properly serve beer outside the building where the tables and seats are maintained to occupants of an automobile even though the automobile is standing on the premises and off the public highway.

2. Q. Can beer be given away to any person by the owner between the hours of twelve o'clock midnight on Saturday night and seven o'clock of the following Monday morning?

A. There is nothing in the statute to prevent the giving of beer between the hours mentioned. There is, however, a provision against the sale of beer between such hours, and whether or not a particular gift would be legal and proper would depend upon the circumstances. If a person having beer in his home should give some of it to a guest, clearly this would not be a violation of the law. On the other hand, if a Class B permit holder who was in the business of selling beer should attempt to give it in connection with the sale of some other merchandise, such gift would clearly be nothing but a subterfuge designed to evade the provisions of the law against a sale, and would in fact, to all intents and purposes be a sale and would be a violation of the law. Certainly, any gift of beer between those hours by a Class B permit holder would be subject to suspicion. Our conclusion, therefore, is that whether or not a particular gift would be a violation of the law would depend upon the circumstances, and if the circumstances showed that it was a mere subterfuge indulged in by a Class B permit holder as a means of evading the law, that it would be illegal, and in effect, a sale.

3. Q. Can the owner or owners operating a barbecue, road house, inn, tavern or restaurant outside the corporate limits of a city or town receive beer lawfully purchased by a customer, refrigerate the beer, and later, at the customer's command give or serve it to him at the place of business without violating the law?

A. the procedure contemplated by this question might be said to be technically within the limits of what is permitted under the provisions of the act. However, it is an obvious evasion of the spirit and intent of the act. Cer-

tainly no one could be a dealer in beer without having a permit and the act defines a dealer in Section 5 thereof, as follows:

"'Dealer' shall mean any person, firm or corporation, other than a brewer, bottler, wholesaler or retailer, who shall sell, barter, exchange, offer for sale, have in possession with intent to sell, deal or traffic in beer, containing not more than three and two-tenths (3.2%) per centum of alcohol by weight, not to be consumed in or upon the premises where sold."

Under this language, the owner of a barbecue so handling beer certainly could be said to be dealing or trafficking in beer, and to all intents and purposes such trafficking would be equivalent to sale, and our conclusion is, that such trafficking in beer without the holding of a Class B permit would be a violation of the provisions of the act.

4. Q. Having in mind Sections 24 and 34 read together and relating to advertising, this question: What is considered outdoor advertising as distinguished from indoor advertising?

A. We have prepared an opinion upon the question of what, in our judgment, constitutes outdoor advertising within the meaning of Section 34 of the act, and we enclose a copy of that opinion herewith.

5. Q. Are the following methods of advertising considered outdoor advertising in violation of Sections 24 and 34; electric signs, hand bills, billboards, sidewalk signs, window cards fastened outside a window glass and automobile truck signs?

A. The opinion of this Department referred to in the answer to the preceding question, will for the most part answer this question. Our conclusion is that hand bills are not outdoor advertising, and that if electric signs, sidewalk signs, window cards fastened outside of window glass are used only at the place where beer is sold for the purpose of indicating that beer is on sale at the particular place, that they are not outdoor advertising. However, if used not with reference to the sale of the product at a particular place, that would be outdoor advertising. Billboards certainly would be outdoor advertising. Automobile truck signs would not be outdoor advertising if limited to vehicles engaged for the purpose of selling or delivering beer. If the vehicle was simply made a traveling billboard, a different result would be obtained, and in our judgment, it would then be outdoor advertising.

6. Q. Having in mind Section 34, is an electric sign or other sign fastened to the building where the beer is actually sold and upon the premise of the permit holder in violation of law?

A. It is our opinion that if the sign is so attached to the building as to indicate the place where beer is on sale much as drug signs are exhibited in front of drugstores that it would not be outdoor advertising. On the contrary, if it were a big electric sign on top of the building and removed entirely from any particular storeroom, and obviously designed to advertise the product rather than to indicate a particular place where the product is sold, then in our opinion it would be outdoor advertising.

7. Q. Having in mind Section 22, as it relates to Class B permits, many permit holders under Class B classification have been reported to be giving away cookies, crackers or pretzels, claiming this to be food and claiming this to be in compliance with Section 22, and I therefore ask whether or not food must be *sold* with the beer to be in compliance with the law?

A. Attention is called to the fact that under the amendment to the original act, viz.: House File 611, Section 22 of the original act is repealed and the provisions with reference to the sale on the premises are now contained in Section 14. Section 14 now provides that a Class B permit holder is author-

ized to sell beer for consumption on or off the premises, "provided, however, that unless otherwise provided in this act, no sale of beer shall be made for consumption on the premises unless food is served and consumed therewith." You will notice that there is nothing in this language to require a specific sale of food and we see no legal objection why pretzels and beer cannot be served at a certain price without designating how much is for the pretzels and how much for the beer, the same as ham and eggs may be sold at a certain price without any designation as to how much is for the ham and how much for the eggs. In other words, we can see no legal objection to serving beer and pretzels at a certain price and beer and crackers at a fixed price or beer and any other food product.

8. Q. Having in mind Section 24, "Nor shall any such beer be sold to any person between twelve o'clock midnight, Saturday night and seven o'clock the following Monday morning" this question: As the hour of twelve o'clock midnight on Saturday approaches and customers are seated in a place of business holding a Class B permit, assuming that each person had before him or her an opened bottle of beer, would it be unlawful for that group or an individual, as the case may be, prior to midnight, order and pay for a case or more of beer and to permit that group or person to continue drinking until that particular beer was consumed?

A. This inquiry simply raises the question as to whether the provision of the law requiring that there shall be no sales after midnight on Saturday night may be evaded by the customer buying a quantity just before midnight for consumption on the premises after midnight. It should be borne in mind that there is nothing in the law requiring the holder of a Class B permit to close his place of business at midnight, nor is there anything in the law prohibiting the drinking of beer after midnight on the premises of a Class B permit holder, and the law should have a reasonable interpretation bearing in mind that it relates to a beverage that is non-intoxicating. On the other hand, no practice should be permitted which results in a clear violation of the provisions of the act. Our conclusion is that any Class B holder who, during the time just before midnight, sells to any individual or group of individuals, beer to be consumed on the premises in such quantities that it cannot be reasonably consumed before midnight, violates the provisions of the act. In other words, while it is perfectly lawful for a Class B holder to sell beer up to midnight, it should not be sold for consumption on the premises in such quantities just before midnight as to make it clear that it is for consumption after midnight. This should not be construed, however, as a holding of this Department that the man who bought one bottle of beer, or a bottle of beer for each member of the party, a minute before midnight would be engaged in a violation of the law, or that the permit holder who sold it to him would be engaged in a violation of the law. A reasonable and practical rule for administrative purposes would be that if a sale were made before midnight of an open bottle of beer, not more than one such bottle to a customer, that no violation of the law would be involved, but that if quantities greater than that were sold just before midnight, and particularly, if they were unopen and could not be consumed on the premises until long after midnight, that it would be a violation of the law.

SCHOOLS: COUNTY SUPERINTENDENT: ELECTION: Interpretation of House File No. 544, Forty-fifth General Assembly, in regard to the qualifications of a County Superintendent to be elected May 9, 1933, and under the law, be inducted into office September 1, 1933.

May 1, 1933. *Superintendent of Public Instruction, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

"We ask for your interpretation of House File No. 544, Forty-fifth General Assembly, in regard to the qualifications of a County Superintendent to be elected May 9, 1933, and under the law, be inducted into office September 1, 1933."

Under prior holdings of this office and our Supreme Court in the case of State vs. Huegle, 135 Iowa, 100, a candidate for office must be eligible at the time of entering upon the office and need not be at the time of election, so if the successful candidate for County Superintendent of Schools is eligible at the time of induction into office, viz., September 1, 1933, that will suffice.

The question then incidentally arises as to what is meant by being eligible for the office. House File No. 544, Forty-fifth General Assembly did not carry the publication clause, so therefore, becomes a law of this state on July 4, 1933, and the provisions of this act then do not come into being until that period.

You will note that Section 18 of the act provides as follows:

"No provision of this Act shall affect or impair the validity of any certificate in force or renewable June 30, 1933."

Our interpretation of Section 18 is that the holder of a certificate in force on June 30, 1933, will be entitled to all the rights and privileges under that certificate the same as if this act had never been passed. This will also be true as to the holder of certificates which expired prior to June 30, 1933, but are renewable on or before that date. So, if the holder of a certificate in force June 30, 1933, or the holder of a certificate that was entitled to be renewed June 30, 1933, possesses the proper qualifications for the office of County Superintendent on May, 1933, he would be entitled to be inducted into office if he were a successful candidate in the election and providing his certificate had not been cancelled prior to his induction into office.

GENERAL ASSEMBLY: PUBLIC OFFICE: REPRESENTATIVES. A person cannot hold the office of Labor Commissioner and the office of Representative in the State Legislature at the same time."

May 3, 1933. *Hon. Frank Wenig, Spencer, Iowa:* Your letter of April 26th, addressed to the Attorney General, and your telegram of May 1st, addressed to L. A. Rader, were today placed on my desk, in view of the fact that Mr. Powers, who was supposed to pass on this matter, has been called to LeMars, Iowa, and will probably be there for the next several days.

Your first question is whether or not you can hold the office of Labor Commissioner and the office of Representative in the State Legislature at the same time.

Section 22 of Article 3 of the Constitution of Iowa provides as follows:

"No person holding any lucrative office under the United States, or this state, or any other power, shall be eligible to hold a seat in the General Assembly: but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative."

Cowell defines an office as a function, by virtue whereof a man has some employment in the affairs of another.

Webster defines it to be a duty, charge, or trust.

"Office" has also been frequently defined by the courts, and the following definitions of the word, as given by the courts, are only a few of those found

in Words and Phrases. The first one, which seems to be the only narrow construction which I have been able to find, is as follows:

"Whether we look into the dictionary of our languages, the terms of politics, or the dictum of common life, we find that whoever has a public charge or employment, or even a particular employment affecting the public is said to hold or be in office."

Rowland vs. City of New York, 83 N. Y., 372.

As just stated, this construction seems somewhat narrow, and the case just cited is the only case found by me where the court went so far as to say that even a particular employment affecting the public would make one an officer. Numerous cases, in which the courts have said that the employment must imply a continuity of service, in order to be termed an office, may be found in the leading law encyclopedias. Two of the cases are hereafter cited as follows:

"Within the ordinary acceptation of the term, one who is engaged to render service in a particular transaction is not an officer. That word implies continuity of service, and excludes those employed for a special and a single transaction."

Clark vs. Renninger, 89 Md., 66; 42 Atl., 928; 44 L. R. A., 413.

"Whether the duties are to be continuing and permanent or merely occasional and temporary is the proper method of distinguishing an office from employment."

State vs. Board, 51 N. J. Law (22 Vronn.), 240; 17 Atl., 112.

You can see that, even though the broad construction were placed on the word "office," still you would be classed as an officer, if you qualify for the office of Labor Commissioner. It is not an office which implies that the employment will consist of a special or single transaction. It is a continuing office, and regardless of the fact that you will be there for a certain number of years, the service is continuous and the office will continue.

It is therefore the opinion of this Department, and we believe the courts will agree with us, that the office of the Labor Commissioner of the State of Iowa is an office within the legal meaning of the term, and since the law provides that the holder of that office shall draw a certain salary, there is no question but that it is a lucrative office.

It is therefore our opinion that, if you should qualify for the office of Labor Commissioner, you will become disqualified for the office of Representative of the State Legislature.

You also ask whether or not it would be possible for you to have Mr. Urick hold over until after the Special Session and for you to accept and place your appointments effective July 1st.

You could not very well accept the office for the purpose of making appointments and still hold your seat in the Legislature, under the section of the Constitution hereinbefore quoted, for the reason that accepting one office would cause a vacancy in the other.

You also ask, if there is to be a successor elected in your county to the office of Representative in the State Legislature, whether it would be possible to hold the special election in conjunction with the election on the ratification of the constitutional amendment.

We are not saying that it would be necessary to elect a successor, for the reason that we will want to study that question very carefully before conceding that these men should be elected, rather than appointed. However, if it were necessary to elect the successor, we will say that it would be impracticable

to hold the two elections on the same day. The reason is that, under the bill providing for the constitutional convention, the judges and clerks of the election are to be selected by the Chairman and Secretary of the County Conventions. These judges and clerks will be selected in an entirely different manner from the judges and clerks selected for the general election or other special elections provided by statute. For this reason, there would be no saving of money by holding the two elections on the same day. The only advantage would be in having the vote out, and it might cause some question as to the legality of the election of the delegates to the State Convention.

BANKS AND BANKING: COUNTY TREASURER: Rights in regard to moneys deposited in a bank operating under Senate File No. 111, 45th General Assembly.

May 5, 1933. *County Attorney, Audubon, Iowa:* We have your request for an opinion as to the rights of a County Treasurer in regard to moneys deposited in a bank now operating under Senate File No. 111.

Under the Sinking Fund Act, public bodies are not entitled to file as against the Fund and to be paid out of the Fund until after the closing of a bank. These banks under Senate File No. 111 are not closed, so that the public body having a deposit in the bank, has no right under the law to file against the Sinking Fund for this deposit.

Under the provisions of House File No. 541, as amended, public bodies have the right to enter into depositors' agreements without waiver of any preference or of the right to participate in the State Sinking Fund. Therefore, where a bank now operating under Senate File No. 111, desires to reorganize and as a part of the reorganization, desires to set off a segregated or trust fund and have the depositors waive a percentage of their deposit and look to this trust fund for the amount of deposit waived, the public body, having a deposit in the bank, may at its discretion, enter into such depositor's agreement if the agreement is similar in form to those approved by the Banking Department. After the reorganization of the bank and the issuance of a Trust Certificate to the public body, it will participate in the segregated or trust fund until that fund has been liquidated, and then as to the balance of its deposit, the legislature will undoubtedly authorize filing into the Sinking Fund for that amount. As the law now stands, public bodies may enter into these depositors' agreements without prejudice to their right to participate in the State Sinking Fund, but they cannot file therein until the bank is closed. This matter will undoubtedly be taken care of by the next legislature. In the meantime, we believe that public bodies may enter into these agreements with safety.

INSURANCE: BENEVOLENT AND BENEFIT SOCIETIES AND ASSOCIATIONS. Their right to operate, either as unincorporated associations, corporations for profit or non-pecuniary profit corporations, where they have not complied with the statutory provision in regard to insurance companies.

May 6, 1933. *Commissioner of Insurance, Des Moines, Iowa:* We have your request for opinion as to the right of the so-called benevolent and benefit societies and associations to operate as such, either as unincorporated associations, corporations for profit or non-pecuniary profit corporations, where they have not complied with the statutory provision in regard to insurance companies.

You ask first whether these companies may operate under Chapter 394 of

the Code without complying with the statutory provisions in regard to insurance companies.

Section 8582 of that chapter provides for two or more persons incorporating themselves for the establishment, among other things, of fraternal lodges or societies and also of organizations of a benevolent or charitable character. I have examined the set-ups of a number of these so-called benevolent and benefit societies and while the language of their various applications, certificates, by-laws and articles of incorporation are couched in different terms and in various phrases, their ordinary mode of operation is to have the applicant pay a stated sum at the time of signing the application and then, another stated sum within a subsequent definite period, and further agree to pay a stated sum upon a happening or contingency, such as death or illness of another member. Some also provide for a sum to be paid each quarter in addition.

The amount to be paid upon the contingency to either the member or designated beneficiary is of various amounts. Some provide for a definite sum in event of death at a certain age and still others provide for a definite sum with the further provision that the amount is decreased in the event it is paid after the member has attained a certain age, so that the older he gets and the more he has paid into the company, the less his beneficiary receives at the time of death. Still others provide not for a definite sum, but for an amount equal to a certain assessment contribution or donation from each member with generally a percentage deducted to take care of so-called expense.

The only act that appears to be required from the member is that he pay in money. They are not obliged to attend meetings nor is there any lodge system or ritualistic form of work provided, and from going over these plans, it is my thought that if these organizations did set up a lodge system or ritualistic work, it would be a case of the tail wagging the dog instead of the dog wagging the tail, as their one and only purpose is to collect money and pay benefits.

Many courts have held that where the purpose is to provide a beneficiary fund to be paid upon the happening of a certain event, the avowed fraternal character is merely incidental.

Such organizations cannot attempt to escape their true intent by subterfuge. Our Supreme Court has held that in determining the actual business of such organizations we must look behind the name and behind the authorized powers and privileges and look at the very thing being done. When we so look at these companies, it is clear that they are not fraternal lodges or societies such as contemplated by law.

The next question then is whether they are organizations of a benevolent charitable character as contemplated by Section 8582 of the Code. The words "benevolent" and "charitable" are nearly synonymous in meaning and especially so when applied to institutions, organizations and societies. The ordinary conception of a charitable institution is a hospital that accepts all that may be brought within its doors and renders a service without hope of compensation or reward. The charitable feature of such hospitals is, of course, not altered by the fact that they require those to pay who are able to pay, as nevertheless, they render the service to anyone requesting it.

I have looked in vain, however, to discover such a feature in these benefit societies. In fact, they are the exact opposite. They require their members to pay certain amounts upon demand, and upon failure to pay, the member

loses all rights to participate even though he previously had faithfully performed for years. They do not agree to pay the amount to anyone that may ask for it, but they only agree to pay to their own members and then upon the strictest of terms, for one of their main provisions is that a member is suspended for failure upon demand and that the suspension shall cause all rights and benefits of the members to be forfeited and terminated.

None of the funds of these companies are derived from charity as the member is under contract to pay on demand or forfeit his rights. The beneficiaries take the money by contract and not by donation.

I fail to find where these organizations are rendering any service without the hope of reward or compensation and I fail to see where they are doing any more than any other insurance company. They are clearly not organizations of a benevolent or charitable character, and their main object being insurance, they cannot evade the insurance laws by calling themselves a benevolent society and obtaining their charter as such.

These organizations are likewise not within the exception of Section 8780 of the Code which is as follows:

"*Sick and funeral benefits only.* The provisions of this chapter shall not be construed to include fraternal orders which only provide for sick and funeral benefits."

We have fully outlined the thoughts of this Department above in that these organizations are not fraternal orders.

The next question is whether these are insurance companies and operating in violation of Section 8718 of the Code which is as follows:

"*Assessment associations prohibited.* No life, health, or accident insurance company or association, other than fraternal beneficiary associations, which issues contracts, the performance of which is contingent upon the payment of assessments of call made upon its members, shall do business within this state except such companies or associations as are now authorized to do business within this state and which, if a life insurance company or association, shall value their assessment policies or certificates of membership as yearly renewable term policies according to the standard of valuation of life insurance policies prescribed by the laws of this state."

The word "insurance" has been variously defined by text writers and courts but it is generally held to be an agreement by which one party for consideration, promises to make the payment of money upon the destruction or injury to the person or property of another, and it has likewise often been held to be an agreement to pay a sum of money upon the happening of a particular event or contingency. Our Supreme Court has held that it must be determined from the business which the association conducts, whether or not it is an insurance company and that this cannot be determined by the name. Our court has also held "where the object of an association is to provide a plan for the payment by assessment of funeral expenses of each member, and which has no charitable fraternal or benevolent purposes, it is an ordinary mutual insurance company." It has also been held, "It is insurance where there is a payment consideration by one and a promise by the other to pay upon the happening of a loss."

Text writers have stated that the five ingredients of an insurance contract are:

1. Subject matter.
2. The risk insured against.
3. The amount.

4. The duration of the risk.
5. Premium or assessment.

We find that all five of these elements are in the contract between these societies and their members and no reason is presented why associations such as these, which purport to have been organized for the mutual protection of their members and act through regular officers and ordinarily under a charter and by-laws and resort to assessments, donations or contributions on its living members to procure funds to discharge its obligations of its officers, agents and such of its members as may die or be sick or injured, should not be governed by the rules of law applicable to ordinary insurance companies.

The mere fact that the amount payable on the happening of a particular contingency in the contract is not fixed but depends upon the number of members in the society at the time of death does not change the character of the association nor does the fact that there is no obligation on the part of a member enforcible in a court of law to pay any sum by way of premium, in any manner alter the character of the company, if there is a promise to pay upon the happening of a certain event.

It makes no difference whether this promise to pay be called a donation, contribution, assessment or premium, as the effect is exactly the same. It is in fact a misnomer to call such assessments a contribution or donation, as the member is required to pay the amount called for and in event he does not pay it, he loses the right of membership, so it can hardly be called a donation or contribution to pay an amount that a person has agreed to pay and is bound to pay under the terms of a contract entered into.

The Insurance Department of Iowa was created for a definite purpose and that was to investigate all companies seeking to do an insurance business and tc make certain requirements to protect the citizens of Iowa and to take certain steps for that purpose. Our insurance laws are founded on a wise public policy and any attempt to evade them should be promptly met and defeated.

These companies and associations are clearly not fraternal beneficiary associations excluded in Section 8718 of the Code.

It is therefore the opinion of this Department that these companies are operating in violation of law and that those companies that do not cease to operate should be dealt with according to law.

REAL ESTATE: Agency: Commission.

May 8, 1933. *Real Estate Commission, Des Moines, Iowa:* This will acknowledge receipt of your inquiry of the fifth inst., in which you inquire relative to the following question:

"'A' is the real estate broker. 'B' is a salesman for A under the usual split commission contract. B starts deal while in the employ of A. B severs his connection with A and after leaving the employ of A, completes the deal above referred to, and refuses to divide the commission."

You desire to know—what is the obligation of B, the salesman, to A, the broker?

Please be advised that in the opinion of this department there are several controlling factors which might materially change the situation and in that connection each particular case would have to be considered on its own merits. However, the general rule with reference to transactions of this nature is stated in 2 Corpus Juris 714, Section 368, which is, as follows:

"*Transactions after Termination of Agency.* As a general rule, after one has performed his office as agent or has in good faith severed his relations as agent, he is free to take up negotiations for his own interest, and can act adversely to his former principal as fully as any other person. Because of the previous trust relations, however, equity will subject such transactions to a rigorous examination to see that the former agent did not abuse his position of trust and influence, or in any way fail in his attitude as agent during the agency; and an agent cannot terminate the agency in order to take advantage of his principal's condition or *of information* resulting from his agency."

You will note that we have italicized the words "of information." We do this to call your attention to the fact that an agent who comes into possession of information which he would not have otherwise learned except through his employment with the principal could not sever or terminate the agency and use the information gained during the term of employment to his own advantage and adverse to the interests of the broker.

Also, see Section 369, 2 Corpus Juris 714, which is, as follows:

"Loyalty to his principal's interests requires that an agent shall make known to his principal every material fact concerning his transactions and the subject matter of his agency that comes to his agency; and if he fails to do so he is liable in damages to his principal for any injury incurred or loss suffered in consequence of such failure, * * *"

This point is also discussed in 21 Ruling Case Law 826, as follows:

"He may not use any information that he may have acquired by reason of his employment either for the purpose of acquiring property or doing any other act which is in opposition to his principal's interests."

We present this for your consideration in cases which may arise, as, apparently, from the digests, the controlling feature, is confidential information secured while acting as agent, which he learns and uses after the agency is terminated, to his own advantage.

An essential feature of all cases of this nature is whether or not there is an exclusive listing with the principal.

A recent case was tried, in which this question was discussed, in Polk county. The facts in that case, so I am informed, were that an agent for a small loan company terminated his employment with the company and took employment with another small loan company and used a list of customers which he had secured in his former employment. The method of using was by writing to each of these customers and calling their attention to the fact that he was now employed with this new company and would be glad to serve them. I believe that the holding of the court was that the use of the company, for whom he formerly worked, of the listing was not permissible. I am informed that the case has been appealed in the Supreme Court but in a brief search, on this date, I am unable to give the citation. As soon as I do, I will forward the same to you.

It is the opinion of the writer that if the agent comes into the possession of knowledge that he would not have learned if it had not been for his former connection he then cannot take advantage of it. He owes a duty to his former employer to account for the commission gained in accordance with their previous arrangement. However, each case would have to be considered on its own merits.

CORPORATION: FOREIGN: REAL ESTATE LICENSE: It is necessary for a foreign corporation coming into the State of Iowa for the purpose of transacting a real estate business—to take out a real estate license.

May 9, 1933. *Real Estate Commission, Des Moines, Iowa:* This will acknowledge receipt of inquiry of the twenty-seventh ult., in which you state, as follows:

"It has been the policy of this department to make a foreign corporation coming into the State of Iowa for the purpose of transacting a real estate business take out a real estate license and designate the Real Estate Commissioner as their attorney-in-fact, upon whom to get service in case of litigation. We have also compelled them to have an office in the State of Iowa. The question we wish decided, is wether or not this foreign corporation should go through the corporation department, and pay the regular fee of $25.00 in addition to the $10.00 required for the license in this department.

In the opinion of this Department, this would be necessary and we wish to call your particular attention to Chapter 386 of the Code of Iowa, 1931. You will note that Section 8420 deals with the application for a permit for any foreign corporation deciding to transact business in this state. Section 8421 sets out the details of the application. Section 8422 allows the Secretary of State to make an independent and further investigation as to the property of such corporation within this state and the true facts determining the value of the same and allows the fixing of the fee to be paid by such company. Section 8423 deals with the fees to be paid. Section 8427 states, as follows:

"No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such permit. This prohibition shall also apply to any assignee of such foreign stock corporation and to any person claiming under such assignee of such foreign corporation or under either of them."

From a reading of this section, it would seem to us that a corporation, such as you suggest, would be handicapped unless they would qualify.

Section 8430 provides for a forfeit for violations of this chapter.

We also wish to call your attention to Section 1905-c24 of the Code of Iowa, 1931, which states, in part, as follows:

"No * * * corporation shall be granted a license, unless every member or officer of such * * * corporation, who actively participates in the brokerage business of such * * * corporation, shall hold a license as a real estate broker, and unless every employee who acts as a salesman for such * * * corporation shall hold a license as a real estate salesman."

In the opinion of this Department the better practice would be for the foreign corporation to have a corporation permit to do business in the State of Iowa and as set out above, it certainly would be to their advantage, in accordance with Section 8427, as should they get into any legal difficulty, where litigation would be started by them, it might be that this section would be raised against them and they might lose their right to maintain an action, because of it.

STATE SINKING FUND: Executive Council: Resolution: Depositor's Agreements: Brookhart-Lovrien.

May 10, 1933. *Treasurer of State, Des Moines, Iowa:* This will acknowledge receipt of your letter of the fifth inst., dealing with questions arising under the State Sinking Fund, in which you state, as follows:

"The Executive Council, by resolution, has authorized you to sign Depositor's Agreements in banks, in this state, in which state funds are deposited where you may deem advisable and for the best interests of all parties concerned. You inquire—what conflict, if any, arises between the enactments of the 45th General Assembly on Depositor's Agreements and Public Fund Chapters in the Code of Iowa, 1931, to wit: Chapters 352-d1 and 352-a1?"

In the opinion of this Department, the state, through the Executive Council,

may agree as to its deposits in a state, savings or private bank, now under Senate File No. 111, which is seeking to reorganize and also a national bank where the form of agreement has been approved by the Superintendent of Banking and Executive Council. However, Section 7420-a9, of the Code of Iowa, 1931, states, as follows:

"*Certification of deposits.* Whenever any such depository bank is hereafter *closed and placed in the hands of a receiver or a trustee in bankruptcy*, and the amount of the several deposits of public funds deposited therein by authority of and in conformity with the direction of the legal governing council or board which is by law charged with the duty of selecting depository banks for said funds and fixing the amount thereof has been ascertained and fixed by an order of court, the superintendent of banking shall then certify such list of public deposits so approved by the court to the treasurer of state and the auditor of state."

Therefore, a *participation in the State Sinking Fund cannot arise until the depository bank is closed and placed in the hands of a receiver or a trustee in bankruptcy.* The taking over of the management of the bank, under Senate File No. 111, and the further step of appointing a conservator does not qualify in keeping with this Code Section.

In answer to your second question, which states, as follows:

"Can governing bodies enter into a compromise settlement with reference to public funds deposited in restricted banks, and have protection for the difference between the amount accepted, in compromise, and the amount on deposit, under the Lovrien-Brookhart Law?"

will say that the entering into such agreements by the state or any other governing body, under the provisions of House File No. 541 as amended by the Senate, does not constitute a waiver of any preference or right to participate in the State Sinking Fund. As to the amount waived, however, there is *no provision at the present time whereby it can be filed or certified against the State Sinking Fund* as it is necessary to first accept the trust certificate, as provided in Senate File No. 483 and receive the dividends from the segregated or trust fund and apply such dividends to the trust certificates. The balance, if any, that is not paid out of the trust fund, *could not be filed or certified against the State Sinking Fund without an enactment of the General Assembly* as, at the present time, there is no statutory method by which such participation could be had in the Sinking Fund as these banks are not closed nor are they in the hands of a receiver. The General Assembly would have to pass an act setting up the machinery to allow the certification of any unpaid balance so that participation could be had in the Sinking Fund.

Regarding your third question, in which you ask for an opinion on the constitutionality of the acts of the 45th General Assembly authorizing governing bodies to waive public funds in banks, other than those in receivership, will say that, in a separate communication, we will render an opinion on this question.

In answer to the fourth question presented, in which you inquire, as follows:

"May objections or protests be made against Boards of Supervisors waiving public funds in which the state has an interest in view of the fact that the amount waived does not come under the Lovrien-Brookhart Law as you feel that such a protest or objection would be justified?"

will say that the entering into such depositors' agreements is a matter of discretion with the Board of Supervisors, where it involves local funds, as provided in Section One (1), Paragraph Three (3), of House File No. 541. How-

ever, in Paragraph Four (4), of Section One (1), you will note, it is stated, as follows:

"Any public body hereinbefore named may with depositors of any national bank enter into a depositor's agreement with said bank, provided the form of said agreement shall be one that shall have been first approved by the Superintendent of Banking and by the Executive Council of the State of Iowa. * * *"

The writer is of the opinion that the Legislature did not intend that trust funds, which are the property of the state, would be subject to the sole discretionary power of a local Board of Supervisors and that in order that such funds be protected, the form of depositor's agreement would have to be approved by the Executive Council. The question, relative to trust funds, should be called to the attention of the several governing boards of the state. They should be advised that where trust funds, belonging to the state, are involved, that the form of depositor's agreement should be submitted to the Executive Council for approval.

REDEMPTION FROM TAX SALE: Application to extend time: Issue deed: Sheriff. Banks operating under S. F. 111: County Treasurer: Sign waivers on public funds deposited.

May 11, 1933. *County Attorney, Dakota City, Iowa:* We are in receipt of your letter of April 28th, in which you ask for an opinion on the following:

"The time of redemption in a certain case expired on April 28, 1932. Before the deed was executed and delivered, the debtor filed an application to extend the time of redemption to March 1, 1935. Should the sheriff under these circumstances refrain from issuing the deed until the ruling on the application was made by the District Court?"

You are advised that this is a matter primarily between the holder of the sheriff's sale certificate and the owner of the equity of redemption, and can only be decided by the District Court. However, in order for the sheriff to protect himself against both parties, we believe he would be justified in withholding the sheriff's deed until the matter was passed on by the court.

You also ask whether or not the County Treasurer or the School Treasurer have authority to sign waivers on public funds deposited in banks now operating under Senate File 111, or under the similar national law.

You are advised that the law recently passed by the 45th General Assembly provides that these depositors' agreements may be executed by the governing boards. It would therefore be the duty of the board, rather than the Treasurer, to execute the depositors' agreements. We might call your attention, however, to the fact that this law does not make the execution of such agreements mandatory. If the governing board does not care to enter into such an agreement, it does not need to. We also wish to call your attention to the fact that you should assure yourself that the agreements are such as are provided for under the recent legislation.

BANKS AND BANKING: Depositors' agreements: State sinking fund.

May 11, 1933. *Superintendent of Banking, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

May public bodies enter into depositors' agreements looking toward the reorganization of a bank, and will the entering into such agreements prejudice the right of the public body to participate in the state sinking fund?

The State Sinking Fund for public deposits, known as the Lovrien-Brookhart Law was enacted by the Forty-first General Assembly in 1925 for the purpose

of creating a fund for the payment of public deposits in banks closed and in the hands of a receiver. This law provides for the filing of claims against the Fund in event of receivership, the Fund to be made up of interest payments by going banks, on public funds on deposit.

It was the thought of the legislature at the time that this act was enacted, that it would definitely take care of any loss to public bodies by reason of the closing of banks and that the interest payments would be sufficient to take care of such public deposits. However, because of economic conditions that arose subsequent to the passing of the act, this has proven impossible and the fund is now owing to public bodies that have duly filed therein, over $17,000,000.

The last legislature, in order to conserve the assets of our banks, for all deposits, and to prohibit the withdrawal of funds by a few to the detriment of all depositors and creditors of the bank, enacted Senate File No. 111 which provides, among other things, that all deposits, both public and private, are to be held. The legislature then to provide for an orderly plan of reorganization of banks, enacted Senate File No. 483 which provides for the issuance of Trust Certificates against a segregated or trust fund to both public and private depositors. The legislature also enacted House File No. 541, which act allows public bodies to join with private depositors in the reorganization of banks and in order to assure for such public bodies the retention of all rights as against the Sinking Fund, the legislature provided in House File No. 541 as follows:

"Joining in such agreement shall not be a waiver of any preference or of the right to participate in the state sinking fund for public deposits."

During the enactment of this legislation, the question arose in both the House Committee on Banking and the Senate Committee on Banking, and also in the minds of others who were interested in legislation to protect the rights of all depositors, both public and private, as to whether public bodies should file against the said Sinking Fund at the present time or at a subsequent time.

In view of the fact that the State Sinking Fund was in arrears over $17,000,000 and the probability of it paying out in the near future being seriously in doubt, it was decided that the interest of public bodies in closed banks would be best protected by allowing these public bodies to accept Trust Certificates against the segregated or trust fund in their own bank and to participate in this fund like private depositors in event that such was the plan of reorganization.

It was thought it would be many years before claims filed against the Sinking Fund would be paid, but that holders of Trust Certificates should be able to receive dividends out of the Trust Fund in the near future and that in event the Trust Fund paid out 100 per cent to the public bodies, there would be no necessity of filing against the Sinking Fund, as such public body would be paid in full, but in event that the Trust Fund did not pay out 100 per cent, then the public body to file against the Sinking Fund for any balance due by subsequent legislation.

It has therefore never been the opinion of this Department that the right of public bodies to participate in the State Sinking Fund is in any wise prejudiced by their entering into depositors' agreements, as the right of public bodies to so participate has at all times been preserved for them under the law and such has been the continued holdings of this office since the enactment of the legislature.

We wish further to call your attention to Section 5 of House File No. 541

which provides that in so far as the provisions of this act may conflict with other acts or parts thereof, the provisions of this act shall control.

Under the present method, public bodies have the opportunity to be paid 100 per cent out of the assets of their own bank while if they file against the Sinking Fund, they would not be paid out of their own bank, but would have to take their turn at the bottom of the Sinking Fund. Obtaining money out of their own bank appears to us to be a benefit to the public depositor, for they thus retain their interest in the Trust Fund out of their own local bank instead of looking solely to the large Sinking Fund that would be thirty million dollars in arrears if all claims against it were filed at this time, and this is especially so when the segregated or trust fund will in many instances be able to declare a dividend in the near future and public bodies will have the right to participate in the State Sinking Fund for the amount not received out of their own bank and the Trust Certificates held by them.

This office is very glad to give you this opinion in order to clarify the situation for public bodies as we have at all times held that the entering into depositors' agreements does not prejudice the right of public bodies to participate in the State Sinking Fund and we have held that they must first take the dividends from the segregated or trust fund of their own bank which, as we have pointed out above, is to their benefit and not their detriment.

The question may arise in your Department as to the constitutionality of the act allowing public bodies to enter into depositors' agreements. You appreciate the fact, no doubt, that the duties of this office as defined by statute and in practice, are to uphold the constitutionality of the acts of the General Assembly, but irrespective of such duty, we have gone into the law on this proposition. As the state is supreme and has the power to create its subdivisions and has the power to control them, we believe that if the matter ever reaches our Supreme Court, it will hold that the legislature had the right to authorize public bodies to enter into such depositors' agreements as to deposits of public moneys and that the law will be held constitutional.

BANKS AND BANKING: Waiving: Public funds: Acts of the 45th General Assembly: Constitutionality.

May 11, 1933. *Treasurer of State, Des Moines, Iowa:* This will acknowledge receipt of your inquiry of the fifth inst., in which you ask for an opinion of this office on the following question:

"Are the Acts of the 45th General Assembly, authorizing governing bodies to waive public funds in banks other than those under receivership, constitutional?"

The question that presents itself is whether or not it is the province or within the duties of the Attorney General to declare acts of the Legislature unconstitutional and in that connection I wish to call your attention to the case of State vs. Executive Council, 207 Iowa, 923. Justice Evans, in rendering the opinion of the court, states, as follows:

"The procedure adopted herein cannot be approved. As presented, the case carries some of the aspects of a moot one. The legislative call upon the attorney general to test the constitutionalty of the act, by action brought by himself, overlooked the limitations upon the power of the judiciary, and quite ignored the legitimate scope of the powers of the attorney general. By the very nature of his office, and by statute, he is the legal adviser, both of the executive council and of the general assembly. To require him to maintain this action is to put him in a position which is repugnant to his other official duties. Nor has the judiciary of this state any power to render a merely de-

claratory judgment. We have jurisdiction to entertain only justiciable causes, prosecuted by a bona-fide litigant whose private rights are alleged to be invaded by an unconstitutional act. * * * Nevertheless, judicial duty requires us to say that he (Attorney General) has no legal standing as a plaintiff in this case * * *"

The question of the use of public money, in this connection, brings us to an examination of the rights of the General Assembly with regard to public money. In McSurely vs. McGrew, 140 Iowa, 163, the power of the Legislature to release a county treasurer from liability on his bond was challenged. The court sustained such power and said, as follows:

"* * * This is predicated upon the thought that the Legislature has plenary power over counties and their officers; that no contract rights were impaired, and no vested rights taken away. If nothing but private rights were involved, it is manifest that the act could not be sustained. But the matters involved here are public, and the county of Van Buren is the real party in interest. A county, while a body corporate under our law, is a subdivision of the state, created for administrative and other public purposes, owes its creation to the state, and is subject at all times to legislative control and change. No citizen has any vested right in or to its revenues. These may be changed, diverted to other uses, or taken away, and no one may complain on the theory that his interests have been affected or any contract rights destroyed. The Legislature might have permitted the deposit of county funds in banks and absolved the county officers from any liability on account of such deposits. Neither the county nor any of the inhabitants thereof had any vested interest in the funds coming into the County Treasurer's hands. * * *"

Also, see Scott County vs. Johnson, 209 Iowa, 213, which holds, in part, as follows:

"The General Assembly has ample authority to divert from the county general fund to the state sinking fund for public deposits interest acruing on deposits of public funds in the hands of the County Treasurer."

And further:

"A county has no standing to question the constitutionality of a legislative act relative to its governmental powers."

See also Waddell vs. Board of Directors, 190 Iowa, 400.

See Abbott on Municipal Corporations, Sections 22, 84, 88 and cases cited:

"But the municipality itself cannot complain of any act of the Legislature diminishing its revenues, amending its charter, or even dissolving it entirely. It may, of course, acquire certain proprietary or private rights, not held by the public in general, of which it cannot be deprived. * * * But this rule or rather exception to the general rule, seems to apply only to property reduced to possession, or held in trust for the inhabitants of the territory as distinct from the people as a whole. It does not apply to executory contracts, or to provisions concerning funds or revenues. City, county, and township funds are subject to legislative control."

A review of the cases decided under the chapter, relating to the State Sinking Fund and other cases, such as the first case referred to herein, State vs. Executive Council, leads us to the conclusion that as the Department of Justice is legal advisor to the General Assembly, as stated by Justice Evans in that case and in fact, that the duties of this Department, as defined by statute and in practice, is to uphold the constitutionality of the acts of the General Assembly. The question of the constitutionality, as shown by the cases cited herein, is one for the courts to decide on the institution of an action by a proper party as plaintiff.

SALARY REDUCTION BILL: Senate File 479: City and Town Officials.

May 12, 1933. *Auditor of State, Des Moines, Iowa:* We have this day fur-

nished you an opinion on Senate File 479 of the 45th General Assembly, generally known as the salary bill, except Sections 47 to 50, inclusive, of this bill. We now give you this supplemental opinion covering those particular sections, 47 to 50 inclusive, which relate to city and town officials.

It is the opinion of this office that this act, in so far as it applies to those offices named in Sections 47 to 50, inclusive, became effective May 1, 1933.

The suggestion has been made by someone that the salaries of the city or town officials could not be increased or diminished during their term of office, for the reason that the statute prohibits it. Section 6705 of the Code of 1931 fixes the compensation of the mayor in special charter cities. Section 6704 fixes the compensation of all men in the same cities. In these two sections, it is provided that the respective officers shall receive such salary as may be provided by ordinance.

Section 6707 of the Code of 1931 provides as follows:

"The emoluments of any officer shall not be increased or diminished during the term for which he shall have been elected or appointed, nor shall any change of compensation affect any officer during his existing term, unless the office be abolished."

What this section really means is that, when the City Council has once passed an ordinance fixing the salaries of the mayor and aldermen, those salaries cannot later be increased or diminished by the City Council by way of a new ordinance during the term for which said officers were elected or appointed. It does not mean, however, that the Legislature cannot amend the law by diminishing the maximum salary for said officers.

In view of this fact, there is no question in our minds but what Sections 47 to 50, inclusive, of Senate File 479 became effective on May 1, 1933.

SALARY REDUCTION BILL: Senate File 479: State and County Officers.

May 12, 1933. *Auditor of State, Des Moines, Iowa:* A few days ago, you orally requested of this Department an opinion relative to Senate File 479 of the 45th General Assembly, generally known as the salary bill. Your question was:

"What offices are affected by this bill, and when does the change in salaries become effective?"

Numerous questions have been referred to this office by county officials in different parts of the state, the main one being as to whether or not the salary of a public officer may be changed, and said change become effective during the term for which he is elected or appointed. After reading numerous Iowa cases on this question, we are of the opinion that the Legislature has power to increase or diminish the salary of a public officer during the term for which he is elected or appointed, except those offices protected by constitutional provision.

It has been held in numerous cases that the relation between the public officer and the people is not in the nature of a contract. The first case, which we find on this subject, is Iowa City vs. Foster, 10 Iowa, 189. In that case, the rule is stated as follows:

"The principle is that public officers, and the officers of public corporations, are created for the public benefit, and that they and their offices, duties and emoluments, are governed by considerations related to the common good, and that there is nothing in the nature of a contract pertaining to them, in the sense of the constitution."

The rule stated in this case has ever been followed by the Supreme Court of this state. We quote as follows:

"It is conceded that, in the absence of a constitutional restriction, the General Assembly may abolish any office created by a legislative authority."

Crozier vs. Lyons, Auditor of State, 72 Iowa, 401.

The question raised in the case just cited was whether or not the Legislature had authority to abolish the Circuit Courts of this state and thereby abolish the office of Judge of the Circuit Court. It was held that the Judges of the Circuit Court are not protected by the constitution, but were created by statute under authority granted by the constitution, and that therefore the Legislature had a right to abolish the Court, and that having abolished the Court, there could be no salary.

Another case, to which we might call your attention, furnishes the following quotation:

"That it is competent for the Legislature to abolish an office, increase or decrease the duties devolving upon the incumbent, add to or take from his salary, when not inhibited by the constitution, we entertain no doubt. We are equally clear that it is within the legislative power to add to or change the methods in which vacancies may occur, and make such changes applicable to existing offices and those holding them."

Bryan vs. Cattell, 15 Iowa, 538, at 553.

We might also quote from a later case the following statement:

"A public office has in it no element of property, but it is rather a personal public trust, created for the benefit of the state, and not for the benefit of the individual citizens thereof. Nor are the prospective emoluments of a public office property in any sense, for the salary or other perquisites may be reduced or otherwise regulated by a law at all times, unless such change is forbidden by the constitution."

Shaw vs. Marshalltown, 131 Iowa, 128, at page 134.

Again, in the case of Erickson vs. City of Des Moines, this statement was made:

"Public offices are created in the interests of the general public, and not for the benefit of the individual. And no one in possession of an office has a constitutional right to remain therein for the whole period of the term, for which he was elected." (Citing Shaw vs. Marshalltown, supra.)

"The incumbent of a state office is subject to a removal on impeachment proceedings. This is a provision of the constitution * * *. Being unlimited in its power, the Legislature may prescribe the conditions on which removal proceedings shall be instituted, in the tribunal or body in which shall be vested the power of the termination. And as no contract right exists in favor of the incumbent of an office, it does not remain for him to quarrel with the method of procedure adopted. In the case of a statutory office, the Legislature may even abolish the office, and with the taking effect of the law providing therefor the right of the incumbent to further act ceases eo instanti, notwithstanding the term for which he was elected has not expired." (Citing Crozier vs. Lyons, supra.)

Erickson vs. The City of Des Moines, 137 Iowa, 452, at page 481.

This is not only the Iowa rule, but the general weight of authority, as shown by Ruling Case Law, and other legal works.

We might add that the constitution of this state, Article 4, Section 22, creates the offices of Secretary of State, Auditor of State, and Treasurer of State, but it is not provided in the constitution that their salaries may not be increased or diminished during their term of office. In fact, the constitution does not mention the salaries of said officers, but leaves that up to the Legislature.

It is therefore the opinion of this office that, in so far as the elective state

officers are concerned, except the Judges of the Supreme Court and the Judges of the District Court, and in so far as all of the county officials and all of the appointive state officers are concerned, Senate File 479 became effective on May 1st, and the salaries of these officers from and after that date shall be governed by said bill.

In so far as the Judges of the Supreme Court and the Judges of the District Court are concerned, they are protected by Article 5, Section 9, of the state constitution, wherein it is provided as follows:

"* * * which compensation shall not be increased or diminished during the term, for which they have been elected."

We might also add that at any place in the bill where the salary of the deputy to any state elective or appointive officer, or the deputy of any county official, has been changed, the change becomes effective as of May 1, 1933. This same situation is true as to all township officials.

This bill, however, does not of itself affect the salaries of the assistants, stenographers, file clerks, deputies and other employees, whose salaries are not specifically changed by some provision in the bill. In other words, there is no provision in this act for a blanket cut on all salaries, and consequently it applies only to those offices mentioned in the bill.

We do not pretend to cover in this opinion Sections 47 to 50, inclusive, of the bill, which apply to officers of cities and towns, as a separate opinion will be prepared on that portion of the bill.

BANKS AND BANKING: Banks under S. F. 111: Public deposits: National banks operating under control of conservators: Public officers: State sinking fund.

May 16, 1933. *County Attorney, Britt, Iowa:* We are in receipt of your letter of May 4th, in which you ask for an opinion on the following:

"Does the rule of the State Department of Banking for administration of banks under Senate File 111, including public deposits as exempt from interest payment by the bank, include national banks operating under the control of conservators?"

You are advised that the County Treasurer does not have authority to deposit public funds in a bank operating under Senate File 111, unless that bank has been designated as a depository of public funds under Chapter 352-D1 of the Code of 1931.

Section 7420-d5 provides that if none of the duly approved banks will accept said deposits under the conditions herein prescribed or authorized, said funds may be deposited in any approved bank or banks conveniently located within the state.

Section 7420-d6 provides that said deposits shall draw interest at the rate of not less than 2 per cent per annum on 90 per cent of the collected daily balances, payable by the bank at the end of each month.

It is the opinion of this Department that, unless the bank operating under 111 or the national bank, which is operating under the control of a conservator, is willing to pay interest, as provided in Chapter 352-D1, the County Treasurer or other public official having custody of funds, as provided in said chapter, does not have authority to deposit said funds in such banks.

BEER.

May 16, 1933. *County Attorney, Storm Lake, Iowa:* This will acknowledge receipt of your letter of recent date, to Edward L. O'Connor, Attorney Gen-

eral, in which you inquire if a country club, located outside the corporate limits of the city of Storm Lake, which is used by a gun club, is entitled to a Class "B" permit under an act of the 45th General Assembly legalizing and regulating the manufacture and sale of nonintoxicating liquors.

This club would come under Section 19 of the act, if it meets the qualifications contained in that section. As you will note, the wording used in this section is, as follows:

"* * * that a golf *or* country club located outside the territorial limits of the city, town * * *"

and we interpret this to mean that it does not necessarily have to be a golf club, but can be a club organized outside of the city limits, which might qualify as a country club.

The next question that arises is "b" under this section as to whether or not it is a proprietary club, or operated for pecuniary profit. You state that there are some small buildings, which are the property of the club and your letter is not exactly clear as to the arrangements that the club has with reference to the main buildings of the premises in question. It would seem that the arrangement as to the use of the main buildings of the Gun Club would be somewhat controlling. From the statement of facts presented, we understand that the owner of the premises is not to be interested in this permit in any way. Accordingly, if the club handles the beer, and sells only to bona fide members, the question of a proprietary club would not enter into consideration. The other divisions of this section are clear and we are of the opinion that they would have to be met in order that such a club would qualify. These are questions for the Board of Supervisors to determine.

As to your next question, which reads, as follows:

"They would like to know if the word 'may' in the clause 'provided, however, that a golf or country club located outside the territorial limits of the city, town, or special charter city may be issued a Class B permit by the local Board of Supervisors' means that the Board 'must' issue a permit if the other requirements of Section 19 are complied with."

it would seem to this Department that it is necessary to go into the intent of the Legislature in the enactment of this law. The question of local option was debated in the State Senate and the question raised as to the right of an approving body to exercise its discretion in granting permits and that provision was voted down by a vote of 29 to 21.

The general provisions of the act are mandatory and there is no question but what, if a city or town council were to refuse all applicants permits, that any applicant could invoke the legal aid of mandamus proceedings against the council refusing him the permit and the questions as to his qualifications would be determined. The only exception in the act is the provision under discussion in that it says "may" with reference to the issuing of a permit, while in other classes of permits the direction to the approving body is that it "shall" be issued. The question of police power may have been in the minds of the Legislature in the making of the exception of this particular class of permit. By this, we mean that a city or town has a better opportunity to exercise this function than does the county. First, because the limits of the municipal corporation are not so extensive and secondly, the average city is better equipped to exercise this function than is the average county. It is apparently optional.

APPROPRIATION ACT: As to the construction of Section 69 of the 1933 Appropriation Act (House File No. 73) and the procedure required thereunder.

May 17, 1933. *Board of Education, Des Moines, Iowa:* We have your request for opinion as to the construction of Section 69 of the 1933 Appropriation Act (House File No. 73) and the procedure required thereunder.

Section 69 of the Appropriation Act is as follows:

"All appropriations made by this act may be available by such department, bureau, board, commission or institution as named herein, only upon a sworn statement made by the head of the department, bureau, board, commission or institution, that all money received from unexpended appropriations, miscellaneous receipts, fees, or other income, has been expended. The sworn statement shall be made to the Auditor of State, who shall disburse to the department, bureau, board or commission such parts of the appropriations as he deems necessary. All unexpended balances from this appropriation shall revert to the general fund of the state."

House File No. 73, Senate File No. 471, Senate File No. 470 and Senate File No. 472 were all passed at the last session of the legislature and were finally adopted on the same day and were approved by the Governor on the same day, so that these three acts must be read and construed together.

Your first question is as to what kind of "sworn statement" is required under the provisions of this act and the extent to which the statement must show that moneys received from unexpended appropriations, miscellaneous receipts, fees or other income has been expended.

Under the provisions of Senate File No. 470, known as the Budget and Financial Control Act, there is allotted to your Board before each quarter an allotment or amount estimated to be necessary to carry on your work for the ensuing quarter, such requisition to contain the details of the proposed expenditures. Under the provisions of this act, these allotments are to be approved by the Governor unless he finds that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full. In such event, he may modify such allotments to the extent necessary in order that there shall be no overdraft or deficit, such reductions in allotments, however, to be uniform and prorated.

There are, of course, certain receipts coming into institutions under the supervision of your Board that are not deposited in the State Treasury and the procedure in regard to this is provided for in Section 6, Subdivision 7 of the act.

Under the provisions of Section 69 of House File No. 73, your Board must not only make their requisition for allotment for each quarter but prior to the receiving of their monthly installment, must also file the affidavit mentioned in Section 69. This affidavit is only intended to cover such income as may be used for general educational purposes and need not take into consideration endowment or private funds or gifts to any of the institutions or the income from endowment or private trust funds or trust funds belonging to students or other funds that are available only for a particular purpose, as in our opinion, such are not covered under Section 69 of House File 73 and need not be taken into consideration in making the sworn statement.

Section 3940 of the Code provides that all appropriations made payable annually to each of the institutions under the control of the Board of Education shall be paid in twelve equal installments on the last day of each month on order of the Board. The Budget and Financial Control Act, however, provides that all acts in conflict therewith are repealed, so that your allotments will be made on a quarterly basis, but will be payable in monthly installments except that they will not be equal monthly installments, for, under the provi-

sions of Section 69 of House File No. 73, all moneys for general educational purposes must have been expended before the appropriations will be available and necessarily, some monthly installments will be much higher than those of other months, as, for instance, when students are paying their tuition in September, there will be a great amount of money on hand for the use of general educational purposes, and the amount that you would then draw from the state at that time would not be as great as the amount you would draw in December. Where your school operates on the semester basis as no new revenue would be coming in from that source, at that time. So, in order for you to obtain your regular monthly installment, you must show that the amount of money on hand for general educational purposes has been expended, or will be expended before the end of the next monthly period, but you need not take into consideration special funds held for special purposes which cannot be expended for such general educational purposes.

The next question is to whom shall this sworn statement be made. Section 69 of House File No. 73 provides that the statement shall be made to the Auditor of State, but Section 32 of the Budget and Financial Control Act provides that wherever the words "Auditor of State" or "State Auditor" appear in the Code or in laws enacted by the Forty-fifth General Assembly with reference to security of state revenue, settlement of state claims, both the receipts and disbursements, issuance of warrants, apportionment of school funds and the keeping of bookkeeping and accounting records and the rendering of bookkeeping and accounting records of which the Auditor of State is relieved, it shall mean the "State Comptroller" or "Office of State Comptroller," so that under the provisions of this last named act, the sworn statement shall be made to the State Comptroller and not to the Auditor of State. This is also borne out by the fact that under the provisions of these acts, the Comproller is invested with all the duties of pre-audit and the Auditor of State has all the duties of post-audit, so that the Comptroller with the Governor is to authorize the expenditure of all moneys while the Auditor of State has the duty of auditing the various Boards and Departments to see that the money was regularly spent after they had received it, and the Auditor thus has no duties at all in regard to disposing of any part of the appropriations, so that the legislature clearly intended that these sworn statements should be made to the State Comptroller and not to the Auditor of State.

The next question arises in regard to the provision in Section 69 of House File No. 73 providing that there shall be disbursed such an amount of the appropriation as the State Comptroller (under our construction) deems necessary.

In regard to this, the State Comptroller cannot act in an arbitrary manner and it is our opinion that if the allotments are duly made and the sworn statement of the Board is in good order and shows an expenditure of all funds available for general education purposes, or that such funds will be fully expended before the end of the next monthly period, the State Comptroller must disburse the regular monthly appropriation, providing the estimated budget resources are found sufficient and it is not necessary to reduce the allotments to all Departments pro rata.

TOWNSHIP TRUSTEES: Authority of member of the board to furnish material or labor to the township.

May 17, 1933. *County Attorney, Waukon, Iowa:* We wish to acknowledge

receipt of your letter of May 15th, in which you ask for an opinion on the following proposition:

"The Board of Supervisors of this county have in some cases turned the maintenance work on roads over to the trustees of the respective townships. In these townships, the trustees that advertise for bids for road levies and in some cases members of the Board of Trustees have been the lowest bidders, and have been awarded the dragging contracts.

"Your question is whether or not, under Section 13327 of the Code of 1931, this procedure is legal."

Section 13327 of the Code of 1931 provides as follows:

"Members of Boards of Supervisors and township trustees shall not buy from, sell to, or in any manner become parties, directly or indirectly, to any contract to furnish supplies, material or labor to the county or township in which they are respectively members of such Board of Supervisors or township trustees."

In view of the wording of this section, members of the Board of Trustees are prohibited from making a contract or performing labor for the township, but they would not be prohibited from working for the county or making a contract with the Board of Supervisors.

It is therefore the opinion of this office that in townships, where the maintenance work on roads has been turned over to the Board of Trustees, no trustee could legally bid on such contracts. However, in townships, where the Board of Supervisors has decided to retain jurisdiction and to accept bids and let the contracts, a member of the Board of Trustees could legally bid on such work and enter into a contract with the Board of Supervisors for the maintenance of the road. Section 13327 of the Code of 1931 only prohibits a member of the Board of Trustees from contracting with the Board of Trustees.

BEER.

May 17, 1933. *County Attorney, Mason City, Iowa:* This will acknowledge receipt of your letter of the sixteenth inst., in which you state, as follows:

"Could a person who had a club with fifty (50) bona fide members on January 1, 1933, obtain a Class "B" permit under the Beer Bill by joining a national rifle or wrestling club or association?"

In the opinion of this Department such a club (we understate that the club is not located within the territorial limits of a city or town) would have to qualify under Section Nineteen (19) of the act, and you will note that the wording states, as follows:

"Where the club is outside the city limits it must be a country *or* golf club."

We construed the word "*or*" to mean that it may be any kind of a country club and such permits are to be granted, if at all, by the board of supervisors of the county.

The conditions and qualifications, which must be met, by such a club are:

B. That it is not a proprietary club, or operated for pecuniary profit.

From your description of this club, the writer is not sure whether the club is owned or operated by one person or whether or not the members operate a club house.

(C) under the conditions and qualifications for a permit, states that it must be incorporated under the laws of the State of Iowa, and its charter in full force and effect or that it is a regularly chartered branch of a nationally incorporated organization.

The next division is (D), which states that such a club must have a permanent local membership of not less than fifty (50) adult members.

Division (E) provides for the approving of an application for a permit by the members.

Division (F) provides that it must have been in operation as a club on the first day of January, 1933, or if thereafter formed it must be in continuous operation for at least two (2) years before applying for a Class "B" permit.

However, this is a matter within the discretion of the board of supervisors as to whether or not the conditions and qualifications, as set forth in this act, and as expressed herein, are met. You will have to assist them if they are in doubt in order that they may be in a position to make a correct decision. Of course, the burden is on the applicant to show that he meets the provisions imposed by this section of the act.

This Department has also ruled that, in a club of this nature, which has been granted a permit, the sale must be confined to *members only* and that the members of a lodge will therefore have custody and control of the beer and that the dispensing of it will be under the direction of the governing board or body.

SCHOOLS: Purchase of land.

May 18, 1933. *Auditor of State, Des Moines, Iowa:* We have your request for opinion on the following two propositions:

1. Has the Independent School District the authority to own or purchase more than five acres of land?

Under the provisions of Section 4361 of the Code, any school corporation may take and hold an area equal to two blocks exclusive of the street and highway, for a schoolhouse site and not exceeding five acres for playground or other purposes for each such site, so that the School Board has authority to own five acres for playground or other purposes, and in addition thereto, an area not to exceed two blocks for the schoolhouse site.

2. Has the Independent School District the authority to purchase tracts of land without first submitting the same to the vote of the people in said district?

Section 4317 of the Code provides for the establishment of two funds, one, the schoolhouse fund, and the other, the general fund, each to have a particular purpose.

Under Section 4363 of the Code, the directors of any Independent District whose territory is composed wholly or in part of territory occupied by any city, or city under special charter, may certify an amount to the Board of Supervisors who shall levy the same, and the tax so levied shall be placed in the schoolhouse fund and used for the purchase of sites in and for such school district. But the town of Cedar Heights does not come within this provision, as Cedar Heights is not a city as it has less than 2,000 population, so it therefore necessarily comes under the provisions of Section 4217 of the Code, and especially paragraph 7 thereunder which provides that the voters at any annual meeting or election, shall have the power to vote a school tax for the purchase of grounds, construction of schoolhouse and so on, so that in our opinion, the Independent School District of Cedar Heights has no authority to purchase tracts of land for school purposes without first submitting the same to the vote of the people, but of course, after a vote on the school tax has carried and the money is then available in the schoolhouse fund for such purpose, the Board has the authority to choose the site.

Some question may arise that if there is sufficient money in the General

Fund for the purchase, then a vote of the electors for a schoolhouse tax would not be necessary and the Board would have the authority to so purchase the schoolhouse site, but such is not true, for if there is money in the general fund, it would not be available for that purpose, as otherwise, school boards would be holding back on their activities so as to get into the General Fund a sufficient amount of money to make the purchase, and in our opinion, the fact that there was sufficient money in the General Fund for the purchase would not in any wise alter the situation.

SCHOOLS: School treasurer: Stamped warrants.

May 19, 1933. *Superintendent of Public Instruction, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

"What should a school treasurer do where there are warrants outstanding that have been stamped 'not paid for want of funds' and he now has money in his hands insufficient to pay the warrants for current indebtedness that have not been stamped, and also the stamped warrants?"

There are statutory provisions for the retirement of county warrants, state warrants, city warrants and drainage warrants that have been stamped "not paid for want of funds," but our statute is silent on the retirement of stamped school warrants.

Section 4318 of the Code provides as follows:

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

Our Supreme Court has spoken on this question but once, that being the case of Chase vs. Morrison, 40 Iowa, 620, and in that early case, our Supreme Court held that the school treasurer must make pro rata payments on warrants outstanding.

It is therefore the opinion of this office that during the period the school treasurer has insufficient funds to retire the stamped warrants and the unstamped warrants, that he should give periodic notice to all warrant holders, advising those that had warrants, that upon request, they would be entitled to a pro rata payment on their warrant.

We would suggest that an orderly procedure be outlined in that for instance, every thirty days, the warrant holders who desire a payment on their warrant, make that fact known to the treasurer and he can then ascertain the pro rata payment to be made on each warrant. Under this procedure, if the holder of a stamped warrant desires to hold it and continue to receive the interest thereon, he may do so without prejudice to his right to continue to receive interest thereon. However, as soon as the treasurer has sufficient money to take care of stamped warrants and the current warrants that have not been stamped, he should at once notify the holders of all warrants that he has sufficient money on hand to pay all warrants in full, and give them a certain length of time, for instance, thirty days, in which to present their warrant for payment, and at the expiration of that time, the warrant would cease to draw interest if the holder of it neglected or refused to present it for payment.

MOTOR VEHICLES: CORN SHELLER MOUNTED ON TRUCK. REGISTRATION. A truck, operating on the highways should be required to be licensed whether it carries a corn sheller or anything else. Corn shellers, wood saws, threshing machines operated by a tractor are not required to be licensed.

May 20, 1933. *County Attorney, Primghar, Iowa:* Acknowledgment is made

of receipt of your letter of the 19th inst., concerning the matter of registering as a motor vehicle a truck on which is mounted a corn-sheller, and we note the quotation you give from a letter written by the Superintendent of the Motor Vehicle Department to one, Dan Waadscheer, of Sioux Center, Iowa.

The question which your letter raises depends, of course, upon the interpretation of the definition of a motor vehicle as contained in Section 4863 and which is as follows:

"The term 'motor vehicle' shall include all vehicles propelled by any power other than muscular power except traction engines, road rollers, cranes, corn shellers, wood saws, sprayers, disc sharpeners, and other articles of husbandry of a like or similar nature, and such vehicles as are run only upon tracks or rails."

It is the opinion of this Department that under this statute there is exempt from the term "motor vehicle" only such road rollers, cranes, corn shellers, wood saws, etc., as are propelled by their own power. For example, if a man has a corn sheller and has a tractor to operate the sheller and to move it from farm to farm on the public highways, that a motor vehicle license would not be required, and apparently, in the letter written by the Superintendent of the Motor Vehicle Department to Dan Waadscheer, that is the sort of equipment that the Superintendent had in mind, especially, since he uses the term "combination tractor and sheller." It is the opinion of this office that an entirely different situation arises where a regular truck is used designed for transporting merchandise on the public highways and equipped with pneumatic tires like any other truck operating on the highways and a corn sheller is mounted on the truck. It would seem that in that case a truck operating on the highways should be required to have a license whether it carries a corn sheller or something else. That is the way we have interpreted the definition of motor vehicle as contained in Section 4863, and we are quite sure that that interpretation carries out the legislative intent. In other words, corn shellers, threshing machines, wood saws, and other farm machinery operated by a tractor is not required to have a license when the tractor is used to pull the equipment on the highway, and if that equipment is mounted on a regular truck, and that truck is used on the highways like any other truck, it is the opinion of this Department that it should be licensed. The portable mills, which you mention, of course, fall into that classification.

FARM BUREAU: Board of Supervisors: Membership of 1932 or 1933 for 1933 appropriation: July 1st appropriation.

May 22, 1933. *County Attorney, Mount Pleasant, Iowa:* I have your request for an opinion concerning the following propositions:

"In making the appropriation to the Farm Bureau, is the Board of Supervisors to use the Farm Bureau membership of 1932 or 1933 as the basis for their 1933 appropriation?

"Should the Board of Supervisors wait until after July 1st, before making such appropriation?"

In answer to your first question, the Board of Supervisors should consider the 1933 membership of the Farm Bureau as a basis for making the 1933 appropriation.

In answer to your second question, it is simply a matter of policy for the Board to adopt as to whether or not they shall wait until after July 1st, before making the appropriation.

Article 4 of the statutory form prescribed for the Articles of Incorporation

for Farm Aid Associations specifically provides that "the yearly dues of the members of this corporation shall be not less than one dollar, payable at the time of applying for membership and on the first Monday of January of each year thereafter. No member having once paid his dues shall forfeit his membership until his subsequent dues are six months in arrears."

Section 2926 of the 1931 Code of Iowa.

Under this provision, a member having paid his dues for 1932 cannot have his membership forfeited for non-payment of dues until after July 1, 1933. This section also states that after he has become a member in 1932, his annual dues shall be payable on the first Monday in January, 1933. The question as to whether or not he is a bona fide member, without paying his dues from January 1, 1933, until July 1, 1933, may be a moot question with the Board of Supervisors. If a member has paid his 1932 dues and is conscientious in his intention and promise to pay his 1933 dues, and enters into an obligation with the association to pay these dues prior to July 1, 1933, and has in fact paid such dues by July 1, 1933, he might still be considered a bona fide member by reason of the obligation entered into with the association. Many of the members may honestly intend to pay their dues before July 1, 1933, but due to financial difficulties are unable to do so. Of course there may be former members who do not intend to pay up any dues for 1933, even though they might promise to do so. It is this latter class that makes the Board's decision a difficult one, prior to July 1, 1933. If the Board should adopt the policy that they would not make this appropriation until after July 1, 1933, then they would be in a position to know definitely whether or not this member really did intend to pay his 1933 membership dues. He would have been given six months' period of grace, in which to make good on his promise, and not having done so for a period of six months, the Board could adopt the policy that this member was not a bona fide member and should not be considered as a member of the group for the purpose of determining whether or not the association had met the requirements of Section 2930 of the Code.

However, this is entirely a matter of policy for the Board of Supervisors in each county to determine. There is no statutory requirement making it mandatory on the Board to wait until after July 1st, before they make such appropriations. However, there is no specific statutory requirement making it the mandatory duty of the Board to make this appropriation prior to July 1, 1933. It is the apparent legislative intention, as expressed in Chapter 138 of the 1931 Code, that the appropriation should be made sometime shortly after the first Monday of January of each year, after the formation of such Farm Aid Associations. This is inferred from the statutory requirement in the Articles of Incorporation making the dues payable after the year, in which they joined the association, on the first Monday in January thereafter. What the legislators evidently had in mind was that, in the formation of such an association, the membership dues would be paid on the first Monday in January thereafter, and as soon as the association had the required statutory number of bona fide members, together with the yearly membership dues and pledges, amounting to the statutory requirement, and that they were cooperating with the United States Department of Agriculture, the State Department of Agriculture, and the Iowa State College of Agriculture and Mechanical Arts, to then go ahead and make the appropriation. Where the dues are not paid on the first Monday in January, as provided by the Articles of Incorporation,

in compliance with the statutory requirement, it leaves the Board more or less up in the air, in determining whether such members should be considered bona fide members or not.

It is the opinion of our Department that, if the members should execute a promissory note or a check for their dues to the association on the first Monday in January, or shortly thereafter, then the Board would be in a position to conscientiously consider them as bona fide members of the organization. Of course, if the member pays his dues on the first Monday in January, there can be no question about him being a bona fide member.

It might be advisable for the Board to establish the policy of not making these appropriations until after July 1st in the year in which the appropriation is due, in case there is any question as to whether or not the membership is bona fide. Where this policy has not been adopted, the change might create additional difficulties, which might render it inadvisable. However, in order to entitle any such Farm Aid Association to receive this appropriation, they must have at least 200 bona fide members, whose aggregate yearly membership dues and pledges to such organization amount to not less than $1,000.00. If the Board is satisfied from a fair and impartial investigation that the association has the required number of bona fide members and dues and pledges, the Board may make this appropriation at any time after the first Monday in January.

FISH AND GAME: Sale of property owned by commission.

May 25, 1933. *Fish and Game Department, Des Moines, Iowa:* In answer to your inquiry, of recent date, in which you ask for an opinion as to the rights of your Commission to dispose of real estate, to-wit: A lot, which the Commission owns at Lansing, Iowa, will say that, in the opinion of this Department, there is no legal machinery in the state at this time which would allow your Commission to dispose of the same by sale.

We have checked the powers granted to the Fish and Game Commission and also those granted to the Executive Council and have come to the conclusion that the only method, by which this sale can be made, is by legislative enactment.

In this connection, relative to the powers of a subdivision of the state, or a Board or Commission of the state, we wish to call your attention to the case of Scott County vs. Johnson, found in 209 Iowa, 213, and particularly to the statements of the Court, at page 221, which is, as follows:

"The plaintiff is one of the counties of the state. True, it is a body corporate, and may sue or be sued as such. But this attribute is conferred upon it by legislation, and not otherwise. It is a subdivision of the state, and owes its creation to the state, and is subject at all times to legislative control. * * * * All its revenues are public revenues, derived through the power of taxation conferred upon the county by the legislature. All its rights, privileges, and power are likewise governmental, and are conferred upon it by legislation; and none of them inhere in it independent of such legislation. Its rights herein are measured by the statute; and none are superior to statutory control."

I am informed through this Department that the Iowa State Highway Commission is desirous of disposing of some property and that Mr. C. E. Walters, Special Assistant Attorney General, is preparing a bill to allow that Commission and also Commissions and Boards instituted, such as your Commission, to dispose, *by sale*, or exchange, of public lands under the jurisdiction of such Boards. In that connection, we notice House File No. 278, a recent enactment

of the Forty-fifth General Assembly, repeals Section 1824, of the Code of Iowa, 1931, and enacts a substitute therefor permitting the Executive Council, upon recommendation of the Board of Conservation, to sell, trade or exchange state-owned lands, under the jurisdiction of said Board, and provision is made for the use of the proceeds of such sale or transfer and for the issuance of patents therefor. A copy of this act is, as follows:

"Section 1. That section eighteen hundred twenty-four (1824) Code, 1931, is hereby repealed and the following enacted in lieu thereof:

'Sale or exchange of public lands under jurisdiction of the Board. The Executive Council may, upon a majority recommendation of the Board of Conservation, sell or exchange such parts of public lands under the jurisdiction of the Board as in its judgment may be undesirable for conservation purposes, excepting state owned meandered lands already surveyed and platted at state expense as a conservation plan and project tentatively adopted and now in the process of rehabilitation and development authorized by a special legislative act. Such sale or exchange shall be made upon such terms, conditions or considerations as the Board of Conservation may recommend and that may be approved by the Executive Council, whereupon the Secretary of State shall issue a patent therefor in the manner provided by law in other cases. The proceeds of any such sale or exchange shall become a part of the funds to be expended under the provisions of this chapter.'"

You state that your Commission has no use for the lot at Lansing, Iowa, and our suggestion is that if you have a purchaser available that you enter into a contract, subject to the approval of the Legislature and have the same so worked that if an enactment is passed by the Special Session of the General Assembly, which, we understand, is to be called in the month of August, of the current year, that such an act will allow your Commission to complete this sale, so that the terms of the agreement may be carried out, otherwise not.

BANKS AND BANKING: Objectionable paper: Removal thereof.

May 25, 1933. *Superintendent of Banking, Des Moines, Iowa:* We have your letter of some time ago in which you write us in part as follows:

"Section 9183, 9183-c1 and 9184 provide for the investment of funds of savings banks, state banks and trust companies. The clause in line three of Section 9184 reads as follows: 'or any other personal or public security.'

"Please give us your interpretation as to our rights in requiring the elimination of paper we regard as objectionable in the light of the wording of the statute."

Under the statutes of Iowa, the Superintendent of Banking is the head of the Banking Department of Iowa and has general charge, control, supervision and direction of banks and trust companies incorporated under the laws of Iowa and is charged with the execution of the laws of this state relating to banks and banking. Banking is affected with vital public interests and is subject to regulation by law in interest to the public welfare. A banking corporation is wholly a creature of statute and does business by legislative grace.

Under the law, you were charged with the control, supervision and direction of these corporations. You have the right to require the removal of objectionable securities and in our opinion, you have the right to object to the investment of savings banks, state banks and trust companies in objectionable securities and if you believe that securities are illegal and objectionable, you may order their elimination, as Section 1984 does not mean that such corporations may invest in any personal or public security that they choose, but the same must be with your approval.

MUNICIPALITIES: Manufacturing and sale of non-intoxicating liquors.

May 26, 1933. *League of Iowa Municipalities, Marshalltown, Iowa:* This will acknowledge receipt of your letter of the nineteenth instant, in which you request an opinion of this Department. You include a form of ordinance drafted by you, in compliance with request from numerous cities and towns in the state.

Condensing your inquiry somewhat, you state, as follows:

Should the penalty section of such an ordinance, as allowed by the recent enactment, of the Forty-fifth General Assembly, legalizing and regulating the manufacture and sale of non-intoxicating liquors, as provided in Section thirty-seven (37), thereof, be in keeping with Section 5714, of the Code of Iowa, 1931, or should it, by reason of the wording of the section of the Act, under consideration, owing to the use of the words " * * * in conformity with the provisions of this Act" provide for a penalty in the same proportion, as provided in Section thirty-eight (38) of the Act?

In the opinion of this Department, Section 5714, of the Code of Iowa, 1931, should prevail for the following reasons:

We do not believe that it was the intent of the Legislature to have the penalty, identical to the provisions of the act and in this connection, we wish to call your attention to the definition of the word "conformity," Words and Phrases, Second Series, Volume I, page 890, which is, in part, as follows:

"The word 'conformity' as used in Code Civ. Proc., Section 540, providing that writ of attachment directed to the sheriff must require him to attach so much of defendant's property 'as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in *conformity* with the complaint,' etc., is not the equivalent of "*identical,*' but rather means '*in accordance and character and in harmony or congruity.*' "

Webster's College, Home and Office Dictionary gives the following definitions of the word "conformity":

"Compliance with established forms; conformity."

and also gives the following definitions of the word "identical":

"Expressing sameness; differing in to essential point."

Accordingly, we feel that your ordinance, a copy of which is enclosed in your letter, is correct as to the penalty.

Also, the Legislature, undoubtedly, did not give or intend to give the cities and towns the power to impose larger penalties than those recited in the general provisions of the law, such as Sections 5714, 5926 and 6720, of the Code of Iowa, 1931.

MUNICIPALITIES—Refunding of license fees.

May 26, 1933. *League of Iowa Municipalities, Marshalltown, Iowa:* This will acknowledge receipt of your letter of the nineteenth instant, in which you ask for an opinion, of this Department, on the following question:

Can a city or town make a refund on the license fee on a pro rata basis in cases where the permit is either cancelled or revoked?

We are of the opinion that the power of the city or town, in this matter, is limited to the provisions of the recent enactment of the Forty-fifth General Assembly, legalizing and regulating the manufacture and sale of nonintoxicating liquors, and there being no provision for such a refund, on a pro rata basis, it cannot be done.

The answer, as given to the question, set forth in the other opinion, will answer the third question presented in your communication of the nineteenth instant, relative to the case where an applicant has applied for and has been

granted a Class "C" permit and later decides to apply for a Class "B" permit and desires that the amount paid in on the permit held by him be credited on the amount to be paid for the other type of permit. We are of the opinion that the law does not provide for such a credit to be extended and that the act should be construed accordingly.

In answer to your fourth question, relative to the form of ordinance and as to whether or not a city or town could conflict with the state statutes, relative to the hours of selling this beverage and as to the manner and form of the state of the same, etc. This is a question of reasonableness, in keeping with the cases cited in Annotations to the Code of Iowa, Volume I, Chapter 290, Ordinances, which are, as follows:

Ebert vs. Short, 199 Iowa 147; 201 Northwestern 793.
Meyers vs. C., R. I. & P. R. Co., 57 Iowa 555; 10 Northwestern 896.
State Center vs. Barenstein, 66 Iowa 249; 23 Northwestern 652.
Swan vs. Indianola, 142 Iowa 731; 121 Northwestern 547.
Star Trans. Company vs. Mason City, 195 Iowa 930; 136 Northwestern 899.

The intent of the Legislature was not to give cities and towns the power to adopt any ordinances, which would conflict with the provisions of this act or to make regulations, which would conflict with the sale of the beverage.

This Department would be interested in receiving from you a resume of the opinions, expressed by the ten lawyer-members of the Legislature, to whom you state you have written, regarding the questions, presented herein, especially as to the penalty provision.

The act was not drafted in this office. I make this observation, in response to your inquiry, relative to this point.

LEGALITY OF SENATE FILE 487, 45th GENERAL ASSEMBLY.

May 29, 1933. *Treasurer of State, Des Moines, Iowa:* I have your request for an opinion from this Department concerning the legality of Senate File No. 487, which was a bill for an act to provide for the release of public funds in closed banks, to authorize the Executive Council to obtain funds from the Reconstruction Finance Corporation therefor, and to levy a tax for the purpose of securing repayment thereof.

It is the opinion of this Department that this act is authorized by the laws of this state. The only question that can possibly arise is concerning the right of the Executive Council to levy such a tax as being a delegation of legislative powers. This question has been squarely passed upon by the Supreme Court of Iowa in the case of Rowley vs. Clarke, 162 Iowa, page 732, decided by the Supreme Court on December 5, 1913.

The question presented to our Supreme Court in the Rowley vs. Clarke case, was whether or not the legislature had the right to authorize the Executive Council to levy a tax for the payment of a capitol extension. The principle involved in the Rowley vs. Clarke decision is exactly the same as the question that you now raise with respect to Senate File No. 487. This is not in violation of the constitutional provisions of this state. Along this line, let me call your attention to the language used by our Supreme Court in the Rowley vs. Clarke case:

"The levy of a tax to be collected in the future does not constitute a provision for expenses presently created, within the contemplation of Section 2, Article 7 of the Constitution; and the mere fact that a statute authorizes the levy of future taxes to discharge a present obligation does not preclude

the right to create a debt, but the statute may authorize the expense to be incurred and at the same time direct the issuance of evidence of indebtedness and provide for a future tax out of which to extinguish the debt."

Therefore, it is the opinion of this Department that Senate File No. 487, above referred to, is entirely legal and constitutional and does provide the legal and proper machinery for the discharge of the obligations authorized by this act, and the repayment of any loan that may be negotiated with the Reconstruction Finance Corporation, or any other governmental agency authorized to advance such a loan.

CITY ORDINANCE UNDER BEER LAW.

June 3, 1933. *County Attorney, Manchester, Iowa:* This will acknowledge receipt of your letter of the twenty-second ult., in which you ask for an opinion of this Department, on the following question:

The city council of Hopkinton, Iowa, in your county, has adopted an ordinance for the regulation of sale of beer, which prohibits the sale between the hours of 11:30 p. m. and 7:00 a. m., on week days.

Is such an ordinance valid, under the recent enactment of the 45th General Assembly, legalizing and regulating the manufacture and sale of non-intoxicating liquors?

In the opinion of this Department, in keeping with Section 37, of the act, under consideration, which states, as follows:

"Cities and incorporated towns, including cities under special charter are hereby empowered to enact ordinances for the enforcement of this Act in conformity with the provisions of this Act."

Section 38, of the act, provides for the penalty. We construe this to mean that Chapter 290, of the Code of Iowa, 1931, relative to ordinances, controls. In this connection we are of the opinion that the power of a city or town is limited to the provisions of the act, under consideration.

The question involved is whether or not the ordinance is reasonable. In Volume I, of the Annotations to the Code of Iowa, 1931, the following cases are cited, with reference to whether or not an ordinance is reasonable:

Ebert vs. Short, 199 Iowa 147;
Myers vs. C., R. I. & P. R. Co., 57 Iowa 555;
State Center vs. Barenstein, 66 Iowa 249;
Swan vs. Indianola, 142 Iowa 731;
Star Trans. Company vs. Mason City, 195 Iowa 930.

The intent of the Legislature was not, in our opinion, to give cities and towns the power to adopt any ordinances, which would conflict with the provisions of this act or to make regulations, which would conflict with the sale of the beverage.

Therefore, we conclude that no ordinance should be enacted which would change or differ the hours during which beer is to be sold from that designated under the recent enactment of the 45th General Assembly, legalizing and regulating the manufacture and sale of nonintoxicating liquors. A regulation such as this, by cities and towns, might lead to a local option interpretation of this act, which was not the intent of the General Assembly enacting the same.

MANUFACTURING AND SALE OF NON-INTOXICATING LIQUORS.

June 3, 1933. *County Attorney, Clinton, Iowa:* This will acknowledge receipt of your request for an opinion, of recent date, relative to the following question:

"(1). Does the provision 1b of Sections 10, 11, and 12 of said Act (the recent enactment of the 45th General Assembly, legalizing and regulating the manufacture and sale of non-intoxicating liquors) in which the provision is made that the applicant must be 'a citizen of the state of Iowa' mean that the applicant must be a natural born or a naturalized citizen of the United States?"

In the opinion of this Department, the wording, as used in the act, "that he is a citizen of the State of Iowa," is broad enough to include both a natural born and naturalized citizen of the United States.

In Question Two, you state, as follows:

"(2). What is the interpretation which your office has presented upon Division E of Sections 19 and 20?"

The wording of this division (Division E), of the sections, referred to, is, as follows:

"Sec. 19. * * * * * * * * * * * * *

"e. Unless the application for such permit is approved by a majority of the bona fide members of such club who are present at a regular meeting, or a special meeting called to consider the same."

Sec. 20. * * * * * * * * * * * * *

"e. That the application for such permit was approved by a majority of the bona fide members of such club present at a regular meeting or at a special meeting called to consider the same."

In the opinion of this Department, the words "approved by a majority of the bona fide members of such club" are qualified by the succeeding phrase "who are present at a regular meeting, or a special meeting called to consider the same" and you will note that this is true in Division E of Section 20 that the phrase "approved by a majority of bona fide members" is also qualifide by the statement "present at a regular meeting or a special meeting."

Accordingly, we take it that it is a majority of the bona fide members, *who are present.*

In answer to your third inquiry will say that under Section 19, of the act, under consideration, the board of supervisors may issue a Class "B" permit to a golf or country club. You desire to have us define what is meant by a country club.

The Legislature having used the words "golf *or* country club," we are of the opinion that it is not necessary that the country club be organized with the primary purpose of playing golf and that any recognized outdoor exercise, either golf, tennis, boating or numerous other activities, qualifies a club as a country club, where the same is organized and operating outside the territorial limits of a city or town.

In Question Four, you inquire, as follows:

"Must clubs that have permits, serve food with the drink?"

In the opinion of this Department, the food provision relates to Class "B" permit holders in retail trade, who operate a restaurant or a cafe and does not apply to a hotel or to a club. The latter situation arises where beer is sent to the guests' rooms of a hotel and as you will note, this is construed not to be a sale of beer *off the premises*, which, as is considered in the case of a Class "B" or Class "C" permit holder in sending out not less than 144 ounces, shall be *unrefrigerated.*

June 5, 1933. *Real Estate Commissioner, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-third ult., in which you request an opinion on the following matter:

"We have a complaint against a real estate broker in Des Moines who listed a house for rent at $50.00 per month and collected $25.00 from the prospective tenant. The prospective tenant did not go through with the transaction, and the real estate broker retained the $25.00, without notifying the property owner of this transaction."

This is not a law question but one of fact.

The contract of employment of the broker, by the real estate owner, whether verbal or in writing, would control in such situation. In the absence of any agreement whether written or verbal, the question would then be one of implied contract.

Our Supreme Court, in a recent decision, Wareham vs. Atkinson, et al, 247 Northwestern Reporter, 534, on Page 536 states, as follows:

"(4). In the instant case it was necessary for the plaintiff to prove: (1) The contract upon which he bases his right to a commission; (2) that he produced a purchaser who was ready, willing, and able to purchase on terms satisfactory to the defendants; (3) that the purchaser was induced to enter into the negotiations and to make the purchase through the efforts of the plaintiff as agent, in other words, that the plaintiff was the efficient moving cause of the sale; (4) *that there was an implied contract to pay commission or compensation for his services.*"

Accordingly, we are of the opinion, (1) that the contract, as between the parties, relative to the amount of the commission, would control in case there was a contract; and (2) in the absence of any contract, then, in accordance with the holding of the Court, as above set forth, in Division (4), the matter of implied contract to pay commission or compensation for services rendered would arise.

The only question that would arise in this last named procedure would be as to whether or not the retention of the $25.00 was reasonable compensation for the services rendered.

AGRICULTURAL DEPARTMENT.

June 5, 1933. *Treasury Department, St. Paul, Minnesota:* This will acknowledge receipt of your inquiry of the twenty-fifth ult., in which you ask for an opinion and an interpretation of the recent enactment of the 45th General Assembly, legalizing and regulating the manufacture and sale of nonintoxicating liquors, in which you state, as follows:

Sub-Section 7 of Section 2073 of Chapter 100, of the Code of Iowa, 1931, provides that an applicant for a permit to buy, keep and sell liquors, must show in his petition that he is not a keeper of a hotel, eating house or restaurant, and that none of said named businesses are located in his place of business or directly connected therewith; that Section 14 of House File No. 587 provides that no sale of beer shall be made for consumption on the premises unless food is served therewith; and that such place is equipped with tables and seats sufficient to accommodate at least 25 persons at one time.

You desire to know whether or not if the holder of either kind of a permit can sell the other designated beverage, as one section requires that no food be served, while the other requires that it be served. You submit the following questions:

"(1). What constitutes the keeping of an eating house or restaurant, so as to bar the keeper from securing a permit to sell liquor on prescription?"

Section 2808, of the Code of Iowa, 1931, contains a definition of the word "food" and this section states, as follows:

"5. 'Food' shall include any article used by man for food, drink, confectionery, or condiment, or which enters into the composition of the same, whether simple, blended, mixed, or compound."

The definition of the word "restaurant" is found in Division Four, of the same section, and states, as follows:

"4. 'Restaurant' shall mean any building or structure equipped, used, advertised as, or held out to the public to be a restaurant, cafe, cafeteria, dining hall, lunch counter, lunch wagon, or other like place where food is served for pay, except hotels and such places as are used by churches, fraternal societies, and civic organizations which do not regularly engage in the serving of food as a business."

Division Six, of this section, contains a definition of the words "Food establishment," which is, as follows:

"6. 'Food establishment' shall include any building, room, basement, or other place, used as a bakery, confectionery, cannery, packinghouse, slaughterhouse, dairy, creamery, cheese factory, restaurant or hotel kitchen, retail grocery, meat market, or other place in which food is kept, produced, prepared, or distributed for commercial purposes."

In regard to your second question, which is as follows:

"(2). What constitutes the serving of food on premises so as to qualify the proprietor to secure a permit to sell beer?"

You are advised, in accordance with the division, which defines the word "food" (Division 5, of Section 2808), that wafers or pretzels are food and are sufficient, according to the wording of the act.

Relative to your third question, which is as follows:

"(3). May these two privileges be possessed on the same premises?"

and also your fourth question, in which you state as follows:

"(4). Putting the last question more specifically, may a druggist who has a permit from the State to sell beer under the new law also have a right to a permit to sell liquor on prescription as medicine?"

will say that if your Department would construe the service of pretzels and wafers with beer to be an operation of a restaurant or food establishment, then we presume that it would come in conflict with the provisions of the act, which allows the sale of liquor on prescription for medicine.

However, you state that where a druggist sells malted milk and with it, wafers, that your office does not make the point that one so serving it is keeping an eating house or restaurant and we would construe this in the same manner under the so-called Beer Law.

There is also the further qualification, in House File No. 587, and Amendment, House File No. 611, that there must be tables and seats to accommodate at least 25 persons at one time. However we construe the serving of pretzels and wafers, with beer, to be a service of food the same as you do, in administering the act on medicinal whiskey where they serve malted milk and wafers. It would seem that this would be a violation of a very minor nature and that in the event that the druggist who desires to sell both medicinal whiskey on prescription and beer might sell malted milks and whiskey and also serve the wafers or pretzels with beer and not come within the provisions of one running a restaurant or food establishment.

In the event that a druggist, such as we have designated, would go into the business of selling sandwiches and food of various sorts, then, he would be subject to the law, rules and regulations of the Department of Agriculture on the operating of a restaurant, or a food establishment and would have to be licensed as such and could not sell medicinal liquor on prescription.

BEER BILL: KEG BEER: STORING: SALE: LICENSED REFRIGERATOR STOREHOUSE:

June 5, 1933. *County Attorney, Mason City, Iowa:* This will acknowledge receipt of your letter, of the twenty-seventh ult., in which you request an opinion, from this Department, on the following matter:

"May a licensed refrigerator storehouse store keg beer for the purpose of refrigeration, the particular warehouse in question not being in the beer business and so not having any type of beer permit?"

In the opinion of this Department Section Thirty-two (32), of the recent enactment of the Forty-fifth General Assembly, legalizing and regulating the manufacture and sale of nonintoxicating liquors, controls in this matter, which section is, as follows:

"Every person holding a Class 'B' or Class 'C' permit having more than one (1) place of business wherein such beer is sold shall be required to have a separate license for each separate place of business."

In the case of a Class "B" or Class "C" permit holder, the question involved is whether or not beer is sold and if so, then there shall be a separate license for each separate place of business.

In the case of a Class "A" permittee, Section Thirty-one (31), of the act, controls, and this section states, as follows:

"Every Class 'A' permittee having more than one (1) place of business shall be required to have a separate license for each separate place of business maintained by such permittee wherein such beer is stored, warehoused, or sold."

In the opinion of this Department, in the case of a Class "A" permit holder, wherever beer is stored, warehoused or sold, there must be a separate permit, in each case.

However, in the case of a Class "B" or Class "C" permit holder, the controlling question is relative to a place of business where beer is sold.

In the case of a storehouse refrigerating beer, it might be construed that he should apply for a Class "A" permit by reason of the wording of Section Thirty-one (31), in which it includes stored and warehoused.

STATE SINKING FUND: PUBLIC FUNDS: INTEREST TO STATE TREASURER: SENATE FILE NO. 111:

June 5, 1933. *Treasurer of State, Des Moines, Iowa:* This will acknowledge receipt of your request for an opinion on a letter, received by your Department, from M. B. Guthrie, Cashier, Hershey State Bank, Muscatine, Iowa, under date of the thirty-first ult., in which he states, as follows:

"We are today remitting interest on various public funds which are impounded under Senate File No. 111 to the County Treasurer, to be in turn forwarded to your office for the Lovrein Brookhart sinking fund. In this connection we wonder if we are within our rights in diverting this interest to your office, since we find that public funds in banks which are about to be reorganized out of Senate File No. 111, have no claim on the sinking fund for reimbursement."

In the opinion of this Department, no claim can be had on the sinking fund, unless all the requirements of Chapter 352-A1, of the Code of Iowa, 1931, are met, as it is a special act for a special purpose. This is also true in regard to the meeting of requirements, under Chapter 352-D1, which is entitled "Deposit of Public Funds" and also Chapter 352-A1. Under the last designated chapter, you will note that Section 7420-D2 requires that a written resolution or order shall be entered of record in the minutes of the approving board

and shall distinctly name each bank approved, and specify the maximum amount which may be kept on deposit in each such bank.

Also, Section 7420-d6, which states, as follows:

"Said deposits shall draw interest at the rate of not less than two percent per annum on ninety percent of the collected daily balances, payable by the bank at the end of each month, provided that interest at the rate of one per cent per annum on ninety per cent of the daily balance shall be required on such funds deposited by any treasurer of a school, city or town corporation, by a county treasurer, or by a township clerk for the months of April and October."

Accordingly, no claim against the state sinking fund can be certified as against it, unless the requirements with regard to the depository bank is qualified by a written resolution and the amount to be certified is less than the amount specified, which can be so deposited and the further requirement that the interest, in accordance with the section set out above, has been complied with.

We are of the opinion that until a bank is closed and placed in the hands of a receiver, in accordance with Code Section 7420-a9, no claim against the sinking fund arises. In the case of reorganization the condition precedent to the filing of such claim has not yet arisen. However, should the reorganization fail and the bank be placed in the hands of a receiver, if the interest were not paid, then the right of participation in the state sinking fund would be denied.

Accordingly, either under Senate File No. 111, or in the further step of reorganization, if it is the desire to participate in the state sinking fund, in the event that a receiver is later appointed, the interest must be paid.

CHIROPRACTORS. PRESCRIBING DRUGS OR MEDICINES.—FOOD.

July 6, 1933. *County Attorney, Polk County, Des Moines, Iowa:* Your letter of the first inst. asks for an opinion from this office on the following question:

"Is it illegal for a licensed chiropractor, under the state law, to prescribe, sell or indicate to his patient crushed and ground garden vegetables put in gelatine capsules and specified as nutritional foods for no other purpose?"

Section 2559 of the Code provides as follows:

"Operative surgery—drugs—osteopathy. A license to practice chiropractic shall not authorize the licensee to practice operative surgery, osteopathy, nor administer or prescribe any drug or medicine included in materia medica."

From this section it is apparent that a chiropractor is by law precluded from administering or prescribing any drug or medicine included in materia medica.

In your question you use the words, "to prescribe, sell or indicate to," which are broader than the words, "administer or prescribe," used in the statute. The words, "prescribe and indicate to," would appear to mean, substantially, the same thing. The word, "sell," in your question is not included in the section above quoted, but the fact that it is omitted from that section would not mean that chiropractors may sell drugs and medicines which the statute provides they shall not prescribe or administer.

It is not for this Department to say whether "crushed and ground garden vegetables put in gelatine capsules and specified as nutritional foods," constitute drugs or medicine included in materia medica. That is a question of fact determinable by an examination of materia medica. There would appear to be no law limiting chiropractors from recommending wholesome foods in

any case where the ordinary layman would be within the law in so recommending them.

CORPORATION—FEE—FOREIGN CORPORATION. FEE FOR INCREASE IN CAPITAL.

July 6, 1933. *Secretary of State, Des Moines, Iowa:* We have your letter of June 29th last, as follows:

"Calling your attention to section 8424 of the 1931 Code of Iowa, you will note that a foreign corporation may report the amount of money or property increased in the state of Iowa, by an additional statement attached to the annual report or the same may be shown upon the annual report.

We are desirous of knowing if the fee that is required to be paid for this increase in capital should be paid at the time the annual fee is paid and annual report submitted, also, if this is a part of the annual report as well as the annual fee that is required."

Section 8424 of the Code is as follows:

"Increase of capital—blanks. If from time to time the amount of money or other property in use in the state by said foreign corporation is increased, said corporation shall at the time of said increase, or at the time of making annual report to the secretary of state, in July of each year, file with the secretary of state a sworn statement showing the amount of such increase, and shall pay a filing fee thereon of one dollar for each one thousand dollars or fraction thereof of such increase. The secretary of state shall upon request furnish a blank upon which to make report of such increase of capital in use within the state."

Your attention is called particularly, to the part of said section which reads as follows:

"Said corporation shall at the time of said increase or at the time of making annual report to the secretary of state, in July of each year, file with the secretary of state a sworn statement showing the amount of such increase and shall pay a filing fee thereon, etc."

The fee that is required to be paid for the increase in capital should. according to this section, be paid at the time the annual fee is paid and annual report submitted, unless it has been previously paid at the time the increase was made.

Answering you in the language of your letter, it is my opinion that this is a part of the annual report, as well as the annual fee, that is required.

BOARD OF CONSERVATION.

June 6, 1933. *Board of Conservation, Des Moines, Iowa:* This will acknowledge receipt of your communication of the twenty-third ult., in which you ask for an opinion, relative to the following:

Can the Board of Conservation, under the laws of the 45th General Assembly, require steam boat owners to carry boiler insurance? If not, can the Board require them to furnish the Board with a boiler inspection certificate before they can be granted a license?

It is the opinion of this Department, in view of the fact that the enactment of the 45th General Assembly, in which Chapter 85 of the Code of Iowa, 1931, and all amendments thereto were repealed, that Section 2, of the act, would permit such a requirement. The provisions of this section are, as follows:

"*Inspection of Boats and Licensing Required.* Any person having upon the inland waters of the state any boat, operated by machinery used for hire or offered for hire, must have his craft and all its appurtenances annually inspected and licensed before it is so used.

"Every such owner shall file in the office of the Secretary of the Board of

Conservation an application for inspection of boats and licensing thereof, on a blank to be furnished by the Board for that purpose.

"The boat inspector shall have the power and authority to determine whether the boat is safe for the transportation of passengers and upon what waters it may be used, * * * * to determine whether the machinery, equipment and all appurtenances are such as to make said boat seaworthy where used and equipped as provided herein, and such other matters as are pertinent.

" * * * * * * * * * * "

"The owner of all boats used for hire is held responsible for the proper equipping and licensing thereof, as provided in this act."

Under the rules and regulations for operating boats and other craft on the inland lakes and streams of the state * * * * * *, I note Division (f), which is, as follows:

"Owners of steamboats operated for hire on the inland waters of the state are hereby required to carry boiler insurance and copy of the insurance policy shall be filed with the board."

The only question involved is whether or not such a rule and regulation, with reference to the carrying of insurance on boilers, is a reasonable one. We see no ground for holding that such a rule and regulation is unreasonable and believe that the Board of Conservation was within its rights, under the authorities given by the Legislature to make such a rule and that the Courts would construe the same to be a reasonable rule and regulation.

STATE TREASURER.

June 6, 1933. *Treasurer of State, Des Moines, Iowa:* This will acknowledge receipt of your request for an opinion, under date of the fifth inst., in which you present the following facts:

"On August 5, 1931, the Bank of Popejoy of Popejoy, Iowa, a private banking institution, was placed in Receivership and among the liabilities of said bank, was the account of the Treasurer of Oakland Township School District in the amount of $3,273.83. This claim was duly proven and certified to the Treasurer of the State of Iowa for payment out of the 'State Sinking Fund for Public Deposits.' Reimbursement for the amount of said claim was made in full on or about the eighth day of October, 1931 and the claim was properly assigned to the Treasurer of State as provided by law.

"Some time later, according to the records in this office, some creditors petitioned the District Court of Franklin County to discontinue the Receivership and voluntary proceedings of bankruptcy be instituted against John E. Carr, the owner of the Bank of Popejoy. For some reason unexplained, the Treasurer E. H. Anderson of the Oakland Township School District failed to properly file this claim against the bankrupt and we find that said claim was, therefore, not included among the allowable liabilities in the schedule filed by the bankrupt.

"Inasmuch as the period provided by the law within which to file claims of this nature has expired we would like to have you determine the status of the claim at this time and the possibility of same being set up as a proper claim since the period for filing claim has expired. We would also like to have you determine the liability of E. H. Anderson, Treasurer of said School District and of Ray E. Johnson, Treasurer of the State of Iowa, for their failure in not properly filing said claim within the period provided by law."

An examination of the Bankruptcy Act, and authorities, in which rulings have been made, interpreting the said act, reveals the following:

Section 57(n) provides as follows:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment:

Provided, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer."

The only exception, of the right of a creditor to file, after the year, that we have been able to find, is that in favor of the United States. Section 511, under "Bankruptcy," in 7 Corpus Juris 312, states the rule in the following manner:

"The general rule is that claims against the estate of a bankrupt must be proved within one year after the adjudication and cannot be proved subsequently, and neither the court nor the referee has any discretionary power to permit the filing of proofs of claim after the expiration of such period, either nunc pro tunc or otherwise. Where a claim was originally filed within the year, but was disallowed, and subsequent proceedings showed that it should have been filed for a larger amount, the amendment filed after the year had expired was not barred by the one-year limitation."

The case of in re Stoever, 127 Federal 394, states the rule, with reference to the exception, which is made, on behalf of the United States, and the decision is, in part, as follows:

"The provision that claims shall not be proved against the bankrupt's estate subsequent to one year after the adjudication is a statute of limitations, and is not binding on the United States."

The facts were that the bankrupt has contracted to furnish paper to the United States, and agreed that, in case of his failure to furnish paper as ordered, he should be liable for the difference between the contract price and the amount the government was compelled to pay therefor. The holding of the Court was that the commencement of bankruptcy proceedings against him did not terminate the contract, nor affect the government's right under the contract.

Remington on "Bankruptcy," Volume 2, Page 283, Section 883, states, as follows:

"*Limitation Not Applicable to United States Government nor to Taxes.*—The limitation of Section 57 (n) does not apply to claims of the United States Government."

In the case of United States v. Birmingham Trust Company, 258 Federal 562, the Court states, as follows:

"The right of the United States to present a claim in a bankruptcy case at any time while the bankruptcy is pending and the funds thereof are not distributed, cannot be disputed."

There is a suggestion in some text books, with reference to the Bankruptcy Act and this particular section, regarding the right of a sovereign to file a claim as is outlined in the case of the United States, and we have considered the possibility of seeking to have this rule extended to include a state. However, we find the following case, which, apparently, defeats this idea:

"The sovereign power of the United States in the family of nations is vested exclusively in the United States government; 'sovereignty' in its full sense imports the supreme, absolute, and uncontrollable power by which any independent state is governed; and, although the states of the Union are called sovereign and independent states under the Declaration of Independence, they were never in their individual capacity strictly so, because they were always, in respect to some of the higher powers of sovereignty, subject to the control of a common authority, and were never separately recognized or known as members of the family of nations."—See STATE vs. DIXON, 213 Pacific 227, at Page 230; 66 Montana 76.

Section 104 of the act, is entitled "Debts Which Have Priority," and states, as follows:

"(a) The 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 payment 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.

Division (b), of this section of the act, Subdivision (5), states, as follows:

"debts owing to any person who by laws of the States or the United States is entitled to priority."

The question that presents itself, relative to filing the claim, in question, under this section of the act, is the nature of the so-called Lovrien-Brookhart Sinking Fund Act, as to whether or not it is a *tax* and therefor entitled to priority, so that a claim may be filed even though the year limit has expired.

The case of Cornelius vs. Kromminga, 161 Northwestern 625; 179 Iowa 712, states, as follows:

"A '*tax*' is a contribution or levy imposed on property for general public purposes without regard to the question of special benefits conferred."

The constitutionality of the Lovrien-Brookhart Sinking Fund Act was considered by our Supreme Court, in the case of Scott County vs. Ray E. Johnson (Treasurer of State), and the opinion of the Court, by Justice Evans, states, in part, as follows:

"The General Assembly has ample authority to divert from the county general fund to the state sinking fund for public deposits interest accruing on deposits of public funds in the hands of the county treasurer."

These funds, which are diverted to the sinking fund are those which are collected by general taxation.

Further quoting from the opinion of the Court, by Justice Evans:

"All of plaintiff's (Scott county) property is acquired by the exercise of governmental functions. *All its revenues are public revenues, derived through the power of taxation conferred upon the county by the legislature.*"

Accordingly, we are of the opinion that the money, in question, being funds raised by taxation, though later diverted to a specific fund, to wit: The so-called State Sinking Fund, and in view of the fact that this tax money was on deposit in the private bank, in question, and had not, as yet, been received by the State Treasurer, that it is inherently a trust fund.

The provision, in the section of the act, as above set out, which is, as follows:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to * * * * * *"

which includes the state, might be construed to mean *taxes*, which have been levied as against the bankrupt and not satisfied. However, in the particular case, the bankrupt had, under his custody and control, tax funds collected in the county, in which his private bank was located. These funds had not, as yet, been forwarded to the State Treasurer. In the preliminary proceedings, the amount of the fund, in question, had been certified under the receivership in the Iowa District Court to the State Treasurer and he, in turn, had allowed the claim and paid this amount back to the School District through the legal machinery of the so-called State Sinking Fund Act. At a later date, creditors succeeded in terminating the receivership proceedings, in the Iowa District Court by the filing of a Petition in Bankruptcy, which brought the particular fund, in question, under the control of the United States District Court. The assets of the bank were augmented by this particular fund, which was money raised by taxation, and it had not,

as yet, arrived at the office of the Treasurer of State. Hence the bankrupt had, under his custody and control, taxation money due the State of Iowa.

We are of the opinion that this question should be raised by the making of an application to the referee and in the event that the claim is not allowed, then, that an action should be instituted in the United States District Court to raise the question as to whether or not this particular fund comes within the exception, as set out herein, relative to the filing of this claim within the year.

In the event that we are unable to establish this claim by the method above outlined you present the following question:

"We would also like to have you determine the liability of E. H. Anderson, Treasurer of said School District and of Ray E. Johnson, Treasurer of the State of Iowa, for their failure in not properly filing said claim within the period provided by law.

In the opinion of this Department, this presents a fact question. We feel that this failure would be a neglect of the duty of a public officer. The reason that we state that it is a fact question and one which should be investigated with the following thought in mind:

(1) To whom was the notice of the first meeting of the creditors, directed, in which there appears a direction to file claim? Was it directed to the Treasurer of the School District or to the Treasurer of the State of Iowa?

The records of your office should disclose the fact with reference to this point.

(2) In the event that the notice was directed to the Treasurer of the School District and he failed to file the claim or to notify the State Treasurer that the estate of the bankrupt was being administered by the Bankruptcy Court, then we feel that any liability, which would be attached, falls upon him.

(3) In the event that your records disclose that the notice was directed to the Treasurer of State or the fact that the estate was in bankruptcy was called to his attention by the Treasurer of the School District and with the notice enclosed in such a communication or the facts with reference to the same set out fully, then, if such was the fact—that it was called to the attention of the Treasurer of State either directly by the referee in bankruptcy or by the Treasurer of the School District, then the neglect would fall upon the Treasurer of State.

Enclosed herewith, for verification by you or an official of your office, find a pleading, which we suggest be filed with the Referee in Bankruptcy, at Mason City, Iowa, asking that this claim be allowed.

In the event that the same is not allowed, then action in the United States District Court could be instituted in keeping with the procedure outlined herein and this Department would file such an action.

BOARD OF SUPERVISORS: Authority to Hire a Parole Agent for Polk County: Does not interfere with agents of State Board of Parole.

June 7, 1933. *County Attorney, Des Moines, Iowa:* We beg to acknowledge your letter of May 29th, in which you request an opinion from this office regarding the legal authority of your Board of Supervisors to employ someone to perform the duties of a parole agent in connection with defendants paroled by your Court; and, to provide for the salary to be paid such an agent.

The Board of Supervisors, under Section 5130, is clothed with a wide latitude of power, to act for its county in the management of its business and property

and preservation of order. The express provision of the statute of its authority, "to fix compensation for all services of county and township officers not otherwise provided by law, and to provide for the payment of the same," presupposes their power to meet new and needed conditions of employment as they arise. In fact, the law seems to recognize this authority as restricted by two conditions only; they cannot employ anyone to perform the duties of an office already created by law; or, exceed an express provision of statute regarding employment. Of course, their actions must be for the benefit of the county.

It is the opinion of this office, that, the State Board of Parole does not have jurisdiction, or the responsibility of parolees released by the trial court under Code Section 3800, where defendant is paroled to an individual. It would follow that the duties of a parole agent as suggested by your letter would not conflict with, or assume any of the duties of a state office.

There seems to be no express provision in the statutes regarding the particular employment of a county parole agent, so that in creating such an agency and fixing its compensation and providing for the payment of same, the board would not exceed any, "express provision of the law,"

The need of such action by your Board of Supervisors is well expressed in your letter and your opinion in that regard should be ample assurance of its necessity and benefit to your county.

Our Supreme Court has consistently upheld the action of county boards in agency employment for various special services, the need thereof, the good faith of the board and the elimination of the two restricted conditions hereinbefore referred to, being the basis of its approval of such employment. It is therefore the opinion of this office that the Board of Supervisors of Polk County does have authority to employ an agent to supervise the paroled subjects of your court as suggested in your letter, and to fix his compensation and provide for its payment.

SOLDIERS' RELIEF COMMISSION: POOR FUND.

June 8, 1933. *County Attorney, Shenandoah, Iowa:* We wish to acknowledge receipt of your letter of June 1st, in which you ask for an opinion on the following:

"The Tuck Law, that is, Section 5259 of the Code of 1931, exempts expenditures for the benefit of any person entitled to receive help from public funds. Does this give the Soldiers' Relief Commission authority to issue warrants in excess of the amount anticipated for said fund, or levied for said fund?"

It is the opinion of this office that the Soldiers' Relief Fund is exempted from the operation of the Tuck Law, for the reason that Section 5259-4 does not use the term, "poor relief," but specifically provides that it shall not apply to expenditures for the benefit of any person entitled to receive help from public funds.

Your question does not take into consideration the Budget Law, as contained in Chapter 24 of the Code of 1931, and especially Section 380. Were it not for an act of the recent Legislature, this Budget Law might prevent the issuance of such warrants against the Soldiers' Relief Fund. However, House File 114 amends Section 380 by striking out the words and figures at the end of said section, "in Section 373 and 381," and substituting therefor, the following, "in Sections 373, 381 and paragraph 4 of Section 5259."

In view of this amendment, we are of the opinion that neither the Tuck Law nor the Budget Law prevents the issuance of warrants, provided that said warrants are issued by the County Auditor in disbursing said funds. However, there is no provision which would authorize the Relief Commission, after receiving a payment from the County Auditor, to issue checks in disbursing the funds to an aggregate amount in excess of the anticipated revenue.

Under Section 5392, the County Auditor may issue his warrant to the Commission and allow that body to disburse the funds, or said funds may be disbursed in any other manner the Commission may direct. According to this section, the Commission could direct that the county officer issue the warrants direct to the persons entitled to receive the benefits. The warrants then being issued by the Auditor on the county funds, there would be nothing to hinder the overdrawing of the funds.

MUNICIPALITIES—Class "B" Permit.

June 9, 1933. *County Attorney, Iowa City, Iowa:* This will acknowledge receipt of your letter of the eighth inst., in which you request an opinion on the following questions:

"1. In the event a town council has issued to an individual a Class "B" permit covering a certain place of business, which place is described in the license, and the permit holder moves his business to another building and another location in the same town, will his license and permit continue and be valid for the new location, or will his old permit be automatically cancelled and he be required to obtain a new permit and again pay a license fee?"

In the opinion of this Department, such a transfer of the place of business could not be construed to be a cancellation or a forfeiture of a permit. This would be a matter within the discretion and jurisdiction of the city or town council and, of course, the permit holder would have to abide by Subdivision (b), Division (2), of Section 11 of the Act, which, is, as follows:

"b. That the place or building where he intends to operate conforms to all laws, health and fire regulations applicable thereto, and is a safe and proper place or building."

and also comply with the other provisions of the act with reference to the location of a place and building, which would have to be a matter or record at the city hall and also the provision in the act, relative to the name of the owner of the building and if such owner is not the applicant that the applicant is the actual lessee of the premises. The same procedure would follow as in the case of a fire, where the place of business of the permit holder was destroyed and we are of the opinion that this would be simply a matter of the records to be kept with reference to permit holders by the city clerk of the municipality issuing the permit.

In answer to your second question, which is, as follows:

"What would be the rule on a Class "C" permit on the same circumstances?"

will say that we feel that this question has been clearly answered in our answer to your first question, except of being Section 11 of the Act, Section 12 applies in the case of a Class "C" permit holder.

In answer to your third question, which is, as follows:

"In the event the old permit can be transferred to the new place of business, what sort of an application should be made to the council and what procedure followed?"

It is the opinion of this Department that a request for such a transfer should be informal. The only question would be, as set out in answer (1), and that

is that the place or building conforms to the provisions of the act, which change could be made on the records in the office of the city clerk.

BANKS AND BANKING: INTEREST ON PUBLIC DEPOSIT IN TRUST FUND REORGANIZED BANK.

June 9, 1933. *Superintendent of Banking, Des Moines, Iowa:* We have your request for an opinion as to whether banks that have been reorganized must pay interest on that part of the public deposit in the trust fund.

Section 7420-d6 of the Code, 1931, provides generally that banks must pay 2% interest per annum on 90% of the collected daily balance on public deposits except for the months of April and October.

Section 7420-a6 of the Code, 1931, provides for diversion of this interest to the Sinking Fund. Neither one of these sections were repealed by the last General Assembly and the Forty-fifth General Assembly passed both House File 541 and Senate File 483, both providing that there shall be no waiver of right of public bodies to participate in the State Sinking Fund.

It is therefore the opinion of this Department that the interest required to be paid on public deposits by banks must be paid on that part of the deposit in the trust fund.

MUNICIPALITIES—Hospital project.

June 9, 1933. *County Attorney, Spencer, Iowa:* This will acknowledge receipt of your letter of the seventh inst., in which you request an opinion on the following question:

An election was held at Spencer on June 6, 1933, under the provisions of Senate File No. 256, authorizing a city to pledge a part of the net income from its municipally-owned light plant for the purpose of building a hospital. Section 2 of this bill provides that the power granted to the city council shall not be exercised unless a majority of the legal electors of the city voting thereon vote in favor of the exercise of such power.

Can the city council, in view of the fact that a majority of those voting were in favor of building a hospital, carry out the provisions of Senate File No. 256, in view of the provisions of Sections 1171-d4 and 6246, of the Code of Iowa, 1931?

In other words—do these provisions conflict with Senate File No. 256?

In the opinion of this Department, Senate File No. 256 is a separate and distinct method of financing a project of this nature and supercedes Sections 1171-d4 and 6246 of the Code of Iowa, 1931. The sections of the Code to which you refer, while setting up a different matter, would not take precedence over Senate File No. 256.

Senate File No. 256, in brief, sets up legal machinery by which a city of the second class, having a population not less than 5,000 and not more than 6,000, owning and operating an electric light and power plant that is wholly paid for, and that is producing an annual income from the sale of electric current in excess of all expense of operation and reasonable depreciation charges, may, for the purpose of paying the cost of the construction of a municipal hospital, borrow money, and may, for the repayment of said loan and interest thereon, pledge for a period not exceeding fifteen (15) years, not to exceed fifty per cent (50%) of the net earnings each year of said plant. It also provides a method by which the council may issue interest-bearing certificates of indebtedness and the method of payment thereof. Section 2 provides that this power shall not be exercised, unless a majority of legal electors of the city, voting thereon, vote in favor of the exercise of such power and also

provides that the question may be submitted at a general or special election called for that purpose. It further provides for the filing of a petition with the mayor and for the method of giving notice of election, as provided in Section 6133 of the Code of Iowa, 1931.

We are of the opinion that a new, separate and distinct method of financing is set up by this act and that it is not recognized as being a bond indebtedness and is not dependent upon a millage levy.

You will note, from an examination of the Section 1171-d4 of the Code of Iowa, 1931, that the wording, in part, is, as follows:

"Hereafter when a proposition to authorize an issuance of *bonds* * * * * * is submitted to the electors, such proposition shall not be deemed carried or adopted, anything in the statutes to the contrary notwithstanding, unless the vote in favor of such authorization is equal to at least sixty per cent of the total cast for and against said proposition at said election."

Section 6246 of the Code of Iowa, 1931, provides, as follows:

"A majority of all the legal votes cast on the particular question at the election shall be sufficient to authorize the municipality to contract the indebtedness, except that if the question submitted is one in connection with waterworks, gasworks, electric light or power plants, heating plants, or the establishment of a hospital, the affirmative vote shall also be as large as a majority of all the legal votes cast at the preceding municipal election."

One Legislature could not bind a succeeding Legislature from passing an act, which would set up a definite manner of financing, such as is set up in Senate File No. 256.

You will note that the wording of Senate File No. 256, in part, states as follows:

"* * * * * * unless a majority of the legal electors of the city voting thereon vote in favor of the exercise of such power."

This is a clear pronouncement that it means a majority of the legal electors, who vote in favor of the exercise of such power at that particular election. Even in the absence of such a qualification, there is considerable authority that a majority vote of the legal voters of the city means voters, who vote at the election and not those qualified but that does not mean a majority of those qualified to vote but who do not exercise this privilege in the election in question. See:

Hevelone vs. City of Beatrice, 234 *Northwestern* 791, at Page 795; 120 *Nebraska* 648.

State vs. State Board of Canvassers, 172 *Northwestern* 80, at Page 87; 44 *North Dakota* 126.

People vs. Edvander, 136 *Northwestern* 693, at Page 695; 304 *Illinois* 400.

In re validation of East Bay Municipality District—Water Bond of 1925, 239 *Pacific* 380; 196 *California* 725.

State vs. Axness, 139 *Northwestern* 791, at Page 794; 31 *South Dakota* 125.

In re contest of Le Sueur Election, 149 *Northwestern* 472; 127 *Minnesota* 318.

Webster's College, Home and Office Dictionary gives, as a definition of the word "majority," the following:

"The state of being greater; greater number; more than half."

We construe Senate File No. 256 as a specific act for a specific purpose and if all provisions and qualifications, as set out in this recent enactment of the Forty-fifth General Assembly, are met, should a majority of the qualified electors vote in favor of such a project, the city council may issue interest-bearing certificates of indebtedness and pay off this indebtedness in the man-

ner prescribed in the act. The use of funds created are to be for the construction of a municipal hospital; that Sections 1171-d4 and 6246 of the Code of Iowa, 1931, do not conflict or prevent the city council from proceeding, in accordance with Senate File No. 256, under the facts as presented by you.

CORPORATION IS RESPONSIBLE FOR THE ACTS OF ITS AGENTS.

June 10, 1933. *State Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twentieth ult., in which you ask for an opinion on the following:

"Is a stock company in the business of fur farming responsible for the acts of its manager who is also the president of the company?"

In the particular case, you state that the stock company has a game breeder's license, authorizing the raising and captivity of wild birds and animals, providing their stock is acquired legally, and in accordance with the terms of the license granted; that the manager has been doing a private business dealing in illegally acquired foxes; that he advertises and does business in his own name and transacts his business on the company's premises and keeps his illegally acquired stock in the company's pens; and, that the manager was convicted of an illegal purchase of red fox in 1932 and 1933.

You desire to know whether or not the company's license is subject to revocation, because of the illegal acts of its president and manager and you desire to know the procedure.

In the opinion of this Department, from the facts, as set forth, it appears that the president and manager of this company is transacting an illegal business and that the company is a party to such a procedure. Consequently, we feel that your Department would be justified in notifying the company that in the event that such practices, by the manager, were not discontinued, you would exercise your right to revoke the license of the company. If the practices were continued, then, we feel that you should revoke this license.

Section 1703-d14 of the 1931 Code of Iowa, states, as follows:

"Any person violating any rule or regulation of the commission shall be punished by a fine not to exceed one hundred dollars for each offense, or by imprisonment in the county jail for a period not to exceed thirty days, or by both such fine and imprisonment, under the same legal procedure as prescribed for violations of the fish and game laws of the state."

Under this section, the manager could be prosecuted and you have the right to give notice of revocation of the license and to take away, in that procedure, any rights and privileges, which may be had by him, under the law, at this time, by reason of such license, also if the illegal practices are condoned by the company after notice, you could revoke the license of the company.

Section 1793 provides for venue in prosecutions and states that prosecution for violations may be brought in a county in which the violation takes place.

BEER: No sale for consumption on premises unless food is served and consumed.

June 10, 1933. *Assistant County Attorney, Cedar Falls, Iowa:* This will acknowledge receipt of your letter of the seventh inst., in which you request an opinion, from this Department, on the following question:

"Can a duly licensed dealer, holding a Class "B" permit, under the recent enactment of the 45th General Assembly, legalizing and regulating the manufacture and sale of non-intoxicating liquors, who has the requisite number of

tables, serve customers parked in cars on the premises on which the restaurant or eating house is situated?"

You also state that the parties involved are of the opinion that the law provides that the beer must be served on the premises and does not specifically state that it must be served at the tables.

In the opinion of this Department the reference made in the act, in Section 14, in part, is, as follows:

"* * * * * * no sale of beer shall be made for consumption on the premises unless food is served and consumed therewith, and unless such place where such service is made is equipped with tables and seats sufficient to accommodate not less than twenty-five persons at one time; * * * *"

A designation that there must be tables and seats, such as that just outlined, could not be construed in any other manner, in our opinion, than that the Legislature intended, by making such a qualification, that the tables and seats be used. To say otherwise would be a fallacy of thought. The fact that there is a designation with reference to tables and seats, would mean that the beverage is to be served at the tables and seats. Otherwise it would serve no useful purpose in the act, whatsoever. It would simply be surplusage. Accordingly, the serving of beer to cars, in our opinion, is an evasion of the law. We are of the opinion that as long as the act says "place or building" and that the permits issued describe the entire premises, if a permit holder so desires, he could serve the beverage at tables and seats on the lawn of the premises described in the permit.

However, we do not feel that the table and seats, as designated by the Legislature, were not to be used and that people could have service in parked automobiles.

SCHOOLS: State aid: School inside corporate limits.

July 10, 1933. *County Attorney, Davenport, Iowa:* We have your request for opinion on the following proposition:

There exists in Scott county a rural independent school district. It has qualified as a standard school and has been receiving state aid under Section 4332 of the Iowa Code. People residing at one place in the district desire to incorporate and the boundaries of the proposed town include the location where the schoolhouse is situated but the proposed town takes in only approximately one-fourth of the district. If this town is incorporated and the school is inside of the corporate limits of the town, will it still be entitled to state aid under Section 4332?

Section 4329 of the Code provides 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, shall have been maintained for eight school months during the previous year."

Section 4332 of the Code provides 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."

The last Legislature, in its Appropriation Act, provided as follows:

"Standard schools (for aid of rural schools only) $90,000.

Your sole question, as I can see it, is whether a school where the schoolhouse is located in the incorporated town but draws its pupils mainly from the rural district, is a rural school.

The word "rural" is generally defined as that which pertains to the country as opposed to the city or town. The statute in regard to aid for rural schools was enacted at the Thirty-eighth General Assembly and is known as Chapter 364 of the Session Laws of that Assembly. The title of the act is as follows:

"An Act providing for the Standardization of Rural Schools and granting state aid and providing for an appropriation therefor."

It therefore seems plain to us that the Legislature intended to give this aid only to schools that are in fact rural schools and that a rural school district should be one that does not contain a city, town or a consolidated school, as schools in these latter districts are taken care of by particular legislation.

It is therefore, the opinion of this Department that if the people residing in one place in a rural and independent school district desire to incorporate and the boundaries of the proposed town include the location of the schoolhouse, but only a portion of the district, such school will not be entitled to state aid under the provisions of Section 4332 of the Code of Iowa, 1931.

SCHOOLS: School warrants: Warrants stamped "unpaid for want of funds."

July 10, 1933. *County Attorney, Cresco, Iowa:* We have your request for opinion on certain propositions and we will answer them in their order.

1. Where the funds of a school corporation are tied up in a closed bank, the school board may issue warrants to the amount of their anticipated revenue and have them stamped "unpaid for want of funds," the anticipated revenue being, of course, the amount estimated to be received from taxation plus the amount received from other sources.

2. Warrants stamped "unpaid for want of funds" should be paid pro rata and not in the order of their presentation.

3. The School Board has no authority to pay current expenses, thus giving priority to subsequent warrants, but should issue to such claimants a warrant to be stamped.

4. There is nothing illegal in a township school treasurer depositing funds in a national bank now in the hands of a conservator if the national bank will pay the 2% interest provided in the Sinking Fund Act, as a treasurer of a public body is required under this act, to deposit the money in a bank that will pay this interest, and under a recent act of the Legislature, the public body may go any place in the state to deposit its money in order to deposit it in a bank that will pay this interest. In view of the fact that there are hundreds of banks in Iowa open unrestricted and can pay interest, we would deem it unwise for a public body to deposit in a national bank operating under a conservator.

SCHOOLS: Stamped warrants.

July 10, 1933. *County Attorney, Mt. Ayr, Iowa:* You advise that the School Board has $21,700 in the General Fund in the Mt. Ayr State Bank which is now tied up because the bank is under Senate File 111. You further advise that the funds of the Board are exhausted and that there are outstanding warrants of approximately $9,500. You state that $16,000 has been levied for the General Fund for this year and out of that will be received about $12,000, and that in addition thereto, about $12,000 will come in during the summer months for tuition. You ask whether the Board has the power to issue warrants and the manner of their collection.

The Board will have the power and authority to issue warrants so long as the warrants issued do not exceed the anticipated revenue. These warrants, when funds are not available, may be stamped "Unpaid for want of funds" and are to be paid pro rata when funds are available.

July 10, 1933. *Securities Department, Des Moines, Iowa:* We have received your request of May 1st for an opinion interpreting certain phases of the Iowa Securities Act.

Your letter presents three separate questions which we will discuss in the order in which they appear in your inquiry:

1. Do dealers in securties have the right to purchase unregistered stock in their own name and for themselves, and then sell it as their own property?

It is the opinion of this office that they may not do so. The contention of the dealers is that they have the constitutional right to dispose of their own property. However, it is the law that the disposal of their property may be regulated and for that reason, dealers must comply with the Iowa Securities Act in selling stock, even though they own it in their own right.

This doctrine is illustrated in the case of *State vs. Swenson*, 172 Minn. 277, 215 N. W. 177, wherein the court said:

"While it is recognized everywhere that the owner has the right to sell or dispose of his property when and to whom he pleases, it is also recognized everywhere that the manner of exercising that right may be regulated by law and that he may be restrained from making such use or disposition of his property as will be injurious to the community, and may be required to comply with reasonable regulations deemed necessary for the prevention of frauds, or for the protection of the general public."

The case of Kerst vs. Nelson, 171 Minn. 901, 213 N. W. 904, contains the following language which is an answer to the above question:

"If the public is to be protected, sales by the owner of securities must be regulated, as well as sales by the owners' representatives. An investor is injured in the same way, when he buys a worthless security from one or the other. The character of the security offered for sale is the important consideration. If the security is within the scope of a statute which is a valid exercise of the police power of the state, the seller must obey the law, whoever he may be."

It is the opinion of this office that the Iowa Securities Act does not interfere with the dealers' constitutional right to dispose of their own property. It is a regulation of the right to dispose of their property which must be complied with. Therefore, dealers may dispose of stock which they own only in accordance with the provisions of the Iowa Securities Act. However, if the transaction is isolated and not made in the course of repeated and successive sales, a dealer may come within the exception provided in Section 8581, C-5, subsection c of the Code of Iowa, 1931. That section states an exception to the act, as follows:

"c. An isolated transaction in which any security is sold, offered for sale, subscription or delivery by the owner thereof, or by his representative for the owner's account, such sale or offer for sales, subscription or delivery not being made in the course of repeated and successive transactions of a like character by such owner, or on his account by such representative, and such owner or representative not being the underwriter of such security."

The section quoted above will be considered more in detail in a later portion of this opinion.

2. Do dealers who have specific authority from the owners of stock, authorizing them to act as the owners' agents, come within the exception clause of

the Iowa Securities Act known as Subsection c of Section 8581, C-5 of the Code of Iowa, 1931?

It is the opinion of this office that dealers may sell for owners unregistered securities under the provision of Section 8581, C-5, Subsection c, set out in full in the preceding paragraphs of this opinion.

If the transaction is an isolated one and the owner is not engaged in repeated and successive transactions of a similar character, dealers may act as his representative in making the sale. Under the plain language of the statute, a sale by the owner *or his representative* is exempted from the operation of the statute, in isolated transactions. Dealers may act as the owner's representatives and in such a case, the only test as to the legality of the transaction whether or not it is *an isolated one* and not *one of a series* of similar transactions. It is, therefore, the opinion of this office that dealers, who have specific authority from owners desiring to make a single isolated sale of securities, have the right under the section set out supra to represent the owners and make the sale.

3. Does a real estate dealer, not licensed as a dealer in securities, and who receives no commission for buying or selling securities, have the right to purchase building and loan association stock for the purpose of selling it at a profit under the Iowa Securities Act? It appears that he is engaged in repeated and successive transactions.

Basing our opinion entirely upon the statement of the above question and upon the facts set out in your letter, it is the conclusion of this office that such a dealer violates the Iowa Securities Act. It is apparent that he does not come within the exception or exemption of Section 8581, C-5, Subsection c, of the Code of Iowa, 1931, supra. There is no other exception which could be applicable. The fact that the real estate dealer purchases the stock outright is not determinative of the question. The determining factor is whether or not the transaction is an isolated one, or is one of a series of like character.

The case of *State vs. Barrett (Ore.), 254 Pac. 198*, is a case on all fours with the question as propounded. The exception in the Oregon Securities Act is almost identical in language with that of the Iowa section involved. There, the court said, in discussing the Oregon statute relating to exempt transactions:

"There was sufficient evidence offered to show that the defendant in dealing with this stock was not within the provisions, even though there had been evidence of his ownership of it. His course of dealing with the stock consisted of repeated and continuing transactions, all looking to the sale and transfer of the stock to the public generally."

The case of State vs. Swenson, supra, contains the following interpretation of the phrase, "repeated and successive transactions,":

"Isolated sales are excluded; but a sale is not to be deemed an isolated sale where it bears such a relation to other similar sales accruing sufficiently near the same time as to constitute one of a series of the associated acts for promotion of the same project."

It is apparent, therefore, that the real estate dealer who buys building and loan association stock for the purpose of reselling it to the public at a profit in repeated and successive transactions is guilty of a violation of the Iowa Securities Act. Such a real estate dealer should be required to qualify as a dealer and obtain a license under the Iowa Securities Act.

There is no definite formula for determining whether transactions are repeated and successive, within the meaning of the statute. Each case must be

determined on its own facts. It appears that this case does not come within the exception, since there are admittedly repeated and successive transactions.

July 10, 1933. *Superintendent, Securities Department, Des Moines, Iowa:* We have received your request for an opinion upon the following question:

"Must a company distributing school supplies obtain a license, as provided in H. F. 475, in order to sell stock in their company to merchants who are to retail their products? It is the plan for the salesmen to sell stock to each merchant who is to act as the agent for the supply company."

It is the opinion of this office that such plan does not come under the terms and provisions of H. F. 475. That act provides for the regulation, supervision, and licensing of persons, firms and corporations which sell, or offer for sale, memberships or certificates entitling the holders to purchase merchandise, materials, and equipment upon a "cost plus," or discount basis. It is only when the offered memberships and certificates are issued to the "public generally" that the statute applies.

It is the opinion of this office that the term "public generally" was not intended to refer to such a limited portion of the public as local dealers in school supplies. Such dealers are a very small portion of the "public."

Bouvier's Law Dictionary defines "public" as follows:

"The whole body politic or all the citizens of the state. The inhabitants of a particular place." (Vol. 3, page 2763, 3rd Ed.).

Corpus Juris defines the word "public" in this way:

"In one sense, the 'public' is everybody; and accordingly 'public' has been defined or employed as meaning the body of the people at large; the community at large; without reference to the geographical limits of any corporation like a city, town or county; the people; the whole body politic; the whole body politic or all the citizens of the state."

"In another sense, the word does not mean all the people, or most of the people of a place, but so many of them as contradistinguishes them from a few. Accordingly, it has been defined or employed as meaning the inhabitants of a particular place; all the inhabitants of a particular place; the people of the neighborhood." 50 Corpus Juris, 844.

We have found no authority or definition of the word "public" which would authorize its use when referring to a particular class or group of the community at large. Therefore, a company handling school supplies and selling stock to merchants is not selling, or offering to sell, to the public generally memberships or certificates of membership entitling the holder thereof to merchandise and materials, equipment and/or services on a discount or cost plus basis, within the meaning of H. F. 475.

In our opinion, it was not the intention of the legislature, as expressed in the language of the act, to permit those operating under H. F. 475 to limit their activities among such a restricted portion of the public generally, as is proposed in the plan submitted to you.

STOCKS: Preferred stock. Non-cumulative.

July 10, 1933. *Secretary of State, Des Moines, Iowa:* I have your request for an opinion as to whether or not non-cumulative preferred stock is against public policy.

Dividends on preferred stock may be either cumulative or non-cumulative.

Fletcher's Cyclopedia Corporations, Vol. 12, page 186;

Coggshall vs. Georgia Land and Investment Company, 14 Ga. Appeals, 637; 82 S. E., 156;

17 American Bar Association Journal, 126-129; 25 Ill. Law Review, 148 to 164.

The definitions of and distinctions between cumulative and non-cumulative preferred stock are well recognized and established.

Fletcher's Cyclopedia Corporations, Vol. 12, pages 186 and 187.

Where the dividends are non-cumulative the corporation has no right to accumulate a reserve fund from earnings which would otherwise be paid out as dividends to the holders of common stock, and afterwards use it to pay dividends to the preferred stockholders, when the net profits of the year for which the dividend is declared are not sufficient for that purpose. On the other hand, when the reserve fund is accumulated in whole or in part by the cutting down of dividends which would otherwise have been paid to preferred stockholders, that fund so far as it represents moneys so retained is available for the subsequent payment of dividends upon the preferred stock and if the holders of non-cumulative preferred stock have an absolute right to dividends whenever in any year the net earnings are sufficient to pay them, the directors having no discretion in the matter, the right to them is not lost because the directors failed to declare them in any year, and the fact that the directors thereafter declare a lump dividend covering the years during which no dividends were paid, is not a violation of the provisions making the dividends non-cumulative.

Fletcher's Cyclopedia Corporations, Vol. 12, pages 189 to 191.

Nowhere do the textbook writers or the decisions of the courts hold that non-cumulative preferred stock is against public policy. Non-cumulative preferred stock is recognized the same as cumulative preferred stock. It is entirely a matter between the company offering the stock for sale and the prospective stockholder as to whether he shall purchase cumulative or non-cumulative preferred stock. The matter of public policy does not enter the picture at all.

Therefore, it is the opinion of this Department that non-cumulative preferred stock is not against public policy.

July 11, 1933. *Motor Vehicle Department, Office of Secretary of State, Des Moines, Iowa:* This will acknowledge receipt of your request for the opinion of this Department, under date of the tenth inst., on the following question:

"Where does the responsibility rest for a load of merchandise perishable or otherwise in the case where a motor vehicle is held pending the trial of the driver for violation of the Motor Vehicle statutes or where the operator is required to unload part of the load because of excessive weight?

"Would the inspectors of our Department be liable?

In the case where there is a violation of the law and loss results by reason of the fact that the goods are perishable, no liability would attach to your inspectors nor to the State of Iowa, unless they became custodians of the merchandise. This is also true of local officers who assist inspectors of your Department. The liability would rest upon the driver or the custodian of the merchandise and the fact that there is a loss is due to the fact that there is a violation of the law due to overloading or any other violation of the Motor Vehicle Laws of the State.

Accordingly, in the case of your inspectors stopping a truck and holding the driver, the only interest is in seeing that the Motor Vehicle Laws of this state are not being violated.

July 11, 1933. *County Attorney, Cedar Rapids, Iowa:* This will acknowledge

receipt of your letter of the tenth inst., to this Department, in which you ask for an opinion on the following question:

"A road house keeper is not within the corporate limits of any city or town, forms what he calls a 'club' which is incorporated. The various holders of stock or 'members' are permitted to purchase beer and bring it to the road house and keep it there. The road house keeper has nothing to do with the sale of the beer, but he does make a charge to the 'members' for refrigerating the beer and serving it to them."

Is this a violation of House File No. 587, as amended by House File No. 611, Acts of the 45th General Assembly?

In the opinion of this Department, this is an evasion of the spirit and intent of the act.

No one can be a dealer in beer, without having a permit and the act defines a "dealer" in Section 5, of the act, as follows:

"e. 'Dealer' shall mean any person, firm or corporation, other than a brewer, bottler, wholesaler or retailer, who shall sell, barter, exchange, offer for sale, have in possession with intent to sell, deal or traffic in beer containing not more than three and two-tenths (3.2%) per centum of alcohol by weight, not to be consumed in or upon the premises where sold."

In keeping with the provisions of this section, the owner of a road-house handling beer in the manner described by you, certainly is dealing or trafficing in beer and to all intents and purposes such trafficing would be equivalent to sale and we feel that such a practice indulged in without a Class "B" permit, is a violation of the provisions of the act.

July 11, 1933. *County Attorney, Ida Grove, Iowa:* This will acknowledge receipt of your request, of the sixth inst., for the opinion of this Department, on the following question:

"Can the holder of a class 'B' permit to sell beer, upon selling the business in which he is engaged, transfer the permit to sell beer to the purchaser of said business and can the purchaser thereof continue to sell beer under the transferred permit? Or must the purchaser make application for a new permit and obtain a new permit in order to sell beer?"

In the opinion of this Department, a permit to sell beer, under House File No. 587, as amended by House File No. 611, cannot be transferred from one person to another. In the case of a Class "B" permit holder, there is certain qualifications, which must be met, which are personal. In this connection, we wish to refer you to Section 11 of the act, which provides for the submitting of a written application for a permit of this class and requires that certain qualifications be established by the applicant. See Subdivisions A, B, and C, under Section 11, and also Subdivision A, under Division 2, of this section. Under Division 3, there is a requirement, relative to the bond.

It will be necessary for the purchaser to make application for a new permit and there is no provision, in the act, under consideration, for a refund or credit to be allowed on the permit previously granted.

While you do not ask this question it may arise in the future in your county and the situation is, as follows:

Where the permit holder desires to change his location.

In such an event, we are of the opinion that if the qualifications, under Section 11, are met, particularly, Subdivisions D, E, and F, under Division 1, and Subdivision B, under Division 2, such a change of location is allowed.

This matter can be called to the attention of the city authorities, granting the permit, and the change can be made on the records, if the qualifications, as outlined herein, are met.

July 12, 1933. *Board of Conservation, Des Moines, Iowa:* This will acknowledge receipt of your letter of the tenth inst., in which you request the opinion of this Department, on the following matter:

Section 1812, of the Code of Iowa, 1931, gives jurisdiction over meandered streams and lakes and lands bordering thereon not used by some other state body for state purposes, to the Board of Conservation.

Chapter 448 provides for the sale of islands and abandoned river channels.

Section 1812 changed the duties in Chapter 448 of the Code to the Board from the Secretary of State and the Board has been selling abandoned river channels under the procedure set out in Chapter 448.

"What effect will Chapter 34, Acts of the 45th General Assembly, have on this situation and what is your opinion as to the proper procedure to follow in order to sell abandoned river channels at this time?"

House File No. 278, which is Chapter 34, Acts of the 45th General Assembly, repeals Section 1824, of the Code of Iowa, 1931, and permits the Executive Council, upon the recommendation of the Board of Conservation, to sell, trade or exchange state-owned lands, under the jurisdiction of the Board, and provides for the use of the proceeds for such sale or transfer and for the issuance of patents therefor. Sale or exchange of public lands under the jurisdiction of the Board is permitted and the procedure, as we view it, would be that a resolution to sell or exchange public lands, being considered by the Board of Conservation, upon a majority recommendation of the Board, and in this resolution, the Executive Council, should be stated the following:

1. That the public land is under jurisdiction of the Board.
2. That, in the judgment of the Board, it is undesirable for conservation purposes.
3. That it has not been surveyed and platted, at state expense, as part of the conservation plan, and it is not now in the process of rehabilitation and development as authorized by a special legislative act.
4. A recommendation as to terms, conditions and consideration of the sale or exchange.
5. A request to the Executive Council that such a sale or exchange be made.
6. A request to the Secretary of State that, in the event the Executive Council approves the sale or exchange, a patent be issued.
7. The disposition to be made of the proceeds of any such sale or exchange, in accordance with the provisions of Chapter 87, of the Code of Iowa, 1931.
8. That the Resolution has been passed in accordance with House File No. 278 or Chapter 34, Acts of the 45th General Assembly.

You will note from a reading of Chapter 34, Acts of the 45th General Assembly, that the Executive Council may approve or disapprove, as the wording of the act is, as follows:

"The Executive Council may, upon a majority recommendation of the Board of Conservation, sell or exchange * * * * * * *"

This leads us to the conclusion that it is a matter of discretion to be exercised by the Executive Council.

We feel that the resolution outlined, as set out herein, would be sufficient if the facts were such as to bear out the statements made in such a resolution and if recommended by a majority of the Board of Conservation, the Executive Council could pass on the question of whether or not to sell or exchange, and if the authority is granted, could make the sale or exchange. The Council could direct the Secretary of State to issue patent for the land.

July 12, 1933. *County Attorney, Fairfield, Iowa:* This will acknowledge

receipt of your letter of the eleventh inst., in which you ask for the opinion of this Department, on the following matter:

What is the status with reference to the sale of near beer, at the present time?

What, if anything, have district courts done with regard to near beer?

We note that you state that you are about to commence prosecutions on different parties for the sale of near beer in your county.

In the opinion of this Department, Section 5, Division (i), of House File No. 587, as amended by House File No. 611, Acts of the 45th General Assembly, controls in this situation and includes all malt products regardless of the percentage of alcohol by weight or volume. Division (i), of Section 5, is, as follows:

"'Beer' shall mean any liquid capable of being used for beverage purposes made by the fermentation of an infusion in potable water of barley, malt and hops, with or without unmalted grains or decorticated and degerminated grains containing not more than three and two-tenths (3.2%) per centum of alcohol by weight."

This section of the act placed all beer, ale, porter, stout, or any other malt liquor containing not more than three and two-tenths (3.2%) per centum of alcohol by weight, under the provisions of this act.

Prosecutions would lie for anyone selling so-called near beer without a permit and Section 38 of the act provides for the penalty.

July 12, 1933. *County Attorney, Marshalltown, Iowa:* This will acknowledge receipt of your request for an opinion, under date of the eleventh inst., on the following questions:

1. Can a class "B" or a class "C" permit holder, under House File 587, as amended by House File No. 611, transfer from one place of business to another in the same city or town?
2. Can a holder of a class "B" or a class "C" permit, under the Act referred to above, transfer his place of business from one city or town to another city or town in the same county?

In the opinion of this Department such a transfer of the place of business, as presented in your Question No. 1, could not be construed to be a cancellation or a forfeiture of a permit and the city or town council would make this transfer, if the permit holder met the requirements, under Subdivision B, Division 2, of Section 11, of the Act, which is relative to the health and fire regulations on the building to be used by a Class "B" permit holder. In the case of a Class "C" permit holder, Section 12 has the same provisions. This transfer would have to be made a matter of record in the City Hall. The same procedure would have to be followed as in the case of a fire where a building was damaged and it is necessary for a permit holder to transact his business in a new location.

In answer to your Question No. 2, will say that Class "B" and Class "C" permits are granted by the city or town council and this would be a matter of the records to be kept in each city or town granting permits. However, the money would be allocated to the General Fund and, hence, it would follow that a transfer from one city or town to another city or town in the same county could not be done, under the provisions of the act, under consideration.

SCHOOLS: Tuition: Out of district.

July 12, 1933. *County Attorney, Iowa City, Iowa:* We have your request for opinion on the following proposition:

A resident of a school district in this county which does not afford high school facilities, adopted her sister's son, adoption proceeding being had in the State of Texas. The boy's father and mother, both live in Texas, but are divorced. The boy has been living in this county with his aunt who was the person adopting him, for at least a year. She furnishes his sole support and gives him a home. She is a legal resident of the school district. The boy has been attending high school in Iowa City. The boy is 17 years old. His aunt has filed affidavit that the proceedings for the adoption of the boy are pending in Texas and will not become permanent until a year from the time such proceedings were instituted. Can this minor establish a school domicile in Iowa with his aunt prior to the time the adoption papers are legal, and is the school district in which the boy and the aunt reside liable to the district furnishing high school facilities, for the tuition of this boy?

Section 4275 of the Code provides as follows:

"'High school outside home district. Any person of school age who is a resident of a school corporation which does not offer a four year high school course, who has completed the course as approved by the department of public instruction for such corporation, shall be permitted to attend any public high school or county high school in the state approved in like manner that will receive him, or may attend any public high school of equivalent standing in an adjoining state, if said school in the adjoining state be nearer to the pupil's residence than any approved public high school in the state of Iowa."

Section 4277 of the Code provides as follows:

"Tuition Fees—payment. The school corporation in which such student resides shall pay from the general fund to the secretary of the corporation in which he shall be permitted to enter a tuition fee of not to exceed twelve dollars per month during the time he so attends, not exceeding a total period of four school years. Such tuition shall not exceed the average cost of tuition in such high school. The secretary shall deliver to the treasurer such tuition fees with an itemized statement on or before February fifteenth and June fifteenth of each year."

The sole question then is whether this boy resides in the district as contemplated by the above two sections. The residence required under our school law is not such residence as would be required to establish a right to vote or which would fix liability of a city or county for the support of a pauper, or for the purpose of determining the rights of administration of his estate. The right to attend school is not limited to the place of the legal domicile. A residence even for temporary purposes in a school district, is sufficient to entitle children to attend school there.

It is clear, we believe, that this boy is not living in the district primarily for the purpose of obtaining free schooling, as that is only incidental. He is living in the district because he is supported by his aunt and is to be her child by adoption as soon as proceedings are consummated so we do not have the question of a child being sent to a school district by parents residing out of the district solely for the purpose of taking advantage of the free schools there.

It is true, we believe, that a man might leave his legal domicile for a temporary purpose and reside in another part of the state, yet his children would not be obliged to attend the school of the legal domicile, as within the meaning of the school laws, they could attend school in the district where he temporarily resides and the only requirement so far as residence is concerned, is dwelling in the school district, as every child of a school age in this state is entitled to attend the public schools in the district in which it actually resides, whether that be the place of its legal domicile or the legal domicile of its parents or guardians or not.

It is therefore, the opinion of this Department that the School District in which the boy and his aunt reside is liable to the district furnishing high school facilities for the tuition of this boy.

BONDS: Public bonds.

July 12, 1933. *Governor of Iowa, Des Moines, Iowa:* The letter of the Chairman of the Charity Fund Committee directed to you has been handed to me with the request that an opinion of this office be given you with reference to the subject matter thereof.

This letter states that poor fund warrants amounting to $211,000 were placed in judgment in the usual manner. Five per cent bonds were offered by the county but until very recently there were no bids for the bonds but that now a bid of 98, or a sum of $4,200 less than par has been made. The letter further states that the Charity Fund Committee of the Chamber of Commerce has agreed to pay to the purchasers of the bonds the $4,200, being the difference between the bid of 98 for the $211,000 of bonds and the par.

The letter further states that in case they could be assured that they will not be held personally liable for their action, the Board of Supervisors would be willing to authorize the payment of a bill from the charity fund for the $4,200 which was advanced by the charity fund to complete the sale of these judgment bonds.

Section 1175 of the Code provides as follows:

"Selling price. No public bond shall be sold for less than par plus accrued interest."

Section 1176 provides:

"Commission and expense. No commission shall be paid, directly or indirectly, in connection with the sale of a public bond. No expense shall be contracted or paid in connection with such sale other than the expenses incurred in advertising such bonds for sale."

Section 1177 provides:

"Penalty. Any public officer who fails to perform any duty required by this chapter or who does any act prohibited by this chapter, shall be guilty of a misdemeanor."

It is clear from the above sections that the board has no right or authority to sell the bonds for less than par plus accrued interest. It would not seem so important that the board should determine the source of the money to be paid for the bonds so long as the bonds sell at par plus accrued interest.

It is not clear from the letter what connection the Board of Supervisors has with the Charity Fund. There is nothing to indicate that it is a county fund over which the board has any control, and I assume the board has nothing to do with this fund except as it has been placed at the disposal of the board by the Charity Fund Committee. The board may be assured its members will not be held personally liable for their action if they comply with the above statutes.

MOTOR VEHICLE TRANSFER FEE (PUBLIC BODIES). Governmental subdivisions of the state are not required to pay the fifty cent transfer fee prescribed by Section 4963 of the Code.

June 13, 1933. *Superintendent, Motor Vehicle Department, Des Moines, Iowa:* Acknowledgment is made of receipt of your letter of the ninth inst., requesting the opinion of this Department on the following proposition:

"The question has come to us as to whether when a public body purchases an automobile from a dealer or used dealer and a transfer is necessary, the charge of fifty cents should be made against the public body or whether it should be waived."

In seeking a solution to this question, reference should be made to Section 4867 of the Code, which exempts subdivisions of the government of the State of Iowa from the payment of the fees prescribed by that chapter, which is Chapter 251. Section 4962 requires the purchaser of a motor vehicle which has been licensed to join in a notice to the county treasurer and "at the same time make application for the transfer of the motor vehicle and for a new certificate of registration." Section 4963 requires the applicant to pay a fee of fifty cents for the transfer. It is clear from these statutes, first, that the transferee of a licensed motor vehicle is required to make application for a transfer of the license and that the fee is fixed at fifty cents for such transfer; and second, that subdivisions of the government of the state are not required to pay the fees prescribed by Chapter 251, and the fees thus prescribed are not only the regular motor vehicle license fee, but also, the transfer fee.

Our conclusion is, that governmental subdivisions of the state, should not be required to pay the fifty cent transfer fee prescribed by Section 4963 of the Code.

PUBLICLY OWNED MOTOR VEHICLES: Labels in conspicuous place.

June 19, 1933. *Superintendent, The Women's Reformatory, Rockwell City, Iowa:* We have your letter of June 1st in regard to House File No. 26, Forty-fifth General Assembly.

You advise that the Women's Reformatory is a penal institution for women criminals of the State of Iowa, and that you are located on a farm with no walls or guards and only matrons in charge of cottages; that at different times, the inmates escape and it is necessary to use motor vehicles to apprehend them.

You further advise that these inmates naturally have friends and that if the motor vehicle of the institution seeking to apprehend them bore a name or any other sign of its ownership, that it would seriously interfere with your opportunity to apprehend the criminal, as the criminal would be advised by friends that the car was in a particular locality, if the criminal herself did not see the car. Your question then is whether such cars used for the apprehension of escaped inmates must bear the two labels provided for in House File No. 26. Section 2 of that act provides as follows:

"All publicly owned motor vehicles shall bear at least two labels in a conspicuous place, one on each side of said vehicle and the bureau, department or commission using it. This label shall be designed to cover not less than one square foot of surface. This section shall not apply to any motor vehicle which shall be specifically assigned by the head of the department or office owning or controlling it, to enforcement of police regulations."

Police regulations are defined by courts as those regulations that look to the public health, safety and morals and to the prevention of damage to the public or third persons and also such regulations as relate to good government.

We presume that your institution has certain regulations for the return of escaped inmates and as to what shall be done with any inmate that has been returned after an escape or attempted escape and apprehension of escaped inmates of your institution pursuant to such regulations, is clearly the enforcement of a proper police regulation.

It is therefore, the opinion of this Department that any motor vehicle which has been specifically assigned by you, as Superintendent of The Women's Reformatory, to the apprehension of escaped inmates of your institution, need

not bear the label provided for in House File No. 26, 45th General Assembly.

Anyone fishing on a private dock without the owner's consent is a trespasser.

June 20, 1933. *Board of Conservation, Des Moines, Iowa:* The question presented is, as follows:

"Does a fisherman trespass when on any dock built by private parties or does the builder trespass on public property?"

Section 1799-b2, of the Code of Iowa, 1931, requires that a construction permit must be secured by anyone desiring to erect a private dock. However, there is no license fee paid to the state for the use of such dock or pier. A riparian or littoral owner has the right of access to the water abutting his property and one manner in which he may exercise the same is by the building of a private dock or pier.

40 *CYC.*, at Page 565, under the title "Waters," states, as follows:

"* * * * * * Such an owner (riparian rights in navigable waters) has the right of access to the navigable part of the stream from the front of his lot, and, provided he does not impede or obstruct navigation, to build private wharves, landings, or piers, or use the water of the stream for any proper purpose. But his enjoyment of these rights is subject to the public easement of passage or right of navigation; and to the right of the public to use the stream, when suitable for such purposes for fishing and taking ice, and for boating, skating, bathing, and other sports."

130 *Iowa* 603 is the case of The Board of Park Commissioners of the City of Des Moines, Iowa, vs. The Diamond Ice Company, et al. The decision in this case is, in part, as follows:

"All persons have a common right to the legitimate use and enjoyment of a stream the title to which is in the state, but no one will be permitted to exercise a single right to the exclusion of all others, and it is the duty of the state to enact such laws as will preserve its use to all persons and for all purposes."

In the opinion of this Department no riparian or littoral owner could so use his right of access to a stream or lake in such a way as to prohibit the use of the public in and to the stream or lake as it abutts his property, that is, the public has a right to use the water in front of a riparian or littoral owner's land for any of the purposes as set forth above in the quotation from the title "Waters" in 40 *CYC.* However, the riparian or littoral owner has the right of access and in accordance with the laws in such matters has a right to construct a private dock and use the same for private purposes and in this connection should secure a construction permit, as required in Section 1799-b2 of the Code.

40 *CYC.*, at Page 901, *Management and Use*—Right to Use, states, as follows:

"Wharves or landings may be either private or public in their nature, although owned by an individual; and the question whether they belong to one or the other class depends upon the purpose for which they were build, the uses to which they have been applied, the place where located, and the character of the structure. If public, the owner is under obligations to concede to others the privilege of using it on payment of reasonable wharfage; if private, he has the right to the exclusive use and enjoyment, or to permit such individuals to enjoy it as he sees proper, even though the wharf extends beyond low-water mark, and was erected without the consent of the state, and even though there may be no other wharf at the place. Nor can the public obtain an adverse right as against such owner by mere user. To obtain it there must be an intention on the part of the owner to dedicate the property to the use of the public, and there must be an acceptance of such dedication on the part of some public authority, which may sometimes be implied, and in the absence of such dedication and acceptance the use will

be regarded as under a simple license, subject to withdrawal at the pleasure of the owner by giving reasonable notice. And after he has given such a notice to an indivdual, and thereby revoked the license as to him, an entry of the latter upon the wharf is a trespass for which an action will lie. But it is otherwise before notice has been given."

Where a riparian or littoral owner builds a dock or pier into the water from his own property and has, as provided in this state, a construction permit for the same, it is our opinion that it constitutes private property and that he may decide who is to have the use of this dock or pier.

Accordingly, in the case of such a private dock or pier, the riparian or littoral owner would not be trespassing on public property, while anyone fishing on any such dock, without the owner's consent, would be a trespasser.

BEER: Sale by County Agricultural Fair Association.

June 20, 1933. *County Attorney, Guttenberg, Iowa:* This will acknowledge receipt of your letter of the fourteenth inst., in which you ask for an opinion, from this Department, on the following questions:

Can the Communia Turn Verein and the Clayton County Agriculture Fair Association sell beer?

You state that they are both located outside the corporate limits of a city or town.

In the opinion of this Department, there is no provision made, in the recent enactment of the 45th General Assembly, legalizing and regulating the manufacture and sale of nonintoxicating liquors, whereby either one of these associations can receive a permit to sell beer. There is no agency designated, who could issue such a permit. You will note, from a reading of the act, under consideration, that Class "A" permits are issued by the Treasurer of State to wholesalers *only*. Class "B" and "C" permits (retail) which include the special permits to hotels, inns and taverns and to clubs within the city limits are issued by the city or town council. Dining and buffet car permits are issued by the Treasurer of State. In the case of a golf or country club, outside the city limits, the permits are issued by the Board of Supervisors of the county. There is no provision for the issuing of such a permit, as suggested by you.

Can a permit be issued to the Elkader Golf Club, which is located within the corporate limits of Elkader, Iowa?

Section 19, of the act, under consideration, provides, as follows:

"Sec. 19. No club shall be granted a class 'B' permit under this Act:

a. If the premises occupied by such club are not wholly within the territorial limits of the city, town or special charter city to which such application is made; provided, however, that a golf or country club located outside the territorial limits of the city, town or special charter city may be issued a class "B" permit by the local Board of Supervisors, and further provided that all of the permit fees authorized under this paragraph shall be collected and retained by the county in which such golf or country club is located and credited to the general fund of said county and provided further that such golf or country club shall comply with the restrictions contained in the succeeding paragraphs of this section.

b. If it is a proprietary club, or operated for pecuniary profit;

c. Unless it is incorporated under the laws of the State of Iowa, and its charter in full force and effect, and/or excepting regularly chartered branches of nationally incorporated organizations;

d. Unless such club has a permanent local membership of not less than fifty (50) adult members;

e. Unless the application for such permit is approved by a majority of the bona fide members of such club who are present at a regular meeting, or a special meeting called to consider the same;

f. Unless it was in operation as a club on the first day of January, A. D., 1933, or, being thereafter formed, was in continuous operation as a club for at least two (2) years immediately prior to the date of its application for a class 'B' permit."

You will note the exception "that a golf or country club located outside the territorial limits of the city, town or special charter city may be issued a Class 'B' permit by the local Board of Supervisors."

In the case, which you present, the city or town council, of Elkader, could issue a permit under the provisions of Sections 19 and 20, of the act, under consideration, if the qualifications were met.

Can the Elkader Fair Association, located within the territorial limits of the city of Elkader, secure a permit?

If this fair association is within the corporate limits of the city of Elkader the city or town council could issue a permit to an applicant in either the "B" or "C" classification, relating to retail dealers, in accordance with Sections 11 and 14, in the case of a Class "B" permit, and Sections 12 and 15, in the case of a Class "C" permit. The fair association would have to lease certain premises to the applicant and the premises would have to comply with the provisions, as set out in the act, under consideration. The question, which you present, generally arises where the applicant desires a shorter period of time than one year. As there is no provision in the act whereby the fee can be reduced, it would be necessary that he pay the fee for the entire year.

BEER.

June 20, 1933. *County Attorney, Independence, Iowa:* This will acknowledge receipt of your letter, of recent date, in which you ask for an opinion on the following question:

A hotel holding a class "B" permit, under the recent enactment of the 45th General Assembly, legalizing and regulating the manufacture and sale of nonintoxicating liquors, and the permit holder, who is the owner of the building, desires to take over a room, which is part of the building and convert the same into a dining room where beer will be served.

Does the permit holder need another permit to sell beer in this additional place?

In the opinion of this Department, the type of Class "B" permit, which is issued to a hotel, and which is covered in Section 27 of the act, under consideration, should have the entire premises, covered by the hotel, included in the permit. If this is so, under such a permit, beer could be served in any part of the hotel on which the owner might decide. It is not necessary that the sale of the beverage be confined just to one part of the hotel but it might be served in two or three dining rooms, as the case might be, and can also send beer to the guest rooms, refrigerated, as it is not construed to be a sale of beer for consumption off the premises in the case of a permit issued to a hotel, inn or tavern.

Section 23 of the act, under consideration, provides, as follows:

"Hotels, inns or taverns holding class 'B' permits may serve beer to their guests either in the dining room or dining rooms or to any guests duly registered at such hotel in the rooms of such guests and such service for the purposes of this Act shall not be construed as a service of beer for consumption off the premises."

If by any chance, in the granting of this permit, the entire hotel is not recited and designated in the permit, then, the matter should be called to the attention of the city council and have this rectified.

BEER.

June 21, 1933. *County Attorney, Fort Dodge, Iowa:* This will acknowledge receipt of your letter of the seventeenth inst., in which you ask for an opinion from this Department on the following question:

"1st. A and B are operating a wholesale beer house under an 'A' permit and they incorporate the two partners becoming the sole owners of the corporation and become the AB company, is the permit that they held as partners transferable to the corporation?"

This Department is of the opinion that the legal distinction, which exists between a co-partnership and a corporation, is controlling rather than the fact that the members of the co-partnership would later be the sole stockholders of the corporation.

It has been the ruling of this Department, in similar cases, that a new permit would have to be secured by the corporation, as a new legal entity has been created. One case in which a new permit has been granted is the case of an individual, who, after receiving his permit, decided to incorporate.

"2nd. An 'A' permit holder has the permit to sell beer in a certain location, he sells the location, in this case a road house, can he transfer his permit to another location or sell beer at a new location under the permit he had for the old location?"

In the opinion of this Department such a transfer of the place of business could not be construed to be a cancellation or a forfeiture of a permit. The permit holder would have to abide by Subdivision (b), Division (2), of Section 11, of the act, which is, as follows:

"b. That the place or building where he intends to operate conforms to all laws, health and fire regulations applicable thereto, and is a safe and proper place or building."

and also comply with other provisions of the act, with reference to the location of the place or building, which would have to be a matter of record at the city hall and also the provisions of the act, relative to the name of the owner of the building, if such owner is not the applicant, that the applicant is the actual lessee of the premises. The same procedure would follow as in the case of a fire, where the place of business of the permit holder was destroyed. We are of the opinion that this would simply be a matter of the records to be kept with reference to the permit, by the clerk of the municipality issuing the permit. We assume, of course, that this road house is within the city limits.

"3rd. B, who sold his road house does not wish to go back into the beer business until sometime in the fall, will he be permitted to allow his license to remain dormant until that time? In other words can he avoid paying the $20.00 due July 1st, if he wants to use the license in September or October?"

In accordance with our answer to your Question No. Two, we are of the opinion that this matter should be called to the attention of the city council so that he may qualify again, with reference to the place or building when he engages in business in the new location.

This procedure, in the event that he desires to operate in a new location, which, we take it from your letter, is the fact. In the event that he desires to start business in the fall, we are unable to find anything in the act, under

consideration, which would allow any rebate or credit for the portion of time when he did not actively engage in business.

BEER.

June 21, 1933. *County Attorney, Spirit Lake, Iowa:* This will acknowledge receipt of your letter of the fourteenth inst., in which you request the opinion of this Department on the following questions:

"1. Customers phone to A from his own municipality and surrounding country, ordering 3.2 beer, to be delivered by A or X who runs a general delivery truck. The beer to be in original packages, unrefrigerated and the delivery not to be made on Sunday. If A fills these orders is he within the law?"

We take it from this presentation that A, in this case, is either a Class "B" or a Class "C" permit holder. We are, therefore, of the opinion that such a sale made by A and the goods delivered by him or his constituted delivery system, operated by X, is legal. Either a Class "B" or a Class "C" permit holder would have the right to sell beer in the original packages, unrefrigerated, in the manner, which you describe.

"2. A takes orders in his own town for groceries and 3.2 beer, later delivers same in original packages and unrefrigerated. Is A within the provisions of the law, there being no ordinance to the contrary? Sometimes A delivers the beer by general delivery truck, expense paid by purchaser. What is the rule in that case?"

In the opinion of this Department this question is taken care by the answer to Question One and we see nothing which would prohibit such a sale and delivery.

"3. A delivers 3.2 beer on Sunday in orginal packages, unrefrigerated, the order for the beer having been taken on Saturday preceding, the purchaser having (1) a current account at A's place of business, (2) purchaser paid for the beer on Saturday at time order was taken, (3) the purchaser paid for the beer at A's place of business on Saturday. A to deliver the beer on Sunday either by his own delivery truck or by a general delivery truck or purchaser is to take the beer away himself on Sunday. Is any one or all of these proceedings within the law?"

In the opinion of this Department all methods, presented in this question, are evasions of the law and we construe this question as being one which would come under the laws of sales as set out in the Code of Iowa, 1931, and that there can be no completed sale without delivery. That is, the delivery is an essential part of the completed transaction and thus we would construe all the methods, which you suggest, as evasions of the law, as there is no delivery of the merchandise at the time the order is taken but the delivery is made and the sale completed on a day when the sale of the beverage is prohibited, as set out in Section 24 of the act, under consideration, which is, in part, as follows:

"* * * * * * nor shall any such beer be sold to any person between the hours of twelve o'clock midnight on Saturday night and seven o'clock of the following Monday morning."

"4. K has a class 'B' permit under H. F. 587 as amended by H. F. 611. D comes into K's place of business on Saturday, pays K for one bottle of 3.2 beer, D hands it back to K, asking K to keep it in his ice box for him, D, till Sunday. Sunday, D, comes into K's place of business and then and there consumes the said beer with food. Is K within the law?"

This presents a border-line question, but, in our opinion, the practice is followed with the view of violating the intent and spirit of the law and the

prohibition against the sale of beer on Sunday and you will note in the method, such as suggested by you, that the handing of the beer to D is an effort to comply with the question of delivery. However, we feel that it is still an evasion of the law.

BEER.

June 21, 1933. *Senator, Des Moines, Iowa:* This will acknowledge receipt of your letter of the fifteenth inst., in which you request an opinion from this Department, on the following queston:

"The East Dubuque Supply Company is operating a wholesale beer business in East Dubuque. The owners of the company also have a class A permit in Dubuque, run under a different name.

"Many of the class B and C permit holders here are desirous of purchasing from the East Dubuque Supply Company, but the company is hesitant in making the sales due to the provisions of Section 35 of the Iowa beer law; that is, they fear that the B and C permit holders would be violating the law in purchasing from them.

"The company is desirous of making sales in Dubuque, and from the East Dubuque house, and making their reports to the Treasurer of State direct from East Dubuque, and paying the tax from that source."

In accordance with Section 35 of the act, under consideration, "it shall be unlawful for the holder of any Class 'B' or Class 'C' permit * * * * to purchase beer * * * * from any person other than a person holding a subsisting Class 'A' permit * * * * *" and in the event that the East Dubuque Supply Company is outside the limits of the State of Iowa or if within the limits of the State of Iowa, and do not have a Class "A" permit, it would be an evasion of the law as the company, in question, can only sell to wholesalers, who, under the act, under consideration, can resell to retailers, holding Class "B" or "C" permits. However it seems to us, from a reading of your letter, that without much inconvenience the beer can be distributed through the Class "A" distributor, which they have in Dubuque. If this is not a satisfactory arrangement, the East Dubuque Company could contact a distributor in Dubuque and these distributors with Class "A" permits could supply the "B" and "C" permit holders.

As the business of the sale of the beverage increases, undoubtedly, the East Dubuque Supply Company will decide to make connections with numerous distributors, holding Class "A" permits and when they receive an order at the East Dubuque Supply Company's office, in East Dubuque, they can refer the customer to one of the distributors handling their product, being next to the retailer desiring to handle their brand of beer.

A levy may be made for the maintenance of a band by a municipality.

June 23, 1933. *County Attorney, Marshalltown, Iowa:* This will acknowledge receipt of your letter of the twenty-first inst., in which you request an opinion on the following matter:

"Conceding the fact that the proceeds of a special tax levy for the maintenance and hiring of a municipal band cannot be diverted into other channels of public expenditure, does the voting at a city election rescinding the power to levy such a tax and the power to employ a band, remove the power of a municipality to employ a band or may they employ a band as long as the funds last?"

You state further, as follows:

"There would seemingly be two divisions in this problem. First the employment during the year following the levy when the funds would be collected

and then if funds were saved over and above the expense of operation, would they still, with the balance of the money in this particular fund, be empowered to hire or employ a band for the following year? If there were no objection to this, a municipality might reduce their yearly expenditure on the band and employ a band for special occasions for some period of time, even past the year, or as long as the funds last."

We take it that Section 5389, of the Code of Iowa, 1931, relative to cancellation and revocation of authority, has been exercised by the municipality, which you have in mind; that a petition has been presented to the council or commission; that the voters have cancelled the levy by majority vote; and that, in accordance with said section, no further levy for said purpose, shall be made.

You will notice Section 5840, which states, as follows:

"All funds derived from said levy shall be expended as set out in Section 5835 by the council or commission."

Section 5835, of the Code of Iowa, 1931, states, in part, as follows:

"Cities * * * * * * may * * * * * * levy each year a tax of not to exceed two mills for the purpose of providing a fund for the maintenance of employment of a band for musical purposes.

In the opinion of this Department, where the right to revoke the grant of authority, under Chapter 296, of the Code of Iowa, 1931, has been exercised, in accordance with Section 5839, of said chapter, the voters have expressed their will to the effect that a levy for this purpose be discontinued and cancelled. This chapter, relative to a procedure whereby a levy can be made for the maintenance of a band by a municipality is, apparently, full and complete in itself and it also makes provisions for the revocation of authority to levy such a tax.

The funds on hand during the year for which the levy has been made may be used. However, if at the end of the designated time, there is still funds on hand, these funds would revert to the General Fund and could not be used after the period of time designated had elapsed. Tax levies made for a specified length of time and not expended during that length of time, revert to the General Fund at the expiration of the specified time. See Section 387 of the Code of Iowa, 1931.

BEER.

June 27, 1933. *County Attorney, Orange City, Iowa:* This will acknowledge receipt of your letter of the twenty-third inst., in which you request the opinion of this Department, with reference to the recent enactment of the 45th General Assmbly, known as H. F. 587, as amended by H. F. 611, on the following questions:

"1. Is a class 'B' or a class 'C' beer permit transferable in a case where the holder of a permit sells out his business to another?"

In the opinion of this Department, the granting of a permit is an act, personal in its nature, and as such it cannot be transferred to another person. There is no provision in the act for a transfer, such as is suggested by your question.

"2. Is the holder of a beer permit entitled to a refund of a proportionate part of the permit fee if he discontinues business or surrenders his permit?"

There is not a provision in the act, under consideration, for a refund of any part of the permit fee. The fee, in question, is allocated to the General Fund of the city or town and there is no legal machinery, in our opinion, by which a refund could be made.

"3. Can the holder of a class 'B' permit sell beer in a stand attached to the outside of the building in which he is permitted to sell beer, such stand being in front of the building and on the sidewalk? Can the holder of such permit sell beer in a stand on the street immediately in front of, but not attached to, his building?"

This Department has ruled that, as a permit describes the premises, upon which the building is located, the permit holder may sell any place in the building or on the premises. In other words—he may sell on the lot for which his permit is granted provided he has a sufficient number of tables and seats, as set out in Section 14, of the act, under consideration.

However, we do not feel that this would permit him to sell beer from an attached stand on the sidewalk, owing to the fact that there would not be the required seating capacity and the sidewalk could not be consrued as a part of the premises over which the permit holder has exclusive control.

In the case of where he desires to sell beer in the street in front of the building, where he holds a permit, we would construe this to be an evasion of the act, as it is not a part of the premises, described in his permit.

Section 11 of the act, deals with the application and the issuing of a permit. Subdivision (d), of that section, states, as follows:

"d. The location of the place or building where the applicant intends to operate."

We construe this to be the premises for which the permit is granted. This would not include the sale of beer on the sidewalk or in the street in front of the premises.

BEER.

June 27, 1933. *Secretary, Executive Council, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-second inst., with enclosure of letter, from Ralph W. Jackman, Counsel for the Wisconsin State Brewers' Association, in which the following question is presented:

May a brewer or wholesaler, under the recent enactment of the 45th General Assembly, legalizing and regulating the manufacture and sale of nonintoxicating liquors (H. F. 587, as amended by H. F. 611), sell fixtures for drawing of beer or bar fixtures by outright sale where the entire purchase price is paid in cash?

Section 26, of this act, provides, as follows:

"No brewer, bottler or wholesaler shall supply, furnish, give or pay for any furniture, fixtures, furnishings, or equipment used in or about any place, which shall require a class 'B' permit except as herein provided. No brewer, bottler or wholesaler shall advance, furnish money for or pay for any permit or tax which may be required to be paid by any dealer or retailer except as herein provided. No brewer, bottler or wholesaler shall be financially interested either directly or indirectly in the conduct or operation of the business of a retailer or dealer as herein defined except as herein provided. Nothing contained herein shall be construed as prohibiting the leasing of real state owned by a brewer, bottler or wholesaler to any permit holder."

In the opinion of this Department the wording of this section of the act is broad in that it says that "no brewer, bottler or wholesaler shall *supply, furnish, give or pay for* any furniture, fixtures, furnishings, or equipment * * *." We construe this to not only bar the sale, by conditional sales contract, in which case the title does not pass, also, where a chattel mortgage is given but that it also forbids a sale by the designated parties to the holder of a Class "B" permit, because of the use of the words "supply or furnish" that this includes a sale of any nature and that the intent of the Legislature,

as expressed in this section, forbids the supplying or furnishing by any means of fixtures or equipment to the holder of a Class "B" permit.

We feel that any other construction, that could be placed on the wording of this section, would lead to endless subterfuges and evasions of the act. Each case would have to be investigated on its individual merits. Also, there might be a valid sale for a cash consideration and the consideration would be inadequate and in the nature of a bonus for the handling of the product of the brewer. From a business standpoint, in many cases, undoubtedly, the handling of such fixtures and equipment is for the purpose of inducing sales of their particular product. It is a side-line and used largely for the purpose of stimulating sales. It was obviously the intent of the Legislature not to encourage such a practice.

MOTOR VEHICLE: Driver's license. Suspension.

June 27, 1933. *Secretary of State, Des Moines, Iowa:* At a conference with you a day or two ago, you presented to me the situation with reference to the case of L. J. Foster where the facts are substantially as follows:

L. J. Foster on April 17, 1933, upon a plea of guilty to the crime of driving a car while intoxicated, was sentenced to imprisonment in the county jail of Black Hawk county for a period of six months, and the court ordered that said sentence be suspended, and in addition, the court ordered that the defendant be forbidden to drive a motor vehicle on the highways of the State of Iowa for a period of three months. Thereafter, and on the 17th day of June, 1933, the Honorable Clyde L. Herring, as Governor of the State of Iowa, suspended the sentence imposed upon L. J. Foster, and particularly, that part thereof as to the right of the defendant to drive a car for a period of ninety days. The Motor Vehicle Department, acting in pursuance of the requirements of Section 4960-d33, revoked the driver's license of L. J. Foster for a period of one year.

Section 4960-d33 of the Code provides that

"The department shall forthwith revoke the license of any person upon receiving a record of the conviction of such person of any of the following crimes: * * *

2. Driving a vehicle while under the influence of intoxicating liquor or narcotic drug."

The question which arises is whether the suspension of the sentence imposed upon L. J. Foster has the effect of avoiding a revocation of the driver's license of L. J. Foster under the provisions of Section 4960-d33. The Constitution of the State of Iowa, Article 4, Section 16, provides that the Governor shall have power to grant pardons and reprieves, and to remit fines and forfeitures. The question narrows down as to whether the provision for a cancellation of a driver's license under Section 4960-d33 is a forfeiture within the meaning of the constitutional provision.

After giving the matter some thought, we have reached the conclusion that the revocation of the driver's license is a part of the penalty resulting from conviction of the crime of driving a car while intoxicated, and is a provision for a forfeiture of the right to drive an automobile after such conviction, and that since it is a forfeiture, and since the Governor, under the Constitution, has the right to remit forfeitures, that the action of the Governor in suspending the operation of the judgment against Foster had the effect of remitting or suspending the forfeiture which resulted from said judgment, and therefore, under the record in this particular case, there should not be

a revocation of the driver's license as provided in Section 4960-d33 of the Code.

I understand that the license of L. J. Foster has already been taken up. In that event the details of restoring him to his right to drive an automobile are not important. That is to say, that it would seem as though the old license might be restored to him on the theory that the revocation that had been made of the license had become inoperative, or if you prefer, no doubt a new license could be issued to him but our judgment is, that under all the circumstances in this case that L. J. Foster should not be deprived of his right to drive an automobile as a consequence of his conviction of driving a car while intoxicated, because the effect of the Governor's action was to remit all the forfeitures resulting from said conviction.

BEER.

June 27, 1933. *County Attorney, Cedar Rapids, Iowa:* This will acknowledge receipt of your letter of the twentieth inst., in which you ask for an opinion about Section 26 of H. F. 587, as amended by H. F. 611, on the following questions:

"1. A wholesaler has customarily in the past, prior to the passage of this bill, furnished to his customers large refrigerating cabinets or coolers, without any charge to them. They have had the use of this cooler so long as they used his products. If he continues with an arrangement of this sort, made prior to the enactment of the "beer bill," is he violating the section above referred to or any other section of the Bill?"

Section 26, of the recent enactment of the 45th General Assembly, legalizing and regulating the manufacture and sale of nonintoxicating liquors, provides, as follows:

"No brewer, bottler or wholesaler shall supply, furnish, give or pay for any furniture, fixtures, furnishings, or equipment used in or about any place, which shall require a class 'B' permit except as herein provided. No brewer, bottler or wholesaler shall advance, furnish money for or pay for any permit or tax which may be required to be paid by any dealer or retailer except as herein provided. No brewer, bottler or wholesaler shall be financially interested either directly or indirectly in the conduct or operation of the business of a retailer or dealer as herein defined except as herein provided. Nothing contained herein shall be construed as prohibiting the leasing of real estate owned by a brewer, bottler or wholesaler to any permit holder."

We construed this section, as follows:

That when a Class "B" permit is taken out, such a permit holder comes under the provisions of the act and that in using a refrigerator or a cooler and having come into possession of the same in the manner in which you describe, it is a violation of the act, under consideration. The fact that the permit holder had possession of this refrigerator or cooler, prior to the time that he applied for a Class "B" permit, does not alter the situation, as it is clearly a violation of the section, in that "no brewer, bottler or wholesaler shall supply, furnish, give or pay for any furniture, fixtures, furnishings, or equipment * * * *," and in arriving at this conclusion we take into consideration the fact that the refrigerator or cooler is not the property of the permit holder but belongs to the brewer, bottler, or wholesaler. Of course, we assume that the refrigerator or cooler, in the instant case, has been furnished or supplied by a brewer, bottler or wholesaler, who, prior to the passage of this act, was manufacturing near beer and is now manufacturing 3.2% beer by weight. In the case where the permit holder continues to use the cabinet,

it is not his property and in the event that he discontinues the sale of the particular product of the brewer, bottler or wholesaler, the refrigerator or cooler can be taken away, such a procedure is a clear violation of the act, under consideration. The status of the dealer was changed when he qualified for and was granted a permit, under the act, in question.

"2. A wholesaler handles, in addition to beverages, certain refrigerating cabinets or coolers, which he sells on conditional sale contracts. These coolers are sold to class B permit holders, regardless of whether they are customers of the wholesaler or not. Many of them, of course, are customers, but there is no requirement that they handle the wholesaler's beverages. Is this a violation of the section above referred to?"

This Department has ruled that the wording of Section 26, of the act, under consideration, is so broad as to include a sale of any nature, because of the use of the words "supply or furnish," and, hence, we construe this to be a violation of the section, of the act, under consideration.

CHILD STEALING—KIDNAPPING.

June 28, 1933. *Governor of Iowa, Des Moines, Iowa:* I have received a request from your office for an opinion as to whether or not a conviction for child stealing would be the equivalent of a conviction for kidnapping, in order to qualify the person furnishing the required information leading to the successful prosecution of the guilty parties to be entitled to the reward offered.

Chapter 574 of the 1931 Code of Iowa, defines the crime of kidnapping and provides punishments therefor. Section 12982 of the 1931 Code of Iowa, defining the specific crime of child stealing is included in the chapter defining kidnapping. While the stealing of a child under sixteen years of age would constitute the specific crime of child stealing, it also would come within the general definition of kidnapping. Therefore, anyone furnishing information leading to the recovery of the Loll baby and to the arrest and successful prosecution of the kidnapper or kidnappers would be entitled to receive the reward offered, provided their activities in securing and furnishing this information were instituted as a result of reading and acting upon the Governor's proclamation.

SCHOOLS: Teachers' contracts.

June 29, 1933. *Superintendent of Public Instruction, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

At the March election, a new school director was elected between the date of election and the annual March meeting. The ex-director prepared a contract with a teacher for the ensuing year and had the President sign the contract. The Board had not authorized anyone to employ a teacher. The contract has never been approved by the Board. Is the contract binding and what action should be taken in regard thereto?

Under the provisions of Section 4228 of the Code of Iowa, 1931, the board shall elect all teachers and make all contracts, and as this must be done by the board as such the individual members thereof have no authority to enter into contracts, but of course, like any other contract, such teachers' contracts may be submitted to the board for acceptance or rejection.

This contract has never been submitted to the board, so is of no legal force and effect. In order to definitely clear the record of this contract, I would suggest that the board at its July meeting, have the records show that it has been advised that there is such a purported instrument outstanding and then have the board vote on the question as to whether they desire to accept or

reject this instrument. If the board decides to accept the instrument entered into, then it will become a contract and binding, but if they decide to reject it, then of course, it will have no force and effect and they can proceed to elect a teacher to fill the office.

Section 4229 of the Code of Iowa, 1931, provides in regard to the contents of a teacher's contract. The contract must be in writing and shall state the length of time the school is to be taught and the compensation per week of five days or month of four weeks, so that the contract, to be binding, must contain these elements and it is not sufficient that the teacher agree to accept what other teachers are to be paid, as under the statutory provisions, the compensation must be set out.

I think that we have made it clear in the foregoing that if this instrument which purports to be a contract is not submitted at the July meeting, then the board itself, in order to dispose of the matter, may take appropriate action to bring the matter up for determination by resolution as I have heretofore suggested.

BEER.

June 30, 1933. *Treasurer of State, Des Moines, Iowa:* We have your request for an opinion, of the twenty-fourth inst., on the following question:

"The United States Army Post at Fort Des Moines, Iowa, purchases, through its commissary, beer, under the recent enactment of the 45th General Assembly, legalizing and regulating the manufacture and sale of nonintoxicating liquors (H. F. 587, as amended by H. F. 611). Section 28, of said Act imposes a wholesale tax of $1.24 for every barrel containing 31 gallons and a like rate for any other quantity or for fractional parts of a barrel."

Can a refund of the tax, paid to date, on 700 barrels, and an exemption from payment of this tax, on future purchases, be made?

In a recent decision, Panhandle Oil Co. vs. State of Mississippi, 72 L. ed. 857; 277 U. S. 218, which went to the United States Supreme Court, from the State of Mississippi, and is found in 112 Southern 584, Mr. Justice Butler delivered the opinion of the court, which is, in part, as follows:

"Chapter 116 of the Laws of Mississippi of 1922 provided that 'any person engaged in the business of distributing gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of 1c (one cent) per gallon upon the sale of gasoline * * * *' except that sold in interstate commerce or purchased outside the state and brought in by the consumer for his own use. Chapter 115, Laws of 1924, increased the tax to three cents and Chapter 119, Laws of 1926, made it four cents per gallon. Since some time in 1925 petitioner has been engaged in that business. The state sued to recover taxes claimed on account of sales made by petitioner to the United States for the use of its Coast Guard Fleet in service in the Gulf of Mexico and its Veterans' Hospital at Gulfport. * * * Accordingly the demand was for three cents a gallon on some and four cents on the rest. Petitioner defended on the ground that these statutes, if construed to impose taxes on such sales, are repugnant to the Federal Constitution. The court of first instance sustained that contention and the state appealed. The Supreme Court (State of Mississippi) held the exaction a valid privilege tax measured by the number of gallons sold; that it was not a tax upon instrumentalities of the Federal government and that the United States was not entitled to buy such gasoline without payment of the taxes charged dealers."

The decision of the Supreme Court in the State of Mississippi was reversed in the United States Supreme Court and the court, in rendering its decision, said, in part, as follows:

"The right of the United States to make such purchases is derived from the Constitution. The petitioner's right to make sales to the United States

was not given by the state and does not depend on state laws; it results from the authority of the national government under the Constitution to choose its own means and sources of supply. While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes. * * * A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States, of its constitutional powers to operate the fleet and hospital. * * * To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. And that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the state.

"The exactions demanded from petitioner infringe its right to have the constitutional independence of the United States in respect of such purchases remain untrammeled. * * * Petitioner is not liable for taxes claimed."

Mr. Justice Holmes does not agree with the finding of the majority and in this he has the concurrence of Mr. Justice Brandeis and Mr. Justice Stone. Mr. Justice McReynolds also arrives at another conclusion and states, in part, as follows:

"It cannot be that a state tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the states all power to tax persons or property. * * * The states are, and they must ever be, coexistent with the national government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise."

In this, Mr. Justice McReynolds was quoting from the doctrine laid down in Union P. R. Co. vs. Peniston, 21 L. ed. 787.

In a more recent case, involving the same principle, Graysburg Oil Co. vs. State of Texas (1929), a Texas case was reversed on the authority of Panhandle Oil Co. vs. Mississippi. This also was a gasoline tax case. Also, see Note 56 A. L. R. 587.

26 R. C. L., Section 71, at Page 95, states the rule, as follows:

"The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission, but it does not extend to those means which are employed by Congress to carry into execution the powers conferred upon that body by the Constitution of the United States. It is consequently well settled that a state has no power to tax the means and instrumentalities which the Federal government employs to carry on its proper functions."

These seem to be the most recent pronouncements of the United States Supreme Court on situations, such as are presented in this question. However, we are of the opinion that there is a distinction between the two cases decided in the United States Supreme Court, which are cited herein, and the question before us at this time. You will note that the Mississippi case deals with the question of merchandise used in governmental functions, in this case, that of furnishing gasoline to the fleet in the Gulf of Mexico. The distinguishing feature between this case and the question presented is in the exercise of governmental functions. It is necessary that the fleet have fuel, but it is

not necessary for the Federal government to furnish beer to its soldiers and it is not required to do so.

We, therefore, feel that the serving of beer to soldiers, through an army commissary, is not a governmental function and that the tax must be paid.

You would not be authorized to make any refund of this tax or to exempt the Post at Fort Des Moines from payment of this tax on future purchases.

Any person coming into the state with the intention of remaining shall be considered a resident.

July 3, 1933. *State Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the thirtieth ult., in which you request the opinion of this Department on the following question:

An individual fishing in the State of Iowa on a resident license, having been in the state only a few weeks, claims his intention is to remain in the state and for that reason considers himself a resident.

What constitutes a legal resident of the State of Iowa.

Section 11756, of the Code of Iowa, 1931, states, as follows:

"*Who deemed resident.* Any person coming into this state with the intention of remaining shall be considered a resident."

See:

Cox vs. Allen, 91 *Iowa* 462; 59 *N. W.* 335.

"*Persons coming into state.* One who abandons his residence in another state and comes to this state to reside is entitled to his exemption immediately upon taking up his residence in this state."

Union County Investment Company vs. Messix, 152 *Iowa* 412; 132 *Northwestern* 823.

"*Period of residence.* The party claiming the exemption need not show that he has been a resident for any particular period."

These cases relate to the question of exemption and would also control in the question presented. Residence is a matter of intention and the questions for you to determine with reference to the individual, who is fishing in Iowa, on a resident license, would be as to whether or not he has abandoned his resident in another state and that he intends to make his residence in Iowa from now on. This, in many cases, is hard to do. However, if you feel that his conduct is a subterfuge, the only method, by which you could learn as to whether or not it is, would be to find out from him or from anyone else who knows the facts as to whether or not he has abandoned his residence in another state and has taken steps to reside in the State of Iowa, that is, if he is a man with a family—to determine as to whether or not his family is now making their home in Iowa or if they still maintain a home in another state. Also, what business he expects to engage in in Iowa. In other words—if he intends to maintain a home for his family in another state and is engaged in business or is employed in another state and has made no arrangements regarding any of these things in the State of Iowa, the presumptions would be that he is seeking to evade the laws of the state, with regard to the purchasing of a non-resident license for hunting and fishing.

BONDS: Reproduction of great seal of Iowa on face of bonds:

July 3, 1933. *County Attorney, Des Moines, Iowa:* I have your letter of June 30th wherein you request an opinion from the Department of Justice concerning the following proposition:

"In printing bonds of Polk county, it has been suggested by the engravers that we have as a distinguishing feature a reproduction of the Great Seal of

Iowa on the filing and face of the bonds, we would like to have your opinion as to whether or not there is any legal objection to this use of the seal?"

The Great Seal of the State of Iowa should not be used in the furtherance of any local county situation. Section 20 of Article Four of the Constitution of Iowa specifically provides that the governor shall be the custodian of the state seal and that it shall be used by him officially. It is then clearly the intent of this section of the state constitution that the Great Seal of the State of Iowa shall be used only by the governor in his official capacity and on official business pertaining to the duties of his office.

Sections 472 to 477 inclusive of the 1931 Code of Iowa provide that the Great Seal of the State of Iowa shall not be used indiscriminately. Section 472 of the 1931 Code is sufficiently broad to cover this situation and to prohibit the use of the seal of the great State of Iowa on county bonds.

It is, therefore, the opinion of this department that a reproduction of the Great Seal of the State of Iowa should not be placed upon the face of the bonds of Polk county.

BEER.

July 3, 1933. *Treasurer of State, Des Moines, Iowa:* This will acknowledge receipt of your request, of this date, for an opinion on the following question:

A class "A" permit holder, under House File 587, as amended by House File 611, Acts of the 45th General Assembly, has a trade territory which extends into the State of Illinois.

Does the tax, as provided in Section 28, of the Act, apply to beer, which is delivered to customers in Illinois?

In the opinion of this Department, Section 13, of the act, under consideration, controls on the question presented, which section is, as follows:

"Sec. 13. Any person holding a class 'A' permit issued by the Treasurer of the State of Iowa, as in this Act provided, shall be authorized to manufacture and sell, or sell at wholesale beer containing not more than three and two-tenths per cent (3.2%) of alcohol by weight for consumption off the premises, all such sales within the State of Iowa to be made only to persons holding subsisting class A, B, or C permits issued in accordance with the provisions of this Act."

Section 28, of the act, provides, as follows:

"Sec. 28. In addition to the annual permit fee to be paid by all class 'A' permittees, under the provisions of this Act, there shall be levied and collected from such permittees on all beer containing not more than three and two-tenths (3.2%) per centum of alcohol by weight, manufactured for sale and sold in this state at wholesale and on all beer imported into this state for sale at wholesale and sold in this state at wholesale, a tax of one and 24/100 ($1.24) dollars for every barrel containing thirty-one (31) gallons, and at a like rate for any other quantity or for the fractional parts of a barrel."

The question, as we view it, relates to the place where the contract of sale is consummated. In the law of "Contracts" there must be an offer and an acceptance in order that the minds of the parties meet and by way of illustration—in the instant case, salesmen take orders for beer in Illinois for an Iowa wholesale dealer, who holds a Class "A" permit, under the act referred to herein, or the offer to buy is made by letter or other modes of communication by the buyer to the seller. In this connection see:

Born vs. Home Insurance Company, 120 *Iowa* 299; 94 *Northwestern* 849.

"When the minds of the parties have met and they have agreed to exactly the same thing, the place where the agreement was finally consummated becomes the place of contract, and unless it be shown that it was the intention

of the parties that it should be performed at some other place it will ordinarily be governed by the law of the place where it was executed."

These salesmen offer to sell beer of a certain grade or brand to a retail dealer and receive an order from the retail dealer for a certain amount. He communicates this order to the wholesale dealer, who can accept or reject the offer to buy. In the event that he is unable to supply the amount desired, he rejects. In the event that he is not satisfied with the financial standing of the buyer and his ability to pay for the amount of merchandise he orders, he can reject and in the event that he accepts the offer, the sale and contract is consummated at the office of the seller, which in this case, is in the State of Iowa and so the sale and contract is consummated in the State of Iowa.

You will note that Section 28, above set out, provides, in part, as follows:

"* * * * * * and sold in this state at wholesale and on all beer imported into this state for sale at wholesale and sold in this state at wholesale, a tax of one and 24/100 ($1.24) dollars for every barrel * * * * * *"

Accordingly, in the opinion of this Department, in sales such as outlined, by an Iowa permit holder, who is authorized to sell beer by virtue of the act, under consideration, a tax can be collected by your Department as the sale is consummated in the State of Iowa and comes within the provisions of the act.

July 5, 1933. *Real Estate Commissioner, Office of Secretary of State, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-seventh ult., in which you request the opinion of this Department on the following question:

"Will you please refer to the Real Estate License Law, 1905-c27, which says: 'He shall employ a secretary and such clerks and assistants as deemed necessary to discharge the duties imposed by the provisions of this chapter and shall outline the duties of such secretary, etc.'

"Could you construe this to mean that the Secretary of State, who is the Real Estate Commissioner, has authority to appoint her Secretary to act in her place and stead at hearings for infraction of the Real Estate License Law?

"Please also refer to 1905-c50 which says:

'..... and the Commissioner may sign subpoenas, administer oaths, and and affirmations, examine witnesses and receive evidence.'

"Does this mean that no one but the Commissioner may do these things, or can they be done by her secretary?"

In the opinion of this Department, the questions raised by you are answered by Section 1905-c27, of the Code of Iowa, 1931, which is, in part, as follows:

"*Real Estate Commissioner—rights and duties.* The Secretary of State shall be the Real Estate Commissioner and shall be charged with the administration of this chapter. * * * * *"

(Referring to Chapter 91-c2, which is entitled "Real Estate Brokers".)

In the case of *McDunn vs. Roundy*, 191 Iowa 976; 181 Northwestern 453, the court states, as follows:

"The word 'shall,' when addressed to public officials, is mandatory and excludes the idea of discretion."

Undoubtedly, it was the intention of the Legislature in enacting the chapter, under consideration, as expressed in Section 1905-c27, that the Secretary of State should be empowered with quasi judicial functions and in that connection would preside over hearings in the administration of the duties of this office. If this were not true, the Legislature would have provided for a Deputy Commissioner and would have fixed the duties of such Deputy and would have allowed a delegation of authority by the Commissioner to such Deputy.

The reference in Section 1905-c50, as set forth by you, relative to the Commissioner's right to sign subpoenas and etc., by the use of the word "may," undoubtedly, was for the purpose of designating quasi judicial acts and relates to the grant of authority in this connection rather than suggesting that anyone else might do these acts for the Commissioner.

There is no question but what all routine matters may be delegated by the Commissioner to the Secretary and to such clerks and assistants as deemed necessary to discharge the duties imposed by the provisions of this Chapter. As a practical matter, all such duties should be performed by the secretary, clerks and assistants, but rulings should be made by the Commissioner, as the statute referred to herein uses the word "shall" and the Commissioner also has the right to conduct hearings, as are done in a court of law.

Accordingly, we are of the opinion that the Commissioner should sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence and that there might be a question raised, relative to the legality of a proceeding in which the Secretary would preside and do these things and also make rulings as to the evidence and make the findings of the Commissioner.

MOTOR VEHICLE: Refund—Time limit for filing claims.

July 6, 1933. *Secretary of State, Des Moines, Iowa:* Your letter of the fifth inst. states that your Department is desirous of having an opinion on Section 4924 of the motor vehicle laws of Iowa, regarding the time limit for claims to be filed under that section.

Section 4925 of the Code reads as follows:

"Payment authorized. The department is hereby authorized to make such payments according to the above provisions, when sufficient proof of such destruction by accident, or the junking and entire elimination of identity as a motor vehicle, theft, or sale for continuous use beyond the boundaries of the state, is properly certified, approved by the county treasurer, and filed with the motor vehicle department.

"The decision of the department shall be final."

These sections being read together, prescribe no fixed time for or limitation upon the filing of claims. The department is authorized to make the refund provided for when sufficient proof of destruction by accident, etc. is properly certified, approved by the county treasurer, and filed with the Motor Vehicle Department.

It is the opinion of this Department that no limitation is fixed by either of these sections upon the time for filing such claims for refund.

TAXATION: "Erroneously or illegally" exacted: Land in rural independent school district.

July 6, 1933. *County Attorney, Pocahontas, Iowa:* We wish to acknowledge receipt of your letter of July 3rd. The question which you submit to us is as follows:

"Certain real estate belonging to the claimants has been since 1921 assessed and taxes levied against it as though it were located in the Havelock Consolidated School District, when as a matter of fact the land never was within the Consolidated District, and should never have been taxed for the benefit of said District. The land actually is located in a rural independent district. The present owners have been paying the tax for more than five years, and are now asking for a refund of all taxes paid by them within the last five years."

Section 7235 of the Code of 1931 provides 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."

A tax is "erroneously or illegally" exacted, only when the levy was unauthorized in law, or when the particular officer or board had no authority to make the levy, or when the property was non-assessable. It is the opinion of this office that the tax which was levied against this property for the benefit of the School District was erroneously exacted. The claimants had no opportunity to appear before the Board of Review and make objection, because there was nothing at that time to which they could object. The levy was made at a later date, and when these claimants had no opportunity to object. Although the general rule is that taxes voluntarily paid are not recoverable, this is not the present Iowa rule, since the enactment of Section 7235.

In the case of Commercial Bank vs. Board, 168 Iowa, 501, 150 N. W. 704, the rule was adopted by our Supreme Court as follows:

"The duty to return taxes illegally exacted is none the less a duty, because the tax was voluntarily paid, or because the illegality of the statute, under which they were exacted, was not discovered for several years. This case follows the rule adopted in the case of Slimmer vs. Chickasaw (Iowa), 140 Iowa, 448; 118 N. W., 779."

It is therefore the opinion of this office that the tax should be refunded, but that the refund should be for a period not to exceed five years from the date of payment.

INCOMPATIBILITY OF OFFICE: Postmaster: Member of Fish and Game Commission.

June 14, 1933. *Governor of the State of Iowa, Des Moines, Iowa:* We wish to acknowledge receipt of your letter of June 5th, with which you enclose a letter addressed to you by J. Ray Brown of Dubuque, Iowa. You ask for an opinion on the facts stated in his letter, as follows:

"Mr. J. R. McLaughlin of Preston, Iowa, has been named Postmaster of that city. He is also a member of the State Fish and Game Commission, recently appointed. Does his appointment as Postmaster of the town of Preston create a vacancy in the Fish and Game Commission?"

We find upon investigation that Mr. McLaughlin's term of office, as a member of the Fish and Game Commission, commenced on May 1, 1933, and that he has already qualified. Later he was named as postmaster. Therefore, if there is an incompatibility, the vacancy would be created in the office to which you appointed him, rather than in the Federal office, for the reason that the acceptance and the qualification for a second office creates a vacancy in the office which he was holding at the time of the later appointment.

We might also add that this opinion will deal with the question of incompatibility, in so far as it applies to the position of a member of the Fish and Game Commission, and that we will not deal with the question, in so far as it applies to the post office. The position of postmaster, being a Federal appointment, would be governed by different rules, with which we have nothing to do.

In the case of Banker vs. Bobst, 205 Iowa 608, the Supreme Court of Iowa held that the office of constable of a township and the office of city marshal of a city located within the township were incompatible. In that case, the court made the following statement relative to incompatibility:

"It is a well-settled rule of common law that, if a person, while occupying one office, accepts 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.' * * * The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices; and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. * * * But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other, 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' * * * A still different definition has been adopted by several courts. It is held that incompatibility in office exists *'where the nature and duties of the two offices are such as to render it improper, from consideration of public policy, for an incumbent to retain both.'*"

This same statement was made by the court in the case of State vs. Anderson, 155 Iowa 271.

Under the statement of facts which you furnish us, Mr. McLaughlin was appointed as a member of the Fish and Game Commission. The statute provides that he shall serve without pay. Certainly, there could be nothing improper, from a consideration of public policy, for him to retain both offices. He will receive a salary as postmaster, but will not receive a salary as a member of the Fish and Game Commission. It is also true that neither of these offices is subordinate to the other, nor is there anything inconsistent in the functions of the two offices.

This leaves then only one question, that is, whether or not the incumbent is able to be engaged in the duties of both offices at the same time. In answer to this question, we will say that the Fish and Game Commission does not require full time service. If there is any Federal law, or if there is any rule of the Postal Department which would require that absolutely all of his time be given to the Federal service, that would not interfere with his right to hold the position under the state laws, in so far as we are concerned. That question would have to be raised by the Federal authorities.

For this reason, this Department is of the opinion that, in so far as the State of Iowa is concerned, there is nothing incompatible between these two offices, and that Mr. McLaughlin is still a member of the Fish and Game Commission of the State of Iowa, even though he has qualified as postmaster in th town of Preston. There is no vacancy, unless there is an incompatibility.

We would suggest, however, that Mr. McLaughlin acquaint himself with the Federal rules governing the holding of the office of postmaster, in order to ascertain whether or not he is prohibited from holding any other office or devoting any of his time to other business.

CITIES AND TOWNS: Registrar, appointment of: Section 2389 of Code of 1931.

June 14, 1933. *County Attorney, Davenport, Iowa:* We wish to acknowledge receipt of your letter of June 12th, in which you ask for an opinion on the following:

"Section 2389 of the Code of 1931 provides that the Board of Supervisors in each county shall appoint a local registrar for each registration district in the county, except that such appointment shall be made by the local Board of

Health in cities having a population of 35,000 or more. The term of office of each local registrar shall be four years, and he shall serve until his successor has been appointed and has qualified.

"However, the city of Davenport township is made up entirely of the city of Davenport, being over 65,000 population, and is a special charter city, and for that reason would not be governed by Section 2389. The question is whether the local registrar should be appointed by the Board of Supervisors as a registrar for the city of Davenport township, or whether he should be appointed by the local Board of Health for the city of Davenport."

The opinion which we will give you is based on two cases, which were decided by the Supreme Court of this state, both of which cases went up from Scott county. The first case is State vs. Finger, 46 Iowa 25, in which the court held that Section 390 of the Code, as amended by Chapter 6, Laws of 1876, providing for the election of city assessors, was a law relating to the powers of cities organized under the general incorporation act, and hence under Section 21, Chapter 116, Laws of 1876, it did not apply to those cities organized and acting under special charters. The reason the Supreme Court held as it did in that case was because Section 390, as amended, if applied to the city of Davenport, would affect the charter or laws of the city. Its charter and ordinances made no provision for the election of an assessor for state and county taxes. The application of the law to the city would require the election of an officer at the city election, who is not recognized by the charter or any ordinance of the city. In that case, the court made the following statement:

"We are unable to see, if the act in question is applicable to a city existing under a special charter, why Section 829 is not also applicable. If it should be so held, the City Council would be required to act as a Board of Equilization. This would affect the charters or laws of cities existing under special chapter in a most material respect."

Section 6731 of the Code of 1931, being the section relative to special charter cities, provides as follows:

"The provisions of this chapter shall apply only to cities acting under special charters. No provisions of this Code, nor laws hereafter enacted, relating to the powers, duties, liabilities, or obligations of cities or towns, shall in any manner affect, or be construed to affect, cities, while acting under special charters, unless the same have special reference or are made applicable to such cities.

"In all laws hereafter enacted, such reference or application shall be in a separate section in the act."

Where is there anything with reference to Section 2389, which affects the powers, duties, liabilities, or obligations of cities or towns acting under special charter? The local registrar, if appointed by the local Board of Health of the city of Davenport, will not be paid from city funds. He receives his compensation from the fees collected. He is not an elective officer, but an appointee. There is no expense and no liability placed on the city of Davenport by virtue of the fact that the local Board of Health would make the appointment. The local Board of Health itself is appointed and not elected.

Chapter 114 of the Code of 1931 provides for registration districts, as follows:

(1) Each city and town.

(2) Each civil township having no city or town within or partly within its limits.

(3) The portion of each civil township lying outside of any city or town located within or partly within such township.

Section 2389 does not affect the powers or duties of the special charter cities. It merely directs that the local Board of Health shall appoint the local registrar, who shall receive his compensation, not from the city funds, but from the fees collected.

We base our opinion in this matter on the case of Barthemeyer vs. Rohlfs, 71 Iowa 582, 32 N. W. 673. This case also went up from Scott County. It was an action in which the plaintiffs, tax payers of the city of Davenport, sought to enjoin the collection of a tax voted by the legal voters of said city to aid in the construction of a railroad projected by Davenport, Iowa and Dakota Railroad Company, one of the defendants in the action. The motion for an injunction was overruled, and the plaintiffs appealed. In this case, the Court distinguished the application of the rule laid down in State vs. Finger.

The Court, in the Barthemeyer case, made the following statement:

"In our opinion, the law authorizing taxation in aid of railroads cannot be held to be a law affecting the chartered powers of the city. It seems to us that this is quite apparent from an examination of the whole act. In the first place, the tax voted under the law is not a city tax. It is not levied by the city council. It is required to be levied by the Board of Supervisors. It is true, certain officers of the city are required to determine whether a majority of the taxpayers have signed a petition for an election, and to call the election and declare the result. But the city, as a corporation, is in no manner affected by the result, and is not liable for anything, not even for the expenses of holding the election. The officers to whom these duties are assigned are clothed with no discretion. They are mere agents, designated by law to determine when the statute has been complied with. If the Legislature, instead of designating certain officers of the city to perform this duty, had provided for the appointment of commissioners, or had imposed the duty on some court or judge or other person, the powers of the city would surely not have been affected by the law; and we cannot see that the fact that the law designates certain city officers to perform duties imposed, affects the powers of the city any more than the appointment of a person or persons not connected with the city government."

The rule laid down by the Supreme Court in the Barthemeyer case is undoubtedly applicable to the facts in the instant case. The only thing that Section 2389 requires is that the local Board of Health appoint the local registrar for the state of Iowa. There is no liability whatever placed upon the city, nor is there anything which affects the special charter city itself.

BEER.

June 14, 1933. *County Attorney, Harlan, Iowa:* This will acknowledge receipt of your letter of the tenth inst., in which you ask for an opinion, of this Department, relative to the following question:

"The Parish at Westphalia have and maintain a club house in connection with the church, school and other equipment there."

Under the recent enactment of the 45th General Assembly, legalizing and regulating the manufacture and sale of nonintoxicating liquors, they hold a Class "B" permit. Can they lawfully dispense beer on Sunday to their members and guests?

In the opinion of this Department, such a sale, as outlined, could not be allowed.

Section 24 of this act provides, in part, as follows:

"* * * * * * nor shall any such beer be sold to any person between the hours of twelve o'clock midnight on Saturday night and seven o'clock of the following Monday morning."

I also note that you state that Father Duran, of the parish, has informed you that salesmen of the beverage have informed him that various fraternal orders, who have club permits, are dispensing beer on Sunday and that you advised Father Duran that this is in violation of the law.

In the opinion of this Department, you are correct in your interpretation of the law. If such fraternal organizations are dispensing beer on Sunday they are violating the law and are subject to the penalties, as provided in the act, under consideration, at any time.

BEER.

June 14, 1933. *County Attorney, Belmond, Iowa:* This will acknowledge receipt of your letter of the seventh inst., in which you request an opinion, from this Department, relative to the following question:

Can the owner of a candy kitchen, located in the corner of a building, known as the "Moore Hotel," in Clarion, make application and be granted a permit to sell beer, under the recent enactment of the 45th General Assembly, legalizing and regulating the manufacture and sale of nonintoxicating liquors, to the rooms of the hotel?

You also state that a door enters into the lobby from the candy kitchen and that the owner has a lease, which calls for the privilege of occupying the basement of the hotel proper and that the hotel does not have a permit to sell beer.

In the opinion of this Department, the class of permit and the premises described in the permit would control in a situation, such as you present.

You will note, from an examination of the act, under consideration, that there are several classes of "B" permits. One type of permit issued to a retail dealer, as outlined in Section 11 of the act and the rights and privileges of such a dealer are defined in Section 14 of the act, is issued by the city or town council. Another type of permit, as outlined in Section 16 of the act, is issued to dining cars, buffet or observation cars, to the Pullman Company or railway companies, by the Treasurer of the State. Another type of Class "B" permit is issued by the Board of Supervisors of the county, to a golf or country club. The other type of Class "B" permit is issued by the city or town council, to hotels, inns or taverns, as outlined in Section 27 of the act.

The ordinary Class "B" permit, issued to a retailer, the provisions, regarding which, are set out in Sections 11 and 14, and the procedure with regard to a hotel, inn or tavern, is different. You will note that Subdivisions (a), (b) and (c) of Section 27 provide for the amount of the permit fee, in accordance with the number of guest rooms in the hotel, inn or tavern.

The question, which you present, would have to do with the type of permit, which could be granted, and the requirements which the applicant would have to meet before either type of permit could be legally granted. By way of illustration—if the owner of the candy kitchen is simply a tenant of the owner of the hotel building and his business is a separate enterprise from that of the hotel proper, then, in our opinion, he would qualify for the type of class "B" permit, which is outlined in Section 11 of the act. In the event the hotel management controls the candy kitchen, the application made would be that of the hotel company, in accordance with the provisions of Section 27 of the act, under consideration. In that case, the type of permit would be as outlined in the last named section. This would be a matter for the city council to determine, that is, as to whether the qualifications and conditions, set forth

in the various sections in the act, were met, which would determine as to the type of permit to be granted.

BEER.

June 15, 1933. *County Attorney, Cedar Rapids, Iowa:* This will acknowledge receipt of your letter of the twelfth inst., in which you ask for an opinion, from this Department, on the following question:

A certain corporation, all of the stock of which is owned by A. and B, has a Class "B" permit. A and B wish to form a partnership with C and obtain a Class "A" permit. In view of the fact that this corporation is, of course, an entity, would this arrangement be in violation of that section of the law, prohibiting the owners of a Class "A" permit from being directly or indirectly interested in a Class "B" permit?

In the opinion of this Department, Section 26, of the recent enactment of the 45th General Assembly, legalizing and regulating the manufacture and sale of nonintoxicating liquors, would control, which section is, in part, as follows:

"* * * * * * Nor brewer, bottler or wholesaler shall be financially interested either directly or indirectly in the conduct or operation of the business of a retailer or dealer as herein defined except as provided herein. * * * * *"

Also, see Section 9 of the act, under consideration, which is, as follows:

"It shall be unlawful for any person or persons to be either directly or indirectly interested in more than one (1) class of permit."

Accordingly, it would seem that there would be no question, in our opinion, that such an arrangement, as outlined by you, would be in violation of the act, under consideration.

NATIONAL BANK DEPOSITS.

June 15, 1933. *County Attorney, Newton, Iowa:* This will acknowledge receipt of your letter of the twelfth inst., in which you ask for an opinion on the following matter:

Can the resolution, relative to public funds, which has been forwarded to you from this Department, cover funds which are to be waived in national banks that are reorganized so that Boards of Supervisors, finding such resolutions, would be entitled to participation in the State Sinking Fund?

In the opinion of this Department, Senate Amendments to House File No. 541, which states, in part, as follows:

"* * * * * * Any public body hereinbefore named may with depositors of any national bank enter into a depositor's agreement with said bank, provided the form of said agreement shall be one that shall have been first approved by the Superintendent of Banking and by the Executive Council of the State of Iowa."

controls somewhat in this situation.

However, to date, no direct agreement has been made with the Comptroller of the Currency of the United States, relative to the acceptance of depositors' agreements with resolution, in question, attached thereto, so the matter will have to be taken up with the conservator of the national bank, in question, which is, as set forth in your letter, the Colfax National Bank.

It has been called to the attention of this Department that in some cases national banks have not been paying the interest, as provided in Chapter 352-a1 of the Code of Iowa, 1931, and, of course, in order to allow participation in the Sinking Fund, the qualifications and conditions, as set forth in this chapter of the Code, and also in Chapter 352-d1, would have to be met.

We have been informed that this matter has been called to the attention

of the Comptroller of the Currency, by Honorable Leo J. Wegman, Treasurer of State of the State of Iowa, and, undoubtedly, this interest will be paid into the State Sinking Fund by national banks operating in Iowa. However, it might be advisable for your Board to ascertain if this interest has been paid up to the time of reorganization and if it is now being paid. The Public Fund Act, which is commonly known as the Lovrien-Brookhart Sinking Fund Act, is a special act with reference to public money and the conditions and qualifications of the act must be met in all particulars in order that participation may be had.

ELECTION: Special election: Repeal election of June 20, 1933.

June 16, 1933. *County Attorney, Des Moines, Iowa:* Replying to your inquiry of the tenth inst., asking for an opinion construing Section 17 of Senate File No. 477, you are advised that Senate File No. 477 providing for the Repeal Election of June 20, 1933, specifically makes applicable to that election all of the statutes concerning the manner of conducting elections for state and county offices. Your attention is particularly called to Section 824 of the Code of 1931 which prohibits

"loitering, congregating electioneering, treating voters, interrupting, hindering, or opposing any voters"

and other provisions relative to the secrecy of the ballot. This statute prohibits loitering, congregating, electioneering, soliciting, etc.

"within 100 feet of any outside door of any building affording access to any room where the polls are held, or any outside door of any building, affording access to any hallway, corridor, stairway, or other means of reaching the room where the polls are held."

It is the opinion of this office that this statute applies to solicitation of any kind, whether connected with the subject of the election or not, by anyone within 100 feet of the outside door of a building containing a polling place and, of course, to any such acts within the building.

Section 825 provides a penalty of a fine or imprisonment for violation of this act.

Section 831 provides for the employment and detailing at each election of police "to prevent violations of law and any lawful command made under the chapter." In view of the fact that the controversy may become more or less bitter, it is especially important that there be no violations permitted and judges of election should be so instructed. It is the duty of the local authorities to see that these statutes are strictly enforced and permit no loitering, soliciting, or interfering within the 100 feet limit above referred to and, if any persist in so doing, to enforce the penal provisions of the act against them.

BANKS: Under Senate File 111.

July 10, 1933. *County Attorney, Mt. Ayr, Iowa:* We have your letter which is as follows:

"We have but one bank functioning in our county unrestricted—balance under Senate File 111.

Statute provides treasurer must collect interest on public funds deposited in banks or be personally liable for this interest.

The unrestricted bank will not take any more public deposits than they now have. If treasurer or clerk deposit in Senate File banks they cannot collect interest on deposits. There is no other place to deposit in Ringgold county, Iowa."

Under the Sinking Fund Act, public bodies must deposit their money in

banks that will pay the 2% interest as provided therein. Under the recent act of the legislature, public bodies may deposit their funds in any bank in the state, so if the unrestricted banks in your county will no longer accept public deposits and pay the interest as provided by law, then public bodies are authorized to deposit their funds in any bank in the state that will pay this interest.

NEWSPAPERS, OFFICIAL: Merging of Burlington Hawkeye and Burlington Gazette under name of Hawkeye Gazette: Board of Supervisors.

July 14, 1933. *County Attorney, Burlington, Iowa:* We acknowledge receipt of your letter of July tenth, in which you ask for an opinion on the following:

"Burlington county is entitled to three official newspapers. The Board of Supervisors at the January meeting, 1933, selected three official papers, two of which were the Burlington Hawkeye and the Burlington Gazette. Since that time, the Burlington Hawkeye and the Burlington Gazette have merged under the name of the Hawkeye Gazette. The proceedings of the Board of Supervisors are no longer being published in three official newspapers. Does the Board of Supervisors have authority to select another newspaper as an official paper, or must they wait until the January meeting in 1934?"

Section 5397 of the Code of 1931 provides as follows:

"The Board of Supervisors shall at the January session each year select the newspapers in which the official proceedings shall be published for the ensuing year."

The section of the Code just quoted does not mean that the January meeting is the only meeting at which official papers could be selected. It means that the designation should be made at the January meeting. However, if at some time during the year one of the official papers should go out of business, it would be necessary to select another, for the reason that Section 5411 of the Code of 1931 provides that the proceedings of the Board of Supervisors shall be published in each of said official papers, meaning the number as required in Section 5399 of the Code.

We note from your letter that the Burlington Hawkeye and the Burlington Gazette have now merged. If this is true, and if the Board has not, since that merger, designated the new paper as an official paper, then it is no longer an official newspaper of the county, and it would be necessary for the Board to designate two official papers, rather than one.

COUNTY OFFICERS, COUNTY CLERK—FEES. A county clerk has the right to retain compensation received by him from abstract companies, private individuals, banks, etc. for making reports containing the title, amounts involved, suits commenced, judgments entered, but without certificate or authentication.

July 14, 1933. *State Representative, Waukon, Iowa:* Your letter of the eighth inst., addressed to the Attorney General, has been handed to me for reply.

You inquire whether the county clerk of the district court has the right to retain compensation received by him from abstract companies, private individuals, banks, attorneys, merchants, etc., for making reports containing the title of suits commenced, amounts involved, judgments entered, etc., these reports being given at stated times each week but without any certificate or authentication.

Section 5230 of the Code prescribes the salary for the clerk of each county according to the population of the county. That compensation is in full for his services as such clerk and he is not entitled to other fees or compensation from the public treasury.

A public officer takes his office cum onere and is entitled to no salary or fees except those which the statute provides.

McEldery vs. Abercrombie, 104 Southern, 671 (Ala.)

Outagamie County vs. Zuehlke, 161 N. W., 6 (Wisc.)

Public officers when challenged must be able to point out their authority for demanding fees and salaries.

Henry vs. Dolan, 203 N. W., 369 (Wis.)

Section 10837 of the Code provides:

Fees. The clerk of the district court shall charge and collect the following fees, all of which shall be paid into the county treasury:

21. For all copies of record or papers filed in his office, transcripts and making complete record, ten cents for each one hundred words.

This statute prescribes a great many other fees which shall be collected by the clerk. All of the fees contemplated by this section, clearly, must be paid into the county treasury by the clerk. It would appear that he has no authority to collect other fees for services rendered as clerk.

Statutes prescribing fees for public officers are strictly construed, but fees by implication are not permitted.

Board of Commissioners vs. Walker, 181 Pac., 195.

The services described in your letter are no part of the duties of the clerk and could properly be performed by any other individual as the records in the clerk's office are public records. In many counties, this service is rendered by abstractors or other persons who receive a nominal compensation therefor. This service is not included in the list of services for which the clerk shall charge a fee, they being covered by Section 10837 above referred to.

It is the general contemplation of the law that such a public officer shall devote his full time to the discharge of his duties. This is a good rule and should be adhered to by all public officers. It would, of course, be conceded that full time does not mean twenty-four hours a day. A public officer can do better work and more of it if he has, at proper intervals, brief time for relaxation. If he does any outside work, either for or without compensation, he should not allow it in any way to interfere with the full and honest performance of the duties of his office.

The case of Baldwin vs. Stewart, 207 Iowa 1135, holds that the clerk shall not, in addition to his regular salary, retain the fees collected by him for acting as a commissioner of insanity. This, however, is not your case.

If the clerk should by any chance be a notary public and should, during his office hours without any interference with his duties, draw a deed and receive compensation therefor, I do not think anyone would be heard to say that he should pay to the county treasurer the amount received for drawing the deed.

If the work referred to in your letter includes copies of records or papers filed in his office or transcripts, then the fees collected therefor, should be paid to the county treasurer.

I am convinced from your letter that the services you refer to do not come within the statute; that it is not the duty of the clerk as a public official to render such services as you describe, and that it is done by him outside his regular duties as clerk, and therefore, he would not be liable to account to the county for the proceeds of such work.

STATE FAIR BOARD.

July 14, 1933. *State Fair Board, Des Moines, Iowa:* This will acknowledge receipt of your request for an opinion, of this date, on the following matter:

Section 2904, of the Code of Iowa, 1931, provides for the payment of state aid, relating to the county district fairs and directs that "the Auditor of State shall issue his warrant to any society for the amount due as state aid * * *."

In view of the fact that the Acts of the 45th General Assembly changed the duties of the State Auditor and created a State Comptroller, how should these warrants be issued?

In the opinion of this Department, as numerous duties of the State Auditor have been transferred to the newly created department of State Comptroller, these warrants would be issued by the State Comptroller from the date he took office, July 4, 1933.

This duty is imposed upon the Auditor, under the laws of this state and automatically, by the transfer of these numerous duties, this becomes the duty of the State Comptroller that is, to carry out the provisions of a section of the Code, such as Section 2904, although the Code section, regarding which you inquire, now reads that the State Auditor shall issue the warrant.

July 14, 1933. *State Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the eleventh inst., in which you request the opinion of this Department, on the following matter:

"On July 1, 1933, we issued to G. M. Scheibeler of Imogene, Fremont county, Iowa, a wholesale fish market or fish peddler's license.

"The application was properly executed and the required fee was paid and properly entered in our records. On the 10th day of July, 1933, we received a request from Mr. Scheibeler asking us to return his check to him as other plans had worked against him in such a manner that he could not use the license issued. He also returned the license to this office.

"Under the provisions of the law we are asking you to inform us whether or not we can return this money to the man. We have no evidence as to whether or not the license was used between July 1 and July 10."

In the opinion of this Department, an investigation shows that license fees for a market or fish peddler's license and also other fees, as set out in Chapter 86, of the Code of Iowa, 1931, which defines the laws, with reference to the functions of the Fish and Game Commission, which said chapter has been amended by Acts of the 45th General Assembly, discloses no provision for a refund of license fees paid.

Therefore, as license fees paid, under the acts relating to the functions of the Fish and Game Commission, are allocated to specific funds and as the clerical functions have been performed by your Commission, there is no way that a refund could be legally made.

July 14, 1933. *State Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the thirteenth inst., in which you request the opinion of this Department, on the following matter:

"The proposed Winterset area is now in readiness and we are confronted with a problem in accepting this land whereas one owner objects to the expense of having the abstract brought down to date.

"Would it be possible for us to accept the deed and title by making an examination of the abstract and having the abstractor furnish us with a certificate, or, in a case of this kind where the land will be donated to the State of Iowa by the community, can we bear the cost of the abstract?"

As we understand this project, the land is to be donated to the State of Iowa and if your Commission has decided to accept the same, we are of the opinion that before doing so, an abstract should be prepared so that no liens against this property would later appear, which would affect the title of the State.

Under the circumstances, as outlined, the abstract should be brought down to date and the expense, in our opinion, could legally be paid out by your Commission for such a service.

Section 10185, of the Code of Iowa, 1931, provides, as follows:

"*Gifts to state.* A gift, devise, or bequest of property, real or personal, may be made to the state, to be held in trust for and applied to any specified purpose within the scope of its authority, but the same shall not become effectual to pass the title in such property unless accepted by the executive council in behalf of the state."

Section 10186, of the Code, 1931, provides, as follows:

"*Management of property.* If gifts are made to the state in accordance with the preceding section, for the benefit of an institution thereof, the property, if accepted, shall be held and managed in the same way as other property of the state, acquired for or devoted to the use of such institution; and any conditions attached to such gift shall become binding upon the state, upon the acceptance thereof."

You will note in the last section quoted, the following:

"and any conditions attached to such gift shall become binding upon the state, upon the acceptance thereof."

If the donor, in the instant matter, desires to donate the land, in question, to the State with the proviso that the State pay for the making of an abstract if they desire one, this would be, in our opinion, a legitimate expense and also the land should not be accepted until a search is made with reference to the title to ascertain relative to liens. A certificate from the abstractor would suffice as far as acceptance is concerned and then we feel that the abstract should be brought down to date and examined.

OSTEOPATHIC-SURGERY. QUALIFICATIONS OF APPLICANTS. The requirements for examinations may be met prior to the passage of law relative to osteopathic-surgery.

Indefinite supporting statements of individuals should not be accepted as satisfactory evidence; the law does not require only school records; the Board of Examiners appear to be the sole judges of applicants seeking a license to practice.

July 14, 1933. *Commissioner, State Department of Health, Des Moines, Iowa:* Your letter of the twelfth inst., addressed to the Attorney General, has been handed to me for reply.

You ask for the opinion of this Department upon the following questions:

1. Can statutory qualifications be complied with prior to passage of law relative to osteopathic surgery?
2. Should indefinite supporting statements of individuals be accepted as being in compliance with law, or should applicant be required to submit as satisfactory evidence, *only school records*, to the Board of Osteopathic Examiners before an applicant be permitted to take examination for a license to practice osteopathy and surgery?

It is the opinion of this Department that the first question should be answered in the affirmative.

Section 2550 of the Code provides as follows:

"Requirements for license—osteopathy. Every applicant for a license to practice osteopathy shall:

1. Present a diploma issued by a college of osteopathy approved by the osteopathic examiners.
2. Pass an examination in the science of osteopathy and the practice of the same as prescribed by the osteopathic examiners, including minor surgery."

Section 2551 of the Code is as follows:

"Requirements for license—osteopathy and surgery. In addition to the

requirements of the preceding section, every applicant for a license to practice osteopathy and surgery shall:

1. Present satisfactory evidence that he has completed either:

a. A two-year post-graduate course of nine months each, in an accredited college of osteopathy, involving a thorough and intensive study in the subject of surgery as prescribed by the osteopathic examiners, or

b. A one-year post-graduate course of nine months, as prescribed in the preceding paragraph, and, in addition thereto, has completed a one-year course of training as a surgical assistant in a hospital having at least twenty-five beds for patients and equipped for doing major surgical work.

2. Pass an examination as prescribed by the osteopathic examiners in the subject of surgery, which shall be of such character as to thoroughly test the qualifications of the applicant as a practitioner of surgery.

The first question relates particularly to the section last above quoted. This section expressly provides that "every applicant for a license to practice osteopathy and surgery shall: 1. Present satisfactory evidence that he has completed either" of the courses of training as prescribed in paragraphs a and b of the section.

The question naturally arises as to what board or authority shall pass on the requirements for the issuance of a license under these sections. Section 2473 provides:

"Rules relative to examinations. Each examining board shall establish rules for:

1. The conducting of examinations.
2. The grading of examinations and passing upon the technical qualifications of applicants, as shown by such examinations."

This section, by its terms, gives the examining board in the case of applicants for a license to practice osteopathy and surgery, the authority to make rules for the examinations and for passing upon the technical qualifications of applicants, and stops there without saying that the board shall pass upon the qualifications under the rules laid down by the board. Of course, the board of examiners can make no rules which amount to the repeal of any statute. The statutory law with reference to such examinations, should be and is a part of the rules by which the applicants for a license are measured. In other words, the rules relative to examinations, as referred to in Section 2473 of the Code, must harmonize with the law as laid down in Section 2551, prescribing the requirements for a license to practice osteopathy and surgery. That question left open by that statute seems, however, to be settled by Section 2477 of the Code which is set out as follows:

"Certification of successful applicants. Every examination shall be passed upon in accordance with the established rules of the examining board and shall be satisfactory to at least a majority of the members of said board. After each examination, the examining board shall certify the names of the successful applicants to the state department of health in the manner prescribed by it. *The department shall then issue the proper license and make the required entry in the registry book.*"

This section appears to make clear the duties and authority of the examining board and the Department of Health with reference to the issuance of a license. There is nothing in any of these statutes which require the statutory qualifications to have been met and complied with subsequent to the enactment of these particular statutes. In other words, it would appear to be immaterial whether the one-year post-graduate course and the one-year course of training as a surgical assistant in a hospital having at least twenty-five beds

for patients, etc., were completed one month or many years prior to the taking of the examination so long as the requirements are met.

With reference to question two submitted by you, in addition to what has already been set out above which partially answers that question, I would say that the sections above quoted appear to make the osteopathic examiners the sole judges of the qualifications of those seeking the license. The applicant, clearly, must "present satisfactory evidence." "Indefinite supporting statements of individuals" should not be accepted by the board of examiners as being in compliance with Section 2551, as that would leave the door open to fraud. The board of examiners should require the applicant for a license to present satisfactory evidence, but in the last analysis, that board would appear to be the judges of what is satisfactory evidence.

You ask if the applicant should be required to submit as satisfactory evidence only school records. The law does not make such a requirement as this. If the examining board accepts evidence as satisfactory which would not be satisfactory to the Department of Health, the responsibility rests wholly with the examining board, and when, after examination, the examining board has certified the names of the successful applicants to the State Department of Health in the manner prescribed by it, the Department of Health shall then issue the proper license and make the required entry in the registry book.

July 18, 1933. *Board of Conservation, Des Moines, Iowa:* This will acknowledge receipt of your request of the seventeenth inst., for the opinion of this Department on the following question:

"In the project at Backbone State Park, the Board of Conservation proposes to erect a dam.

"What would be the rights of property owners downstream, in case that, during the building of such a dam, the flow of water would be temporarily diminished?"

The general law, with reference to the rights of the property owners to the flow of waters, is found in Gehlen Brothers, et al., vs. J. F. Knorr, et al., 101 *Iowa* 700, and the Court, in that case, finds, in part, as follows:

"If there are two dams on the same stream owned by different persons, one dam being above the backwater from the other, neither owner may exercise his right to use the water of the stream so as to unduly interfere with the rights of the other, but each owner must put up with such slight disadvantages as are indispensable to a reasonable use of the water of the stream by the other."

The general rule of law is as follows:

"One property owner has no monopoly in the flow of the water; every proprietor above them has the same right to the use of the water for artificial purposes, and every one of the upper proprietors, for the purpose of enabling themselves to reap the benefit of this right, have, as a natural consequence, the right to temporarily stop the flow of the stream for such length of time as will put them in position to reap the benefits of their rights."

"In the absence of superior rights, acquired by license, grant, or prescription, the rights of such proprietors in the water of the stream are equal."—See * Willis vs. City of Perry, 92 *Iowa* 297.

"The owner of land through which a stream of water runs has a right to have it flow over his land in the natural channel, undiminished in quantity and unimpaired in quality except in so far as diminution or contamination is inseparable from a reasonable use of such water." See* Gehlen Brothers vs. Knorr, 101 *Iowa* 700.

The Courts in determining whether a use is reasonable take into consideration the following:

"the use; its extent, duration, necessity, and its application; the nature and size of the stream, and the several uses to which it is put; the extent of the injury to the one proprietor, and of the benefit to the other; and all other facts which may bear upon the reasonableness of the use."

Red River Roller Mills vs., Wright, 30 *Minn.* 249, 15 *Northwestern* 167. Washburn, Easem., page 379—101 *Iowa* 700.

Also, see Gould on "Waters," Section 213, which is as follows:

"While one riparian proprietor may not divert the water of a stream so as to deprive a lower proprietor on the same stream of the benefit thereof, such upper proprietor may reasonably detain the water for proper purposes. The doctrine that such use by the upper proprietor may result in diminishing the quantity of water which will go down the stream, and may affect the current by retarding the flow to a reasonable extent, and still be consistent with the existence of a common right, was early held in this country, and has been constantly adhered to. Ice Company vs. Guthrie (Neb.) 60 *N. W. Rep.* 717. If the general rule that each riparian proprietor is entitled to the flow of the stream, according to its natural course, without interruption or diminution, should be strictly adhered to, it would result in a virtual abrogation of the well-settled doctrine that the rights of all proprietors of the stream are equal, and would 'preclude the use of flowing waters in most cases; as, where power is desired, the rule must yield to the necessity of gathering the water into reservoirs. It is lawful to do this where it is done in good faith, for a useful purpose, and with as little interference with the rights of other proprietors as is reasonably practical under the circumstances.' "

A recent case, in which this question has been considered, by our Court, is the case of Harp vs. Iowa Falls Electric Company, 196 *Iowa* 317.

"The owner of a dam which backs water into an upstream dam, to its material injury, may not justify his conduct on the plea that he is maintaining the water level at the same point which was formerly maintained by the owner of a dam still farther downstream, when the defendant has acquired no ownership of said latter right, and when said latter right affirmatively appears to be nonprescriptive."

This was an "action in equity, to enjoin defendant from maintaining its dam at such a height as to back the water up at plaintiff's dam and mill, and thus to destroy or to infringe upon plaintiff's right to the fall of the water. Plaintiff asks that the nuisance created thereby be abated, and that defendant be required to lower its dam, and to maintain it so as not to interfere with plaintiff's rights."

The decree was for the plaintiff and the defendant appealed. The decision was affirmed in the Iowa Supreme Court.

We believe that we have set out the general proposition of law governing the question asked in this state and in brief they are, as follows:

1. That each proprietor has an equal right in the stream;
2. That each proprietor is entitled to an undiminished supply;
3. That each owner is entitled to a reasonable use of the water; and,
4. That all the surrounding circumstances are taken into consideration,—the use of the water, the size of the stream, and the nature of the use of the stream.

Therefore, it is our opinion that it is a question of the reasonableness of the use of the water and in determining what is a reasonable use all surrounding circumstances are taken into consideration. In the erecting of this dam, we would think it advisable to confer with other property owners, who are affected, and if necessary, after the extent of the use has been determined, make whatever adjustments are necessary with other proprietors, in the event that their flow of water will be diminished temporarily.

Your Board has the right to the reasonable use of the stream and has an equal right with other property owners. Investigation, by engineering means,

will determine as to the amount of interference which will be caused with the other proprietors, and after this is determined, the general rules of law, as set out herein, can be applied.

COMPTROLLER BILL: Permanent school fund. Transfer permanent school money from one county to another.

July 20, 1933. *Auditor of State, Des Moines, Iowa:* We wish to acknowledge receipt of your letter of July 13th, in which you ask for an opinion on the following:

"Since the passage of Senate File 470 of the Acts of the 45th General Assembly, said Act being generally known as the Comptroller Bill, who will have the authority to transfer the permanent school money from one county to another, to supervise the escheated estates, the proceeds of which have become a part of the Permanent School Fund, and all other matters in relation to said Permanent School Fund?'

Prior to the passage of Senate File 470 of the Acts of the 45th General Assembly, all of the duties relative to the Permanent School Fund were performed by the Auditor of State, by virtue of Chapter 232 of the Code of 1931.

The Comptroller Bill in only one instance mentions in so many words the Permanent School Fund, that is, in Section 6, Sub-section 9, relative to the duties of the Comptroller, the bill provides as follows:

"To apportion the interest of the permanent school fund on the first Monday of March and September of each year, among the several counties in proportion to the number of persons between five and twenty-one years of age in each, as shown by the last report filed with him by the Superintendent of Public Instruction."

However, there are other provisions of the bill relative to the duties of the Comptroller and the duties of the State Auditor which require us to rule that all of the duties with reference to the Permanent School Fund are transferred to the Comptroller. For instance, Section 5, Sub-section 6, of the bill provides, relative to the duties of the State Comptroller, as follows:

"Perform and exercise all those duties and powers now delegated by law and performed by the State Auditor which relate to bookkeeping and accounting and to the pre-audit and settlement of state accounts and claims."

Section 6, Sub-section 2, of the bill provides, relative to the specific duties of the State Comptroller, as follows:

"To control (a) the payment of all moneys into the treasury and (b) all payments from the treasury by the preparation of appropriate warrants, or warrant checks, directing such collections and payment."

Section 12 of the Bill provides in part as follows:

"The State Auditor is hereby relieved of all duties in respect to the pre-audit and settlement of state accounts, both receipts and disbursements, and the keeping of accounting records and the making of financial reports now required of him by law, as they relate to state finances. * * * * and the keeping of state bookkeeping and accounting records and the rendering of reports relating to state finances now required by law, of which the State Auditor is hereby relieved, are hereby transferred to the Office of State Comptroller, together with all books, records, documents and papers pertaining to such accounts and reports, * * * *."

Again it is provided in the second paragraph of Section 12, as follows:

"And it is also the purpose of this section to confine the functions of the Auditor of State to those duties enumerated in: * * * *." (Here follows a list of the sections of the Code of 1931, enumerating duties to be performed by the State Auditor.)

None of the sections included in Chapter 232 of the Code of 1931 are found in the list of Code sections above referred to.

As we understand it, the Permanent School Fund is accounted for in a separate set of books in the office of the Auditor of State. The Comptroller's Bill provides that all of these books of account be turned over to the State Comptroller. Certainly, it could not have been the intention of the Legislature to leave the Permanent School Fund under the control and supervision of the State Auditor and yet transfer all of the books to the office of the Comptroller.

It is therefore the opinion of this office that the effect of Senate File No. 470 is to transfer all of the duties relative to the Permanent School Fund from the office of the Auditor of State to the office of the State Comptroller.

ELECTION: Special election: Cost of publishing proclamation and sample ballot be certified by Secretary of State to Auditor of State.

July 20, 1933. *Auditor of State, Des Moines, Iowa:* We wish to acknowledge receipt of your letter of July 13th, in which you ask for an opinion on the following:

"Should the cost of publishing the proclamation and the sample ballot, in connection with the special election of June 20, 1933, held under authority of Senate File 477, be certified by the Secretary of State to the Auditor of State, or should such cost be certified by the County Auditors of the several counties to the Auditor of State for payment?"

Section 18 of Senate File 477, or that part of said section which has reference to this question, is as follows:

"The expense of holding such election shall be paid by the State Treasurer of the State of Iowa, out of funds in his hands not otherwise appropriated. All bills of necessary and proper expense incurred according to law, shall be submitted to the County Auditors in the several counties by claimants with itemized, verified statements of account, which shall be filed with said County Auditors within ten (10) days after the holding of such election, and the several County Auditors shall thereupon duly itemize and certify such claims for expense to the Auditor of State of the State of Iowa, who shall draw warrants therefor to the persons entitled thereto in the amount found to be due. All the ballots for such special election shall be furnished by the Secretary of State of the State of Iowa and delivered by him to the several county auditors in the state for distribution to each election precinct in their respective counties at least three (3) days prior to the date of such special election. The cost of printing said ballots shall not exceed a proportionate amount, space and composition considered, of the cost of printing ballots for a general state election. The Secretary of State shall cause said ballot, together with the Governor's proclamation of such special election, to be published in two (2)newspapers of general circulation in each county at least ten (10) days prior to the date of such special election."

We are convinced that the latter part of that section, which provides that the ballots shall be furnished by the Secretary of State, and that the Secretary of State shall cause said ballots, together with the Governor's Proclamation of such election to be published, would mean that the expense would be certified by the Secretary of State to the State Auditor and warrants drawn by the State Auditor, regardless of the fact that the first part of the section provides that the expense of holding such election shall be paid by the Treasurer of State, after said bills are certified to the Auditor of State and warrants drawn.

We are also of the opinion that this section, along with Chapter 6 of the Code of 1931, is sufficient authority for this ruling. Chapter 6 of the Code of 1931 make provision for the procedure mentioned by us in cases of constitutional amendments and public measure.

ROADHOUSE DEFINED.

July 20, 1933. *County Attorney, Boone, Iowa:* This will acknowledge receipt of your letter of the fifteenth inst., in which you request the opinion of this Department on the following matter:

There is a section in the 1931 Code which provides for a township license for all places outside of the corporate limits of a city or town which furnished entertainment, prepared food or drink.

"The question has arisen in this county concerning the sale of pop and other bottled soft drinks in oil stations which make no effort to serve food other than perhaps candy bars, or provide no entertainment.

"It has been my contention that this Section of the Code is meant for Roadhouses and not for oil stations. There would be no license required of them to sell a can of sardines or a package of doughnuts, and certainly a bottle of pop would be very little, if any different, than canned goods or other articles in the grocery line."

Chapter 285, of the Code of Iowa, 1931, relates to township licenses, and in Section 5582-c1 defines a roadhouse and states, as follows:

"'*Roadhouse*' *defined.* A road house, for the purposes of the preceding section, shall be construed to mean any building or establishment open to the public and located on or accessible to a road or public highway outside the limits of an incorporated town or city where entertainment, prepared food or drink is furnished to the public generally for hire, sale or profit."

In the opinion of this Department, an oil station that engages in the sale of oil and gasoline and, as a side line, sells pop, could not be construed to be a roadhouse.

Section 5582 recites the circumstances under which a license is required and is as follows:

"*License required.* No person shall, for himself or for any other person, firm, or corporation, keep or operate for hire or for profit any theater, moving picture show, pool or billiard room or table, dance hall, skating rink, club house, roadhouse, amusement park, or bowling alley, outside the limits of cities and towns without first procuring a license therefor from the township trustees.

"This section shall not apply to baseball games or county fairs."

We do not believe that it was the intention of the Legislature to require a license of an oil station that sells pop and candy bars.

BEER.

July 20, 1933. *County Attorney, Grundy Center, Iowa:* This will acknowledge receipt of your letter of the eighteenth inst., to Edward L. O'Connor, Attorney General, which has been referred to the writer for attention, in which you ask for the opinion of this Department on the following matter:

"A Class 'B' permit holder wishes to deliver beer to purchasers seated in automobiles outside his place of business and on lots owned by him. He expects to take the beer out to them and to see that they drink it before driving away."

In the opinion of this Department, we see no legal objection, where the permit describes certain premises, that beer may be sold, as provided in House File No. 587, as amended by House File No. 611, Acts of the 45th General Assembly, where the seating arrangement, as designated in Section 14, is complied with.

As the Legislature designated that there should be "tables and seats sufficient to accommodate not less than twenty-five persons at one time," we are of the opinion that the sale of beer to customers in parked automobiles is an evasion of the act. The fact that a designation was made about serving beer at tables and seats, leads us to the conclusion that it was the intention of the

Legislature that beer should be served at tables and seats and not to patrons in parked automobiles. If such patrons cared to leave their automobiles and drink the beer on the lawn at tables and seats, we see no objection.

BEER.

July 20, 1933. *County Attorney, Grundy Center, Iowa:* This will acknowledge receipt of your letter of the eighteenth inst., to Edward L. O'Connor, Attorney General, which has been referred to the writer for attention, in which you ask for the opinion of this Department on the following question:

"A town in this county (Grundy) granted a Class 'C' beer permit on April 25th. The town recalled the same at the request of the holder, cancelled it, and issued a Class 'B' permit to the same man on May 6th. The town applied the $25.00 paid for the class 'C' permit on the $100.00 fee for the Class 'B' permit and charged the permit holder the balance of $75.00 at the time the Class 'B' permit was issued. So that the holder has paid only $100.00 for both permits. This seemed fair to the town council due to the fact that the Class 'C' permit was in force only 10 days."

In the opinion of this Department, the conclusion which you have reached and have stated in your letter is correct. The act is silent on the subject of a refund and in case there is a change in the class of permit, it is necessary, if the holder of one class of permit desires another class of permit, that he pay the entire fee, as there is no provision for a refund.

COUNTY RECORDER. Filing of mortgages of personal property: Affidavit attached to copy.

July 21, 1933. *County Attorney, Montezuma, Iowa:* We wish to acknowledge receipt of your letter of June 17th.

"Your question is whether or not, under Section 10015 and 10016 of the Code of 1931, providing that mortgages of personal property, or a true copy thereof, may be duly filed with the County Recorder, the Recorder should require that an affidavit be attached to the copy, stating that it is a true copy. In other words, should the County Recorder require that this copy be certified?"

You state that a large corporation takes conditional sale notes and presents what purports to be a copy to the County Recorder for filing, but that no other affidavit or other proof that it is a true copy is attached, and the County Recorder feels that she should have some proof, for the reason that one of these copies might be entirely false, no original instrument having been executed.

You understand of course that that question could only be raised between the parties to the instrument or between the mortgagee and someone claiming a lien on or interest in this personal property. It is not anything that would affect the County Recorder in any way.

Sections 10015 and 10016 really pertain to the validity of the instrument as against existing creditors or subsequent purchasers without notice. These sections require that the instrument shall be acknowledged like conveyances of real estate, and such instrument or a *true copy thereof duly recorded by or filed and deposited with*, the Recorder of the County, etc.

It is easily seen that these two sections pertain to the validity of the instrument as between the parties. The next section, 10017, pertains to the filing of the instrument. It is as follows:

"Upon receipt of any such instrument or a true copy thereof affecting the title to personal property, the Recorder shall indorse thereon the time of receiving it, and shall fine the same in his office for the inspection of all persons, and such filing shall have the same force and effect as if recorded at length."

We see no reason why your County Recorder should worry about questions which pertain to the validity of an instrument filed in her office. She need only concern herself with the question as to whether or not she has performed her duties relative to the filing or recording.

Sections 10015 and 10016 do not use the term, "certified copy," and we cannot say that true copy means a certified copy.

CITY: Petition to change plan of government. Withdrawal of name on petition.

July 24, 1933. *State Representative, Dubuque, Iowa:* Your favor of the nineteenth inst., addressed to the Attorney General, has been referred to me for reply.

You state that the City of Dubuque has the city manager plan of government and that at this time there is a petition before the city directors asking that an election be held to decide whether the form of government should be changed. You ask this question: Can a signer of said petition now on file withdraw his signature, and if so, by what procedure?

The statutory law with relation to the city manager plan is contained in Chapters 327 and 328 of the Code as amended in some minor details by the Acts of the 45th General Assembly. The procedure for the abandonment of that plan of city government is covered by Sections 6687 to 6690 of the Code, inclusive, Section 6687 being amended by Chapter 115 of the Acts of the 45th General Assembly. These statutes provide that upon the petition signed by the electors of such city or town, equal in number to twenty-five per cent of the votes cast in said city or town for all candidates for governor at the last preceding general election, a special election should be called, etc. There is nothing in these statutes which provides that a signer may withdraw his signature from the petition.

You state that the petition is at this time before the city directors which indicates that it has been completed, filed, and delivered. It is an elementary legal proposition that a written instrument once completed and delivered or filed, may not thereafter be altered or changed, at least, without the knowledge and consent of all interested parties. In this instance, the law provides that "upon the petition signed by the electors," etc., "a special election shall be called," etc. If such a petition has been filed, then it would seem that a special election shall be called and there would seem to be no authority in any quarter to change the petition after it is filed.

These sections have not been before our Supreme Court for construction. If there should be a signer who desired to withdraw his name, he could file a petition asking that his name be withdrawn from the original petition and not counted as any part thereof, and could make a good faith effort to secure the withdrawal of his name. This would raise the issue and the question should be brought before a court for determination, if it were deemed of sufficient importance. The court might then discover some authority for the withdrawal which I cannot find in or read into the statutes.

CITIES AND TOWNS: Reconstruction Finance Corp.: Issue revenue bonds to pay costs: Borrow money from R. F. C.: Sewer rentals.

July 25, 1933. *Public Works Advisory Committee, Des Moines, Iowa:* We wish to acknowledge receipt of your letter of July 3rd, in which you ask for an opinion on two questions, as follows:

"1. Senate File 485 provides that cities and towns are authorized and em-

powered to own, acquire, construct, equip, operate, etc., and to issue revenue bonds to pay the costs of such improvements to be financed only through the Reconstruction Finance Corporation, and that such cities and towns are authorized to borrow money from the Reconstruction Finance Corporation, created by the Reconstruction Finance Corporation Act. Could this be interpreted to cover the borrowing of money under the Public Works Act, which takes the place of the Reconstruction Finance Corporation?"

It is true that Senate File No. 485 authorizes the municipality to borrow from the Reconstruction Finance Corporation, created by the "Reconstruction Finance Corporation Act." However, the purpose of this legislation was to permit the cities and towns to take advantage of the facilities offered by the Federal Government for the financing of such projects. It is what might be termed emergency legislation, or at least legislation passed for the purpose of permitting cities and towns to take advantage of offers made by the Federal Government.

Since the passage of Senate File 485, Congress has provided for the financing of these projects, under the Public Works Act. The money, however, is furnished to the Administrator of Public Works by the Reconstruction Finance Corporation, and he in turn makes the loan to the municipality.

We feel that it was the intention of the Legislature to pass legislation which would be helpful to the cities and towns in financing their projects, and that for that reason a broad construction should be placed on the law. We therefore feel that it is our duty to rule that cities and towns have authority under Senate File 485 to borrow under the Public Works Act, even though the application is not made directly to the Reconstruction Finance Corporation.

"2. Your second question is whether or not the cities and towns could legally charge the state sewer rentals under this new law in any case where buildings owned by the state are connected with the sewer."

Cities and towns have authority to assess state property for street improvement. This is found in Section 5988 and also in 6019 of the Code of 1931. The bill itself provides that the rentals shall be paid by the owner of every lot, parcel of real estate, or building that is connected with and uses such works, by or through any part of the sewer system of the city or town, etc.

We are therefore of the opinion that the city has power and authority to collect rentals from the state.

BANKS AND BANKING: Deposit of Treasurer of State for Vocational Education fund in Valley National Bank—is same subject to check?

July 27, 1933. *Treasurer of State, Des Moines, Iowa:* We have your request for opinion on the following deposit in the Valley National Bank of Des Moines:

"Leo J. Wegman, Treasurer of State Vocational Education."

You ask whether this fund is subject to check at this time.

As I understand, this money was received from the United States by the Treasurer of the State of Iowa pursuant to the provisions of the National Vocational Education Acts and is used in promoting and financing vocational education in agriculture, trades and industries, and home economics. Section 13 of the act provides in part as follows:

"That in order to secure the benefits of the appropriations, * * * as herein provided, any state shall through the legislative authority thereof, appoint as custodian for said appropriations, its State Treasurer, who shall receive and provide for the proper custody and disbursements of all money paid to the state from said appropriations."

Section 14 of the act is in part as follows:

"That the Federal Board for Vocational Education shall annually ascertain whether the several states are using or are prepared to use the money received by them in accordance with the provisions of this Act * * * Upon such certificate, the Secretary of the Treasury shall pay quarterly to the custodian of the National Vocational Education of this state, the moneys to which it is entitled under the provisions of this Act. The moneys so received by the custodian for vocational education for any state shall be paid out on the requisition of the State Board as reimbursement for expenditures already incurred to such schools as are proven by the said State Board and are entitled to receive such moneys under the provisions of this Act."

The moneys so received by the Treasurer of the State of Iowa pursuant to the act, was placed, as I understand, in a separate account designated as above, and has been used for no other purpose and is held subject to check by the custodian for expenditures incurred under the provisions of the act.

It is clear from the reading of the act, that the sums allotted to Iowa and the various states, are not absolute gifts, but are gifts conditioned on the disbursements of the sums in accordance with the provisions of the act and various regulations and the State Treasurer is only custodian, and therefore, title to the fund remains in the United States.

In view of the matters above set forth and that this fund is only in the custody of the Treasurer of the State, and placed by him in the bank for a particular purpose, and also in view of our opinion to you of March 15, 1933, it is the opinion of this Department that the balance of the said fund in the bank is subject to check and withdrawal at this time.

COUNTY OFFICERS: County Board of Education: Salary of Deputy County Superintendent of Schools: Board of Supervisors.

July 26, 1933. *County Attorney, Newton, Iowa:* We wish to acknowledge receipt of your letter of July 21st, in which you ask for an opinion on the following question:

"Is it the duty of the County Board of Education to fix the salary of the Deputy County Superintendent of Schools, or is it now the duty of the Board of Supervisors to fix that salary?"

Section 5234 of the Code of 1931 provides as follows:

"Each Deputy County Superintendent shall receive such annual salary as shall be allowed by the County Board of Education, and which said board shall fix each year in accordance with the provisions of the teachers' minimum wage law."

Section 33 of Chapter 89 of of the Acts of the Forty-fifth General Assembly, being Senate File 489, is as follows:

"The salaries of all deputy auditors, deputy treasurers, deputy recorders, assistant county attorneys, deputy clerks of court, and all other deputy county officials shall be fixed by the Board of Supervisors, not to exceed sixty (60) per cent of the salary of the principal of the respective office."

It will be seen from a reading of Senate File 479 that this bill does not specifically name the office of Deputy County Superintendent, nor does it refer specifically to Section 5234 of the Code. However, Section 33 of the act provides that the Board of Supervisors shall fix the salaries of all Deputy County Officials. It is therefore the opinion of this office that Section 33 of Senate File 479 repeals Section 5234 of the Code of 1931.

SHERIFF: Service charges: Advance or after service?

July 28, 1933. *County Attorney, Audubon, Iowa:* Your letter of June 24th, has been assigned to me for reply.

You say some question has arisen in your county as to the right of the Sheriff to demand from the attorneys of your county all charges in connection with the service of original notices. You say for a considerable period it was the practice of your Sheriff to render a bill monthly to the attorneys for all charges, including the county fees, mileage and copy fees in connection with the service of original notices served by him, and that the county bar association of your county adopted a resolution by which they refuse to pay any of the charges except those which were the individual property of the Sheriff, the balance of the costs to follow the case. You state:

"What we desire an opinion on is the question as to whether the Sheriff has a right to demand that all of the charges for serving an original notice, both county and mileage be paid in advance; and the further question, whether he was authorized to refuse to make such services if they are not paid or tendered in advance."

Section 5191 of the Code provides:

"Fees. The Sheriff shall charge and be entitled to collect the following fees:

1. For serving a notice and making return thereof for the first person served fifty cents, and for each additional person twenty-five cents. * * *

9. For a copy of any paper required by law, made by him for each one hundred words or fraction thereof, ten cents."

Paragraph 10 of Section 5191, as amended by Section 6 of Chapter 90, Acts of the Forty-fifth General Assembly provides, in part, as follows:

"Provided, however, that in the serving of orginial notices in civil cases the Sheriff shall be allowed mileage at the rate of five cents per mile in each action wherein such original notices are served, and he may refuse to serve original notices in civil cases until the statutory fees and mileage for service have been paid."

All of the fees charged by the sheriff are statutory fees, and under these provisions of the Code, it is my opinion that the sheriff has a right to demand and collect such fees and mileage in advance.

POOR RELIEF: Payable through taxation or grocery orders?: Municipal golf course: Contracted for: Authority to expend further money:

July 28, 1933. *Auditor of State, Des Moines, Iowa:* Your letter of the twenty-sixth inst., submitting three questions which have to do with the findings of your examiners in the examination of the records of the City of Ottumwa, is received.

Your first question is as follows:

"In view of Sections 5300 and 5326, does Section 5771 of the 1931 Code give to city officials of the first class cities authority to distribute relief to the poor of such city, and to pay such relief out of funds collected by the city through taxation?"

Sections 5300 and 5326 are quoted respectively, as follows:

"5300. Who deemed trustee. The word 'trustees' in this chapter shall be construed to include and mean any person or officer of any county or city charged with the oversight of the poor."

"5326. County expense. All moneys expended as contemplated in the six preceding sections shall be paid out of the county treasury, after the proper account rendered thereof shall have been approved by the boards of the respective counties, and in all cases the necessary appropriations therefor shall be made by the respective counties. But the board may limit the amount thus to be furnished."

The first section merely defines trustees as the word is construed in Chapter 267 of the Code relating to the support of the poor.

Section 5326 provides that all moneys expended as provided in the six preceding sections shall be paid out of the county treasury after proper account

rendered therefor has been approved by the Board of Supervisors. This section grants no authority to city officials to expend any money, the spending of which is contemplated by Sections 5319 to 5325, inclusive.

Section 5771 of the Code is quoted as follows:

"5771. Infirmary—outdoor relief. Cities of the first class shall have the power to establish and maintain, either within or without the limits of the city, an infirmary for the accommodation of the poor of the city, and to provide for the distribution of outdoor relief."

This section gives cities of the first class power to establish and maintain an infirmary for the accommodation of the poor and for the distribution of outdoor relief and not for general relief of the poor. It is not contemplated in providing for an infirmary or for outdoor relief that the infirmary shall furnish support for people who are in good health. The words of the statute "and to provide for the distribution of outdoor relief," contemplate the class of relief similar to that furnished by an infirmary. The Standard Dictionary defines "outdoor" as follows:

"Being or done in the open air. Outside of certain public institutions, not in alms house, as the outdoor paupers or relief."

It is my opinion that Section 5771 of the Code does not give city officials of first class cities authority to distribute relief to the poor of such cities and to pay such relief out of funds collected by the city through taxation except as that relief is furnished in an infirmary for the accommodation of the poor of the city, and except as outdoor relief is furnished for the poor who may be ill outside of such infirmary.

Your second question is as follows:

"Does Section 5824 of the 1931 Code, give the city the right to participate in riverfront improvements and pay for this work by grocery orders when funds are not available, as provided in this section?"

Section 5824 is quoted as follows:

"Cities may aid. Such city shall not be liable for any indebtedness incurred by said commission or for any bond issued by said commission. Such cities are hereby authorized to aid in making the improvements specified in this chapter by appropriating money from its general fund or from the surplus remaining at the end of the fiscal year in any special fund, except in cases where such diversion of money is especially prohibited by statute, and may appropriate in aid of the improvements herein provided for, the reasonable saving effected in the building of bridges and otherwise by reason of said improvements."

This section clearly gives cities the right to aid in making certain riverfront improvements by appropriating money from the general fund or from the surplus remaining at the end of the fiscal year in any special fund except for such diversion as is prohibited by law. The language of this statute implies that the payments will be made in money from the funds as specified and not by grocery orders bought with money from other funds. If the grocery orders were purchased with money from the general fund or from the surplus remaining at the end of the fiscal year in some special fund, then perhaps this payment could properly be made under this section with such grocery orders. Otherwise, this section conveys no such authority.

Your third question follows:

"The city of Ottumwa has entered into a contract with the Public Recreation Company of Iowa (a copy of the contract being attached) which contract calls for all expenditures to be made on the municipal golf course of Ottumwa, to be paid by the Public Recreation Company, yet in view of this existing

contract, the city officials have authorized expenditures approximating $1,100.00 for materials used in the construction of the municipal golf course, and we ask whether such expenditures are legitimate expenditures or whether they should be charged back to the authorities authorizing same?"

I have read the contract referred to therein and can find no justification in that contract for the expenditure on the part of the city of approximately $1,100.00 for materials used in the construction of the municipal golf course referred to therein. It would appear from your question, taken in connection with the terms of the contract, that there was no occasion or authority for such expenditure. Some supplemental contract or some conditions arising outside of those mentioned in your question and in the contract might justify such expenditure. It would appear that the contract is a long time lease of all that part of the East Half of Section 36, Township 73, Range 14, lying south of the Oskaloosa and Keokuk road, as now located, to the Public Recreation Company of Iowa, and that any expenditure of money thereon by the city, other than is necessary to protect its title to said premises and to protect said premises from waste, would be an unjustifiable expenditure on the theory that the city would be expending a large amount of money on this property for the benefit of the Public Recreation Company, a private corporation. There may be much more involved in this matter, however, than the question and contract themselves imply which might justify the expenditure.

TAXATION: Drainage ditch rights of way exempt. What constitutes right of way.

July 28, 1933. *County Attorney, Forest City, Iowa:* We wish to acknowledge receipt of your letter of recent date, in which you ask for an opinion on the following:

"The rights of way for the drainage ditches in this county vary from 100 to 140 feet. However, few of the ditches, if measured from bank to bank, actually exceed 40 feet in width, the balance being taken up by spoil banks. Under Section 6945 of the Code of 1931, what would be considered the right of way, the land actually covered by the easement or the ditch itself from bank to bank?"

Section 6945 provides as follows:

"Real estate occupied as a public road, and rights of way for established public levees and rights of way for established, open, public drainage improvements shall not be taxed."

Certainly, Section 6945 provides that the right of way shall not be taxed. Surely, the right of way for a drainage ditch is not that portion which is actually covered by the ditch itself from bank to bank, any more than the right of way for public highway would be that portion which is covered by the road bed from shoulder to shoulder, or in cases of paved roads, from one edge of the pavement to the other. The right of way certainly means that portion of the land covered by the easement.

CUSTODIAN.

August 1, 1933. *Secretary of State, Des Moines, Iowa:* Complying with your request for an opinion on the question of the legality of a proposed resolution of the Executive Council, authorizing the employment of six (6) additional employees in the Custodian's Department and the incurring of a total expense, in connection therewith, of a sum not to exceed Thirty-three Thousand Four Hundred Eighty Dollars ($33,480.00), we desire to advise that we have examined the statutes and laws and particularly Sections 306 and 307, Code, 1931,

and it is our opinion that the Executive Council does not have authority to authorize such an expense.

Chapter 17 of the Code deals with the duties of the Custodian of Public Buildings and those duties relating particularly to the rendering of janitor service in the state buildings at the seat of government.

Chapter 18 deals with the Executive Council and its duties and Section 306, referred to in the proposed resolution, authorizes the Executive Council, by a unanimous vote, to incur additional expense and employ additional people "for the purpose of performing any duty imposed upon such council" when the members of said council are not able to perform such duties without neglect of their usual duties. The janitor work and janitor service and custodial care of state buildings is not a part of the duties of the Executive Council but is a duty of the Custodian of Public Buildings and, therefore, such section would not authorize the employment of additional help in the Department of Custodian, as proposed by the resolution.

We have examined the Appropriation Act of the Forty-fifth General Assembly and find that, in Section 59 thereof, where the appropriation to any department is insufficient to properly meet the legitimate expense of such department, the Governor, with the approval of the Director of the Budget, is authorized to transfer from any other department of state, having an appropriation in excess of its necessity, sufficient funds to meet that deficiency.

We find no other provision in the law, authorizing any executive officer or the Executive Council to increase the appropriation made to any department or agency of the state and if appropriation to the Department of the Custodian is to be increased, it can only be done by transfer of a part of the appropriation given to some other department where it appears that it is in excess of its necessity.

COUNTIES: FUNDING BONDS: BOARD OF SUPERVISORS. Authority of Board of Supervisors to issue funding bonds for purpose of paying debts incurred prior to the enactment of Beatty-Bennett law.

August 2, 1933. *County Attorney, Fort Dodge, Iowa:* We wish to acknowledge receipt of your letter of July 27th, in which you ask for an opinion on the following:

"Last year a bridge of ours was destroyed by a flood. Proceeding under the exception granted by paragraph One of Section 5259, Code of Iowa for 1931, the Board of Supervisors let a contract for the building of a new bridge to replace the one destroyed. Most of the work was done last fall, 1932, and early this spring bonds to the amount of $28,000 were issued to take up the outstanding warrants issued for the construction of the bridge. The cold weather prevented the finishing of the bridge last fall. The balance was done this spring, costing about $10,000. All of the work was done before the passage of the Beatty-Bennett bill, and before it became a law on April 13, of this year.

"The warrants were not outstanding, however, as of June 1, of this year. Now, we have outstanding $10,000 in warrants for the completion of the bridge, and it is the desire of the board to issue bonds to pay off these warrants. Does the Beatty-Bennett bill prevent the issuance of these bonds?"

This office is of the opinion that the Beatty-Bennett bill does not prevent the issuance of funding bonds to pay this $10,000 of indebtedness. We base our reasons for this on the provisions of Section 1, Chapter 123, of the Acts of the Forty-fifth General Assembly, commonly known as the Beatty-Bennett bill.

Section 5258 of the Code of 1931 provides that expenditures of counties shall be confined to receipts. Section 5259, sub-section 1, excepts from the operation of Section 5258 expenditures for bridges or buildings destroyed by fire or flood or other extraordinary casualty.

Section 1 of the Beatty-Bennett bill makes provisions for the mandatory reduction in tax levies. The same section makes certain exceptions, one of which will be found in lines 25 and 26 of Section 1, Chapter 123, of the Acts of the Forty-fifth General Assembly. These two lines, when read in connection with lines 5, 6, 7 and 8 of the same section, are as follows:

"Provided, however, that the term, 'total rate of millage levy,' in both instances where heretofore used in this section, shall not be construed to include, and the limitation imposed by this section shall not be applicable to, any funding bonds issued to pay indebtedness incurred prior to the taking effect of this act, * * *."

It will be seen from the reading of Section 1 of this act that several exceptions have been made relative to principal and interest on bonds issued by the county. In this particular quotation, however, the exception made is for funding bonds, where the indebtedness was incurred prior to the taking effect of the act. It does not provide that the warrants must have been issued prior to the taking effect of the act, but that the indebtedness must have incurred prior to that time. In view of this fact, we are of the opinion that your county has authority to issue these bonds for the purpose of funding the $10,000 indebtedness incurred by the issuance of warrants for the completion of the bridge, which was destroyed by flood and which without question came within the exception prescribed in Section 5259 of the Code of 1931.

BEER.

August 2, 1933. *Treasurer of State, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-second ult., in which you ask for the opinion of this Department, on the following question:

"Can Class 'A' permit holders deliver beer to any 'B' or 'C' permit holder without having on file an order therefor?"

Section 6, of House File No. 587 as amended by House File No. 611, Acts of the Forty-fifth General Assembly, provides, in part, as follows:

"* * * * * A Class 'A' permit shall allow the holder thereof to manufacture and/or sell at wholesale beer containing not more than three and two-tenths (3.2%) per centum of alcohol by weight. * * * * * *"

Section 13 of the act again refers to the authority granted to a Class "A" permit holder and states, as follows:

"Any person holding a Class A permit issued by the Treasurer of the State of Iowa, as in this Act provided, shall be authorized to manufacture and sell, or sell at wholesale beer containing not more than three and two-tenths per cent (3.2%) of alcohol by weight for consumption off the premises, all such sales within the State of Iowa to be made only to persons holding subsisting Class B or C permits issued in accordance with the provisions of this Act."

By House File No. 611, this section was amended to include sales to Class "A," "B" and "C" permit holders.

We are unable to find anything in the act, which would forbid a Class "A" permit holder from delivering beer or selling beer without having on file an order therefor.

Section 7176, Code of Iowa, 1931, defines the word "Peddlers," and provides, in part, as follows:

"* * * shall be held to include and apply to all transient merchants and itinerant vendors selling by sample or by taking orders, whether for immediate or future delivery."

However, Section 7177 is entitled "Exceptions" and provides, among other things, as follows:

"The provisions of the three preceding sections shall not be construed to apply to persons selling at wholesale to merchants, * * * * * *"

Accordingly, in the opinion of this Department, there is nothing in the act or in the Code which would forbid this practice.

COUNTIES: APPROPRIATION: SUPPLEMENTAL. Authority of board to make appropriation, when receipts to any county funds will be larger than anticipated.

August 2, 1933. *County Attorney, Fort Dodge, Iowa:* We wish to acknowledge receipt of your letter of July 27th, in which you ask for an opinion on the following:

"A certain millage levy was spread on the books; the board, having gotten it in its head that they had to guess as to the number of actual dollars that would be collected, refused to budget up to the full amount of the levy and merely budgeted up to 80%. As a result of this unwise restriction of the budget for the various offices, at least two of them are already in the red. One of them being the Sheriff's office, and the other the Treasurer's office. We now wish to make this 20% available by calling it a contingent fund under Section 5260-c3, or by regarding it as unanticipated revenue to be used in a supplemental appropriation under Section 5260-c6."

We doubt whether or not this could be classed as a contingent fund under Section 5260-c3 of the Code of 1931, for the reason that we believe that section contemplates an appropriation at the same time that the other appropriations are made in January of each year. The section itself provides for the appropriation of a sum which may be spent for purposes which cannot be anticipated at the beginning of the year. We do not say it would be impossible to class your extra 20% as contingent funds, but we do have our doubts.

In so far as Section 5260-c6 is concerned, we are of a different opinion, that is, we feel confident that your difficulty can be taken care of under the provisions of that section. Your Board of Supervisors made a levy which will raise an amount of money 20% in excess of the appropriations for the county offices. Certainly, under the provisions of Section 5260-c6, they have authority to make a supplementary appropriation by resolution at any regular meeting. However, in making such appropriation, the provisions of Section 5260-c6, and especially the last two sentences of that section, should be carefully observed and followed.

MOTOR VEHICLE CHAUFFEUR'S LICENSE. If a manufacturers' agent drives a truck exclusively within the scope of this employment as such agent, and in all cases is acting as the agent of the employer in carrying on his manufacturing business, then he would not be required to procure a chauffeur's license.

August 2, 1933. *Superintendent, Drivers' License Department, Des Moines, Iowa:* I have your letter of this date in which you request us to give an opinion on the questions presented by the letter of Mr. H. W. Stine attached thereto.

Mr. Stine's letter addressed to Mr. Henry W. Burma, Sheriff of Butler County, Iowa, asks for an opinion on the questions as to whether drivers employed by him to drive his several trucks throughout the county for the purpose of

picking up cream and hauling it to his creamery, are by law required to have a chauffeur's license, it being his claim that he is a manufacturer and that these employees are his agents and come within the exception contained in paragraph 6 of Section 4863 of the Code.

Paragraph 6 of Section 4863 provides, in part, as follows:

"'Chauffeur' shall mean any person who operates an automobile in the transportation of persons or freight and who receive any compensation for such service in wages, commissions or otherwise, paid directly or indirectly, or who, as owner or employee operates an automobile carrying passengers or freight for hire including drivers of ambulances, passenger cars, trucks, light delivery and similar conveyances; provided, however, that this definition shall not include manufacturers' agents, proprietors of garages, etc."

This definition of the word "chauffeur" provides specifically that it shall not include manufacturers' agents. The law appears to be plain but the application of it to the facts in particular cases may be somewhat difficult.

If a manufacturers' agent drives a truck exclusively within the scope of his employment as such agent, and in all cases is acting as the agent of the employer in carrying on his manufacturing business, then it is my opinion he would not be required to procure a chauffeur's license. If, however, he operates an automobile in the transportation of property of others than this particular manufacturer for hire, he would not longer be within the exception and should be required to procure a license.

The question naturally arises as to who are manufacturers and paragraph 12 of the same section of the Code answers that inquiry, said paragraph being as follows:

"12. 'Manufacturer' or 'dealer' shall signify a person regularly in the business of having in his possession motor vehicles for sale or trade and for use and operation pursuant thereto, and shall be considered owners of motor vehicles manufactured or dealt in by them for the purposes of this chapter, prior to sale and delivery thereof, and of all motor vehicles in their possession and operated or driven by them or by their agents or employees; but the determination of the department shall be final and conclusive upon the question whether or not an applicant for registration shall be a manufacturer or dealer within the meaning and intent of this chapter."

From a reading of the above paragraph, it will be apparent that manufacturers generally, do not come within the exception provided for in paragraph six quoted above.

In view of the provisions of Section 4863 of the Code, taken as a whole, it is my opinion that drivers employed to drive trucks throughout a county for the purpose of picking up cream and hauling it to the creamery owned and operated by the owner of the trucks, should be required to procure a chauffeur's license.

GAMBLING DEVICE. JINGLE BOARD GAME. This is not a gambling device. If winning were wholly dependent upon the element of chance and not upon the element of skill, then such a game would be a gambling device. In Jingle Board, as described, the winning or losing depends largely upon the skill of the participant.

August 3, 1933. *County Attorney, Algona, Iowa:* Your letter of June 16th last, has just now been referred to me.

You state:

"This office has been requested for an opinion as to whether the following is a gambling device or not. This game is called 'Jingle Board.' Coins of different denominations are placed on a certain level board, covered with oilcloth. The ordinary harness rings are sold to the players, three for ten cents,

for the purpose of encircling the coin with these rings. If the player rings the coin, he receives whatever coin he rings. If the player's skill is such that he fails to ring a coin, he is given a small pin with a celluloid ornament on it."

It is my opinion that this is not a gambling device within the definition contained in the case of Brenard Mfg. Co. vs. Jessup & Barrett Co., 186 Iowa 872.

Three elements must be present to make it a gambling device, to-wit.: consideration, the element of chance, and a prize. The device described by you contains the two elements, namely, a consideration and a prize. The element of chance is present to a certain degree and would clearly be present if the winning or losing was dependent upon the spinning of a wheel or similar scheme where no skill is involved. In the Jingle Board game, as it is described in your letter, the winning or losing depends largely upon the skill of the participants as in the case of running a race with a silver cup for a prize. If the person playing this game possesses skill he may win and without skill he will invariably lose.

I am assuming in this opinion that the player is not hindered by any secret device and that there is a chance for him to win with a fair degree of skill. County attorneys should inspect such things as this closely, however, for they are very close to the line and their use should be discouraged as far as possible.

If winning is wholly dependent upon the element of chance and not upon the element of skill, then such a game is clearly a gambling device.

SCHOOLS: DEPOSITORY BANKS. As to Section 7420-d4, Code of Iowa, 1931, amended by House File 134, Chapter 137, 45th G. A. Is board limited to one depository bank? Does board approve or disapprove bank selected by treasurer—is board denied power to make original selection of bank? Will bank designated prior to H. F. 134 remain official depository until new depository is designated under H. F. 134.

August 4, 1933. *Department of Public Instruction, Des Moines, Iowa:* You call our attention to the fact that Section 7420-d4 of the Code of Iowa, 1931, was amended by House File 134, Chapter 137, Acts of the Forty-fifth General Assembly and in regard thereto, ask our opinion on the following questions:

1. Is the board, under the terms of Section 7420-d4, as amended, limited to one depository bank or may more than one depository bank be designated?
2. Is the board, under Section 7420-d4 as amended, limited to the mere approval or disapproval of banks selected by the school treasurer, or is the board denied power to make an original selection on its own responsibility aside from any selection first made by the treasurer?
3. When a particular bank has been the officially designated bank of a certain school district prior to the enactment of H. F. 134, will such bank remain the official depository until a new depository is designated in the manner prescribed by H. F. 134?

We will answer these in the order that you have asked them.

(1) The use of the word "bank" in the singular does not mean that the school can designate but one bank as depository and so therefore may designate one or more.

(2) The Board of Directors has no original power of selection or designation as their power is only to approve or disapprove the selection of the school treasurer, so that the school treasurer must select the depository and this selection to be approved or disapproved by the Board of Directors and in event of disapproval, the treasurer must make another selection and so on until the selection of the treasurer is approved by the board.

(3) Such a bank already designated will remain a depository until a new bank has been properly designated.

TRAVEL EXPENSE: Expense of public officials using own automobiles in connection with their duties and when transporting other public officials in their cars.

August 7, 1933. *State Comptroller, Des Moines, Iowa:*

In response to your request for an opinion concerning the traveling expenses of public officers when using automobiles in the performance of their duties, I hereby submit the following:

You call my attention to the fact that certain state officials have been using their private automobiles in the performance of their public duties and at the same time transporting other state officials for the purpose of the performance of their duties and that the official who operates his own car charges the railroad fare rate for the route traveled and, in addition thereto, each one of the other public officials also charges the railroad fare rate and the aggregate railroad fare rate for the entire party is then filed as a claim against the state. You inquire as to whether or not this practice is in accordance with the laws of this state.

You are advised that the above practice is not in accordance with the laws of this state. Section 1225-d1 of the 1931 Code of Iowa has been amended by Chapter 90 of the Acts of the Forty-fifth General Assembly. Section 1225-d1 of the 1931 Code of Iowa, as amended, reads as follows:

"Charge for use of automobile. When a public officer or employe is entitled to be paid his expenses in performing public duty, no charge shall be made, allowed, or paid for the use of an automobile in excess of five (5c) cents per mile of actual and necessary travel."

Section 1225-d2 of the 1931 Code of Iowa is as follows:

"Mileage and Expenses—Prohibition. No law shall be construed to give to a public officer or employe both mileage and expenses for the same transaction."

Section 1225-d3 of the 1931 Code of Iowa reads as follows:

"Mileage and Expenses—When Unallowable. No public officer or employe shall be allowed either mileage or transportation expense when he is gratuitously transported by another, nor when he is transported by *another public officer or employe* who is entitled to mileage or transportation expense."

It is apparent from the above provisions that a public officer who uses his own automobile can collect only the sum of five cents per mile of actual and necessary travel, even though he carries other public officials in the same automobile. Section 1225-d3 of the 1931 Code of Iowa absolutely prohibits a public officer to make any charge for transportation expense when he is transported by another public officer or employe who is entitled to mileage or transportation expense.

Other sections of the Code provide that all state officers and employes shall, in addition to salary, receive their necessary expenses by the nearest traveled and practicable route when engaged in the state in the performance of official business. Necessary traveling expense means the amount of money actually paid by the public officer as traveling expense. In case the public officer uses railroad transportation and actually pays the fare, he would be entitled to be compensated for this expense from the state upon filing the claim to which should be attached a proper receipt showing that this amount of money was actually expended by him for such traveling expense but no public official can

ride in any other public officer's automobile and then charge the state the railroad fare which he would have to pay had he traveled by railroad transportation. No public official can legally charge another public official transportation expense in case he transports the other public officer in his automobile in the performance of a public duty. This is clearly prohibited by Section 1225-d3 of the 1931 Code of Iowa and is also prohibited by Chapter 252-A1 of the 1931 Code of Iowa which chapter provides for the regulation of motor vehicle carriers. Before anyone can engage in the transportation of passengers for hire he would have to make application to the State Railroad Commission and receive authorization from them in accordance with the provisions of Chapter 252-A1 of the 1931 Code of Iowa. Anyone transporting passengers for hire without complying with the provisions of the above chapter would be guilty of a misdemeanor as provided by Section 5105-a39 of the 1931 Code of Iowa.

It would also be clearly against public policy for any state official to engage in the business of transporting other public officials for hire while in the performance of public duties.

It is also fundamental that no state official is entitled to compensation for traveling expenses unless that state official has actually paid the expenses and has a receipt to present at the time he files his claim against the state for traveling expenses.

Therefore, it is the opinion of this department that no public officer or employe is entitled to mileage or transportation expense when he is transported by another public officer or employe who is entitled to mileage or transportation expense and that when an automobile is used, no state officer can charge the state the railroad fare for the route traveled.

PURCHASE OF LAND BY COUNTY.

August 7, 1933. *Superintendent and Engineer, Board of Conservation, Des Moines, Iowa:* This will acknowledge receipt of your request, on this date, for the opinion of this Department on the following matter:

"The question has arisen in Hardin county, relative to the acquisition of some 200 acres of real estate joining the State Park in the county and it is the desire of the county to purchase the same.

"May a county use its funds for this purpose?"

We find, by an examination of the statutes, under Section 5130, Code of Iowa, 1931, the general powers granted to the Boards of Snpervisors of counties by the Legislature, and Division 12, under such section, is, in part, as follows:

"To purchase, for the use of the county, any real estate necessary for county purposes; * * * * *"

Division 16, of Section 5130, is, as follows:

"To permit any person to use any portion of the lands owned by the county for ornamental purposes, or for the erection of any monument or fountain under such restrictions as the board may from time to time enact, when such use will not interfere with the use for which such real estate was originally acquired by the county."

Under these divisions, of this Code section, we find that the county can purchase real estate necessary for county purposes, but, in our opinion, as the real estate to be acquired, would become a part of the state park in Hardin county, we do not believe that it can be construed to be for a county purpose.

In Division 16, it is our opinion that this refers, exclusively, to lands owned

by the county, which, of course, would be acquired heretofore and prior to the improvement of the project, under consideration.

Under Chapter 87, Code, 1931, which deals with the Board of Conservation and Public Parks, we find Section 1822, which is, as follows:

"*Management by municipalities.* The board may, subject to the approval of the Executive Council, enter into an agreement or arrangement with the Board of Supervisors of any county or the council of any city or town whereby such county, city, or town shall undertake the care and maintenance of any state park. Counties, cities, and towns are authorized to maintain such parks and to pay the expense thereof from the general fund of such county, city, or town as the case may be."

Section 1822-a1 is, as follows:

"*Expenditure by cities.* Any one or more cities having a population of thirty-five hundred or over, situated in counties having a population of one hundred fifty thousand or over, may through action of its city council expend money to aid in the purchase of land within the county for state parks which, when purchased, shall be the property of the state of Iowa, to be cared for as state parks."

The city of Eldora, if it is over thirty-five hundred (3500) population, could enter into this, but if it were not for the fact that Hardin county does not contain a population of one hundred fifty thousand (150,000) or over, Sections 1822-a2 and 1822-a3 provide for limitation on expenditure and city funds available and refer to the expenditure authorized in Section 1822-a1.

Section 1827, of Chapter 87, provides, as follows:

"*Powers in municipalities and individuals.* Municipalities, or individuals, or corporations organized for that purpose only, acting separately or in conjunction with each other, may establish like parks outside the limits of cities or towns, and when established without the support of the public state parks funds, the municipalities, corporations, or persons establishing the same, as the case may be, shall have control therefor independently of the Executive Council; but none of the said municipalities, individuals, or corporations, acting under the provisions of this section shall establish, maintain or operate any such park as herein contemplated for pecuniary profit."

The acquisition of this land, by the city of Eldora or Hardin county, for the purpose contemplated, would automatically, under the Code, make this state property after it is acquired.

We base our opinion, in connection herewith, on Section 1803, of Chapter 87, Code, 1931.

In connection with ways and means whereby this real estate may be acquired legally by either Hardin county or the city of Eldora, we wish to call your attention to Section 5797, of Chapter 293, Code of Iowa, 1931, which is entitled "Acquisition of Real Estate" and is, as follows:

"Said park board may acquire real estate within or without the city for park purposes by donation, purchase, or condemnation, and take the title to the same in the name of the board in trust for the public and hold the same exempt from taxation."

Section 5800 is entitled "Bonds" and provides, as follows:

"For the purpose of paying for real estate it may issue bonds in amounts needed, notwithstanding the limitation of Section 6238; provided, however, that the annual interest on the aggregate of such bonds outstanding shall not be in excess of sums as follows:

1. For towns and cities of less than twenty-five thousand population, a sum equal to the proceeds of a tax of one and one-quarter mills on the dollar of the aggregate taxable value of property therein subject to taxation.
2. For cities of twenty-five thousand population or more, a sum equal to

the proceeds of a tax of one and three-quarters mills on the dollar of the aggregate taxable value of property therein subject to taxation."

FISHING LICENSE.

August 7, 1933. *State Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-fourth ult., in which you request the opinion of this Department on the following matter:

Is a fishing license required for residents who fish in Lake Folsom located in Pottawattamie county?

"Lake Folsom was originally formed by a cut-off of the Missouri river and the land surrounding is privately owned. At various times since the formation of the lake, the Missouri river has raised to a sixteen or seventeen foot level and when this condition occurs, it overflows into Lake Folsom.

"The owner of the land surrounding makes a charge for entrance to the lake and informs those seeking recreation at this lake that a state fishing and hunting license is not required because he feels that the lake is privately owned. He also claims to have stocked the lake at various times and for that reason claims that no license is required.

"We contend that due to the overflow of the Missouri river, that the lake has been stocked to some extent naturally."

Under Chapter 87, Code of Iowa, 1931, which deals with the Board of Conservation and Public Parks, we find Section 1812, which provides, as follows:

"*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."

Section 1704, of Chapter 86, Code, 1931, provides, as follows:

"*State ownership and title—exceptions.* The title and ownership of all fish, mussels, clams, and frogs in any of the public waters of the state, and in all ponds, sloughs, bayous, or other waters adjacent to any public waters stocked with fish by overflow of public waters, and of all wild game, animals, and birds, including their nests and eggs, found in the state, whether game or nongame, native or migratory, except deer in parks and in public and private preserves, the ownership of which was acquired prior to April 19, 1911, are hereby declared to be in the state, expect as otherwise in this chapter provided.

It would seem, to this Department, that this is a fact question—as to whether or not Lake Folsom is supplied with fish from the overflowing of the Missouri river—and if this is the case, then your Commission could require licenses for hunting and fishing. It also occurs to us that, under the first Code section above set forth, there might be a serious question as to whether or not this lake is under the jurisdiction of the State of Iowa at this time.

We would suggest that your Department make an investigation, with reference to the two points raised in this letter, that is, (1) with reference to who has jurisdiction of the lake, and (2) relative to the overflow stocking this lake with fish.

We would be pleased to confer further with you after you have made such investigation, if you deem it advisable.

COUNTY CLERK; DEPUTY CLERK; REFEREE; APPOINTMENT AS REFEREE. FEES PAID TO DEPUTY COUNTY OFFICERS ARE NOT COUNTY FEES. The court may appoint the deputy clerk or other person as referee as he sees fit, and is not limited to the appointment of the county clerk. A deputy officer is not a county officer and the fees as referee are not county fees.

August 7, 1933. *Judge of the District Court, Cedar Rapids, Iowa:* This will acknowledge receipt of your letter of the 31st ult., in which you request the construction placed by this office upon Chapter 180 of the Acts of the Forty-fifth General Assembly. I quote from your letter as follows:

"I am wondering whether the actual reading of H. F. 124 was intended to require that if the court saw fit to appoint a referee in probate that he *must* be the clerk of the district court. Suppose the court, for any reason that might seem sound and wise to the court, appointed a deputy clerk? In that event would the fees received by such officer be accounted for as a part of the fees of the office of the clerk of the district court? May the court appoint a person other than the clerk of the district court or one of his deputies?"

Section 12041 of the Code, prior to the enactment of Chapter 180 of the Acts of the Forty-fifth General Assembly, provided that in matters of accounts of administrators and executors the court might appoint one or more referees who would have the power and perform the duties therein of referees appointed by the court in civil actions. That section made no mention of the clerk but it appeared to be the practice of the courts to appoint the clerk as referee in such cases. The section, as amended by Chapter 180 above mentioned, provides that the court "may appoint a referee, which referee, in all counties having a population of less than one hundred thousand, shall whenever in the opinion of the court it seems fit and proper, be the clerk of the district court of the county in which the estate is being probated."

The language contained in the amendment, and particularly, the words, "which referee shall whenever in the opinion of the court it seems fit and proper be the clerk," would indicate that it was the intent of the legislature that the clerk should be appointed whenever it seemed to the court that such appointment was fit and proper. Had this not been the intent of the legislature, Chapter 180 probably would not have been enacted. Had the legislature intended that the clerk should be appointed in all cases, it surely would have so stated in definite language.

It is my opinion that the court may appoint the deputy clerk or other person as referee and is not limited to the appointment of the clerk. Chapter 180 further provides that all fees received by any county officer as such referee shall become a part of the fees of his office and shall be accounted for as such. It is my opinion that this provision is not broad enough to cover fees paid to a deputy officer as such referee. A deputy county officer cannot be said to be a county officer. To hold that the provision with reference to accounting for the fees applies to deputy officers would be to read something into the statute which is not there.

As you suggest in your letter, the language of the statute does not appear to be entirely clear, but it would seem the construction here given it is both logical and in harmony with the language used in the statute.

MOTOR VEHICLE. TITLE. TRANSCRIPT OF JUDGMENT. By the sale, delivery of possession, and delivery of bill of sale and transfer card, properly executed, the title to the car passed prior to the filing of the transcript of judgment with the County Treasurer. After paying the 50c fee, the purchaser or transferee, having done all things to comply with the law, if the County Treasurer is satisfied with the regularity of transfer, shall have new registration certificate.

August 7, 1933. *Superintendent, Motor Vehicle Department, Des Moines, Iowa:* This will acknowledge receipt of your letter of the fourth inst., in which you ask for an opinion upon the question submitted in the letter from the

County Treasurer of Clinton county enclosed with your letter. The material part of the County Treasurer's letter is as follows:

"On July 31st there was a transcript of judgment filed in this office for action per Section 5079-c4 of Chapter 251 of the Code of 1931; notice was sent as required and today was advised that this car had been sold on January 23, bill of sale being recorded February 10th in the Clinton County Recorder's office, the back of the original registration slip having been made out January 23rd but not offered to this office for transfer until today. I realize that ordinarily transfer could be issued by the payment of the $5.00 penalty. But in this case where no application had been made prior to the date transcript was filed, should transfer be issued or not? How would Sections 4961-2-3-4 cover this? Shall this be transferred or not?

If ruling is that plates must be surrendered, what about the party who has purchased same, how will he obtain license? Section 5079-c4 does not state that car cannot be sold I believe.

Trial held and verdict returned in this case on December 22nd."

Section 5079-c4 of the Code provides that where a judgment is recovered in a court of record in this state in an action for damages for injury to or death of a person or for injury to property caused by the operation or ownership of any motor vehicle on highways of this state, and such judgment shall remain unsatisfied and unstayed for a period of sixty days after an entry thereof, a transcript thereof may be filed with the county treasurer and thereupon the county treasurer shall forthwith suspend the license, if any, of the judgment debtor, and shall forthwith suspend the registration of any and every motor vehicle registered in the name of the judgment debtor.

In the instant case the verdict was returned and presumably the judgment entered on December 22, 1932, and the transcript of judgment was not filed with the county treasurer until July 31st thereafter. The car was sold on January 23rd, the bill of sale being recorded on February 10, 1933, in the proper county recorder's office, and the transfer slip was made out on January 23rd presumably as required by law and delivered. By the sale, delivery of possession and delivery of the bill of sale and transfer card, the title to the car passed to the purchaser unless such transfer of title was precluded by Section 4964 of the Code which provides as follows:

"When title passes. Until said transferee has received said certificate of registration and has written his name upon the fact thereof for the purpose of this chapter, delivery and title to said motor vehicle shall be deemed not to have been made and passed."

The letter quoted above states that the back of the original registration slip was made out January 23rd. That statement would imply that Section 4964 was complied with. The transferee must have received said certificate of registration and must have written his name upon the face thereof to effect delivery for the purposes of Chapter 251 of the Code. Assuming that the transferee and transferor did all things required of them as to the filling out of the transfer card, it is the opinion of this office that title to the car had passed prior to the filing of the transcript of judgment with the county treasurer on July 31st.

Section 4967 provides that if a transfer of ownership is not completed as provided in Chapter 251 within ten days after the actual change of possession, a penalty of $5.00 shall accrue against said vehicle and no certificate of registration therefor, shall issue until said penalty is paid. The purchaser should be subjected to that penalty and should pay the registration fee of fifty cents required by Section 4963, and in all other respects comply with the law, and

upon having done so, and thereupon the county treasurer, if satisfied of the genuineness and regularity of such transfer, shall register said motor vehicle in the name of the transferee and issue a new certificate of registration.

The license plates should not be surrendered under the provisions of Section 5079-c4 of the Code in view of the holding that the title had passed prior to the filing of the transcript of judgment with the county treasurer.

WALKATHON.

August 8, 1933. *Iowa State Fair Board, Des Moines, Iowa:* This will acknowledge receipt of your request, of the seventh inst., for the opinion of this Department on the following question:

In view of the fact that the action, started by the city of Des Moines, as against the manager of a "Walkathon," a contest taking place at this time at the state fair grounds, was decided in favor of the defendant on the theory that the ordinances of the city of Des Moines did not control as to contracts entered into and exhibitions given on the state fair ground, is it possible for the city of Des Moines to refuse to police the state fair grounds during the time that this exhibition is being continued prior to the Iowa state fair and during the time of the fair?

In the opinion of this Department, the decision of Judge Mershon, of the Municipal Court of the city of Des Moines, was to the effect that the city of Des Moines, by ordinance, could not regulate exhibitions held on the State Fair Grounds, but this would not relieve the city of Des Moines, from policing the area occupied by the State Fair Grounds, as it is in the city limits. We do not construe the decision of the Court as violations of the state law on State Fair Grounds and it being within the area occupied by the corporate limits of the city of Des Moines, the police of the city should cover this territory and perform the duties imposed upon them with reference to individuals, who might violate the law.

The ordinance, in question, which was the basis of this law action, forbid "Walkathons," but as the State Fair Grounds is state property, an ordinance of a city would have no effect on an exhibition to be given on state property. However, individuals who violate the state laws, while on the State Fair Grounds, would be subject to the jurisdiction of the police department of the city of Des Moines.

Peace officers generally are defined in Section 13405, Code, 1931, and are classified, as follows:

1. Sheriffs and their deputies.
2. Constables.
3. Marshals and policemen of cities and towns.
4. All special agents of the department of justice.
5. Such persons as may be otherwise so designated by law.

The respective duties of the above designated peace officers are outlined and defined in Section 13405-b1, which is, as follows:

"*Duties.* It shall be the duty of a peace officer and his deputy, if any, throughout the county, township, or municipality of which he is such officer, to preserve the peace, to ferret out crime, to apprehend and arrest all criminals, and in so far as it is within his power, to secure evidence of all crimes committed, and present the same to the county attorney, grand jury, mayor or police courts, and to file informations against all persons whom he knows, or has reason to believe, to have violated the laws of the state, and to perform all other duties, civil or criminal, pertaining to his office or enjoined upon him by law. Nothing herein shall be deemed to curtail the powers and duties otherwise granted to or imposed upon peace officers."

BEER.

August 9, 1933. *County Attorney, Le Mars, Iowa:* This will acknowledge receipt of your letter of the fourth inst., in which you request the opinion of this Department on the following question:

"A town in this county (Plymouth) has revoked a Class 'B' permit. What is the authority in the matter of a city or town council revoking a permit?"

Section 7, of House File No. 587, as amended by House File No. 611, Acts of the 45th General Assembly, provides, in part, as follows:

"Power is hereby granted to cities and incorporated towns, including cities under special charter, to issue the Class 'B' and 'C' permits and to revoke the same for causes herein provided."

Your second question is as to whether or not the city is limited as to violations of Section 33 of the act. We do not construe this to be a limitation on the manner of revoking permits. It is our contention that a permit may be revoked for a violation of any section of the act.

On several occasions, we have suggested that in the event that the city council desires to revoke a permit that a hearing be had in which the permit holder shall be heard, and that the county attorney, in every instance, where it is possible, be present at such a hearing so that he may determine as to whether or not he should submit the matter to the Grand Jury, so that the penalties, as recited in Section 38, of the act, might be claimed against the permit holder. Also, we have instructed members of the Department of Criminal Investigation and county attorneys in the state that in the event that a criminal prosecution is started, under the provisions of the act, in question, that the city council should be advised of the proceedings and in the event of conviction, that they are advised so that they may proceed to revoke the permit. We construe the matter of granting permits and revocation of the same to be a matter of discretion with the city council as they are the sole judge in the case of a Class "B" and Class "C" permit, as to whether or not the prospective permittee has met the requirements of the act. In this connection, we have also advised applicants, who have been refused permits, that their only remedy is mandamus proceedings, in which there can be a hearing, relative to the qualifications of the applicant, to determine whether or not he has met the requirements of the act. In the event that the finding of the Court is that he has met the requirements, it is mandatory for the city or town council to issue a permit.

You also seek information, relative to the following question:

"Can other bonds besides corporate bonds be accepted by the city council?"

The bonds, under this act, run to the State of Iowa and the Treasurer of this state prescribes the form of bond. Honorable Leo J. Wegman, who is the Treasurer of State, has made a ruling that he will accept only surety bonds, signed by a bonding company.

Your next question is, as follows:

"If a permit holder has plead guilty to a liquor violation, which would amount to a conviction, would this come within the meaning of Section 33, of the Act, and be a conviction under this Act?"

Section 33 provides, in part, as follows:

"If a permit holder is convicted of a sale of intoxicating beverages contrary to the provisions of this Act his permit shall be revoked * * * *"

We construe this to mean just exactly what it says, that is, a conviction of a felony will be a cause for revocation of the permit. Also, this is an

act for the sale of beer of not more than 3.2% of alcoholic content by weight and this places a limitation on the volume and weight of the alcoholic content which can be sold by a permit holder. We would construe it to be a violation of the act if the permit holder sold an alcoholic beverage of over this percentage and that a conviction, such as a plea of guilty, which would be a conviction in the Federal Court, of the sale of any beverage containing over this percentage of alcohol would be sufficient grounds for the revocation of the permit.

BEER.

August 9, 1933. *County Attorney, Charles City, Iowa:* This will acknowledge receipt of your letter, of the seventh inst., to Honorable Leo J. Wegman, Treasurer of State, which has been referred to this Department for attention.

You desire an opinion on the following question:

"A Class 'B' permit holder in Charles City recently died. The question has arisen as to whether or not this permit can be transferred to the father who is going to continue the operation of the restaurant, of the permit holder. If it cannot be transferred, has the City Council any authority to refund part of the hundred dollars and if so, what part?"

This is the first matter of like circumstance that has been called to the attention of this Department. However, we have rendered opinions, on several occasions, for county attorneys, to the effect that, as the application, to be made by a Class "B" permit holder, under House File No. 587, as amended by House File No. 611, Acts of the Forty-fifth General Assembly, is a personal one, in that, there are provisions with reference to character, citizenship, etc., it cannot be transferred from one person to another.

The question of refunds has already had our attention, on several occasions, and it is our opinion that there is no provision, in the act, for a refund and that as the money is allocated to a specific fund, and that there is no machinery by which a refund can be made.

The application of our interpretation to this act may seem harsh in the instant case. However, we are endeavoring to follow the intent of the Legislature in this matter and until the Courts find otherwise, we feel that we have given a correct legal interpretation.

SALARY: Insurance Commissioner: No senator or representative shall have right to accept an office of profit during the term for which he is elected if such office has been created during his term in the Legislature or if the emoluments of said office have been increased during his term in the Legislature.

August 10, 1933. *State Comptroller, Des Moines, Iowa:* Acknowledgment is made of receipt of your letter of some days ago, calling attention to the following fact situation: (1) The present Insurance Commissioner, E. W. Clark, was appointed Commissioner for the term of four years, beginning July 1, 1931, and ending July 1, 1935; (2) his nomination was submitted to the Forty-fourth General Assembly which convened in January, 1931, and confirmed by that General Assembly; (3) E. W. Clark was a member of the Forty-fourth General Assembly; and a Senator during that period; (4) the Forty-fourth General Assembly raised the salary of the Insurance Commissioner from $4,000.00 to $4,500.00 per year, effective January 1, 1933, or during the last two and one-half years of the term for which E. W. Clark was appointed. Based on these facts, you request the opinion of this office on the following proposition:

"Since January 1st (1933) Mr. Clark has certified his salary at the rate of $4,500.00 per year and we would like your official opinion as to whether or not this can be granted under the law."

In order to properly answer your inquiry, attention must be directed to Article 3, Section 21, of the Constitution of this state, which is as follows:

"Section 21. No senator or representative shall, during this 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."

This provision of the Constitution is so clear and unambiguous as to leave little room for construction. It simply provides that every member of the legislature is disqualified from holding by appointment any civil office of profit under this state, in two instances: (1) where the office has been created during the term for which such member was elected; (2) where the emoluments of the office have been increased during such term. This provision, or a similar one, is common to constitutions. Its purpose is obvious. The Supreme Court of South Dakota, in discussing a similar provision of the constitution of that state, well expressed that purpose as follows:

"The language of the Constitution is plain. Its meaning cannot be mistaken. The purpose of the provisions is apparent. It is intended to preclude the possibility of any member deriving, directly or indirectly, any pecuniary benefit from legislation enacted by the legislature of which he is a member, is one of the most important of many reforms attempted by the framers of organic law. It is intended to remove any suspicion which might otherwise attach to the motives of members who advocate the creation of new offices or the expenditure of public funds."

See Palmer vs. State, 75 N. W. 818.

This provision is clearly designed to prevent any member of the legislature being influenced in his vote as a legislator by any personal consideration and to prevent his being a beneficiary of his own vote or influence. It is designed to preserve and protect the purity of legislative deliberations, and its clear intent and purpose is to make it impossible for any senator or representative to personally benefit from any action of the legislature to which he was elected a member, and its result is to disqualify every senator and representative from holding any office for profit which was created during the term for which he was elected or the salary of which was increased during said term.

That the office of Insurance Commissioner is an office of profit under the State of Iowa, cannot be questioned. The Insurance Commissioner is among the better paid officers of this state. It is equally obvious that the emoluments of the office were increased during the Forty-fourth General Assembly. The term of office was four years from July 1, 1931, to July 1, 1935, and the compensation was increased from $4,000.00 to $4,500.00, effective January 1, 1933, so that the compensation for the office to which he was appointed was increased by the Forty-fourth General Assembly, of which he was a member, and that increase was made to apply to a part of the term for which he was appointed. The device which was resorted to in making the increase in compensation effective January 1, 1933, was an obvious effort to avoid this constitutional prohibition.

E. W. Clark was elected State Senator from the Forty-third Senatorial District of Iowa at the General Election in November, 1928. He qualified as

a State Senator from this district on the convening of the Forty-third General Assembly which was on the second Monday of January, 1929. He was elected for a term of four years and his term expired on the convening of the Forty-fifth General Assembly which was convened on the second Monday of January or January 9, 1933. Senator Clark was nominated for Insurance Commissioner by the Honorable Dan Turner, Governor of Iowa, early in January, 1931, and the nomination was approved by the State Senate in executive session on January 22, 1931, thereafter and on the twenty-second day of June, A. D., 1931, the said E. W. Clark was appointed Insurance Commissioner and a commission issued to him. All of this took place while E. W. Clark was State Senator from the Forty-third Senatorial District and while Mr. Clark was a member of the Forty-fourth General Assembly of the State of Iowa. The salary of the Insurance Commissioner was increased from $4,000.00 per annum to $4,500.00 per annum by the Forty-fourth General Assembly. This increase in salary was fixed by Section 25, of Chapter 257, of the Acts of the Forty-fourth General Assembly and which is as follows, to-wit.:

"For Salaries: (a)
Commissioner to January 1, 1933 per annum $4,000.00
After January 1, 1933 the salary of the commissioner shall be per annum .....$4,500.00"

E. W. Clark, as State Senator and as a member of the Forty-fourth General Assembly, voted for this increase in the salary of the Insurance Commissioner which votes are recorded in Senate Journal for 1931 on pages 1125 and 1523. The votes cast for the increase in his own salary by Senator Clark were recorded on April 2, 1931, and again on April 15, 1931. The record in the Senate Journal shows that he voted for the increase in the salary of the Insurance Commissioner after he was nominated by the Governor and approved by the State Senate as the encumbent of that office. Thus, it is apparent that the fixing of the increase of the salary of the Insurance Commissioner to take effect January 1, 1933, was an intent to avoid and circumvent Section 21 of Article 3 of the State Constitution. It might be urged that the increase did not take place during the term for which he was elected but afterwards. This reasoning cannot be sustained, however, without ignoring the realities of the situation and the clear purpose and intent of the constitutional provisions. Senator Clark's term as a State Senator did not expire until the convening of the Forty-fourth General Assembly which happened on January 9, 1933. It should be borne in mind also that Senator Clark's salary was actually increased by the Forty-fourth General Assembly during its session in the year 1931. How can it be said that the salary of the Commissioner of Insurance was not increased for the term for which members of the Forty-fourth General Assembly were elected when the law which increased it was passed during the Forty-fourth General Assembly in the year 1931? That legislative enactment is what increased it and that act was passed by the Forty-fourth General Assembly in 1931 and that is the very thing which the constitutional provision was designed to prevent.

The question, therefore, is not whether E. W. Clark as Insurance Commissioner, should receive the $4,000.00 salary or the $4,500.00 salary. The question is whether he is lawfully holding the office and entitled to any salary. It will be noticed that the constitutional provision does not relate to the power of the legislature to increase the salary, but to the qualifications of the senator or representative to hold the office in the event an increase has

been made. If he is disqualified to hold the office under the Constitution, then his appointment is unauthorized and void and he is not entitled to receive any salary.

The conclusion of this office is that the compensation of the Insurance Commissioner was increased by the Forty-fourth General Assembly; that E. W. Clark, as a Senator elected for the term of the Forty-fourth General Assembly, was ineligible to accept an appointment to the office, and the attempted appointment of him to that office is void, and, that he is entitled to no compensation whatever.

The conclusion has been reached with some reluctance because of the consequences of such a holding, but the provisions of the Constitution are equally binding upon all of us, whether members of the legislative, executive or judicial branches of the government. We can hardly be expected to look for ways to avoid that Constitution. Its provisions on this question are clear and we cannot condone a nullification of those provisions because of the exigency of a particular case. Our court has never had occasion to deal with this particular provision of the Constitution or the consequences of ignoring it, but the courts of other states have frequently had under consideration similar constitutional provisions, and the question usually arose on a refusal of the auditor to issue a warrant covering the compensation of the officer who was appointed in violation of the constitutional provision.

A consideration of some of those cases will serve to illustrate the consequences of ignoring a constitutional provision of this sort.

In the case of Norbeck & Nicholson Company vs. State (S. D.) reported in 142 Northwestern page 847, the Constitution provided that no member of the legislature shall be interested, directly or indirectly, in any contract with the State authorized by laws passed during the term for which he was elected. Peter Norbeck was a member of the legislature which authorized the sinking of a well at the State University of Vermilion. The contract for the sinking of the well was let to the Norbeck & Nicholson Company, a corporation, of which Peter Norbeck was a stockholder and officer. The well was sunk in accordance with the terms of the contract. The Auditor of State refused to issue a warrant for the payment of the contract and action was brought to test the right of the State Auditor to thus refuse the issuance of the warrant, and the court held that the contract, being in violation of the provisions of the Constitution of the state, was void and that no payment could properly be made thereon or for the work performed in pursuance thereof.

In the case of State of Minnesota, ex rel H. W. Childs, Attorney General, vs. John B. Sutton, reported in 30 L. R. A. page 630, there was a constitutional provision as follows:

"No senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States or the State of Minnesota, except that of postmaster; and no senator or representative shall hold an office under the state which has been created or the emoluments of which had been increased during the session of the legislature of which he was a member until one year after the expiration of his term of office in the Legislature."

Sutton became a representative in the legislature of the State of Minnesota on the first Monday in January, 1895, and the time for which he was elected continued until the first Monday in January, 1897. He served until the second day of May, 1895, when he resigned his office as a member of the legislature,

and on the fourth day of May, 1895, he was appointed to the office of Inspector of Boilers. Thereafter, action was brought in quo warranto to oust him from the office of Inspector of Boilers, and the Court held that under the constitutional provision that "no senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States or the State of Minnesota, except that of postmaster," he was ineligible for the office of Inspector of Boilers, and that his appointment was void, and that he should be ousted from exercising or attempting to exercise the functions of that office.

There are a number of other decisions of courts of last resort to the same general effect. See Bascome vs State ex rel Short, an Oklahoma case, reported in 40 A. L. R. 941; Gibson vs. Kay, an Oregon case, reported in 137 Pacific Reporter 864; State vs. Clausen, a Washington case, reported in 182 Pacific Reporter 610; State vs. Bratton, a Tennessee case, reported in 253 Southwestern Reporter 705.

Our conclusion is that E. W. Clark was not eligible to accept an appointment of Insurance Commissioner for the term beginning July 1, 1931, and that the attempted appointment of him to that office is void, and that he is holding the office now contrary to the provisions of the Constitution of the State, and that the State Comptroller should refuse to issue any warrant to him by way of compensation.

August 11, 1933. *County Attorney, Marshalltown, Iowa:* This will acknowledge receipt of your letter of the ninth inst., in which you request the opinion of this Department on the following question:

"A" holds a Class "B" permit for a small restaurant, of which he is the lessee. At the rear of his premises is a small amusement park operated by "C." A dance hall, in the amusement park, is attached to this restaurant. Can "A" legally set up a place for the service of beer in the dance hall? Can be serve beer throughout the amusement park or set up a place for the service of beer on the grounds of the amusement park under the same license by reason of the terms of this lease as to his concession rights on the amusement park?

In the opinion of this Department, under House File No. 587 as amended by House File No. 611, Acts of the Forty-fifth General Assembly, there is a designation that beer may be sold by permit holders at the "place or building." We construe this to mean that the premises, for which the permit is granted, for instance, if it were granted for Lot 11, Black "F," of a certain city, the permit holder might serve beer any place on the premises in the event that he abided by Section 14, as amended, relative to the service of beer and other sections, relating to the sale of this beverage. However, the fact that he might have a lease on concession rights, in other parts of the town or city, would not allow him to sell beer at those places as they are not covered by his permit.

We have held that, where there is a lot adjoining the building, on the premises described in the permit, beer may be served on the lawn if the provisions, with reference to "tables and seats" are complied with.

BEER.

August 14, 1933. *County Attorney, Manchester, Iowa:* This will acknowledge receipt of your letter of the tenth inst., in which you ask for the opinion of this Department on the following question:

"Does the council of the city of Manchester have the authority to grant a holder of a Class 'B' permit, for the sale of beer, issued by them, the right to change location to the fair grounds for the duration of the fair, and then authorize the permit to be changed back to the location where first granted?

"This matter will arise by an application making the same showing as to location and condition of the building as required in an original application."

In the opinion of this Department, under House File No. 587, as amended by House File No. 611, Acts of the Forty-fifth General Assembly, changes of location can be made by a Class "B" permit holder by the making of an application to the City Council and the request can be granted to another location *within* the city limits (I take it, in the instant case, that the fair grounds are within the corporate limits of the city of Manchester). We have rendered several opinions to this effect as, in the case of a fire or the expiration of a lease or for any other good cause, it might be expedient for a Class "B" permit holder to change his place of business from one location to another and we feel that there should be no limit placed upon th right of a permit holder, of this class, to the right to change the location of his place of business. The provisions of Section 11, Division (2), Subdivision b, which are as follows:

"b. That the place or building where he intends to operate conforms to all laws, health and fire regulations applicable thereto, and is a safe and proper place or building."

should be met in the new location.

We are of the opinion that a transfer from one person to another cannot be accomplished, under the act, in question, for the reason that the application, to be made, is a personal one, in its nature, as it relates to good moral character and also to the question of citizenship. We have ruled on several occasions that a transfer from one person to another cannot be had, under this act.

BOARD OF EDUCATION: Board of Education and Finance Committee are legally justified in buying Iowa products where cost of Iowa products exceed cost of similar materials obtainable from outside of this state—Re: Chapter 62-b1 Code of 1931.

August 16, 1933. *Iowa State Board of Education, Des Moines, Iowa:* We have your letter of August 12th in regard to Chapter 62-B1 of the Code of Iowa, 1931, your letter being in part, as follows:

"The Board of Education and the Finance Committee are constantly urged to award contracts for Iowa products in situations where the cost of Iowa products are in excess of the costs of similar materials obtainable from outside of this state. In some instances, the cost of using Iowa products will exceed by upwards of 20% the cost of using articles brought in from elsewhere.

"Will you please give us an official opinion as to whether we are legally justified in buying Iowa products under such circumstances, and if so, how far may we go without subjecting ourselves to any form of legal criticism."

I note that this law was enacted at the Forty-second General Assembly, it being Chapter 27 of the acts of that assembly and the title of the act is in part as follows:

"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."

You will note then, that the intent of the act is to promote the use of materials, products and so on, manufactured or grown within the State of Iowa, by requiring a preference to be given them where the same can be secured with-

out loss to the state. Our Supreme Court has held many times that the use of the words "may, must, shall and will" in statutes are elastic and frequently treated them as interchangeable and in construing the statute, the rules for interpretation direct attention to the signs of the legislative intent and the reason and spirit of the law, and we believe that this act is not mandatory except where the quality is equal and the Iowa products can be secured without additional cost over foreign products or products of other states. Of course, the question of quality is naturally therefore a matter of some discretion with the Board or Commission.

We are, therefore, of the opinion that the purpose of this chapter was to promote the use of Iowa products, but it was not intended that Iowa products should be purchased where the cost of the product of equal quality from a foreign state was much less, as suggested in your letter, and that you are authorized to award contracts for foreign products where the cost of such product of equal quality is less than the cost of the Iowa product. But, as we have heretofore suggested, the question of quality must be somewhat discretionary with your Board or Committee, as it is very rare that products are of an exact quality and if you believe that the difference in quality of the Iowa product more than offsets the excess price, you are authorized to buy the Iowa product even though the price may be a little more, but if the quality is equal, then of course, you are not bound by the statute, and must give the contract to the lowest bidder.

COSMETOLOGY. RIGHTS OF BOARD OF COSMETOLOGY EXAMINERS REGARDING SCHOOLS OF COSMETOLOGY. The Board of Cosmetology Examiners may require schools of cosmetology to be on a separate floor and to have certain sanitary equipment, etc. This opinion answer eight questions regarding requirements of schools of cosmetology.

August 17, 1933. *County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your favor of the fourth inst., in connection with which you submit to this office for an opinion, certain questions submitted to you by Honorable Paul Cunningham, Attorney, of Des Moines, Iowa. The questions submitted in your letter are as follows:

1. Has the Department of Cosmetology the right to require that the school of cosmetology be on a separate floor and maintain a separate entrance from any cosmetology establishment? In other words, is there any violation of the Code in having a school of cosmetology on the same floor with a cosmetology establishment and separated by a temporary petition reaching to the ceiling. The department now requires, under a mimeographed set of rules that the school of cosmetology must be on a separate floor and maintain a separate entrance from any cosmetology establishment.
2. Has the Board of Cosmetology Examiners, under the Code a right to refuse approval to a school of cosmetology which accepts patrons by appointment?
3. Has the department the right to require that walls in cosmetology schools be painted or enameled and washed at least four times a year? In other words, if they are painted and kept clean, is this not sufficient?
4. Has the department the right, under the statute, to require cosmetology schools to furnish twelve (12) blocks with Wefts, of first quality hair to be used for marcelling and fingerwaving, and also, to require the blocks to be placed on standards the proper height so students may stand while working?
5. Has it the right, under the statute, to require that the study room be entirely separate from the practice room or clinic?
6. Has it the right to require twelve or more chairs or any specific number for a school?

7. Has it the right to specify any particular kind of lavatory, stove or sterilizing equipment, providing the school is kept clean and its instruments sterilized?

8. Has it the right to specify the number of hours of daylight training for any period of time that the school must adhere to?

I shall not undertake to discuss these several questions separately.

Section 2585-b6 of the Code of Iowa, is as follows:

"2585-b6. Rules—practice in home. The State Department of Health shall prescribe such sanitary rules for shops and schools as it may deem necessary, with particular reference to the conditions under which the practice of cosmetology shall be carried on and the precautions necessary to be employed to prevent the creating and spreading of infectious and contagious diseases. Cosmetology may be practiced in the home providing a room, other than the living rooms, be fitted up for that purpose. The Department of Health shall have power to enforce the provisions of this section and to make all necessary inspections in connection therewith."

This section gives the State Department of Health very broad powers. It may prescribe such sanitary rules for shops and schools as it may deem necessary. The statute confers this power upon the State Department of Health rather than upon the Department of Cosmetology which is under the jurisdiction, as it were, of the Department of Health. The Department of Health, of course, would have the power to delegate much of this authority to the Department of Cosmetology and if it does so, the latter department would have the right to make many, if not all, of the requirements referred to in the eight questions submitted.

If all of the rules laid down by that department and referred to in the above questions are "such sanitary rules for schools and shops as it (the Department of Health) may deem necessary," then such rules are within the law. Much discretion is given to the Department of Health in these matters.

Answering question one more specifically, I would say that the Department of Cosmetology has the right to require that a school of cosmetology be on a separate floor and maintain a separate entrance from any cosmetology establishment, if that is a reasonable requirement and is done for the purpose of guaranteeing proper conditions under which the practice of cosmetology may be carried on. There is no violation of the Code in having a school of cosmetology on the same floor with a cosmetology establishment, but such a regulation may be made under the authority granted by the Code if it is reasonable and proper in carrying out rules of sanitation.

Question two is not as clear as it might be but probably is a reasonable rule intended by the board for a proper purpose and should be answered in the affirmative if it is applied to all schools alike.

Some of the other questions might tend to work a hardship in certain cases, particularly, questions three, six, and seven. However, I would answer all of the questions submitted in the affirmative subject to the following qualifications: The legislature has the power to delegate to the Department of Health under the police powers of the state rather extensive authority where life, health, and safety of individuals are concerned. Speaking generally, it may be said that the Department of Health has authority to formulate such rules as will best preserve and protect the health of those patronizing cosmetology shops and schools. The statute says these may be such rules as it may deem necessary. In so far as these rules are reasonable, not unduly burdensome to any person or group of persons and not unreasonably discriminatory as between persons or groups of persons, they should be sustained.

It is the duty of this Department to uphold all such rules of any department of the state government as comply with the law.

SCHOOLS: TRANSPORTATION, school children: Chapter 59, and Chapter 60, 45th G. A.—Sections 4274-e3, 4274-e4, 4233-e1, 4233-e4.

August 17, 1933. *Department of Public Instruction, Des Moines, Iowa:* We have your request for an opinion which is in part as follows:

Mr. A lives in subdistrict No. 3 of school township B where the school is closed. The township board designates the school in subdistrict No. 4 of the same school township for the attendance of A's children, but since that school is 2.1 miles from his home, the board is required to provide transportation. See Section 4233-e4.

But Mr. A elects to send his children to the town school in independent district C, a distance of 3 miles, and Section 4233-e1 provides that he may do so if the cost to the township does not exceed the pro-rata cost in the entire township for the school year immediately preceding.

1. If A sends his children to the town school, must the board of school township B pay tuition up to $6 per month and in addition the transportation cost also, provided the cost of both tuition and transportation combined does not exceed the pro-rata cost in the entire school township during the year immediately preceding?

2. If the distance from A's home to the town school were 1.9 miles—that is, under two miles and also less than to the school in subdistricts No. 4—would the township board still be required to pay tuition and also transportation to the town school if Mr. A. should choose to send his children to the town school rather than to the school in subdistrict No. 4 designed by the township board for their attendance?

Chapter 59, Forty-fifth General Assembly (Code Sec. 4274-e3) provides that the Board shall contract for suitable transportation of such children of school age from kindergarten to eighth grade, inclusive, living two miles or more from such school and the same chapter also provides (Sec. 4274-e4 of the Code) that the Board may permit pupils enrolled in secondary grades or any other pupils that are not entitled to free transportation, to avail themselves of the facilities provided their parents pay the pro-rata cost of the transportation.

Chaper 60, Acts of the Forty-fourth General Assembly (Code Sec. 4233-e1), provides among other things, that if a school is closed for lack of pupils, the Board shall provide for the instruction of the pupils and it also gives parents in such districts the right to send their children to a public school of their choice outside the school township provided the cost will not exceed the pro-rata cost in the entire school township during the school year immediately preceding. This same Chapter 60 of the Forty-fifth General Assembly, as amended by Chapter 61 (Code Sec. 4233-e4) provides as follows:

Transportation. When children enrolled in an elementary school other than in a consolidated district lives two and one-half miles or more from the school in their district or subdistrict or when the school in their district or subdistrict has been closed and they are thereby placed more than two miles from the school designated for their attendance, the board shall arrange with any person outside the board for the transportation of such children to and from school and the cost of such transportation shall be paid from the general fund, but the board may provide transportation for a less distance.

You will note in the section just cited above, that when a school has been closed and the pupils are more than two miles from the school designated, the Board shall arrange for the transportation and this matter of transportation is specifically limited to and from the designated school and does not contemplate transportation to the chosen school. Section 4233-e1 and Section 4274-e3 also contemplate this as is shown from the wording of the sections

themselves, for they provide that when the board contracts for school facilities, it may also contract for transportation.

It is therefore, the opinion of this Department that if "A" sends his children to his chosen school and not to the designated school, that his school township must pay the tuition within the limits of Section 4233-e4, but transportation in such cases in addition to tuition is not mandatory upon the Board; but where the children are sent to the designated school and the distance is more than two miles, then their own school township must pay the tuition, if any, together with the cost of transportation.

In view of our opinion, your question No. 2 does not require an answer as we hold that no matter what the distance is to the school of his choice, transportation to such school is not mandatory.

BOARD OF EDUCATION: State has judgment against defendants—decree of foreclosure entered—defendants have certain other property on which this judgment is lien, but property is mortgaged in excess of its value—mortgage holder of this property willing to take deed in lieu of foreclosure and desires state to release this property from lien of its judgment. Whether partial release be executed and who has authority to execute release?

August 19, 1933. *Board of Education, Des Moines, Iowa:* I have your letter of August 15th enclosing letter from attorney J. M. Otto, of Iowa City, together with form for partial release of judgment in the Floerchinger matter.

You advise that there was a foreclosure and that the State of Iowa by the Board of Education, for the use and benefit of the State University of Iowa, has a judgment against the defendants and decree of foreclosure has been entered; that these defendants have certain other property on which this judgment is a lien, but which property now has a mortgage thereon in excess of its actual value and so therefore, there is no lien or equity above the mortgage. It appears that the mortgage holder of this property is willing to take a deed in lieu of foreclosure and desires that the state release this property from the lien of its judgment.

You ask first whether the partial release of judgment should be executed and second, as to who has the authority to so execute the release.

The Board of Education, among its other powers and duties, manages and controls the property belonging to the institutions and directs the expenditure of all moneys belonging to the institutions, and is also authorized to perform all acts necessary and proper for the execution of the powers and duties conferred by law upon it and the finance committee. The finance committee is authorized to loan funds belonging to the institution and shall have charge of the foreclosure of mortgages. It is therefore, apparent that the determination as to whether such a release should be entered into, is in the Board of Education, and not in the finance committee, as their only power is to loan the money and secure payment of the loan, and it is for the State Board of Education to determine whether in this particular instance, there is any equity in the property that can be applied to the payment of their judgment, or whether the property is not sufficient to pay the mortgage which is, of course, prior and superior to the lien of the state's judgment, and also whether the defense of such foreclosure suit by the state and the establishment of its lien would be an expense and a burden; and such matter should be determined by the Board by proper resolution. It is the opinion of this Department that if the Board thinks it is to the best interests to execute a partial release of judgment, then it has the power and authority to order the execution of the release.

Section 3928 of the Code provides that when loans are paid, the finance committee shall release the mortgage by a satisfaction piece signed and acknowledged by the chairman or secretary of said committee. When the Board of Education by proper resolution, authorizes the execution of a partial release of judgment, the judgment is satisfied as to that particular property and is paid as to that property, so therefore, the chairman or secretary of the finance committee should be the one to sign and acknowledge such partial release of judgment.

CITY COUNCIL MEMBER: MILK INSPECTOR. "Your question is whether or not there is any prohibition against a member of the City Council acting as milk inspector."

August 19, 1933. *Office of Auditor of State, Des Moines, Iowa:* We wish to acknowledge receipt of your letter of recent date, in which you ask for an opinion on the following:

"A member of the City Council has been acting as milk inspector for the city of Red Oak. He has received compensation at the legal rate of $1.00 per meeting as Councilman and also 35c per hour for his duties performed as milk inspector. Your question is whether or not there is any prohibition against a member of the City Council acting as milk inspector."

Section 5673 of the Code of 1931 provides as follows:

"No officer, including members of the City Council, shall be interested, directly or indirectly, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the city or town."

In line with this section of the Code just quoted, the Supreme Court of this state in the case of Peet vs. Leinbaugh, 180 Iowa, 937, 164 N. W., 127, held that the Mayor of the town of Martelle was not entitled to receive compensation while working for the town as a day laborer. In that case, the Mayor had collected his wages to the amount of $7.90. Later, an action was commenced against him and judgment rendered for the amount received by him, together with interest and costs of the action. It appeared that Eaton, the Mayor, had incurred expenses in the sum of $40.00, as attorney's fees in that litigation. Later, the town council passed a resolution to pay the costs and attorney's fees attached against Eaton, whereupon Peet commenced an action to restrain the payment thereof. A temporary injunction was issued, but upon the trial of the case on its merits, the injunction was dissolved. Peet then appealed to the Supreme Court, where the cause was reversed and remanded to the District Court, with directions that a decree, permanently enjoining the defendants as members of the city council from paying any part of the costs and attorney's fees referred to, be entered. In that case, the Court discussed Section 5673 hereinbefore quoted.

In view of the holding of the Supreme Court in the case of Peet vs. Leinbaugh, we must rule that the member of the City Council of the city of Red Oak cannot receive pay for acting as a milk inspector, and that any payment made to him as such milk inspector by the city was an illegal payment.

BANKS AND BANKING: BOARD OF SUPERVISORS: Has Boad of Supervisors authority, upon request of depositors in closed state bank that has been in hands of receiver for more than two years, to employ and pay out public money for accountant to examine books, etc. of closed bank and make report thereof.

August 21, 1933. *County Attorney, Ida Grove, Iowa:* We have your request for an opinion on the following proposition:

Has a Board of Supervisors authority, upon the request of a group of depositors in a closed state bank that has been in the hands of a receiver more than two years, to employ and pay out of public money or funds an accountant to examine the books, files, records and papers of the closed bank and make report thereof of any irregularities found? If the board has such authority out of what fund should same be paid?

Our counties are quasi corporations, being created by the legislature for the purpose of political organization and simple administration, and they therefore have only such rights and powers as are expressly given to them by the legislature, or may be implied.

Our Supreme Court, in Brooks vs. Town of Brooklyn, 146 Iowa, 136, said at page 141, in regard to the duties and powers of the municipal corporation, which duties and powers are ordinarily much broader than those of a quasi corporation:

"It is well settled, of course, that a municipal corporation has such powers and such only as are first, expressly granted, or second, such as are fairly or necessarily implied from those granted, and third, such as are essential to the declared objects and purposes of the incorporation. As to the third, it is not enough that they be convenient; it must appear that they are indispensable. In case of doubt, the existence of power is denied by the courts."

Our legislature has given no authority to the Board of Supervisors to make such expenditures of county money for the purpose of investigating the books, records, files and papers of a closed bank, for the purpose of finding out irregularities, if any, are not indispensable, for, if any money is to be recovered, it would not be recovered for the people at large of the county, but only for a certain few, and county moneys would be expended to the benefit of these certain few.

It is therefore, the opinion of this Department that the Board of Supervisors has not the power or authority to employ or pay out public money or funds to an accountant to examine the books, files, records and papers of a closed state bank.

COUNTY TREASURER: Robbery of safe: Liability to county for taxes paid in.

August 21, 1933. *County Attorney, Independence, Iowa:* We wish to acknowledge receipt of your letter of recent date, in which you ask for an opinion on the following question:

"The treasurer of this county received payment of taxes in installments last year. He placed the money so received in separate envelopes with the name of the taxpayer, who paid the money so placed, on such envelopes. These were kept in the safe in the Treasurer's office. On September 26, 1932, a robbery of the safe occurred in such a manner that the insurance policy did not cover and with the money taken was that in the envelopes. After such occurrence the taxpayers, who were paying their taxes in installments, came in and paid the balance due on their taxes and the Treasurer gave a receipt in full payment. He represented to the taxpayers that he could so accept these installment payments. The receipts and stubs thereof show that the sums paid were in part payment of taxes.

"The questions presented are whether the Treasurer is liable to the county or are the taxes chargeable back to the property, and if the latter is true, what is the procedure for so doing?"

The statute (Code Section 7184) makes it the duty of the County Treasurer to proceed to collect the taxes. Code Section 7210 provides as follows:

"No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the office of the Treasurer, at some time between the first Monday in January and the first day of March following,

and pay his taxes in full, or one-half thereof before the first day of March succeeding the levy, and the remaining half before the first day of September following."

Code Sections 7207, 7208, and 7209 are as follows:

"7207. Payment—what receivable. The Treasurer is authorized and required to receive in payment of all taxes by him collected, together with the interest and principal of the school fund, the circulating notes of national banking associations organized under and in accordance with the conditions of the act of the congress of the United States, entitled, 'An act to provide a national currency secured by the pledge of the United States stocks, and to provide for the redemption thereof,' approved February 25, 1863, and acts amendatory thereto, United States legal tender notes, and other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency.

"7208. Certain warrants receivable. Auditor's warrants shall be received by the County Treasurer in full payment of state taxes, and county warrants shall be received by the Treasurer of the proper county for ordinary county taxes, but money only shall be received for the school tax.

"7209. Warrants not receivable. Warrants issued by any city or town shall not be received by the County Treasurer in payment of the city or town taxes."

In the case of Rundell vs. Boone County, 204 Iowa, 965, 216 N. W., 122, the County Treasurer had forwarded tax receipts to a bank in another county, which had not been designated as a depository of county funds, with instructions to this bank to collect the taxes and deliver the tax receipts upon payment to the bank of such taxes. The taxes were paid by persons residing in that community to the bank, and the money was entered on the books of the bank as deposits to the credit of the County Treasurer. Later the bank closed, and the County Treasurer attempted to sell this real estate for taxes. The Court granted an injunction to restrain the sale of the real estate, and the Supreme Court of this state affirmed the decision. In passing on this question, the Supreme Court said:

"It was the statutory duty of the County Treasurer to have required that the actual money should be paid to him in cash before the delivery of the tax receipt to the taxpayer or to the bank. A public interest is here involved and the public are entitled to have the taxes paid in the manner pointed out by the statute. The public revenues must be collected by the County Treasurer substantially in the manner provided by the statute and accounted for in full by him.

"The rights of the taxpayers are also involved, and he should not be compelled to pay his taxes twice, if he has in fact paid them once according to law. This case is not one where the taxpayer made the bank their agent for the purpose of taking their money and forwarding it to the Treasurer to pay such taxes, and before it had been so forwarded, the bank failed, and no tax receipt had been issued or delivered. Here the Treasurer saw fit to send the tax receipts to the bank for collection by the bank in behalf of the Treasurer and with authority to deliver the receipts, when the amount was so paid. The Treasurer charged the bank therewith and marked the taxes as paid on his books. * * * * Whether the County Treasurer acted illegally in depositing the money in the Bouton bank and what may be his rights or liabilities in respect thereto are not matters before us for consideration. We limit our decision to the one question that under the established facts the taxpayers did in fact pay their taxes to the County Treasurer and receive their receipts therefor."

In the instant case, if the person who was holding the office as County Treasurer had also been acting as trustee or agent for the taxpayers and merely holding the money for them for safekeeping until enough had accumulated to pay the first half of the taxes, then the loss might be that of the taxpayer.

rather than of the county. However, the facts in this case show that the Treasurer represented to the taxpayers that he had authority to accept the money in smaller amounts than the first installment of the taxes. The receipts which he issued and the stubs retained by him show that the sums paid were in part payment of taxes. After this money was lost by robbery, the Treasurer then accepted the balance due on the taxes and issued a receipt in full payment. We are not so sure that he did not have authority to accept this money in amounts less than one-half of the taxes for the year. The statute provides that it is the duty of every person to attend at the office of the Treasurer and pay his taxes in full, or one-half thereof, before the first day of March. The payment of this first half is for the purpose of complying with the statute, in order to allow the second half to remain unpaid until the last of September without penalty. Regardless of the question of making payments in less than the one-half, the money was actually paid to the County Treasurer, who is charged with the duty of collecting the taxes. He issued receipts for said amounts as payment on the taxes. He later accepted the balance due and issued receipts in full. As given to us in your letter, the facts show that he was not acting as agent for the taxpayers, but was collecting the taxes in performance of the duties of his office.

We might add that if any of these taxpayers had gone to the office of the County Treasurer, after making the partial payment on their installment of taxes, and demanded a return of the tax, the County Treasurer probably would have refused to return it to him on the ground that the tax was paid to the county.

In view of this situation and in view of the holding in the case of Rundell vs. Boone County and cases therein cited, we are of the opinion that the taxes referred to in your letter have been paid to the County Treasurer and that they cannot again be collected from the taxpayer.

In so far as your question as to the liability of the County Treasurer is concerned, we are sorry indeed to inform you that our opinion is that he cannot be held for the loss of this money through robbery. There is no need for us to go into a long discussion of the question, for the reason that on February 17th we prepared a lengthy opinion for Mr. Leon A. Grapes, County Attorney of Scott county, Iowa. We herewith enclose a copy of that opinion, and ask you to read carefully the cases cited therein relative to the liability of a treasurer, and especially the case of Rose vs. Hatch, 5 Iowa, 149. The rule laid down in that case was also affirmed in the case of Prudential Insurance Company of America vs. Hart. The pronouncement made in these cases is not only the Iowa rule but the general weight of authority throughout the United States for the proposition that an officer is not an insurer of funds in his hands, and that if he complies with the requirements of his bond or the statutory requirements, he is not liable. You will find that the case of Rose vs. Hatch is a case in which the facts are similar to your case, that is, that the money was placed in a safe and lost through robbery. We believe that after a reading of these two cases you will agree with our theory.

BOARD OF SUPERVISORS: Poor Farm extension: Vote of people.

August 22, 1933. *County Attorney, Denison, Iowa:* We wish to acknowledge receipt of your letter of recent date, in which you ask for an opinion on the following:

"The Board of Supervisors find it necessary to build an extension to the Poor Farm. This extension will cost perhaps $12,000 to $13,000.

"I am of the opinion that Section 5261 means that the probable cost to the county should not exceed $10,000. I am asking your opinion on the same, because we are planning on borrowing some money from the Federal Government under the new law, which will limit the expenditure of the taxpayers of Crawford county on said project to less than $10,000, but with the proposed 30% gift from the government would exceed $10,000. Would a project based on said facts be legal?

"I would also appreciate knowing whether or not Crawford county, through its Board of Supervisors, could pay the said cost, if the same is under $10,000, or levy a tax for same, without a vote of the people."

Section 5261 provides as follows:

"The Board of Supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction of a courthouse, jail, or county home when the probable cost will exceed ten thousand dollars, or any other building, except as otherwise provided, when the probable cost will exceed five thousand dollars, nor the purchase of real estate for county purposes exceeding ten thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given as in other special elections."

It will be seen from the reading of this section that if the cost of the building or addition is more than $10,000, the proposition must be submitted to a vote of the people. The section, however, does not state whether the cost means the total cost of the building or addition, or merely the cost to the county. In connection with this section, we wish to call your attention to the case of Way vs. Fox, 109 Iowa, 340; 80 N. W., 405. In that case, the people of the town of Garner, Iowa, raised $30,000, and offered it to the county to be expended to the purchase of a site and the erection of a court house. The Supreme Court said, speaking of this same section of the Code:

"The limitations of Section 423 of the Code with reference to the amount that may be expended by the Board in erecting a court house, and in purchasing a site therefor, have no application to the case before us; for it clearly appears that the money which the defendants proposed to expend was donated by the citizens of Garner."

In your instant case, we understand that the extension to the County Home will cost between $12,000 and $13,000, but that 30 per cent of that amount will be donated by the Federal Government in the nature of a gift, and that it will not be necessary to re-pay any portion of that 30 per cent.

We are therefore of the opinion that there is no difference between a donation and a gift by the Federal Government and a donation by an individual, and in view of that fact, it is our opinion that so long as the amount to be expended from the county funds does not exceed $10,000, it is not necessary to submit the proposition to the voters.

FIRE DEPARTMENT: Driver of truck paid monthly salary.

August 22, 1933. *City Attorney, Shenandoah, Iowa:* We wish to acknowledge receipt of your letter of recent date, in which you ask for an opinion on the following:

"For the past number of years, the City of Shenandoah has been paying the driver of a fire truck a regular monthly salary, and the other members of the Department have been receiving from $125.00 to $175.00 annually. They spend very little time in attending fires, but of course are subject to call at all times.

"The question is whether or not Shenandoah has a paid fire department under the provisions of Chapter 322 of the Code."

In the case of Seavert vs. Cooper, 187 Iowa, 1109, 175 N. W., 19, the Supreme Court of this state said:

"The language used in the statute refers to something more than a mere nominal sum paid to members following an independent occupation and occasionally responding to a fire, and devoting only a few minutes of an hour or so to the service of the department. * * * It was not intended that men pursuing other vocations or employment who are in no sense dependent upon the nominal compensation usually paid, if any, by fire departments consisting of business, professional men, and citizens generally who have united in an organization for the common good and protection of all, should be paid a pension by continuing in such capacity for twenty-two years."

We believe that the payment of $125.00 to $175.00 annually to each member of the department is merely the paying in a lump sum, rather than paying a certain amount for each fire attended. We cannot see how the payment of this nominal amount could place the fire department of the city of Shenandoah in what is known in the statute as the paid class. We are therefore of the opinion that the city of Shenandoah has what is called in the statute an organized fire department, and that the levy for the pension fund is discretionary and not mandatory.

FIRE DEPARTMENT MAINTENANCE FUND: Millage levies: Difference between Section 1 of Chapter 123 of Acts of 45th G. A. and Section 7 of bill.

August 22, 1933. *City Treasurer, Council Bluffs, Iowa:* You recently directed a letter to Mr. C. W. Storms, Auditor of State, with reference to the Beatty-Bennett bill, which appears in the Acts of the 45th General Assembly as Chapter 123. That letter was forwarded to the State Board of Assessment and Review by Mr. Storms, and later forwarded by the Board to this Department, in view of the fact that your letter calls for an interpretation of the Beatty-Bennett bill. Your question is as follows:

"The last five lines of Section 1 of Chapter 123 of the Acts of the 45th General Assembly provides that the limitation imposed by Section 1 shall not apply to any millage levies authorized or required to be made by any city or town for the fire fund or the fire department maintenance fund. Section 7 of the bill provides that the total rate of millage levies made in the years of 1933 or 1934 by any city or town for fire fund and fire department maintenance fund shall not exceed one-fourth of the total rate of millage levies made in the year of 1930 by such city or town for said funds. Your question is, which of these sections governs?"

Our answer is that the sections do not conflict, and that both provisions quoted may and should be given effect.

Section 1 of the bill provides for the reduction of total millage levies of a taxing district. So far as this reduction is concerned, the two funds mentioned are exempted. However, Section 7 provides what levies may be made for these two particular funds, that is, that the levy shall not exceed one-fourth of the total levy for said funds in the year of 1930. In the year of 1930, the levy was made on the taxable, or one-fourth, value of the real estate. Since the Acts of the 45th General Assembly, the levy is made not on what had been known as the taxable or one-fourth value, but on the full value of the property. Therefore, the levy would be one-fourth what it was in 1930, but this difference is due merely to the change in the manner of making the levy.

Section 7 does not require them to cut or reduce the levy, but merely provides that they cannot levy more than they did in 1930.

MOTOR VEHICLE. SCHOOL BUSSES. LIABILITY OF SCHOOL DISTRICTS. The school district is not required to pay license fee on motor vehicles used exclusively to transport children to and from school.

A school district being a governmental subdivision and transporting children being a governmental function, is not liable for injuries caused by school busses.

August 23, 1933. *Superintendent, Motor Vehicle Department, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 11th inst., with which you enclose a letter from Mr. G. R. Richards of Alexander, Iowa, and request an opinion with reference to the questions asked in that letter.

He states that the Consolidated School at Alexander owns the bodies of the school busses and that the drives furnish the trucks for the transportation of children. He asks the question: Whether or not if the drivers were to turn the trucks over to the School Board, the trucks would then be exempt from the duty to pay a motor vehicle license fee.

Section 4922 of the Code is as follows:

"Exemption. No license fee shall be collected on motor vehicles owned by a foreign government, or by the government of the United States, or by the State of Iowa, or by the counties, municipalities, and subdivisions thereof."

The question arises whether the school district is a subdivision of the state government. It is the opinion of this office that it is such subdivision, and that under this section such school corporation is not required to pay a license fee on motor vehicles used exclusively as school busses to transport children to and from school. The motor vehicle department will, on application, furnish distinguishing plates for motor vehicles thus exempted from the payment of a license fee. In order to be entitled to the exemption provided for by Section 4922, the school district must be the absolute and unqualified owner of the motor vehicle.

The second question submitted is whether the ownership and operation of school busses by the school district would increase the legal liability of the school district in case of damage caused by and through the operation of such school busses. A recent decision of the Missouri Supreme Court states the law with reference to the liability of a school district in such cases, in substance, as follows:

"A school board is a quasi corporation in control of public funds for educational purposes and is in that respect an instrument of the state government and being entitled to no pecuniary profit for its services, is not liable for injuries to a pupil from the operation of its motor truck in the performance of its corporate duties. Dick vs. Board of Education, 238 S. W., 1073; 21 A. L. R., 1327.

"It is a general rule of law that a municipal corporation is not liable for damages which may be caused by some agent of the corporation in the discharge of his duties as such agent when the act he is performing is in the nature of a governmental function. Bradley vs. City of Oskaloosa, 193 Iowa, 1072."

If transporting children to school is a governmental function as distinguished from a mere ministerial or corporate act, there probably would be no legal liability for damage caused by the motor busses owned and operated by the school district.

State Fair Board has complete control of State Fair Grounds.

August 23, 1933. *Iowa State Fair, Des Moines, Iowa:* This will acknowledge receipt of your request, on this date, for the opinion of this Department, on the following question:

"As president of the Iowa State Fair, is it my duty to swear in the police who will police the State Fair Grounds, during the 1933 State Fair?"

Section 2886, of Chapter 135, Code of Iowa, 1931, defines the powers and duties of the Iowa State Fair Board and this section, in part, is, as follows:

"The State Fair Board shall have the custody and control of the State Fair Grounds, including the buildings and equipment thereon belonging to the state, and shall have power to:

"* * * * * * * * * *

"6. Adopt all necessary rules in the discharge of its duties and in the exercise of the powers herein conferred."

Chapter 136, which refers to county and district fairs, in Section 2896 gives to the society conducting the Fair, the sole and exclusive control of such Fair.

In going back into the law of the matter, under consideration, we find, under Chapter 3, Code of Iowa, 1897, relating to agricultural and horticultural societies, stockbreeders' associations, and state dairy associations, Section 1664, which is entitled "Police Power," and provides, as follows:

"Police power. The president of any such society may appoint such number of peace officers as may be necessary, and may arrest or cause to be arrested any person violating any of the provisions of this chapter, and cause him to be taken before some justice of the peace to be dealt with as provided by law; and he may seize or cause to be seized all intoxicating liquors, wine, or beer of any kind, with the vessels containing the same, and all tools or other implements used in any gambling, and remove or cause to be removed all shows, swings, booths, tents, carriages, vessels, boats, or any other thing that may obstruct or cause to be obstructed, by collecting persons around or otherwise, any thoroughfare leading to the inclosure in which such agricultural fair is being held. Any person owning, occupying or using any of such things causing such obstruction, who shall refuse or fail to remove the same when ordered to do so by the president shall be liable to a fine of not less than five nor more than one hundred dollars for every such offense. During the time the fair is being held, no ordinance or resolution of any city or town shall in any way impair the authority of the society, but it shall have sole and exclusive control over and management thereof."

In Hern vs. Iowa State Agricultural Society, 91 Iowa, 97, the Court states, as follows:

"The Iowa State Agricultural Society is not liable for a wrongful arrest made by its agents, especially where the act was outside of the scope of the agent's employment. * * * * * * The society having no power to authorize arrest of persons for any other offenses than selling intoxicating liquors, gambling and horse racing within its grounds an arrest by its officers and agents for any other offense, such as that of assault will not render the society liable."

In the recodifying of the Code, Section 1664, as it appears in the 1897 Code, was passed by the 23rd General Assembly, and appeared in Code, 1873, as Section 1116. In the recodification of the Code, this section has been divided into several sections and now appears as Sections 2896, 2898, 2899 and 2900, in the 1931 Code of Iowa. While the same now appears in Chapter 136, which is entitled "County and District Fairs," yet, it applies as to the Iowa State Fair and was originally passed for the benefit of all fairs and the fact that it has been placed in this new chapter does not, in any sense, change the force and effect of these particular sections, in that this section (1664) has never been repealed.

It is the opinion of this Department, in view of the Code section, cited herein, and the case referred to, that it was the intention of the Legislature of the State of Iowa that complete custody and control of the State Fair Grounds is given to the State Fair Board and you, as president of the Board,

have the responsibility of seeing that the grounds are properly policed. The Board also has the right to adopt all necessary rules in the discharge of its duties, as outlined in the Code.

We also wish to refer you to Chapter 66, Code of Iowa, 1931, which is entitled, "Administration of Oaths," and under that chapter, in Section 1216, we find:

"The following officers and persons are empowered to administer oaths and to take affirmations in any matter pertaining to the business of their respective office, position, or appointment."

and Division (2) recites,

"Members of all boards, commissions, or bodies created by law."

The one hundred, or so, officers, who police various departments of the Fair, exhibits, etc., could be sworn in by you, as president of the Fair Association, as we feel it was the intention of the Legislature, as expressed in Section 2886, Code of Iowa, 1931, that the responsibility and duties of seeing that the grounds are properly policed rests upon the Board and that you are empowered to adopt rules and regulations governing the general management of the State Fair Grounds.

POLL TAXES: Liability of man becoming 21 years old after 1st of January or 45 years old after 1st of January.

August 23, 1933. *County Attorney, Chariton, Iowa:* We wish to acknowledge receipt of your letter of recent date, in which you ask for an opinion on the following:

"It frequently happens that a young man becomes twenty-one years after the 1st of January of a particular year, or that a man becomes forty-five years of age after the 1st of January. In either event, there is a dispute as to whether or not these men would be liable for poll taxes for that particular year."

The statute provides in Section 4644-c58 for the levy of a road poll tax on every male person between the ages of twenty-one years and forty-five years, who are residents of the county outside the corporate limits of cities and towns. The law which applies to the payment of a road poll tax by persons residing outside of the corporate limits of cities and towns contains no provision relative to paying the same between any certain dates in the year. However, prior to the Acts of the 43rd General Assembly, Section 4813 of the Code of 1927 made provision for the payment of such tax and was somewhat similar to the provision of Section 6231 of the Code of 1931, except that Section 4813 actually provided for the levy of the tax, while Section 6231 provides that cities and towns shall have the power to make such levy. In neither 4813 nor 6231 is there any provision that it shall apply to persons who pass the age of twenty-one between the 1st of February and the 1st of October. Those sections merely provide that the tax shall be paid between those dates.

It is therefore the opinion of this office that the person who is between the ages of twenty-one and forty-five on January 1st of any year is required to pay a poll tax for that year. If he becomes of age after the 1st of January, or becomes forty-six years of age after that date, it could not change his liability, so far as the tax is concerned. We believe this is the only fair way to construe this law, hence this ruling.

SOLDIERS: Legal residence of wife of enlisted man: Hospital treatment at Broadlawns.

August 24, 1933. *Emergency Relief Committee, Des Moines, Iowa:* We wish

to acknowledge receipt of your letter of recent date, in which you ask for an opinion on the following three questions:

"1. If an enlisted man at Ft. Des Moines, who voted at the last election in Polk county (but who enlisted in another state), is married and has a home near Ft. Des Moines off the reservation but in Polk county, is his wife a legal resident of Polk county?

"2. Is she a resident of Polk county, if she was a resident before her marriage and was married here?

"3. Is she entitled to medical and hospital treatment at Broadlawns by virtue of her residence in this county, in case there are no funds available to pay for treatment at a private hospital?"

In answering the first question, we will start out by quoting Section 4, Article II, of the State Constitution, which is as follows:

"No person in the military, naval, or marine service of the United States shall be considered a resident of this state by being stationed in any garrison, barrack, or military or naval place, or station within this state."

One might think that the section of the Constitution just quoted would prohibit the soldier in this case from obtaining a residence or domicile in this state. What we think this section means is that the mere fact that the man is stationed in this state does not mean that he acquires a residence here. In other words, it does not prohibit the acquisition of a residence in this state.

In the case of Taylor vs. Independent School District, 181 Iowa, 544; 164 N. W., 878, it was held that one's voting residence is at the place which he treats as his home and to which he intends at all times to return, when not employed at other places.

In the case of State vs. Groome, 10 Iowa, 308, it was held that if a person actually removes to another place with the intention of remaining there for an indefinite time and making it his place of fixed residence or present domicile, it is to be regarded as his domicile, notwithstanding he may entertain a floating intention to return at some future time. The place where a married man's family resides is generally to be considered his domicile.

In the case of Dodd vs. Lorenz, it was held that adult unmarried school teachers become residents of the county in which they teach, when the employment is entered upon with the good faith intention of making the place of employment their permanent home or residence, so long as the employment continues.

We find one case in Iowa, the case of Harris vs. Harris, 205 Iowa, 108; 215 N. W., 661, in which the Supreme Court of this state held that an officer in active service in the United States Army cannot acquire domicile in an Army Post, where he is stationed therein and establishes his family there. It will be noted that in this case the Court held that he could not acquire domicile *in the Army Post.* This was a divorce case. The plaintiff, who was the husband, had been raised in Polk county, Iowa, and was a resident of that place at the time he received an appointment to West Point, and also at the time that he graduated from West Point. He was stationed in numerous forts and army camps over the United States, as well as in Panama, and while he was stationed at one of these forts, he married the defendant. After his marriage to her, he was ordered to the Philippines, and later back to Washington, Chicago, and finally to the Canal Zone. During all of this time, he was in the military service of the United States Government, and was stationed in places over which the Government of the United States had complete and absolute control. He later commenced an action in Polk county for a divorce and

alleged in his petition for jurisdictional purposes that he was and had been for more than twenty years a legal resident of the city of Des Moines, Polk county, Iowa, and that such residence had been in good faith. The question there was whether or not he was a resident of Polk county for the purpose of maintaining the divorce action. The Court held that he was, and that under the circumstances, and in view of the fact that in all of his military service he was stationed in places over which the Government of the United States had complete and absolute control, he could not acquire a domicile, and therefore retained his domicile or residence in Iowa.

There is no question but that the rule stated in that case is the general weight of authority throughout the United States. However, it will be interesting to note that in this particular case just cited, the Supreme Court of Iowa made a pronouncement relative to acquiring a domicile outside of the Army Post. The statement of the Court is as follows:

"It is true that an officer or a private may establish a home near his military station and thus acquire a domicile there, but this must be established by independent evidence of a change of domicile to that place. Ex parte White (D. C.), 228 F., 88.

"If a soldier stationed at any Army Post is permitted to live outside the Post, it was held in Re Cunningham, et al., 45 Misc. Rep., 206; 91 N. Y. S., 974, that such person might acquire a domicile there. There seems to be no doubt that a soldier may acquire a new domicile apart from the army, and the fact that he cannot stay in the new home, if called away to the army, does not prevent his forming the animus manendi and acquiring the domicile there. Mooar vs. Harvey, 128 Mass., 219; Hodgson vs. De Beauchesne, 12 Moore P. S., 285; President of the United States vs. Drummond, 33 Beaver, 449; Attorney General vs. Pottinger, 30 L. J. Es., 284."

In view of the quotation just repeated, we turn now to the facts in the instant case. The soldier enlisted in another state and was sent to Fort Des Moines. He voted in Polk county at the last election. He married a Polk county girl, and established a home for her near the Fort, but off the reservation and in Polk county. There is no question, under these facts, coupled with his intention to make Polk county his permanent residence, but that he has acquired his domicile here. His wife was a resident of Polk county before she married him, but regardless of that fact, she would acquire the domicile of her husband upon her marriage to him. If his domicile was in another state, her domicile would be there upon her marriage to him. The change would take place by virtue of the marriage. This is the general rule throughout the United States. For that reason, the residence of the husband, being in Polk county, the residence of the wife remains in Polk county.

We feel that the answer to your first question answers the second and third. We are convinced beyond a doubt that the lady, to whom you refer in your letter, is a resident of Polk county, Iowa, and if there is any duty to furnish medical assistance, Polk county would owe that duty.

STATE HIGHWAY COMMISSION: National recovery act: Contract for construction work.

August 24, 1933. *Iowa State Highway Commission, Ames, Iowa:* I received your letter of date August 7, 1933, but as heretofore verbally communicated to you, I have delayed answering it with the hope that we would get some instructions relative to the matter involved from the Federal Administration of the NIRA. To date this office nor the Attorney General's office at Des Moines has received any rules, regulations or notification as to the effect of the NIRA

upon public contracts. I have noted in the papers, as you also undoubtedly have, that an opinion was given relative to supplies for the Federal Penitentiary at Atlanta, holding that contracts could in nowise be altered or changed by reason of the NIRA.

I have conferred with the Attorney General and he approves the conclusion of the writer that the NIRA can in nowise be construed to in any manner change, alter, or in any manner impair the obligations of a contractor. This necessarily applies to public as well as private contracts.

We next then, come to the authorization of public officials, commissions, etc., to change, alter or impair the obligation of a public contract entered into pursuant to notice to bidders and public lettings. This Department knows of no statute that authorizes public officers, commissions, etc., to change and alter the provisions of public contracts as to basic prices, quality, etc., except as expressly contained in the contract, of which plans and specifications may be a part. This Department has been unable to discover in any of the contracts, including the plans and specifications as a part thereof, any authorization for an adjustment of prices, or an allowance as compensation to offset additional cost to the contractor.

The question you ask is in the following language:

"In case a contract for materials, supplies, equipment or construction work was entered into by the State Highway Commission previous to July 20, 1933; that is, previous to the time when the Commission or the contractor had any definite information as to the rules or requirements of the federal government under the National Recovery Act, and subsequent to said time the contractor has signed the blanket code put forward by the National Administration, or his particular trade group has adopted a special code for that particular trade or industry, all in conformance with the National Administration's program for national recovery, and such blanket code or special code results in increased cost to the contractor, does the Highway Commission have legal authority to readjust the prices in said contract or to allow additional compensation sufficient to offset the increased cost to the contractor, due to the adoption of such National Industrial Code?

The answer of this Department to the above and foregoing question is: That the Highway Commission has no legal authority to adjust the prices in said contract, or to allow additional compensation sufficient to offset the increased cost of the contract due to the adoption of the National Industrial Recovery Act, or any Code adopted and approved thereunder.

FOREIGN CORPORATIONS. DUTY OF EXECUTIVE COUNCIL TO APPRAISE PROPERTY OUTSIDE THE STATE OF IOWA. The Executive Council is not required to appraise the property of foreign corporations which is outside the State of Iowa.

August 25, 1933. *Lieutenant Governor of Iowa, Des Moines, Iowa:* This will acknowledge receipt of your favor of the 24th inst., requesting the opinion of this office as to the duty of the Executive Council in the matter of appraising utility property belonging to foreign corporations that contemplate the issuance of stock to be held by the parent holding company.

Your first question is:

"Are we required to appraise property outside the State of Iowa?"

In Chapter 387 relating to foreign public utility corporations, Section 8433 of the Code, in so far as it is material to the matter under discussion, provides as follows:

"Sections 8412 to 8416 inclusive, and 8420 to 8428 inclusive, are hereby made applicable to any foreign corporation which, directly or indirectly, owns, uses,

operates, controls, or is concerned in the operation of any public gas works, electric light plant," etc.

located within the state, or owns or controls any of the capital stock of any corporation which owns or operates any public gas works, electric light plant, etc., located within the state. A strict construction of this section might require an affirmative answer to your question. In other words, it would appear from the language of Section 8433 that Section 8414, and other related sections, are made applicable to any foreign corporation, or in other words, all corporations which own and operate any utility plants or capital stock in any companies operating utility plants located within the state. In view of the Iowa Securities Act contained in Chapter 393-C1 of the Code, it would not appear that such a strict construction of Section 8433 is justified.

You state that the foreign corporation contemplates the issuance of stock to be held by the parent holding company. If such stock is to be sold at some subsequent date in the State of Iowa, the securities laws of this state should amply protect the citizens of this state who might buy such stock.

This office is inclined to place a more liberal construction on Section 8433 and to hold that the Executive Council is not required to appraise property belonging to a foreign corporation which contemplates the issuance of stock to be held by the parent holding company domiciled outside this state where such property is located outside this state.

Your second question is:

Should our appraisal be based on the present physical value of the property as determined by the apparent replacement value with proper deductions made for any lack of normal probabilities for the future earnings, such as lack of proper franchise?

Sections 8414 and 8415 prescribe the elements to be considered in making such appraisements. Section 8415 is as follows:

"Elements considered in fixing amount. For the purpose of encouraging the construction of new steam or electric railways, and manufacturing industries within this state, the labor performed in effecting the organization and promotion of such corporation, and the reasonable discount allowed or reasonable commission paid in negotiating and effecting the sale of bonds for the construction and equipment of such railroad or manufacturing plant, shall be taken into consideration by said council as elements of value in fixing the amount of capital stock that may be issued."

This section permits a certain valuation to be placed upon labor performed in effecting the promotion of certain corporations, the reasonable discount allowed or commission paid in negotiating and effecting the sale of bonds in addition to the usual items which enter into such appraisals.

Section 8414 provides that the Executive Council shall investigate under such rules as it may prescribe, and ascertain the real value of the property or other thing which the corporation is to receive for its stock. The requirement of this statute is that the Council shall ascertain the real value.

Your second question should, therefore, be answered in the affirmative. That is, the appraisal should be based on the present physical or real value of the property, and the replacement value with deductions made for lack of normal probabilities for future earnings should properly be taken into consideration. Replacement value alone, would not in all cases be a fair test, and all facts and circumstances should be taken into consideration which will enable the council to ascertain the actual value of the property in dollars and cents.

PRISON MADE GOODS: Hawes-Cooper Act: Labeling: In Re: Chapter 50, 45th G. A.

August 25, 1933. *County Attorney, Centerville, Iowa:* We have your request for opinion in regard to Chapter 50, Acts of the Forty-fifth General Assembly, pertaining to prison made goods. You ask in regard to the following matters:

(1) Must prison made goods purchased and received by the retailer prior to January 19, 1934, bear the stamp or label if sold subsequent to that date?

(2) Would there be any difference if the goods were purchased in the State of Iowa or in a foreign state and shipped into Iowa?

(3) How must the goods be marked?

(4) If the wholesaler or jobber purchased the goods prior to January 19, 1934 and they are unmarked, and subsequent to that date, sells the goods to a retailer, must the retailer have the goods marked?

(5) Would there by any difference if these goods were sold and made inside or outside the State of Iowa?

Our legislature enacted Chapter 50 of the Acts of the Forty-fifth General Assembly pursuant to the Federal Acts known as the Hawes-Cooper Act. This appears in United States Statutes, at volume 45, page 1084, and is as follows:

Chapter 70—An Act

To divest goods, wares, and merchandise manufactured, produced or mined by convicts or prisoners of their interstate character in certain cases.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that all goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in federal penal and correctional institutions for use by the federal government, transported into any state or territory of the United States and remaining therein for use, consumption, sale or storage, shall upon arrival and delivery in such state or territory be subject to the operation and effect of the laws of such state or territory to the same extent and in the same manner as though such goods, wares and merchandise had been manufactured, produced, or mined in such state or territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

This act was approved January 19, 1929, to be effective five years from date of approval so it will go into effect January 19, 1934. It will be noted that the purpose of the above act is to divest prison made goods from the protection of interstate commerce and to make the sale of all such goods subject to the laws of the state wherein they are sold.

Pursuant to this, our Forty-fifth General Assembly passed Senate File 129 which is known as Chapter 50 of the laws of the Forty-fifth General Assembly, which act goes into effect on January 19, 1934, the same time as the Hawes-Cooper Act, so that with the taking of the interstate protection off such merchandise, we need only to look to the act of our own legislature, and this act provides that beginning January 19, 1934, all such goods so made by convict labor, either in the State of Iowa, or which is imported, brought or introduced into this state shall, before being exposed for sale, be branded, labeled or marked, and shall not be exposed for sale in this state without such brand, label or mark, and Section 2 of the act provides that any person having such merchandise in his possession for the purpose of sale without the brand, mark or label, or who removes such brand, mark or label shall be guilty of a misdemeanor so that it is the offering of the goods for sale after that date, and not the purchase of the goods that is the wrong, and it is therefore the opinion of this Department that all such merchandise offered for sale subsequent to January 19, 1934, must bear the brand, label or mark no matter what date it

was purchased by the wholesaler, jobber or retailer, and even though the wholesaler or jobber purchased the goods prior to that time and they are unmarked, they must be marked by him before being exposed for sale to the retailer and if the retailer has the goods on hand at that time unmarked, he must have them properly marked before exposing the goods for sale to the customer.

The above is true also, even though the goods were purchased from without the state and shipped into Iowa prior to January 19, 1934, as the Hawes-Cooper Act provides:

"Shall upon arrival or delivery in such state or territory, be subject to the operation and effect of such state or territory to the same extent and in the same manner as though such goods, wares and merchandise had been manufactured, produced or mined in such state or territory."

The phrase "upon arrival and delivery in such state or territory" clearly means that after such arrival and delivery, the goods shall be subject to the laws of the state wherein sold so that if they were delivered prior to January 19, 1934, without the label, they would have to be properly labeled if sold after that date. Such right of the individual states was expressly contemplated by the provisions of the Hawes-Cooper Act.

In regard to the markings, we have not as yet been advised as to any approved marking except as provided for in the act. As to the manner of marking the goods, however, it appears plain that each individual article must be branded or marked even though a number of such articles may be packed together in a container, for instance, bags must be branded even though the bags are sold in a package and the entire package could be labeled, as the act provides "the brand or mark shall in all cases where the nature of the article will permit, be placed upon the same and only where such brand or marking is impossible shall the label be used, and where the label is used, it shall be in the form of a paper tag which shall be attached by wire to each article." It is therefore, plain that the legislature intended that each individual article sold be either branded or labeled where possible.

STATE HIGHWAY COMMISSION: County roads: Board of Supervisors: Appropriation of funds.

August 26, 1933. *County Attorney, Burlington, Iowa:* Your letter of August 18th has been forwarded to this office for attention.

Answering your first question, "Can the County Board of Supervisors appropriate funds in 1933 for the construction of local county roads incompleted which were approved in the program adopted in 1930 without having another meeting of the Township Trustees, etc.? In other words can the Board of Supervisors under Section 4644-c24 appropriate funds for the road construction when these roads have been approved in a previous program which was adopted more than three years ago? Does the three-year limitation in Section 4644-c24 apply only as the basis for drawing up this program, or does it mean that if this program is still uncompleted at the end of the three years that the Board without any further meeting with the township representatives or securing the approval of the State Highway Commission can appropriate funds to complete the road construction program?"

This office has held that under circumstances as stated in your letter, the three-year program adopted in 1930 by the board of supervisors of your county terminated at the expiration of the three-year period from the time of its adoption, and the secondary roads in this program unimproved reverted back

into the unimproved portion of the secondary road system of the county, and the funds unexpended, if any, reverted back into the general secondary road funds, to be distributed and appropriated as if they were original income from taxation. They therefore, became a part of the paper balances of your county road funds upon the expiration of the three-year period. The adoption of another program is necessary and without such adoption your board of supervisors could make no appropriation for road improvement. This is the general proposition.

Answering your second question: "If it should be held by your office that the board cannot appropriate any funds for road construction purposes or proceed with any construction work during 1933 because more than three years have elapsed since the adoption of the program for local roads, and because no 1933 program has been adopted, can there now be notices given to the township trustees and the procedure followed as outlined in Section 4644-c25 and following sections relative to the adoption of a local county road program, although the meeting and the notices would not be given in accordance with the dates set forth in the statute?"

It is the opinion of this Department that notices to the township trustees and procedure followed as outlined in Section 4644-c25 could not now be legally instituted, and would not if instituted authorize the appropriation and expenditure of funds thereunder upon any program adopted as a result thereof.

Answering your third question, "If your answer to the preceding question should also be in the negative, can the board of supervisors at this time, even though no meeting of the board of approval as set forth in Section 4644-c25, etc., is held or can be held, meet, and adopt a County Trunk road program for the year 1933?" This county trunk program so adopted would, of course, be duly approved by the State Highway Commission. The particular question here is whether or not Section 4644-c35, in which it is said that, "The Board of Supervisors shall, immediately after the adoption of the county road program," or any other section of this chapter, prohibits the board from adopting a secondary road program relating to County Trunk Roads unless the local county road program shall have been first adopted as provided in the statute.

It is the opinion of this Department that as to the county trunk road program for the year 1933, it is now too late for your board of supervisors to adopt such a program. Any other holding would permit the boards of supervisors to neglect having county local road programs and have them approved, to the material injury of the county local road system.

BEER BILL: Disagreement on opinion: Recovery of illegal taxes, if possible: Lagomarcino-Grupe Company, of Davenport, Iowa—Subject:

August 26, 1933. *Treasurer of State, Des Moines, Iowa:* This will acknowledge receipt of your request of the twenty-fourth inst., for the opinion of this Department on the following question:

"The Lagomarcino-Grupe Company, of Davenport, Iowa, disagree with the ruling made by the Department of Justice, relative to the payment of the tax levied under Section 28, of House File No. 587, as amended by House File No. 611, Acts of the 45th General Assembly. They desire to submit a legal brief on the matter and are paying this tax on beer delivered from their Iowa places of business to points in the State of Illinois under protest, at this time. They desire a statement from my department so that in the event that they later find it necessary to sue to recover back payments already made and payments to be made of this tax, that their right is protected to institute

such suit. The Lagomarcino-Grupe Company is paying the tax under protest, at this time, and they should be protected for this reason. By what means can this be accomplished?"

The case of Scottish Union and National Insurance Company of Edinburgh, Scotland, and London, England, Appellant, vs. John Herriott, Treasurer of State, reported in 109 Iowa, 606; Northwestern, 665, is an action at law to recover taxes paid defendant as treasurer of state. Defendant, in his individual capacity, filed a motion to be dismissed from the case, and his motion was sustained. In his capacity as treasurer he filed a demurrer to the petition, which was also sustained, and plaintiff appealed. The Court held:

"Where a state officer, acting under the authority of a law, receives taxes paid to him under duress and protest, an action will lie against him for the recovery of the same if the law is invalid, although he has placed the money to the credit of the state."

and further held, relative to voluntary payments:

"The payment, by a foreign corporation, under protest, of a license tax imposed by a state law claimed to be unconstitutional, will not be deemed voluntarily made when it was compelled, by threat of the Auditor of which the Treasurer knew, to pay in order to protect its property and continue its business in the state."

In that case, "plaintiff filed with both the Treasurer and the Auditor a written protest, in which it claimed that the tax was unconstitutional and invalid, and that by so paying it did not acknowlege its liability to pay the tax, or waive any of its right to contest the same. Plaintiff was bound to submit to the exaction or discontinue its business. Under such a state of facts it is clear that plaintiff's act was not voluntary, and that it may recover back the amount paid, provided it has established its claim that the act in question is unconstitutional,"

and the Court cited Swift Co. vs. U. S., 111 United States, 23; Cunningham vs. Monroe, 15 Gray, 471; Carew vs. Rutherford, 106 Mass., 1; Beckwith vs. Frisbie, 32 Vt., 559; Shelton vs. Platt, 139 U. S., 594; and cases cited in State vs. Nelson, 41 Minn., 25.

61 Corpus Juris 992, Section 1271, 5, is entitled "Payment Under Protest—a":

"In absence of statute. In some jurisdictions there are statutes providing for recovery back of illegal taxes paid under protest and, independently of any statute, there are cases which hold in general terms that taxes paid under protest may be recovered back on showing that they were illegal, even though, at the time of payment, no coercive measures have been taken for collection of the tax, provided the defect was not due to the taxpayer's own neglect;"

Under this is cited Thomas vs. Burlington, 28 N. W., 480; 69 Iowa, 140; Winzer vs. Burlington, 27 N. W., 241; 68 Iowa, 279; Richards vs. Wapello County, 48 Iowa, 507.

"In the absence of statute a tax paid involuntarily or under compulsion or duress may be recovered back, even though no protest was made at the time of payment and no protest is necessary to warrant recovery for such protest would be useless, * * * * *. Of course, if payment is made under implied duress as well as under protest, the right of recovery is unquestionable."

Also see Section 1272, b, entitled, "Statutory Provisions."

"By force of statute in some of the states, illegal taxes may be recovered back in an action at law where their payment was accompanied by a formal protest against the validity of the taxes and against being compelled to pay them."

In the opinion of this Department, a communication from you to the Lagomarcino-Grupe Company, to the effect that unless this tax is paid, steps will be taken to revoke their permit, is sufficient.

This Department has received a brief from the Lagomarcino-Grupe Company, but, to date, have not had time to analyze the same. In the course of the next few days, we will go over the brief and if any questions are raised, on which we have not rendered an opinion to you, relative to this entire situation, we will call the same to your attention.

BOARD OF CONSERVATION: Right: Agreement: City Park commission: Bond issue: Acquisition of land: State of Iowa: Repayment: Term of years:

August 29, 1933. *Board of Conservation, Des Moines, Iowa:* This will acknowledge receipt of your letter of the sixteenth inst., in which you request the opinion of this Department, on the following question:

"Does the Board of Conservation have the right to enter into an agreement with a City Park Commission who are willing to issue bonds for immediate acquisition of land for the State of Iowa, to be repaid to the city by the board in the course of fifteen years, or a period of years?"

We are of the opinion that the nature of this agreement would be the controlling feature, with reference to the sum to be repaid to the city.

Section 1800, of the 1931 Code of Iowa, states, as follows:

"*Eminent domain.* The Executive Council may, upon the recommendation of the board, purchase or condemn lands for public parks. No contract for the purchase of such public parks shall be made to an amount in excess of funds appropriated therefor by the general assembly."

In keeping with this section of the Code, in making an agreement, such as is suggested, it could not be made for an amount in excess of funds appropriated therefor by the General Assembly. The question of repaying the city, over a period of years, is doubtful, for the reason that no one can say what an appropriation might be in the future.

In State vs. Executive Council, 207 Iowa, 923, Judge Evans, in rendering the opinion of the court, states, in part, as follows:

"* * * * * * In the absence of any constitutional provision to such effect, no general assembly has power to render its enactment irrevocable and unrepealable by a future general assembly. No general assembly can guarantee the span of life of its legislation beyond the period of its biennium. The power and responsibility of legislation are always upon the existing general assembly. One general assembly may not lay its mandate upon a future one. Only the constitution can do that. It speaks as an oracle, and stands as a monitor over every general assembly. The funds resulting from license fees and gasoline taxes are within the legislative power, and are necessarily subject to the control of the existing general assembly. Its enactment in relation thereto will continue in force until repealed. The power of a subsequent general assembly either to acquiesce or to repeal is always existent."

We believe, in keeping with the reasons stated herein, that the Board could not enter into a contract, which would be valid, to agree with a City Park Commission that a bond issue would be repaid by the Board over a term of years.

SCHOOLS: Treasurer shall not receive compensation for official services. Section 4239-a3, Code of Iowa, 1931.

August 30, 1933. *Superintendent of Schools, Douds, Iowa:* We have your letter of August 28th.

The provisions of Section 4239-a3 of the Code are plain and the legislature has provided that the treasurer shall not receive compensation for official services. This provision of the statute cannot be circumvented and if he has

made expenditures or advancements for stamps and stationery, of course he is entitled to the return of such money, but he cannot have compensation.

SCHOOLS: Town of Stout does not maintain a high school—Whether Stout district can enter into contract for schooling at Cedar Falls, also transportation.

August 30, 1933. *County Attorney, Grundy Center, Iowa:* You advise that the town of Stout does not maintain a high school and as a result, must send its children of high school age, to some other school; that the State Teachers College at Cedar Falls maintains a training high school, but this is 14 miles from Stout, and that Parkersburg and Dike are about one-half that distance. The Teachers College high school will charge approximately $15.00 a year tuition, while Dike or Parkersburg will charge $9.00 per month.

You further advise that transportation can be furnished pupils to Cedar Falls for $27.00 per pupil per year and so it will be a substantial saving to Stout if the children can be transported to Cedar Falls.

You ask whether the Stout District can enter into a contract for such schooling at Cedar Falls and transportation.

It is the ordinary rule that high school pupils are not entitled to transportation and our legislature provided in Section 4, Chapter 59 of the Forty-fifth General Assembly that to avail themselves of this free transportation, their parents must pay the pro rata cost, but there is a different proposition involved here in that under the provisions of Section 3942 of the Code, the Board of Directors of any school district of the State of Iowa may enter into a contract with the Board of Education for furnishing instruction to pupils of such school district, and it appears plain that under this special provision, if the Board can enter into a contract for instruction, they can likewise enter into a contract for transporting the children to their school.

It is therefore the opinion of this Department that whenever the Board of Directors of a school district in the State of Iowa enter into a contract with the State Board of Education for furnishing instruction to pupils of such school district, that they may also enter into a contract for transportation and furnish the pupils with free transportation.

SCHOOLS: Teacher's contract.

August 30, 1933. *County Attorney, Mason City, Iowa:* We have your request for opinion on the following proposition:

"The Board of Directors of a rural school have selected a teacher. The president of the Board does not join in the selection. Can the president be compelled to sign the contract with the teacher?"

It is the opinion of this Department that pursuant to the provisions of Section 4229 of the Code that if the Board has selected a teacher, then the President has no discretion but to enter into the contract with her, and it is his duty to so formally execute it.

SCHOOLS: TUITION: Scott township is required to pay tuition for high school pupils whose parents own land within Alexander Cons. Dist. Would Scott Township Board of Education be permitted to deduct from amount of tuition required by Alexander Board, amount of school taxes paid by these parents on property owned within said district.

August 30, 1933. *County Attorney, Hampton, Iowa:* You advise that Scott township is required to pay tuition for several high school pupils whose parents

own land within the Alexander Consolidated District, and you ask for an opinion on the following proposition:

"Would the Scott Township Board of Education be permitted to deduct from the amount of tuition required by the Alexander board the amount of school taxes paid by these parents on property owned within the said district. This question might apply, however, in the Latimer district where some of the Scott township pupils might attend."

Section 4269 of the Code of Iowa, 1931, provides:

"*Offsetting tax.* 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."

It is plain from the statute that the parent is allowed to deduct the amount of the school tax paid by him in the district, but Scott township is not allowed to so deduct this amount, and it is therefore the opinion of this Department that Scott Township Board of Education is not permitted to deduct from the amount of tuition required by the Alexander Board, the amount of school taxes paid by parents on property owned by them within the Alexander district.

SCHOOLS: Teacher's contract.

August 30, 1933. *County Attorney, Logan, Iowa:* We have your request for opinion on the following proposition:

"In accordance with Section 4131-c1 of the Code of 1931, a portion of the school corporation outside of the city of Dunlap detached themselves from the school corporation and organized themselves into a rural independent school corporation. The board of the old corporation, after organization and prior to the detachment, had made a contract of employment with a school teacher for the school located in the new district. Must the new board carry out the terms of that contract?"

Sections 4137 and 4138 of the Code provide for equitable division of the assets and distribution of the liabilities in such event. This contract is still in force and binding and if it is now a liability on the new district, this will have to be taken into consideration at the time of the division, but the contract must be carried out and the boards must determine between themselves as to how it is to be taken care of.

SCHOOLS: TAX LEVIES: COUNTY SCHOOL FUND: BEATTY-BENNETT LAW. Section 4395 of the Code provides for a mandatory levy for the support of the schools and under the president amendment cannot be reduced below ¼ mill or more than ¾ mill and such levy cannot be reduced or omitted.

August 30, 1933. *County Attorney, Winterset, Iowa:* We have your request for an opinion on the following propositions:

"In making the 1933 tax levies, may the Board of Supervisors, in addition to the funds specifically set forth in Section 1, Chapter 123 of the laws of the 45th G. A., include the mandatory levy for the county school fund as set forth in Section 4395, 1931 Code of Iowa, and make the deductions required by the Beatty-Bennett law on the remaining funds; or

May the Board of Supervisors, in making said tax levies, include the county school fund in the funds to be reduced and apply the percentage reduction to the minimum county school fund levy as set forth in Section 4395, 1931 Code of Iowa; or,

May the Board of Supervisors, in making said tax levies, omit the minimum county school fund levy entirely?"

Section 4395 of the Code provides for a mandatory levy for the support of the schools and under the present amendment, cannot be reduced below one-

fourth mill or more than three-fourths mill and such levy cannot be reduced or omitted.

SCHOOLS: Tuition.

August 30, 1933. *County Attorney, Cherokee, Iowa:* We have your letter of August 7th in which you ask for an opinion on the three following propositions:

(1) The Board of Supervisors have deemed it expedient to move certain families with children from the County Farm to the town of Meriden for the purpose of avoiding the payment of tuition. Does the moving of these families into the town give them a residence sufficient to avoid the payment of tuition?

(2) These families were moved to the County Farm from other towns. Do they still have residence in the town from which they were moved?

(3) Can the Board of Supervisors construct and maintain a school with a properly accredited teacher at the County Farm?

1. Ordinarily, the question of legal residence has nothing to do with the right of a child to attend school in a particular place, as the residence required under our school law is not such a residence as would be required to establish a right to vote and the right to attend school is not limited to the place of the legal domicile. A residence even for temporary purposes in a school district is sufficient to entitle children to attend their school there and a man might leave his legal domicile in Davenport for a temporary purpose and reside during the school year at Cherokee, yet his children would not be obliged to attend the school of his legal domicile in Davenport; but they could attend the school in the district where he temporarily resided as the only thing required is that they must dwell in the district.

Section 5346 of the Code of Iowa, 1931, provides:

"*Education of children.* Poor children, when cared for at the county home, shall attend the district school for the district in which such home is situated, and a ratable proportion of the cost of the school, based upon the attendance of such poor children to the total number of days' attendance thereat, shall be paid by the county into the treasury of such school district, and charged as part of the expense of supporting the county home."

Therefore, if these children were at the County Farm, the costs of their schooling would be paid for by the county pursuant to the above statute and if the Board of Supervisors have deemed it expedient to move these children from the County Farm to the town of Meriden, then the county would still be liable for the cost of their schooling.

It is therefore the opinion of this Department that under the provisions of Section 5346, Code of Iowa, 1931, the county is liable for the costs of schooling of these children in Meriden.

2. As we have pointed out above, it is an ordinary rule of school law that a child may attend school free where he is dwelling during the school year, and it is not a question of legal residence, but that this has been changed by our legislature in regard to poor children cared for by the county. Our legislature has provided that in such instances, the cost of schooling is to be taken care of by the county, so that the question of whether they still maintain their legal residence in the town from which they were moved has no bearing at all on the question, in our opinion.

3. There is no authority in our opinion, for the Board of Supervisors constructing and maintaining a school with an accredited teacher on the County Farm if there is a school in that district.

SCHOOLS: Compensation to school directors.

August 30, 1933. *County Attorney, Estherville, Iowa:* We have your letter in regard to compensation to school directors in which you ask the following:

"Should work performed by a director, such as hauling coal for school house, cleaning the school house, mowing the yard around the school house, and such other duties be construed as an official duty and hence not subject to compensation?"

Section 4239-a3 of the Code of Iowa, 1931, provides:

"*Compensation of officers.* The board shall fix the compensation to be paid the secretary. No member of the board or treasurer shall receive compensation for official services."

Official duties are anything which have to do with the providing of school facilities and maintenance and care of the building and grounds and the comfort of the pupils. Our Supreme Court in Weitz vs. Des Moines Independent District, 87, Iowa, 81, 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 a contract may be recovered back."

and in Kegy vs. Independent District of West Des Moines, 117 Iowa, 698, our Supreme Court said:

"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."

It is therefore the opinion of this Department that a director cannot receive compensation for performing the duties and work as outlined by you.

SCHOOLS: FREE TRANSPORTATION: Section 4, Chapter 59, Acts of 45th G. A. provide: "The Board may permit pupils enrolled in the secondary grades or any other pupils that are not entitled to free transportation to avail themselves of the transportation facilities provided their parents pay the pro rata cost of such transportation.

August 30, 1933. *County Attorney, Oskaloosa, Iowa:* We have your request for opinion on the following propositions:

(1) There is a consolidated school in Lacey which has a four-year high school course. The school furnishes regular bus transportation. There are children eligible for high school living outside the district but in districts having no high school facilities some live as far as four miles. The directors and officers of the Lacey school have offered the parents of these children free bus transportation if they will attend the Lacey school. Some of these pupils are in what is ordinarily the New Sharon school territory. The Lacey board believe the additional revenue from such pupils more than offsets the cost of free transportation and that this additional income would greatly help in financing the costs of running the Lacey school. Is such free transportation illegal?

(2) If it is illegal, how should it be stopped?

Section 4, Chapter 59, Acts of the Forty-fifth General Assembly, provides:

"The board may permit pupils enrolled in the secondary grades or any other pupils that are not entitled to free transportation, to avail themselves of the transportation facilities provided their parents pay the pro rata cost of such transportation."

High school pupils are not entitled to free transportation. The legislature in the above act has provided a definite manner in which they may secure transportation, viz., by their parents paying the pro rata costs and they may not ride in school busses unless they do pay their share of the costs and cannot be allowed to ride otherwise. The facilities of a high school are not a commodity to be sold on the open market and be the subject of spirited bidding.

Such is neither the spirit of the law nor of the times. We must live and let live. We cannot countenance the giving of free transportation for the purpose of inducing pupils to attend a certain school. If this were true, certain schools would put on a very spirited campaign, and other schools with probably a better and more expensive plant, who did not care to enter into such a campaign, would find themselves without pupils and their plant an additional burden. Schools, as well as individuals, must recognize that we must all work for a common good and no institution for the sole purpose of obtaining additional revenue, may cripple another institution.

It is therefore the opinion of this Department that it is illegal for the Board of Directors of the Lacey school to furnish free transportation to high school pupils of another district.

It appears to us that it should not require any action to stop such a practice if the Board is advised of the illegality of such an arrangement. If action is necessary, it could be brought by an interested taxpayer.

SECURITIES: NOT EXEMPT FROM REGISTRATION AND QUALIFICATION: PLEDGE ORDERS. Certain securities commonly referred to as "pledge orders" due serially over a period of years secured by earnings of utility plants constructed in pursuance of Par. 312, of the 1931 Code and particularly Sec. 6134 D-1 to D-7 inclusive, are not exempt from registration and qualification under the Iowa Securities Act.

September 1, 1933. *Securities Commission, Des Moines, Iowa:* I have your inquiry asking whether or not certain securities commonly referred to as "pledge orders" due serially over a period of years secured by earnings of utility plants constructed in pursuance to paragraph 312 of the 1931 Code, and particularly Section 6134 d-1 to d-7 inclusive, come under the provisions of the Iowa Securities Act.

In compliance with your request I have examined the statutes applicable to the matter referred to, and before arriving at any conclusion I wish to set out certain of the statutes which are the basis of this opinion.

Section 8581-d6 of the 1931 Code provides:

"No securities except a class exempt under any of the provisions of Section 8581 C-4, or unless sold in any transaction exempt under any of the provisions of Section 8581 C-5, shall be sold within the state unless such securities shall have been registered by notification or by qualification."

Therefore, unless these pledge orders are included within the exemptions defined under Section 8581-c4 or 8581-c5 of the 1931 Code, such order would have to be registered and qualified before any sale can be made within the State of Iowa.

The pledge orders in question, as I understand it, are created under what is commonly known in this state as the Simmer Law. The utility plant or improvement is built with the understanding that pledge orders are given to the contractor who builds the improvement and the contractor in question gets an order on the plant, which order is paid out of the property itself and the net earnings from the plant. My understanding is that the utility plants are built in pursuance to and under Section 6134-d1 to 7 inclusive of the 1931 Code.

Referring to Paragraph d-2 of Section 6134 of the 1931 Code, you find that the law provides that such contracts shall not constitute a general obligation or be payable in any manner by taxation. The law further provides that under no circumstances shall the city be in any manner liable by reason of the failure

of the net earnings being sufficient for the payments provided in the contract. We, therefore, readily conclude that these pledge orders can in no sense be an obligation of the city, but are in fact an order only upon the plant itself to be paid for out of the net earnings of the plant, and further out of such value as the property itself may have.

Among exempt securities, as defined by statute, are included any security issued or guaranteed by the United States or any territory or insular possession thereof, or by the District of Columbia, or by any state or political subdivision or agency thereof. See Paragraph A, Section 8581-c4 of the 1931 Code.

The pledge order in question, if called a security, is not, of course, guaranteed. If the pledge orders could be construed to be securities issued by the city within the meaning and intent of Paragraph Z, Section 8581-c4, then said pledge order would be clearly exempt from registration or qualification. It is the opinion of this department, however, that these pledge orders are not securities issued by the state or political subdivision thereof, within the intent and meaning of the legislature. The pledge orders amount to nothing more than a demand upon the plant and the improvement or of payment for the retirement of pledge orders out of the net earnings of the plant or improvement. It is true the town officers execute the issuance of the pledge orders without any guarantee on the part of the political subdivision to pay them. The officers of the city or town in which one of these plants is built are merely the instruments through which the contract of sale of the plant and equipment is consummated. Clearly it was the intent of the legislature to exempt only those securities that were issued by the political subdivision, backed up by the assets of that political subdivision, and payable out of the assets of that subdivision. It was certainly not the intent of the legislature to exempt and permit the sale of pledge orders such as are referred to herein, which have no semblance of a municipal or state obligation.

It might be contended that the language of Paragraph J, Section 8581-c4 of the 1931 Code of Iowa covers the particular transaction in question. The statute reads as follows:

"Securities evidencing indebtedness due under any contract made in pursuance to the provisions of any statute of any state of the United States providing for the acquisition of personal property under conditional sales contracts are exempt."

It might properly be assumed from the language used in Section 6134-d1 to 7, inclusive, that these plants and improvements are purchased by political subdivisions under a conditional sales contract. If Section 8581-c4 referred to above had referred to the "acquisition of property under conditional sales contracts" there might be some question as to whether or not these pledge orders would be construed as exempt from registration under the Securities Act. You will note, however, that the language of the statute refers to the "acquisition of *personal* property under conditional sales contract." The conditional sales contract as we understand it provides for the acquisition of real estate, brick, mortar, or other building material of some kind, together with mechanical equipment, transmission lines (both above and underground), and such other things as may be necessary to carry on the operation of furnishing electrical energy, heat, water and/or gas, as the case may be. It is evident that the legislature had no intention of exempting securities or pledge orders issued in connection with the building of a utility plant or it would have used the

phrase "property acquired" rather than confine itself to the phrase "*personal* property."

The Iowa Securities Law was enacted to protect investors by regulating sales and purchases of stocks, bonds, notes, evidences of indebtedness, etc. If there is any likelihood that these securities are to be sold on a basis of a municipal obligation when they are in fact not a municipal obligation, the public should be protected by the State Department in insisting that these pledge orders are qualified before sales are permitted within the state.

It is, therefore, the opinion of this department that the pledge orders referred to in your letter are not exempt under the Securities Act from registration and qualification. You, as Securities Commissioner, should require the registration and qualification before any sale of same is permitted within the State of Iowa.

BEER BILL: Permit under Chapter 100, Code of Iowa, 1931: Application for permit to sell beer: Chapter 37, Acts of the 45th General Assembly.

September 1, 1933. *County Attorney, Waterloo, Iowa:* This will acknowledge receipt of your letter of the thirty-first ult., in which you request the opinion of this Department, on the following question:

"We have in this city a druggist who has a permit to sell intoxicating liquors under Chapter 100 of the 1931 Code. He now wishes to make application for a permit to sell beer on the premises in accordance with the recent law passed by the last General Assembly.

"In your opinion is it permissible for such a permit holder to also have a license to sell beer?"

Subdivision (7), of Section 2073, of Chapter 100, Code of Iowa, 1931, provides that an applicant for a permit to buy, keep and sell liquors, must show in his petition that he is not the keeper of a hotel, eating house or restaurant and that none of said named businesses are located in his place of business or directly connected therewith.

Section 14, of Chapter 37, Acts of the 45th General Assembly, provides that no sale of beer shall be made for consumption on the premises unless food is served therewith, and that such place is equipped with tables and seats sufficient to accommodate at least twenty-five (25) persons at one time.

Section 2808, Code of Iowa, 1931, contains a definition of the word "food" and Division (5), of that section is, as follows:

" 'Food' shall include any article used by man for food, drink, confectionery, or condiment, or which enters into the composition of the same, whether simple, blended, mixed, or compound."

The definition of the word "restaurant" is found in Division (4), of the same section, and provides, as follows:

" 'Restaurant' shall mean any building or structure equipped, used, advertised as, or held out to the public to be a restaurant, cafe, cafeteria, dining hall, lunch counter, lunch wagon, or other like place where food is served for pay, except hotels and such places as are used by churches, fraternal societies, and civic organizations which do not regularly engage in the serving of food as a business."

Division (6) contains a definition of the words "food establishment," which is, as follows:

" 'Food establishment' shall include any building, room, basement, or other place, used as a bakery, confectionery, cannery, packing house, slaughter house, dairy, creamery, cheese factory, restaurant or hotel kitchen, retail grocery, meat market, or other place in which food is kept, produced, prepared, or distributed for commercial purposes."

We are advised by Mr. S. B. Qvale, Supervisor of Permits, Treasury Department, St. Paul, Minnesota, that the serving of wafers with malted milks is not considered, by the Federal authorities, as being a service of food, which would invalidate a permit issued under Chapter 100 of the Code for the sale of liquor.

We are of the opinion, in keeping with the definition of "food," Division (6), of Section 2808, Code of Iowa, 1931, that beer may be served, in keeping with Chapter 37, Acts of the 45th General Assembly, and that the serving of pretzels or wafers is sufficient to meet the provisions of the law, and, hence, feel that, if a druggist desires to retain a permit already granted, in accordance with Chapter 100, of the Code, that he may also apply for a permit under Chapter 37, Acts of the 45th General Assembly, to sell beer if he desires just to serve wafers or pretzels with the beer. The distinction is—if he desires to enter into a food business, which would bring him within the definition of a "restaurant," or "food establishment," that he would, then, be prohibited from having the two classes of permits.

SECURITIES: H. F. No. 475, 45th G. A. A plan whereby a manufacturing concern proposes to make a contract with one merchant in each city, whereby the merchant is given exclusive control of a particular line at jobbers' prices, and the manufacturing concern sells the merchant from one to three hundred dollars worth of stock, preferred, does *not* come under H. F. No. 475, 45th G. A. but *does* come under Chapter 393-C1, Iowa Securities Act.

September 1, 1933. *Superintendent, Securities Department, Des Moines, Iowa:* We have received your request and that of Joseph I. Brody, Attorney-at-Law, for an opinion upon the following question:

"1. Does the plan of a manufacturing concern which proposes to make a contract with one merchant in each city, whereby the merchant is given the exclusive control of a particular line at jobbers' prices, and the manufacturing concern sells to the merchant from one hundred dollars to three hundred dollars of preferred stock in their company, come within the provisions of House File No. 475, 45th G. A.?"

"2. Does the plan come within the provisions of Chapter 393 c-1 of the Iowa Code, known as the Iowa Securities Act?"

It is the opinion of this office that such plan does not come under the terms and provisions of H. F. 475. That act provides for the regulation, supervision and licensing of persons, firms and corporations which sell, or offer for sale, memberships or certificates entitling the holders to purchase merchandise, materials and equipment upon a "cost plus," or discount basis. It is only when the offered memberships and certificates are issued to the "public generally" that the statute applies.

It is the opinion of this department that the term "public generally" was not intended to refer to such a limited portion of the public as a single dealer in a particular line. Such dealers are a very small portion of the "public."

Bouvier's Law Dictionary defines "public" as follows:

"The whole body politic or all the citizens of the state. The inhabitants of a particular place." (Vol. 3, page 2763, 3d Edition).

Corpus Juris defines the word "public" in this way:

"In one sense, the 'public' is everybody; and accordingly 'public' has been defined or employed as meaning the body of the people at large; the community at large; without reference to the geographical limits of any corporation like a city, town or county; the people; the whole body politic; the whole body politic or all the citizens of the state.

In another sense, the word does not mean all the people, or most of the people of a place, but so many of them as contradistinguishes them from a

few. Accordingly, it has been defined or employed as meaning the inhabitants of a particular place; all the inhabitants of a particular place; the people of the neighborhood." 50 Corpus Juris 844.

We have found no authority or definition of the word "public" which would authorize its use when referring to a particular class or group of the community at large. Therefore, a company selling their preferred stock to merchants in return for a contract with the merchant, providing that the merchant shall receive certain goods at jobbers' prices, is not selling or offering to sell to the "public generally" memberships or certificates of membership entitling the holder thereof to merchandise and materials, equipment, and/or services, on a discount or "cost plus" basis, within the meaning of H. F. 475.

In our opinion, it was not the intention of the legislature, as expressed in the language of the act, to permit those operating under H. F. 475 to limit their activities among such a restricted portion of the "public generally" as is proposed in the plan submitted to you.

However, it is the opinion of this office that the proposed plan does come within Chapter 393-C1 of the Code of Iowa, known as the Iowa Securities Act. The plan, as proposed, involves a sale of securities of the manufacturing concern.

A sale is defined in Section 8581-c3, subsection 3, of the 1931 Code of Iowa as follows:

"'Sale' or 'sell' shall include every disposition, or attempt to dispose, of a security or interest in a security for value. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. 'Sale' or 'sell' shall also include an exchange, an attempt to sell, an option of sale, a solicitation of sale, a subscription or an offer to sell, directly or by an agent, or a circular, letter advertisement or otherwise; provided, that a privilege pertaining to a security giving the holder the privilege to convert such security into another security of the same issuer shall not be deemed a sale, or offer to sell, or option of sale of such other security within the meaning of this definition and such privilege shall not be construed as affecting the status of the security to which such privilege pertains with respect to exemption or registration under the provisions of this chapter, but when such privilege of conversion shall be exercised such conversion shall be subject to the limitations hereinafter provided in subsection (h) of Section 8581-c5; and provided further, that the issue or transfer of a right pertaining to a security and entitling the holder of such right to subscribe to another security of the same issuer, when such right is issued or transferred with the security to which it pertains, shall not be deemed a sale or offer to sell or option of sale of such other security within the meaning of this definition, and such right shall not be construed as affecting the status of the security to which such right pertains with respect to exemption or registration under the provisions of this chapter; but the sale of such other security upon the exercise of such right shall be subject to the provisions of this chapter."

It appears that the proposed plan involves the sale of securities within the meaning of the Iowa Securities Act.

A similar situation was presented to the Supreme Court of Utah in the case of National Bank vs. Price, 234 Pac., 231. A corporation was formed to operate a beet sugar factory. It was selling stock to beet sugar growers in connection with a contract to grow sugar beets for the factory. The court said:

"It is true that no license or permit from the commission would be required to solicit and obtain contracts to grow beets, but all these notes, beet contracts, and stock sales were part of one general plan, and it will not do to

say that a vital part of such a transaction can be eliminated as illegal and void and the remainder be legal and valid."

It was there held that the plan came within the purview of the Utah Blue Sky Law, and that the transaction involved a sale of securities.

The plan, as proposed, does not come within any of the exceptions or exemptions of either Code Section 8581-c4 or 8581-c5. Therefore, before the proposed plan can be acted upon, it is necessary that the stock be registered with your department. It is also necessary that the agents representing the manufacturing concern should obtain a license to sell securities as salesmen. Such agents come within the definition of a salesman contained in Section 8581-c3, subsection 6, of the Code of Iowa, 1931, which is as follows:

"'Salesman' shall include every natural person, other than a dealer, employed or appointed or authorized by a dealer *or issuer*, to sell securities in any manner in this state. The partners of a partnership and the executive officers of a corporation or other association registered as a dealer shall not be salesmen within the meaning of this definition."

Therefore, it is our opinion that the manufacturing concern desiring to carry out the proposed plan must first register the securities to be offered to the local merchants, and that the agents representing such concern must obtain salesman's licenses from your office.

BOARD OF CONSERVATION: City of Eldora: Purchase of land: Bond issue: Fish and Game Commission: Legal right to transfer: Use of funds by Board of Conservation: Maintenance and improvement.

September 2, 1933. *Board of Conservation, Des Moines, Iowa:* This will acknowledge receipt of your letter of the thirty-first ult., in which you request the opinion of this Department, on the following question:

"The city of Eldora is proposing to purchase, by means of a bond issue in the amount of 30% of the purchase price, an area adjacent to Eldora Pine Creek State Park. They are doing this on the assumption that the Board of Conservation will contribute 35% and the Fish and Game Commission 35%.

"If such a purchase is made, will the city of Eldora have the legal right to transfer their title in said real estate to the state?

"Second, under the above circumstances, does the Board of Conservation have the legal right to use funds that are available for their use, for the purchase of 35% of the above, unless title to the entire area is in the name of the state?

"Assuming that said area can be purchased in the above manner, could the Board of Conservation funds be used in the maintenance and improvement of the entire area?"

Section 1800, of the Code, 1931, is, as follows:

"*Eminent domain.* The Executive Council may, upon the recommendation of the board, purchase or condemn lands for public parks. No contract for the purchase of such public parks shall be made to an amount in excess of funds appropriated therefor by the general assembly."

In this connection, you will note that the question of the amount, appropriated by the General Assembly, would control, if the amount is in excess to the amount already appropriated.

Section 1803, of the Code, 1931, provides that the title to all lands purchased, condemned, or donated, for park or highway purposes, shall be taken in the name of the state. However, if division of real property, to the extent of thirty-five per cent is made, there would be no objection, because of this section of the Code. Still, it is our opinion that the Board of Conservation, on behalf of the state, could not take an undivided thirty-five per cent interest in a tract of land, but would have to have the part, purchased by them, set aside. Of

course, in using funds, in matters of this nature, as in every case, by the Board, it must be subject to the approval of the Executive Council, as set forth in Sections 1800 and 1821, of the Code, 1931.

Section 1822-a1, of the Code, provides that cities of a certain population, through action of the city council, may expend money to aid in the purchase of land, within the county, for state parks, which, when purchased, shall be the property of the State of Iowa, to be cared for as state parks. However, it is our understanding that the city of Eldora does not have a population of thirty-five hundred or over and that Hardin county does not have a population of one hundred fifty thousand or over.

Section 1822 simply provides for the care and maintenance by cities, of state parks. It is doubtful if the city of Eldora has the right to transfer their title to the state.

In answer to your third question, relative to the use of funds of the Board of Conservation in the maintenance and improvement of the entire area, we are of the opinion that this would not be a proper use of the funds of the Board of Conservation. In this connection, you are referred to the opinion of this Department, to your Board, under date of August 29, 1933, with reference to the right to enter into an agreement with the City Park Commission.

As far as the Board of Conservation is concerned, the only safe way, as we view it, to proceed in this matter, would be to have the city of Eldora undertake this entire project.

I note that you desire an immediate opinion, in this matter, and I have not had time to check Chapter 86 of the Acts of the 45th General Assembly, which relate to the Fish and Game Commission, with reference to their right to enter into this sort of an arrangement.

BANKS AND BANKING: State banks, savings banks or trust companies organized pursuant to the laws of the State of Iowa, may issue preferred stock, subject to the same liabilities as common stock.

September 2, 1933. *Superintendent of Banking, Des Moines, Iowa:* We have your request for opinion on the following propositions:

(1) May state banks, savings banks or trust companies organized pursuant to the laws of the State of Iowa, issue preferred stock?

(2) Could such preferred stock be non-assessable?

The ordinary stock of a corporation or "Common Stock" as it is called, gives no stockholder any greater rights than any other stockholder and between common stockholders there is no difference and they stand upon equal footing and are entitled to share in the profits of the corporation equally. Preferred stockholders, however, stand on a different footing, the preference depending upon the contract between the corporation and the stockholders, but such stock ordinarily gives to its holders a preference over common stockholders in the payment of dividends. They are entitled to receive dividends to the extent agreed upon before any dividends are paid to the holders of the common stock, and for this privilege and additional benefit, ordinarily waive any voice in the management of the company.

The author in Thompson on Corporations, Third Edition, Volume 5, pp. 419 and 412, states:

"Ordinarily the power to issue preferred stock must be expressly conferred by constitution of the state or by statute and such right does not exist as a power implied from the general forms of expression in corporation statutes. * * * * But it is generally conceded that in the absence of any prohibition

in the laws of the state or where there is no charter regulations on the subject, a corporation may at or before the time of its organization, classify its shares of stock and may provide for a preference of one class over another and it may also issue preferred stock without any statutory authority therefor provided all of the stockholders assent to the issue."

Article VIII of the Constitution of Iowa pertains to corporations and the organization and regulation of banks. Our Supreme Court, however, has held that Article VIII pertains only to banks of issue and as we no longer have banks of issue in Iowa, the constitutional provisions have no application. There is no provision, however, in the Constitution in regard to any particular kind of stock. The only provision affecting the question before us is Section 9 of Article VIII which provides:

"*Stockholders responsibility.* Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held for all of its liabilities, accruing while he or she remains such stockholder."

As we have stated above, Section 9 of the Constitution applies only to banks of issue, but it will be noted that under that constitutional provision, all stockholders are liable for an assessment.

Section 9157 of the Code of Iowa, 1931, provides the manner of incorporation and what the articles shall contain, but states nothing in regard to the different classes or kinds of stock.

Section 9175 provides that at all stockholders' meetings of a savings bank, each share of stock shall be entitled to one vote.

Section 9251 of the Code provides as follows:

"*Liability of Stockholders.* All stockholders of savings and State banks shall be individually liable to the creditors of such corporations of which they are stockholders, over and above the amount of stock by them held therein and any amount paid thereon to an amount equal to their respective shares, for all its liabilities accruing while they remain such stockholders."

Section 9259 of the Code makes the foregoing provision in regard to savings banks and state banks applicable to loan and trust companies, and Section 9261-c1 provides:

"*Shares.* The capital of trust companies shall be divided into shares of One Hundred Dollars ($100) each or into such shares of such less amount as may be provided in the Articles of Incorporation."

It will be seen from the foregoing that there is no express power either in our Constitution or in our statutes for the issuance of preferred stock, nor is there any prohibition in regard to such issue, but there is a direct mandatory provision that all stockholders are entitled to vote and that all are liable for the assessment. There being no direct prohibition then, we believe that following the general rule, the stockholders could unanimously provide for the issuance of preferred stock, as the stockholders among themselves may agree to give all of the dividends to a certain number of stockholders and the others not take any, but such holders of preferred stock would be liable the same as holders of common stock for an assessment, and would be entitled to a vote and voice in the company, so that the only benefit of preferred stock would be that the stockholders would agree among themselves that a certain number of their group were to have dividends before the others and that would be the only distinction.

The author in Fletcher Cyclopedia of Corporations, Volume II, page 750, states the following rule; and cites two Ohio cases in support thereof:

"In the absence of express provision to the contrary, the holders of preferred stock in a corporation are subject to the same liability as holders of common stock. * * * Where a statute makes the stockholders of a corporation individually liable to creditors beyond the par value of their shares, it applies to the holders of preferred stock."

As far as the writer knows, there is only one bank in receivership in Iowa that has issued preferred stock, and under date of April 20, 1933, I advised your Department that in my opinion, such stock was subject to the statutory assessment the same as common stock. Pursuant to this opinion, I understand that suit for stockholders' assessment was instituted but the case has not as yet been tried in the District Court.

During the session of the last legislature, the writer of this opinion prepared a bill providing for the issuance of preferred stock and providing that the holders of such stock should receive a stipulated dividend, and further providing that such preferred stock be non-assessable. Someone, however, took all these provisions out of the bill before it was submitted to the Banking Committee of the Senate. It was our thought in the preparation of this bill, that we should be in a position to take advantage of Section 304 of the National Emergency Banking Act providing for the R. F. C. subscribing for preferred stock in state banks and trust companies. The R. F. C. have made definite restrictions on the purchase of preferred stock, which are in part as follows:

1. Have substantial voting rights in the particular bank.
2. That a limitation be placed upon the payment of common dividends.
3. Application of a substantial part of the net profits for the retirement of the preferred stock.
4. Understanding as to the general policies of the bank.

It is plain that under our present statutory provision, we cannot comply with these restrictions and the conditions.

It is therefore the opinion of this Department that state banks, savings banks and trust companies may issue preferred stock, but it will be subject to the same liabilities as common stock and entitled to all the privileges of common stock in regard to voting and will also be assessable.

STATE AID: APPROPRIATION REDUCTION: METHOD OF PRORATING STATE AID TO COUNTY AGRICULTURAL SOCIETIES: 2. FILING OF REPORTS BY COUNTY FAIRS: ACTUAL PAYMENT OF EXHIBITORS NOT MADE: 3. ACTUAL AMOUNT PAID MADE IN REPORT: PRORATED:

September 6, 1933. *State Fair Board, Des Moines, Iowa:* This will acknowledge receipt of your letter of the fifth inst., in which you request the opinion of this Department, on the following question:

"The 45th General Assembly reduced the appropriation of the State aid, for county and district fairs, from $150,000 to $105,000, annually, but did not change Section 2903, Code, 1931, which provides the method of computing State aid." You desire to know:

1. By what method may the amount of State aid, available to county agricultural societies, be prorated?
2. How may county fairs file their reports to your Department before they actually pay the exhibitors their premium?
3. In making the report, should the county fair report the actual amount paid in premiums where they prorate?

You suggest that the fairs figure their state aid on the same basis as they have in the past as the law has not been changed with reference to the method of computing, and, then, deduct twenty-five per cent (25%) of this amount,

by reason of the fact of the reduction of the appropriation for the current year. This would seem to us to be a fair and equitable plan and would meet the situation as it now exists in a satisfactory manner.

In answer to your second question, will say that in view of the financial stress of the last year or so, we are of the opinion that the method, which you used for 1932, is as good a method as can be suggested and we note that you state that it had the approval, in the year 1932, of the Budget Director and of this office, and that this was done for the reason that fairs were unable to receive financial aid from banks in paying their premium lists, and, hence, some plan had to be adopted to meet the same, and that the following plan was devised:

Officers of county fairs issue their premium checks, place them in envelopes addressed to the winning exhibitors and turn them over to the bank which carried their account.

In accordance with Section 2902, Code, 1931, prior to November 1, a sworn statement was made and forwarded to your Department and subsequent thereto, the State warrant, covering the amount of State aid, was forwarded to the Treasurer of the Fair Association, who deposited it in the bank to the credit of the county fair, and officials of the bank, when they received this warrant, mailed the checks to the exhibitors, which had been left with them.

We are unable to suggest a better plan of meeting this situation and in view of the financial conditions, will approve the procedure outlined above.

In answer to your third question, relative to the filing of reports to your Department, we are of the opinion that Division (1), of Section 2902, Chapter 136, Code, 1931, should be followed, and this subdivision states, as follows:

"The actual amount paid by it in cash premiums at its fair for the current year, which statement must correspond with the published offer of premiums."

As stated in your communication, a number of the county fairs have adopted a resolution similar to the resolution adopted by the Iowa State Fair Board on April 12, 1933, which provides that if the receipts of the fair do not amount to a certain amount all premiums, pay rolls, contracts and other obligations created by the Fair Board will be reduced in the same proportion that said receipts are less than the amount fixed in the resolution. The question you raise is whether the county fairs should report to the State Fair Board, for the purpose of computing the state aid, the amount of premiums awarded or the amount of premiums they actually pay. In other words, a county agricultural society could not award premiums, by way of illustration, amounting to $2,500 and actually pay only $2,000 and then report to your department the amount awarded ($2,500) instead of the amount paid ($2,000). The report, such as illustrated in the preceding sentence, would be erroneous in that they are not paying what they report to your department, but a lesser amount, and it would be, in our opinion, an evasion of the section, of the Code, under consideration.

BEER BILL: SALE IN UNINCORPORATED TOWN: USE OF TICKETS:

September 8, 1933. *County Attorney, Vinton, Iowa:* This will acknowledge receipt of your letter of the sixth inst., to Edward L. O'Connor, Attorney General, which has been referred to the writer for attention.

You request the opinion of this Department on the following question:

Beer is being sold in an unincorporated town in your county. In so doing, tickets are used. Is it possible for a permit to be granted to an applicant in an unincorporated town?

Section 25, of Chapter 37, Acts of the 45th General Assembly, is, as follows:

"No permit shall be granted to any person under the provisions of this Act unless the premises occupied by such permit holder wherein beer is to be sold, are wholly within the corporate limits of a city, incorporated town or special chartered city of the State of Iowa."

The only exception to the rule is in the case of a golf or country club. You will note that Section 19, of the act, under consideration, provides for this and that the wording is "golf *or* country club." In previous opinions, given by this Department, we have construed this to mean that any country club, which is regularly organized as a club for outdoor activities, may be granted a permit, in accordance with Section 19 by the board of supervisors of the county.

BEER BILL: DRUG COMPANY LEASED BUILDING: MODERNISTIC CLUB: CLASS "B" PERMIT: MANAGER OF CLUB TERMINATED ASSOCIATION WITH CLUB: TRANSFER OF PERMIT TO NEW MANAGER: CAN IT BE TRANSFERRED AT ALL: SALE OF BEVERAGE CONTINUED:

September 8, 1933. *County Attorney, Sioux City, Iowa:* This will acknowledge receipt of your letter of the sixth inst., to Edward L. O'Connor, Attorney General, which has been referred to the writer for attention.

You desire the opinion of this Department on the following set of facts:

Shortly after the passage of the Beer Law, Todd-Becker, a local drug company, had a lease upon an entire building. This company sublet upstairs rooms to the Modernistic Club. This company is one of the partners in this club. The club secured a Class "B" permit, which was granted by the City Council, to the Modernistic Club, Mr. Coates, Manager. The manager has terminated his association with the club.

Must this permit be transferred to the new manager? Can it be transferred at all? Is it possible for the club to continue the sale of this beverage?

In the opinion of this Department, it would seem that this permit was granted under Chapter 37, Acts of the 45th General Assembly to the club and hence the change of managers would not make any difference with respect to this permit. You do not state as to whether or not this was a personal application, made by the manager, or granted under Section 20, of the act, under consideration, to the club. This, we feel, would be controlling, in this matter, if the city council granted, to Mr. Coates, this permit on his personal application. Then, we would feel that when Mr. Coates terminated his association with the club that he would have the right to make application to transfer this permit to another location on application to the city council, in which he would present a good reason for making the change. We have advised numerous county attorneys that such a transfer is permissible within the city limits, for which the permit has been granted and have made this ruling, as in many cases, fire or the termination of a lease, or other causes, have made it practical to allow this under the act.

The question, which you have presented, seems to us to be one of fact—as to whether the city council granted the permit to Mr. Coates, to a partnership, which went under the name of Modernistic Club, or to a club, in accordance with Section 20, of the act. In the first instance, the club could not continue to operate this permit. In the other two instances, we would see no objection to the club continuing the use of the permit.

BUILDING AND LOAN ASSOCIATIONS: EXCHANGE MORTGAGES FOR FEDERAL BONDS: HOME OWNERS LOAN ACT.

September 8, 1933. *Federal Home Loan Bank, Des Moines, Iowa:* Pursuant

to our conversation over the telephone a few days ago, we are herewith confirming the oral opinion which we gave you at that time.

"Your question was whether or not building and loan associations have authority or power to exchange mortgages which they hold for federal bonds which are issued under the Home Owners Loan Act recently passed by Congress."

It is true that under the statutes building and loan associations do not generally have authority to invest their funds in bonds, except as provided in Section 9340-b1 of the Code of 1931, wherein it is provided that such associations may invest their idle funds, or any part thereof, in United States interest-bearing bonds or obligations, or state, county, municipal, township, or other political subdivisions of this state, not to exceed 10 per cent of the assets of the association. This section merely provides for the investment of idle funds.

Section 9340 of the Code of 1931 provides that all funds, except those necessary to defray the expenses of the association, shall be invested for the benefit of the shareholders, and further provides that for every loan made a non-negotiable note or bond secured by first mortgage on real estate shall be given, etc.

From a reading of these two sections, it can easily be seen that building and loan associations would not generally have authority to make investments in anything except mortgage loans, as provided in Section 9340, or in the securities provided in Section 9340-b1. The question then is whether or not exchanging these mortgages for federal bonds, to be issued under the authority of the Home Owners Loan Act, is to be construed as an investment. It is the opinion of this office that such an exchange is not an investment. The purpose of this federal legislation was to enable the owners of small homes to have their loans refinanced. Mortgages, which are held by the building and loan associations in the State of Iowa, and which were considered as adequately secured at the time the loans were made, have in numerous instances, in fact in a majority of the cases, become rather poor investments, due to the fact that the values of real estate in the state of Iowa have materially decreased during the last few years. There is no question but that the building and loan association has authority to accept additional security for a loan, which it considers inadequately secured, or which is even doubtful or slow in character. This is merely a matter of doing something which is to the best interest of the association and its stockholders.

With this thought in mind, and under the general rule which has been stated by the courts that banks and other corporations in general have authority to accept securities for the purpose of protection, which they would not have a right to purchase as an investment, we are led to the conclusion that building and loan associations have this same authority. In other words, the accepting of these bonds cannot be considered in any sense of the word as an investment. It must be construed as an exchange made by the association with the purpose in mind of assisting in the refinancing of the loan held by it, not only to aid the owner of the real estate but as a protection to its own stockholders and members.

Under the general powers granted to the associations by the statute, we find in subsection 4 of Section 9329 of the Code of 1931 the following:

"To acquire, hold, encumber and convey such real estate and personal property as may be necessary for the transaction of their business."

As before stated, this office is of the opinion that the transaction mentioned

by you is not an investment, but must be construed to be more in the nature of the liquidation of a loan held by the association, and that the association can without violating the laws of this state make such exchanges.

PUBLIC WORKS: ACCEPT GRANT FROM U. S. GOV'T.: NATIONAL INDUSTRIAL RECOVERY ACT: COUNTIES. "The laws of this state authorize the state, counties, or municipal corporations to accept such a grant from the Federal government, to be used to aid in financing the construction of public works. It is also required that Iowa labor and materials be preferred in the construction of public improvement."

September 8, 1933. *State Public Works Committee, Marshalltown, Iowa:*

Pursuant to our conversation of yesterday, we are herewith rendering an opinion on the questions submitted by you at that time. The proposition which you submitted is as follows:

"Do the laws of Iowa authorize (a) the state or (b) any county of the state to:

"(1) Accept a grant from the United States government, to be used to aid in financing the construction of public works;

"(2) Enter into a valid agreement with the United States government that the grantee will apply the grant in accordance with the National Industrial Recovery Act and the rules and regulations of the President made in pursuance thereof;

"(3) Enter into a valid agreement with the United States government that, in consideration of the grant being made, the grantee will require that all contracts with relation to the project, whether paid from the grant or from public funds put up by the grantee, shall contain the usual labor provisions concerning use of American Machinery and Materials, etc."

We will answer your questions in the order asked.

(1) There is no question but that the laws of this state authorize the state, counties, or municipal corporations to accept such a grant from the Federal Government. The provision of the Code granting such authority are set out, as follows:

"10185. Gifts to state. A gift, devise, or bequest of property, real or personal, may be made to the state, to be held in trust for and applied to any specified purpose within the scope of its authority, but the same shall not become effectual to pass the title in such property unless accepted by the executive council in behalf of the state.

"10186. Management of property. If gifts are made to the state in accordance with the preceding section, for the benefit of an institution thereof, the property, if accepted, shall be held and managed in the same way as other property of the state, acquired for or devoted to the use of such institution; and any conditions attached to such gift shall become binding upon the state, upon the acceptance thereof.

"10187. Gifts to state institutions. 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.

"10188. Gifts to municipal corporations. Counties, cities, towns, the park board of any city or town, including cities acting under special charter, and civil townships wholly outside of any city or town, and school corporations, are authorized to take and hold property, real and personal, by gift and bequest; and to administer the same through the proper officer in pursuance of the terms of the gift or bequest. No title shall pass unless accepted by the governing board of the corporation, township, or park board. Conditions attached to such gifts or bequests become binding upon the corporation, township, or park board upon acceptance thereof."

You will note from the reading of the above sections that the conditions attached to such gifts or bequests become binding upon the corporation, township, state, or state institution.

Section 1803 of the Code of 1931 is as follows:

"1803. Title to lands. The title to all lands purchased, condemned, or donated, hereunder, for park or highways purposes, shall be taken in the name of the state and if thereafter it shall be deemed advisable to sell any portion of the land so purchased or condemned, the proceeds of such sale shall be placed to the credit of the said public state parks fund to be used for such park purposes."

Section 1804 of the Code of 1931 is as follows:

"1804. Gifts. The board of conservation with the written consent of the executive council, may accept gifts of land or other property, or the use of lands or other property for a term of years, and improve and use the same as public state parks."

Section 1805 of the Code of 1931 is as follows:

"1805. Conditions—lands. The conditions attached to a gift shall be entered in writing as part of the record of the title by which the state takes the lands, and shall be inscribed upon any chart, map, or description of said park if the conditions are made by the grantor in lieu of money as a consideration paid by the state."

Section 1806 of the Code of 1931 is as follows:

"1806. Conditions—personalty. If the donation be other than real estate and a particular specification for its use be made by the donor, no part of such donation shall be used or expended for any other purpose."

The sections just quoted provide for the acceptance of gifts by the State Board of Conservation.

In so far as the State Fish and Game Commission is concerned, the authority is granted in the following section of the Code of 1931:

"1703-d12. Specific powers. The commission is hereby authorized and empowered to:

"2. Acquire by purchase, condemnation, lease, agreement, gift and devise lands or waters suitable for the purposes hereinafter enumerated, and rights of way thereto, and to maintain the same for the following purposes, to wit:

"a. Public hunting, fishing and trapping grounds and waters to provide areas in which any person may hunt, fish, or trap in accordance with the provisions of the law and the regulations of the commission;

"b. Fish hatcheries, fish nurseries, game farms and fish, game, fur-bearing animal and protected bird refuges."

In so far as the right of a county to accept donations, to be used for any particular purpose, is concerned, we call your attention to the following:

Section 5361 of the Code of 1931 provides that the Board of Supervisors shall not order the erection of or the building of an addition or extension to or the remodeling or reconstruction of a court house, jail, or county home, when the probable cost will exceed $10,000, until a proposition therefor shall have been first submitted to the legal voters of the county. This provision of the Code of 1931 has been a law of this state in that identical form since the early history of the state, except that the maximum limitation has been increased. In passing on this section of the law, the Supreme Court of Iowa recognized the right and authority of a county to accept gifts in the case of Way vs. Fox, 109 Iowa, 340, 80 N. W., 405. The Court in that case held that the limitations provided in the Code, with reference to the amount that might be expended by the Board in erecting a court house and in purchasing a site therefor, have no application, where it appears that the money has been donated by private

citizens. In line with this decision of the Supreme Court, our Department has recently ruled in an opinion addressed to C. Level, Assistant County Attorney at Denison, Iowa, that the same provision of the law does not apply, where approximately 30 per cent of a $12,000 project is being donated or granted by the Federal Government, in view of the fact that it will not be necessary to repay any portion of that 30 per cent. We can see no difference between a gift or grant by the Federal Government and a donation by private individuals. This of course would apply only to the 30 per cent which the Federal Government is granting.

(2) In view of the sections of our law hereinbefore quoted, it is our opinion that the state, counties and municipalities not only have authority to enter into a valid agreement with the Federal Government that the grant from the United States Government will be used to aid in financing the construction of public works, but that this grant must be used in accordance with the conditions under which it was granted.

(3) The laws of this state require that every commission, board, committee, officer, or other governing body of the state, or any subdivision thereof, prefer Iowa materials, products, supplies, provisions, and other needed articles produced, manufactured, compounded, made, or grown within the state. It is also required that Iowa labor and materials be preferred in the construction or building of any public improvement or works, and that every contract entered into by any commission, board, committee, officer, or governing body shall contain a provision requiring such preference. In support of this statement, we quote for you the following sections of the Code of 1931:

"1171-b1. Preference authorized—conditions. Every commission, board, committee, officer or other governing body of the state, or of any county, township, school district, city or town, and every person acting as contracting or purchasing agent for any such commission, board, committee, officer or other governing body shall use only those materials, products, supplies, provisions and other needed articles produced, manufactured, compounded, made or grown within the state of Iowa, when they are found in marketable quantities in the state and are of a quality reasonably suited to the purpose intended, and can be secured without additional cost over foreign products or products of other states."

"1171-d1. Iowa labor. Every commission, board, committee, officer or other governing body of the state, or of any county, township, school district, city or town, and every person acting as contracting agent for any such commission, board, committee, officer or other governing body of the state, or of any county, township, school district, city or town, shall give preference to Iowa labor in the constructing or building of any public improvement or works, and every contract entered into by any such commission, board, committee, officer or other governing body of the state for the construction or building of any public improvement or works shall contain a provision requiring that preference shall be given to Iowa domestic labor in the constructing or building of such public improvement or works. The provisions of this and the two following sections shall not apply to the purchase of materials and supplies to be used in the construction of any road or highway."

We believe this is the authority for which you asked and that the laws herein quoted should satisfy the Administrator of Public Works or the head of the Legal Department of that body.

BOARD OF CONTROL: Child Welfare Laws: Placement of Wards: Chapter 185 and Chapter 181 of Code of Iowa.

September 11, 1933. *Board of Control, Des Moines, Iowa:* We have your request for opinion on the following proposition:

The Board of Control of State Institutions would like the opinion of your department concerning an apparent conflict in our child welfare laws.

In Chapter 185, Section 3716 it appears that the placement of wards of the Iowa Soldiers' Orphans' Home in foster homes is one of the duties of the Superintendent of that institution.

In Chapter 181, Section 3661 A1—2, it appears that the placement of all children who are wards of the state is one of the duties of the Child Welfare Bureau.

Chapter 181-A1 of the Code in regard to Child Welfare supervision was enacted by the Fortieth General Assembly, the law being Chapter 77 of the Acts of the Forty-first General Assembly, and the title to the act being as follows:

"An Act to give the State Board of Control certain duties for the protection of defective, delinquent, dependent and neglected children; to authorize said Board to appoint the Superintendent of Child Welfare, fix his term of office and define his duties; to fix the salary of such superintendent and provide for his assistants; to provide for cooperation with other State institutions; and making an appropriation to cover the salaries and traveling expenses of such superintendent and assistants."

Section 1 of the act which is now 3661-a1 of the Code, states:

"It shall be the duty of the Board of Control, among other things; to promote the rehabilitation of disrupted families who have normal children who are wards of the State or the placement of such children in wholesome foster homes."

Section 2 of this act which is Section 3661-a4 of the Code provides for the appointment of the Superintendent of the Child Welfare and states that the Board shall have the power to define his duties.

The legislature thus created a new agency and gave to this agency new powers that had not existed before. Formerly, there was no such power and the matters necessarily must be left to the superintendent of the institution as provided in Chapter 185 of the Code, and Chapter 181-A1 of the Code acting to so create a new agency and giving broad general powers therefor, supersedes the provisions of Chapter 185 in regard to the placement of children.

We presume that the Board, pursuant to Section 3661-a4 of the Code, has defined the duties of the Superintendent of the Child Welfare and that if those duties prescribed that the superintendent shall have charge of the placement, then such governs; and in event, the Board has not defined the duties of the Child Welfare in regard to placement, it may do so and if the Board gives to the Superintendent of Child Welfare these duties, then such controls.

Section 3716 of the Code provided an agency of the Board of Control in the placement of such children, viz., the superintendent of the institutions, but such agency as we have heretofore pointed out, has now been superseded and the legislature has created a new agency, viz., the Department of Child Welfare, and in our opinion, the only duty of the superintendent of the institution at the present time is to sign the contract in behalf of the Board as provided in Section 3716.

MUNICIPAL CORPORATIONS. TAXATION. City shall not appropriate in the aggregate an amount in excess of its annual legally authorized revenue but may anticipate revenues for the year for which appropriation was made.

September 14, 1933. *Auditor of State, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 12th inst., in which you state that your examiner, Mr. DeHart, has requested an opinion on the following questions:

"At some time before the beginning of the fiscal year 1932-33, I believe in

January, a judgment was entered against the City of Des Moines in regard to refund of taxes to certain banks, and the judgment stated that this money was to be paid the banks out of money in the hands of the county treasurer belonging to the city; in other words, out of their current year's tax collections.

As this refund was ordered before the appropriation ordinance was made up for the year, was the city within their rights in appropriating the total amount to be received from taxes without giving consideration to this refund?

As shown by Section 5663, Paragraph 16, Code of 1931, no city can appropriate in the aggregate an amount in excess of its annual legally authorized revenue, and when this refund was ordered by the court, did not that part of their tax collections necessary to pay said refund, cease to be a part of their legally authorized revenue so that the amount to be appropriated should have been only the amount left after this refund had been taken out?

Since this judgment was to be taken up with a bond issue, would it have been proper to appropriate the money to have been received from the sale of these bonds before the beginning of the fiscal year or to appropriate it so that it could be used only as received?"

From your statement of the matters involved in the questions submitted it appears that the judgment entered against the city was to be paid out of money in the hands of the county treasurer belonging to the city thus reducing that fund by a considerable amount. If the judgment was paid out of such fund the city council when passing its appropriation ordinance should take into consideration the fact that the revenues for the ensuing year would be substantially reduced by payment of the judgment and should comply with that part of paragraph 16 of Section 5663 which provides as follows:

"No city shall appropriate in the aggregate an amount in excess of its annual legally authorized revenue, but cities may anticipate their revenues for the year for which appropriation is made, or bond or refund their outstanding indebtedness."

Ordinarily the city may appropriate an amount equal to its annual legally authorized revenue. In the case referred to in your questions, if the council appropriated the full amount of its annual legally authorized revenue for the payment of items other than the judgment in question, there would be nothing left with which to pay the judgment. If the judgment were paid out of such revenue thus substantially reducing the amount thereof, and the council had appropriated the whole amount of its legally authorized revenue without regard to the fact that it had been reduced by payment of the judgment, there would, of course, be a shortage of funds with which to pay the amounts appropriated. The legislative intent was, without doubt, to limit the appropriations during any year to the amount of revenue which would be legally raised during that year. The city would hardly be within its rights in appropriating the total amount received from the taxes without giving consideration to a refund which was previously ordered and which would greatly reduce the sum received from taxes.

You indicate that the judgment was to be taken up with a bond issue, but earlier in your letter you state that the judgment was to be paid the banks out of money in the hands of the county treasurer belonging to the city. If the judgment were paid the question would then arise why there should be a judgment bond issue. However, if there was a bond issue it would be proper for the council to appropriate the money to be received from the sale of the bonds before the beginning of the fiscal year in so far as the money actually came in in that year.

MUNICIPAL COPORATIONS. ENGINEERING DEPARTMENT. Regular monthly salaries of engineering department should not be paid from improvement fund of city where such department has duties outside those referred to in Sec. 6211.

Same rule re payment for use of private cars in engineering work for city. Cost of paving between rails and 1 foot on each side thereof not payable out of improvement fund.

September 14, 1933. *Auditor of State, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 12st inst., in which you submit the following questions:

1. Can regular monthly salaries of an engineering department be paid from the improvement fund of a city or town?

2. Can payment for use of private cars used in engineering work be paid from said improvement fund?

3. Can cost of paving between rails of a street car and for one foot on each side, or any part of the cost be paid from the improvement fund?

4. Should not engineering costs on all projects be paid originally from the general fund and then when the engineering cost of the project has been computed, this amount then to be refunded to the general fund from the improvement fund?

These questions cannot be answered by a mere yes or no, for the reason that many facts and circumstances in a particular case might qualify the answer considerably.

With reference to question one, I would say that as a general proposition it would be answered in the negative. This is one the assumption that it has reference to a city which has a regular engineering department, the employees of which receive regular monthly salaries without reference to any particular engineering projects which have arisen or may arise within the city.

Section 6211 provides, in part, as follows:

"Taxes for particular purposes. Any city or town shall have power to levy annually the following special taxes:

3. Improvement fund. Not exceeding five mills, which shall be used only to pay for deficiencies in assessments and for plats and schedules as provided by law, and for the construction, reconstruction, and repair of any street improvement at the intersections of streets, highways, avenues, and alleys, and for one-half of the cost of such improvement at the intersections of streets, highways, avenues, and alleys not crossing, and for spaces opposite property owned by the city or town and by the United States, and for the purchase price of property purchased by the city at tax sale and subsequent taxes assessed against such property."

It is therein provided that the improvement fund shall be used to pay deficiencies in assessments and for plats and schedules, for the construction, reconstruction and repair of street improvements at intersections, etc. The engineering costs would be part of the cost of construction, repair, etc., and in so far as these salaries are a part of the costs of the improvements referred to in said paragraph 3 of Section 6211, it would seem proper to charge them to the improvement fund in the final analysis of the matter. The engineering costs are sometimes an important cost item in street improvement projects. Cities having such an engineering department, no doubt, have provided for the payment of the salaries in that department by ordinance, which ordinance would prescribe the fund out of which the salaries are to be paid. A town which has no regular engineering department would not be confronted with the monthly salary question. The activities of the engineering department ordinarily would embrace a wide field and cover many projects other than those

to be paid for out of the improvement fund and the limits placed upon that fund should not be overstepped.

The answer to the second question is that payment for the use of privately owned cars used in engineering work should not be paid for from the improvement fund unless said cars are used exclusively for the engineering purposes covered by paragraph 3 of Section 6211. If said cars are used in the construction, reconstruction, or repair of street improvements at the intersections of streets, etc., or for other purposes covered by said paragraph 3, and are necessary for such engineering work, it would appear to be lawful to pay for such use from the improvement fund.

Your third question is answered by Section 6052 of the Code which provides that all railway companies shall be required to construct and repair all street improvements between the rails of their tracks and one foot outside thereof at their own expense.

"A municipal corporation has no power to relieve a street railway from its statutory duty in this respect."

Burlington R. & L. Co. vs. City, 188 Iowa, 272.

Paving between the rails of street car tracks and for one foot on each side thereof, should not be made out of the improvement fund.

With reference to question four, it would appear to be both reasonable and logical, as well as within the law, to pay the engineering costs on city projects from the general fund and then when the engineering cost of any particular project has been computed, the amount then might properly be refunded to the general fund from the improvement fund if the particular project was one for which payment is to be made out of the improvement fund. There might be certain engineering costs which would be payable directly out of the improvement fund where the engineering items were exclusively in connection with the particular construction or repair work contemplated by paragraph 3 of Section 6211.

MUNICIPALITY. MAYOR. FEES. WHO SHOULD RETAIN FEES, COUNTY OR CITY. FINES. A mayor who receives annual salary in lieu of fees under city ordinance cannot retain fees when acting as justice of peace in state cases. Such fees are due the county rather than the city. Fines collected by a mayor for violations of state statutes should be paid into the county treasury for benefit of school fund.

September 15, 1933. *Auditor of State, Des Moines, Iowa:* This will acknowledge receipt of your favor of the 16th ult., with which is enclosed a letter from one of your examiners, Mr. John Horning, dated August 11th.

These letters present several questions which are, in substance, as follows:

First: "Ordinance No. 3, Section 1, 1925 Revised Ordinance Page 20: The mayor shall perform such duties as are enjoined upon him by the statutes of the State of Iowa, and the ordinances of the City of Charles City, and for performing these duties the mayor shall be paid a yearly salary in lieu of fees in the sum of $1,000.00 to be paid quarterly."

It is stated that under this ordinance and under the laws of the state, the mayor tried many cases for the violation of state statutes in his capacity as ex officio justice of the peace. That in cases tried before him for violation of the state statutes he filed a claim against Floyd county for the fees and collected same.

The question is presented whether he is entitled to retain these fees, and if not, whether they belong properly to the city of which he was mayor or to the county.

Section 5670 of the Code is as follows:

"Salaries in lieu of fees. It may be provided by ordinance that any city or town officer elected or appointed shall receive a salary in lieu of all other compensation; and in such case such officer shall not receive for his own use any fees or other compensation for his services as such officer, but shall collect the fees authorized by law or ordinance, and pay the same as collected, or as prescribed by ordinance, into the city or county treasury, as the case may be."

Under the ordinance above quoted and under this section of the Code, the mayor would not be entitled to any compensation other than the $1,000 provided for in the ordinance. The ordinance provides that he shall receive a yearly salary in lieu of fees. See Report of Attorney General for 1925-1926, page 252.

The question whether fees heretofore collected by the mayor in state cases tried before him, that is, in cases arising under the state law rather than under city ordinances, should have been turned over by him to the city treasurer or the county treasurer, is a more difficult question.

In the case of Labor vs. Polk County, 70 Iowa, 568, under the statutory law prevailing at that time and under a city ordinance applicable to that particular case, it was held that a police judge, though he was paid a salary, could recover of the county such fees as the county was liable for under Section 3806 of the Code in criminal cases where the prosecution failed or where such fees could not be made from the persons liable to pay the same, such fees being then payable to the city treasurer.

In the case of City of Des Moines vs. Polk County, 107 Iowa, 526, it is held that where a city has so prescribed by ordinance it may maintain an action against the county for fees earned by certain of its officers in vagrancy cases.

It is the opinion of this office that under Section 5670, as it now stands, the fees payable to the mayor acting as ex officio justice of the peace in cases where he receives a salary in lieu of other compensation for his services, are due the county rather than the city. The words of the statute, "shall collect fees authorized by law or ordinance, and pay the same as collected, or as prescribed by ordinance into the city or county treasury as the case may be," allows no other construction. Clearly, in all cases arising under city ordinances, the city would receive the fees. In cases arising under the state law where the mayor's jurisdiction as an ex officio justice of the peace is invoked, the same statutes and rules would apply as are applicable to a justice of the peace. He is, in fact, acting as a justice of the peace rather than mayor in such cases. Section 5665 of the Code refers to the fees of the mayor when "discharging the duties of a justice of the peace." In the trial of state cases he is not acting as mayor but is acting as a justice of the peace, the state law having clothed him with this power.

Under Section 13403, the mayors are made magistrates within their respective counties. Section 13404 fixes the power of magistrates. The mayor, acting as a magistrate or justice of the peace, exercises jurisdiction beyond the power of the city council to confer upon him. It might be argued that since the city pays his whole salary the city should be entitled to any fees he may earn, and that would appear to be true except for the words, "city or county treasury as the case may be," in Section 5670. If it were not the intent of the legislature that such fees should be paid into the county treasury, surely, the words "or county treasury" would not be a part of the statute.

Another question is presented by your letter as follows:

"Should the fine assessed by a mayor or police judge against violators of state statutes be paid into the city treasury or should the same accrue to the benefit of the school fund, as provided for like cases which are handled by a justice of the peace."

It is the opinion of this office that such fines should be paid into the county treasury for the benefit of the school fund.

MUNICIPALITY. PRINTING OF NOTICE OF SALE OF BONDS (OFFICIAL NEWSPAPER OR NOT): When a city or town is issuing bonds does the notice for the sale of such bonds and other printing in regard to their issue have to be published in an official newspaper as designated by the board of supervisors or can this printing be done in any newspaper of general circulation?

September 15, 1933. *Auditor of State, Des Moines, Iowa:* This will acknowledge receipt of your favor of the 12th inst., in which you ask the following question:

"When a city or town is issuing bonds, does the notice for the sale of such bonds, and other printing in regard to their issue have to be published in an 'official newspaper' as designated by the board of supervisors or can this printing be done in any newspaper of general circulation in the city or town?"

The following statute controls with reference to the notice of sale:

"1172. Notice of sale. When public bonds are offered for sale, the official or officials in charge of such bond issue shall, by advertisement published for two or more successive weeks in at least one official newspaper of the county, give notice of the time and place of sale of said bonds, the amount to be offered for sale, and any further information which may be deemed pertinent."

Section 1174 provides that any or all bids may be rejected and the sale may be advertised anew in the same manner.

Section 352 of the Code, provides that 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 for proposed form of contract, etc., and give notice thereof by publication in at least one newspaper "of general circulation in such community at least ten days before said hearing."

Section 363 provides that before a municipality shall institute proceedings for the issuance of bonds or evidence of indebtedness, etc., notice shall be published at least once in a newspaper of "general circulation" within such municipality at least ten days before the meeting at which it is proposed to issue such bonds.

You will note from these sections that in some instances the official newspaper is designated and in the others a newspaper of general circulation in the city or town. In such matters the statute covering the particular case should be strictly followed.

MUNICIPALITY. BIDS FOR PURCHASE OF CARS: It would be permissible to advertise for bids through the newspapers or by letter, personal method or oral communication. There is no legal requirement that the low priced car or the low bid be accepted if there is a difference in quality and in the requirement of the city.

September 18, 1933. *Auditor of State, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 12th inst., in which you present the following questions:

"In purchasing cars for use of the city must these cars be advertised for or is it permissible for the purchasing agent to ask various companies to submit bids, when authorized to do so by the council? Would not this latter practice tend to limit the bidding to some extent?"

In answer to this question you are advised that the purchasing agent would be controlled in his action by the ordinances of the city, and so far as the state law is concerned, it would be permissible to advertise for bids through the medium of the newspapers, or a more direct and personal method, by letter or oral communication asking the various companies to submit their bids. The latter practice might tend to limit the bidding to some extent but would not necessarily do so.

Your second question is as follows:

"If bids are asked for a six-cylinder, four-door type sedan, must the low priced car or the low bid be accepted or can a more expensive car be purchased?"

There is no legal requirement that the low priced car or the low bid be accepted if there is a difference in quality and in the requirements of the city. The lower priced car at the lower bid might be a very inferior article and not such as to meet the requirements of the city, in which case the purchasing agent, in the exercise of sound discretion, would be justified in rejecting the lower priced and inferior article in favor of a higher priced article which meets the requirements of the case.

COUNTY SUPERVISOR: Candidates: Questionnaire: Legality of same.

September 18, 1933. *Commissioner of Labor, Des Moines, Iowa:* This will acknowledge receipt of your request, of the sixteenth inst., for the opinion of this Department, on the following question:

The following questionnaire was submitted to candidates for supervisor in an Iowa county. The candidate elected answered all questions in the affirmative. The defeated candidate was doubtful as to the legality of Questions No. 2 and No. 4 and for that reason did not sign the questionnaire.

Would the answering of Questions No. 2 and No. 4, in the affirmative, by the candidate, later elected, disqualify him for the office?

"1. Do you favor the repeal of the secondary road bill and the return of maintenance and construction funds to township officers?

"2. Are you in favor of a reasonable cut in the salaries of the various county officers, including county engineer, board of supervisors, etc.?

"3. Are you willing to consider the elimination of unnecessary deputies, we suggest deputy county superintendent, county recorder, county clerk and other officers?

"4. Are you in favor of the reduction in the number of meetings of the board of supervisors and after a certain number have been held the balance to be without pay?

"5. Are you willing to discontinue the practice of allowing more than one member of a family to serve as a county official, including board of supervisors?"

I have gone over these questions and I am of the opinion that the only one of the five questions, which is objectionable, is Question No. 4, which relates to the number of meetings of the Board of Supervisors and after a certain number have been held, the balance to be without pay.

The case of Carrothers vs. Russell, 53 Iowa, 346, is a case that came to our Supreme Court on appeal from Jasper county. The facts are as follows:

At the October election, 1878, the parties were candidates for the office of recorder of the county. The appellee received twenty-five hundred and twenty-three votes, and the appellant received twenty-six hundred and twenty-five, being a majority of one hundred and two. The appellee contested the election upon the ground that the appellant offered to the electors of the county, for the purpose of procuring his election, a bribe. The alleged offer of a bribe consisted in the fact that at the political convention at which the appellant

was nominated as a candidate for the office, a resolution was passed in these words:

"Resolved, that in view of the general reduction of wages, and incomes, a general reduction of the salaries of all public officers, and a reduction of the contingent expenses of Jasper county is imperatively demanded; and, as the Republican legislature of our state has refused to take any steps toward reduction by law, we, therefore, to give expression to our desire in this direction, pledge our nominee for clerk, and require him, to conduct his office for the yearly salary of $1,500, without any compensation for so-called 'extras,' and that he pay his own deputy out of his salary; and that the recorder pay into the contingent fund all fees in excess of $1,000 a year."

The appellant was present at the convention and participated therein, and then and there, after receiving his nomination, with knowledge of the action of the convention in passing the resolution, stated publicly to the convention that he would abide by the resolution, and would pay into the treasury of Jasper county, for the benefit of the electors, all fees which should be received by him in excess of $1,000 per annum, and pay all expenses of his office out of the $1,000; that the fees of the office amounted to more than $2,000 per annum, as the appellant knew, and that it was his intention to offer to the electors more than the sum of $1,000 for each year, as a bribe to induce the electors to vote for him and elect him to office of county recorder.

In the trial of this case in the lower court, there was a judgment in favor of the contestant, who was the appellee on appeal. There was also evidence that appellant made the same promise as was contained in the resolution to different voters during his candidacy for the purpose of inducing them to vote for him, and that at least one voter was thereby induced to vote for him. It was also shown by evidence at the trial that the fees of the office had been for many years largely in excess of one thousand dollars ($1,000.00) a year, and that the appellant knew this to be a fact.

The court, in his instructions, stated, in part, that if the evidence showed that one of the parties had publicly endorsed the resolution of the convention and had pledged himself to carry out the same; that the resolution was circulated throughout the county, and was used as an argument by a candidate and by his friends for the purpose of inducing the electors to vote for him, that he would be disqualified from holding the office and if a finding was made that such a course of procedure was followed that he was not entitled to the office. The court also stated, in his instructions, that promises to people by candidates for public office, that if elected they will practice a rigid economy in the expenditures of their several departments or offices, are unobjectionable, and if the successful candidate fulfills his pledges, he is entitled to praise and commendation, as in such a case the candidate only promises to perform a legal and moral duty. But the proposition contained in the resolution has an entirely different aspect, as it contains more than a promise of rigid economy and is a distinct proposition to the electors that if they will elect a particular candidate he will donate all fees received from the office, in excess of a certain sum, to the taxpayers of the county by paying the same into the county treasury; that such a proposition introduced into elections would be a mischevious element very nearly allied to bribery; that if a candidate indorsed the resolution and pledged himself publicly and privately that, if elected to the office, he would carry out the proposition, he would be disqualified from holding the office, regardless of how many or how few voters were changed thereby. The court further said, in his instructions, that there can be no difference between the sale of an office for a valuable consideration, and the disposing of it to the person who will perform its duties for the lowest

compensation, such a practice being inconsistent with sound public policy and tends to corruption, in that it diverts the attention of the electors from the personal merits of the candidates to the price paid or the cheapness of the offer and if allowed, there would be great danger of offices being filled, not by those best qualified, but by those whose purses enabled them to obtain it.

The giving of these instructions, by the court, was assigned as error in the appeal to the Supreme Court and the question presented on appeal was as to whether a promise by a candidate for a county office to pay into the public treasury, if elected, a part of his compensation, where such promise is made to voters with the intent to induce them to vote for him, should be held to disqualify him to hold the office.

The Supreme Court affirmed the decision of the lower court and Chief Justice Adams, in writing the opinion of the court, states, as follows:

"It is true an offer to pay money into the public treasury is not in one sense an offer to pay money to an elector, the money in the treasury being public, and not individual, property. But nearly all electors are taxpayers, and an offer to pay money into the public treasury, with the intent by such offer to influence the electors to elect to office the person making such offer, has all the effect of a bribe. It has also all the objectionableness of the offer of a bribe, and must be deemed to be such, within the meaning of the statute, unless it is saved from that character in view of the demands of the public interest.

"It is by no means improbable that the convention which passed the resolution, and the incumbent who indorsed it, did so upon the supposition that the public interest demanded a reduction in the compensation allowed by law to the person filling such office. It may be, indeed, as was claimed, that the compensation allowed was larger than it ought to be, but this is a question for the legislature alone, and not for the courts, not even for the electors, except as they may express their will through the legislature."

The court cites a Wisconsin case, 36 Wis., 224, in which the court said:

"If the course pursued by the relator should receive judicial sanction, it is more than probable that all those public offices which are deemed desirable would in time become the objects of pecuniary bids or offers, and in many cases would be bestowed upon the highest bidders, without much regard to their fitness for the positions thus purchased by them. At least such would be the inevitable tendency."

I have gone somewhat into detail in this case because it seems to be in point with the question raised, in No. 4 of the questionnaire. You will note that Question No. 4 states that after a certain number of meetings had been held, the balance are to be without pay, which puts it into the same category as the Jasper county case, by reason of the fact that the money for the meetings, after they reach a certain number, would be retained and would augment the amount of money in the treasury.

In my opinion, if this questionnaire, signed in the affirmative, by a candidate for office, was given general circulation throughout the political subdivision which he would represent and if the candidate for such an office pledged himself both publicly and privately to electors that he would abide, if elected, by such a practice, that he would be disqualified to hold this office in the event that he was elected to the office. The remedy for the defeated candidate, under such a statement of facts, who did not subscribe to a proposition, such as set out in Question No. 4, would be to contest the election on this ground. If the evidence would show the proposition to be as outlined in the Jasper county case, undoubtedly, there could easily be a finding that such a candidate was disqualified to hold the office.

AUTOMOBILE REGISTRATION FEES: Assignment: Restricted deposits of J. K. Fear, County Treasurer: Board of Supervisors: Hamilton County: Resolution.

September 19, 1933. *Treasurer of State, Des Moines, Iowa:* This will acknowledge receipt of your letter of the sixteenth inst., with enclosure of resolution adopted by the board of supervisors and the county treasurer of Hamilton county, in which you request the opinion of this Department on the following matter:

L. L. Doolittle, auditor of Hamilton county, has forwarded to you a resolution, adopted by the board of supervisors and the county treasurer of Hamilton county, which is an assignment of automobile registration fees in the amount of $61,333.40 and represents the restricted deposit of J. K. Fear, county treasurer, and is on deposit in the Farmers National Bank of Webster City. The said banking institution has been operating under Senate File No. 111 since the National Banking Holiday, which started on March 3, 1933, and is now in the process of being reorganized, in accordance with Chapters 157, 158, 159 and 160, Acts of the 45th General Assembly.

Should you, as State Treasurer, accept the above assignment?

Section 4999, Code of Iowa, 1931, allocates motor vehicle funds to a specific purpose and directs how said funds shall be credited by the Treasurer of State to several funds; a percentage of the gross fees and penalties thereon, to a maintenance fund for the state highway commission; a percentage of the gross fees and penalties thereon, to a maintenance fund for the motor vehicle department; and, the balance of said money, less the collection fee of fifty cents retained by the county treasurer on each registration, less the one per cent received by the department as a reimbursement fund from which to pay refunds, to the primary road fund.

Section 5003 is as follows:

"*Cash balance.* The treasurer of state shall maintain in the state treasury, of the money collected as in this chapter provided, a cash balance sufficient to pay the anticipated expenditures by the highway commission for the ensuing month, exclusive of the amount in the funds provided for in subsections 1 and 2 of Section 4999. When necessary to restore the cash balance in the state treasury, he shall draw upon the treasurer of each county of the state in proportion to the amounts in their possession, respectively, a sum sufficient in the aggregate to restore said cash balance. Such drafts shall be honored by the treasurer of each county upon presentation."

You will note in the second sentence of the above cited section the mandatory provision, relative to drawing upon the treasurer of each county and also in the third sentence, the mandatory provision, relative to the honoring of drafts by the treasurer of each county upon presentation.

We also desire to call your attention to Section 5003-c1, which relates to the estimate to be furnished to you in writing by the auditor of the state highway commission, relative to the expenditures to be made during the current month.

Also, see Section 5011, with reference to the duties and liabilities of the county treasurer and Section 5013, of the Code, with reference to reports and remittances to be made by the county treasurer.

We note that this is a national bank and is, undoubtedly, at this time, in the hands of a conservator, in accordance with the chapters of the Acts of the 45th General Assembly, referred to herein.

In a situation, such as is presented, we do not feel that you would be justified in accepting the enclosed assignment. There is a duty imposed upon the county treasurer to collect these funds and this duty cannot be transferred

by assignment to you, as such an assignment would be a changing of the collection agency, which is not contemplated in the law.

Also, for the additional reason that there are certain mandatory duties imposed upon you by these Code sections with reference to these funds.

STATE PARK COTTAGE SITE: Deeding of riparian rights: Right of trespass: Contract for lot.

September 20, 1933. *State Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your request for two opinions, under date of the fifteenth inst., one with enclosure of Contract for Lot in State Park Cottage Site, on which you ask for an opinion from this Department. We will answer both of these questions, as, apparently, each communication raises the same question.

In the development of various lake projects, we are confronted with the question of whether or not the deeding of the riparian rights on a strip of proposed lake shore to the State of Iowa includes the right given to the state in matters of trespass. In one particular instance, the shore line land will extend back from the water's edge approximately 150 feet. It is planned to permit the erection of cottages within the 150 feet and before deeding this land to the state, the prospective cottagers desire to know if the public in general would be permitted to trespass on the land between the cottage and the lake.

In the opinion of this Department, this raises several questions, the first being in the case of a conveyance of land to the state, which would be in its nature a gift, which, we understand, is the case in the matter referred to. In Chapter 87, Code, 1931, entitled, "Board of Conservation and Public Parks," Section 1803, provides, in part, as follows:

"*Title to lands.* The title to all lands purchased, condemned, or donated, hereunder, for park or highway purposes, shall be taken in the name of the state * * * *"

and Section 1804 provides:

"*Gifts.* The board of conservation with the written consent of the executive council, may accept gifts of land or other property, or the use of lands or other property for a term of years, and improve and use the same as public state parks."

However, Section 1805 states, as follows:

"*Conditions—lands.* The conditions attached to a gift shall be entered in writing as part of the record of the title by which the state takes the lands, and shall be inscribed upon any chart, map, or description of said park if the conditions are made by the grantor in lieu of money as a consideration paid by the state."

These Code sections lead us to the conclusion that where a gift of land, such as you have outlined in your question, is made to the state, the donor may prescribe certain conditions relating to the use for which the land is to be put and if the state, through the Executive Council, accepts the gift, it is done in keeping with the conditions imposed by the donor. In other words, those donating such a tract of land as you have described could set apart a certain portion of this land whereby the public would have access to the lake and this designated part would be the only part that the general public could use in reaching the lake without becoming trespassers. It would then be a question for the Executive Council as to whether or not they would grant the Board of Conservation and your Commission the right to accept it with the conditions imposed and if it were accepted, the state would have to respect the conditions imposed in the gift. The general remedy for trespassing would

then apply to that part of the donated ground and Chapter 582, Code, 1931, entitled, "Malicious Mischief and Wilful Trespass" would apply.

In connection with access to public property, eminent domain and the right of condemnation should be taken into consideration, as the law respecting such procedure can always be invoked by the state, except in a situation as above outlined with reference to a gift to which conditions are imposed, as outlined.

In the enclosed Contract for Lot in State Park Cottage Site, Division (4), Subdivision (a), states as follows:

"a. There is reserved to the State of Iqwa and the State Conservation Board all of the riparian and shore line rights conferred by the statutes of Iowa upon the said State Conservation Board for the regulation and control of lakes and streams within the boundaries of State Parks."

We also wish to call your attention to Division (4), Subdivision (h), which states:

"h. The use of the cottage site tract shall be in harmony with the rules and regulations of the State Board of Conservation for the use of State Parks. The park guards or other peace officers shall have the same power and authority to preserve the public peace within the cottage site tract as is conferred upon them by law for such purpose in State Parks."

These quoted subdivisions, in our opinion, are a reservation set aside for the state for public use, which would give access to the lake to the public. In a case where the donors wish to make a reservation for cottage sites, as would seem to be the case in a sale under the enclosed contract, they have, under the quoted paragraphs, reserved the right and power to confer upon the state, jurisdiction and control for public use, such part of the shore line and to such depth as may be agreed upon between the donors and the state at the time the deed is executed and delivered. In other words, any one who would purchase a lot by the enclosed contract takes a deed with a provision contained therein that those donating the land for the State Park have reserved a right to give to the state a certain amount of shore line in keeping with any agreement which may be made between the donors and the State of Iowa.

MUNICIPALITY. BIDS ON MATERIAL OR SUPPLIES: It is not mandatory that the low bid be accepted. In case the low bidder is an out-of-town concern, and there is no difference in the quality of the commodity to be furnished, the low bid should be accepted. There is no requirement in the law that the home concern be given advantage. It is a matter of policy.

September 20, 1933. *Auditor of State, Des Moines, Iowa:* In behalf of one of your examiners, Mr. DeHart, you have submitted to this office the following questions with request for an opinion thereon.

1. In advertising for bids for supplies or material, is it mandatory that the low bid in each case be accepted, provided that the low bidder is a reliable concern?
2. In case the low bidder is an out-of-town concern, must the city council accept this bid? Has a council authority to pass a resolution that no out-of-town bids be considered if the same material can be purchased in the town which is advertising for bids? Is the home concern to be given any advantage over an out-of-town concern?

In answer to the first question, you are advised that it is not mandatory that the low bid in each case be accepted, provided the low bidder is a reliable concern. It would be the duty of the city council or purchasing authority to accept the low bid, all other things being equal, providing Chapter 62-B1 of the Code is not violated. That chapter requires a preference to be given Iowa

products, material, supplies and provisions when they are found in marketable quantities in this state and are of a quality reasonably suited to the purpose intended and can be secured without additional cost over foreign products or products of other states. It cannot be laid down as a mandatory rule, however, that the low bid in each case must be accepted, providing the low bidder is a reliable concern for the reason that Iowa-made goods must be given a preference where possible under the chapter above referred to, and the purchasing committee must also take into consideration the quality of the goods or material to be furnished. Considerable is left to the discretion of the buying authority as to the quality of the article to be purchased. If the low bidder were a reliable concern but its product should not be comparable to that of other bidders, its bid should not be accepted.

The second question is divided into several parts, the first of which is as follows:

In the case the low bidder is an out-of-town concern, must the city council accept this bid?

As a general proposition, and assuming that there is no difference in quality of the commodity to be furnished, the low bid should be accepted.

As regards the second part of this question:

Has the council authority to pass a resolution that no out-of-town bids be considered if the same material can be purchased in the town which is advertising for bids?

We incline to the opinion that such an ordinance would be a discrimination against the taxpayers of the city if not contrary to the state law. A situation could be imagined where there would be one bidder within the city and several bidders within the state but outside the city. If the bidder located in the city knew that his bid must be accepted he could make a bid outrageously high knowing that it could not be turned down, and while this would be of great advantage to him personally, it would be of great disadvantage to the taxpayers of the city.

The third division of this question:

Is the home concern to be given any advantage over an out-of-town concern?

The answer is that there is no such requirement in the state law. That is a matter to be determined by the city council in the exercise of its sound discretion. As a matter of local loyalty, of course, all other things being equal, the policy should be to favor the home concern, but the law does not so require.

The provisions of Chapter 62-B1 apply to all parts of question two.

BOARD OF PAROLE: AUTHORITY OF GOVERNOR TO GRANT PARDONS: "All that Section 3817 requires is that you present the matter to, and obtain the advice of, the Board of Parole before granting the pardon. It is not required that you act on the advice."

September 20, 1933. *Governor of Iowa, Des Moines, Iowa:* We have before us an application for a pardon executed by Thomas Joseph McDonald. At the time this application was transmitted to us by your secretary, Miss Johnson, she gave us the following statement of facts:

"McDonald is now serving a jail sentence. While he was serving this sentence, he was convicted of a charge of breaking jail and was sentenced to serve one year in the reformatory and to pay a fine of $300.00. Your question is whether you have authority under the constitution and the laws of this state to grant a pardon to this young man, or whether it is necessary for the matter to be presented to the Board of Parole."

Article 4, Section 16, of the Constitution of Iowa, in so far as it applies to pardons, is as follows:

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

You will note the italicized portion of the above quotation. In other words, the Constitution grants the Governor power to grant pardons, but such pardons are granted subject to such regulations as may be provided by law.

Section 3817 of the Code of 1931 provides as follows:

"After conviction for a felony, no pardon or commutation of sentence shall be granted by the governor until he shall have presented the matter to, and obtained the advice of, the board of parole, but he may commute a death sentence to imprisonment in the penitentiary for life, without making such reference or obtaining such advice."

All that the above quoted section requires is that you present the matter to, and obtain the advice of, the Board of Parole before granting the pardon. It is not required that you act on the advice. Such a statute would be in direct conflict with Article 4, Section 16, of the Constitution. In fact, the Legislature would not have authority to prohibit the granting of pardons by the Governor. The only purpose of Section 3817 of the Code is to require the Governor to obtain all the facts from the Board of Parole and obtain their advice before he acts. If, after obtaining all the facts, he should be of a different mind from the Board of Parole, he would have authority under the Constitution of this state to act contrary to the advice of the Board. For instance, the Board might recommend that the pardon be granted, and yet the Governor would have a right to refuse to grant it. On the other hand, if the Board should advise against such action, it would not be binding on the Governor. As we before stated, the purpose of Section 3817 is to require the Governor to obtain all the information and advice he can before he acts.

TAXATION. MANDATORY MAINTENANCE LEVIES, provided for in 4644-c11: Paragraph 2 of Section 4644-c11 as amended by 45th General Assembly now provides that the board of supervisors may levy a tax of not to exceed 12 mills on the dollar. The last three lines of Section 21 of Chapter 121, Acts of 45th General Assembly striking the words seven and one-half and substituting the words one and seven-eighths, held to be of no effect.

September 21, 1933. *State Comptroller, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 28th ult., with reference to the meaning and effect of Section 4644-c11 and other sections of the Code of 1931.

Section 4644-c12 was repealed by Chapter 70 of the Acts of the 45th General Assembly which repeal was effective by publication on February 2, 1933. Thereafter and on March 30, 1933, and after said Section 4644-c12 was repealed in toto Chapter 121 of the Acts of the 45th General Assembly was enacted containing Section 22 which purported to amend Section 4644-c12 by striking from line four thereof the word "twelve" and substituting therefor, the word "three." This Section 22 does not revive or re-enact Section 4644-c12. The most it purports to do is to strike out the word "twelve" and substitute therefor, the word "three."

Your letter relates more particularly, however, to Section 4644-c11. In the Code of 1931, prior to any enactment by the 45th General Assembly, paragraph two of Section 4644-c11 read as follows:

"2. A tax of seven and one-half mills on the dollar on all taxable property of the county except on property within cities and towns."

Thereafter and on February 2, 1933, Chapter 70 of the Acts of the 45th General Assembly became effective amending said paragraph 2 so as to make it read as follows:

"2. A tax of not to exceed twelve mills on the dollar, etc."

Thereafter and on March 30, 1933, Chapter 121 of the Acts of the 45th General Assembly became effective by publication, Section 21 thereof amending Section 4644-c11 by striking from line eight the words "seven and one-half" and substituting therefor, the words "one and seven-eighths."

There is an apparent incongruity in this amendment which strikes out the words "seven and one-half" for the reason that the words "seven and one-half" had been stricken out by subsection 3 of Section 1 of Chapter 70, Acts of the 45th General Assembly, and the words "not to exceed twelve" inserted in lieu thereof. It will be apparent that the words "seven and one-half" cannot be stricken from a paragraph which reads, "a tax of not to exceed twelve mills on the dollar, etc."

Section 21 of Chapter 121 was made to apply to Section 4644-c11 as it stood prior to the amendment of Chapter 70. On the one hand it might be said that the striking of the words "seven and one-half" from the statute in which such words do not appear and inserting in lieu thereof the words "one and seven-eighths" would amount to a mere nullity. In other words, there is an attempt to make a substitution which cannot be made for the reason that the words "seven and one-half" are not in the statute, and therefore, nothing can be substituted in their place as they have no place.

To illustrate further, take paragraph 2 of Section 4644-c11 as amended by Chapter 70 before referred to, which reads as follows:

"2. A tax of not to exceed twelve mills on the dollar on all taxable property in the county except on property within cities and towns."

The words, "seven and one-half" cannot be stricken therefrom because such words are absent and the words "one and seven-eighths" cannot be inserted in lieu of the words "seven and one-half," but assuming that they were inserted, they would add nothing but confusion and uncertainty to the section. The words, "one and seven-eighths" could not be substituted for the words "not to exceed twelve" for that would be in violation of the plain language of the attempted amendment.

It was clearly the intention of the legislature in the enactment of Section 21 of Chapter 121 of the Acts of the 45th General Assembly to insert the word "three" in lieu of the word "twelve" in paragraph 2 of Section 4644-c11. While this was their intention, they did not do that thing. This would seem to leave two possible courses to pursue. The first, to disregard the last three lines of Section 21 of Chapter 121 and read paragraph 2 of Section 4644-c11 as follows:

"2. A tax of not to exceed twelve mills on the dollar, etc."

Second, to carry out the intention of the legislature which was not expressed by any specific enactment as far as the matter in question is concerned, by inserting in practice, at least, the word "three" in lieu of the word "twelve." The fact that the words "not to exceed twelve" appear in paragraph 2 leaves the matter to the discretion of the board in certain cases and a liberal and spendthrift board might take advantage of the situation and levy the full twelve mills if no limitation may be found in the law.

In the enactment of Chapter 121 of the Acts of the 45th General Assembly,

the legislature intended and undertook to provide that all property subject to taxation shall be assessed at its actual value, and in the same chapter undertook and intended to provide that the millage rate should then be cut to one-fourth of what it previously had been.

It is our opinion that this object was not accomplished, at least in express terms, as regards paragraph 2 of Section 4644-c11, for the reasons set out above. In Section 88 of Chapter 121 an attempt was made to adjust the millage rate to the revised system of assessed valuation. This section contains the provision, "other than the foregoing sections." Were it not for that clause the twelve mills would be reduced to three.

It is our opinion, that in practice, paragraph 2 of Section 4644-c11 should be read as follows:

"2. A tax of not to exceed three mills on the dollar on all taxable property in the county except on property within cities and towns."

TAXATION: INTEREST OR PENALTY: "The County Treasurer should not accept the amount of the tax plus 6 per cent interest in full settlement, for the reason that the statute provides that upon failure to pay the tax, as provided therein, it shall draw three-fourths of 1 per cent a month interest."

September 22, 1933. *State Board of Assessment and Review, Des Moines, Iowa:* During the latter part of August, you called the writer to your office to attend a conference relative to taxes on the Chicago, Rock Island & Pacific Railway Company, at which time the following proposition was presented:

"On March 3, 1933, the National Bankruptcy Act was amended including, among other things, what is known as Section 77, concerning reorganization of railroads engaged in interstate commerce. Under Paragraph A thereof it is, among other things, provided:

"'Any railroad corporation may file a petition stating that the railroad corporation is insolvent or unable to meet its debts as they mature, and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction the railroad corporation during the preceding six months or the greater portion thereof has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission, hereinafter called Commission. * * * *'

"By Paragraph N of the same section it is provided:

"'In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor, and the rights and liabilities of the creditors, and of all persons with respect to the debtor and his property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.'

"Section 93, Subdivision J, U. S. Code Annotated, provides:

"'Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and attendant cost occasioned thereby, and such interest as may have accumulated thereon according to law.'

"On June 7, 1933, this Company filed in the District Court of the United States, Northern District of Illinois, Eastern Division in cause No. 53209, its petition in accordance with the provisions of Section 77 of the amendment to the Bankruptcy Act heretofore referred to, and on the same date the court, acting by Judge James H. Wilkinson, approved the petition as properly filed under Section 77 of the said Bankruptcy Act. Copy of the petition and a certified copy of the order are attached to the copy of this communication and sent to Mr. Hamilton with the request, however, that they be promptly returned.

"By Chapter 124, Session Laws of the 45th General Assembly, which became effective on April 13, 1933, it is, among other things, provided:

"'Section 1. That the first half, or what is denominated in the statutes as the first installment, of all taxes payable in the year 1933 shall not be deemed delinquent until July 1, 1933, and may be paid at any time prior to said day without interest *as a penalty*. Any penalty paid prior to the taking effect of this act shall be credited as a payment on the second installment. If said installment be not paid prior to said July 1, 1933, it shall draw, from April 1, 1933, interest *as a penalty*, three-fourths (3/4) of one per cent (1%) per month until paid.

"'Sec. 2. This act is deemed of immediate importance and shall be in force and effect from and after its publication in two newspapers of this state, as provided by law.' (Italicizing ours.)

"By Section 9404, Code of Iowa, 1931, the legal rate of interest is fixed at six per centum per annum on money after the same becomes due."

Your question is whether the three-fourths of one per cent per month, as provided in Chapter 124 of the Acts of the 45th General Assembly, is to be construed as interest or a penalty.

On September 1st, we received a letter or brief from the attorneys for the Chicago, Rock Island & Pacific Railway Company, outlining their view of this matter. In this brief they cited the case of N. Y. vs. Jersawit, 263 U. S., 493, in which case the Supreme Court of the United States had under consideration a statute of the State of New York imposing a franchise tax, which statute provided for the payment of the tax on or before January 1st of each year, and if not paid by January 1st, there was assessed a penalty of 10 per cent of the total amount of the tax, plus 1 per cent per month for each month the tax remained unpaid. The lower court held that the 10 per cent and also the 1 per cent a month was a penalty and therefore not allowable under the Bankruptcy Act, but did allow the 6 per cent statutory interest to the date of the payment of the tax. The Supreme Court of the United States, in passing on the question, made the following pronouncement:

"There can be no doubt that the additional 10 per centum charged for failure to pay by January 1 is a penalty, disallowed by the Bankruptcy Act, No. 57 j, but it is urged that the 1 per centum for each month of default is statutory interest, and that the state is entitled to that, and otherwise would be entitled to none. As the 1 per centum is more than the value of the use of the money, and is added by the statute to the 10 to make a single sum, it must be treated as part of one corpus and must fall with that. We presume that, in this event, the state does not object to receiving the simple interest allowed. That part of the order will stand."

It will be noted, however, that the case cited by the attorney is not exactly in point, for the reason that the 1 per cent a month is added by the statute to the 10 per cent to make a single sum, and must therefore be treated as a part of one corpus. Such was the pronouncement of the Supreme Court of the United States in the case just cited.

In the case of U. S. vs. Childs, Trustee, in Bankruptcy, of J. Menist Co., Inc. (N. Y. 1924), 266 U. S., 304, 45 S. Ct., 110; 69 L. Ed., 299, the court had before it a federal statute, which added the sum of 5 per cent to delinquent income tax and "interest at the rate of 1 per cent per month on the tax from the time it became due." In this case, the court held that the interest was not penal, but compensatory, and its allowance, on a claim by the government against a bankrupt, was therefore consistent with the statute. In passing on the question, the court made this statement:

"The tax in this case is one on income; a burden imposed for the support of the government. Interest is put upon it and so denominated, distinguished from the 5 per cent as penalty, clearly intended to compensate the delay in

payment of the tax—the detriment of its non-payment, to be contingent during the time of its non-payment—compensation, not punishment."

We might add that in its opinion in this case, the court discussed fully its former opinion in the case of N. Y. vs. Jersawit, supra.

Another case, upon which the Railway Company seems to rely, is In Re Brown (Ohio), 41 Fed. (2d Ed.), page 228. This is a case in which the County Treasurer of Fayette county claimed to be entitled to collect penalties on taxes due on certain real estate belonging to the bankrupt. The court allowed the tax with interest to the date of payment of the tax, but without penalty. The opinion in the case is very short, and does not furnish a very full statement of the facts. However, one would assume from the reading of the opinion that the statute in Ohio provides not only for interest but for a penalty on real estate tax, while on personal tax there is no provision for interest. As against this case, we wish to call your attention to the case of In Re Scheidt Bros. (Ohio D. C.), found in 177 Fed., 599; 23 A. L. R., 778. In this case the court had under consideration a statute imposing penalties for non-payment of delinquent taxes. The statute did not provide for interest on personal property tax, but merely for a penalty of 10 per cent remaining unpaid after August of each year, and further provided that the county treasurer should thereafter proceed to collect said taxes by distress or action, and that a further penalty of 5 per cent should be added for his use as compensation. In this case, the court held that the penalty takes the place of interest, and that for that reason the referee should have allowed the full amount of the tax, as well as the penalties.

Our statute, Chapter 124 of the Acts of the 45th General Assembly, is in part as follows:

"Section 1. That the first half, or what is denominated in the statutes as the first installment, of all taxes payable in the year 1933 shall not be deemed delinquent until July 1, 1933, and may be paid at any time prior to said day without interest as a penalty. Any penalty paid prior to the taking effect of this act shall be credited as a payment on the second installment. If said installment be not paid prior to said July 1, 1933, it shall draw, from April 1, 1933, interest as a penalty, three-fourths (3/4) of one per cent (1%) per months until paid."

It will be noted that neither this act nor Section 7214 of the Code of 1931, nor any other statute of this state, provides for both interest and a penalty on delinquent real estate taxes. It will also be noted that Section 1 of Chapter 124 just quoted provides that, if not paid by July 1st, the tax shall draw *interest as a penalty*. The question then resolves itself to whether this should be construed as interest or as a penalty. The Legislature used both terms, referring to it as "interest as a penalty." There is no other interest charged for the delay in making the payment, nor is there any other penalty charged. We are inclined to the opinion that the Legislature intended this as interest, and that the words, "as a penalty," are merely surplusage. In fact, the Supreme Court of the United States held in the case of United States vs. Childs, Trustee, supra, that the 1 per cent a month was not penal, but compensatory. In Ohio, the Federal Court allowed it, even to the extent of 15 per cent, when the statute actually provided for it as a penalty. In that case, it was construed as interest, because of the fact that the statute did not provide for any interest.

It is therefore the opinion of this office that the County Treasurer should not accept the amount of the tax plus 6 per cent interest in full settlement, for the reason that the statute provides that upon failure to pay the tax, as

provided therein, it shall draw three-fourths of 1 per cent a month interest. This amount should be demanded and no less an amount should be accepted as a full settlement until the court holds otherwise.

OFFER TO BUY: Contract signed by both parties: Binding: One hundred dollars of earnest money: Retention by real estate broker.

September 23, 1933. *Real Estate Commissioner, Des Moines, Iowa:* This will acknowledge receipt of your letter of the sixth inst., with enclosure, in which you request the opinion of this Department, on the following proposition:

"In most cities in Iowa, a real estate broker or salesman takes what is called an 'Offer to Buy,' a copy of which we are enclosing herewith.

"This contract was signed by both sides and provides that when it is so executed, it becomes a valid and binding contract. In this case there was one hundred (100) dollars of earnest money paid, which was retained by the real estate broker. The purchaser then refused to go through with the deal.

"The question we would like to have you answer, is—who is entitled to retain this one hundred (100) dollars of earnest money?"

This matter comes before the Commission on written complaint and involves the question of whether or not there should be a hearing and if there has been a wrongful detention of money on the part of the broker, if this would be a ground for the revocation of his license to sell real estate under the Iowa laws.

The enclosure, a so-called "Offer to Buy," is, when signed, a valid contract between the parties and the remedy for either party to the agreement in case of a failure to perform would be an action of specific performance or one for damages.

In the event of a failure on the part of either party to carry out the terms of the contract, imposed upon them by the contract, is not a matter for the broker to determine nor is it a matter for your Department, as this is a matter for the parties to determine themselves and either party aggrieved could start an action for specific performance or damages. The one hundred dollars should be retained by the broker until the parties have adjusted their differences. After the differences, if any, between the parties have been adjusted and the broker should then refuse to turn over the money, the aggrieved party could call the matter to the attention of your Department. It is our opinion that the question of the broker's commission is a matter entirely apart from the contract, under consideration. The broker, as in the ordinary case, should make his arrangements, with reference to his commission, with either party or could make it with both parties in the event that they were both advised of the fact that he was charging them both a commission.

In accordance with a recent pronouncement of the Supreme Court of our state, in 247 Northwestern Reporter, 534, Wareham vs. Atkinson, et al., our Supreme Court states as a general proposition and also as the law, that there are four essential things that the broker must prove in an action to establish the right to be paid a commission. They are, as follows:

(1) The contract upon which he bases his right to a commission;

(2) that he produced a purchaser who was ready, willing, and able to purchase on terms satisfactory to the defendants;

(3) that the purchaser was induced to enter into the negotiations and to make the purchase through the efforts of the plaintiff as agent, in other words, that the plaintiff was the efficient moving cause of the sale; and

(4) that there was an implied contract to pay commission or compensation for his services.

The right to a commission would be a matter for the broker and not for your Commission, as you are only concerned with misconduct on the part of the broker. In the instant matter, in the event that this matter is formally called to your attention, would be as outlined herein (1) if it is shown that the broker is wrongfully detaining money, after the parties to the contract have solved their difficulties, this would be a ground for the revocation of his license to sell real estate under the Iowa law; and (2) your Department is concerned only with the question of whether or not the broker has conducted himself in accordance with provisions of the law, and this is the only matter presented by the above question over which you would have jurisdiction.

FISH AND GAME COMMISSION: Injury of truck driver: Rock Island freight train: Industrial Commissioner: Claims for presentation: Legal status of this claim.

September 25, 1933. *State Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-second inst., in which you request the opinion of this Department on the following matter:

A truck driver in the employ of the Commission was seriously injured when his truck struck a Rock Island freight train near Decorah. At the time the man was injured, he was engaged in official duties for the state. He was placed in the Decorah Hospital and is still a patient. An arrangement has been made with the Industrial Commissioner for the payment of compensation and we are now in receipt of the hospital bill and special nurses' bills, which total $599.25. We understand that the Workmen's Compensation Act includes the payment of hospital bills up to $300.00. We are about to prepare these claims for presentation to the Industrial Commissioner for his consideration, and the question has arisen as to whether or not the Fish and Game Commission is authorized to pay the amount over and above that allowed by the Industrial Commissioner?

The expenses for this man are accruing daily at an amount of approximately $10.00 per day, and we are anxious to arrange for some form of settlement, and are wondering about the legal status of the payment of such claims.

The limitation placed on the amount which can be paid for surgical and medical services is stated in Section 1387, Code, 1931, and is, as stated by you, limited at $300.00.

It is our understanding that this matter is now being handled under the Workmen's Compensation Act and particularly under Sections 1418, 1419 and 1422 of the Code, 1931. It is our interpretation of the Workmen's Compensation Act that settlement cannot be made until the extent of the disability can be legally determined. In other words—you state that this man is still in need of hospitalization and is, at present, in a hospital in Decorah, Iowa.

After the extent of the disability is determined and settlement is made, which would limit the amount for hospitalization, as stated, the difference in the amount actually paid for hospitalization and the amount allowed can be determined and a claim can be made to the Legislature for this amount.

We find nothing in Section 1703-d12, which sets out specific powers granted by the Legislature to the Commission, which would allow the payment of the difference mentioned by your Commission. While Division (7), of this section, relates to the payment of salaries, wages, compensation, traveling and other necessary expenses, we do not believe that this refers to a matter of this nature.

We are informed that another Department of State Government made such a claim prior to final settlement, at the last session of the Legislature, yet, we do not believe that this would be a proper procedure and that this claim

should not be made until settlement has been consummated under the Workmen's Compensation Act.

TAXATION: "UNPLATTED LANDS": SCHOOL DISTRICT: "'Unplatted lands,' as used in subsection 1 of Chapter 125 of the Acts of the 45th General Assembly, means lands not platted within a city or town. There is nothing in the act which makes it mandatory that the certificate be filed at the time the taxes are certified by the Secretary of the School District."

September 25, 1933. *County Attorney, Belle Plaine, Iowa:* We wish to acknowledge receipt of a letter from your County Auditor, asking for an opinion on the following questions:

"First, I would like for you to define just what is meant by 'unplatted lands' in subsection 1. Also, is this intended to cover the following classes of property: city waterworks that lies outside of city in another school district; county farm; properties owned by county in Oskaloosa and a few in outlying towns that have been taken over for support of poor. The Ottumwa Library owns 2 farms in this county which are exempt along with educational institutions. Would the city of Ottumwa be liable for this tax? If Mahaska county is subject to tax on properties it owns in towns, would the valuation be computed on acreage basis, as provided in subsection 2?

"Second, if district does not file statement with certificate of taxes, or if district is late in filing taxes (after August 15th), does it disqualify said district in receiving this money? All of our school districts have filed their certificates of taxes and none have filed statements as provided in this chapter. Are these districts entitled to consideration under this law on the 1933 levy?"

We will answer these questions in the order in which they are asked.

1. "Unplatted lands," as used in subsection 1 of Chapter 125 of the Acts of the 45th General Assembly, means lands not platted within a city or town. In other words, it distinguishes land under government survey from platted real estate within the corporate limits of a city or town. It is true then that the act was intended to cover city water works located outside of a city or town, a county farm, unplatted real estate located outside of a city or town, but within a school district, whether owned by a city, a county, a school district, the State of Iowa, or the United States.

2. There is nothing in the act which makes it mandatory that the certificate be filed at the time the taxes are certified by the Secretary of the School District. Of course, Section 5 of the act provides that it shall be the duty of the secretary to file the certificate at the time he certifies the taxes. There is nothing in the law, however, which provides that it must be certified in that same time, in order that the district may be entitled to have the tax spread. We would therefore suggest that the secretaries of the school districts in your county prepare these certificates and file them at once.

ARMORY BOARD: POWER TO ENTER INTO LONG-TIME LEASE: "As a general rule, public officers do not have authority to make a contract for a long term of years which will be binding on their successors. However, each case, in the absence of express authority, must be determined on the facts and circumstances surrounding it."

September 26, 1933. *Adjutant General, Des Moines, Iowa:* We wish to acknowledge receipt of your letter of September 22nd, in which you ask for an opinion on the following:

"Does the Armory Board have authority to enter into a lease for any period extending beyond the biennium for which the Legislature makes appropriations?"

Section 453 of the Code of 1931, providing for the appointment of an Armory

Board and authorizing said Board to fix the rent allowances to be paid by the state for other than state-owned armories, was amended by Chapter 17 of the Acts of the 45th General Assembly. That amendment reads as follows:

"Section 1. That section four hundred fifty-three (453), Code of 1931, be amended by adding to the end of the second paragraph the following:

" 'Said board may lease property to be used for armory purposes, said lease to extend for any period, but not to exceed fifteen (15) years.' "

As a general rule, public officers do not have authority to make a contract for a long term of years which will be binding on their successors. This general rule, however, is on the theory that no express authority has been granted to the officers. If such authority has been granted, then that general rule does not apply. We might also add that the general rule laid down has usually been applied to cases where the question of fraud or collusion entered into the matter.

In 46 C. J., page 1032, Section 289, it is said:

"(Sec. 289) 3. Contracts beyond term. Because a public official, for a known and limited term, has power to make a contract, he is not authorized thereby to make one for an indefinite or long extended term; ordinarily the power is limited in time to the term of the officer who makes it, but if the extent of the officer's power is not expressly limited, the facts and circumstances of each case must be considered in determining it."

It will be seen from the above quotation that each case in the absence of express authority must be determined on the facts and circumstances surrounding them. However, in the instant case the Legislature expressly grants authority to enter into these contracts, and there is no question in our mind but what the Board has authority to act under that grant.

STALLION LAW. "PUBLIC SERVICE." "REGISTERED" (Section 2618).

October 2, 1933. *Secretary of Agriculture, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 29th ult., in which you state that a question has arisen in regard to the meaning of the words "public service" and "registered" in the stallion law, Section 2618 of the Code of Iowa, in connection with which question you ask for an opinion from this office.

Chapter 4 of the Code, relates to the construction of statutes, laying down rules which are to be followed in determining the meaning of the statutory laws of this state so far as possible. Section 63 is in part as follows:

"Rules. In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute:

"2. Words and phrases. Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have a peculiar and appropriate meaning in the law, shall be construed according to such meaning."

The words "public service" and "registered" as they appear in Section 2618 have a fixed and definite meaning and purpose when construed according to the context and approved usage of the language. The words, "offer for public service" as used in this section mean service upon the mares of parties other than the owner of the stallion. In other words, if the owner of the stallion uses the animal only upon his own mares, the service of course, would not be public service, but if the stallion is used upon mares belonging to parties other than the owner, the service would under this section be public service.

The word, "registered," as used in this section means registered with the society or organization maintaining a record of pure bred animals of the

particular breed to which the registered animal belongs. For instance, a Percheron stallion to be registered as the word "registered" is used in this section, must be registered with the Percheron Society of America.

To give the words "public service" and "registered" as used in this section any other meaning would be to defeat the intention of the legislature in the enactment of the statute.

MUNICIPALITY. BONDS OF MAYORS: Mayors shall post a bond of not less than five hundred dollars in all cases.

October 3, 1933. *County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 29th ult., addressed to the Attorney General, which has been referred to me for reply.

You present the question whether or not the laws of Iowa require the mayors of cities and towns in all cases to post official bonds, or whether the city council may by ordinance require such a bond or relieve the mayor of the duty of posting a bond.

Section 1058 of the Code, specifically provides that bonds shall not be required of certain public officers. The exempted list includes aldermen, councilmen, and commissioners of cities and towns but does not include mayors.

Section 1068 is as follows:

"Municipal officers. The bonds of all municipal officers who are required to give bonds shall each be in such penal sum as may be provided by law or as the council shall from time to time prescribe by ordinance; but the bonds of mayors shall not be in less sum than five hundred dollars each."

There appears to be no clear and explicit provision of the law that mayors shall in all cases file official bonds unless such provision is embraced in the last mentioned statute. The portion of that statute which reads, "the bonds of mayors shall not be in less sum that five hundred dollars each," seems to be a fairly clear and explicit provision. The matter might be clearer but we are of the opinion that the provision last quoted in regard to the bonds of mayors is sufficiently clear and definite to justify our opinion in holding that the mayors shall in all cases post a bond of not less than five hundred dollars.

NEPOTISM: EMPLOYMENT OF SONS OF MEMBER OF BOARD OF SUPERVISORS: "It is therefore the opinion of this office that Section 1166 of the Code of 1931 does not prohibit the employment by boards and commissions of persons who are related to one of the members."

October 7, 1933. *County Attorney, Webster City, Iowa:* We wish to acknowledge receipt of your letter of recent date, in which you ask for an opinion on the following question:

"A member of the Board of Supervisors has employed his sons, one to operate a road maintainer in a township on an hourly basis, and the other in grading, trucking and drainage work upon an hourly basis. The compensation received by these men amounts to considerably more than $600.00, in fact, the compensation of one was over $1,000.00. Each supervisor has been managing and has been doing the hiring in his own district, and no specific approval or action has been taken by the Board as a whole on any such appointments or hiring, except such as approving and paying of the monthly salary.

"Your question is whether or not these men come within the operation of the nepotism law embodied in Sections 1166 and 1167 of the Code."

Section 1166 of the Code provides as follows:

"It shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of the state or by virtue of the ordinance of any city or town in the state, to appoint as deputy, clerk, or helper in said office or position to be paid from the public funds, any person related by consanguinity or affinity, within the third degree, to the person elected,

appointed, or making said appointment, unless such appointment shall first be approved by the officer, board, council, or commission whose duty it is to approve the bond of the principal; provided this provision shall not apply in cases where such person appointed receives compensation at the rate of six hundred dollars per year or less, nor shall it apply to persons teaching in public schools."

Section 1167 is as follows:

"No person so unlawfully appointed or employed shall be paid or receive any compensation from the public money and such appointment shall be null and void and any person or persons so paying the same or any part thereof, together with his bondsmen, shall be liable for any and all moneys so paid."

It will be noted that the statute provides that "it shall be unlawful for any person elected or appointed to public office or position * * * * *to appoint* as deputy, clerk, or helper in said office or position." In this case it is not the officer who makes the appointment but the board, of which the officer is a member. The appointment is made or employment furnished by the Board of Supervisors and not by the one member. The statute in no place prohibits boards or commissions from making such appointments. The other two members of the board have as much to say about these appointments as does the father of these boys. They could refuse to employ them, if they should see fit.

It is therefore the opinion of this office that Section 1166 of the Code of 1931 does not prohibit the employment by boards and commissions of persons who are related to one of the members.

It might also be well to mention that the statute prohibits the appointment as "deputy, clerk or helper in the *office* or *position*." These men are employed on the roads and are not under the direct supervision of the supervisor, not employed in the office or position.

FAIR BOARD: Redistricting of Congressional Districts: Election of Directors: Convention, December, 1933.

October 9, 1933. *Iowa State Fair Board, Des Moines, Iowa:* This will acknowledge receipt of your letter of the sixth inst., in which you request the opinion of this Department on the following question:

In accordance with Chapter 58, Acts of the Twenty-eighth General Assembly, which created the Department of Agriculture, and the State Fair Board, it was provided that one director should be elected from each congressional district; the directors from the even-numbered districts were elected for a term of two years and those from the odd-numbered districts for a term of one year, and thereafter when the terms of the various directors expired, the election was for a two-year term. However, when the Code was revised, Chapter 135, of the Code, 1931, contained no reference to electing directors from the odd and even-numbered districts. In the re-districting plan, congressional districts were reduced from eleven to nine.

"Our Board desires to know by what method the Convention, to be called in December, 1933, should elect directors in districts represented by members whose term expire at noon of the day following the Convention, as authorized under Sections 2873, 2874, 2877 and 2878, Code, 1931, and also with reference to the vacancy to be filled in the present 1st and 7th Districts."

The following is a list of the directors showing the congressional district they have represented in the past, also the new congressional district in which they are now located:

Old District	*District Directors*	*New District*
First	*H. O. Weaver, Wapello	First
Second	E. T. Davis, Iowa City	First
Third	Earl Ferris, Hampton	Third
Fourth	Paul P. Stewart, Maynard	Fourth
Fifth	C. J. Knickerbocker, Fairfax	Second
Sixth	C. Ed Beman, Oskaloosa	Fifth
Seventh	Charles F. Curtiss, Ames	Sixth
Eighth	J. C. Beckner, Clarinda	Seventh
Ninth	Carl E. Hoffman, Atlantic	Seventh
Tenth	Sears McHenry, Denison	Eighth
Eleventh	H. L. Pike, Whiting	Ninth

*Deceased. Vacancy not filled.

The office of director of the Iowa State Fair Board is purely a statutory one and is not controlled in any way by the Constitution. Accordingly, the same authority, which creates an office, which is not constitutional, can abolish it or it can be consolidated with one or more offices.

The case of *Mock vs. Lock*, 70 Iowa, 266, is one which relates to a statute in force at this time conferring the right on township trustees to redistrict their township for highway purposes and our Supreme Court held that when, by the exercise of such power, a road supervisor, who was elected for a certain district, is made a resident of another district, he ceases to be a supervisor. This, for the reason that when an incumbent ceases to be a resident of the district for which he was elected, the office becomes vacant. In that case, the man's residence had not been changed but the district had been and the court held that this automatically threw him out of office, because the territory in which he resided had been caused to fall within a different district. See *Section 1146, Code of Iowa, 1931.*

Section 2873, Division 2, states in part:

"And one director from each congressional district, to be elected at a convention as hereinafter provided."

Therefore, there should be only one member of the Board for each congressional district and in the case of a congressional district, as now constituted, which has a member of the Board, who has been elected for a two-year term and has only served one year of his term, you should not elect a director at your December meeting, 1933, as this member has not served out the term for which he has been elected.

I find by your list of directors that the late H. O. Weaver and E. T. Davis are both members of the 1st Congressional District, as now constituted, and this situation solves itself by reason of the death of Mr. Weaver.

In the 7th District, J. C. Beckner and Carl E. Hoffman, because of the redistricting plan, are now members of the same congressional district. Mr. Beckner, I understand, was elected for a two-year term in December, 1932, while the term of Mr. Hoffman, who was elected at the annual meeting in December, 1931, will expire in December, 1933. It is the opinion of this Department that Mr. Beckner has the right to serve out the term for which he was elected and that Mr. Hoffman could not be a candidate to succeed himself at this time by reason of the fact that there is no vacancy in the district, in which he now resides.

Chapter 58, of the 28th General Assembly, was enacted in the year 1900 and now appears in our Code, as Chapter 135. Section 2874 sets forth the present

law, regarding the election of members of the State Fair Board and states that they shall be elected at a convention to be held in December of each year. Section 2873 provides that the State Fair Board shall consist among other members, of one director from each congressional district. Section 2877 provides that this convention shall elect a successor to each congressional district director whose term expires at noon on the day following the adjournment of the convention and also provides that the term of a director shall be for two years. The procedure, after the original election, has been the election of five members of the Board for the even-numbered districts and in the following year, six members of the Board from the odd-numbered districts. But you will note, in Chapter 135, Code, 1931, that the language used in the original act of the 28th General Assembly was repealed by the 40th General Assembly. The present law does not say anything about even or odd-numbered districts. Section 2877 says that "the convention shall elect: a successor to each congressional district director on the board whose term expires at noon on the day following the adjournment of the convention." In other words, you must elect a successor for each director whose term expires this year unless his office has been discontinued and this to be without regard as to whether or not the district is even or odd-numbered.

Accordingly, there are two provisions, in our present law, which control the situation and in our opinion one of these is to the effect that those who were elected one year ago were elected for a two-year term and this term does not expire until December, 1934. The other provision is that only one member of the Board can be elected and serve from a congressional district. We feel that the members elected a year ago have a right to serve out their term. In accordance with the list of directors, submitted to date, in December, 1933, a successor should be elected for Mr. Ferris, Mr. Knickerbocker, Mr. Curtiss and Mr. Pike, as their office will be vacant at that time, by reason of the fact that they were elected for a two-year term and would have served that term at your December election of this year. The other directors, who were elected in December, 1932, will not have served their two-year term at the time of your December, 1933, convention and hence, in our opinion, have a right to serve out their terms.

In the case of Mr. Weaver, who is now deceased, and who was elected for a two-year term in December, 1932, we find, because of the re-districting plan, that at the time he was elected he was a member of the 1st Congressional District and that Mr. Davis was a member of the 2nd Congressional District. However, both became residents of the 1st Congressional District and Mr. Davis will only have served one year at the time of the December, 1933, convention and a successor to him could not be elected until December, 1934.

Also, in the 7th Congressional District, there should not be a successor elected to Mr. Hoffman, whose term expires this December, by reason of the fact that Mr. Beckner is a resident of the 7th Congressional District, at this time, and his term does not expire until December, 1934.

TAXATION: LIGHT PLANT EQUIPMENT: MUNICIPALITY.

October 12, 1933. *State Board of Assessment and Review, Des Moines, Iowa:* I wish to acknowledge receipt of your letter of October 10th, in which you ask for an opinion on the following:

"Is property, such as Diesel Engines and light plant equipment purchased by a municipality on a conditional sales contract, to be paid by installments

out of the earnings of the light plant, where the title remains in the vendor, taxable in the name of the vendor?"

You have submitted to this office, along with your request for this opinion, a copy of a contract between Fairbanks-Morse & Company and the town of Lenox. We therefore base our opinion on the form of contract used in this particular instance.

You will note that in Paragraph 2 of the first page of this special municipal contract the following provision will be found:

"* * * said company does hereby sell, assign and convey to the said municipality the following machinery, equipment and materials."

On page 4 is found this provision:

"The said municipality upon its part agrees to purchase said machinery, equipment and materials * * *."

Again on page 6 will be found the following provision:

"To secure the faithful performance of the provisions of this contract, to be kept and performed by the municipality at the time and in the manner heretofore stated, *the title and ownership of the machinery and material herein specified shall remain in the company as a pledge until* * * *."

This is not a contract by which the company is leasing this machinery and equipment to the municipality under an agreement that the municipality shall pay an annual rental therefor for a certain number of years, with the further agreement that after so many years' rent has been paid, the equipment shall become the property of the city, but is on the other hand a contract by which the company sells to the city at the time of the execution of the agreement, or at the time the proper test of the plant is made and approved, all of the machinery and equipment. In fact, the contract provides that the company *sells, assigns and conveys* to the municipality the machinery therein described. The only purpose of title retention by the company is that they may have security for the obligation, which is to be paid out of the earnings of the plant. In fact, the contract states that the company is retaining the title and ownership of the machinery as a pledge. If this contract were to be construed in such a light that the property would be taxable in the name of Fairbanks-Morse & Company, then every piece of furniture which is sold under a conditional sale contract, containing a provision for title retention as security, would have to be taxed to the company owning the contract. We cannot feel that such is the law of this state.

In giving this opinion, we are ever mindful of the fact that exemptions from taxation should be strictly construed, and that taxation is the rule, while exemption is the exception. However, we cannot view this proposition in the light of exempting Fairbanks-Morse & Company from taxation. If anyone is exempted from taxation, it is the municipality purchasing this equipment. If Fairbanks-Morse & Company are to be taxed, it would be on the contract or credit which it owns. Under the law of this state, moneys and credits are taxed to the owner thereof where he resides. (See Section 6985 of the Code of 1931.)

We have read carefully the case called to our attention, entitled, "In the Matter of the Appeal of the Des Moines Water Company," 48 Iowa, 324. This case holds as follows:

"The reservation by the city of the right to purchase the works does not vest it with any title or right to the property or in any sense make it public property until it shall elect to purchase."

We cannot say that that case is in point with the proposition submitted

to us. In the Des Moines case, the city merely reserved the right to purchase the water works, but had not elected to do so. In the instant case, there is a contract to purchase and a conveyance of the equipment to the city. The title is only retained for the purpose of security.

Section 6134-d1 of the Code of 1931 provides as follows:

"They shall have power to pay for any such plant, improvement or extension thereof out of the past earnings of the plant and/or out of the future earnings and/or may contract for the payment of all or part of the cost of such plant, improvement or extension out of the future earnings from such plant, and may secure such contract by the pledge of the property purchased and the net earnings of the plant."

It will be noted that the contract submitted to us goes no farther than provided by the section just quoted. The council is authorized to purchase the plant outright and to contract to pay for all or part of the cost thereof out of the future earnings of such plant, and may secure such contract by a pledge not only of the net earnings of the plant but of the property purchased.

It is therefore the opinion of this office that under a contract in the form submitted to us, the equipment purchased by the city could not be taxed to the vendor of such equipment as the owner thereof, for the reason that the city is the actual owner of the equipment and that all the vendor has is a contract by which the title is retained as a pledge.

COUNTY PUBLIC HOSPITAL: COUNTY TREASURER: BOARD OF SUPERVISORS: Disburse funds under the control of Board of Trustees.

October 13, 1933. *County Attorney, Oskaloosa, Iowa:* This will acknowledge receipt of your letter of October 10th, in which you ask for an opinion on the following:

"Mahaska county has a county public hospital, as provided under Chapter 269 of the Code of 1931, governed by the Board of seven Trustees. Section 5358 of the Code in that chapter provides that the County Treasurer shall receive and disburse all funds under the control of said Board of Trustees. The same is to be paid out only upon warrants drawn by the County Auditor by the direction of the Board of Supervisors, after the claim for which the same has been drawn has been certified to be correct by the said Board of Trustees.

"Several claims have been certified to be correct by the Board of Trustees, but the Board of Supervisors of Mahaska county has refused to direct the County Auditor to issue warrants for these claims, as I understand, on the ground that the claims are for expenditures which are not proper ones for the county public hospital.

"Your question is whether the Board of Trustees or the Board of Supervisors has authority to determine the legality of these claims."

Section 5358 of the Code of 1931 provides 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."

Section 5359 of the Code of 1931 fixes the powers and duties of the Board of Trustees of the hospital, among which are the general supervision and care of the buildings and grounds; the employment of a superintendent, matron, assistants and employees, and fixing their compensation; the control and supervision over physicians, nurses, attendants and patients; making visits to and examinations of the hospital; determining whether or not any applicant is indigent and entitled to free treatment therein, and fixing the price to be paid by other patients for care and treatment; fixing at the August meeting the

amount necessary for the improvement and maintenance of the hospital during the ensuing year, and causing the same to be certified to the County Auditor before September 1st; filing with the Board of Supervisors a report covering their proceedings and a statement of all receipts and expenditures during the preceding calendar year; accepting gifts, devices, etc.; submitting to the voters the proposition of selling or leasing any sites or buildings and acting upon the result of the election.

According to the provisions of Section 5359 of the Code of 1931, the trustees have the general supervision and care of the grounds and buildings and the right to employ the superintendent, matron, assistants and employees and fix their compensation, and have control of the physicians, nurses, attendants and patients in the hospital. They also have power to purchase equipment for the hospital under the restrictions contained in subsection 2 of this section.

We are therefore of the opinion that Section 5359 gives the Board of Trustees the general management and supervision of the hospital. However, Section 5358 provides that the County Treasurer shall receive and disburse all funds under the control of the Board of Trustees. This section recognizes that the funds of said hospital are under the control of the Board of Trustees. The section further provides that the funds shall 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 Board of Trustees. It would seem to us that that part of the statute requiring the Treasurer to receive and disburse the funds upon warrants drawn by the County Auditor by direction of the Board of Supervisors is merely provided for the purpose of having a check on these funds at all times, rather than to allow the Board of Trustees to receive and disburse the funds. There is no provision in this chapter whereby the Board of Supervisors are authorized to determine whether or not every expenditure for hospital purposes is proper, nor is there any provision authorizing the Board of Supervisors to manage the affairs of said hospital. We believe that the management of this hospital is under the Board of Trustees and not under the Board of Supervisors, and we also believe that it was not the intent of the Legislature that the Board of Supervisors should have a right to go into every claim filed and certified for the purpose of determining whether or not the hospital could get along without the particular items listed in those claims.

Of course if a claim were filed here which was absolutely illegal, such as paying the salary to the trustees, the Board of Supervisors might be justified in refusing to direct the issuance of the warrant. In fact, if they directed that the warrant be issued to pay a claim which was illegal, the County Auditor would still be justified in refusing to issue the warrant. This, however, goes to the question of illegal claims and not to the question of what is a proper or necessary expenditure of funds by the trustees. So far as those matters are concerned, we are of the opinion that the Board of Trustees has the last say.

October 13, 1933. *Securities Department, Des Moines, Iowa:* The letter written to this Department under date of October 10, 1933, with respect to the interpretation of Regulation 465 issued May 18, 1931, and modified by an order made on November 18, 1931, concerning the status of securities listed on the Chicago Board of Trade, has been received.

You state that the question now arises whether or not Iowa brokers under the last order above mentioned can solicit orders to be filled on the Chicago

Board of Trade at a price above par and send the orders into Chicago to be filled, or whether said dealings with the Chicago Board of Trade under the order are limited to customers dealing direct with the Chicago Board.

You also state that your Department has issued an order that certain stocks qualified in Iowa cannot be sold at above par in Iowa until their earning power has been demonstrated by the dividends. Your inquiry apparently relates to such stocks.

It would seem that the State of Iowa cannot regulate the price at which stocks are sold on the Chicago Board of Trade. Furthermore, it appears that a broker in Iowa would have the right to solicit orders for stock listed on the Chicago Board of Trade to be executed in Chicago at the market. Such a transaction would be a Chicago transaction and not a sale, or attempt to sell, in Iowa. In the case mentioned, the broker simply acts as the agent of the customer and that must transact the business through a Chicago broker who is a member of the Board of Trade there. The transaction is consummated when the stock certificate is placed in the hands of the United States Postal Depository, or authorities for transmission to the customer. Therefore, the delivery would take place in Illinois, and it seems to us the matter would be beyond the control of Iowa authorities.

This office is of the opinion that the practice suggested is permissible under the regulations as they now exist, and that stocks qualified in Iowa, and listed for sale on the Chicago Board of Trade may not be sold in Iowa at more than par, but that Iowa brokers may accept orders to be executed in Chicago for the purchase of such stocks at the market on the Chicago Board.

There does not appear to be any way by which the customers could be prevented from dealing direct with a Chicago broker. As long as the transaction is an Illinois transaction and the order is taken to be executed in Illinois where the deal is consummated, it is our belief that there is no way to prevent this being done.

BOND: FAVOR OF REAL ESTATE COMMISSIONER AS AN OFFICIAL: LICENSEE PROPERTY MANAGEMENT BROKER: INDIVIDUAL DESIGNATED AS TRUSTEE.

October 17, 1933. *Real Estate Commissioner, Des Moines, Iowa:* This will acknowledge receipt of your letter of the eighteenth ult., in which you request the opinion of this Department on the following question:

"Can a licensee who wishes to act as a property management broker, voluntarily take out a bond and have the bond run to the Real Estate Commissioner as an official? If this cannot be done, could some individual be designated as a trustee and have the bond run to him?"

If a real estate broker decides to put up a bond for the protection of those dealing with him, we find nothing in the law which would prevent such a procedure on his part. We would suggest, however, that such a bond run to all persons injured by reason of the negligence of the broker or to injury sustained by those dealing with him, which injury is in its nature a violation of trust, contrary to law, which would result in the injury or damage of those dealing with him. Such a bond could be filed with the state and, in this particular instance, with your Department and it could be in the following words: "To the STATE OF IOWA, for the use and benefit of," or could be to the effect that it is for the benefit of those dealing with the broker.

The case of *Curtis vs. Michaelson*, found in 206 Iowa, 111, is an action to

recover damages for personal injuries received by the plaintiff by being struck by a licensed passenger bus operated by the defendant Michaelson. In deciding the case, the court said:

"A party injured in person and property by the operation of a motor vehicle carrier may bring his action directly against the carrier and the statutory surety on the bond filed with the board of railroad commissioners, even though no service is had on the carrier, and even though the bond provides, in effect, for an action against the surety in event that the injured party first obtains a judgment against the carrier and fails to collect thereon."

And later:

"Generally speaking, the form of a bond is quite immaterial when it is *filed* and *accepted* as a statutory bond, because provisions in the bond beyond the call of the statute will be deemed surplusage, while omitted statutory provisions will be read into the bond."

HIGHWAY COMMISSION.

October 19, 1933. In Re: Right of Out of State Corporations to Transact Business and Hold Property in Iowa. Yours, attaching thereto letter received from the Charles R. McCormick Lumber Company of Portland, Oregon, which is as follows:

"We have your Service Bulletin of September 13th, on the front page of which is a notice of revision of Section X of the Special Provisions of July 20, 1933.

The meaning of this revision is not entirely clear to us and we would appreciate your advising whether it means concerns such as ours will not be permitted to quote or sell creosoted material to the state direct, to counties or to contractors without securing a permit to transact business in the State of Iowa."

and copy of Special Provisions of the Commission's specifications, especially calling attention to Section X thereof, which is as follows:

"*Section X. Foreign Corporations.* (All projects.) The bidder's attention is called to the provisions of Chapter 386, Code of Iowa, which requires that a corporation organized under the laws of another state shall secure a permit from the Secretary of State before business can legally be transacted in the State of Iowa. No corporation organized under the laws of any state other than Iowa will be qualified to bid on primary road projects in Iowa unless satisfactory evidence has been furnished that such corporation has secured a permit to transact business in the State of Iowa."

at hand.

In your letter you request to be advised on the following question:

"Under Chapter 386 of the Code is a foreign corporation which merely sells material in the State of Iowa required to secure a permit from the Secretary of State before it is authorized to do business in this state?"

Answering your question, this Department would say:

That an out of state or foreign corporation is not authorized to do business in this state unless it has complied with the provisions and requirements of Chapter 386 of the 1931 Code, and secured the permit therein required from the Secretary of State.

The question then arises: What is doing or transacting business within the state? Where the buyer orders merchandise or commodities, or offers to buy and purchase the same, and the order or offer is forwarded to the out of state corporation, at its office in another state, and the same is there accepted by the out of state corporation, the transaction is not considered to be one made within the State of Iowa, and does not fall within the prohibition provided for in Chapter 386 of the 1931 Code. Such order, proposal or offer made by the buyer, which must be accepted to constitute a sale, has been held by our

courts to constitute a contract made in a foreign state when such order, proposal or offer is accepted by the out of state or foreign corporation at its home office outside of the State of Iowa, and it would be given, under such circumstances, the right to maintain an action in the courts of the State of Iowa, upon such transaction. In support of this proposition I cite the case of Anderson Bros. & Johnson vs. Sioux City Monument Company, et al., 232 N. W., 689. In this case the plaintiff was a Wisconsin corporation. The latter ordered in writing a monument, and forwarded the same to the plaintiff at its home office in Wisconsin, where it accepted the order and in pursuance thereto, delivered to the defendant, at Sioux City, the monument ordered.

The power to exercise this method of purchase of materials and supplies by a public commission is very limited. Section 4755-b10 of the 1931 Code requires advertising for bids for the construction of primary road improvement when the cost thereof exceeds $1,000.00. The advertising for bids and the filing of the written proposals and the acceptance of such proposals, if one be made by an out of state corporation, constitutes the transaction of business within the State of Iowa, which the bidder could not enforce in the courts of the State of Iowa for the reasons set out in Section 8427 of the 1931 Code, which is as follows:

"*Denial of right to sue.* No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured a permit. This prohibition shall also apply to any assignee of such foreign stock corporation and to any person claiming under such assignee of such foreign corporation or under either of them."

But while this is true, the further difficulty would be that Section 8429 of the 1931 Code provides as follows:

"*Powers denied.* No foreign corporation which has not in good faith complied with the provisions of this chapter and taken out a permit shall possess the right to exercise the power of eminent domain or exercise any of the rights and privileges conferred upon corporations, until it has so complied herewith and taken out such permit."

Among the powers which the out of state corporation may not exercise unless it has obtained a permit, as provided in Chapter 386, are:

1. The power to sue and be sued by its corporate name.
2. To make contracts, acquire and transfer property, possessing the same powers in such respects as natural persons.

The effect therefore of the failure of such out of state corporation to secure such permit, is to make the entire transaction, above referred to, as if no transaction had occurred, and the entire transaction would be a nullity. In other words, neither party to the transaction could enforce a contract, because none exists.

The above and foregoing applies particularly to the advertising of lettings of the Iowa State Highway Commission.

When the cost of the primary road construction project is less than $1,000.00, Section 8429 would make the transaction a nullity and neither party could enforce it, the same as if it were a letting on published notice.

We now come to the question of the legality of transactions with such out of state corporations where the matter of maintenance of Primary Roads only is involved, or materials and supplies therefor.

Competitive bids being required for the purchase of road material or road machinery for the improvement or maintenance of primary roads, the trans-

action attempting to make a contract relative thereto, with an out of state corporation, must be one conducted within the State of Iowa, and therefore would be subject to the restrictions contained in Section 8427 and would be a nullity under Section 8429 of the 1931 Code.

It is therefore the opinion of this department that the statutes of the State of Iowa, as to the procedure prescribed for the Iowa State Highway Commission, in the construction of primary road projects, and the purchase of materials and machinery for the maintenance of primary roads, that the transactions relative thereto, or any contract attempting to be made pursuant to such proceedings with an out of state or foreign corporation, is a nullity unless such corporation has secured a permit to do business in Iowa, as required by Chapter 386, 1931 Code of Iowa. That is, the transaction would be the same as if it had never been made and its enforcement would be impossible by either party.

Permit this Department to suggest that the Commission satisfy itself as to whether or not such out of state or foreign corporation has secured such permit as would qualify it to enter into contracts with the Commission, and to this end it is suggested that the Commission require all out of state or foreign corporations, which have not already done so, to file with it a statement or certificate of the Secretary of State, showing that such corporation has the permit required.

BOND: Class "B" permit holder: Chapter 37, Acts of the 45th General Assembly: (BEER BILL): Conviction: Guthrie county: Sale to minors: American Surety Company of New York, Surety: Can the Surety Company be held for this amount under the act? (Costs and fine.)

October 20, 1933. *County Attorney, Guthrie Center, Iowa:* This will acknowledge receipt of your letter of the eighteenth inst., in which you request the opinion of this Department on the following question:

A conviction was obtained in Guthrie county, under Chapter 37, Acts of the 45th General Assembly and the basis of the same was, that a permit holder (Class "B") was charged with illegally furnishing beer to minors. In accordance with Section 11, of the act, he furnished a bond in the sum of two thousand ($2,000.00) dolars, signed by the permit holder, as principal, and the American Surety Company of New York, as surety. Defendant was fined three hundred ($300.00) dollars and costs, and has not paid his fine. He has applied to the Surety Company for the payment of the fine and costs and this company insists that the condition of its bond does not cover criminal liability. Can the Surety Company be held for this amount, under the act?

This is the first matter of this nature which has come to the attention of this Department. As you know, Division 3, of Section 11, states as follows:

"Furnishes a bond in the form prescribed and to be furnished by the Treasurer of State of the State of Iowa, with good and sufficient sureties to be approved by the council of the city or town to which such application is submitted, *conditioned upon the faithful observance of this act*, in the sum of two thousand ($2,000.00) dollars."

The question presented, when put to the test of deduction as to what purposes the bond is required, leads us to the conclusion that the situation presented makes a valid claim as against this bond. The italicized part of the above division of Section 11 is to the following effect:

"conditioned upon the faithful observance of this act."

4 R. C. L. 61 states, with reference to performance of conditions, as follows:

"*Performance in General.* Where the condition in a bond is an undertaking to do a particular thing, failure to do that thing is a breach on the happening

of which a cause of action arises; for the obligor in a bond must perform the condition, if lawful and possible, or pay the penalty, let the condition be ever so trifling and insignificant. He who covenants to do a particular thing is liable without any act on the part of the covenantee, unless the act of the latter is required to enable the former to comply with the covenant. * * * *."

Also, see page 63, Vol. 4, R. C. L., which is entitled, "Accrual of Right of Action," and provides as follows:

"As a rule an action may be maintained on a bond immediately on breach of any of its conditions; and in harmony with this principle it has been held that where a bond is conditioned to pay a sum of money when it becomes due to a third person to whom the obligee is bound, and is further conditioned to save the obligee harmless, the obligee may maintain an action on the covenant guaranteeing the payment of the sum of money if the debt is not paid at the specified time, although the plaintiff has not been actually damnified. * * * *."

One of the provisions of Chapter 37, Acts of the 45th General Assembly, as contained in Section 24 thereof, is to the following effect:

"No person shall furnish to any minor under twenty-one (21) years of age, by gift, sale or otherwise, any beer as defined in this act, * * * *."

This we construe to be a general provision for the protection of the public and in the instant matter, the permit holder has been convicted and has been fined, in accordance with Section 38 of the act, under consideration. The principal on the bond refuses to pay the amount of the fine assessed against him. The Surety Company is, in accordance with Division 3, of Section 11, of Chapter 37, Acts of the 45th General Assembly, a surety on a bond "conditioned upon the faithful observance of this act in the sum of two thousand ($2,000.00) dollars."

In the case of *Curtis vs. Michaelson*, found in 206 Iowa, 111, it was held:

"A party injured in person and property by the operation of a motor vehicle carrier may bring his action directly against the carrier and the statutory surety on the bond filed with the board of railroad commissioners, even though no service is had on the carrier, and even though the bond provides, in effect, for an action against the surety in event that the injured party first obtains a judgment against the carrier and fails to collect thereon."

The court also said:

"Generally speaking, the form of a bond is quite immaterial when it is *filed* and *accepted* as a statutory bond, because provisions in the bond beyond the call of the statute will be deemed surplusage, while omitted statutory provisions will be read into the bond."

Reverting to one of the first statements made in this opinion, in which we suggested that we had come to a conclusion by the method of deduction, in analyzing what was intended by the Legislature in requiring that a bond be furnished by a Class "B" permit holder, under the act, and what the language used conveys to the mind. The Legislature did not intend that this bond be furnished to insure the payment of the tax due the State of Iowa, because the barrel tax, referred to in the act, is paid by the Class "A" permit holder to the State of Iowa and under the provisions of the act, the Class "B" permit holder can only buy from a Class "A" permit holder. It cannot refer to the payment of the permit fee, because that fee must be paid prior to the time the permit is issued.

There has been a breach of the condition, relative to the faithful observance of the act. The question then arises as to by whom an injury has been sustained by reason of the breach of the condition imposed. You will note that the provisions of the bond are that the principal and sureties are firmly bound unto the State of Iowa in the penal sum of two thousand ($2,000.00)

dollars. It should also be observed that this is a penal statute. The bond does not relate that it is for "the use and benefit of any designated party," but runs exclusively to the state; that the faithful performance of the provisions of the act can only relate to the provisions of the act which are criminal in their nature and, hence, if the bond is not for the purpose of paying claims, such as outlined, it is of no value whatsoever.

We are of the opinion that, because of the general import of the words used, a right accrues to the state, for the reason that the penalty imposed has not been satisfied and hence the state has a right to look to the surety for satisfaction and that the payment of the fine and costs, as assessed against the principal, is a valid claim against the Surety Company on the failure of the principal to pay the amount due.

LEGISLATURE. TERM OF OFFICE OF OFFICERS: The speaker of the house of representative holds his office until the first day of the meeting of the regular session next after that at which he was elected, and the terms of office of all other officers of the house and all committee chairmanships and committee memberships expired with the adjournment of the regular session.

October 24, 1933. *Speaker of the House of Representatives, Harlan, Iowa:* You have submitted to this office the question whether the officers, committee chairmen and committee members who held such positions in the 45th General Assembly continue to hold said positions during the approaching extra session of the 45th General Assembly.

Section 7 of Article 3 of the Constitution is as follows:

"Each house shall choose its own officers, and judge of the qualification, election and return of its own members. A contested election shall be determined in such manner as shall be directed by law."

In harmony with the foregoing constitutional provision, Section 10 of the Code was enacted and is as follows:

"The speaker of the house of representatives shall hold his office until the first day of the meeting of the regular session next after that at which he was elected. All other officers elected by either house shall hold their offices only during the session at which they were elected, unless sooner removed."

The above quoted statutory provisions were construed by our Supreme Court in the case of Cliff vs. Parsons, 90 Iowa, 665. The syllabus to this case appears to be a fair statement of the holding of the court, and I quote therefrom as follows:

"The term of office of the secretary of the senate is not made by Section 13 (now Section 10) of the Code to continue during the session at which he was elected, but such officer holds his office only during the pleasure of the senate appointing him and may be removed by that body at any time without notice or hearing."

But one conclusion can be drawn from the statute and Supreme Court decision quoted, and that is that the speaker of the house of representatives holds his office until the first day of the meeting of the regular session next after that at which he was elected, and that the terms of office of all other officers of the house and all committee chairmanships and committee memberships expired with the adjournment of the regular session of the 45th General Assembly.

What has been said thus far relates solely to the constitutional and statutory provisions which apply to the questions being considered. Where there is a conflict between the statutes of the state and standing rules of the House of

Representatives the statutes must prevail. Your attention is directed to rule 65 which was adopted by the House at the regular session of the 45th General Assembly, which rule relates to the Chief Clerk and is in part as follows:

"He shall be elected for a term of two years ending with the tenth legislative day of the succeeding general assembly following his election. Upon the convening of the General Assembly, or in the absence of both speaker and speaker pro tempore, he shall call the House to order and preside until a temporary speaker is elected. He shall perform such duties for a period not exceeding thirty days prior to the convening of the regular sessions of the General Assembly as will expedite the organization of the clerical force of the House, and to that end may retain an assistant. For such services each shall receive the same compensation as is fixed by the General Assembly for similar duties."

I call your attention, also, to Rule 54, as follows:

"Amendment and suspension of rules. No standing rule or order of the House shall be rescinded or changed without one day's notice being given of the motion therefor, nor shall any rule be suspended nor shall any matter tabled or motion be taken up except by a vote of at least two-thirds of the members present; nor shall the order of business as established by the rules of the House be postponed or changed except by a vote of at least two-thirds of the members present except that a motion to make the consideration of a bill a special order shall require a constitutional majority vote."

The portion of Rule 65 above quoted appears to be in conflict with Section 10 of the Code which provides that all officers of the House, other than the Speaker, shall hold their offices only during the session at which they were elected unless sooner removed.

The House shall upon convening in extra session, no doubt, proceed to adopt such standing rules as it desires for its government and in doing so care should be taken to adopt only such rules as conform to the statutory law of the state.

TAXATION: FIGURING VALUES ON UNPLATTED LAND.

October 25, 1933. *Auditor of State, Des Moines, Iowa:* We have your letter of the 3rd inst., in which you ask for a construction of Chapter 125 of the Acts of the 45th General Assembly. You submit this question:

"In figuring the values of unplatted land, should the value of the buildings on the land be taken into consideration?"

It is apparent from an analysis of Chapter 125 of the Acts of the 45th General Assembly, that it was the intent of the legislature not to include buildings or improvements placed upon such land after the land became the property of the government, state, county or municipal corporation. It was the apparent object of the legislature to reimburse school districts where such lands had been taken by the government, state, county, or municipal corporation out of the school districts for taxation purposes. If there were buildings on the land when it was taken over by the government, state, county, or municipal corporation, then such buildings should be taken into consideration. In many instances where such lands have been taken over by the state or county, large buildings such as hospitals and schools have been erected thereon and paid for by public taxation. It certainly could not be the intent of the legislature to have such buildings included in figuring the value of this land for taxation purposes.

The legislature has used the word, "reimbursed," in line 5 of subsection 1 of Chapter 125 of the Acts of the 45th General Assembly, in its natural and ordinary sense. 53 Corpus Juris at page 1181 contains the following definitions of "reimburse":

"The primary meaning of the word is to pay back. It also means to indemnify; to make return or restoration of an equivalent for something paid, expended, or lost; to make whole; to refund; to replace in a treasury or purse, as an equivalent for what has been taken, lost, or expended; to restore."

Similar definitions may be found in Black's Law Dictionary, Webster's Dictionary, and in many cases decided by supreme courts which are cited in 53 Corpus Juris on pages 1181 and 1182.

Where unimproved land was taken out of a school district and given to the state, county, or municipal corporation and later improved by the state, county, or municipal corporation or federal government, such improvements should not be considered in fixing the valuation of this property for taxation purposes for the support of the schools. It is the intent of the legislature to restore to the school district for taxable purposes the equivalent of what was actually taken from the school district.

Therefore, it is the opinion of this department that buildings or improvements made upon such lands by the government, state, county, or municipal corporation should not be considered in fixing the valuation of such unplatted lands for taxation for school purposes.

MOTOR VEHICLE. FLARE LAW.

October 25, 1933. *Superintendent, Motor Vehicle Department, Des Moines, Iowa:* We wish to acknowledge receipt of your favor of the 17th inst., in which you request an opinion as to whether or not cases arising under the Flare Law may be handled in justice of the peace court.

This is the court in which they should be handled as a matter of legal policy we believe. However, the law provides in Section 2 thereof, as follows:

"Any person or persons violating the provisions of Section 1 shall be guilty of a misdemeanor and punishable as such."

Section 12894 provides the punishment for misdemeanors, said section being as follows:

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

This section makes the violation of the Flare Law an indictable misdemeanor and it does not, therefore, come within the jurisdiction of a justice of the peace. That is, a justice of the peace may not try and dispose of the matter finally. Such matters may be brought into justice court on preliminary information, but the most a justice can do in a proper case is to bind the accused over to the grand jury.

FENCE VIEWERS. JURISDICTION, NOTICE, ETC., IN CITIES AND TOWNS.

October 27, 1933. *County Attorney, Emmetsburg, Iowa:* Your favor of the 12th inst., addressed to the Attorney General, has been referred to me for reply. You submit a series of questions as follows:

1. Do the fence viewers have any jurisdiction within the city limits where the city limits cover only a part of the township?

Our answer to this question is no.

2. If the fence viewers have jurisdiction within the city limits, do they have any power to force the building of a fence between joining owners?

To this question we also answer no.

3. Where a fence has been in existence for many years and a dispute now

arises as to which owner has the right half and which owner the left half, do the fence viewers have the power to decide that question of ownership?

Assuming this question relates to a fence controversy within the city limits, our answer is no.

4. Where one of the owners has died and his estate has not been closed, would the notice which is necessary in order to "create a controversy" have to be served on all of the heirs and widow or could it be served on the administratrix or the agent who looks after the land? Does this notice have to be served any particular length of time before the fence viewers are called upon to settle the dispute?

The two parts of question four appear to be answered by Section 1831 of the Code which provides that the fence viewers shall have power to determine any controversy arising under this chapter (Chapter 88) upon giving five days' notice in writing to the opposite party or parties. This would appear to mean the owners of the land rather than an administrator. Section 1835 refers to service of notice upon non-residents and prescribes the manner thereof. Section 1831 provides that upon the request of any land owner, the fence viewers shall give such notice to all adjoining land owners liable for the erection of a partition fence. There is no provision of law as to how soon the fence viewers shall start proceedings after such request is made, and they should, therefore, institute proper proceedings by the service of a five days' notice in writing to the opposite party within a reasonable time after receiving such request.

Question five follows:

5. Do the notices called for by the chapter on fence viewers have to be served like original notices?

Our answer is, that the statute says five days' notice in writing shall be given, and Section 1837 provides that all notices shall be given in writing and return of service thereof made in the same manner as notices in actions before a justice of the peace. In this connection you are referred to Sections 10524 and 11060. These sections provide the manner of serving original notices and should be followed in the serving of notices covered by the chapter on fence viewers.

There is nothing in Chapter 88 which limits the jurisdiction of fence viewers to that part of their township which lies outside of cities and towns. It would not be assumed that township trustees as fence viewers have any authority to compel the construction of a fence between adjoining owners of property in the business district of a city or town. If they have jurisdiction with reference to fences in the outlying portion of a city, they have the same jurisdiction in all other parts of it. Section 5744 gives cities and towns the power to restrain and prohibit the use of barbed wire to enclose land within the corporation and to restrain and prohibit the running at large of cattle, horses, swine, sheep and other animals and fowl within the limits of such corporation.

While the statutes might be more specific in regard to the territorial jurisdiction of the fence viewers, we believe they have no jurisdiction in cities and towns and that the city and town officers and the courts have exclusive jurisdiction within such corporate limits.

In the specific case referred to in your letter, if the parties so agree, jurisdiction might be conferred upon the fence viewers by agreement. The matter might be referred to arbitrators selected by the parties or the matter might be taken into court to determine who owns the fences in question, or perhaps the city ordinances provide a solution for the problems presented.

TAXATION: SUSPENDED TAX: EXPLANATION OF TWO OPINIONS RENDERED IN PRECEDING ADMINISTRATION: SPECIAL ASSESSMENTS.

November 1, 1933. *State Auditor, Des Moines, Iowa:* We wish to acknowledge receipt of your letter of October 21st, in which you call our attention to two opinions rendered by this office during the administration just preceding ours. The first one was issued under date of October 15, 1930, and appears in the Attorney General's Report of 1930, at page 350, while the second one was issued under date of September 18, 1931, and appears in the Attorney General's Report of 1931 and 1932, at page 119.

You ask for the opinion of this office as to whether or not the opinions above referred to are conflicting, or whether they can be reconciled, and, if in conflict, which one should be considered as the prevailing opinion.

Section 6950 of the Code of 1931 provides for the filing of the petition and grants authority to the Board of Supervisors to order the tax suspended. We agree with the writer of the opinion issued under date of September 18, 1931, in so far as his conclusion is concerned, but we do not arrive at that conclusion through the same reasoning. The facts in that particular case were that the tax on the real estate was suspended, as provided in Section 6950 of the Code of 1927, for two years, after which time said real estate was entered on the tax list for succeeding years for both the regular tax and special assessments. The tax for this later year became delinquent, and the property was sold at tax sale for that year. Under the rule laid down by our Supreme Court, the sale of the land for taxes divests the lien of all prior unpaid taxes, regardless of whether the prior unpaid taxes are personal taxes or taxes on the real estate for prior years.

Huff vs. Easley, 47 Iowa, 330.
In re Hager's Estate (Iowa), 235 N. W., 563.

In our mind, there is no question but that the writer of the opinion of September 18, 1931, is correct, at least so far as his conclusion is concerned, and we do not say that his reasoning is not sound. We base our conclusion on the rule laid down by the Supreme Court. In the case of September 18, 1931, the real estate was sold to satisfy a tax for a year later than those years in which the tax was suspended, which sale consequently caused a satisfaction and cancellation of all the taxes.

So far as the opinion of October 15, 1930, is concerned, the facts upon which that opinion is based are different. In that case, the property was sold for the tax of 1923 and a certificate issued to the purchaser. After the certificate was issued and while the person having the right to redeem still held title to the land, the taxes were suspended for the years of 1924, 1925 and 1927. Later the purchaser of the property for the 1923 tax obtained a tax deed. He was not aware that the taxes for the subsequent years had been suspended. The property was not advertised for sale, and he had a right to think that the taxes had been paid. It is true that he has a right to pay all subsequent taxes, as provided in Section 7266, but it was not necessary for him to pay them when they had been suspended. Section 6952 does not provide that said suspended tax shall become due and payable upon the property being sold at tax sale, but provides that said suspended tax shall become due and payable when the petitioner shall sell the real estate, or in case the real estate shall pass by devise, bequest or inheritance to any person other than the surviving spouse or minor child of such infirm person. This property was not sold by the person who owned the property at the time the tax was suspended, nor

did it pass by devise, bequest, or inheritance. It was sold at an involuntary sale. It had already been sold before the tax was suspended. The county officers had the records before them and had every reason to know that the property had been sold at tax sale, yet they suspended the tax for the subsequent years. The tax, while under suspension, certainly was not a lien on the real estate. It was not delinquent, and the real estate could not be sold for such tax.

We are therefore of the opinion that the tax for the year of 1924, 1925 and 1927 would not be a lien on the real estate as against the holder of the tax deed.

SALARIES are not exempt from tax reduction. Salaries fixed in Chapter 89 of the Laws of the 45th General Assembly are not exempt from the tax reduction required by Chapter 123 of the Laws of the Forty-fifth General Assembly.

November 10, 1933. *State Comptroller, Des Moines, Iowa:* We have your request for opinion on the following proposition:

Chapter 123 of the Acts of the Forty-fifth General Assembly provides for the mandatory reduction in tax levies. This act went into effect by publication on April 15, 1933. Chapter 89 of the Acts of the Forty-fifth General Assembly provides for salary reduction and reduces the salaries of public officials such as mayor, councilmen and so on. This act went into effect by publication on April 29, 1933. Does the fact that the latter act went into effect subsequent to the former act make the salaries fixed therein exempt from the tax reduction required by Chapter 123 of the laws of the Forty-fifth General Assembly?

It will be noted that there are certain exemptions provided for in Chapter 123 and that this act reduces the levy but makes no salary reductions. The salary reductions were taken care of by Chapter 89 and it is noted that Chapter 89 is not new legislation but is merely substituting this chapter for former legislation for the purpose of reducing salaries, and it is therefore clear that Chapter 123 applied to the former salaries. This being true, it must necessarily apply to the reduced salaries as nothing new or different is created but the legislature merely reduced the amounts heretofore stated.

Chapter 123 does not exempt mandatory payments and it recognizes no salaries as binding in amount, whether they are to be lowered or not and it is clear that the Legislature knew that salaries could not be maintained on the reduced levy of Chapter 123 and therefore, as a companion bill and to further carry out their intention, enacted Chapter 89, as it will be noted that Chapter 183 was Senate File 131, while Chapter 89 was Senate File 479. It not only went into effect subsequent to the amendatory reduction act but was introduced in the Senate subsequent and instead of being a repeal of any part of Chapter 123 by implication was enacted for the sole purpose of making the provisions of Chapter 123 effective.

It is therefore the opinion of this Department that the salaries fixed in Chapter 89 of the Laws of the Forty-fifth General Assembly are not exempt from the tax reduction required by Chapter 123 of the Laws of the Forty-fifth General Assembly.

TAXATION: DELINQUENT SPECIAL ASSESSMENTS FOR STREET IMPROVEMENTS OR SEWERS.

November 13, 1933. *Auditor of State, Des Moines, Iowa:* We are in receipt of your communication, in which you ask for an opinion on the following:

"When installments on special assessments for street improvements or sewers,

as provided in Chapter 308 of the Code of 1931, become delinquent and such assessments are made for the purpose of paying special assessment certificates, as provided in Chapter 311 of the Code of 1931, is the holder of the certificate entitled to the interest and penalty, or should the penalty go to the county or the city?"

It will be noted that Chapter 308 provides for the street improvement and for the assessment and method of collecting the assessments. Section 6033, which is contained in Chapter 308, provides in part as follows:

"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 penalty as ordinary taxes, *and when collected the said interest and penalties shall be credited to the same fund as the said special assessment.*"

The Supreme Court of this state in the case of Barber Asphalt Company vs. Webster County, 143 Iowa, 255, held that the interest and penalty belong to the holder of the certificate. After the decision in that case, the portion of the above quotation which is italicized was added to said paragraph by the Legislature of this state. It will be noted that Chapter 308 provides for the street improvement and the assessment, regardless of whether the cost is paid by a bond issue or the issuance of special assessment certificates. If the cost is paid by a bond issue, then there is no question but that the penalty provided for in Section 6033 would not go to the holder of the bonds. However, in determining whether or not this provision also applies in the case of a special assessment certificate, it will be necessary to look into the provisions of Chapter 311.

Section 6014 of the Code of 1931 provides for the issuance of certificates payable to the bearer, while Section 6015 provides for 6 per cent interest on these certificates.

Section 6107 provides as follows:

"Such certificate shall transfer to the bearer all of the rights and interest of the city or town in every such assessment or part thereof described therein, and shall authorize the bearer to collect and receive every assessment embraced in the certificate by or through any of the methods provided by law for their collection as the same may mature."

It is the opinion of this office that the above quoted section gives to the bearer of the certificate not only the rights to the principal and interest but to the penalty, if the installment is not paid when due. This certificate differs from the bond in that it is issued against a particular parcel or lot of ground, and it transfers to the holder all of the rights and interest of the city, which would be the right to collect the penalty.

SALARY: STATE OFFICERS: JUSTICES UTTERBACK AND CLAUSSEN: "We are therefore of the opinion that he (Claussen) is entitled to the salary from the date of his appointment."

November 14, 1933. *State Comptroller, Des Moines, Iowa:* We wish to acknowledge receipt of your letter of November 6th, in which you ask for an opinion on the following:

"Hon. George Claussen was declared by the Iowa Supreme Court to be entitled to the office of Judge of that Court as against Hon. Hubert Utterback. Judge Claussen had been appointed shortly before the general election of 1932, and served until the 5th day of December, at which time Judge Utterback, who held a certificate of election, took the office. Judge Claussen received his pay from the state to and including the date of December 4, 1932.

"In April, 1933, the District Court in Clinton county in a quo warranto proceeding, in which the State of Iowa was Plaintiff and Judge Claussen and Judge Utterback were Defendants, decreed that Judge Claussen was entitled to the

office, and that the election of November, 1932, in so far as it applied to that particular office, was a nullity. From the date of the decree of April of 1933, Judge Claussen was returned to the bench and continued to hold the office to the present time.

"The Comptroller has paid Judge Claussen for the period from the time he returned to the office in April to the present date, but Judge Claussen insists that he is entitled to pay for the period from December 5, 1932, to about the 6th of April, 1933. In other words, he insists that he is entitled to be paid for the time during which Judge Utterback actually sat on the bench."

Your question is whether or not you should pay Judge Claussen for that period.

In answering this question, let us first state another fact, of which we have knowledge. Shortly after the election of November 8, 1933, and about the time the action in quo warranto was commenced in Clinton county, the State Auditor, whose duty it then was to issue salary warrants to the state officers, was temporarily enjoined from paying the salary to Judge Utterback during the pendency of the quo warranto action. In April, 1933, the Legislature enacted what is now Chapter 201 of the Acts of the 45th General Assembly, by which there was appropriated to Judge Utterback from the general funds of the State of Iowa the sum of $2,771.39, as full and complete compensation for his services, as Justice of the Supreme Court of the State of Iowa, from December 5, 1932, to April 17, 1933.

So much for the facts. We now go into the question of whether or not Judge Claussen is entitled to be paid for the period during which Judge Utterback occupied the seat in the Court.

It is a general principle of law that the person rightfully holding the office is entitled to the compensation attached hereto, and that the right to the compensation attached to a public office is an incident to the title to the office and not to the exercise of the functions of the office, and the fact that officers have not performed the duties of the office does not deprive them of the right to the compensation, provided their conduct does not amount to an abandonment of the office. (46 C. J., 1014, Section 233. Bryan vs. Catwell, 15 Iowa, 538.)

It is also a general rule of law well recognized in this state that where the de facto officer during his incumbency collects the salary provided by law, the rightful officer, after obtaining possession of the office by judgment of court, cannot recover the salary for the same period. (Brown vs. Tama County, 122 Iowa, 745.) We are therefore called upon to determine whether or not the salary provided by law for this particular office, and which Judge Claussen claims he is entitled to have paid to him, has ever been paid to Judge Utterback. It is our opinion that it has not. As we recall, Judge Claussen did everything he could to protect not only himself but the public by asking for an injunction to restrain the payment of the salary to Judge Utterback until the quo warranto case was finally determined. The salary was not in fact paid to anyone.

By the Appropriation Act, passed by the 44th General Assembly, funds were appropriated to pay the salary for this particular office during the biennium from July 1, 1931, to June 30, 1933. The Legislature, by enacting Chapter 201 of the Acts of the 45th General Assembly, did nothing which would defeat Judge Claussen's right to receive that salary. By that act a special appropriation was made to Hubert Utterback to compensate him for the time during

which he actually occupied the office. That act would not take away Judge Claussen's right to the salary.

Let us call your attention to Section 12427 of the Code of 1931, wherein it is provided that when judgment has been rendered in favor of the claimant to an office, he may at any time within one year thereafter bring an action against the defendant to recover the damages he has sustained by reason of the act of the defendant. Suppose we should say Judge Claussen is not entitled to the salary, because of the provisions of this section. Suppose further that Judge Claussen would then commence an action against Judge Utterback for damages under the section of the Code above mentioned. The major portion of the damage would be the salary which the office carried with it, and Judge Utterback would certainly have a defense to the action by asserting that he had not collected the salary; that the State Auditor was enjoined from paying the salary to him, and that the money which he did receive from the state was a special appropriation by the Legislature merely for the purpose of compensating him, because of the time he spent in the office, even though he was not actually entitled to hold the office. If it were true that such a defense could be made, and if it were upheld by the Court, then Judge Claussen, regardless of the fact that he had taken every precaution to protect himself, as well as the public, by having the injunction issue, would be not only prevented from collecting his salary but would be defeated in his effort to collect damages from Judge Utterback. We cannot place such a distorted construction on the laws of this state relative to the right of a public officer to collect his salary.

We might say, in passing on this question, that we have read carefully the case of Smith vs. Van Buren County, 125 Iowa, 454, wherein it was held that in order to be entitled to the salary or emoluments of a public office, the claimant must show two things, first, that he is entitled to the office, and second, that he actually served in the office. That was a case involving the question of whether the Farmington Herald or the State Line Democrat was entitled to receive the printing as the county official paper. The Court in that case said the position of publisher of an official county paper was so analogous to that of a public officer that the rules of law governing the conflicting claims of officers de facto and de jure against the municipality were applicable thereto. The Court further said, in passing on this question, that to authorize recovery against a county for official printing, the publisher must show both title to the appointment as official printer and performance of the service. However, in that case there was a statute which provided that the payment for the official county printing should be suspended pending a contest. It should also be noted that that case involved the question of a contest between the two papers more in the nature of an election contest as to which man was really elected to the public office, while in the case of Judge Utterback and Judge Claussen the question was whether or not the election was legal. The Supreme Court said it was not, and that Judge Claussen held the office by virtue of an appointment made prior to the election. This being true, Judge Claussen was not in the position of one who was being held entitled to the office for the first time on appeal. He was the judge from the time of his appointment, and only ceased to sit on the bench because a certificate of election was issued to Judge Utterback.

In Andrews vs. Portland (Me.), 10 Am. St. Rep., 280, the plaintiff was duly

appointed and qualified city marshal, and had long been in the actual possession of the office, when he was wrongfully excluded therefrom by the action of the city officers, after which he not only remained ready to perform, but offered to perform, the duties to which he had been appointed; and it was held that he was entitled to recover his salary for the full term.

Finally, no one has ever received the salary for the office in question. Judge Claussen was not only entitled to the office but was the judge from the date of his appointment. It was not as if he had never qualified until after the decision of the District Court in April. He qualified in October, 1932, and during all the time since then he has not only been the judge but has been ready and willing to perform the duties of the office.

We are aware of the fact that the rule, as adopted by the Supreme Court of this state, that payment to a de facto officer is a defense, when the de jure officer seeks to recover the salary for the same period, is based upon public policy. Th courts have said that the public should not be compelled to pay twice for the same service, and that for that reason payment to the de facto officer constitutes a defense in an action commenced by the de jure officer. The reason for the rule is that the public, rather than the persons claiming the office, should be protected. However, in the instant case the public is not being compelled to pay two salaries or to pay twice for the same service. The salary which belongs to Judge Claussen was appropriated by the Acts of the 44th General Assembly and no one has received that salary. On the other hand, the compensation which was paid to Judge Utterback was voluntarily paid by the Legislature, and undoubtedly for the reason that it knew he could not collect the salary which the title to the office carried with it.

We are therefore of the opinion that Judge Claussen is entitled to the salary fixed by statute from the date of his appointment.

BANKS AND BANKING: DEPOSITS SECURED: ESCROW AGREEMENT: State banks, savings banks and trust companies, with the approval of the Superintendent of Banking, have right to pledge portion of their assets to secure deposit in bank and such pledging may be done by escrow agreement or in any other manner mutually agreeable to parties and Superintendent of Banking.

November 14, 1933. *Iowa State Board of Education, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

"Does a bank organized under the laws of the State of Iowa have the legal right and authority to make and sign an escrow agreement with the treasurer of any one of the state educational institutions and the Iowa State Board of Education to protect money belonging to Student Organizations, Athletic Associations, institutional book stores, etc., which the treasurer of that institution may deposit in the said bank?"

Section 9222-c3 of the Code is as follows:

"*Pledge to secure public funds.* State and savings banks and trust companies when authorized by the superintendent of banks may pledge a portion of their assets to secure public funds and such other funds as may be authorized by the superintendent of banking."

You will notice in the foregoing Code provision that state banks, savings banks and trust companies, with the approval of the Superintendent of Banking, may pledge a portion of their assets to secure any funds deposited with them. The Banking Department requires that the Board of Directors of the bank pass a resolution setting forth the assets they wish to pledge and specifically name them, and also providing for the maximum deposit that will be

received by the bank and which is to be secured by the pledged assets. Then, of course, it would make no difference how the assets were pledged as that could be done by escrow agreement or any other arrangement mutually agreeable to the parties and to the Superintendent of Banking.

It is therefore, our opinion that state banks, savings banks and trust companies, with the approval of the Superintendent of Banking, have the right to pledge a portion of their assets to secure a deposit in the bank and that such pledging of the assets may be done by escrow agreement or in any other manner mutually agreeable to the parties and to the Superintendent of Banking.

SCHOOLS: TUITION.

November 14, 1933. *County Attorney, Iowa City, Iowa:* We have your request for opinion on the following proposition:

"We have a number of children in this county, whose parents are residents of Iowa City, Iowa, and of the Iowa City Independent School District, who have been made wards of the Juvenile Court of Johnson county, Iowa, committed to the Johnson County Juvenile Home located in Iowa City, Iowa, and then placed by the Home with people residing in rural districts of Johnson County, Iowa. The rural families provide a home and sustenance for the child.

It is, of course, necessary that these children attend school and a number of them are attending in rural school districts. In many cases the persons with whom the child resides, do not feel that they should be burdened with the purchase of school books and supplies. In other instances the children have reached high school age, and since the rural districts do not furnish high school facilities they must attend in another district.

I would greatly appreciate an early opinion on the following propositions:

1. In the case of such child, or children, attending grade schools, do they become the responsibility of the school district in which they are actually residing under the above circumstances, and would the rural school district be required to furnish books and school supplies for such child in the event such child is an indigent child, and his real parents are unable to furnish his supplies?

2. In the event such child is of high school age, and attends high school in the Iowa City Independent School District, would he be entitled to free tuition by reason of the fact that his real parents live in the Iowa City Independent School District, or would he be the responsibility of the rural school district where he actually resides, so that such district would be required to pay his tuition for attending high school in the Iowa City Independent School District?"

Section 3637 of the Code is in part, as follows:

"*Alternative commitments.* The juvenile court in the case of any neglected, dependent or delinquent child, may:

* * * * * *

2. Commit said child to some suitable family home or allow it to remain in its own home."

Section 3638 of the Code is as follows:

"*Guardianship and adoption.* In case the court commits said child to the custody of some proper person or institution, such person or institution shall, by virtue of such custody, be the legal guardian of the person of such child and may be made a party to any proceedings for the legal adoption of such child, but any such apotion shall be approved by the court."

We presume that the children mentioned in your question have been committed to homes pursuant to the above named sections and therefore, are under orders of court and not under contract. You have not given to us the provisions of the orders of court, but we presume that they contain the usual provisions in regard to care, custody and control, but have no specific provision in regard to schooling.

We have held that the right of a child to attend school does not depend upon

legal residence, but only whether they are living at the time, in the district, in good faith. In addition thereto, under the terms of the statute above quoted, the people in whom the custody of the children are placed, are also the legal guardians. Clearly, the child is entitled to attend school in the district.

Section 4238 of the Code, in regard to free textbooks to indigent children, is as follows:

"*Insurance—supplies—textbooks.* 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 school books 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."

Indigent means needy and these children are no longer indigent or needy as the person having their custody has promised and agreed to provide and care for them, and this would include the providing of school books and supplies. A "dependent and neglected child" is defined in Section 3618 of the Code and after these children are placed in a private home with the order that they be cared for, they are no longer dependent or neglected.

It is therefore the opinion of this Department that such children are not entitled to books and supplies to be furnished by the district, but these are to be furnished by the person in whose custody they are, as a part of the care pursuant to the order of court.

In answer to your second question, the child is no longer under the directions of its parents, but under the juvenile court and its custodian and guardian, as provided by law. The residence of the parents is then immaterial and the child should be treated as any other child living in the rural district.

It is, therefore, the opinion of this department that the rural district would be responsible for the tuition of pupils when they go to the Iowa City Independent School District, the same as any other child living in the rural school district.

LIQUOR PRESCRIPTIONS: TIME OF REPEAL OF EIGHTEENTH AMENDMENT: SALE IN ACCORDANCE WITH FEDERAL AND STATE STATUTES: FURNISHING OF BLANKS FOR PRESCRIPTIONS.

November 20, 1933. *County Attorney, Sioux City, Iowa:* This will acknowledge receipt of yours of the 17th inst., requesting an opinion from this Department on the following question:

Can druggists, both retail and wholesale, fill prescriptions of liquor for medicinal purposes from and after December 5, 1933, at which time it is anticipated that the Eighteenth Amendment to the Constitution of the United States will have been repealed? Also, where the law states that sale shall be made only on prescripions which have been issued in accordance with federal and state statutes and regulations? The blanks now used have been prescribed by the Federal government, and after said date, who will furnish the blanks to be used in the State of Iowa?

It is the opinion of this Department that the repeal of the Eighteenth Amendment to the Constitution of the United States does not affect the situation by reason of the fact that the amendment in question, in accordance with Section 1 thereof, refers to the manufacture, sale or transportation of intoxicating liquors for *beverage purposes*, and hence, liquors sold for medicinal or sacramental purposes are not affected by the repeal of this amendment.

Federal statutes and Chapters 100 and 101 of the Code of Iowa, 1931, take care of the situation in reference to medicinal and sacramental liquors. (See National Prohibition Act, October 28, 1919, c. 85, Sec. 1, 41 Stat. 305.) Sections 17 and 18 deal with physicians' prescriptions and kinds of liquor which may be prescribed.

The above is our opinion and if you desire additional information, we would suggest that you refer the matter to the Department of Justice, Washington, D. C.

BOARD OF SUPERVISORS: OVERSEER OF THE POOR: AUTHORITY TO SERVE NOTICES TO DEPART UPON PAUPERS.

November 21, 1933. *County Attorney, Des Moines, Iowa:* We wish to acknowledge receipt of your letter of October 19th, in which you ask for an opinion on the following:

"Does the Overseer of the Poor, who has been appointed by the Board of Supervisors of the county, as provided in Section 5321 of the Code of Iowa of 1931, have authority to serve notices to depart upon paupers as provided in Section 5315?"

You state that the matter is in controversy between Warren county and Polk county, for the reason that families having heretofore resided and had legal settlement in Warren county have moved and taken up a residence in Polk county, and that Polk county, by its Overseer of the Poor, has caused to be served upon these paupers notices to depart, in order to prevent them from acquiring a legal settlement in the county.

The situation really resolves itself to a question of whether or not the Overseer of the Poor, by virtue of Section 5321, has the same authority granted to the Board of Supervisors or Township Trustees. We have read carefully the opinion of Justice Mitchell in the case of Emmet County vs. Dally, 248 N. W., 366, and we are inclined to the opinion that this case does not cover the situation which you have at hand. It is true that Section 5316 provides that the notice to depart shall be served *upon the order of the trustees of the township*, or of the Board of Supervisors. It should also be noted that Section 5320 provides that the township trustees of each township, *subject to the general rules that may be adopted by the Board of Supervisors*, shall provide for the relief of such poor persons in their respective townships as should not, in their judgment, be sent to the County Home.

Section 5321 provides as follows:

"Overseer of the Poor. The Board of Supervisors in any county in the state may appoint an Overseer of the Poor for any part, or all of the county, who shall have within said county, or any part thereof, all the powers and duties conferred by this chapter on the township trustees. * * *"

Section 5327 provides as follows:

"Township trustees—duty. The trustees in each township, in counties where there is no county home, have the oversight and care of all poor persons in their township, and shall see that they receive proper care until provided for by the board of supervisors."

Section 5327 just quoted was contained in the Code of 1873 in Section 1361, almost in the wording in which it now appears. Section 5321 of the Code of 1931 was not contained in the Code of 1873, but in Section 1361 there was contained this provision:

"But where a city of the first or second class is embraced within the limits of any township, the board of supervisors may appoint an overseer of the poor, *who shall have within said city all the powers and duties conferred by this chapter upon the township trustees.*"

Under that section of the statute, the Supreme Court of this state decided the case of Hoyt vs. Black Hawk County, 59 Iowa, 184, 13 N. W., 72. In that case, an action was commenced to recover relief furnished to a pauper. The question presented was the construction of Section 1361 of the Code. The pauper resided within the limits of Waterloo, a city of the second class. The Board of Supervisors had appointed for the city an Overseer of the Poor. Application was made to him to provide relief for the pauper, without her being sent to the County Poor House, which he refused to do. Application was then made to the Trustees of Waterloo Township, being the township which embraced that part of the city in which the pauper resided. The trustees determined that the pauper was entitled to relief, and directed the plaintiff to furnish certain relief. When the Board of Supervisors refused to pay the plaintiff's bill, action was brought against the county. The trial court rendered judgment for the plaintiff, and the defendant appealed. In passing upon the question, the Supreme Court, after quoting the provisions of the statute, made this pronouncement:

"The question presented is as to whether the City Overseer is to be deemed to have exclusive control of the city poor, or whether his power is to be exercised concurrently with that of the township, either having the power to provide relief whenever the occasion should seem to require. In our opinion, the power conferred upon the City Overseer is exclusive. That of the trustees is exclusive in the township outside of the city, and that is expressly made the measure of the Overseer's power within the city. The language used is 'all the powers and duties conferred,' etc."

In our opinion, as the relief furnished was not furnished upon the order of the City Overseer, the plaintiff cannot recover.

The Board of Supervisors of Polk county saw fit to appoint an Overseer of the Poor. Section 5321 gives the Board of Supervisors authority to appoint such an Overseer *for any part*, or all of the county, and further provides that said Overseer shall have *within said county, or any part thereof*, all the powers and duties conferred by the chapter (Support of the Poor) on the Township Trustees. Surely, if under Section 1361 of the Code of 1873 the Supreme Court of this state could make such a pronouncement as it did in the case of Hoyt vs. Black Hawk County, supra, it could make no different pronouncement under the present statute.

It is therefore the opinion of this office that the Overseer of the Poor has all of the powers and duties conferred upon the Township Trustees. These powers and duties, however, would be limited to the district or portion of the county for which the Overseer was appointed. Section 5321 provides that the Overseer may be appointed for the whole or any part of the county. If he is appointed for the entire county, his jurisdiction extends over the entire county. If he is appointed only for the city of Des Moines, his jurisdiction in the city of Des Moines would be exclusive, and the Township Trustees would have no powers or duties under Chapter 267 of the Code of 1931. You can therefore see that the question of whether your notices are properly served depends entirely upon whether or not the Overseer of the Poor in Polk county was appointed for the entire county or for a portion of the county, and if appointed only for a portion of the county, it further depends on whether or not the Overseer was exercising the powers conferred on him by statute within the part of the county for which he was appointed. In other words, if he was only appointed for a part of the county, he could exercise no authority

outside of that district for which he was appointed. In all of the territory outside of that for which he was appointed, the Trustees would have concurrent jurisdiction with the Board of Supervisors.

BANKS AND BANKING.

November 22, 1933. *Superintendent of Banking, Des Moines, Iowa:* We have your request for opinion on the following proposition:

A bank now operating under the management of the Superintendent of Banking, pursuant to Chapter 156 of the Laws of the Forty-fifth General Assembly, desires to sell, hypothecate, pledge or exchange a portion of its assets with the Reconstruction Finance Corporation. Should these instruments be executed by the Superintendent of Banking or by the proper officers of the bank pursuant to the proper resolution, with the approval of the Superintendent of Banking?

Section 5 of Chapter 156 of the Laws of the Forty-fifth General Assembly provides as follows:

"If, in the opinion of the superintendent of banking, with the approval of the executive council, it is advisable to sell, hypothecate or pledge or exchange any or all of the assets of such banking institutions by said superintendent, the said superintendent is given the power so to do with the reconstruction finance corporation or with any other party he may select."

Banks operating under the management of the Superintendent of Banking, pursuant to Chapter 156 of the Laws of the Forty-fifth General Assembly, are going concerns and they are operated pursuant to this act in the hope and expectation that they will be able to get their affairs in such condition that they may be reorganized or recapitalized and the management turned back to the officers of the bank to operate in the same manner as they did prior to the time the bank operated under this act. During the time the bank operates under Chapter 156 and while it is so waiting to determine whether it will go into receivership or reorganize, it maintains its entity as a corporation, with all of the powers except the absolute management and control of its property, which management and control is in the Superintendent of Banking, as manager of the bank. The corporate functions continue, including the right to hold meetings, elect officers, appoint committees and in short, to perform any function not enjoined by law. It may sue and be sued, except that pursuant to the act, actions by creditors or stockholders against the bank may be abated during the time it is operating under the act.

The Superintendent of Banking is merely an agent to take charge of and manage the business and affairs of the bank. Neither he nor the state has any pecuniary interest in the business. If the bank financially succeeds and makes a profit, the state can claim no part thereof, and if it fails, there is no liability upon the state or the Superintendent of Banking to pay any portion of its loss.

It is therefore apparent that the Legislature intended that a bank operating under Chapter 156 of the Laws of the Forty-fifth General Assembly, should have the right and power to perform all of its normal functions (except paying depositors or creditors), except that prior to such performance, it must obtain the approval of the Superintendent of Banking and for some transactions, must also obtain the approval of the Executive Council, for it is clear that neither the Superintendent of Banking nor the Executive Council could execute in behalf of the bank, any instrument or agreement to pay any sum of money, either for a loan or otherwise.

It is therefore the opinion of this department that when a bank, operating under Chapter 156 of the Laws of the Forty-fifth General Assembly, desires to pledge, hypothecate, sell or exchange any or all of its assets, it must do so in the same manner that it would do such an act if it were not operating under this act, except that in addition thereto, it must secure the approval of the Superintendent of Banking who must in turn secure the approval of the Executive Council.

SECURITIES:

DOES A CONTEMPLATED BUSINESS COME UNDER THE IOWA SECURITIES ACT. This business proposes to market securities for banks, brokers, and dealers in out of state financial centers, principally Chicago. *Party engaging in said business comes under Section 8581-c3 of the Iowa Securities Act and should be registered as a "dealer" before engaging in such business.*—November 23, 1933. *Superintendent, Securities Department, Des Moines, Iowa:* We have examined the communications of Bertram Strauss, asking for an opinion as to whether or not a contemplated business comes within the Iowa Securities Act.

He proposes to market securities for banks, brokers and dealers in out of state financial centers, principally Chicago, and he would represent Chicago brokers in these transactions.

It is the opinion of this office that Mr. Strauss should be licensed as a dealer under the Iowa Securities Act before engaging in such a business. He would clearly come within the definition of a "dealer" found in the Iowa Securities Act. That definition is Section 8581-c3, subsection 4, of the Code of Iowa, 1931, and reads as follows:

"4. 'Dealer' shall include every person other than a salesman who in this state engages either for all or part of his time directly or through an agent in the business of selling any securities issued by another person or purchasing or otherwise acquiring such securities from another for the purpose of reselling them or of offering them for sale to the public, or offering, buying, selling or otherwise dealing or trading in securities as agent or principal for a commission or at a profit, or who deals in futures or differences in market quotations of prices or values of any securities or accepts margins on purchases or sales or pretended purchases or sales of such securities; provided that the word 'dealer' shall not include a person having no place of business in this state who sells or offers to sell securities exclusively to brokers or dealers actually engaged in buying and selling securities as a business."

Section 8581-c11 provides that no dealer or salesman within the above definition shall engage in business in this state unless he has been registered as a dealer or salesman in the office of the Secretary of State in accordance with the provisions of the section. However, he may engage in transactions exempt under Section 8581-c5 without first obtaining a license.

There are no exemptions provided for in Section 8581-c5 which would be applicable to the type of business proposed. The only possible applicable exemption is subsection "e" of that section, which reads as follows:

"e. The sale, transfer or delivery to any bank, savings institution, trust company, insurance company or to any corporation or to any broker or dealer; provided that such broker or dealer is actually engaged in buying and selling securities as a business."

The proposed business does not come within that exemption for the reason that the transactions would not involve the sale, transfer or delivery of securities to dealers and brokers. The business proposed is that of negotiating for the purchase of securities, and, furthermore, there is no assurance in the letter

of Mr. Strauss that his dealings would be with brokers or dealers actually engaged in buying and selling securities as a business.

Therefore, before engaging in transactions such as are described by Mr. Strauss in his communications, it would be necessary for him to register as a dealer as provided by Section 8581-c11 of the Code of Iowa, 1931.

BEER BILL: TAX: PREFERRED CLAIM: PAYMENT OF TAX FROM ESTATE FUNDS: ESTATE NOW INSOLVENT: "Tax must be paid. Section 11970, Code of 1931, prevails."

November 28, 1933. *Treasurer of State, Des Moines, Iowa:* This will acknowledge receipt of your request, for an opinion from this Department, under date of the twenty-seventh instant, in which the following proposition is presented:

The administrator of the estate of Paul G. Matthiessen, who held a Class "A" permit, under Chapter 37, Acts of the 45th General Assembly, has paid from the estate funds, on the barrel tax, as provided for in Section 28 of the act, one hundred forty-five dollars and eighty cents ($145.80). It now appears that the estate is clearly insolvent and the administrator states that he has been informed by his attorney that there is a doubt as to whether or not his tax is a preferred claim as against state funds and that he may be held personally in the matter.

In the opinion of this Department the tax, as provided for in Section 28 of the act, must be paid and it having been paid, there is no provision in the act for a refund. In the event that the administrator did not pay this tax, you, as Treasurer of State, could hold the Bonding Company, by the conditions of the bond posted, for the amount of this tax.

As it has been paid, this would close the matter as far as your Department is concerned.

While your Department is not concerned with the question raised in the letter from the administrator, yet it would seem to us that Section 11970, Code of 1931, would prevail and you will note that Division 2, of that section, which is entitled, "Order of Payment," states:

"2. Public rates and taxes."

BONUS BOARD: IN RE DISPOSITION OF $96,000.0 BONUS BONDS: "The law requires that the Treasurer of State invest these funds under the order of the Bonus Board. He has no choice, except to invest them as directed by the Bonus Board."

November 28, 1933. *State Bonus Board, Des Moines, Iowa:* Some time ago, we received a letter from Hugo Geiger, the then Secretary of the Bonus Board, in which he asked an opinion on the following:

"The State Bonus Board had practically all of its Additional Bonus and Disability Fund invested in Iowa bonus bonds. On December 1, 1932, ninety-six of these bonds, totaling $96,000.00, matured. There was also interest due on other bonds to the amount of $39,667.50.

"On that day, R. E. Johnson, Treasurer of State, forwarded to the Secretary of the Bonus Board a check or a draft of the Treasurer of State, drawn on the Iowa-Des Moines National Bank, payable to the order of the Iowa Soldiers' Bonus Board, and calling for the payment of $135,667.50, which represented the principal of the ninety-six bonds and the other interest.

"Prior to that time, the Bonus Board, by resolution entered in the minutes, had instructed Mr. Johnson, the then Treasurer of State, to re-invest the $96,000.00 in bonds. As soon as this check was received by Mr. Geiger, the Secretary of the Bonus Board, he endorsed the same and returned it to Mr. Johnson, the Treasurer of State, for the purpose of having the $96,000.00 invested in bonds and the remaining $39,667.50 placed in the Additional Bonus

and Disability Fund, to be used for the relief of soldiers, sailors, marines, etc., as provided by statute and the rules of the Board.

"Mr. Johnson did not invest this $96,000.00. He deposited the full $135,667.50 in the Iowa-Des Moines National Bank with other funds belonging to the State of Iowa. This $96,000.00 has never been returned to the Bonus Board nor invested by the Treasurer of State. You ask us what should be done relative to this $96,000.00."

We have had several different stories concerning the facts of this matter. One story was that the money had been deposited in the Valley National Bank, which later consolidated with the Valley Savings Bank and went under Senate File 111 and is now open under waivers. Another story was that the money had been deposited in other banks out over the state. Upon an investigation, we find that the money was actually deposited in the Iowa-Des Moines National Bank, as hereinbefore stated. We have examined the treasurer's check and find that it was drawn on that bank, endorsed by Mr. Geiger, and later deposited in that bank by the Treasurer of State. In view of this fact, and regardless of the fact that the Treasurer of State may have later taken the money out of that bank and deposited it in others, we must rule that he had no right to deposit the $96,000.00 in with the funds of the State of Iowa. He was directed to invest it in bonds. Under Section 145-b1 of the Code of 1931, he had no other alternative. That section provides as follows:

"145-b1. Investment of bonus and disability fund. The treasurer of state upon the order of the bonus board established by Chapter 332, Acts of the Thirty-ninth General Assembly, shall invest such portions of the additional bonus and disability fund created by Section 8 of said chapter as said board may from time to time specify."

The law requires that the Treasurer of State invest these funds under the order of the Bonus Board. He has no choice, except to invest them as directed. If he deposited this money with the state's funds and later honored warrants on the funds, it must be considered that as long as there is more than $96,000.00 in the fund the Bonus Board's money still remains, and that the Treasurer of State should invest those funds in bonds as directed.

Of course we must take into consideration that R. E. Johnson is no longer the Treasurer of State. However, the statute does not specifically name R. E. Johnson as an individual, but provides that whoever is occupying the office of Treasurer of State shall make the investment. We are therefore of the opinion that Mr. Wegman, the present Treasurer, should invest the $96,000.00 as directed by the Bonus Board.

BONUS BOARD: SALARY OF EXECUTIVE SECRETARY AND ASSISTANT: "The Bonus Board fixes the salary of the Executive Secretary and his assistant, and the Legislature and its 45th General Assembly had no authority to fix the salary as it attempted to do in Chapter 188, Section 67, of the acts of that session."

November 28, 1933. *State Comptroller, Des Moines, Iowa:* We acknowledge receipt of your letter of November 14th, in which you ask for an opinion on the following:

"In Chapter 332, Acts of the 39th General Assembly, and in Section 9 thereof, the Bonus Board is empowered to employ such assistants and incur other expenses as may be necessary for the administration and carrying out the provisions of the act.

"We have operated under this section for the payment of salaries and administration expense for the Bonus Board. The Bonus Board authorized the Executive Secretary's salary at $2,700.00 per year and the assistant's at $1,500.00, and we have been paying that salary up to and including October 31, 1933.

"In Chapter 188, Section 67 of the 45th General Assembly, the salary of the Executive Secretary of the Bonus Board was fixed at $2,400.00 and that of the assistant at $1,200.00.

"At the time the bonds issued under the Bonus Law were submitted to the people for vote, Section 9 of the Bonus Law was a part of the original instrument on which the people voted.

"The question arises—What salary are the secretary and his assistant entitled to? Will you please give this department your official opinion whether the salary should be as designated by the Bonus Board or that specified in Section 67, Chapter 188 of the 45th General Assembly?"

We thank you very much for such a full statement of the facts. The question really is whether the Bonus Board, in view of Chapter 188, Section 67, of the Acts of the 45th General Assembly, has authority to fix the salary of the Executive Secretary and his assistant, or whether the Acts of the 45th General Assembly fixing that salary should govern.

You cite Section 9 of Chapter 332 of the Acts of the 39th General Assembly as the authority under which the Bonus Board has been acting. This section is as follows:

"Sec. 9. Administration expense—bonds of assistants. The bonus board is hereby empowered to employ such assistants and to incur such other expenses as may be necessary for the administration and carrying out of the provisions of this act; and the funds necessary for such administration and carrying out of the provisions of this act shall be expended from said bonus fund; such assistants as said board may determine shall give bond in such amount as may be fixed by said board, and shall, whenever practicable, be persons within the classes as defined in section four (4) of this act."

The above quoted section authorizes the Bonus Board to employ such assistants and incur such other expenses as may be necessary for the administration and carrying out of the provisions of the act. This Chapter 332 of the Acts of the 39th General Assembly, of which Section 9 just quoted is a part, was submitted to a vote of the people. The people of this state empowered the Bonus Board "to employ such assistants and to incur such *other expense* as may be necessary." Section 9 certainly means that the Board is empowered to incur the expense of the assistants, for the reason that it uses the term, "and incur such other expense," meaning other expense in addition to the employment of assistants. This entire bill was submitted to a vote of the people and was approved by them. The Legislature cannot now change the provisions of that act.

It is therefore our opinion that the Bonus Board fixes the salary of the Executive Secretary and his assistant, and that the Legislature and its 45th General Assembly had no authority to fix the salary as it attempted to do in Chapter 188, Section 67, of the acts of that session.

TAXATION: DELINQUENT PAYMENTS ON DRAINAGE SECONDARY ROAD AND CITY SPECIAL ASSESSMENTS: RATE OF INTEREST AND PENALTY.

December 7, 1933. *County Attorney, Hampton, Iowa:* We acknowledge receipt of your letter of recent date, in which you ask for an opinion on the following:

"There are a number of payments on drainage secondary road and city special assessments, which are delinquent at this time and upon which payment of the same has been tendered, which included the installment due together with interest, but no penalty. The question has arisen as to what rate of interest is to be charged, and whether or not any penalty attaches to these items after delinquency."

Let us take first the drainage district assessments under Chapter 353 of the Code of 1931. From a reading of Section 7482, one would naturally be led to believe that all drainage or levy assessments draw the same penalties for delinquency as ordinary taxes. However, this is not true, for the reason that the original act, as it appeared in Code Supplement of 1913, Section 1989-a26, has been cut up into several sections and re-arranged in the Code of 1924 and later Codes, and Section 7482 seems to be entirely out of place. This, however, as we understand it, is not due to any fault of the present Code Editor, but due to the fact that a re-arrangement was made by the Code Commission in the Compiled Code of 1919, from which the later Codes were adopted. One should go back to the Supplement of 1913, Section 1989-a26, and read that section carefully and then read the case of Fitzpatrick vs. Fowler, 157 Iowa, 215. In this case, the Court held that the land owner who endorsed on his certificate a waiver of objections, as provided in said section, was entitled to pay his assessment in ten equal installments with interest at the rate of 6 per cent per annum, and that the provision of the statute relative to penalties on account of delinquency did not apply to him, but applied only to those who failed or refused to waive the objection. The rule laid down by our Supreme Court in this case is the law of this state at the present time, and the penalties cannot be collected from the man who waived the objections, as provided.

So far as special assessments for cities and towns are concerned, the situation is different. Prior to the 40th Extra Session, the law relative to special assessments and the waiving of objections was practically the same as is provided at the present time for drainage districts.

Therefore, the owner of any lot or parcel of land, the assessment against which was embraced in any bond or certificate provided for in Section 825 of the Code Supplement of 1913, who waived objections in writing either by endorsement on the bond or certificate or by separate agreement could not be charged more than the rate of interest fixed by the ordinance, not exceeding 6 per cent, regardless of the fact that his later installment became delinquent. This statement, however, applies to cases which arose under Section 825 of the Code Supplement of 1913 prior to the passage of Senate File 169 of the Acts of the 40th Extra General Assembly. The fact that the Legislature changed the law at that time could not affect the rate of interest of those who had waived prior to the passage of the law, for the reason that the laws in force at that time were a part of the contract. We do not mean to say that the law was invalid. We merely say it would not apply to those particular cases. However, we doubt whether or not any cases now exist in which the assessment was made prior to Senate File 169 of the Acts of the 40th Extra Session.

By Senate File 169 of the Acts of the 40th Extra Session, the law was changed to read as it now appears in Chapter 308 of the Code of 1931. In other words, at the present time, instead of requiring a written waiver of objections, the law provides under Section 6032 that unless objections are made within the prescribed time, they shall be deemed waived. The section further provides that the owner shall have the right to pay the assessment in ten annual installments with interest thereon not exceeding 6 per cent per annum. However, Section 6033 of the Code of 1931 and Section 6032 just referred to are both contained in Senate File 169 of the Acts of the 40th Extra Session, and it is clear from the reading of the two sections that the penalties shall apply to all

unpaid installments the same as to ordinary taxes. This would be the rule as to any assessments made for street improvements under the law as it exists in Chapter 308 of the Code of 1931 and to all cases in which the assessments were made, after the passage of Senate File 169 of the Acts of the 40th Extra Session.

You also ask whether the penalties for delinquent special assessments would be 1 per cent a month or three-fourths of 1 per cent a month. In all cases where the delinquencies draw penalty, it would be three-fourths of 1 per cent a month, except for certificates issued prior to the Acts of the 45th General Assembly. All certificates issued prior to the Acts of the 45th General Assembly would draw penalty at the rate of 1 per cent a month, for the reason that that law was a part of the contract at the time the certificates were issued and purchased.

ELDORA PARK LAND: TRANSFER TO STATE OF IOWA: AUTHORITY GIVEN UNDER PRESENT CODE SECTIONS: LEGISLATIVE ENACTMENT.

December 11, 1933. *Board of Conservation, Des Moines, Iowa:* This will acknowledge receipt of your request of the fifth instant for the opinion of this Department on the following question:

The city of Eldora recently acquired some real estate for park purposes outside of the city limits and paid for the same by using the proceeds of a bond issue, which was voted by the city. It is the ultimate desire of the city to transfer this park land, not suitable for city park purposes, to the State of Iowa. Do the present Code sections give, to the city, authority to do this or is it necessary for the Legislature to pass an act authorizing such transfer?

It has been our understanding, through correspondence and personal interviews, that the city of Eldora proceeded in the acquisition of the land in question under Chapter 293, Code, 1931, and particularly Section 5797, of that chapter, which is entitled, "Acquisition of Real Estate," and provides as follows:

"Said park board may acquire real estate within or without the city for park purposes by donation, purchase, or condemnation, and take the title to the same in the name of the board in trust for the public * * * *."

and that the proceedings had, with reference to the bond issue to secure the necessary funds to purchase the land in question, was had under the chapter above referred to and particularly Section 5800.

You will note under Section 5798, Code, 1931, under general powers granted by the Legislature to park boards, that, subject to the approval of the city council, the board "may sell, exchange or lease any real estate acquired by it which shall be found unfit or not desirable for park purposes; * * * *." It seems rather a fallacy to say that land just acquired for park purposes is, in a short period of time, found to be unfit or not desirable for the very purpose for which it was acquired and this, as we understand the situation, must be done to enable the city to now transfer title to the state. While this is not conclusive as it could be in that while the land in question might not be desirable for city park purposes, yet it might be desirable for state park purposes. But such a procedure does present a question which, as stated, appears to be a fallacy in thought. But the distinction, as pointed out, might dispose of the question by saying that certain land would not be desirable for city park purposes, yet it might be desirable for state park purposes.

This matter was submitted for discussion to the staff of this Department,

on December 9, 1933, and various ideas were presented with reference to the best manner to handle the problem, as it is our understanding that it is the desire of the state to acquire the land in question as it will make a valuable addition to the present state park near Eldora. Among other things discussed was the power of the city to mortgage or to lease the land in question, which might meet the situation. However, after all these matters were discussed, at some length, it was felt that the safest way to proceed in the situation would be to amend Section 1822-a1, Code, 1931, with reference to the population requirement, so that it might include cities of the size of Eldora and counties of the size of Hardin county in the matter of population.

We would suggest that you ascertain from the Board of Conservation and from the officials of the city of Eldora if there is any reason why it would not be agreeable to have presented at the Special Session of the 45th General Assembly a bill, such as is herein suggested, which would, undoubtedly, if acted upon favorably by the Legislature, remove any question regarding the legality of such a transfer.

MOTOR VEHICLE. SERIAL NUMBER OF OLD ENGINE PLACED ON NEW ENGINE IN FACTORY: To remove serial number from old engine and place the same serial number on new engine is not a violation of Sections 5080 and 13092, Code, 1931. (In factory.)

December 12, 1933. *State Senate, Des Moines, Iowa:* This will acknowledge receipt of your favor of the 5th inst., in which you ask for an opinion interpreting or construing Sections 5080 and 13092-d1 of the 1931 Code of Iowa.

You state that the Ford Motor Co. is making a practice of replacing engines in Ford motor cars in certain instances, the old engine being removed and a new engine put in its place, the new engine being given the same serial number that the old or replaced engine carried, and your question is whether or not this practice is in violation of the Code sections above referred to.

Section 5080 is, in part, as follows:

"5080. General prohibitions. No person shall:

1. Deface or alter any serial, engine, or assembling number of a motor vehicle. * *

7. Possess a motor vehicle, the serial or engine number of which is defaced, altered, or tampered with."

Section 5081 provides that any person found guilty of violating the preceding section shall be imprisoned in the penitentiary not more than five years or be fined not more than one thousand dollars or be imprisoned in the county jail not more than one year.

The question naturally arises whether the serial number has been defaced, altered, or tampered with. The section must be given a practicable application and such as will carry out the intent of the Legislature. It can hardly be said that the serial number is defaced, for at all times so far as your question is concerned, the motor belonging to the car in question has a definite number upon it. There is no defacement or the serial number would be absent and undiscernible. In your hypothetical case the number appears on the motor at all times and the correct number. There is no alteration for the number is the same. There has been no tampering with the number. It has been placed upon each motor and remains there. Regardless of which motor, the new or the old, is in the motor vehicle the same serial number is present without defacement or alteration and without having been tampered with in any sense that changes it. It meets all of the purposes and requirements of the law.

The case of the State of Iowa vs. Dunn, 202 Iowa, 1188, referred to in the later case of Espe vs. McClelland and Son, 208 Iowa, 512, holds that the possession of a motor vehicle, the engine number of which has been altered, is an offense irrespective of the knowledge of the person possessing it. We quote from that case:

"It is quite universally recognized at this day that the legislature may forbid the doing of an act and make its commission a crime without regard to the intent or knowledge of the doer. Whether a criminal intent or guilty knowledge is an essential element of a statutory offense is to be determined as a matter of construction from the language of the act in connection with its manifest purpose or design."

We readily agree with the holding of the Court in the Dunn case that "no person shall * * * possess a motor vehicle, the serial or engine number of which is defaced, altered, or tampered with." We take the position, however, that in your hypothetical case, as stated above, there has been no defacement or alteration of or tampering with the serial or assembling number of the motor vehicle.

Section 13092-d1 is as follows:

"13092-d1. Alteration of manufacturer's serial number. Any person or corporation removing from or altering, defacing, mutilating, concealing, covering or destroying the manufacturer's serial number or other distinguishing mark upon any machine or manufactured article for the purpose of concealing, destroying or misrepresenting the identity of such machine or manufactured article, or who sells or offers for sale, or who owns or has possession of any machine or manufactured article knowing that the manufacturer's serial number or other distinguishing number or identification mark has been removed, altered, defaced, mutilated, concealed, covered or destroyed with the purpose of concealing, destroying or misrepresenting the identity of such machine or manufactured article, shall be guilty of a misdemeanor."

This section provides that any person or corporation removing from or altering, defacing, mutilating, concealing, covering or destroying the manufacturer's serial number or other distinguishing mark upon any machine (motor vehicle) for the purpose of concealing, destroying or misrepresenting the identity of such machine, or who sells or offers for sale or owns or has possession of any such machine knowing the manufacturer's serial number has been removed, altered, defaced, mutilated, concealed, covered or destroyed with the purpose to conceal, etc., shall be guilty of a misdemeanor.

In the hypothetical case submitted by you, there is no purpose to conceal, destroy or misrepresent the identity of the machine. The identity remains just the same after the new engine is installed as when the former engine was in place.

We cannot believe it was the intention of the legislature to prohibit the practice referred to in your letter which is for the substantial benefit of the owner of the car and results in injury to no one.

It is our opinion that the practice of motor car manufacturers and dealers, as described in your hypothetical question, does not amount to a violation of Sections 5080 and 13092-d1 of the Code of Iowa.

TUITION: INDIGENT FAMILY.

December 12, 1933. *County Attorney, Tama, Iowa:* We have your request for opinion on the following proposition:

An indigent family was placed by the Board of Supervisors in a farm house in Toledo township which house is located about a quarter of a mile from the County Home, but not on the County Home farm, nor under the supervision of the steward of the County Home. Since the placing of this family in this home by the Board of Supervisors and since about May 1, 1933, this family

is no longer indigent, but is self supporting and pay their own rent and pay for their own groceries and other maintenance, some of the money being earned by the father from county or R. F. C. projects and other money being earned from private sources. Two of the children of this family are of high school age and Toledo township in which the family is located, does not have high school facilities and they are attending Toledo high school. The question is whether Toledo township or Tama county is liable for the high school tuition of these children.

We have held that under the provisions of Section 5346 of the Code of Iowa, 1931, the county is liable for the costs of schooling of the children, whether they have placed the family in the County Home or in another home which has been rented by the county for that purpose and I am enclosing a copy of that opinion herewith. I note in your statement of facts that this family is no longer indigent and since May, 1933, has been self supporting, pay their own rent and so on.

Therefore, the children of this family are entitled to the same school rights and facilities as other families in the district, as the right to free schooling does not depend upon residence, for every school child in the district is entitled to free schooling, irrespective of where the actual residence of the family may be so long as they are living in the district in good faith, and the mere fact that they were originally placed in the district by the county would not in any wise affect the situation at this time, as they are now living in the district in the same manner as any other family.

It is, therefore, the opinion of this department that if this family is no longer indigent and are no longer cared for by the county, that Toledo township must pay for their high school education the same as for any other children in the district.

LOTTERY: If tickets are only given away with the purchase of a theatre ticket, and prizes awarded only to those who have the lucky number as the result of the purchase of a theatre ticket, that is lottery. If tickets are given to anyone asking for the same, without any remuneration of any kind being asked, and prizes are given as the result of that party having the lucky number, there is no lottery. The three elements of consideration, chance and prize must appear.

December 15, 1933. *County Attorney, Marshalltown, Iowa:* We acknowledge receipt of your letter in which you ask for an opinion on the following:

"The Midwest Film Distributors, Inc., Omaha, are distributing in the State of Iowa, a set of ten comedy films, which are run once each week for a period of ten weeks, the comedy being a race in which ten comedians participate, each comedian bearing a number one to ten. Every one purchasing a ticket to the theatre, which are serially numbered, who holds a number the last digit of which corresponds to the number of the winner of the race, receives a bag of groceries containing nationally advertised goods in the form of a gift bag, the retail value of which is approximately $1.00."

Under date of August 10th this office rendered an opinion on what is necessary to constitute a lottery. In that opinion we quoted from the authority of the Supreme Court of this state in the case of Brennard Mfg. Co. vs. Jessop & Co., 186 Iowa, 872, as follows:

"* * * a scheme for the division of or distribution of property or money by chance, or any game of hazard, or a species of game among persons *who have paid or agreed to pay* a valuable consideration for the chance to obtain a prize."

The Supreme Court in that case also had to say:

"Authorities uniformly agree that the three elements necessary to constitute a lottery are: (a) a consideration; (b) the element of chance; (c) a prize."

Applying this rule to your case we would say that if, in order to be entitled to a chance to win the prize, it is necessary to purchase an admission ticket to the theatre then it constitutes a lottery. However, if these numbers are passed out not only to persons who are purchasing admission tickets but also to any other person who calls at the box office for a number, then there is no consideration and hence there is no lottery under the rule laid down by our court.

PRESCRIPTION BLANKS:

December 20, 1933. *County Attorney, Waukon, Iowa:* This will acknowledge receipt of your letter of the sixteenth instant, in which you request the opinion of this Department on the following question:

"Under Chapter 100 of the 1931 Code of Iowa and more particularly Section 2093-2, in reference to limit on sales of intoxicating liquor by a prescription holder, it is stated in substance that sales shall be made only on prescriptions which have been issued in accordance with federal and state statutes and regulations and which have been issued by physicians licensed under the laws of this state, etc.

"Since the repeal of the Eighteenth Amendment, physicians are now unable to get prescription blanks from the federal government and are unable to issue prescriptions for liquor on such blanks, unless they had the same on hand prior to the repeal of the Eighteenth Amendment.

"In a request for an opinion, with reference to this matter, I have advised physicians that they may issue liquor prescriptions on the regular physician's blank, provided they incorporate therein the information required and given on the liquor blanks formerly issued by the federal government.

"This information may not have been correct. Therefore, will you kindly advise me as to the opinion of your Department on this matter?"

The question which you present has arisen by reason of the repeal of the Eighteenth Amendment to the Constitution of the United States. That amendment to the federal constitution, in Section 1 thereof, provided:

"The manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

In Section 2 of the amendment, it is provided, as follows:

"The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

This amendment, then, relates solely to intoxicating liquor for *beverage purposes.*

The Twenty-first Amendment to the Constitution of the United States, in Section 1 thereof, repealed the Eighteenth Amendment to the Constitution and Section 2 provides:

"The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Our Legislature, in keeping with the Eighteenth Amendment to the Constitution of the United States, exercised the right to legislate with reference to intoxicating liquor as expressed in Title VI of the Code, 1931. In doing this, the Legislature exercised a right which is inherent in the state and which was also granted under the provisions of Section 2 of the Eighteenth Amendment. See 26 A. L. R.—Note at page 661:

"The earlier cases on this question are discussed in the annotations in 10 A. L. R. 1587, and 11 A. L. R. 1320. A reference to those annotations discloses that, at the date thereof, there was little authority on the question, it being

a relatively new one. The early cases, however, established the principle that has since been followed, viz., that the 18th Amendment to the Federal Constitution and the legislation enacted by Congress, particularly the Volstead Act, do not supersede all existing state legislation or prevent the enactment of future legislation on the subject by the states, but supersede or prevent only so much of such legislation as is inconsistent with the Federal provisions. (Numerous citations.)"

Prohibition is the rule in Iowa as set out in Title VI of the Code, 1931. You will note in various sections of Chapters 100 to 104, inclusive, of Title VI, Code, 1931, that reference is made to federal laws and regulations.

We have been informed that S. B. Qvale, Supervisor of Federal Permits for this District, has notified all applicants, who have made application for permits to purchase since the repeal of the Eighteenth Amendment, by reason of repeal of said amendment, that this Department is no longer authorized to issue permits and that the matter of dispensing intoxicating liquor is to be governed by the laws existing in the state in which the applicant is a resident.

The control of intoxicating liquors, under the Twenty-first Amendment to the Constitution of the United States, is now returned to the state and the question presented relates mainly to intoxicating liquor for non-beverage purposes and also as to what effect the repeal of the Eighteenth Amendment and federal laws and regulations passed thereunder, which are now wiped out, have upon our Iowa law, as set out in Title VI of the Code.

59 Corpus Juris 1060 states, with reference to the *"effect of modification or repeal of adopted statute"*:

"As a rule the adoption of a statute by reference is construed as an adoption of the law as it existed at the time the adopting statute was passed, and therefore is not affected by any subsequent modification or repeal of the statute adopted, unless a contrary intention is clearly manifested; but where the legislative intent to do so clearly appears, the adopting statute will include subsequent modifications of the original act. A well-established exception to, or qualification of, the general rule exists, however, where the reference in an adopting statute is to the law generally which governs the particular subject, and not to any specific statute or part thereof; in such case the reference will be held to include the law as it stands at the time it is sought to be applied, with all the changes made from time to time, so far at least as the changes are consistent with the purpose of the adopting statute."

See also 43 Iowa 282:

"In adopting the statute of another state, the construction given it by the courts of that state will be adopted here only so far as it is in harmony with the spirit and policy of our laws."

Also see 19 Iowa, 29; 36 Iowa, 546; 46 Iowa, 463; and a comparatively recent case, 197 Iowa, 1252, in which the following rule is presented:

"A criminal statute which provides that the punishment thereunder shall be the same as provided in ANOTHER section of the statute, in effect writes the punishment of the adopted statute into the adopting statute, and it matters not that the adopted statute is thereafter repealed and a new statute enacted."

Therefore, it is the opinion of this Department that, in those sections of Chapters 100 to 104, inclusive, Code, 1931, in which reference is made to federal laws and regulations, our Legislature, in passing those sections, adopted the federal laws and regulations for the dispensing of intoxicating liquor the same as though the said laws and regulations had been incorporated and written out in full in the sections of our Code, under consideration, and that, in accordance with the authorities cited, the repeal of the Eighteenth Amendment, and various laws and regulations passed by the National Congress thereunder, does not

change our statutory law. The handling of intoxicating liquor for medicinal, industrial and sacramental purposes is to be carried on in this state in accordance with our state statutes.

You will note that provision is made for the ordering of non-beverage liquors and that the form to be used for order blanks is set out in Section 2141, Code, 1931; also that reports are to be made in accordance with Chapter 102 of the Code and you will note that a dual system is set out and at this time, the federal reports are dispensed with.

The question with relation to prescription blanks, which have heretofore been furnished by the federal government, can be handled by the county auditor and can contain the same provisions as are now set out in the blanks furnished by the federal government.

SECURITIES: A plan to accept money from residents of the State of Iowa to employ a company to deal in the operation of commodity markets, with the understanding that the investors may share with this company in the profits derived by the operation of the company in grains, cottons, etc.; the said company to take an agreement in the form of a power of attorney running to itself, is within the "Iowa Securities Act" and is a sale of securities.

December 20, 1933. *Superintendent, Securities Department, Des Moines, Iowa:* This will acknowledge receipt of your inquiry concerning a plan proposed by the Colonial Trading Company of accepting money from the people of the State of Iowa to employ the Colonial Trading Company to deal in the operation of commodity markets with the understanding that the investing public may share with the Colonial Trading Company in the profits derived by the operation of the Colonial Trading Company in grains, cotton, etc.

It is quite apparent that the Colonial Trading Company proposes to take an agreement in the form of a power of attorney from the investing public to the Colonial Trading Company.

As we have previously advised your Department, in order to arrive at the purpose and intent of Chapter 393-C1 generally known as the "Iowa Securities Act," it is necessary to refer to the title of the act as of the time the same was passed by the Legislature of Iowa and we again invite your attention to the language of the title which is as follows:

"An act to protect investors by regulating sales and purchases and attempted sales and purchases within the State of Iowa, of stocks, bonds, notes, debentures, evidences of indebtedness, investment contracts, interest in or under profit sharing or participating agreements or schemes, and interest and trusts all hereinafter called securities."

The self-evident question now proposed is whether or not the plan as set up by the Colonial Trading Company constitutes a profit paying or participating agreement or scheme for an interest in certain trusts. As one of the features of the proposed plan we find a provision for the agreement and power of attorney providing that the applicant or investor shall deposit money with the Colonial Trading Company in a pool or trading fund, to be used in speculating in grain, cotton, or any other commodity. The agreement provides among other things that the Colonial Trading Company may make such trades as in its discretion it may choose. It provides that fifty per cent (50%) of the net profits shall be retained by the Trading Company as a commission for handling the money of the investing public.

We are constrained to feel that the proposed plan is an attempt on the part of the Colonial Trading Company to avoid the provisions of the Iowa Securities

Act. Specifically speaking, we feel that our statutes are broad enough under the definition of what constitutes a security as set out in paragraph one of Section 8581-c3 to bring the plan proposed by the Colonial Trading Company within the provisions of the sale of securities under the act. It is our judgment that the Colonial Trading Company is attempting to sell a speculative security under the guise of an employment of professional services on and in a speculative market. If the spirit and intent of the Iowa Securities Act is to be carried out as intended by the Legislature, it is our conviction that your department cannot sanction the proposed plan or scheme as set up by the Colonial Trading Company.

COUNTY ATTORNEY: BOARD OF SUPERVISORS: FURNISH CLERK OR STENOGRAPHER FOR COUNTY ATTORNEY: "It is entirely proper for the Board of Supervisors to pay the expenses of the County Attorney's stenographer, while she is engaged in the performance of the county's business, in so far as it affects the County Attorney's office. The County Attorney should be recompensed for any amounts that he has paid for this service."

December 26, 1933. *County Attorney, Anamosa, Iowa:* I acknowledge receipt of your recent request for an opinion as to whether or not the Board of Supervisors of the county should furnish to your office a clerk or stenographer for the purpose of assisting your office in the handling of matters in which the state and county are interested.

You are advised that a similar question was propounded to the Hon. H. M. Havner, Attorney General of Iowa, in February, 1918. Under date of February 2, 1918, Attorney General Havner ruled that the Board of Supervisors had the power to employ a stenographer to facilitate the County Attorney in performing the county business under Section 422, Paragraph 11, Supplement of the 1915 Code of Iowa. This section above referred to is the same as Paragraph 6 of Section 5130 of the 1931 Code of Iowa, and is as follows, to-wit:

"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."

Former Attorney General Havner in his opinion has cited numerous Iowa cases interpreting the power and duties of the Board of Supervisors under this section. While none of these Iowa cases were specifically in point as to the employment of a stenographer or clerk by the county, yet they did hold that the county had the power to do whatever acts were necessary, in order to facilitate the business of the county. In this opinion the former Attorney General Havner states:

"Surely it could not be contended that the County Attorney could be compelled to do the clerical work of typewriting and abstracting under the provisions above referred to. Neither could he be compelled to pay the expense of having the same done out of his own funds. Therefore, such expense as the making of an abstract could be properly paid by the Board of Supervisors under subdivision 11 of Section 422, and if such clerical work is properly chargeable under subdivision 11 of Section 422, then any other clerical work, which would facilitate the business of the office, could as properly be paid for as the making of the typewritten copy."

This office is in accord with the opinion previously handed down by General Havner in 1918. The County Attorney is an officer of the county the same as the Auditor, the Treasurer, the Recorder, or the clerk of Court. There is no question but what the Board of Supervisors should furnish the necessary clerical help for the other county offices in the performance of the business of

the county. The law contemplates that the Board of Supervisors should furnish the County Attorney with an office in the Court House and also equip such an office the same as other county offices are equipped. Where the Board of Supervisors do not furnish the County Attorney with an office in the Court House, then the Board should pay to the County Attorney a proper portion of his office expense necessarily involved in the conduct of the county's affairs. The Board of Supervisors should also pay the proper portion of the expense of a clerk or stenographer for the County Attorney's office in the handling of the county's affairs therein. In view of the fact that the County Attorney is permitted to engage in private practice, a certain percentage of the time spent by the clerk or stenographer would be while she was engaged in doing private work for the County Attorney. The Board of Supervisors should not be called upon to pay this portion of the expense. In other words, the Board of Supervisors should not pay the County Attorney's stenographer for the time and work that she spends in assisting the County Attorney in his private practice. However, it is entirely proper for the Board of Supervisors to pay the expenses of the County Attorney's stenographer, while she is engaged in the performance of the county's business, in so far as it affects the County Attorney's office. The proper amount that the county should pay should be arranged by the County Attorney's office and the office of the Board of Supervisors of the county. The County Attorney should not be called upon to pay the expenses of the stenographer, while she was engaged in assisting in the handling of the county's affairs. The County Attorney should be recompensed for any amounts that he has paid for this service.

BEER: ADVERTISING.

December 27, 1933. *County Attorney, Creston, Iowa:* I acknowledge receipt of your letter of December 23rd requesting an opinion from this office as to whether or not advertising beer to contain not over 5.5 per cent alcohol which, in fact, only did contain 2.9 per cent alcohol constituted a violation of Sections 3041 to 3044 inclusive of the 1931 Code of Iowa.

You state in your letter that a particular company at Greenfield, Iowa, is putting out this beer under labels purporting to show that it contains not over 5.5 per cent alcohol. In your letter you did not state whether this company is advertising that its beer contains not over 5.5 per cent alcohol by weight or by volume. However, this does not make any legal difference because the Iowa Beer Law recently passed by the 45th General Assembly only authorizes the sale of beer containing not more than 3.2 per cent of alcohol by weight.

The practice adopted by this company at Greenfield, Iowa, has been indulged in by other companies and distributors throughout the state. In other instances, the beer is labeled to contain over 8 per cent proof spirits which label is superimposed upon a smaller label stating that it does not contain more than four per centum of alcohol by volume. In another instance, the dealer is advertising that his beer contains not over four per centum of alcohol by volume.

All these types of beer advertising and labeling is calculated to deceive the public. The fair implication to be drawn from this type of advertising is that such beer might contain more than the legal limit under the Iowa law. It is an artifice adopted by dealers to lead the public to believe that they are receiving beer of a higher alcoholic content than 3.2 per cent by weight.

Sections 3041 to 3044 inclusive of the 1931 Code of Iowa are included under

Title X of said Code which refers to the regulations and inspection of foods, drugs, and other articles. These sections refer to "articles" which must be properly labeled and makes it unlawful for any person to have any article as defined by this title in their possession which contains any label or representation which is deceptive as to the true character of the article.

Section 3029 of the 1931 Code of Iowa in paragraph one states that " 'article' shall include food * * *"

Paragraph five of Section 2808 of the 1931 Code of Iowa defines "food" as follows:

" 'Food' shall include any article used by man for food, drink, confectionery, or condiment, or which enters into the composition of the same, whether simple, blended, mixed, or compound."

The above definition of food is one that has been adopted by the Legislature of Iowa. If beer can be interpreted as any article used by man for food or drink, whether simple, blended, mixed or compound, then the use of the above labels in the sale of beer would constitute a clear violation of Sections 3041 to 3044 inclusive of the 1931 Code of Iowa.

In food statutes, the term, "food," usually includes all articles used for food or drink by man whether simple, mixed or compound.

26 C. J., 750.
Arbuckle vs. Blackburn, 113 Fed., 616 (191 U. S., 405; 65 L. R. A. 64).
McCarthy vs. State, 170 Wis., 516 (175 N. W., 785).
Armould vs. State Dairy, etc., Commission, 159 Mich., 1 (123 N. W., 580; 25 L. R. A. (N. S.) 616.)

Milk is included under such definitions.

Commonwealth vs. Bomberger, 44 Pa. Co., 673.

Coffee is also included.

Arbuckle vs. Blackburn, 113 Fed., 616 (65 L. R. A. 64).

Wine is also included under the Federal Pure Food Law.

U. S. vs. Sweet Valley Wine Co., 208 Fed., 85.

Under the Federal Pure Food Act of June 30, 1906, C. 3916, Paragraph six, 34 Stat. 769, U. S. Compiled St. Sup. 1911, page 1356, food is defined as follows:

"The term 'food' as used herein shall include all articles used for food, drink, confectionery, or condiment, by man or other animals, whether simple, mixed or compound."

It is apparent that this Federal definition as used in the above act is substantially the same as the definition adopted by the Iowa Legislature.

In the case of the U. S. vs. Sweet Valley Wine Co., cited above, the defendant was indicted in four counts for misbranding under the Federal Act above quoted. The defendant attacked the indictment by demurrer, one of the grounds being that the government had failed to allege that the various wines therein mentioned and ordered by defendant were foods within the meaning of the Act of Congress. Federal District Judge Killits of the Northern District of Ohio held that wine was included under this definition of food and promptly dismissed the defendant's demurrer. It appears to be the general rule that a legislative body may provide its own definition of food under a law which it enacts and when it does so that definition must necessarily control regardless of dictionary definitions.

In the case of McCarthy vs. State, reported in 175 N. W., pages 785 and 786, the Supreme Court of Wisconsin laid down the following rule:

"It is entirely competent for the legislature to provide its own definition

of a word used in a law which it enacts and when it does so that definition must necessarily control regardless of dictionary definitions."

In construing certain statutes, however, it has been held that the term "food" does not include a beverage or drink. This rule is announced in 26 C. J., page 751, and refers to the case of State vs. Meek, 26 Wash., 405 (67 Pac., 76). However, an examination of this case reveals that the Washington statute defining "food" was as follows:

"The term, 'food,' as used herein shall include all articles used for food, drink, and condiment by man, whether mixed, simple, or compound. * * * * The term, 'drink,' as used herein shall not include liquors containing two per cent or more of alcohol."

It is apparent that this Washington statute clearly eliminates liquors containing two per cent or more of alcohol from the definition of food. This was the enactment of the Legislature and, of course, should be sustained by the Washington Court. The Iowa statute does not have such an exception to liquors. There can be no question but what beer is an article used by man for drink as defined by our legislature in paragraph five of Section 2808 of the 1931 Code of Iowa.

Therefore, it is the opinion of this Department that the labeling or advertising of beer to contain not more than 5.5 per cent of alcohol or not more than 8 per cent proof spirits, or any other misleading type of advertising, except that it contains not over 3.2 per cent of alcohol by weight is a violation of Sections 3041 to 3044 inclusive of the 1931 Code of Iowa and that all persons violating these sections should be prosecuted under the same.

DENTIST. USE OF NAME WHEN ADVERTISING: A licensed dentist shall not use any name other than his own when advertising. If he uses the prefix "doctor" he must add after his name the letters "D. D. S." or the word, "dentist" or "Dental Surgeon." If he advertises under his surname only he is not using a name other than his own.

December 27, 1933. *State Department of Health, Des Moines, Iowa:* We acknowledge receipt of your favor of November 14th, in which you state that in many sections of the state dentists advertise under their surname and do not use their Christian name or initials. You enclose some advertisements taken from newspapers published in this state being the advertisements of dentists who, in some instances, use names other than their own. These dentists advertise variously under the following names: Harmon Dentists, Whitehill Dentists, Craven's Exclusive Plate Shoppes, Taylor Dentists. Craven's Exclusive Plate Shoppes advertise three Iowa addresses, viz.: Mason City, Des Moines and Sioux City.

You request an opinion of this department interpreting the following section of the Code, particularly with reference to the question whether or not a dentist is required to use his full name in advertising, to-wit:

"Sec. 2570. Dentists to practice under their own names. 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."

The law in that section plainly says that no person shall operate any place in which dentistry is practiced in any name other than his own, nor shall he display in connection with his practice on any advertising matter any other

than his own name. While it may have been the intent of the legislature to require dentists to use their full names when advertising, the section does not specifically so provide. A dentist may not use any name other than his own except that if two or more licensed dentists are associated in the practice they may use all of their names. It would seem in view of this language that Cravens may advertise in the name of Cravens without using his initials or Christian name and if he wishes may use it and in connection therewith may use "dentist."

The question of the constitutionality of a statute of the State of Ohio somewhat similar to our Section 2570 above quoted was resolved against the constitutionality of the statute by the Common Pleas Court of Hamilton county, Ohio, in the case of Ex Parte Robert C. Craycroft. The case is reported in Ohio Nisi Prius Reports, Volume 24 at page 513, and was not carried to the court of last resort in that state. That case holds that the statute making the practice of dentistry unlawful unless carried on under the name of the individual practitioner is an abuse of the police power and unconstitutional. It holds, however, that another statute providing a penalty for misrepresentation of their qualifications by dentists is a valid enactment when properly construed. We quote from the above case as follows:

"The present dental statute, the constitutionality of which is being attacked in this proceeding practically prohibits dentists from advertising and if they do advertise subjects them to arrest, fine and possible revocation to practice their profession. It is hard to conceive public health safety or morals were protected by such an act which singles out the profession of dentists. There is no such law pertaining to druggists who are licensed by the state after examination or doctors or veterinaries. It singles out the dentists as a particular class of culprits should they advertise while all other professions which use this method of enlarging their clientele and advancing their business interests are free from any such restrictions; that this is class legislation pure and simple has been decided time and again by the courts of last resort of different states."

It is not the disposition of this office to attack the constitutionality of the statutory law of this state. On the contrary, we deem it our duty to uphold the constitutionality of all statutes until the courts of last resort have held them unconstitutional. Section 2570 must, therefore, be accepted as a constitutional and valid statute until the courts hold otherwise.

Section 2509 provides that any person licensed to practice his profession under Title Eight of the Code which includes dentists may append to his name any recognized title or abbreviation which he is entitled to use to designate his particular profession but no other person shall assume to use such title or abbreviation and no licensee shall advertise himself in such a manner as to lead the public to believe that he is engaged in the practice of any other profession than the one which he is licensed to practice. Section 2510-d1 provides that any person who falsely holds himself out by the use of any professional title or abbreviation, either in writing, cards, signs, circulars, or advertisements to be a practitioner of a system of the healing arts other than the one under which he holds a license, or who fails to use certain designations shall be guilty of a misdemeanor. A dentist may use the prefix "doctor" but shall add after his name the letters, "D. D. S." or the word, "dentist" or "dental surgeon."

Section 2570 clearly was intended to limit dentists to the use of their own names and in connection therewith the prefix, "doctor." If this prefix is used

ne shall add after his name the letters, "D. D. S." or the word, "Dentist" or "Dental Surgeon."

Under the name, Harmon Dentists, or other similar advertising, it would not be permissible to employ and use the services of dentists bearing other names unless Section 2568 is complied with which provides as follows:

"2568. Names of employed dentists to be posted. Every person who owns, operates, or controls a dental office in which anyone other than himself is practicing dentistry shall display the name of such person in a conspicuous manner at the public entrance to said office."

Section 2569 provides that persons who are not licensed dentists may perform laboratory work. An advertisement under the name of Craven's Exclusive Plate Shoppes would violate the law if persons were engaged in the practice of dentistry under such name in violation of Section 2565 which defines the practice of dentistry. If Craven's Exclusive Plate Shoppes merely manufacture plates and do laboratory work and are not engaged in the practice of dentistry defined by law, the advertisement is a lawful one.

SALE OF WARRANTS.

December 27, 1933. *Board of Education, Des Moines, Iowa:* You submitted to us a few days ago, a contract entered into by and between the Board of Education, the Finance Committee of the Board, and Carlton D. Beh Company of Des Moines, Iowa, looking toward the purchase of what is commonly known as "Stamped Warrants" by the Carlton D. Beh Company.

It appears that these warrants are the regular warrants payable to the treasurers of the various institutions under the Board of Education, and pursuant to law, have duly issued, been presented to the Treasurer of State for payment and by him stamped, "Unpaid for want of funds."

You ask:

(1) Is the agreement under which stamped warrants are sold to the Carlton D. Beh Company binding and legal?

(2) Is it legal for the Finance Committee to permit the purchaser to have the interest that has accrued between the date when the warrant may be stamped by the Treasurer of State and the date when the warrant is sold to the Carlton D. Beh Company?

Section 3940 of the Code of Iowa, 1931, provides as follows:

Appropriations—monthly installments. All appropriations made payable annually to each of the institutions under the control of the board of education shall be paid in twelve equal monthly installments on the last day of each month on order of said board.

We understand that because of the escrow agreements with the depository banks of the institutions, that the appropriation is not withdrawn in one installment each month, but that warrants are issued by the State Comptroller pursuant to requisition of the Finance Committee, such requisition being made for the amount needed to bring the deposit up to a certain sum, and that these warrants are in the denominations requested and are payable to the treasurer of the institution and delivered to the Finance Committee.

Section 3935 of the Code, in regard to the duties of the treasurer of the institutions, is in part, as follows:

"The treasurer of each of said institutions shall: (1) receive all appropriations made by the General Assembly for such institution and all other funds from all other sources belonging to said institution."

We understand that these warrants, when so delivered to the treasurer of the institution, are duly endorsed by him and then returned to your Finance

Committee and presented by a member of the Finance Committee to the Treasurer of State for payment.

Section 135 of the Code provides as follows:

"*Payment—interest on unpaid warrants.* He shall pay no money from the treasury but upon the warrants of the auditor, and only in the order of their presentation; or, if there is no money in the treasury from which such warrants can be paid, he shall, upon request of the holder, endorse upon the warrant the date of its presentation, and sign it, from which time the warrant shall bear interest at the rate of five per cent per annum until the time directed in the next section."

Pursuant to this section then, when there is no money in the treasury from which a warrant can be paid, the Treasurer of State endorses upon the back thereof that the same was presented for payment on a certain date and is not paid for want of funds. The Finance Committee, then acting for the treasurer of the institution and the Board of Education, negotiates the sale of the warrant at par to the Carleton D. Beh Company pursuant to the agreement, the purchaser paying the face value of the warrant, and when the warrant is called for payment by the Treasurer of State, the purchaser is paid interest from the date the warrant was originally presented to the Treasurer of State for payment and by him stamped according to law.

Under the agreement referred to, these warrants are delivered to the purchaser as soon as practicable after they are stamped, and the Carlton D. Beh Company has agreed to take all of these warrants offered for the period of the contract. We understand that when this contract was entered into, various financial institutions in the state were approached for the purpose of selling to them these stamped warrants, but they refused to purchase the same. Some of the institutions took a few of the stamped warrants, but notified you that they would not take any more, and that the warning of these institutions was one of the things that induced you to enter into the agreement to sell all of these to the Carlton D. Beh Company, as otherwise, your institutions might have to close.

We have no statutory provisions in this state in regard to the sale and negotiation of these so-called stamped warrants and our Supreme Court, where a similar proposition was before it, as to the legality of a contract entered into without competitive bidding, said in the case of *Lee vs. City of Ames*, 199 Iowa, 1342, at page 1349:

"We have no statutes in this state requiring contracts for excavation and grading of streets preparatory to paving, to be let under competitive bidding. In the absence of statutory requirement, the city was not required to let the contract for extra excavation under competitive bidding, as is required in paving (see cases). It is well settled that a municipal corporation need not, in making its contract, advertise for bids and let to the lowest bidder in the absence of an express statutory requirement; and where a city is not required to advertise for bids, neither is it required to let to the lowest bidder in case it does adopt such course."

This same law, of course, would apply to a contract entered into by the state or any of its boards, as well as to a contract entered into by a subdivision of the state, and it therefore appears that where the agreement was entered into in good faith and there is no statutory provision requiring the advertisement for bids, that the contract is legal and binding; and the fact that some interest had accumulated on the warrant before it was negotiated would make no difference, as ordinarily, interest would accumulate from the date of the stamping of the warrant to the date of the sale of same, and this

interest also was probably one of the inducements to the purchaser in entering into the contract.

It is, therefore, the opinion of this department that the contract is legal and binding and if the contract so provides, the purchaser may have the interest that has accrued between the date the warrant was stamped by the Treasurer of State and the date when it was sold to the purchaser, and the purchase price paid. There is, of course, no question but what the purchaser is entitled to interest after the date of the purchase of the warrant.

FOREIGN CORPORATION SHOULD BE REQUIRED TO REGISTER AND QUALIFY THE SALE OF ITS PROPOSED STOCK.

December 30, 1933. *Superintendent, Securities Department, Des Moines, Iowa:* We have your inquiry of November 7th asking whether or not the capital stock of the Alta Tiger Mining Company, a Utah corporation, given away, all of which stock is owned by an individual, same being assessable, would be prohibited under the Iowa Securities Law.

We have before us the special application for free shares in the Alta Tiger Mining Company. The application provides that the prospective stockholder is to get free stock, but it is taken with the understanding that assessments may be levied by the corporation, not to exceed nine in number, with a limitation of three assessments of two cents each on one share in each calendar year. The application further provides that the assessments levied are to be used in carrying out a plan of developing the properties of the company and money raised by the assessments is to be sent to the treasurer of the company to cover obligations that may be incurred by the Alta Tiger Mining Company.

In order to get at the intent and purpose of the security act it is necessary to refer to the title of the Iowa Securities Act, as same was passed in Chapter 10 of the Session Laws of 1929, which provides as follows:

"An act to protect investors by regulating sales and purchases, attempted sales and purchases, within the State of Iowa, of stocks, bonds, notes, debentures, evidences of indebtedness, investment contracts, interest in or under profit sharing or participating agreements or schemes, and interest and trusts as hereinafter called securities."

Section 8581-c6 provides, to-wit:

"No securities, except of a class exempt under the provisions of Section 8581-c4 sold in any transaction exempt under any of the other provisions of Section 8581-c5, shall be sold within the state unless such security shall have been registered by notification or by qualification as hereinafter defined."

Security is defined in Section 8581-c3 as follows:

"Security shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest in an oil, gas or mining lease, collateral trust certificate, pre-organization certificate, pre-organization subscription, any transferrable share, investment contract, or beneficial interest in title to property, interest in or under a profit sharing or participating agreement or scheme, or any other instrument commonly known as security."

It is our opinion that the Alta Tiger Mining Company should register and qualify with the Securities Department of the State of Iowa the securities sought to be given away in the instant case, for the reason that we feel that this is an attempt on the part of the company to induce the sale of stock to the people within the state. It is true that under the application the person or persons seeking to become interested in the purchase of stock have the right to forfeit their shares, if they are not in position to pay the assessment levied, and that they incur no liability through the signing of the request

for shares. We feel, however, that the statute defining "security," as set out above, is broad enough to cover the scheme or plan used by the mining company to induce the sale of its stock. We do not hesitate to advise your Department that this company should be required to register and qualify the sale of its proposed stock.

December 30, 1933. *Securities Department, Des Moines, Iowa:* We have your letter of October 31st with reference to an inquiry coming from the town of Havelock, Iowa. It appears that the town of Havelock has eleven thousand dollars ($11,000.00) deposited in a closed bank. They propose to build a water tower and issue warrants marked "Not paid for want of funds," which warrants are to be turned over to the contractor and to be payable out of any dividends paid by the bank or to be received from the state guaranty fund. It is our understanding that the warrants are not to be paid from earnings of the tower. Your question is whether or not the plan comes under the recent ruling covering pledge orders.

In our opinion this transaction has no relation to the recent opinion given you in connection with the sale of pledge orders. Pledge orders are issued under a particular statute described as Section 134-d1 to d-7 inclusive, of the 1931 Code. Said pledge orders are redeemed entirely from the earnings of the municipal project operated in pursuance of the provisions of this statute.

Our understanding is that the water tower in the instant case is to be built entirely from assets of the town of Havelock, which are now available in an unliquidated form. It is unnecessary, in our opinion, to require the registration and qualification of the security in question.

BEER BILL: CONFISCATED BEER: VIOLATION OF BEER LAW.

January 2, 1934. *County Attorney, Rock Rapids, Iowa:* This will acknowledge receipt of your letter of the twenty-eighth ultimo, in which you request the opinion of this Department, on the following question:

In a raid, the sheriff of Lyon county took possession of eighty (80) cases of beer of three and two-tenths per cent (3.2%) alcoholic content by weight. The defendant was violating the provisions of Chapter 37, Acts of the Forty-fifth General Assembly.

What should be done with this beer?

Would the sheriff, in disposing of the same without a permit, under the provisions of the act under consideration, be guilty of violating the act?

Chapter 37, as amended by Chapter 38, Acts of the Forty-fifth General Assembly, does not provide a way whereby beer, taken under the circumstances as outlined above, can be disposed of.

Section 1990, Code of Iowa, 1931, provides for an order by the court in which a direction is made for the disposition of liquors, instruments, utensils, or materials, and vessels containing the same:

"1. By ordering the destruction thereof; or

"2. By ordering any portion thereof consisting of alcohol, brandies, wine, or whiskey, to be delivered, for medical or scientific purposes, to any state or reputable hospital in the county, or in adjoining counties, or to the board of control of state institutions."

Section 1993, Code of Iowa, 1931, provides for the destruction of instruments and sale of material. Said section is to the following effect:

The court shall "direct that all instruments used in the manufacture of intoxicating liquors be converted by the sheriff into junk."

Also,

"All material which may have legitimate uses and the junk referred to shall be sold by the sheriff as chattels under execution and all moneys realized therefrom shall be turned into the treasury for the benefit of the school fund of the county."

Section 1994, Code of Iowa, 1931, provides:

"The clerk of the district court shall call to the attention of the courts on the first day of each term all judgments for the forfeiture of intoxicating liquors, instruments, utensils, or materials, and for the disposition of which no order has been theretofore made, and the court shall thereupon enter an order for the disposition of such liquors, instruments, utensils, or materials."

In the opinion of this Department these sections, which you have suggested in your letter, do not apply if the beer is less than three and two-tenths (3.2%) per cent of alcohol by weight by reason of the following:

Section 1 of Chapter 37, Acts of the Forty-fifth General Assembly provides that Section 1923 of the Code of Iowa, 1931, be amended and further provides:

"that the words 'liquor' or 'intoxicating liquor' wherever used in title six of the Code of Iowa, 1931, shall not be construed to include beer, ale, porter, stout or any other malt liquor containing not more than three and two-tenths per centum (3.2%) of alcohol by weight."

Hence, Section 1990 would not apply as it refers to intoxicating liquor and not to beer. The sheriff of your county, in taking the beer, in question, in a raid could hold the same as evidence and could use it as an exhibit in the trial of the defendant. But after the trial, the beer would be treated as any other exhibit and on application of the defendant, should be returned to him. As we view Chapter 37, Acts of the Forty-fifth General Assembly, there is no limit to the amount of beer that one person can have as long as the provisions of the chapter are not violated with reference to sale. It could be used by him for his own use.

The controlling feature would be as to whether or not the alcoholic content would exceed the amount allowed under the so-called beer law. In the event that it did exceed three and two-tenths (3.2%) per cent of alcohol by weight, then the sections cited, 1990 and 1993, would apply and the court could, by order, either direct the turning over of the beer or any portion of the same to any state or reputable hospital or to the board of control, in accordance with Section 1990 or could direct that the same be sold by the sheriff as chattels under execution and all moneys realized therefrom should be turned into the treasury for the benefit of the school fund of the county, in accordance with Section 1993, Code, 1931, as in the discretion of the court would be the proper disposition of the same. In this connection, it would seem to us that Section 1990 would be elastic enough to provide for the disposition of beer which would exceed the amount of alcoholic content allowed.

In the event that the last situation is true, we can dispose of your question, relative to the liability of the sheriff in selling the beer without a permit, by saying that he is simply doing those acts which are a part of his duties as an officer and also, by reason of the additional fact that he is acting under order of the court. There would be no question as to liability on his part in such a situation.

STATE SINKING FUND: PROPER CLAIM: FUNDS ON DEPOSIT: Under these conditions, in your opinion, would a claim by said township for funds on deposit at the time it suspended business be a just and proper claim against the "State Sinking Fund for Public Deposits?"

January 5, 1934. *Treasurer of State, Des Moines, Iowa:* This will acknowledge receipt of your letter of the third instant in which you request the opinion of this Department on the following matter:

The Clerk of Indiana township, Marion county, Iowa, has presented to this Department, a Proof of Claim, against the "State Sinking Fund for Public Deposits" originating from a deposit said township had in the Knoxville Citizens National Bank and Trust Company of Knoxville, Iowa, at the time it suspended business October 10, 1933.

It appears, however, that the depository designated by proper resolution by this township was the Citizens National Bank of Knoxville, Iowa. It appears also that on or about December 30, 1931, subsequent to the date that the Citizens National Bank was so designated as a depository for this township, said Citizens National Bank was merged or consolidated with the Knoxville National Bank and the name under which said institutions then conducted business was the Knoxville Citizens National Bank and Trust Company. Said claimant, therefore, maintains that the Knoxville Citizens National Bank and Trust Company is a continuation of the Citizens National Bank and also the Knoxville National Bank.

Under these conditions, in your opinion, would a claim by said township for funds on deposit at the time it suspended business be a just and proper claim against the "State Sinking Fund for Public Deposits?"

Sections 7420-d1 and 7420-d2 of the Code of Iowa, 1931, sets out the procedure whereby governing boards may designate depository banks for public funds and, in the last named section, it is provided:

"The approval of a bank as a depository bank shall be by written resolution or order which shall be entered of record in the minutes of the approving board, and which shall distinctly name each bank approved, and specify the maximum amount which may be kept on deposit in each such bank."

Section 7420-b1 provides for the procedure after the closing of a bank and the appointment of a receiver for the same and, among other things, provides that a certified copy of the resolution under which the deposit was made shall be furnished to the Treasurer of State by the treasurer of the body having public funds on deposit therein.

The question presented, as we view it, deals with the care used by the governing body respecting the written resolution and whether or not it is a matter of such vital importance that any failure to follow the strict wording of the statutes in this respect would invalidate a claim as against the State Sinking Fund for public deposits. In the case of Andrew vs. Iowa Savings Bank of Estherville, et al., which came to our Supreme Court from Emmet county and which is reported in 203 Iowa, 1089, the court in its opinion states in part:

"The sinking fund from which this payment is sought to be made is, in a very proper sense, a trust fund. It is one created by legislative enactment, and set apart for the express purpose of protecting public funds lawfully deposited 'by authority of and in conformity with the direction of the local governing council or board.' All of the different public corporations enumerated by the statute that place their public funds in approved depositories are interested in the administration of this state sinking fund. No public corporation can participate in such sinking fund unless it has complied with the provisions of the statute permitting it to so participate. The interests involved are so widespread that the administration of said sinking fund should be strictly guarded, with meticulous care, as a trust fund. Unauthorized deposits cannot be allowed to remain in banks because their withdrawal 'might embarrass the bank,' and because participation in the state sinking fund is anticipated. The statute must be reasonably construed. Following the order of the board of supervisors fixing the limit of the deposit of county funds in the bank at $50,000, the treasurer was entitled to a reasonable time, consistent with the ordinary course of business, to withdraw the amount of funds in excess of the limit fixed by the board. The lapse of six weeks and the gradual withdrawals

in small amounts so as 'not to embarrass the bank' cannot be construed to be an attempt to comply with the order of the board of supervisors within a reasonable time. * * * * * The act providing for the creation of a sinking fund was not intended to operate as a device to assist banks that were in financial 'embarrassment,' by leaving public funds on deposit with them. Such was not the purpose of the Brookhart-Lovrien act.

"* * * * *. Such excess deposit was an unauthorized deposit at the time that the bank was placed in the hands of a receiver, and reimbursement for said funds from said state sinking fund cannot be allowed."

In the case quoted from above, the proper resolution had been passed by the board of supervisors setting the maximum amount which might be deposited in the Iowa Savings Bank and a later resolution was passed reducing the maximum amount. Subsequent to the first resolution and prior to the second resolution, reducing the amount the treasurer had in conformity with the first resolution deposited in the Iowa Savings Bank, public funds in excess of the amount fixed in the second resolution, the treasurer made small withdrawals over a six weeks' period but did not reduce the amount below the fixed amount in the second resolution, as the maximum amount which could be kept in the Iowa Savings Bank. The Supreme Court, in reversing the decision of the trial court, allowed a participation in the State Sinking Fund for the maximum amount as fixed by the second resolution but refused participation for the excess above that fixed in the second resolution for an amount in the neighborhood of $24,000.00.

We cite this case as we feel that this gives an idea of the attitude of our Supreme Court in a comparatively recent pronouncement which would govern the question presented.

Also, see 210 Iowa, 215, which case deals with what is construed to be a reasonable time in which the treasurer has to withdraw funds deposited without the sanction of the governing body.

It is the opinion of this Department, in the instant matter, that one controlling feature of the right to file a claim against the State Sinking Fund would be as to which charter was used in the continuation of the merged bank. In the event the Citizens National Bank charter was used, deposits made prior to the merging, would be the basis of a legal claim as against the State Sinking Fund. But on the contrary if, in the merging and reorganization of the banks, the charter of the Knoxville National Bank was used, then the claim would not be good as against the State Sinking Fund by reason of the fact that the Citizens National Bank, which was designated by the governing board, no longer existed and the continuing of this deposit with no new resolution in the Knoxville-Citizens National Bank and Trust Company would be a continuing of a deposit in a bank not designated as it is the continuation of the Knoxville National Bank and not the Citizens National Bank.

Also, in the case of new deposits made subsequent to the merging, a new resolution would have to be passed by the governing board as this would be a new banking institution which, among other things, would have taken on new liabilities and changed its status in numerous ways whereby it could no longer be said to be the Citizens National Bank or the Knoxville National Bank, but a new banking institution and one not designated in the original resolution.

INSURANCE.

January 5, 1934. *Commissioner of Insurance, Des Moines, Iowa:* You advised us some time ago that the Iowa association of insurance agents had

passed a resolution condemning rebates, fictitious fleets, promiscuous appointment of agents and other such unfair practices, and you requested an opinion as to the effect of Section 8666 of the Code, and whether this section applied to all lines of insurance, including fire insurance, suretyship and so on. You further advised that the Iowa association of agents have agreed that if this statute does so include these, the association will do its own policing in order to better conform to the program of the NRA and the present trend of business ethics.

Section 8666 of the Code was originally enacted by the Twenty-third General Assembly and was known as Chapter 33 of the Laws of that Assembly. It was entitled, "An act to prevent discrimination in life insurance." You will note that this original act pertained only to life insurance companies. It was amended by the Twenty-seventh General Assembly and the words "or associations" were inserted after the word "company" so that it then included life insurance companies or associations. This appears as Chapter 46 of the Laws of the Twenty-seventh General Assembly. The statute was subsequently amended by the Thirty-fourth General Assembly and the words "or casualty, health or accident" now appearing in lines one and two of the present section, were inserted. The title to this Chapter 18 of the Thirty-fourth General Assembly is not very helpful in determining the meaning of the Legislature, as the chapter contains twenty-one sections and the whole act is entitled, an act to amend certain sections of the Code, naming the sections, with the simple explanation after those sections, "all relating to insurance."

Section 13 of Chapter 18 of the Acts of the Thirty-fourth General Assembly, is as follows:

"*Discriminations by casualty companies prohibited.* That the law, as it appears in Section 1782 of the Supplement of the Code, 1907, is amended by inserting in line one, between the words 'life' and 'insurance,' the following: 'or casualty, health or accident.'"

Since that time, the statute has not been changed. As I understand, the intent of the Legislature in originally enacting this statute, was to protect purchasers of life insurance and to prohibit distinction or discrimination between persons of the same class and equal expectancy of life, so that one insured would not have to pay a greater premium than another in order to make up for the secret agreement with an insured, who, by reason of some arrangement, was given insurance at a lower cost. It is my understanding that this has been complied with very religiously by the life insurance companies and their agents. It is also my understanding that the other insurance companies and agents desired that this same provision should also cover their field, and instead of passing a new act for that purpose, the Legislature amended the present act so as to prohibit discrimination by any "life or casualty, health or accident insurance company or association."

It is agreed, I believe, that the statute by reason of the amendments, is now unhappily worded, as, of course, many of the statements therein pertaining to life insurance and the equal expectancy of life can have no application to other lines of insurance. The statute, however, has a definite meaning and this meaning must be ascertained.

There is, of course, no question but what the statute expressly prohibits discrimination in life, health and accident business and your question, as I understand, is whether it also prohibits discrimination in the business authorized to be written under Chapter 404 of the Code, and especially Section 8940

of the Code. These kinds of insurance, as I understand, include everything other than life. There is no direct prohibition in the statute covering all of these various kinds of insurance unless the word "casualty" was inserted by the Legislature for that purpose, and the question will then be more or less determined by definition of the word "casualty" and in determining what the Legislature meant by the use of this word.

In 11 Corpus Juris, 30, the author states the following in regard to casualty insurance:

"A term of quite frequent use, yet it cannot be said that its definition has been very accurately settled by the courts. It is commonly held to include those forms of indemnity providing for payment for loss or damage to property (except from fire or the elements), resulting from accident or some such unanticipated contingency, and for loss through accident, or casualties, resulting in bodily injury or death. The term, however, is more properly applied to insurance against the effects of accidents resulting in injuries to property."

In Couch on Cyclopedia of Insurance Law, Volume I, Section 13, the author states:

"In some jurisdictions, a distinction, largely based on statutes, is drawn between accident and casualty insurance, the former being held to relate to accidents resulting in bodily injury or death, and the latter or property losses resulting from accident or casualty, such as boiler, plate glass, injury to property by strikes, etc. But as a general rule 'casualty insurance' covers accidental injury both to persons and to property."

Our own Supreme Court in Bankers Mutual Casualty Company vs. First National Bank, 131 Iowa, 456, at page 461, has said:

"'Casualty' and 'casualty insurance' are words of quite frequent use, yet it cannot be said that their definition has been very accurately settled by the courts. Strictly and literally 'casualty' is perhaps to be limited to injuries which arise solely from accident without any element of conscious human design or intentional human agency; or as it is sometimes expressed, inevitable accident, something not to be foreseen or guarded against. Standard Dictionary. But in ordinary usage, 'casualty' like 'accident' is quite commonly applied to losses and injuries which happen suddenly, unexpectedly, not in the usual course of events, and without any design on part of the person suffering from the injury. Nor does the fact that the conscious or intended act of some other person produce it, take from such injury its character as an accident or casualty. (See cases.)"

and again, the court stated on page 462:

"Casualty by which a loss of property is occasioned is not necessarily restricted to a conflagration by which the property is consumed, and we can see no reason why, in the absence of other restrictive provisions in the statute, it may not as well include lightning, tornado, flood, hail, or other force or violence by which such property is injured, destroyed, or lost without the agency or design of the owner."

It is apparent that our Legislature in using the words "casualty insurance" in Section 8666 of the Code, intended to use it in its broadest sense to include all kinds of insurance as you will note the title to Section 13, Chapter 18 of the Acts of the Thirty-fourth General Assembly states "discriminations by casualty companies prohibited," and does not mention health and accident companies even though they are expressly named in the body of the bill.

In regard to suretyship, the author in Stearns on Suretyship, Third Edition, on page 5, states:

"The liability of the surety is immediate and direct. He agrees that he will perform the principal contract, fixing upon himself the responsibility from the beginning."

It appears to be quite well settled that suretyship contracts and bonds guar-

anteeing fidelity of the insured are insurance contracts, and in Couch on Cyclopedia of Insurance Law, Volume V, Section 1199-a, the author states:

"It is now fairly well settled, by at least the decided weight of authority, that bonds or contracts which guarantee the fidelity of employees, fiduciaries, officials and so on, if written for profit and in the course of business undertaken therefor, are essentially insurance contracts rather than contracts of strict or pure suretyship, and should be construed as insurance contracts."

The author cites in support of this statement a number of cases, among which is Lamson vs. Maryland Casualty Company, 196 Iowa, 1185.

In Couch on Cyclopedia of Insurance Law, Volume I, Section 8, the author states:

"Under statutes classifying as insurance companies those guaranteeing bonds and undertakings required or permitted in all actions or proceedings, a surety company is an insurance company."

And at Section 30, the author states:

"A class of contracts written by guaranty or surety companies, and generally designated as guaranty insurance, comprises principally contract, credit, fidelity, title, bond and security guaranty generally. Contracts of this kind are now almost universally regarded as those of insurance where the underwriter engages in the business for profit, especially since the terms of such contracts usually resemble the essential elements of an insurance contract."

Our Legislature has apparently recognized these contracts as contracts of insurance, as you will note that Section 8940 includes these various kinds of contracts and obligations under the heading of "Kinds of Insurance." It is, therefore, apparent to us that the words "casualty insurance" as used in Section 8666 of the Code includes every kind of insurance provided for by our statutes, except life, health and accident.

In view of the present order of things, it appears to us that this is the only logical interpretation that could be made of this section, for the day is supposed to be past when unfair advantage may be taken of a customer, client or competitor by reason of secret arrangements and agreements, and under the codes of fair practice now being promulgated and adopted by hundreds of businesses, discriminations cannot be tolerated. This is the age of live and let live, not alone in private dealings between individuals, but in dealings between business concerns and their customers and clients, for it is common knowledge that someone must pay the expense of the business, and if one person is preferred and allowed an advantage and does not bear his proportionate cost of the expense or profit, or does not pay a fair price of the commodity, the additional burden must be placed upon someone else in order to make up the deficit, and we believe that this discrimination is exactly what our Legislature intended to legislate against and prohibit.

It is, therefore, the opinion of this department that Section 8666 of the Code applies to all forms of insurance written under the statutes of this state, and all discriminations and distinctions, including rebates, special favors, special benefits, valuable considerations or inducements not specified in the policy or contract of insurance, are prohibited.

STAMPED WARRANTS: SCHOOL DISTRICT: ORDER OF PAYMENT: TRANSFER OF FUNDS: That stamped warrants including the order of transfer, should be paid in the order of the date of their stamping when there is sufficient money on hand with which to pay them and the warrants and the order to pay, to draw interest from the date of presentation, which, in regard to order, was July 12, 1933.

January 9, 1934. *County Attorney, Shenandoah, Iowa:* We have your letter

in regard to the Clarinda School District and the Shambaugh District. It appears that on July 12th, the auditor issued an order on the treasurer to transfer any funds belonging to the Shambaugh District to the Clarinda District, such transfer, however, not to exceed $461.25. At the same time, there were warrants issued and outstanding by the Shambaugh District, which, as I understand, have not been paid. There is money now available to retire some of these obligations and your question is whether these stamped warrants should be paid first or whether the order should be complied with first.

The order of payment is to be treated the same as a warrant issued and where the order has not been complied with and the amount paid, then it shall be treated as a stamped warrant from the date on which the order was made and the amount not paid.

Previous to the special session of the Legislature, we had no definite procedure for the retirement of stamped warrants by school treasurer. There was, as you know, definite methods for retiring stamped warrants of the state, counties, and so on. Last summer, we held that stamped warrants of a school treasurer must be retired pro rata. Since that time, the special session of the Legislature has recodified all provisions in regard to payment of stamped warrants, which is known as House File 111 of the Acts of the special session of the Forty-fifth General Assembly, a copy of which I am enclosing herewith. You will note that this is now the law of this state.

Pursuant to this provision, these stamped warrants and this order which has been made and which is to be treated as a stamped warrant, are to be retired pursuant to Section 5 of this act. This act, as you know, covers all outstanding warrants and so therefore governs your situation even though the act was not in effect at the time of the original transaction on July 12, 1933.

It is, therefore, the opinion of this Department that the stamped warrants, including the order of transfer, should be paid in the order of the date of their stamping when there is sufficient money on hand with which to pay them, and the warrants and the order to pay, to draw interest from the date of presentation, which, in regard to the order, was July 12, 1933.

ELECTIONS: CHAIRMAN, MEMBER OF COUNTY CENTRAL COMMITTEE: "It appears from Sections 626 and 627 of the 1931 Code of Iowa that the chairman must be a member of the county central committee. Each precinct elects a man member and a woman member of the central committee."

January 11, 1934. *Mr. E. J. Feuling, New Hampton, Iowa:* I have your request of recent date for advice regarding the present situation existing in the Central Committee of Hamilton county.

From the facts presented in the attached records, it appears that Doctor Peppers was not a member of the Central Committee at the time he was selected as chairman and that he has not been a member of the Central Committee. The question then would arise, was his appointment as chairman legal and binding.

This question has already been passed upon by the Attorney General's office under date of October 6, 1932. I am herein sending you a copy of the opinion rendered by the former Attorney General with respect to this matter.

It appears from Sections 626 and 627 of the 1931 Code of Iowa that the chairman must be a member of the county central committee. Each precinct elects a man member and a woman member of the central committee. No two mem-

bers of this committee from the same precinct shall be of the same sex. In case an outsider was selected, that would be giving his precinct more representation than the law allows and would constitute two from the same precinct of the same sex. The office of chairman is not a statutory one. There is no term of office specified under our laws for the county chairman. Each member of the committee is elected for two years. It appears that the county chairman holds his office at the will of the majority of the central committee.

ELECTIONS: Chairman of county party central committee must be member of the committee and elected by its members.

October 6, 1932. *Auditor of State, Des Moines, Iowa:* This will acknowledge receipt of your letter in regard to the following proposition:

"Kindly advise if the county central committee can select as its chairman, someone outside of the committee who is not a member and who was not elected in the primary election or appointed to fill a vacancy?"

The statute merely provides that the county central committee elected in the primary election is organized on the day of convention immediately following the same.

This, of course, leaves the necessary officers to be determined by the committee itself, but since no provision is made for the election of officers outside of the committee, we are of the opinion that the chairman must be a duly elected or appointed and qualified member of the committee.

NEWSPAPERS: BOARD OF SUPERVISORS: OFFICIAL NEWSPAPER, SELECTION OF: COUNTY: "It is therefore the opinion of this office that, so far as determining the contest between newspapers is concerned, as provided in Chapter 274 of the Code of 1931, Chapter 102 of the Acts of the 45th General Assembly should not be taken into consideration."

January 11, 1934. *County Attorney, Eldora, Iowa:* We acknowledge receipt of your letter of January 6th, in which you ask for an opinion on the following:

"We have a newspaper contest on in this county set for Friday afternoon, January 12th, and there is one question which I think will be determinative of the matter.

"One of the papers seeking the position of official paper has not been in existence a year until about the 19th of this month. Chapter 102 of the 45th General Assembly defines what a legal newspaper is and requires that it shall have been published regularly for a period of more than one year. The question comes up as to whether an official newspaper selected by the Board of Supervisors must also be a legal newspaper.

"In this connection, Chapter 102 of the 45th General Assembly, Chapter 274 of the 1931 Code of Iowa, commencing with Code Section 5397, and Chapter 490, commencing with Code Section 11098, had bearing on this question."

Section 5397 of the Code of 1931 provides that the Board of Supervisors, at the January session each year, shall select the newspapers in which the official proceedings shall be published for the ensuing year.

Section 5398 provides as follows:

"Such selection shall be from newspapers published, and having the largest number of bona fide yearly subscribers, within the county. When counties are divided into two divisions for district court purposes, each division shall be regarded as a county."

Section 5399 of the Code of 1931 provides for the number of newspapers in the county.

Section 5400 provides as follows:

"Any publisher who desires that his newspaper be so selected may make written application therefor to the board of supervisors at any time prior to

the making of the selection. If more applications are filed than there are newspapers to be selected, a contest shall exist."

Section 5401 provides for depositing with the County Auditor in a sealed envelope a statement verified by the applicant, showing the names of his bona fide yearly subscribers living within the county, and the place at which each subscriber receives such newspaper, and the manner of its delivery.

Section 5411, as amended by Chapter 105, Section 1, of the Acts of the 45th General Assembly, provides what shall be published in said official newspapers at the expense of the county. This section provides for the publishing of the proceedings of the board, the schedule of bills, the reports of the County Treasurer, and a synopsis of the expenditures of Township Trustees for road purposes. At no place in this chapter is any mention made of the publishing of notices.

Chapter 102 of the Acts of the 45th General Assembly is as follows:

"CHAPTER 102
DEFINITION OF LEGAL NEWSPAPER
H. F. 476

AN ACT to define the requirements of a legal newspaper for publication of legal notices, etc.

Be it enacted by the General Assembly of the State of Iowa:

Section 1. For the purpose of publishing and giving assured circulation to legal notices within this state, where newspapers are required to be used, newspapers of general circulation that have been established and published regularly for a period of more than one year, and which have a bona fide paid circulation recognized by the postal laws of the United States, shall be designated for publication of legal notices as required by law.

Sec. 2. A change of name or ownership of a newspaper thus designated that does not affect its general circulation as above required shall in no way disqualify such newspaper for selection in making such publication of legal notices.

House File No. 476. Approved April 5, 1933."

It will be noted that the title to the act is as follows: "An act to define the requirements of a legal newspaper for publication of legal notices, etc." What is meant by the "etc."?

In our opinion, it means nothing. The act itself provides that it is for the purpose of publishing and giving assured circulation of legal notices within the state, where newspapers are required to be used. In other words, it has nothing to do and does not attempt to define the term, "official newspapers," as used in Chapter 274 of the Code of 1931.

It is therefore the opinion of this office that, so far as determining the contest between newspapers is concerned, as provided in Chapter 274 of the Code of 1931, Chapter 102 of the Acts of the 45th General Assembly should not be taken into consideration.

TITLE TO LAKE BEDS: SUBMERGED LANDS OF NON-NAVIGABLE, MEANDERED, BODIES OF WATER WITHIN THE BORDERS OF THE STATE: "On what legal theory does the State of Iowa claim title to the beds and submerged lands of all non-navigable, meandered bodies of water within the borders of the state?"

Introduction of bill in Congress.

January 12, 1934. *Member of Congress, Washington, D. C.:* This will acknowledge receipt of your request and that of the Board of Conservation and the Fish and Game Commission of the State of Iowa for an opinion and legal brief on the following question:

On what legal theory does the State of Iowa claim title to the beds and submerged lands of all non-navigable, meandered bodies of water within the borders of the state?

The purpose of this inquiry is to determine as to whether or not it is advisable to present a bill, similar to that presented to you in the House of Representatives under date of January 27, 1933, in Congress to convey to the states of Iowa, Wisconsin and Illinois, the beds and submerged lands of all non-navigable, meandered bodies thereof, respectively.

We note that you suggest, in previous correspondence, that a brief sent to you by Mr. Ralph E. Kittinger, former Secretary of the Board of Conservation, which presents the proposition that meandered lakes pass to the State of Iowa under the Swamp Land Act and that the Supreme Court of the United States would be required to hold that the beds of non-navigable, meandered bodies of water pass to the state by virtue thereof, would be creating a dangerous situation as far as Iowa is concerned, by reason of the fact that this state, many years ago, granted all swamp lands to the various counties and that, in many cases, these same lands passed to private individuals and that these grants were omnibus in that they granted all swamp lands generally without attempting to describe them by metes or bounds or by description under government survey. The Swamp Land Act took force as of September 28, 1850, and granted to the several states all forty-acre tracts which were more than one-half swamp.

It is the opinion of this Department, as expressed in the legal brief attached hereto, that the Swamp Land Act is not the basis of the claim of the State of Iowa to title in this matter. Historically, the title is based on the law of England whereby, in about the Fourteenth Century, by order of the King, by virtue of the fact that England, as a commerce nation and interested in its right of commerce, declared itself to be the owner of all sea waters and the English courts declared that rivers, being sea waters, vest in the monarch for the benefit of the people interested in commerce and trading and that the title to all lands below high-water mark belonged to the Crown or to the people. This same rule was first expressed in America at the time of the settlement of the thirteen original colonies.

In the year 1789, Virginia's Legislature authorized the representatives of Virginia in Congress to execute a deed of cession to the Western country with the condition to such deed that all states later to be admitted to the Union should have the same right of sovereignty as had the State of Virginia at the time of the execution of said deed and the rule in Virginia at that time was that the sovereign was the owner of all navigable waters, including both salt and tide waters and all fresh waters that might be navigable. In the grant from Queen Elizabeth, Virginia obtained title to "a tract of land extending from sea to sea," which grant was by charter and as a consequence, Virginia, prior to the formation of the United States, claimed all the Western country to the Pacific Ocean and all land south of the Ohio River and at the time of the formation of the original thirteen states, Virginia had not changed her position with regard to her claims to the Western country.

As a consequence of this rule, all states later admitted, including the states of Iowa, Wisconsin and Illinois, upon the admission of these states to the Union, became the owners respectively of all the waters within their respective boundaries and all lands beneath them by virtue of that condition.

The Supreme Court of the United States has repeatedly stated that the bed of non-navigable lakes or streams passed under the law of the state and in this connection, you will note that the brief, attached hereto, refers to State vs.

Jones, et al., 143 Iowa, 398, which was appealed to the Supreme Court of the United States and the decision of the Supreme Court of Iowa was affirmed and appears in 226 United States Reports, 460. Also, in this connection, see Wright vs. Council Bluffs, 130 Iowa, 274; State vs. Thompson, 134 Iowa, 25:

"The law is settled in this state that the owner of land bordering on a non-navigable body of water meandered by government surveyors has title to the water's edge, and not to the center of the lake, as is held in some states. * * * *. And the Supreme Court of the United States has laid down the rule that this question is peculiarly for the decision of the respective states. Hardin vs. Jordan, 140 U. S., 371."

Iowa was one of the states to declare, very early in its history, that inland streams which were above tide waters and which were navigable in fact, were governed by the general rule applicable to tide waters, and its courts held that the ownership of riparian properties extended only to high-water mark. The ruling of the Supreme Court of the United States in Barney vs. Keokuk, 94 U. S., 324, made reference to the leading case in Iowa, McManus vs. Carmichael, 3 Iowa, 1.

We find on investigation that this question has been a matter of concern to the Department of Justice of this state for a period of thirty-five years and has been the subject of opinions by former Attorneys General Mullen and Remley and that an effort was made by the administration in this Department, just prior to the present one, on the part of former Attorney General Fletcher and Assistant Attorney General Swift, to have an action started by the United States against the State of Iowa to determine the question of title as between the United States and the State of Iowa, which was unsuccessful. Also, we find on investigation that former Senator Albert B. Cummins and Congressman Dowell made an effort in 1917 to have this question disposed of and that a letter, under date of February 17, 1917, was written to Congressman Dowell by Franklin K. Lane, Secretary of Interior, expressing an opinion regarding S. 1174, an act "Granting to the State of Iowa all right, title, and interest of the United States in and to the land within the meander lines, as originally surveyed, of the lakes within said state," in which former Secretary Lane states:

"In my report upon the bill dated July 19, 1913, a quotation was made from the syllabus of the case of Hardin vs. Jordan (140 U. S., 371), to the effect that under the common law the grantee of land bounded upon a lake or pond takes to the center of such lake or pond ratably with other riparian proprietors, and in conclusion my report expressed a doubt as to whether Congress should enact the bill and cast a possible cloud upon the title of the owners of land which lies below the meander line of patented tracts bordering such lakes."

However, in concluding this letter, Secretary Lane states:

"After careful reconsideration of the entire matter, I have to advise you that I know of no reason why S. 1174 should not be enacted."

In a report, No. 963 of Senate Calendar No. 863, 64th Congress, 2nd Session, under date of January 23, 1917, from the Committee on the Judiciary, former Senator Cummins submitted a report to accompany S. 1174, in which he states in part:

"In northwestern Iowa there is considerable low, level ground. There are, in this part of the state, many shallow ponds or lakes of no value as bodies of water, but which were meandered when the government survey was made and which were not included in the patents which from time to time were issued for the bordering lands.

"There are a number of navigable lakes in the state, but this inquiry does not touch them."

And further quoting from said report:

"By reference to the letter of the Secretary of Interior, Mr. Lane, it will be observed that he sees no objection to the proposal upon what may be termed its merits. He is of the opinion, however, that the government has no interest in the matter because it is his understanding of the law that the patents which granted the lands outside the meander lines conveyed to the grantees the pond or lake beds, under the rule which in some places governs riparian rights along non-navigable streams, and that inasmuch as legislation, at this time, neither could nor should disturb the rights of these grantees, the act if passed would be not only futile but vexatious. To support his conclusion he cites: Mitchell vs. Smale, 140 U. S., 406-414; Horn vs. Smith, 159 U. S., 40-43; Hardin vs. Jordan, 140 U. S., 371."

"With the utmost respect for the Secretary's legal advisers we venture to say that they have wholly failed to grasp the subject and totally misconceived the cases noted in the letter.

"It has been ruled in scores of authorities, and among the authorities there is no conflict, that when the United States as a proprietor of land within a state conveys land bordering upon a stream or body of water, whether navigable or non-navigable (we do not include tide-waters or the Great Lakes) the question of riparian rights—that is, whether the grantee of the bordering land takes any part of the land covered by water—is to be determined solely by the law of the state in which the property is situated. (Barney vs. Keokuk, 94 U. S., 324; St. Louis vs. Myers, 113 U. S., 566; Packer vs. Bird, 137 U. S., 661; Hardin vs. Jordan, 140 U. S., 371; Shively vs. Bowlby, 152 U. S., 1; R. R. Co. vs. Butler, 159 U. S., 90; Power Co. vs. St. Paul Water Coms., 168 U. S., 349; Hardin vs. Shedd, 190 U. S., 508.)"

This Department is of the opinion that title is in the State of Iowa by reason of the sovereignty of the state and that the theory, which has been advanced on numerous occasions, that title was granted by the United States to the states under what is known as the Swamp Act of September 28, 1850, is erroneous. We base our opinion on the cases cited herein and the brief attached hereto and on references, to this matter, made by the Supreme Court, notably, as stated by Mr. Justice Holmes in 226 U. S., 460:

"It follows that the plaintiff in error shows no title. By the law of Iowa the riparian owners took title only to the water's edge, and therefore the grants of the adjoining land by the United States did not convey the land under the lake. Hardin vs. Jordan, 140 U. S., 371. Hardin vs. Shedd, 190 U. S., 508. Whitaker vs. McBride, 197 U. S., 510, 512. It follows that the bed of the lake either still belongs to the United States or must be held to have passed to the state. * * * *. It is enough to say that by virtue of its sovereignty the State of Iowa has an interest in the condition of the lake sufficient to entitle it to maintain this suit against an intruder without title, whether the state owns the bed or not."

We are also of the opinion that an act, such as you presented in the last session of Congress, should again be introduced, as it would settle a question on which there is a difference of opinion, which difference has been expressed by the courts of our own state and on which, as far as we can find, the Supreme Court of the United States has never directly passed. This Department, in the summer of 1933, in presenting a matter with reference to a navigable lake in the State of Iowa to the District Court of Cerro Gordo county, Iowa, plead that the title to lake beds in the State of Iowa belong to the state and while the question, decided by Judge Kepler was not exactly placed on this point, yet the court, in its opinion, expressed a doubt if this was true and, hence, we feel that this matter, which has been a controversial point for years, should be brought to a conclusion by a bill for an act, such as you have suggested, and we will do everything within our power to cooperate with you

and we know that this is the expressed desire of the Board of Conservation and the Fish and Game Commission of the State of Iowa.

At the time of the last session of Congress, this Department had some correspondence with Attorney General Otto Kerner of the State of Illinois and with the Department of Justice of the State of Wisconsin. Attorney General Kerner expressed the opinion that title was passed to Illinois by the Swamp Land Act, and as stated herein, we do not agree with this theory.

Apparently, the question is of more concern to the State of Iowa than to the other two states interested in this matter and it has been estimated that approximately five thousand acres of Iowa lake beds have been drained at an approximate cost of seven hundred thousand ($700,000) dollars. This Department has pending, at this time, several actions in this state based on the question involved and the passage of an act, as suggested, would clarify the situation. The question is of great importance at this time to the State of Iowa in view of the various emergency projects of the federal government and work can be done in these areas, in keeping with the National Recovery Program.

RESIDENCE: LEGAL RESIDENCE: PAUPER LAWS: "The general rule is that if a man goes from one state to another or from one county to another, with the intention of making it his home for himself and family, he does, as soon as he reaches his destination, become a resident of that place."

January 13, 1934. *State Reemployment Director, Des Moines, Iowa:* We acknowledge receipt of your letter of January 11th, in which you submit the following three questions:

"1. What constitutes legal residence?

"2. What action on the part of an inhabitant of the Nation is necessary for him to become a resident of the State of Iowa?

"3. Is a man a legal resident, if he moves into the county with the intention of becoming a resident, manifesting his intention by bringing his family into the county and making his domicile there, even though he has been served with a non-residence notice to keep him from acquiring a 'settlement' under the laws affecting indigents or paupers?"

We will answer these questions in the order asked.

1. Probably the best definition of "residence" is that deduced from the Roman Law and quoted in 54 C. J., page 708, as follows:

"That a man's residence is the place where his family dwells or which he makes the chief seat of his affairs and interests."

Among the definitions of the term given in statutes are: the permanent home, and the place at which, whenever absent for purposes of business or pleasure, one intends to return; that place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge shall be deemed the place of residence of such persons; the place adopted by a person as his place of habitation, and to which, whenever he is absent, he has the intention of returning; the place where one remains, when not called elsewhere for labor or other special or temporary purposes, and to which he returns in seasons of repose.

Under the exemption laws of this state, Section 11756 provides as follows:

"11756. Who deemed resident. Any person coming into this state with the intention of remaining shall be considered a resident."

The general rule is that if a man goes from one state to another or from one county to another, with the intention of making it his home for himself

and family, he does, as soon as he reaches his destination, become a resident of that place.

2. We believe that the answer to your first question really answers your second. It is our opinion that, in order for a man to become a resident of the State of Iowa, he must come into the state with the intention of making it his home, and that as soon as he arrives at his destination, he becomes a resident of the state.

3. We believe that this question is answered by our answer to your first two questions. It is our opinion that, when a man moves into one county with the intention of making that county his home, and manifesting that intention by bringing his family into the county and making his domicile there, he is actually a resident of the county, when you consider the general question of residence. In other words, if he came from Illinois to the city of Des Moines, with the intention of making Des Moines his residence, and brought his family with him, he would be a resident of this county to such an extent that if he should die the next day, leaving a will, it would be probated in this county as the county of his residence; or if he should die intestate, leaving a considerable amount of personal property, and in addition to that leaving bank deposits in banks in some other counties in the state, his estate would be administered in Polk county, Iowa, as the county of his residence.

Of course you understand that the provisions of our law relative to settlement are entirely different from a question of residence. The settlement laws or pauper laws are for the protection of the county and to prevent the influx of paupers from one county into another, and those laws have no application to the general question of residence. They were enacted only for the purpose of allowing the different counties to take steps to protect themselves against an influx of paupers from other counties.

BOARD OF EDUCATION: CONTRACTS: Member of Board of Education, being officer and stockholder of brick and tile company, the company cannot sell direct to institution for project, nor can company sell direct to contractor who was successful bidder on contract, but company not prohibited from selling to dealer even though dealer in turn sells to contractor—this being two separate contracts.

January 13, 1934. *Board of Education, Sheffield, Iowa:*

Section 13324 of the Code provides as follows:

"13324. *State employees not to be interested in contracts.* It shall be unlawful for any trustee, warden, superintendent, steward, or any other officer of any educational, penal, charitable, or reformatory institution, supported in whole or in part by the state, to be interested directly or indirectly in any contract to furnish or in furnishing provisions, material, or supplies of any kind, to or for the institution of which he is an officer; and it shall be unlawful for any such trustee, warden, superintendent, steward, or other officer of any state institution, to be directly or indirectly interested in any contract with the state to build, repair, or furnish any institution of which he may be an officer."

As I understand, the propositions you present are three:

1. You are a member of the Board of Education and also a stockholder and officer in the Sheffield Brick & Tile Company. Does this constitute any prohibition against the Sheffield Brick & Tile Company selling direct to the University of Iowa, an institution under the Board of Education?

2. Does this prohibit the Sheffield Brick & Tile Company from selling to the contractor who was a successful bidder on a project at any of the institutions under the Board of Education?

3. Does this prohibit the Sheffield Brick & Tile Company from selling to a dealer when it knows the dealer is to sell the material to the contractor who was a successful bidder on a project at one of the institutions under the Board of Education?

I do not believe there is much question but what you are an officer of the institutions under the Board of Education within the meaning of the above section and that you would profit indirectly by reason of your being a stockholder in the Sheffield Brick & Tile Company. Therefore, I do not believe your company could sell directly to the institutions, nor do I believe that your company could sell directly to the contractor who was the successful bidder on a project of the institution, as you would be interested in the contract. But your company would not be prohibited from selling material to a dealer, even though the company knew that this dealer was in turn going to sell the product to the contractor for a project at the institution, as this would be a matter of two separate contracts, that is, a contract of sale by your company to the dealer, and a contract of sale by the dealer to the contractor, and would not come within the prohibition of the statute, as the statute is only intended to prohibit a direct sale between any person interested, and the institution or any person acting for the institution, or performing a project at the institution, as any other construction of this statute would create an impossibility and would make the statute impossible to enforce.

You, of course, could not have an agreement with the contractor prior to the letting, that as a condition securing the contract, he would use the material of the Sheffield Brick & Tile Company, as that would be wholly illegal, but, in my opinion, there is no prohibition in the Sheffield Brick & Tile Company selling to a dealer, who, in turn, sells to the contractor on an institution project, even though the Sheffield Brick & Tile Company may know at the time of its sale to the dealer that the dealer plans in turn on selling part of the material to the contractor.

CONTRACT WITH CARLTON D. BEH CO.: BOARD OF EDUCATION: STAMPED WARRANTS: (Additional opinion to one rendered December 27th): Contract may be partly oral and partly in writing. As to payment of interest on stamped warrants, referred to House File 111, Special Session, 45th General Assembly.

January 13, 1934. *Board of Education, Des Moines, Iowa:* In looking over our opinion of December 27th, in regard to the contract with the Carlton D. Beh Company, I note that I inadvertently omitted to advise you in regard to two matters that I had in mind.

The first is that under the law of this state, a contract may be partly oral and partly in writing, so that if it is all one contract, the entire agreement need not be either in the written instrument or the oral arrangement.

Second, if the agreement is silent on the question as to whom is entitled to the interest thereon at the date of payment of the warrant, it is the law that such interest cannot be apportioned, and the entire interest from the date of stamping to the date of payment goes to the holder at the date of payment, as these are not ordinary notes for money lent which is already due and payable, and which the debtor has obtained an extension of time of payment, and the interest therefor accrues from day to day and is apportionable, but these are obligations of the State of Iowa, purchased as an investment and the state is under no obligation to pay these so-called stamped warrants

except pursuant to law, and the interest therefor not accruing from day to day, is not apportionable.

For your information, I call your attention to House File 111, Acts of the Special Session, 45th General Assembly, which is an amendment to Section 136 of the Code and other sections in regard to payment of stamped warrants, and which went into effect on December 22, 1933, and which provides in part, as follows:

"Sec. 4. Assignment of warrant. When any warrant shall be assigned or transferred after being so indorsed, the assignee or transferee shall be under duty, for his own protection, to notify the treasurer in writing of such assignment or transfer and of his post office address. Upon receiving such notification, the treasurer shall correct the aforesaid record accordingly.

Sec. 5. Call for payment. When the treasurer has funds on hand in the fund on which such warrants are drawn, sufficient to pay a warrant, he shall, by notice posted at his office and in a place readily accessible to the public, call said warrant or warrants for payment, giving the number thereof. Said warrants shall be paid in the order of presentation.

Sec. 6. Mailing notice—terminating interest. In addition to the posting aforesaid, the treasurer shall mail to each holder of a warrant, in accordance with the aforesaid record, a notice of his readiness to pay said warrant, describing it by number and amount, and note the date of such mailing on the record aforesaid. On the expiration of thirty days from the date of said mailing, interest on said warrant shall cease irrespective of the posting aforesaid."

COUNTY OFFICERS: LENGTH OF DEPUTYSHIP: NEPOTISM: BOARD OF SUPERVISORS: "When the appointment is made, the deputy holds office during the term of or at the pleasure of the appointing officer. The Board's action made the appointment legal. The Board is through, so far as its rights are concerned under the Nepotism Law. We see no reason why the appointment for the term commencing January 1, 1933, cannot be approved by the Board of Supervisors in session in December of 1932."

January 13, 1934. *County Attorney, Primghar, Iowa:* We wish to acknowledge receipt of your letter of January 8th, in which you submit the following questions:

"1. Where the appointment of the deputy county officer does not fix the term of office but the bond of said deputy as approved by the Board of Supervisors states that the bond is for a period of two years, what is the length of the deputyship, one year or two?"

Section 5238 provides for the appointment of deputies. Section 5239 provides that, when the appointment is made, a certificate in writing shall be issued by the appointing officer and shall be filed in the office of the Auditor, where it shall be kept. Section 5240 provides that the certificate of appointment may be revoked by the appointing officer.

It is therefore the opinion of this office that, when the appointment is made, the deputy holds office during the term of or at the pleasure of the appointing officer.

"2. The deputies having been appointed in 1932 for 1933 under the exceptions of the Nepotism Law, is the Board of Supervisors able during the term, to prohibit the employment of relatives under the Nepotism Law?"

As we understand your question, some of the officers appointed deputies who were related to them within the third degree. These appointments were approved by the Board of Supervisors. To now allow the Board to change its position, merely because of a change in the personnel, would be saying that the Board of Supervisors practically had authority to fire the deputy officers at any time they saw fit.

Section 1166 of the Code provides that it shall be unlawful for officers to appoint relatives within the third degree, unless such appointment shall first be approved by the Officer Board Council or Commission, whose duty it is to approve the bond of the principal. Under this section, the approval was made. The Board is through, so far as its rights are concerned under the Nepotism Law. Its action made the appointment legal. The appointment, being legal when made, stands as any other appointment.

"3. Was the approval of appointment of the deputies, in the first instance, for the year 1933, a matter over which the December, 1932, Board of Supervisors had jurisdiction?"

The statute merely provides that the appointment shall be approved by the Board of Supervisors. It does not provide that the appointments must be made after the 1st of January in any one year. We see no reason why the appointment for the term commencing January 1, 1933, cannot be approved by the Board of Supervisors in session in December of 1932.

TAXATION: CHANGE ASSESSMENT ROLL: REFUND OF TAXES: BOARD OF ASSESSMENT AND REVIEW: "* * * the Auditor or Treasurer shall amend the assessment roll and/or tax list to conform to the order of the Board. * * * upon order of State Board of Assessment and Review, reducing the assessment on property for a year, for which the tax has already been paid, the Board of Supervisors should then, upon proper application, direct a refund of said tax."

January 16, 1934. *County Attorney, Dubuque, Iowa:* In Re: 1932 Assessment—Dubuque Hotel Company and Klauer Manufacturing Company. We wish to acknowledge receipt of your letter of December 27th, in which you ask for an opinion on the following:

"On November 7, 1933, the County Auditor of Dubuque county received a letter from the State Board of Assessment and Review, directing the County Auditor to reduce the 1932 assessment on the Dubuque Hotel Company from $255,000 to $200,000, and the 1933 assessment on the same property from $204,000 to $160,000.

"On the same date, a similar letter was received by the County Auditor from the State Board of Assessment and Review pertaining to the Klauer Manufacturing Company, by which letter the Auditor was directed to reduce the 1932 assessment on the Klauer Company property, as follows:

"Lots 3, 4 and 5 of sub-lot 506, and city lot 506-A, from $31,620 to $27,120.

"Lot 2 of sub-lot 509-A, from $3,912 to $3,512.

"Lot 509, City of Dubuque, from $12,496 to $10,396.

"Lot 22, Smedley's Subdivision to Dubuque, from $19,550 to $16,550.

"The County Auditor has corrected the assessment for the year 1933, but has been advised by the County Attorney that the matter of changing the 1932 records would be made the subject of a future opinion, if a claim for refund was filed.

"On December 6, 1933, the Dubuque Hotel Company and the Klauer Manufacturing Company filed claims for refund of the 1932 taxes, which had been paid prior to the time the State Board of Assessment and Review ordered the reduction. In fact, the first half of the taxes for the year of 1932 had been paid in the spring of 1933, and the second half had been paid in September of 1933.

"You submit the following questions:

"1. Has the County Auditor power and authority to change the assessment roll and taxing records, even though ordered to do so by the State Board of Assessment and Review?

"2. Should the tax voluntarily paid by the taxpayer without protest or objection, afterward, upon the order of the State Board of Assessment and Review reducing the taxable value of said property, upon which said tax has been levied, be refunded by the Supervisors to said taxpayer?"

Section 7149 of the Code of 1931 provides as follows:

"The Auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property."

We appreciate the fact that the Supreme Court of this state has held that the County Auditor is without authority to correct an error in an assessment after the tax list has been completed and passed to the County Treasurer. We also realize that the Supreme Court of this state has made the pronouncement that, where a tax is legal, levied under statutory authority upon property subject to taxation, by officers having authority to levy the same, the Board of Supervisors is without authority to refund such tax, when it has been voluntarily paid. These rules, however, were laid down by our Supreme Court prior to the statute which created the State Board of Assessment and Review. None of the cases have been decided since the Acts of the 43rd General Assembly, by which Chapter 329-C2 of the Code of 1931 was amended by adding thereto subsection 9-a of Section 6943-c27.

Chapter 329-C2 of the Code of 1931 confers the powers upon the State Board of Assessment and Review to correct errors, irregularities, or omissions in assessments, to lower or abate an assessment found to be erroneous or excessive, and to lower the valuation of property. The provisions of this chapter, which are material at this time, are subsections 1, 9 and 9-a of Section 6943-c27. They are as follows:

"1. To have and exercise general supervision of the administration of the assessment and tax laws of this state, of boards of supervisors and all other officers or boards of assessment and review in the performance of their official duties, in all matters relating to assessment and taxation, and to have the power to order a reassessment of any or all of the property in any taxing district when in its judgment it is necessary, and in the event the valuation of the assessed property is increased to assess the costs thereof in the case of an individual taxpayer to said taxpayer, and in the case of a taxing district or unit to the unit assessed, to the end that all assessments of property and taxes levied thereon be made relatively just and uniform in substantial compliance with the law. Where the costs are taxed to the taxpayer they shall be added to the taxes assessed against said taxpayer and shall be collected in the same manner as are other taxes, and where the costs are assessed against a particular taxing district or unit they shall be paid by said taxing district or unit.

"9. To require any board of review at any time after its adjournment to reconvene and to make such orders as the state board of assessment and review shall determine are just and necessary; to direct and order any board of review to raise or lower the valuation of the property, real or personal, in any township, town, city or taxing district, to order and direct any county board of equalization to raise or lower the valuation of any class or classes of property in any township, town, city or taxing district, and generally to make any order or direction to any county board of equalization as to the valuation of any property, or any class of property, in any township, town, city, county or taxing district which in the judgment of the board may seem just and necessary, to raise or lower the valuation of any piece of property in any taxing district when in their judgment it is necessary, to the end that all property shall be valued and assessed in the manner and according to the real intent of the law, provided, before raising the valuation of any property anywhere in any taxing district, the board must give ten days' notice of its intention to so raise the valuation and in the case of a taxing district or unit the notice shall be served upon the county board of supervisors by serving the notice upon the county auditor, and in the case of a taxpayer the notice shall be served upon the taxpayer.

"9-a. To correct errors, irregularities, or omissions in assessments of individual taxpayers by adding to the tax list any omitted property or by raising, lowering or abating an assessment found to be erroneous or excessive; pro-

vided, that before making any increase in any assessment or assessment of any property as omitted property the board shall notify the owner of record or person assessed with such property by registered mail addressed to such person at his last known place of residence notifying him to appear before said board within ten days from the mailing of said notice and show cause why such increase or addition should not be made; provided, that any party aggrieved by the action of the state board may within twenty days after such action has been taken appeal from the action of the state board to the district court of the county where the property is situated by serving on the chairman of the state board a written notice of appeal in the same manner as provided for the service of original notices. *The state board shall notify the county auditor or county treasurer of any such correction or change and the county auditor or county treasurer shall amend the assessment roll and/or tax list to conform to the order of the board; but no correction or change of assessment shall be made by the state board after the expiration of five years from the date when such assessment was made or should have been made.*" (Writer's italics.)

It will also be noted that the State Board of Assessment and Review has authority, under Section 6943-c30, to compel the performance of its orders by an action of mandamus. The Supreme Court of this state has held that county officials may be compelled to reduce the assessed valuation of property, when it has been ordered by the State Board of Assessment and Review. In the case of State, ex rel. State Board of Assessment and Review, vs. Webster County, 211 Iowa, 1117, 235 N. W., 303, the action was in mandamus to compel the defendants to comply with such order and to reduce the assessed valuation of certain real estate. The facts were that on June 17, 1930, the State Board of Assessment and Review instructed the Board of Supervisors to reduce the valuation of the real estate involved. On July 8th, the Board of Supervisors, by resolution duly passed, declined to obey the order of the State Board of Assessment and Review. The lower court ordered the writ issued, compelling the Board of Supervisors to carry out the order of the State Board of Assessment and Review, from which ruling the county appealed. The Supreme Court, in an opinion handed down on February 17, 1931, affirmed the decision of the trial court. Among other things, the court held that the duties of the county officials were ministerial, and that it was their duty to comply with the order of the State Board of Assessment and Review.

It will be further noted that the order of the State Board of Assessment and Review in the above cited case was to lower the valuation of the real estate in a particular township for the year of 1930. As a matter of fact, real estate is only listed in odd-numbered years. Although the facts in the Webster county case are a little different, and although the tax had not been paid, yet the case practically controls the questions which you have directed to us.

Aside from the Webster county case, and taking the statute itself on its plain wording, we must arrive at the conclusion that the Legislature intended that the State Board of Assessment and Review should have as much power and authority to lower valuations, as it should have to raise them or to assess omitted property. We quote again the first few lines of Section 6943-c27, subsection 9-a, as follows:

"To correct errors, irregularities or omissions in assessments of individual taxpayers by adding to the tax list any omitted property or by *raising, lowering, or abating an assessment found to be erroneous or excessive* * * *."

The above provision gives the Board power to raise or lower or even to abate an assessment, if the assessment is found to be erroneous or excessive. The last four lines of the same section provide that no correction or change of

assessment shall be made by the State Board after the expiration of five years from the date when the assessment was made, or should have been made. Certainly, we cannot say that these last four lines apply only to raising the assessment or listing omitted property. It provides that no correction or change of assessment shall be made after five years, which would include the lowering of an assessment as much as the raising of an assessment. Note also the use of the word, "excessive."

We are therefore of the opinion that your first question should be answered in the affirmative, that is, that the County Auditor and County Treasurer, in making these changes, are not acting under the provisions of Section 7149, but under the provisions of Section 6943-c27, subsection 9-a, wherein it is provided that the State Board shall notify the County Auditor or County Treasurer of any such correction or change, and that the Auditor or Treasurer shall amend the assessment roll and/or tax list to conform to the order of the Board.

Answering your second question, we repeat again the statement heretofore made that the Supreme Court of this state has pronounced the rule that where a tax is legal, levied with statutory authority upon property subject to taxation, the Board of Supervisors is without authority to refund such tax, when voluntarily paid. We state again that those cases were decided prior to the enactment of subsection 9-a hereinbefore cited. We are now of the opinion that when the State Board of Assessment and Review lowers the assessment, it is the duty of the Board of Supervisors to order the Treasurer to make a refund of said tax, even though the same has been paid voluntarily. It seems to us that Chapter 329-C2 of the Code of 1931 is in its terms broad enough for such construction. If such a construction cannot be placed on subsection 9-a, then that portion of it which grants authority to the State Board of Assessment and Review to lower assessments is meaningless and consequently void.

As we have heretofore stated, Section 6943-c27 confers on the State Board of Assessment and Review the power to have and exercise general supervision of the administration of the assessment and tax laws of the state, of Boards of Supervisors and all other officers or Boards of Assessment and Review in performance of their official duties; to confer with, advise and direct Boards of Supervisors, Boards of Review, and others obligated by law to make levies and assessments, as to their duties under the laws; and to compel the performance of any order by any Board of Equalization *or any other officer.*

We are therefore of the opinion that your second question should also be answered in the affirmative, that is, that upon the order of the State Board of Assessment and Review, reducing the assessment on property for a year, for which the tax has already been paid, the Board of Supervisors should then, upon proper application, direct a refund of said tax.

COUNTY RECORDER: INDEXING OF REAL ESTATE MORTGAGES: "* * * real estate mortgages indexed as chattel mortgages, under the authority provided in Section 10032, should be indexed in strict compliance with Section 10021. In complying with the provisions of this section, she is not only protecting the holder of the lien but she is protecting herself against the possibility of a damage suit for failure to properly index the lien."

January 18, 1934. *County Attorney, Charles City, Iowa:* We wish to acknowledge receipt of your letter of January 12th, in which you ask for an opinion on the following:

"Section 10032 makes provision with reference to the indexing of real estate mortgages which create an incumbrance on personal property. Section 10021 makes provision in reference to the indexing of chattel mortgages. Question has arisen as to whether it is sufficient to merely follow Section 10032, or must the Recorder also include in such index all that is required by Section 10021?"

Section 10021 of the Code of 1931 provides as follows:

"The county recorder shall keep an index book in which shall be entered a list of instruments affecting title to or incumbrance of personal property, which may be filed under this chapter. Such book shall be ruled into separate columns with appropriate heads, and shall set out:

1. Time of reception.
2. Name of each mortgagor or vendor.
3. Name of each mortgagee or vendee.
4. Date of instrument.
5. A general description of the kind or nature of the property.
6. Where located.
7. Amount secured.
8. When due.
9. Page and book where the record is to be found.
10. Extension.
11. When released.
12. Remarks and assignments."

Section 10032, relative to real estate mortgages which create an incumbrance on personal property, is 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. Said indexing shall show the book and page where said mortgage is recorded and such record and index shall have the same effect as though said mortgage were retained by the recorder as a chattel mortgage, or as though the same had been recorded at length in the chattel mortgage records and indexed accordingly. When such mortgage is released of record, the recorder shall make entry thereof on said chattel mortgage index book."

It will be noted that this section provides that a real estate mortgage, which creates an incumbrance on personal property, *shall*, after being recorded at length, be indexed in the chattel mortgage index book. Section 10021 in turn provides how said instruments shall be indexed, that is, by complying with the twelve requirements set out in that section. Under No. 12, remarks and assignments, she should show the book and page where the real estate mortgage is recorded. The purpose of showing where it is recorded is not to avoid the necessity of proper indexing but to avoid the necessity of having it filed as a chattel mortgage and keeping it in the office.

It is therefore our opinion that real estate mortgages indexed as chattel mortgages, under the authority provided in Section 10032, should be indexed in strict compliance with Section 10021. If the provisions of this section are not complied with, the question then arises whether or not there is constructive notice of the lien. If there is not constructive notice and the holder of the mortgage is not thereby protected against subsequent purchasers of the personal property covered by the mortgage, there is no reason why he could not recover damages from the County Recorder. It will therefore be seen that in complying with the provisions of this section, she is not only protecting the holder of the lien but she is protecting herself against the possibility of a damage suit for failure to properly index the lien.

SUPERINTENDENT OF PRINTING: CHARGE OF PRINTING AND SUPPLIES OF SECURITIES DEPARTMENT, REAL ESTATE DEPARTMENT, COSMETOLOGY DEPARTMENT, AND BARBERS' DEPARTMENT: "* * * the printing and supplies used by these departments should not be charged to their allocation from appropriations, but should be charged to the general printing account for all departments under the Superintendent of Printing, so far as the printing is concerned; as to supplies, to the Executive Council to furniture and supply account."

January 18, 1934. *State Comptroller, Des Moines, Iowa:* We acknowledge receipt of your letter of recent date, in which you ask for an opinion on the following:

"Prior to the 45th General Assembly, the Securities Department, Real Estate Department of the Secretary of State's Office, the Cosmetology Department, and the Barbers' Department were required to live on their receipts. If I remember correctly, there was a maximum amount put upon the Securities Department, but the other departments were limited to the total amount of receipts. Under this procedure, all of the printing and supplies were charged to the department. The 45th General Assembly made a direct appropriation to each of these departments without regard to their receipts.

"The question is, should we continue to charge the printing and supplies used by these departments to their allocation from appropriation, or should it be charged to the general printing account for all departments under the Superintendent of Printing, and to the Executive Council for supplies from the furniture and supply account?"

We call your attention to the fact that the acts of the Legislature, which created the Securities Department, Real Estate Department, Cosmetology Department, and Barbers' Department, did not provide that the respective departments were required to confine their expenditures to the receipts. However, the Appropriation Act of the 43rd General Assembly did make such provision. That act, however, was an act which made appropriations for a period of two years. When the 44th General Assembly met, it passed an Appropriation Act, found in Chapter 257 of the Acts of the 44th General Assembly. Section 37 of that act appropriates $142,020.00 to the State Printing Board, to be used in the following manner:

"State Purposes

"For the necessary printing and binding authorized by law, for the General Assembly and for all state departments that have not been provided for in departmental appropriations, $142,020.00.

"This section is not to be construed or interpreted to include the expense of any printing for any of the following departments, bureaus, boards, or associations:"

Then follows a list of the departments, bureaus, boards and associations not entitled to the benefits of the appropriation. None of the departments mentioned by you are included in that list. However, in Section 42 of the act, under the appropriation to the Secretary of State, there is no appropriation made for printing either for the Securities Department or the Real Estate Board. There is, however, an appropriation for "traveling and other expenses."

Now, coming down to the Appropriations Act of the 45th General Assembly, which will be found in Chapter 188 of the Acts of the 45th General Assembly, you will find that Section 34, relating to the appropriation for the State Printing Board, is worded the same as Section 37 of the Appropriations Act of the 44th General Assembly, except that the amount appropriated is $120,000.00. It will be noted that in Section 39, Chapter 188 of the 45th General Assembly, the appropriation made for the Secretary of State is in a lump sum for all of the departments coming under that office. At no place in this act is it pro-

vided that the expenditures of the Securities Department or Real Estate Department shall be confined to the amount of the receipts. The appropriation for the office is in a lump sum, the same as the appropriation for all the other departments, such as the Department of Justice, Treasurer of State, Board of Railroad Commissioners, etc. The same situation prevails relative to the Board of Barber Examiners and the Board of Cosmetology Examiners, as will be noted from a reading of Section 21 of Chapter 188 of the Acts of the 45th General Assembly.

It is therefore the opinion of this office that the printing and supplies used by these departments should not be charged to their allocation from appropriations, but should be charged to the general printing account for all departments under the Superintendent of Printing, so far as the printing is concerned, and in so far as supplies are concerned, it should be charged to the Executive Council to the furniture and supply account.

SCHOOLS: TUITION: RE: CHAPTER 60, SECTION 1, ACTS OF 45TH GENERAL ASSEMBLY: What is your construction of Chapter 60, Section 1 of the Acts of the 45th General Assembly in regard to determining the average cost per child, and should tuition be figured as a part of such costs?

January 19, 1934. *County Attorney, Boone, Iowa:* We have your request for an opinion on the following question:

"What is your construction of Chapter 60, Section 1 of the Acts of the Forty-fifth General Assembly, in regard to determining the average cost per child and should tuition be figured as a part of such costs?"

In regard to children in the elementary grades, tuition should be so figured because if the tuition were not so paid, there would be that additional cost in keeping their own school open, but tuition paid for high school pupils should not be added.

In regard to your second question, children attending the designated school are entitled to transportation if they live the required distance, but are not entitled to transportation when they attend a school of their choice.

SCHOOLS: CLOSED FOR LACK OF PUPILS: RE: CHAPTERS 60 AND 61: As the law existed prior to the 45th General Assembly, when a school was closed for lack of pupils, the district was required to furnish school facilities for "pupils of said district." Chapters 60 and 61 of the 45th General Assembly now provide for "Instruction of pupils of the corporation." What is the effect of this change?

January 20, 1934. *County Attorney, Manchester, Iowa:* You ask our opinion on the following proposition:

"As the law existed prior to the Forty-fifth General Assembly when a school was closed for lack of pupils, the district was required to furnish the school facilities for 'pupils of said district.' Chapters 60 and 61 of the Forty-fifth General Assembly now provide for 'instruction of the pupils of the corporation.' What is the effect of this change?"

The effect of the change from the words "pupils of said school" to "pupils of the corporation" is to give this right to all pupils of the corporation irrespective of whether or not they were in attendance at the school at the time of closing, as formerly required; and this is true, even though the children were sent to an adjoining consolidated district prior to the closing of the school.

WITNESSES: WITNESS FEES: COUNTY OFFICERS: SUPERINTENDENT OF SCHOOLS: All witnesses appearing and giving evidence before the County Superintendent pursuant to the provisions of Chapter 219 of the Code, are entitled to fees, whether subpoenaed or not.

January 25, 1934. *County Attorney, Iowa City, Iowa:* We have your request for opinion on the following proposition:

Are witnesses who appear voluntarily and without subpoenas, entitled to witness fees under the provisions of Section 4301 of the Code?

This section is a part of Chapter 219 pertaining to appeals from the decisions of Board of Directors and hearings before the County Superintendent of Schools and the State Superintendent.

We appreciate that costs were not taxable at common law and being only taxable pursuant to statutory provisions, such statutes must be strictly construed and there can be no implied authority to tax, but it appears that the Legislature here did not have in mind penalizing the witnesses who appeared voluntarily without subpoena; but they had in mind the giving to the County Superintendent a means to require the appearance of witnesses, this means being the subpoena. Therefore, "such witnesses" as used in the statute, means all witnesses and not merely those subpoenaed.

It is, therefore, the opinion of this department that all witnesses appearing and giving evidence before the County Superintendent, pursuant to the provision of Chapter 219 of the Code, are entitled to fees, whether subpoenaed or not.

LEASE: TRANSFER: MITIGWA CAMP: CONSIDERATION SUFFICIENT: Are these leases good?

January 26, 1934. *Governor of Iowa, Des Moines, Iowa:* This will acknowledge receipt of a letter from your office written to you by George J. Keller, Civil Works Engineer of the Iowa State Emergency Relief Committee and the Civil Works Administration, under date of the twenty-first instant, in which the following question is presented:

The Attorney for the Civil Works Administration has rendered an opinion on the lease transferring Mitigwa Camp to the State of Iowa in which he states in part as follows:

"It is my opinion that this lease does not transfer the possession of properties described therein to the State of Iowa, for the reason that there is no consideration therefor."

The same condition exists in the case of the lease relative to the Y. W. C. A. property to the State of Iowa.

Are these leases good?

A lease may be either a written or oral contract and an essential element of a contract is consideration. Consideration is not necessarily a financial arrangement between the parties to an agreement. Our Supreme Court, in the case of Downey vs. Gifford, 206 Iowa, 848; 218 Northwestern Reporter, 488, said:

"Consideration for contract may consist in benefit to promisor or inconvenience or detriment to or waiver by promisee."

Also, in the case of Alexandria Billiard Company vs. Miloslowsky, 167 Iowa, 395; 149 Northwestern Reporter, 504:

"A definite written agreement to make a lease upon fixed terms and conditions is binding although no formal lease is ever executed.

And also:

"Before one person may hold another upon a written agreement to make a lease upon fixed terms and conditions, he must show that he has complied with all conditions imposed on him and that the minds of the parties met upon the terms and conditions of the intended lease as well as the default of the other party."

The Supreme Court of Massachusetts has said, in the case of Berman vs. Holdsworth, 174 Massachusetts, 260:

"'Lease' is in its nature a conveyance as well as a contract."

We do not have before us the leases in question but it appears to us that if there is any question relative to consideration in the leases in question that it can be easily rectified by inserting into the leases a slight money consideration as, for instance, the payment of the sum of One Dollar ($1.00) or, in keeping with the cases cited herein, particularly the case of Downey vs. Gifford, "consideration for contract may consist in benefit to promisor or inconvenience or detriment to or waiver by promisee." In other words, if an act is required which is of any benefit or any detriment on the part of either party or both parties, there is sufficient consideration. Of course, the courts, in some contracts where, apparently, an unfair advantage is being gained by either party, will inquire into the question of adequacy of consideration. However, this would possibly not arise in the leases which we are discussing. Undoubtedly, in leases of the nature under consideration, by reason of the work which is to be done on the premises in question and covered by the lease, there is sufficient consideration. However as stated above, in order to properly pass on the question of consideration, a study of the lease itself would have to be made as it is the best way to determine the proper answer to the question.

CONDEMNATION PROCEEDINGS: NOTICE: FIREARMS: CONFISCATED PROPERTY AND EQUIPMENT: VIOLATION OF LAWS OF THE STATE: FISH AND GAME COMMISSION: "Is a notice, such as the enclosure, necessary * * * *?"

January 27, 1934. *State Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of recent date, with enclosure, copy of Notice of Condemnation Hearing, in which you request the opinion of this Department on the following question:

Is a notice, such as the enclosure, necessary in condemnation proceedings involving firearms or other equipment confiscated and turned over to the State Fish and Game Warden for disposal where the owner has been violating the laws of this state with reference to the use of said firearms or equipment?

We note, from an examination of the enclosure, copy of Notice of Condemnation Hearing, that it is given in pursuance of the provisions of *Chapter* 30 of the Laws of the Forty-fifth General Assembly, and we find in Sections 6 and 7 thereof the following:

"Sec. 6. Any device, contrivance or material used to violate any regulation adopted by the fish and game commission, or any other provision of this chapter, is hereby declared to be a public nuisance and it shall be the duty of the state game warden and his deputies, or any peace officer, to seize such devices, contrivances or materials so used, without warrant or process, and to deliver them to some magistrate having jurisdiction.

"Sec. 7. Said magistrate, upon said delivery being made to him, shall docket the proceeding and fix a day and hour for hearing thereon which shall not be more than ten or less than three days after said delivery. Written notice of the time and place of said hearing shall be personally served upon the person from whom the aforesaid articles or things were taken if such person is found in the county, otherwise, said notice shall be served by posting the same in some conspicuous place as near as reasonably possible to the place where the seizure was made. Said notice shall be so served at least two full days prior to said hearing."

You will notice that Section 6 of the act directs the State Game Warden or his deputies or any other peace officers, after he has seized devices, contrivances or materials, to deliver the same to some magistrate having jurisdiction. The notice, in question, is in keeping with the provisions of Section 7 and is a

direction to that official as to what he shall do. Among other things, he shall fix a day and hour for hearing and a time limitation is set out.

The notice, such as the enclosure, is provided for so that the person, whose property is to be condemned, is given a chance to appear and make any defense which he may have. In the event that he cannot be served personally within the county, a provision is made for the posting of a notice.

It is the opinion of this Department that the notice is necessary and that confiscated property cannot be retained unless notice is given as prescribed and a taking of this property, in accordance with the provisions of the sections referred to herein, would not be within the law unless such notice were given. If no notice were served, the owner of such property would have a legal right to question the confiscating of his property.

REAL ESTATE SALESMEN: SECTION 1905-c25, CODE, 1931: EMPLOYMENT BY ATTORNEY.

January 30, 1934. *Real Estate Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-ninth instant, in which you request the opinion of this Department on the following question:

Does the exemption of "an attorney admitted to practice in Iowa" as provided in Section 1905-c26 of Chapter 91-C2, Code of Iowa, 1931, contemplate or provide that such attorney may employ real estate salesmen as defined in Section 1905-c25?

It is the opinion of this Department that the exemption with reference to an attorney at law, as set out in Section 1905-c26, Code, 1931, that part of which relates to an attorney at law states as follows:

"* * * * nor shall this chapter apply to an attorney admitted to practice in Iowa; * * * *."

is clearly expressed in the negative on the proposition presented.

The intent of the Legislature, in passing this act and making this exemption, was for the express purpose of exempting an attorney at law from the provisions of the chapter by reason of the nature of the work of his profession.

Accordingly, an attorney at law being exempted under the provisions of this chapter cannot employ salesmen as set out in Section 1905-c25, Code, 1931, as it is expressly stated in Section 1905-c26 that "the provisions of the chapter shall not apply to an attorney at law." Hence, an attorney at law cannot employ real estate salesmen as would one who had secured a broker's license.

COURTHOUSE: Building of same: Grant from Federal Government: Depositing of funds: Federal reserve bank: STATE SINKING FUND: Protection of Board of Supervisors of Cass county.

January 31, 1934. *County Attorney, Atlantic, Iowa:* This will acknowledge receipt of your request for the opinion of this Department on the following questions:

Cass county has received a grant from the federal government to be used in the building of a court house and the direction, with reference to the depositing of the funds comprising the grant, is that said fund shall be deposited in a federal reserve bank.

There is no federal reserve bank in Cass county and it will be necessary to go outside of the county to find a proper depository for these funds.

The Board of Supervisors desires information as to the following questions:

1. In the event of the closing of the banking institution in which the funds are deposited and the appointment of a receiver, could the amount of funds on deposit be certified as against the State Sinking Fund for public deposits and is it necessary that the interest, as provided in Chapter 352-D1, Code, 1931, be complied with with reference to interest payments?

2. In the event that a claim, such as is suggested in the first question asked, is not a proper fund to come under the provisions of the chapter relating to the State Sinking Fund for public deposits, what steps should the Board take in order that it might protect itself as to any loss which may occur in the funds on deposit?

In answer to your first question, it is the opinion of this Department that it it not necessary that the interest, as provided in Chapter 352-D1, Code, 1931, be paid on the amount of funds on deposit by reason of the fact that these funds are not contemplated in those included in the chapter relating to the State Sinking Fund for public deposits as this is not money raised by taxation but is, in its nature, a grant or private money for a particular purpose. Hence, there would be no advantage in paying this interest as in the event of a loss, funds of the nature under consideration would not be the basis of a claim as against the State Sinking Fund for public deposits.

In answer to your second question, it is the opinion of this Department in order that the Board of Supervisors may be safeguarded against any loss that you ask the federal reserve bank in which you deposit the funds in question for the placing of government bonds in escrow or bonds of a character regarding which there can be no question in an amount sufficient to protect the Board against any loss. In the event that such an arrangement is made, the Board would be fully protected.

BANKS: BANKING: DEPOSITOR AGREEMENTS: PUBLIC BODIES: STATE SINKING FUND: County has right to enter into depositor agreements and same applies to any other public body, without liability, personal or otherwise, on members of Board of Supervisors or other public body, in event the entire amount of claim of public body is not eventually paid. Re: participation in State Sinking Fund.

February 2, 1934. *County Attorney, Muscatine, Iowa:* Your letters of recent date requesting an opinion as to the right of your County to enter into a depositor agreement with the Iowa State Bank of West Liberty, Iowa, has been turned to me. It appears that a new capital structure is being set up which is assuming a part of the deposit liability of three depository banks and this new structure desires the execution of depositor agreements by the public bodies who were depositors in one or all of the three banks, and you ask whether it is legal to sign such an agreement and if such signing would be without personal liability on the part of the Board, whether the public body would retain its right to participate in the State Sinking Fund, and if the same thing would apply to the town of West Liberty and the West Liberty Independent School District.

The present session of the Legislature has passed House File 122, being an act in regard to the rights of certificate holders to agree to a subordination of the earnings and income of the bank. After this Bill was introduced in the House, it was amended by Senator Byers of Linn County, the amendment appearing on page 167 of the Senate Journal, and being as follows:

"Amend by inserting after Section 6 the following:

Sec. 7. The reorganization of state banks, savings banks and trust companies referred to in this act and in Chapters one hundred fifty-six (156), one hundred fifty-nine (159), and one hundred sixty (160), Acts of the Forty-fifth General Assembly and acts amendatory thereto, may with the approval of the Superintendent of Banking, be brought about through the use of the existing corporation or by the organization of a new bank, where such bank as so reorganized acquires all or a portion of the assets, and assumes all or a portion of the liabilities, of one or more existing banks.

Further amend by renumbering the sections following.
The amendment was adopted."

This bill was passed with the amendment and went into effect by publication and is now the law of this State. You will note that by this amendment, the Legislature defined a reorganization to be where a new bank assumes all or a portion of the assets and liabilities of one or more existing banks. Under this definition, the Iowa State Bank of West Liberty is a bank in the process of reorganization and as stated in the definition, reorganized pursuant to Chapters 159 and 160 of the Acts of the Forty-fifth General Assembly, with the approval of the Superintendent of Banking, which has been secured in this particular case.

Under the provisions of Chapter 157 of the Acts of the Forty-fifth General Assembly, public bodies have the right to enter into depositor agreements looking toward the reorganization, reopening, or consolidation of a bank, and the fact that your depositor agreements provide for a waiver of a part of the statutory assessment does not in any wise affect the situation for the reason that it is a depositor agreement within the provisions of the law, and therefore, public bodies in their discretion have the right and authority to enter into such agreements the same as any other depositor agreement.

It is, therefore, the opinion of this Department, (1) that your County has the right and authority under the law to enter into this depositor agreement and the same applies to the town of West Liberty, West Liberty Independent School District and any other public body; (2) that entering into each depositor agreement is without liability, personal or otherwise, on the members of the Board of Supervisors or any other public body, in the event that the entire amount of the claim of the public body is not eventually paid; (3) after the execution of the depositor agreement, you would stand in the same position to participate in the State Sinking Fund as any other public body in a reorganized bank, but as you know, some questions were raised in regard to whether our present Sinking Fund Law was definite in regard to the mechanics of a public body participating in the State Sinking Fund where their bank reorganized instead of being placed in the hands of the receiver. To take care of this, I prepared an amendment to the Sinking Fund Act which does so provide in a definite manner and method. This act has been recommended for passage by both the Banking Committee of the House and the Senate and I have been assured by the Legislature, will pass as soon as they can get a few minutes' time to work on it.

I have also prepared another bill to legalize all depositor agreements entered into before the passage of the act and this will likewise pass, I have been assured, so I would suggest in order to definitely protect your rights against the Sinking Fund, that the execution of depositors' agreements by public bodies be withheld until after the Legislature has passed these two bills that I have just referred to and I believe that they will do it any day.

SECURITIES: Exchange of Securities: No exchange possible under state of facts offered below under Section 8581-c5, paragraph d: "X Company has outstanding a large amount of debentures which mature at various dates in the future. X Company owns all the capital stock of Y Company, * * * and to stabilize the conditions and avert receivership there are offered to the debenture holders of X Company the new debentures of Y Company in exchange for those of X Company which are outstanding."

February 9, 1934. *Superintendent, Securities Department, Des Moines, Iowa:*

We have your communication addressed to us under date of January 20th asking for an opinion upon the following state of facts:

"The Associated Gas and Electric Company (hereinafter called X Company) has outstanding a large amount of debentures which mature at various dates in the future. X Company owns all of the capital stock of the Associated Gas and Electric Corporation (hereinafter called Y Corporation). Owing to various conditions, X Company finds it necessary to effect a reorganization of its affairs. These conditions reflected in the current market price of the debentures of the X Company which are now selling at a fraction of their face value. In an effort to stabilize conditions and avert a possible receivership, there are offered to the debenture holders of X Company the new debentures of Y Corporation in exchange for the debentures of X Company, which are outstanding at the present time."

Inasmuch as this essentially involves the legality of the exchange of securities of two different corporations it calls for the application of the aforesaid state of facts to Section 8581-c5, paragraph d. The section is as follows:

"d. The distribution by a corporation actively engaged in the business authorized by its charter of capital stock, bonds or other securities to its stockholders or other security holders as a stock dividend or other distribution out of earnings or surplus; or the issuance of securities to the security holders or other creditors of a corporation in the process of a bona fide reorganization of such corporation made in good faith and not for the purpose of avoiding the provisions of this chapter, either in exchange for the securities of such security holders or claims of such creditors or partly for cash and partly in exchange for the securities or claims of such security holders or creditors; or the issuance of additional capital stock of a corporation sold or distributed by it among its own stockholders exclusively, where no commission or other remuneration is paid or given directly or indirectly in connection with the sale or distribution of such increased capital stock."

It is our opinion that an analysis of the statute and the application of it to the state of facts herein set forth would not permit the exchange of securities of these two corporations in the manner and method indicated. A fair construction of the statute quoted, in our opinion, contemplates that the exemption therein provided is designed to permit only the reorganization of a single corporation wherein it may desire to issue new securities in exchange for their own outstanding securities.

If any other construction were put upon the statute under such a state of facts there would be grave danger that the door would be opened for the miscellaneous distribution of securities in the State of Iowa without any supervision by the State Securities Department.

SECURITIES: Union Deposit Company of Denver. The plan proposed by the Union Deposit Co. of Denver for sale of securities under partial payment plan comes clearly within and is governed by the provisions of Chapter 392. The certificates come squarely within the definition of "stock" as provided in Section 8517, Chapter 392, and Chapter 392 must be complied with.

February 9, 1934. *Auditor of State, Des Moines, Iowa:* This will acknowledge receipt of your communication under date of December 23d asking for an official opinion on the investment set-up or agreement of the above company.

You specifically inquire whether or not, from examination of their prospectus, samples of their investment agreements, and their declarations of trust, they come within or without the provisions of Chapter 392 of the Code of Iowa providing for the sale of securities on a partial payment plan.

That part of Section 8517, the first statute under Chapter 392, so far as the same is material to this opinion is as follows:

"The term 'stock' shall mean certificates, memberships, shares, bonds, con-

tracts, debentures, stocks, tontine contracts, or other investment securities or agreements of any kind or character *issued upon partial* payment or installment plan."

Section 8518 of the Code of Iowa is as follows:

"No association contemplated by this chapter shall issue any stock until it shall have procured from the Auditor of State, a certificate of authority authorizing it to engage in such business. To procure such certificate of authority it shall be necessary for such association to file with the auditor of state a statement under oath showing the name and location of such association, the name and post office address of its officers, the date of organization and, if incorporated, a copy of its articles of incorporation, also, a copy of its by-laws, or rules, by which it is to be governed, the form of its certificates, stock, or contracts, all printed matter issued by it together with a detailed statement of its financial condition and such other information concerning its affairs or plan of business as the Auditor of State may require. The same shall be by the Auditor of State laid before the Executive Council for consideration."

A sample copy of the Union Investment Trust Certificate with participating share attached designated as the "Series 'K' type" has the following provisions:

"Certificates, with Participating Shares attached, may be issued from time to time in one or more series at the price of $1,000.00 per Unit ($900.00 per Unit for the Certificate and $100.00 per Unit for the Participating Share). All Certificates of the same series shall bear the same date and no Certificate shall be issued more than ten months after the date thereof. Payments, at the option of the purchaser, may be made in the following amounts per Unit represented by the Certificate purchased.

Option No. 1. One single payment of $1,000.00.

Option No. 2. Initial payment of $100.00 and 90 monthly payments of $10.00 each thereafter.

Option No. 3. 100 monthly payments of $10.00 each."

At this point it may be material to say that Option No. 1 does not come within the purview of Chapter 392 inasmuch as that contemplates the outright purchase of a certificate in one single payment for $1,000.00 and certificates under Option No. 1. have already been registered with the State Securities Department. Your inquiry is therefore directed as to Options No. 2 and 3 above set forth.

As bearing upon the question of whether or not by any construction the purchase of certificates under either Options No. 2 or 3 could be considered as outright purchases of the same or purchase of them upon the installment plan, the following material extracts from the plan submitted to Series "K" type are taken.

Under paragraph 6 bearing upon default the following appears:

"If a payment due on the purchase price of this Certificate or of the Participating Share hereto attached shall not be received by the Trustee within the calendar month in which it is due and payable, such payment shall be considered in default, and the number of units represented by the attached Participating Share shall be reduced, for each $10.00 per Unit in default, by one per cent (1%) of the number of Units, originally represented thereby."

Under paragraph 7 entitled "Withdrawals," the following appears:

"There may be no withdrawal of any portion of the purchase price of the Participating Share hereto attached ($100.00 per Unit), but, subject to the limitations hereinafter provided, the registered owner of any Certificate shall have the privilege at any time before six months prior to the stated maturity of such Certificate, upon ten days' written notice to the Trustee, of withdrawing an amount in cash up to the full amount paid on such Certificate ($900.00 per Unit when fully paid)."

In paragraph 8 entitled "Reinstatement" the following appears:

"Amounts withdrawn in respect to any Certificate may be repaid and thereby

reinstated upon repayment, within three years from the date of withdrawal, and at least twelve months before the stated maturity of such Certificate, of the amount withdrawn, together with an amount equal to ten per cent."

It is the opinion of this office that the plan proposed comes clearly within and is governed by the provisions of Chapter 392. The certificates come squarely within the definition of the term "stock" as provided in Chapter 392, Section 8517, and the above extracts clearly indicate a plan of selling the same upon the partial payment or installment plan. This they may not do under Section 8518 without complying with its requirements.

Your exhibits are herewith returned.

MUNICIPALITY: MILK: LICENSE FEE: The city has a right under Section 5747 of the 1931 Code to enact an ordinance providing for the inspection of milk and similar products and the enforcement of sanitary requirements for their handling and distribution and for the collection of a reasonable license fee therefor.

February 15, 1934. *Senate Chamber, Des Moines, Iowa:* Your favor of the 14th, addressed to the Attorney General, has been referred to me for reply.

You state that the Plymouth Cooperative Company sells butter to stores, restaurants, hotels and others about Mason City and have done so for years; that it also delivers cream to three customers, the cream being pasteurized and that the creamery is operating under a state license. You state further that the Mason City milk inspector stopped the delivery of cream by this company or association and insisted it must secure a license which would cost upwards of $100.00. You ask the question, whether or not the city has a right to require a license and stop the delivery of cream within the city by those who do not have such a license.

You enclose with your letter a little booklet which purports to be milk ordinance No. 277 of the City of Mason City, Iowa, adopted August 5th, 1933. We have examined Article 3, relating to permits and fees but we do not find anything in that article which would provide for a license fee costing anything like $100.00. It provides that it shall be unlawful for any person to sell cream within the city who does not secure from the health department a permit. We are not advised as to what fee is charged for such permit. The article further provides for milk plant inspection fees, milk producers inspection fees, and milk delivery license fees. Article 14 provides that any person who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction for each offense shall be fined not less than $10.00 nor more than $100.00, or be imprisoned not more than thirty days. The question submitted by you does not relate to penalties under this latter article and, therefore, we do not address ourselves to the question of the validity of the article relating to penalties.

In 1910, the Supreme Court of this State in the case of Bear vs. City of Cedar Rapids, 147 Iowa, 341, held that the city should be enjoined from the enforcement of an ordinance providing for the collection of a license fee from all persons selling milk or cream within the city limits. Since that time, however, Section 5747 of the Code has been enacted, this section being as follows:

"Dairy herds and milk. Cities and towns, in addition to powers already granted, shall have within their corporate limits the power by ordinance to:

1. Provide for the inspection of milk, skimmed milk, buttermilk, and cream, for domestic or potable use.

2. Establish and enforce sanitary requirements for the production, handling, and distribution of milk, skimmed milk, buttermilk, and cream for domestic or potable use.

3. Compel the tuberculin test by an accredited veterinarian for dairy cattle supplying milk for human consumption.

4. Provide for the pasteurization of milk, skimmed milk and cream, except that produced from a cow or herd of cows which has been placed and maintained under state or federal supervision for the eradication of tuberculosis, provided that, a cow or herd of cows shall be considered under such supervision when there is on file in the office of the secretary of agriculture an application for such supervision, and except that produced from a cow or herd of cows which has been tested and found free of tuberculosis by an accredited practicing veterinarian."

This section specifically provides that cities and towns may provide for the inspection of milk, skimmed milk, buttermilk and cream for domestic or potable use and establish and enforce sanitary requirements for the handling and distribution of such products. This section does not specifically provide for the collection of the license fee in connection with such inspection and the enforcement of sanitary requirements, but it is our opinion that the city has a right to collect such license fees and inspection fees within reasonable limits as an incident to its right to provide for inspections and enforcement of sanitary requirements. The following is stated to be a uniform rule:

"Municipal corporations can exercise such powers only as are expressly granted and such implied ones as are necessary to make available the powers expressly conferred and essential to effectuate the purposes of the corporation and these powers are strictly construed."

Bear vs. Cedar Rapids, 147 Iowa, at 349.

City ordinances must be fair and reasonable in their operation. The power to regulate does not carry with it the power to license for revenue.

"Ordinarily the power to tax for revenue will not be implied from a general grant of authority as power to regulate or to license and regulate."

Quoting again:

"The prevailing rule is that under the power to regulate, the municipal corporation may license and charge a reasonable fee to cover the expense of regulation, except concerning those occupations where regulation and supervision appear necessary or desirable for the public good."

McQuillin Municipal Corporations, Section 1089.

Our own Supreme Court in the case of Huston vs. City, 176 Iowa, at page 473, makes the following statement:

"It is true, of course, that under power to license, the city has no authority to tax but the mere fact that license fees may result in producing revenue which may be paid into the city treasury for the use of a special or the general fund does not of itself deprive the assessment of the character of a police regulation. * * * And all reasonable intendments must favor the fairness and justice of the fee thus fixed; it will not be held excessive unless it is manifestly something more than a fee for regulation."

Under the holdings of our own court, Section 5747 of the Code would appear to be ample authority for the enactment by the city of an ordinance providing for the inspection of milk and similar products and the enforcement of sanitary requirements for their handling and distribution and for the collection of a reasonable license fee therefor.

As to what is a reasonable license fee, we shall not undertake to express an opinion without further information as to the facts involved.

QUALIFIED VOTER: Qualified voter, as used in Section 4464 of the Code means one who is qualified to vote pursuant to the statutes of Iowa, and whether they have registered or not, is immaterial.

February 20, 1934. *Department of Public Instruction, Des Moines, Iowa:* We have your request for opinion construing Section 4464 of the Code of Iowa, 1931,

and asking whether a qualified voter, as the term is used in that section, means a voter that has duly registered so as to vote pursuant to law, or whether a voter otherwise qualified to vote but has not as yet registered, may sign such a petition and be deemed a qualified voter.

Article II, Section 1 of the Constitution defines who shall be an elector. The Legislature subsequently provided that before such electors were entitled to vote, they must register pursuant to statutory provisions. In our Supreme Court, in the case of Edmonds v. Banbury, 28 Iowa, 267, it was held that the provision requiring registration is constitutional for the reason that the Legislature did not attempt to determine or declare who a qualified voter or elector was, but merely provided that before qualified voters, as defined in the Constitution, could exercise the right to vote, they must register, so the provision in regard to a voter, but merely prescribed regulations for a qualified voter to follow in order to vote.

The Supreme Court of Washington in Hindman vs. Boyd, 84 Pacific, 609, seemed to have taken a similar view to this, while the Supreme Court of Wyoming in Lane vs. Henderson, 7 Pac., (2nd) 588, held that an elector in order to be a qualified voter, must also have been registered pursuant to statute, but it will be noted that the Constitution of Wyoming not only defined who shall be an elector, but also specifically placed the duty on the Legislature to enact registration laws so that registration in that State is by their Constitution impliedly made a part of the definition of whom shall be an elector.

It is, therefore, the opinion of this Department that qualified elector, as used in Section 4464 of the Code means one who is qualified to vote pursuant to the statutes of Iowa, and whether they have registered or not, is immaterial.

SCHOOLS: SCHOOL BOOKS: AS GIFT AND TO LOAN: Pursuant to Section 4238, Code, after vote of the people as provided in Section 4218, Code, the Board may purchase books and loan them to pupils for stipulated compensation and Board may likewise accept the gift of books by any pupils who desire to make gift. Matter of replacement and maintenance of books should also be inserted in question to people.

February 20, 1934. *County Attorney, Keokuk, Iowa:* Your letter of February 16th has been turned to the writer for attention. You request our opinion as to whether your school board may purchase or accept school books as gifts to loan the books to the pupils for a stipulated compensation, and also whether the Board has the power to appropriate necessary funds for the repair, maintenance and replacement of such books. You further inquire whether the matter can be determined by the Board and if the Board would be liable in such event in a suit for damages or to restrain their action.

Section 4238 of the Code, in regard to the duties of the Board, is in part as follows:

"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."

The Supreme Court of Arkansas, in adopting the definition of Webster's dictionary, in the case of State vs. Brown, 102 S.W., 394, stated that the word "loan" is defined to mean to deliver to another for temporary use on condition that the thing be returned, or to deliver for temporary use, on condition that the equivalent in kind shall be returned with the compensation for its use. This, I believe, very well defines the word and a loan does not necessarily mean that it is gratuitous, but that it may be for a compensation—as for instance, a loan of money.

It is, therefore, apparent that such was the intention of the Legislature and that on a vote of the District, school books may be purchased and loaned for a stipulated compensation.

Section 4218 of the Code, as amended, provides the manner of submission of such matters to the voters. It is our thought that Section 4446 of the Code does not apply to your particular question, as this requires that the books be sold to the pupils at cost and likewise, Section 4464 does not apply, as this requires that the text books be provided, free, for the use of pupils.

It is, therefore, the opinion of this Department that pursuant to Section 4238 of the Code, after a vote of the people, as provided in Section 4218 of the Code, as directed that it be done, the Board may purchase books and loan them to pupils for a stipulated compensation and they may likewise of course, accept the gift of books by any pupils who desire to make the gift. It would also naturally follow that if the Board was so authorized, it may make proper expenditures for replacements and maintenance of the books, but this should also be inserted in the question to be submitted to the people. As to whether the Board would be subject to lawsuits and injunctions, of course, we have no knowledge, but in our opinion, such a transaction is legal and therefore, the Board should be victorious if any such suit was instituted.

MUNICIPAL ELECTIONS IN CITIES HAVING PERMANENT REGISTRATION: NAMES IN POLL BOOKS: It is not necessary to write the names of voters in the poll books at elections in cities having permanent registration, except as provided by Section 718-b8.

February 21, 1934. *County Attorney, Leon, Iowa:* I have your favor of the 20th inst. in which you request the opinion of this Department as to whether or not it is necessary to write the names of voters in the poll books in elections in cities having permanent registration. You refer to Section 800 of the Code of 1931, which is as follows:

"800. Names to be entered in poll book. The name of each person, when a ballot is delivered to him, shall be entered by each of the clerks of election in the poll book kept by him, in the place provided therefor."

You also quote Section 718-c2 relating to permanent registration, which provides as follows:

"Entries required. The entries required to be made in Sections 800 and 808 shall be made on the certificates of registration provided for in Section 718-b20."

You submit the following question:

"If the names are not required in the poll books in cities having permanent registration, how will the auditor secure the names to be listed in the alphabetical lists for the primary elections as provided in Section 568?"

This question, we believe, is answered by Section 718-c1, which is as follows:

"718-c1. Party affiliations. The lists of voters provided for in Section 568 need not be prepared in cities having the permanent registration system. The registration cards provided for in this chapter shall be used in lieu of such lists."

You ask this further question:

"And how will the names be secured for jury lists when the condition arises that they must be made by the board of supervisors or the jury commission?"

Chapter 482 of the Code relating to the selection of jurors appears to make no reference to the procedure to be followed where districts having permanent registration are involved, different from the procedure to be followed where permanent registration is not involved. Section 10868 provides that if the

judges of election in any precinct fail to return any list of persons selected for jury service, the board of supervisors shall at the meeting held to canvass the votes at such election make and certify such list or lists for the delinquent precincts, and the auditor shall file such certified lists in his office and cause copies thereof to be recorded in the proper election books. It will be noted from this section that the board of supervisors shall at its meeting held to canvass the votes cast at an election, make and certify such list or lists for delinquent precincts. The board will then have available all of the necessary records.

Section 718-b8 provides for an election register in which the judges shall enter the word "voted" or other information to be made by judges of election immediately after approving the certificate of registration. It would seem this register should constitute a complete record for all purposes for which a record of those who voted might thereafter be necessary.

Construing all of the above statutes with a view to carrying out the intention of the Legislature, it would seem that your first question should be answered in the negative. In other words, it is our opinion that it is not necessary to write the names of voters in the poll books at elections in cities having permanent registration except as provided by Section 718-b8. If, as a matter of practical convenience and for the sake of keeping additional or more complete records, it was deemed advisable or advantageous in cities having permanent registration to keep the poll books provided for by Section 800, although it might entail slight additional expense, there would seem to be no very valid objection thereto. We do not believe Section 800 is intended to require poll books in addition to the election register provided for by Section 718-b8 in cities having permanent registration.

MOTOR VEHICLES: AMBULANCE: HEARSES: FEES: Interpretation of statutes governing license fees for ambulances and hearses. (Whether or not ambulances or hearses are classified as trucks or passenger cars.)

February 27, 1934. *Superintendent Motor Vehicle Department, Des Moines, Iowa:* We acknowledge receipt of your favor of the 8th inst. with regard to the interpretation of the statutes governing license fees for ambulances and hearses. Paragraph two of your letter is as follows:

"The legislature recently passed a bill making a flat rate of $15.00 on hearses. Ambulances were originally included in the bill but were stricken. I understand that in previous years this Department has licensed ambulances as one and one-half ton trucks, charging a fee of $25.00. This Department can find no legal support for that idea and consequently has issued orders to register them as passenger cars on passenger car basis."

Section 4908 of the Code, as amended, is as follows:

"The annual fee for all motor vehicles except motor trucks, hearses, motorcycles, and motor bicycles, shall be equal to one per cent of the value as fixed by the department plus forty cents for each one hundred pounds or fraction thereof of weight of vehicle, as fixed by the department."

Section 4912, as amended, provides that the annual license fee for hearses shall be $15.00 and that passenger car plates shall be issued for hearses. Section 4913 provides that one and one-half ton capacity motor trucks, equipped with pneumatic tires shall pay an annual license fee of $25.00.

It is the opinion of this department that such ambulances as may be classified as trucks should pay the fee provided for by Section 4913. The question first to be determined is a question of fact, viz.: whether or not the particular am-

bulance is a truck so as to bring it within the provisions of Section 4913, or whether it belongs in the general classification of motor vehicles other than trucks so as to bring it within Section 4908.

Some ambulances are built along the line of trucks and possess generally the characteristics of trucks rather than those of passenger motor vehicles, although passengers rather than freight are hauled in ambulances. There are some passenger cars which are used for the dual purpose of carrying passengers and serving as ambulances. When used for ambulance purposes there is a slight rearrangement of the seats. Motor vehicles of this class should be licensed under Section 4908.

This department is not at this time undertaking to define the words "motor truck." Your department and the motor vehicle industry, no doubt, have given the words a definite meaning and when you have determined that a particular motor vehicle is a truck within the common acceptance of that term and according to the acknowledged usages of the motor vehicle industry and the practice of your office, then you should classify it as a truck within the meaning of Section 4913, and in all cases where you cannot so classify it, it must come within the provisions of Section 4908 relating to the annual fee for all motor vehicles except motor trucks.

TAX SALE POSTPONEMENT: "If for any reason, as provided in Section 7262 of the Code of 1931, the sale could not be held on April 2nd, it should be advertised *for the first Monday* of the next succeeding month, in which the required notice can be given."

February 27, 1934. *County Attorney, Onawa, Iowa:* Your letter of February 21st, addressed to the Atorney General, has been placed in my assignment.

"Your question is whether or not the tax sale of December, 1933, which, by act of the Special Session of the 45th General Assembly, was postponed, can be held at some date other than April 2, 1934."

Section 7244 of the Code of 1931 provides for holding the annual tax sale on the first Monday in December. This section was amended by Chapter 133 of the Acts of the 45th General Assembly by adding thereto the following: "No such sale of lands, town lots, or other real estate, shall take place after the taking effect of this act and prior to December 4, 1933, and all such tax sales heretofore advertised are hereby adjourned until December 4, 1933."

The 45th General Assembly Special Session, by Senate File 70, then amended Chapter 133 above quoted by striking "December 4, 1933," wherever it appears in said act, and inserting in lieu thereof "April 2, 1934." The effect of Chapter 133 of the Acts of the 45th Regular Session was to prohibit the holding of the 1932 tax sale, in case it had not been advertised prior to the enactment of said Chapter 133, or if said sale had been advertised, but not held, the effect of the act was to adjourn it until December 4, 1933. Chapter 133 does not specifically provide that the sale must be held on December 4, or, as amended, on April 2. It merely provides that it cannot be held prior to that date.

Section 7262 of the Code of 1931 provides as follows:

"If, from neglect of officers to make returns, or other good cause, real estate cannot be advertised and offered for sale on the first Monday of December, the treasurer shall make the sale on the first Monday of the next succeeding month in which the required notice can be given."

In the face of Senate File No. 70 of the 45th Special Session, amending Chapter 133 of the 45th Regular Session, the tax sale could not be held on December 4, 1933. Therefore, it should be held on the first Monday of the next succeeding

month, in which the required notice could be given. If for any reason, as provided in Section 7262 of the Code of 1931, the sale could not be held on April 2nd, it should be advertised *for the first Monday* of the next succeeding month, in which the required notice can be given. This does not mean that the Treasurer can advertise the sale for April 2nd and on the morning of April 2nd postpone it for a month. It means that if from neglect of the officers to make the return, or other good cause, the real estate cannot be advertised and offered, it should then be advertised and offered on the first Monday of the next succeeding month. Therefore, if he advertises the sale for April, he will have to hold it on that date. However, if for good reason he cannot advertise and offer the property for sale on that date, he should advertise it for the first Monday in May.

SCHOOLS: TUITION: OFFSET IN TAXES CLAIMED WHEN PARENT IS BILLED FOR TUITION FOR CHILD ATTENDING SCHOOL IN DISTRICT FOR ONE YEAR IN WHICH HE WAS NOT A RESIDENT: Parent claiming offset for real estate taxes when billed for tuition cannot go back for a period of five years, but is only entitled to deduct the amount of school tax paid by him in district during year for which tuition is demanded.

March 7, 1934. *County Attorney, Oskaloosa, Iowa:* We have your letter of March 5th asking our opinion on the following proposition:

"Section 4269 provides 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. A child who is not a resident of the New Sharon Independent School District attended school in that district for one year; the father owns real estate located within the district, and has owned such real estate for a number of years. When he was billed for the tuition, he claimed an off-set for real estate taxes which he had paid within the district for the past five years."

We presume that the parent or guardian is personally paying both the tax and the tuition and we believe it is plain that there can only be a donation for the tax paid during the year for which tuition is demanded.

It is, therefore, the opinion of this department that this taxpayer cannot go back for a period of five years, but is only entitled to deduct the amount of school tax paid by him in the district during the year for which tuition is demanded.

CHILD PLACING AGENCY: RESIDENCE OF CHILD: When a child placing agency receives a child pursuant to Chapter 181-A4 of the Code and assumes the rights of a legal guardian over the child and the natural parent relinquishes all rights and duties as to the care and custody of such child, that the residence of such child is the residence of the child placing agency.

March 12, 1934. *Board of Control, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

"Pursuant to the provisions of Chapter 181-A4 of the Code, children are committed to child placing agencies. Upon such commitment, the parents many times relinquish their rights or duties with respect to the care and custody of the child, and in such instances, the child placing agency assumes the rights, powers and privileges of a guardian. Many of these agencies are members of the local community chest, and we desire your opinion as to the legal residence of children surrendered to such child placing agencies."

It is the law that the domicile of minor children is that of their parents and the domicile of an adopted child is that of the adopting parents. It is also the law that if one committed to a state institution has a residence at the time of

commitment, that residence remains during the restraint even though the parent or spouse of the committed person may change his or her residence. The sole question then, is as to the status of these child placing agencies and I understand from you that these agencies are in effect, legal guardians of children so placed in their custody, and that the natural parents relinquish all rights and duties as to the care and custody of the children. This being true, the residence of such children is the residence of the child placing agency.

It is, therefore, the opinion of this Department that when a child placing agency receives a child pursuant to Chapter 181-a4 of the Code and assumes the rights of a legal guardian over the child and the natural parent relinquishes all rights and duties as to the care and custody of such child, that the residence of such a child is the residence of the child placing agency.

BEER BILL: Chapter 37 as amended by Chapter 38, Acts, 45th General Assembly: Permit holder convicted of selling beer in violation of Section 24: Wife desires to secure Class "B" permit.

March 12, 1934. *County Attorney, Estherville, Iowa:* This will acknowledge receipt of your request of this date for the opinion of this Department on the following question:

A Class "B" permit holder in Armstrong, Emmet county, Iowa, was convicted of selling beer in violation of Section 24 of Chapter 37, as amended by Chapter 38, Acts of the Forty-fifth General Assembly, in that he sold beer to persons under 21 years of age. The Council, under Section 7 of the act, has revoked his permit. His wife, who is not engaged in business, seeks to have a Class "B" permit, under the act, issued to her.

As you know, Chapter 37, as amended by Chapter 38, Acts of the Forty-fifth General Assembly, has been amended by House File No. 336, which amendment will become the law in the State of Iowa at midnight March 15, 1934.

The right to issue a permit, under Chapter 37, as amended by Chapter 38, Acts of the Forty-fifth General Assembly, is given to city and town councils under Section 7 and an applicant for a permit must meet the requirements as set out in Section 12 of the Act. If the provisions of Section 12 of the Act are met, it is mandatory that the city council issue a permit.

Section 7 of the Act is clear as to the rights of the city council to issue and revoke permits under the Act and it is not the desire of this Department to invade the rights given to that body under the Act in question. However, it would seem, if the application is not made in good faith, but for the purpose of allowing her husband to continue in business, then the application should be denied as Section 33 of the Act provides in part as follows:

"* * * or is convicted of a sale of intoxicating beverage contrary to the provisions of this act his permit shall be revoked and he shall not again be allowed to secure a permit for the distribution or sale of beer containing not more than three and two-tenths (3.2%) per centum of alcohol by weight nor shall he be an employee of any person engaged in the manufacture, distribution or sale of beer * * * *."

The same provision as quoted above is contained in Section 31 of the new Act, known as House File No. 336.

DAM: RECONSTRUCTION: CENTRAL STATE ELECTRIC COMPANY: IOWA RIVER: ELDORA: RIGHTS: LAND OWNERS: VALID OBJECTION: In the instant case, a superior right exists by reason of the length of time that the dam has been maintained.

March 14, 1934. *Board of Conservation, Des Moines, Iowa:* This will acknowl-

edge receipt of your letter of the thirteenth instant in which you request the opinion of this Department on the following question:

The Central States Electric Company own a dam and dam site in the Iowa River at Eldora. The Company has offered to give a grant of possession to the Fish and Game Commission giving them the right to reconstruct the dam. Does the reconstruction of this dam give rise to a claim for damages to riparian owners?

The facts are as follows:

The original dam was constructed in the late forties or early fifties and was maintained as a mill dam until the year 1912. At this time the dam and dam site was purchased by an electric company, the old dam removed and a cement dam constructed. The electric company operated the dam for power for a number of years. In the year 1930 a portion of the dam was washed out and later in the summer of the same year, the company blew out another portion of the dam. The dam has remained in this situation since and the new dam which is contemplated will be lower than either the cement dam, or the mill dam which was originally constructed.

"The exact question upon which we desire an opinion is as to the rights of the land owners above the dam raising any valid objection to the reconstruction of the dam."

In all questions of riparian rights, the question arises as to whether or not the stream is navigable or non-navigable. In the first instance, the riparian owners own to the high-water mark and in the non-navigable stream, to the thread thereof.

A situation, such as you have outlined, is a subject of a Supreme Court decision in the case of Shortell vs. Des Moines Electric Company, 186 Iowa, 469. This was a suit in equity by riparian proprietors to restrain the defendants from repairing and reconstructing the Center Street dam across the Des Moines river in the city of Des Moines. The Des Moines Ice & Cold Storage Company and the state of Iowa intervened. The court dismissed plaintiffs' petition, and also the petition of intervention of the state. Plaintiffs, the state of Iowa, and the defendant city appealed and the decision of the lower court was affirmed by our Supreme Court. The plaintiffs, in this case, owned certain residences and other property in the city of Des Moines, adjacent to the Des Moines river and north of the Center Street dam. The suit was instituted by plaintiffs for the purpose of enjoining the defendant Des Moines Electric Company, owner thereof, and F. E. Marsh & Company, contractors, from reconstructing a portion of the Center Street dam which was washed out in 1915, and from maintaining same across the river. A dam was first constructed across the Des Moines river at about the location of the Center Street dam in 1847 and maintained at about the place in question by different owners from the time of its original construction to the commencement of this case, which was about 1918.

The court, in this case, deals with the question as to whether or not the river is navigable and states the proposition, which was stated at the outset of this opinion, as follows:

"Riparian owners on a non-navigable stream take to the thread thereof, and on navigable streams, to the high-water mark, and the beds of navigable streams belong to the state."

Also on the question of the right to maintain a dam on navigable waters, the court said:

"Where, for 60 years or more, a dam had been maintained, and, by Chapter 179, 28th General Assembly, the paramount right of the owner to maintain the same recognized, the dam should not be treated as an unlawful obstruction, in a suit by riparian owners to enjoin the reconstruction of a portion thereof which was washed out, and the maintenance of the same across the river."

The court further said, with relation to constructing a dam in navigable waters, regarding obtaining permission of the Secretary of War:

"Should the Des Moines River be treated as navigable waters of the United States, it is a question for the United States and not for the state courts to determine."

In that case there was discussed the question as to whether or not the dam can be higher than the dam which was maintained for a number of years had been but I note that, in the instant matter, as outlined by your presentation of facts, the dam is to be lower than that which has been in existence for a number of years.

The general law, with reference to the rights of the property owners to the flow of waters, is found in Gehlen Brothers, et al. vs. J. F. Knorr, et al., 101 Iowa, 700, and the general rule of law, as stated, is:

"One property owner has no monopoly in the flow of the water; every proprietor above them has the same right to use the water for artificial purposes, and every one of the upper proprietors, for the purpose of enabling themselves to reap the benefit of this right, have, as a natural consequence, the right to temporarily stop the flow of the stream for such length of time as will put them in position to reap the benefits of their rights."

The court said in Willis vs. City of Perry, 92 Iowa, 297:

"In the absence of superior rights acquired by license, grant, or prescription, the rights of such proprietors in the water of the stream are equal."

It is the opinion of this Department that in the instant case a superior right exists by reason of the length of time that the dam has been maintained. The Fish and Game Commission could proceed under the set of facts presented by you.

In this connection see also Gould on "Waters," Section 213.

A recent case, involving a dam, is Harp vs. Iowa Falls Electric Company, 196 Iowa, 317, which deals with the height to which a dam might be erected.

The Engineering Department of your Board can determine the true situation which exists in the matter presented and apply the law as presented herein to the same.

BANKS: BANKING: PUBLIC BODIES AS DEPOSITORS IN REORGANIZED BANKS: STATE SINKING FUND: Public bodies as depositors in state and national banks seeking to reorganize pursuant to law, may legally enter into depositor's agreements, looking toward such reorganization and that such agreements will be valid and binding and such public bodies may file against and participate in the State Sinking Fund for public deposits upon complying with the provisions of law.

March 17, 1934. *Superintendent of Banking, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

"What is the present status of the rights of public bodies as depositors in banks that have reorganized pursuant to law, or will so reorganize hereafter, to file against and participate in the State Sinking Fund for public deposits and may such public bodies legally enter into depositor's agreements?"

Let me suggest at the outset that we believe all of the necessary corrective bills on this proposition have now been passed by the Special Session of the Legislature and therefore all former opinions by us on this proposition are hereby withdrawn and annulled.

Senate File 111 (Chapter 156) of the 45th General Assembly gave to the Superintendent of Banking the management and certain powers over State banks operating pursuant to the act. Chapter 159, as amended by Chapter 160, Acts of the 45th General Assembly, set up a definite manner and method by

which these banks could reorganize by having their depositors enter into agreements, waiving a certain portion of their deposits and agreeing to take trust certificates for the waived portion. Chapter 157, 45th General Assembly, gave to public bodies, as depositors, the right to enter into depositors agreements without prejudice to their rights to participate in the State Sinking Fund for public deposits

Chapter 352-A1 of the Code has heretofore provided that when a bank is closed and placed in the hands of a receiver or trustee in bankruptcy, the public depositor may file against the State Sinking Fund. This chapter, however, at the present time, as amended by House File 257, 45th General Assembly, Extra Session, provides that public bodies may also file against the State Sinking Fund when the depository bank

"has been heretofore or is hereafter reorganized either by reopening, sale to another bank of all or part of its assets with assumption of all or part of deposit liability, consolidation with another bank, purchase of part or all of assets of another bank, merger with another bank or banks; or in any manner authorized by Chapters 156, 159 and 160 of the Acts of the Forty-fifth General Assembly, as amended, or by the National Bank Conservation Act, and especially Section 207 of Title II thereof, and trust certificates have issued pursuant to depositors' agreements; or whenever any bank that has assumed all or part of the deposit liability of a depository bank, has heretofore or is hereafter reorganized in any manner authorized by Chapters 156, 159 and 160 of the Acts of the Forty-fifth General Assembly, as amended, or by the National Bank Conservation Act and especially Section 207 of Title II thereof, and trust certificates have issued pursuant to depositors' agreements."

This act also provides a definite manner and procedure for such public bodies to follow in order to file against and participate in the State Sinking Fund and sets forth the rights of such claimants and the right to participate in the distribution of the assets of the bank or the trust fund. One of the conditions precedent to filing, however, is the following:

"Unless either the bank liable therefor, or claimant has paid all interest due the State Sinking Fund for public deposits to the date of its reorganization, both on that part of claimant's deposit left in the bank and that part represented by the trust certificate, the Treasurer of State may refuse to file the claim of such claimant."

House File 231, 45th General Assembly, Extra Session, legalizes all depositor's agreements heretofore entered into by public bodies where the bank has reorganized pursuant to law and gives to such public bodies the right to participate in the State Sinking Fund under the provisions of House File 257, 45th General Assembly, Extra Session.

The foregoing provisions apply to both national and state bank reorganizations and, of course, have no application to a restricted bank that was not released but was subsequently closed and placed in the hands of a receiver, as the rights of public bodies as depositors in such banks is provided for in Chapter 352-A1, as the same now appears in the Code.

It is, therefore, the opinion of this Department that public bodies as depositors in State and National banks seeking to reorganize pursuant to law, may legally enter into depositor's agreements looking toward such reorganization and that such agreements will be valid and binding and such public bodies may file against and participate in the State Sinking Fund for public deposits upon complying with the provisions of law. It is further the opinion of this Department that all depositor's agreements heretofore entered into by public bodies, pursuant to law, have been legalized by the Legislature and that

such public depositors may file against and participate in the State Sinking Fund upon complying with the provisions of law.

PRIVATE BANKS UNDER SENATE FILE 111 WHICH DID NOT REORGANIZE: Liquidation of such banks must follow the statutory provisions as far as possible as to the liquidation of such banks and this will apply to depositor classifications and preferences. It obviously cannot apply to stock assessments as there is no stock assessment to be assessed.

March 19, 1934. *Banking Department, Des Moines, Iowa:* We have your request for opinion as to whether private banks that have operated under Senate File 111, 45th General Assembly and did not reorganize, but are now in receivership and the Superintendent of Banking has been appointed receiver, should be liquidated pursuant to statutory provisions pertaining to State banks, or in the manner provided by law for private banks.

Section 2 of Chapter 156, 45th General Assembly, provides in part as follows:

"The Superintendent of Banking, whenever he shall have taken over the management of any such banking institution as provided in Section 1, shall have the right and power, with the approval of the Executive Council to proceed to wind up its affairs as provided by law."

Pursuant to this act of the Legislature, private banks being included in Section 1, their management was taken over by the Superintendent of Banking, who, pursuant to the above provision, is winding up its affairs and the question is as to the construction of "winding up its affairs as provided by law." and whether the Legislature intended private banks should be liquidated as provided by law for private banks at that time, or liquidated in the manner of liquidating state banks pursuant to statutes. Heretofore, our Supreme Court has held that the statutory provisions do not apply to private banks, but it appears to us that the Legislature has now gone a step further and has thrown the protection of the Superintendent of Banking around private banks and their depositors and creditors with the thought in mind of treating them in the event of liquidation, as state banks. The Superintendent of Banking, as such, would have no right to liquidate banks. He was given such right by statute and in carrying out liquidations, must follow these statutes. There is no other yardstick for him to follow and he cannot at his own pleasure determine the manner in which he will liquidate banks. The Legislature had intended that he follow any other rule to carry out the mandate to "wind up the affairs of such banks," they would have so legislated and provided a definite procedure in regard to private banks. No other rule was provided. Therefore, as far as possible, he must liquidate private banks pursuant to statutory provisions formerly applying only to state banks.

It is, therefore, the opinion of this Department that the Superintendent of Banking, in liquidating such private banks, must follow the statutory provisions as far as possible as to the liquidation of such banks and this will apply to depositor classifications and preferences. It obviously cannot apply to stock assessments, as there is no stock to be assesed.

I am returning herewith the letter of P. D. Van Oosterhaut in regard to the receivership of the Exchange Bank of Oranville which you forwarded to me with the request.

AUDITS: IOWA STATE COLLEGE: STATE UNIVERSITY: Whether Auditor of State should audit Athletic Council, Memorial Union, Musical Union and other outside endeavors which are closely connected with the schools, but really not a part of the school.

March 19, 1934. *Auditor of State, Des Moines, Iowa:* On December 20th, you requested our opinion as to whether or not in connection with the audits of Iowa State College and the State University, you should audit the Athletic Council, Memorial Union, Musical Union and other outside endeavors which are closely connected with the schools, but really not a part of the school.

It is our opinion that any activity at these schools which is supported in part or wholly by taxes, should be audited and this includes all activities that receive any part of the appropriation of the school or whose separate income, if more than its own demands, should be turned to the treasurer of the institution, and I believe this would cover all of the activities that you have inquired about above. It is my understanding that the Athletic Council at Iowa City is a separate corporation and probably the reason you are not able to find them in the Secretary of State offices was that they are probably incorporated as one for non-pecuniary profit and therefore, their articles would be filed in Johnson county and not with the state, but as this Board undoubtedly receives money from the state appropriation to the University or as any overplus if there should be any, in the hands of this corporation, should be turned into the treasury of the school, I see no reason why this should not be audited the same as the rest of the school.

I would suggest, however, that a footnote be carried at the bottom of the audit of each of these various activities to show their relation to the school in general and any other pertinent matters.

TAXATION: ACCEPTANCE OF 1932 TAXES OF ROCK ISLAND RAILWAY BY COUNTY TREASURERS: PENALTY: "The Company is liable for the three-fourths of 1 per cent a month, regardless of the fact that it is in bankruptcy."

March 19, 1934. *Auditor of State, Des Moines, Iowa:* We wish to acknowledge receipt of your request for an opinion on the following:

"Mr. J. B. Angell, Real Estate and Tax Commissioner for the Chicago, Rock Island & Pacific Railway Company, has written to most of the treasurers in the counties, through which the Rock Island lines pass, advising that he is authorized to pay the first installment of the taxes for the year of 1932, levied against the property of said Company, but that he is not authorized to pay any penalty. He further states that in making payment he can make his draft read, 'to apply on account of 1932 taxes.' He desires to know if the treasurers will accept such payments and issue receipts on regular forms, marking across the face of each receipt the notation, 'The county, in accepting the taxes covered by this receipt, does not waive the right to collect interest or penalty,' or some appropriate reservation.

"He further states that the reason he suggests the issuance of the regular tax receipts is that, if the treasurers accepted the money on miscellaneous receipts, they would be compelled to hold the amount in a trust fund until the unpaid balance was paid or cancelled in said appropriate manner."

We wish to announce again at the outset of this opinion that we are convinced that the Company is liable for the three-fourths of 1 per cent a month, regardless of the fact that it is in bankruptcy. We also state that we do not agree with the last paragraph of the above quotation, that is, that if any other kind of a receipt than the regular tax receipt was issued, the Treasurer would be compelled to hold the money in a trust fund. The tax receipts, which are issued by the County Treasurers, merely are of a form prescribed or suggested by the State Auditor. It is not mandatory that that type of a receipt be used. However, we see no objection to using that receipt, if the portion in printed form, announcing that it is a receipt for a particular installment of the taxes,

is obliterated or marked out, and if there is written across the face of the receipt the following: "The money, for which this receipt is issued, is accepted by the County Treasurer to apply on the principal of the 1932 tax owed by said Company, and does not prejudice the rights of the county or county officials to insist upon the payment of the three-fourths of 1 per cent interest as a penalty, as provided by the laws of the State of Iowa."

We believe there should also be written across the face of the draft by the officer of the Company the following: "To apply on account of 1932 taxes, without prejudice to the rights of the county to insist on the payment of the three-fourths of 1 per cent a month interest on delinquent taxes, as provided by the laws of the State of Iowa."

It is our understanding that you propose to make mimeographed copies of this opinion and forward them to the County Treasurers in all counties, in which the Rock Island owe taxes. We are today forwarding a copy to Mr. J. B. Angell, Real Estate and Tax Commissioner for the Rock Island lines, and also forwarding a copy to Gamble, Read & Howland, attorneys for said Company, in Des Moines, Iowa.

The Federal Court has entered an order that all claims against the Companies hereinafter named must be filed with W. H. Burns, General Auditor of the Trustees, 1106 LaSalle Street Station, 139 W. Van Buren Street, Chicago, Illinois, on or before the 1st day of May. The claim should be a verified proof in duplicate in such form as may be approved by the Trustees and as may be acceptable to the Court. Blank forms for the filing proof of these claims may be obtained from W. H. Burns, at the address above stated. We, therefore, suggest that the County Treasurers immediately obtain the blank forms and file the required proof of claims in duplicate for all taxes, which are due and delinquent, including the three-fourths of 1 per cent, which should be designated as interest, rather than the penalty. The claim, as we say, should cover all taxes due and unpaid, together with the three-fourths of one per cent a month from the time each installment became delinquent, as provided by statute.

As soon as these claims are filed, this office will arrange to assist some one of the County Attorneys in the presentation of his claim, with the agreement that the ruling on that claim shall govern all of the claims filed.

These claims should be filed as claims of the first class.

OSTEOPATHS: LEGAL RESIDENCE AND ELIGIBILITY FOR OFFICE: OSTEOPATHS: REPORT ON INDIGENT PERSONS: A township trustee moving to a neighboring township but maintains his home in the original township can still hold his office; AN OSTEOPATH not being a physician and surgeon cannot fill out doctor's report for medical and surgical treatment of indigent persons to state hospital.

March 20, 1934. *County Attorney, Bedford, Iowa:* Your favor of the 15th inst., addressed to the Attorney General, has been referred to me for attention.

Your first inquiry is in regard to the legal residence for voting purposes of a man who is elected to the office of township trustee and whom, you say, on March 1, 1934, moved to a neighboring township, reserving a room in the house of his former residence, notifying the township clerk that he was maintaining his former or original residence until after the April meeting of the township trustees, and that he would continue to serve as township trustee until after that meeting. Your second paragraph is as follows:

"The question has been asked me if he still can hold office, having moved out of the township but having retained a room there?"

This case turns upon the facts, as the law is quite clear. If this man removed from the township in which he held the office of township trustee, he would immediately be disqualified by his removal from the township and the office would be vacant. The question is whether he has removed from the township in which he held the office. It would be quite possible for him to retain his residence there although he had removed his personal property largely to another township. If he regularly spent his nights in the original township and maintained at all times that he was not changing his residence until after the April meeting, and in good faith intended and undertook to maintain his residence in the original township, it is our opinion that his intention and his maintaining a home in the original township would prevail.

It would be necessary to take all the facts and circumstances into consideration and without knowing all the facts and circumstances, it would be impossible for this office to determine the matter definitely. The officer must do more than merely say he is maintaining his old residence, but if he did maintain a room in which he lived, going from that place to his work in the township of his prospective residence, it seems that he should be able to do that without forfeiting his original residence and his office. Being on the ground, however, and knowing the circumstances, you are in a better position than we to determine whether this party is in good faith or not in so maintaining his original residence, and with the suggestions we have here made, you will doubtless be able to arrive at a correct decision in the matter.

You submit a second question as to whether or not an osteopathic physician can fill out the doctor's report for medical and surgical treatment of indigent persons in the hospital at Iowa City.

Your attention is called to an opinion issued June 26, 1928, by the Attorney General's office in which it was held that an osteopath cannot make the examination of indigent persons under the provisions of Chapter 199 of the Code, not being a physician and surgeon. The opinion calls attention to Section 2181 of the Code, and particularly, paragraph 5 thereof, defining the words "physician and surgeon, osteopathic surgeon," etc. The opinion ends by saying:

"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."

BEER BILL: HOUSE FILE NO. 336: NEAR BEER: CEREAL BEVERAGE: LABELING OF SAME: SECTION 36 OF THE ACT: Does this beer come under the provisions contained in Section 36 of the act, House File No. 336 of the Acts of the Extra Session of the Forty-fifth General Assembly, which relates to the label which shall be placed on beer sold in this state?

March 20, 1934. *County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your request for the opinion of this Department on the following question:

A number of distributors in Iowa sell beer which is termed "near beer" to retailers which is presumed to contain one-half of 1 per cent of alcohol by weight.

Does this beer come under the provision contained in Section 36 of House File 336 of the Acts of the Extra Session of the Forty-fifth General Assembly, which relates to the label which shall be placed on beer sold in this state?

Subdivision (i) of Section 6, House File No. 336, which is the new beer law, is as follows:

" 'Beer' for the purpose of this act shall mean any liquid capable of being used for beverage purposes made by the fermentation of an infusion in potable water of barley, malt and hops, with or without unmalted grains or decorticated and degerminated grains containing not more than four per centum (4%) of alcohol by weight."

Section 36 of said law provides:

"All bottles, kegs, barrels or other original containers in which beer is sold in this state shall bear a label on the outside thereof, stating as follows: 'This bear does not contain more than four per centum (4%) of alcohol by weight.' The label on any bottle, keg, barrel or other container, in which beer is offered for sale in this state, representing the alcoholic content of such beer as being in excess of four per centum (4%) by weight shall be conclusive evidence as to the alcoholic content of the beer contained therein."

It will be noted in the subdivision cited above that the definition of beer is broad and, undoubtedly, includes all beer. It will be noted, in both subdivision (i) of Section 6 and in Section 36, that the words used is that it relates to beer "containing not more than four per centum (4%) of alcohol by weight" which, of course, refers to the alcoholic content by weight of any percentage less than four per centum (4%).

Chapter 147 of the 1931 Code of Iowa which relates to the regulation and inspection of foods, drugs, and other articles and the sections contained in said chapter are general in that Section 3029 provides what articles shall include food.

In paragraph 5 of Section 2808 of the 1931 Code of Iowa there is a definition of food as follows:

" 'Food' shall include any article used by man for food, drink, confectionery, or condiment, or which enters into the composition of the same, whether simple, blended, mixed, or compound."

This, undoubtedly, includes beer. Section 3042 of the 1931 Code deals with mislabeling articles.

However, we are of the opinion that for two reasons these sections do not apply in the matter under consideration; first, by reason of the fact that the sale of beer containing one-half of 1 per cent of alcohol by weight would not be in conflict with Section 36 of House File No. 336, as the wording used in that section in part is as follows:

" 'This beer does not contain more than four per centum (4%) of alcohol by weight.' "

Second, House File No. 336 takes precedence over Chapter 147 and other chapters under Title X of the Code, relating to regulation and inspection of foods, drugs and other articles, by reason of the fact that in House File No. 336, the Legislature was dealing with a specific product, beer, and has designated the manner by which beer can be sold in Iowa and in Section 36 the manner is stated in which all beer sold in this state shall be labeled.

ELECTION: RIGHT TO VOTE: Indigent poor temporarily located in a home or hotel outside the city limits of former residence, entitled to vote at city election in the precinct they formerly voted in provided they had not signified their intent of becoming residents in the precinct or township where they are temporarily located.

March 20, 1934. *County Attorney, Davenport, Iowa:* I have your letter of March 13th wherein you request an opinion from this department on the following questions:

"As a manner of dealing with poor relief, Scott county established a Civic Hotel in the city of Davenport where indigent poor who were single men resided.

When the Federal Transit Bureau was established, they decided to use the building in the city of Davenport that was used by the Civic Hotel and therefor rented the Bettendorf Hotel located in the town of Bettendorf, Scott county, Iowa, and the men were moved from the Civic Hotel to the Bettendorf Hotel in Bettendorf and the Federal Transit Bureau is using the Civic Hotel in Davenport for their purposes.

Are these men who are now living in Bettendorf, residents of the city of Davenport or the town of Bettendorf? Should the necessary head tax be assessed by the assessor in Bettendorf or by the assessor of the city of Davenport township? Would they vote in Bettendorf town election or would they have the right to come to Davenport and vote in the City Election here at the precinct where they formerly resided? It is my understanding that residence being a question purely of intent, that it would be only just for them to vote at the City Election in Davenport, voting in the precinct where they formerly resided. If they were not properly registered I believe that they would have the right to register in the city of Davenport giving their former address and specifying that their stop in Bettendorf was only temporary.

Will you please give me the benefit of your opinion on these matters and I will appreciate having an early reply as registration is now going on as well as assessments being made and it is necessary to have this settled before the impending city and town elections."

It is the opinion of this department that you are absolutely correct in your statement of the law as set forth in the above letter.

REAL ESTATE: BROKER'S LICENSE: ATTORNEY: FIRM OF CHAMBERLAIN & KIRK.

March 21, 1934. *Real Estate Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the nineteenth instant in which you request the opinion of this Department on the following question:

The firm of Chamberlain & Kirk is composed of Joe Chamberlain, who has a broker's license, and Arthur Kirk, who is an attorney at law and who does not have a license. They have a number of salesmen. Is there anything in the Real Estate License Law which would disbar Mr. Kirk from transacting any and all real estate business which might come into their office?

You state:

"This Department has taken the stand that it will not issue a salesman's license to a person who wishes to work through a lawyer. While the law does give a lawyer the right to transact any and all real estate business, we do not feel he has any right to have salesmen working under him unless he takes out a broker's license."

It is the opinion of this Department that you are correct in the stand taken by your Department in that a lawyer without a broker's license could not employ salesmen working under him under this act by reason of the fact that Section 1905-c26, 1931 Code of Iowa, which relates to an attorney at law, states:

"* * * * * nor shall this chapter apply to an attorney admitted to practice in Iowa; * * *."

In a ruling made to your Department, under date of January 30, 1934, we stated:

"The intent of the Legislature, in passing this act and making this exemption, was for the express purpose of exempting an attorney at law from the provisions of the chapter by reason of the nature of the work of his profession.

"Accordingly, an attorney at law being exempted under the provisions of this chapter cannot employ salesmen as set out in Section 1905-c25, Code, 1931, as it is expressly stated in Section 1905-c26 that 'the provisions of the chapter shall not apply to an attorney at law.' Hence, an attorney at law cannot employ real estate salesmen as would one who had secured a broker's license."

In the situation which you have presented in your present request for an opinion, the same rule would apply. Mr. Kirk, in accordance with the exemp-

tion allowed by law, would be exempted in his practice as an attorney at law. However, if Mr. Kirk engages in the real estate business and desires to employ salesmen, then, he should have a broker's license.

It is our opinion that the exemption, as stated, is to facilitate the practice of law in that every time a lawyer transacted business for his client involving real estate, it is not necessary for him to have a broker's license. But if he desires to engage in the real estate business and especially so, if he wishes to employ salesmen in the conducting of business of this nature, then it would be necessary to have a broker's license.

ENGINEERING: SUPERVISION OF CONSTRUCTION OF BUILDINGS: Supervision of construction of public buildings does not have to be by a licensed engineer.

March 21, 1934. *Iowa State Board of Engineering Examiners, Des Moines, Iowa:* Your favor of the 12th inst., addressed to the Attorney General, has been referred to me for reply.

You state that a member of your State Board states that in one of the larger cities of the state, several new school houses are to be built and he submits to you and you in turn submit to us the following question:

Does the law of this state permit the supervision of the construction of these buildings to be done by anyone other than a licensed engineer?

The law of this state relating to civil engineers is contained mainly in Chapter 89 of the Code, Section 1854 being the first section of that chapter is as follows:

"1854. Registered engineers and surveyors. No person shall practice professional engineering or land surveying in the state unless he be a registered professional engineer or a registered land surveyor as provided in this chapter, except as permitted by the last section thereof."

Section 1855 defines certain terms including the term, "professional engineering." The part of this section relating to professional engineering is as follows:

" 'Professional engineering' means the practice of any branch of the profession of engineering other than military engineering. The practice of said profession embraces the designing and the supervision of the construction of public and private utilities, such as airports, railroads, bridges, canals, harbors, river improvements, light houses, wet docks, dry docks, ships, barges, dredges, cranes, floating docks, and other floating property, the design and the supervision of the construction of steam engines, turbines, internal combustion engines and other mechanical structures, electrical machinery and apparatus, and of works for the development, transmission or application of power, and the designing and the supervision of the construction of municipal works, irrigation works, water supply works, sewerage works, drainage works, industrial works, sanitary works, hydraulic works, structural works, and other public and private utilities or works which require for their designing or the supervision of their construction such experience and technical knowledge as are required by this chapter.

"The execution as a contractor of work designed by a professional engineer or the supervision of the construction of such work as a foreman or superintendent for such a contractor, or the construction, improving, or extending of private drains or drainage works, private irrigation works, private water supply works, or other works of a private nature shall not be deemed to be the practice of professional engineering within the meaning of this chapter.

"A 'professional engineer' means any person who practices professional engineering."

The first part of the definition is very broad where it is defined to mean the practice of any branch of the profession of engineering other than military

engineering. If the definition ended there, we would incline to the opinion that the supervision of the construction of public school buildings would be a part of the practice of engineering. We do not claim to be familiar with the practice of engineering, but we assume that in its broader sense the practice would be held to include the supervision of the construction of such public buildings. The statutory definition, however, appears to limit the term "professional engineering" somewhat, but provides that the practice of said profession embraces the designing and supervision of the construction of public and private utilities such as airports, railroads, canals, harbors, river improvements, etc., and the design and supervision of the construction of steam engines, turbines, etc., and other public and private utilities or works which require for their designing or the supervision of their construction such experience and technical knowledge as are required by this chapter.

We do not believe that school houses would be classified as public or private utilities or works in the sense in which these words are used in Section 1855. We must read this section as a whole and not base our opinion upon any particular portion of the section without considering all other parts of the section. If the construction of public buildings were within the contemplation of the legislature when this statute was enacted, it could readily have named public buildings along with public and private utilities and the various kinds of public and private works, specifically mentioned. We are convinced that as a practical matter such public buildings could be built more satisfactorily and more economically under the supervision of a professional engineer than under the supervision of anyone not so qualified, and this is true particularly in the case of large buildings involving the expenditure of large sums of money. We believe the money spent for the employment of an engineer to supervise the construction of such buildings would be money well spent and would result in substantial financial saving to the school districts and to the public. We are not prepared to say, however, that Section 1855 requires that the supervision of the construction of such buildings shall be done only by a professional engineer.

LIQUOR COMMISSION: APPOINTMENT OF LEGAL COUNSEL: "It is therefore the opinion of this Department that the Liquor Commission are not authorized or empowered to appoint legal counsel to represent their Commission, and that the legal representative of said Commission is the Attorney General of the State of Iowa."

March 22, 1934. *Governor of Iowa, Des Moines, Iowa:* You request an opinion from our Department upon the following proposition:

"Can the Liquor Commission appoint legal counsel to represent them and pay for said legal services out of the funds under their control?"

Your attention is called to the following sections of the Iowa law:

Section 152 of the 1931 Code of Iowa provides as follows:

"Special counsel. No compensation shall be allowed to any person for services as an attorney or counselor to any department of the state government, or the head thereof, or to any state board or commission, except in cases specially authorized by law * * *."

Section 5 of the Liquor Control Act, in sub-paragraph 4, provides that the Liquor Commission may appoint a secretary and such other assistants and/or employees as may reasonably be necessary and at such salary each as may be fixed by said Commission.

In accordance with Section 5, sub-paragraph 4, of the Liquor Control Act, the

Liquor Commission, in addition to a secretary, may appoint such other assistants and/or employees as may be reasonably necessary, and may fix their salaries. Under this section, they might appoint an attorney as an assistant or as an employee of the Commission, for the purpose of assisting them in the administration of this act. The mere fact that the employee was an attorney would not render him ineligible to accept such an appointment. However, his status would be that of an administrative assistant or employee and not that of an attorney or as legal counsel for the Commission, and would not be authorized to issue any official legal opinions.

It is the law and policy of our state government to have the Attorney General represent the State of Iowa and all of its Commissions and Departments in all legal matters, except as otherwise specially authorized by law. The only exception under our law is in the case of the legal counsel for the Railroad Commission. This exception is specifically authorized by Section 7913 of the 1931 Code of Iowa.

Sub-paragraph 4 of Section 5 of the Liquor Control Act does not specially authorize the Liquor Commission to appoint legal counsel to represent the Liquor Commission. Their legal representative is the Attorney General of the State of Iowa, the same as any other Commission or Department of the state government, except that of the Railroad Commission.

It is therefore the opinion of this Department that the Liquor Commission are not authorized or empowered to appoint legal counsel to represent their Commission, and that the legal representative of said Commission is the Attorney General of the State of Iowa.

BEER BILL: HOUSE FILE NO. 336, ACTS, EXTRA SESSION, 45TH GENERAL ASSEMBLY: DELIVERY OF BEER: COLLECTION ON DELIVERY: CHARGED TO ACCOUNT.

March 22, 1934. *County Attorney, Cedar Rapids, Iowa:* This will acknowledge receipt of your letter of the twentieth instant in which you request the opinion of this Department on the following question:

May a class "B" permit holder under the new beer law accept telephone orders for beer from persons in a nearby office building and deliver the beer, collecting for it on delivery? Would the situation be different if, instead of collecting for the beer on delivery, the permit holder charged it on his books?

In the opinion of this Department the transaction which you outline would be no different than that of a housewife phoning the grocery store and asking as a part of her order that she be sent beer and that the same be charged to her account.

Under House File No. 336 of the Acts of the Extra Session of the Forty-fifth General Assembly, Section 15 relates to the sale of beer by a Class "B" permit holder. We would construe the question which you have presented to be a sale of beer for consumption off the premises. The provisions of the new act does not include the provisions of Chapter 37, as amended by Chapter 38, Acts of the Forty-fifth General Assembly, with reference to sales off the premises being not less than 144 ounces in the original container and unrefrigerated. Hence, we would see no objection to a sale of two or three bottles of refrigerated beer to an office building by a Class "B" permit holder. The fact that the order was telephoned, that collection of the same was not made until delivery or that the price to be paid was charged to the account of the purchaser would not be a violation of House File No. 336 of the Acts of the Extra Session of the Forty-fifth General Assembly.

BOARD OF CONSERVATION.

March 23, 1934. *Chief Engineer, Board of Conservation, Des Moines, Iowa:* This will acknowledge receipt of your letter of the nineteenth instant in which you request the opinion of this Department on the following questions:

1. Do the provisions of Section 61, Chapter 188, take precedent over Section 26, Chapter 4, Laws of the Forty-fifth General Assembly?
2. Would any money set aside by the Board of Conservation for the purchase of land or the erection of buildings or any construction, out of the $85,000.00 annually appropriated under Section 9, Chapter 188, come under the provisions of Section 26, Chapter 4, for the portion reading as follows: "* * * *; except that capital expenditures for the purchase of land or the erection of buildings or new construction shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made."?
3. Would any funds contributed to the Board of Conservation for specific purposes, such as the purchase of certain real estate, come under the provisions of Section 61, Chapter 188, or Section 26, Chapter 4?
4. The Board of Conservation contemplates contributing money for the purchase of materials, equipment, labor, etc., to be used in conjunction with CCC work and similar agencies—such contribution to enable the construction and carrying on of work that would not otherwise be done by the Federal Government or other agencies, unless such contribution were made. Could the Board of Conservation now set aside any portion of the $85,000.00 not otherwise obligated or spent before July 1, 1934, for the purposes aforementioned; and would the setting aside of such funds prevent such funds from reverting to the general treasury, even though the material, equipment, etc., should not be paid for by July 1, 1934?
5. The Board of Conservation now has negotiated the purchase of certain real estate. In some cases, abstracts showing merchantable titles have not been cleared up or may not be cleared up by July 1, 1934. Would the fact that such negotiations are under way make available any unexpended balance remaining in the appropriation for the fiscal year ending July 1, 1934, for such purchases?
6. The Board of Conservation is carrying out at the present time the necessary legal procedure relative to the construction of a number of dams at the outlets of lakes or the reclamation of such lakes—all of such procedure being set out under provisions of Chapter 35, Acts of the Forty-fifth General Assembly. Such procedure might carry over beyond the end of the fiscal year. Would the initiation of this procedure serve as an encumbrance against funds available to July 1, 1934, even though the actual expenditure should be made after that date?
7. Is outside revenue received by the Board of Conservation a trust fund? If so, would it come under the provisions of reversion? Supplemental letter, April 12, 1934.
8. What is the meaning of "unencumbered balances" mentioned in Section 26, Chapter 4, Laws of the Forty-fifth General Assembly?

In answer to your first question, it is the opinion of this Department that the Budget and Financial Control Act governs because it is a definite and specific act of the legislature for the setting up of a business-like system for the handling of all state funds and a change in the structure of state government. It is also of a permanent nature while the Appropriation Act is to make provision for the total amount to be expended and recognized that other provisions of law may govern. In this connection, we wish to call your attention to 59 Corpus Juris, page 930, Section 535 which provides:

"*Time of taking effect.* Where two conflicting statutes passed at the same session are to take effect on different dates, the one taking effect at the later date will, from that day, although not previously, prevail as the later expression of the legislative will. However, this rule is not an effective guide in some cases, as where all acts passed at the same session, other than emergency acts, take effect at the same time by virtue of a constitutional provision but they shall take effect a prescribed number of days from the end of the session.

Also, an act containing an emergency clause will prevail over another act passed at the same session and not containing such a clause, at least until the other act becomes effective."

Accordingly, it is our opinion that Section 26 of Chapter 4, Laws of the Forty-fifth General Assembly takes precedence and that the reversion of unexpended or unencumbered balances is annual rather than on the biennial.

In answer to your second question, we are of the opinion, where land has been contracted for or where a project has been instituted by the Board of Conservation (in the use of the word "instituted," we mean where a contract has been entered into for the doing of certain things, as for instance, the erection of a building, dam or any other improvement), that the money which the state of Iowa through the Board of Conservation has obligated itself to pay would not revert to the general fund. However, anticipated projects which may not materialize would not come within this class. In other words, the project would have to be started and by that we mean, a contract entered into or the work already started. But this provision would not include those projects which were just contemplated by the Board or which had simply been considered by the Board but upon which no action had yet been taken.

In answer to your third question, funds contributed to the Board of Conservation by *private persons* for specific improvements and purposes would not revert to the general fund in accordance with Section 61 of Chapter 188, Acts of the Forty-fifth General Assembly, as such funds would, in their nature, be trust funds.

In answer to your fourth question, it is our opinion that the Board of Conservation could not set aside money which it contemplated using for certain purposes. We think the intent was that the projects must be definite and that the mere contemplation that the Board might desire to contribute to some project would not be sufficient to keep these funds from reverting to the general fund at the end of the fiscal year. However, if a definite pledge of funds has been made, then, we feel that this money would not revert to the general fund at the end of the fiscal year.

In answer to your fifth question, it is our opinion, where a contract has been entered into on a definite project and the abstract of title has not yet been approved and passed on by this Department on the land in question, that the question would be as to whether or not the state of Iowa through the Board of Conservation had committed itself on this project. But if a contract was entered into, subject, of course, to the provisions that a merchantable abstract of title would be furnished, and the abstract was examined prior to the end of the fiscal year and if examined, objections had been made to the sufficiency of the title, which could not be cleared up prior to the end of the fiscal year, funds set aside for this purpose would not revert to the general fund. This would simply be a delay in the completion of the project or in the accepting of the title by the State.

In answer to your sixth question, it is the opinion of this Department that the necessary legal procedure, relative to the construction of dams, would be measured by the same legal yardstick which has been applied to other answers to your questions in this communication. The initiation of the procedure to remove legal obstacles, where a definite project had been undertaken by the Board and an agreement made with parties whereby funds of the Board were used in payment of land, would not revert to the general fund.

In answer to your seventh question, will say that it is our opinion that revenue received by the Board of Conservation from outside sources would not revert to the general fund at the end of the fiscal year. This would be true whether the money was given for a specific or special purpose or for the general work of conservation.

In answer to your eighth question, will say that it is the opinion of this Department that the meaning of the words "unencumbered balances" are those balances which have not been pledged or which will not be used in definite projects already instituted and which would revert to the general fund as unencumbered balances. An exception would be made where the funds were pledged or a contract entered into whereby the Board of Conservation had agreed to do certain things and pay certain sums. The funds necessary to carry out those projects would not revert to the general fund.

INCOMPATIBILITY: Acceptance of a member of the State Fish and Game Commission of a Federal appointment automatically vacated such membership on the commission.

March 26, 1934. *Governor of Iowa, Des Moines, Iowa:* You have requested an opinion from this department upon the following proposition:

"J. N. Darling, a member of the State Fish and Game Commission, has already accepted a Federal appointment in Washington, D. C., and has tendered his resignation as a member of the State Fish and Game Commission. Should this resignation be accepted on the ground that he could not hold two offices?"

As I understand the facts, J. N. Darling will be in Washington, D. C. in the performance of his new duties under his new oath of office as a Federal official. Under the circumstances, it will be impossible for him to meet with the State Fish and Game Commission and perform his duties as a member thereof while he is in Washington, D. C.

There seem to be three tests relative to the incompatibility of a public office. The first question is whether or not one office is subordinate and accountable to the other office; the second is whether or not the duties of the one office conflict with the duties of the other office, while the third question is whether or not the party holding the office can physically fill both offices at the same time. Any one of these three situations would cause such an incompatibility that the person could not hold both positions at the same time.

As I understand the situation with respect to Mr. Darling, the duties of the second office would conflict with the duties of the first office and that it would be physically impossible for Mr. Darling to perform his new duties at Washington and also his old duties as a member of the Fish and Game Commission. Under these circumstances the office for which he last qualified would automatically cause his resignation as to the prior office. See State ex rel. Crawford vs. Anderson, 155 Iowa, 271, and State ex rel. Banker vs. Bobst, 205 Iowa, 608.

It is therefore the opinion of this department that Mr. J. N. Darling's office, as a member of the State Fish and Game Commission, was vacated automatically when he accepted the Federal appointment and took the oath of office as a Federal employee in Washington, D. C. Therefore, the resignation should be accepted and a new appointment made to fill the vacancy that now exists in the State Fish and Game Commission.

EMPLOYMENT: CHILDREN UNDER FOURTEEN YEARS: THEATER: VIOLATION OF SECTIONS 1526 AND 1527, CODE, 1931:

March 26, 1934. *Bureau of Labor, Des Moines, Iowa:* This will acknowledge

receipt of your request of the twentieth instant in which you request the opinion of this Department on the following question:

A theater conducting a general theatrical business including pictures and orchestra on certain evenings present what they term a discovery program in which local talent, amateur or otherwise is permitted to appear and have a part in the program. The manager of the theater arranges with teachers of dancing in the community and the parents of children under 14 years of age to have children appear on the discovery night as a part of the show. No compensation is paid the children except street car fare. The children are given one rehearsal in the theater prior to the performance on the stage, which is generally at nine or ten o'clock in the evening. The children's act is given a place on the program and before their appearance on the stage the master of ceremonies announces their names and the type of act they will present. The parents of the children or someone representing them accompanies the child to the theater and remains on the stage in the wings during the time the child takes part in the performance.

Is this in violation of Sections 1526 and 1527 of the Code, 1931, relative to the employment of children under the age of 14 years in the theater?

Does Section 1527 prohibit the use of children under sixteen years of age after six o'clock P. M. in theatrical acts?

Please be advised that, in the opinion of this Department, a situation such as you present is not a violation of Sections 1526 and 1527 of the Code of Iowa, 1931.

In the case of State vs. Erle, 210 Iowa, 974, Justice De Graff, in rendering the opinion of the court, calls attention to the fact that nothing in the sections, under consideration, prohibits any child from working in any of the establishments or places or occupations, outlined in these sections, when the same are operated by his parents.

In this case, a child, under the age cited in these sections, was appearing on the stage as a professional violinist under the supervision of his mother and the court said:

"We cannot strictly say that a *place* may be operated. It is a figure of speech —metonymy. As a transitive verb, to *operate* means 'to put into * * * activity; * * * to work.' A person cannot put a place *into* activity, but he can put activity *in* a place. It is reasonable to assume that by the words 'when operated,' the legislature intended the transitive meaning of the verb. In the instant case, it may be conceded that the mother did not operate the theater, or place of amusement. The material question is, did she have an occupation? Yes. What was that occupation? Furnishing entertainment. Who operated it? The mother. Where? In the R. K. O. theatrical establishment, in Sioux City, Iowa, at the time in question. In brief, the mother operated the occupation and owned the act in which the boy was assigned a part at the time the complaint was filed. It is quite apparent from the record that the mother not only owned the occupation, but also operated it.

"* * * * * *.

"The legislative intent in the enactment of the law under discussion is obvious. It was to prevent a child under 14 years from being employed by the owner or operator of the defined and prohibited establishments, in which, by the nature of the work or the place of employment, his health or moral welfare might be impaired. The legislature did except a child under 14 years when acting in the occupation of his mother, as in the instant case."

In the case above cited and discussed, the child was a professional performer while in the situation presented by you, the children's performances are amateur and are under the personal supervision and direction of their mothers while appearing on the stage. Consequently, we do not feel that the appearance, as you have outlined, of children under 14 years of age, is a violation of Sections 1526 and 1527 of the Code of Iowa, 1931.

BOARD OF PAROLE: EXPENSES OF MEMBERS OF BOARD: Members of Board of Parole are entitled to actual expenses, including transportation, meals and hotels while engaged in official business in the city of Des Moines, or wherever the Board may meet.

March 28, 1934. *State Comptroller, Des Moines, Iowa:* We have your request for opinion on the following proposition:

The members of the Board of Parole reside out of the city of Des Moines and the Board maintains an office and employees at the seat of government in Des Moines. Some of the hearings of the Board are conducted at the office in Des Moines and others at the institutions. The Board of Parole meets generally twice a month, the meetings extending over a period of three or four days. Pursuant to the Comptroller Act, we have adopted Rule 9, which is as follows: "Officers and employees whose residence is at some other place than their official domicile will not be allowed expense while at such residence, or traveling to and from the same." Would you kindly furnish us with an official opinion as to whether the Board should be allowed traveling and hotel expense while in the city of Des Moines and for trips to Des Moines and return?

Section 3784 of the Code provides as follows:

"Each member of the Board, the secretary, and all other employees shall, in addition to salary, be entitled to receive their necessary traveling expenses by the nearest traveled route while engaged in official business."

Chapter 188 of the Code, in regard to the Board of Parole, makes no provision as to the residence of either the members of the Board, or does not provide for their official domicile, and likewise is silent upon the matter as to the time to be spent by the Board in performing their official duties. The Legislature, however, appropriates for each member of the Board, a yearly salary, and Section 32 of the Appropriation Act of the Forty-fifth General Assembly provides in regard to the Board of Parole, as follows:

"for salaries, support, maintenance and miscellaneous purposes, $18,304.00."

In the case of State, ex rel. vs. Hackman, 207 S. W. (Mo.), 498, it appears that the relator is a State Game and Fish Commissioner of Missouri, and the respondent is a State Auditor. The relator, at the time of his appointment, resided in the city of St. James, and continued to reside there. He established no residence in Jefferson City, but did establish an office there in which he maintained a clerk and office force. Once or twice each month, it became necessary for him to go from his home to his office to go over the matters of the office and certify expense accounts to the State Auditor for payment. While doing this, he charged his hotel bills while at Jefferson City, in his accounts as expenses chargeable to the state. This, the State Auditor refused to pay, and to determine the matter, a writ of mandamus was sought to compel the payment, and the court said on page 498:

"We start with the proposition that there is no law, either statutory or constitutional, which fixes the residence of the State Game and Fish Commissioner. So far as the law is written, this official enjoys the privilege of residing wherever he pleases within the state. Some are not so fortunately situated. The statute creating relator's office and prescribing the duties thereof, nowhere fixes his place of residence, and he is permitted to escape the privilege of having the merchants and tradesmen of the capital city adjust his living expenses to the size of his salary. Respondent (under the Constitution provision, supra) is not so fortunate. Relator had the legal right to maintain his residence at St. James. He likewise had no restrictions upon the place of locating his office. Quite naturally, he saw fit to locate it at the seat of government, but this did not compel him to change his residence. * * * *

The expenses involved in this action were expenses incident to the examination and approval of these expense accounts as well as other expense accounts of the office maintained by the relator. If either the law or the Con-

stitution required of relator a residence at the seat of government and the law (as it does not) required his office to be maintained at the seat of government, there would be excuse for the action of the State Auditor in this case. But as it is, there is absolutely no excuse for the refusal to audit and allow these expenses which are amply provided for, both by the law creating the office and prescribing the duties, and the Appropriation Act covering the expense of the office."

The court sets out the statute under which the office was created, which provides that the statement of expenses shall include "all necessary traveling expense, postage, stationery, flour and other incidental expense as may be required." It will be noted that nowhere in the opinion is it mentioned as to whether the relator is paid a yearly salary or per diem, nor does the court attempt to distinguish between officers giving only a part time to their work from those giving their entire time. The sole question on which the court seemed to determine the case was whether actual residence and actual locating of the office of the relator must be at the capital of the state.

In the case of State vs. Eggers, 136 Pac. (Nev.), 100, the question was whether "actual traveling expense" of a state officer included also living expenses while away from home performing official duties, or whether it meant only expenses of conveyance, and the court there held that this meant all expenses.

In the case of Corbett vs. State Board of Control, 204 Pac. (Cal.), 823, there was an action by a member of the State Board of Equalization for expenses in attending meetings of the Board. It appears that he was a resident of San Francisco and had his home there. Meetings of the Board were held at Sacramento and under the law, the Board was required to meet at Sacramento once a month. The question was whether he was entitled to the expenses incurred in traveling to Sacramento from San Francisco and return, and also for room rent and meals at hotels in Sacramento while there in attendance upon meetings. The statute provided, "The members of the Board and Secretary are entitled to their actual traveling expenses * * * * incurred by them in the discharge of their duties." The court held that "actual traveling expenses" meant not only expenses paid for some kind of locomotion or conveyance, but also for hotels and meals.

In the case of Fergus vs. Russell, 110 N. E. (Ill.), 130, one of the questions was as to the appropriation to the Lieutenant Governor of $2,000.00 per annum for traveling expenses. The statute provides a salary for him of $2,500.00 per annum and the court, in holding that he was entitled to the appropriation of $2,000.00 for traveling expenses, stated on page 141:

"The Lieutenant Governor is the only member of the Executive Department who is not required to reside at the seat of government and as his chief duty as Lieutenant Governor is to preside over the deliberations of the Senate when the General Assembly is in session, it is apparent that he will necessarily incur some traveling expenses."

I have searched diligently in an attempt to ascertain the correct law on this proposition. We have no cases in Iowa and I can find no case holding contrary to the foregoing. The duties of the Board of Parole and the provisions for their expenses, together with an appropriation for them appear to me to fit squarely into the rules of law as outlined above.

We appreciate the fact that perhaps the salary of the Board of Parole was changed some time ago from per diem to yearly and also appreciate the fact that your office has been very diligent in keeping the expenses of the state

to a minimum and is to be congratulated for the very good work done, but we can only interpret the law as we find it, and in view of the holdings of other courts, our conclusion is unescapable.

It is, therefore, the opinion of this department that the members of the Board of Parole are entitled to their actual expenses, including transportation, meals and hotels while engaged in official business in the city of Des Moines, or wherever the Board may meet.

AUTOMOBILE INSURANCE: AUTOMOBILE USED FOR BENEFIT OF PUBLIC AND AS GOVERNMENTAL FUNCTION: The state nor its subdivisions are not authorized to expend money for the payment of premiums on automobile insurance.

March 29, 1934. *Auditor of State, Des Moines, Iowa:* We have your request for our opinion as to whether the State and its various Boards, Commissions and Subdivisions are authorized to expend money for the payment of premiums for automobile insurance, the automobiles being used for the benefit of the public and as a governmental function.

A governmental function is one in which the State acts as a sovereign, for the benefit of the people and for the performance of which, no profit or advantage is received. No action lies at common law against the State or its subdivisions for injury resulting from the performance or non-performance of a governmental function, for the reason that the constant fear of liability for damages while acting for the public welfare would prevent proper performance of public functions.

This common law rule of "The King can do no wrong" was recognized by our Supreme Court in the early case of Metz vs. Soule, 40 Iowa, 236, in which it was pointed out that this maxim did not mean that the sovereign was incapable of doing wrong, but meant that where a wrong had been done, and it was called to his attention, he would voluntarily redress it but could not be coerced into doing so, as no one had the power to command the King. In other words, the State may do wrong, but cannot be sued.

There is, therefore, in effect, no liability in respect of torts except as expressly or impliedly imposed by statute. We have no such statutory provision in this State. The last pronouncement of our court on this proposition was the case of Hills vs. Independent School District, 251 N.W., 606, decided December 12, 1933. In that case, the school district furnished the bus for the transportation of pupils. The driver, at the time of the accident, was the wife of the contract driver. The pupil, while being regularly transported in the bus, either fell or was thrown and suffered injuries. An action was brought against both the school district and the driver of the bus. There was a directed verdict for the District, but judgment was entered against the driver. On Appeal, however, this was reversed and the court held that neither the driver nor the district were liable.

In the case of DeVotie vs. Iowa State Fair Board, 249 N. W., 429, our court held that the Fair Board could not be sued and at page 430, stated:

"The society is an arm or agency of the state, organized for the promotion of public good, and for the advancement of the agricultural interests of the state. It would be manifestly wrong to permit its fund to be used to pay damages arising out of the commission of wrongful acts by its officers and servants, and which are in no wise connected with the object and purpose of the society's creation."

And the court further points out in that case that this in fact, bars an action

for the reason that there can be no cause of action without a suable defendant.

Many cases point out that the mere fact that the Legislature has given its subdivisions the right to sue and be sued does not mean that they can be sued for their torts, but merely that they are suable on actions provided.

In Long vs. State Highway Commission, 204 Iowa, 376, our court held that the Highway Commission could not be sued, and in the case of Cross vs. Donohue, 202 Iowa, 484, held that a former employee could not bring an action against the Superintendent of a State Hospital for the Insane at Cherokee on account of salary due and damages.

It is, therefore, apparent that our Supreme Court has recognized the general rule, which, as far as we can find is the rule of all States except the State of New York.

A public expenditure must be for the public and in payment of a public liability and unless expressly authorized by statute, a public body has no authority to appropriate money for gratuities or gifts. There being no public liability on account of injuries on the part of the State or its subdivisions as such, it follows that there can be no automobile insurance premium lawfully paid out of public funds as such would constitute a gift or gratuity and would be illegal.

It has been suggested that the state can consent to be sued and that the insurance company could agree at the time of issuance of the policy of insurance not to take advantage of the non-suability of the State or its subdivisions, but would agree to defend the action as if the State were liable. The two answers to this are first, that irrespective of such agreement, it would still be a gratuity, and second, that if such were done, the verdict of the jury might exceed the liability of the insurance company on its policy, and the State would be liable for the overplus, and such a judgment could not be liquidated, as neither the State or its subdivisions would have any fund out of which to pay the judgment.

The State and its subdivisions then not being liable as such, the question naturally follows as to whether the individual officers and members of the various boards or commissions or employees of such, are liable, and if so, whether the State and its subdivisions would be authorized to expend money for premiums for the protection of them. It should be borne in mind that there is no duty upon a member of a board to act individually. His duty is to act as a part of the board in the manner prescribed for its action and that neglect to exert its powers or all it means, is the neglect of the body and not of the individuals composing it; and that employees of the State or its subdivisions are not servants and the rule of respondeat superior does not apply to charge them with the responsibility for the acts of employees; and that officers are not liable for errors or mistakes of judgment in the performance of acts within the scope of their authority, as to which they are empowered to exercise judgment and discretion.

In the Cross case, supra, our court said:

"Likewise, an action will not lie against the agent of the state for acts done within the scope of the agency unless he intentionally, or by his own wrongful acts and conduct, creates a liability."

And in the Long case, the court said:

"There is no claim that the State Highway Commission are acting fraudulently, illegally, or in derogation of the authority vested in them by the statute. The state highway commission are agents of the state, acting for and in behalf of the state, within the powers conferred upon them by the statute."

And in the Hibbs case, the court, after holding that there was no good reason for not exempting an employee from liability during the performance of a governmental function when the school district and the individual members of the Board were exempted, stated at page 608:

"Many cases are cited above to support the practically universally recognized rule that the exemption from liability in cases of this character applies as well to the school corporation, its officers, and, upon principle, it must be held to apply to its employees. * * * * * The rule of nonliability exists because the functions being performed are for the common good of all without any special corporate benefit or profit."

It, therefore, appears that if a public officer or employee are performing a public act, even though negligently, they cannot be sued unless perhaps they were acting maliciously and the same rule would apply to them as to the State and its subdivisions.

It then naturally follows that if the officers and employees were acting recklessly, maliciously and wrongfully, would they be individually liable and if so, would the State or its subdivisions be authorized to pay premiums on insurance against such liability? Our Supreme Court has not answered this question except in the Long case, as above stated, in which the court did state:

"There is no claim that the state highway commission are acting fraudulently, illegally or in derogation of the authority vested in them by the statute."

It, therefore, appears from the statement that our Supreme Court might hold that the officers and employees were suable, if such existed. Two other Supreme Courts have held both ways on this proposition.

In the case of Betts vs. Jones, 166 S.E. (N.C.), 589, an action was brought against individual school directors for injury and death of a child being transported in a school bus. The driver was the son of one of the directors and many patrons of the school had complained to the Board before he was hired, that he was reckless and it was alleged that the defendants secured the driver known to them to be unfit, unsafe, non-dependable and reckless and that they acted unlawfully, wrongfully, maliciously and corruptly. The Supreme Court there held that an action could be maintained against them as individuals, as a public officer becomes personally liable for consequent damages when he goes outside of his line of duty and acts corruptly and with malice.

In the case of Consolidated School District vs. Wright, 128 Okla., 193, which opinion was affirmed in a case of the same title in 19 Pac., (2nd) 369, the action was brought against the individual members of the Board on account of an injury to a pupil being transported in a bus, and it was alleged that the Board hired an inexperienced and incompetent driver and knew, or should have known that he was an unsuitable and improper person for the position. The court there held that irrespective of such, the defendants, as individuals, were not liable, for the reason that they were performing a governmental function and that there was no duty upon them to act individually, but when they did act, they acted as a Board, and therefore, it was not an individual liability, but a Board liability.

Irrespective of how our Supreme Court might hold on this proposition, there does not appear to be any justification for the payment of premiums for the purpose of protecting the individual liability of officers and directors acting maliciously and wrongfully in the employment of agents whose negligence caused the injury and damage, for, if the officers and directors so act, the liability is their own and not that of the State or its subdivisions, and they should, therefore, bear the burden.

It is, therefore, the opinion of this Department that neither the State nor its subdivisions are authorized to expend money for the payment of premiums on such automobile insurance.

This opinion, however, is not to be construed as affecting rights of employees under the Workmen's Compensation Act nor the right of the State or its subdivisions to require their employees or drivers to personally buy and carry such insurance.

DAMS—IOWA RIVER NEAR ELDORA: Contract between State and Central States Electric Company for construction of dam across the Iowa River near Eldora.

March 29, 1934. *State Fish and Game Warden, Des Moines, Iowa:* You have resubmitted to this Department a contract with reference to which we gave you an opinion a few days ago, said contract relating to the construction of a dam across the Iowa river near Eldora in Hardin County, Iowa, said contract being between the Central States Electric Company on the one part and the State of Iowa, through the agencies of the Fish and Game Commission and the Board of Conservation on the other.

This contract has been modified by adding thereto a provision that the title of the State to that portion of the dam which is being constructed by the Fish and Game Commission and the Board of Conservation shall remain in the State as personal property and shall not pass to the Central States Electric Company or its successors and assigns, the State reserving the right to remove its portion of said dam at its pleasure. This modification of the contract would, in a measure at least, meet our objections that public money or money of the State was being invested in property which would be owned by a private corporation.

We are now advised that no money of the State is being invested in this dam but that it is being built by labor furnished by the federal government and the material being furnished by agencies other than the State, partly by private subscription. In view of this situation, we cannot complain that money of the State is being expended for the benefit of a private corporation.

Section 7775 of the Code provides that 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 purposes specified in said section shall pay to the Executive Council certain fees.

In view of what has been said, it appears that this dam is not being constructed for the use and benefit of any particular person, firm or corporation but on the contrary is being constructed for the use and benefit of the State of Iowa, the title thereto remaining in the State with the right of the State to remove said dam at will.

We have taken the view that the permit fee and the annual inspection fee were police protection measures and which comes within the provisions of the chapter requiring such fees.

The question now arises whether this dam being constructed by the State for its own use and benefit comes within the prohibitions contained in Section 7767 of the Code. That section is as follows:

"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."

We are advised that the Iowa river at the point where this dam is under construction is not a navigable or meandered stream. The dam is not being constructed for manufacturing or power purposes nor does the State contemplate taking any water from said stream for industrial purposes. Therefore, it is our opinion that the prohibitions of this section does not apply and that it is not necessary so long as the conditions above set out prevail to secure a permit from the Executive Council.

We are relying upon the representations made to us to the effect that this river at the place in question is not a meandered or navigable stream and that the water at this place will not be used for manufacturing or power purposes nor for industrial purposes, and upon the further fact that the Central States Electric Company and its successors and assigns have the prescriptive right to maintain a dam at this place equivalent to the one being constructed, and that therefore there can be no question of liability for damage which might accrue to anyone on account of backing up the waters above this dam. If at any time this dam shall be used for manufacturing or power or industrial purposes, the fees provided for by Section 7775 of the Code will become due.

EXPENSES: Expenses of Iowa Commission to Study Liquor Control are paid to the amount of $2,885.88 by Senate File No. 294.

INCOMPATIBILITY: No Senator or Representative may take a civil office of profit which shall have been created or the emoluments increased during the term for which he is elected except such offices as may be filled by elections of the people.

March 29, 1934. *Iowa Liquor Control Commission, Des Moines, Iowa:* I have your request of March 27th for a legal opinion from this Department upon the following questions:

1. Can the State of Iowa pay the necessary expenses of the Iowa Commission to Study Liquor Control Legislation, appointed by the Governor, where said expenses might be in excess of the expenses authorized for state employees by the general and permanent laws of the state?
2. Can a representative or senator who voted for the Liquor Control Act be appointed to a position under the commission on a monthly, weekly, or daily basis?

In answer to your first question, I wish to call your attention to Senate File No. 294 which was an appropriation act to pay the necessary expenses of the Iowa Commission to Study Liquor Control Legislation which was appointed by the Governor. This appropriation act, known as Senate File No. 294, was passed by both houses on March 12, 1934, and became effective by publication on March 16, 1934. Senate File No. 294 was a specific appropriation act of the legislature to pay the necessary expenses of this commission to study and recommend liquor control legislation. The commission itself was a special commission of an emergency type to render this service to the State of Iowa. The members of this commission and their employees were not regular state officers or employees. Therefore, the general, regular, and permanent laws of the State of Iowa did not apply to them or justify the payment of any expense money incurred by the commission. It required special legislation to set up an appropriation to take care of these expenses. Therefore, the provisions of Senate File No. 294 are controlling. The only question remaining is as to what the necessary expenses of this commission were. Authority for determining

what the necessary expenses were is granted to the Iowa Commission to Study Liquor Control Legislation subject to the approval of the Executive Council of the State of Iowa. However, the commission and the executive council could in no event pay more than two thousand eight hundred eighty-five dollars and eighty-eight cents ($2,885.88) for the total expenses incurred. This limitation is contained in the Act itself.

It is therefore the opinion of this department that the payment of these expenses are to be controlled by the specific provisions of Senate File No. 294.

In answer to your second question, I wish to call your attention to Section 21 of Article III of the Constitution of the State of Iowa which provides 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 of the people."

Employees appointed by the Liquor Control Commission are members of and a part of the Liquor Control Commission. The status of such employees or assistants as state employees or officers was created by the Liquor Control Act which was passed by the 45th Extra General Assembly. The members of the 45th Extra General Assembly created not only the Liquor Control Commission but also created the assistants and members of the commission. Were it not for the passage of the Liquor Control Commission Act there would be no employees or assistants under the Liquor Control Commission. Every member of the 45th Extra General Assembly is bound by the provisions of Section 21 of Article III of the Constitution of the State of Iowa. No member of that General Assembly whether they voted for the Liquor Control Act or not, is eligible for appointment as commissioner, or to any office under the commission which the commission is authorized to appoint.

It is therefore the opinion of this Department that a representative or senator who was a member of the 45th Extra General Assembly cannot be appointed to a position under the commission on a monthly, weekly, or daily basis, during the term for which they were elected.

BEER BILL: ISSUANCE OF CLASS "B" AND "C" PERMITS: TOWN SITE: PLATTING OF TERRITORY.

March 30, 1934. *Assistant County Attorney, Cedar Rapids, Iowa:* This will acknowledge receipt of your letter of the twenty-eighth instant in which you request the opinion of this Department on the following question:

The new beer law gives authority to boards of supervisors to grant permits for the sale of beer in villages platted prior to January 1, 1934.

Subsection 4 of Section 5623, Code, 1931, defines villages as platted town sites, unincorporated.

Would platted additions to cities which are not within the incorporated limits come within the definition of villages as used in the beer law? There are quite a number of such additions to the city of Cedar Rapids.

Section 8 of House File No. 336, Acts of the Extra Session of the Forty-fifth General Assembly provides in part:

"Power is hereby granted to boards of supervisors to issue, at their discretion, class 'B' and 'C' permits in their respective counties in villages platted prior to January 1, 1934, and to revoke same for causes herein provided, or in the event the place of business of the permit holder is conducted in a disorderly manner."

Subsection 4 of Section 5623, Code, 1931, provides as follows:

"*Villages.* Town sites platted and unincorporated shall be known as villages."

It is the opinion of this Department, if territory was platted prior to January 1, 1934, that it would meet the requirements of Section 8 of House File No. 336, Acts of the Extra Session of the Forty-fifth General Assembly. As a general rule, platted territory is given a name. While Subsection 4 of Section 5623, Code, 1931, refers to town sites, we feel that the controlling feature is whether or not the territory in question was platted prior to January 1, 1934, and if so, it meets the requirements of the new beer law.

BEER BILL: ISSUANCE OF CLASS "B" AND "C" PERMITS: TOWN SITE: PLATTING OF TERRITORY IN TRIBOJI BEACH.

March 30, 1934. *County Attorney, Spirit Lake, Iowa:* This will acknowledge receipt of your letter of the twenty-seventh instant in which you request the opinion of this Department on the following questions:

Under Section 8 of House File No. 336, Acts of the Extra Session of the Forty-fifth General Assembly, "power is granted to boards of supervisors to issue, at their discretion, class 'B' and 'C' permits in their respective counties in villages platted prior to January 1, 1934, and to revoke same for causes herein provided, or in the event the place of business of the permit holder is conducted in a disorderly manner."

Division 4 of Section 5623, Code, 1931, contains a definition of the term village. In the surrounding lake region we have several platted territories that have been platted for years and are not included in incorporated towns. One of the platted districts, not in an incorporated town, is known as Triboji Beach. In this territory there are many cottages and several residences in which people live the year around. There is an oil station and a restaurant that are operated the year around and another restaurant operated through the lake season, also boat liveries and a pavilion.

Is a platted territory that is not an incorporated town a village?

What is the distinction between a town site platted and unincorporated, and a territory that is platted and unincorporated?

Triboji Beach was platted several years prior to January 1, 1934.

Subsection 4 of Section 5623 provides as follows:

"*Villages.* Town sites platted and unincorporated shall be known as villages."

Section 8 of House File No. 336, Acts of the Extra Session of the Forty-fifth General Assembly, provides in part:

"Power is hereby granted to boards of supervisors to issue, at their discretion, class 'B' and 'C' permits in their respective counties in villages platted prior to January 1, 1934, and to revoke same for causes herein provided, or in the event the place of business of the permit holder is conducted in a disorderly manner."

It is the opinion of this Department that the platting of a territory such as you state the situation at Triboji Beach on West Lake Okoboji in your county is sufficient to meet the requirements of Section 8 of House File No. 336.

From the situation as you have outlined it, we would construe Triboji Beach as being a town site sufficient to meet the requirements of Subsection 4 of Section 5623, Code, 1931. The territory has been platted and given the name of Triboji Beach.

DENTIST'S LICENSE: REINSTATEMENT AFTER LICENSE HAS LAPSED: EXAMINATION: If a regularly licensed dentist allows his license to lapse for failure to pay annual license fee, and then pays up his back fees, an examination is not necessary for reinstatement.

March 30, 1934. *Commissioner of Public Health, Des Moines, Iowa:* Your letter of the 15th ult., addressed to the Attorney General, has been referred to me for reply.

You request a construction of Sections 2447 and 2448 and in connection therewith submit four questions as follows:

1. May the Board of Dental Examiners require a licensee who has failed to pay his annual renewal fee prior to June 30th of any year following date of issuance of such license, to submit to an examination even though the statutory annual renewal fees are in receipt by the Department?
2. In case the applicant should fail to pass the examination would it not be in fact revoking the license and the licensee is not guilty of any of the ten (10) grounds under Section 2492 for which a license may be revoked?
3. Is it within the jurisdiction of the State Department of Health to reinstate a delinquent licensee without the special recommendation of the Dental Board as set out in Section 2448?
4. If it may be assumed that it was the intention of the Legislature that the matter of reinstatement of a licensee who has merely failed to pay the annual renewal fee prior to the expiration date of any such license, should be more than a routine matter in deciding the question of whether or not an applicant should be reinstated with or without examination, should the Board raise questions as to qualifications, or should board limit their investigation of licensee's fitness to the statutory grounds in Section 2492?

We set out Sections 2447 and 2448 of the Code, as follows:

"2447. Renewal of licenses. Every license to practice a profession shall expire on the thirtieth day of June following the date of issuance of such license, and shall be renewed annually upon application by the licensee, without examination. Application for such renewal shall be made in writing to the department accompanied by the legal fee at least thirty days prior to the expiration of such license. Every renewal shall be displayed in connection with the original license. Every year the department shall notify each licensee by mail of the expiration of his license."

"2448. Reinstatement of licensee. Any licensee who allows his license to lapse by failing to renew the same, as provided in the preceding section, may be reinstated without examination upon recommendation of the examining board for his profession and upon payment of the renewal fees then due."

Section 2448 provides that the licensee "may be reinstated without examination upon recommendation of the examining board."

Relying upon this language certain examining boards are claiming the right on any grounds which may occur to them to refuse to renew certain licenses without allowing the person seeking the renewal of his license a hearing. In other words, certain examining boards are claiming under this section the right and authority to revoke the licenses of certain practitioners to practice their professions in this state. This language taken alone would seem to carry with it the logical construction that the examining board may authorize the reinstatement without an examination or may require a new examination. In arriving at a correct interpretation of Section 2448, however, it is necessary to read in connection therewith, Section 2447 and all of the sections relating to the revocation of licenses, being Sections 2492 to 2508, inclusive.

Section 2447 provides that every license to practice a profession shall expire on the thirtieth day of June following the date of the issuance of such license, "and shall be renewed annually upon application by the licensee without examination." This language, too, seems very clear and provides specifically that the license shall be renewed annually upon application by the licensee without examination. This language is mandatory. If the examining board is to be guided by this plain language of the statute, it must in all cases renew the annual licenses without examination.

The Supreme Court of the State of Missouri has construed a statute somewhat similar to ours. The Missouri statute was, in part, as follows:

"All persons who have been regularly registered and licensed as dentists under the provisions of this act, shall be entitled to have their license renewed upon application to said dental board on or before the 30th day of November in each calendar year next succeeding the expiration of the license then held by such applicant. All applications for renewal of license as herein provided shall be accompanied by a fee of one dollar," etc.

The Supreme Court in the case of State vs. Missouri Dental Board, 233 S. W. Reporter, at page 394, 48 C. J., 1106, construing said section uses the following language:

"Is there discretion lodged in the Board in the performance of this act. We say not. The law says applicants for a renewal license shall be entitled to have their licenses renewed upon the payment of a fee of one dollar. Of course the applicant must be regularly registered and previously licensed before he is entitled to a renewal license. If the applicant is duly registered and has been previously licensed, then the law says such 'applicant shall be entitled to a license'."

The Missouri statute says the licensees "shall be entitled to have their licenses renewed." The Iowa statute says the license "shall be renewed annually upon application by the licensee without examination." If the legislature had intended that the license should be renewed annually without examination in certain cases thereafter specified, it might have so provided. It did not provide any exceptions where examinations should be given.

Section 2441 provides that the "department may refuse to grant a license to practice a profession to any person otherwise qualified upon any of the grounds for which a license may be revoked by the district court." This section is set out in Code Revision Bills (1923) as Section 4 of Code Commissioners Bill No. 262 and thereafter appears a note from which we quote the following:

"'Department' substituted for the various boards which now issue licenses under existing practice acts to harmonize with the administrative plan of the bill. The 'district court' substituted for the various boards which now issue licenses under the existing practice acts to harmonize with Sections 53 to 56, inclusive.

"After a license has been issued, no question shall be raised as to the qualifications of the licensee except as provided in Section 53 to 69, inclusive."

Sections 53 to 69 are now Sections 2492 to 2508, inclusive, of the Code.

While the above underlined note was not made a part of the statute, it was no doubt in harmony with the construction placed upon the statute by the legislature.

In further support of our opinion that the board of examiners may not require an examination before reinstating the applicant, we cite Sections 2492 to 2508, inclusive, relating to the revocation of licenses. Section 2492 provides the grounds for revocation of a license. Section 2495 gives the district court of the county in which the licensee resides, jurisdiction of the proceedings to revoke or suspend his license. Section 2499 prescribes the rules governing the petition to be filed in such cases, one of which is that the state shall be named as the plaintiff and the licensee as defendant, and another is that the charges against the licensee shall be stated in full.

As we view it, there is no way that a license may be revoked or suspended except as provided in these sections. To say that the board may require a new examination is to say that the board may revoke a license. We do not believe these statutes should be construed to permit a board to do indirectly what it is not permitted to do directly. We believe in view of what has been here stated and set out that your first question should be answered in the negative;

that is, that the board of dental examiners may not require the licensee who has failed to pay his license fee prior to June 30th of any year following the issuance of his license to submit to an examination where the statutory renewal fees are heretofore received by the department.

Your second question is answered in the affirmative. If the applicant having taken and failed to pass the examination were to have the renewal of his license refused without having had any of the grounds provided for in section 2492 proven against him, it would amount to a revocation of his license by the board.

The answer to your third question is, we take the position that when it is shown to the Board of Examiners that the proper application is on file and the proper fees paid for the renewal, and they have found these things to be true, then their authority in the matter ceases, and on showing of these conditions precedent, they should recommend to the Department that the renewal certificate issue. We are holding they do not have the right to require an examination as a condition precedent to the issuance of a renewal of a license.

Your fourth question is answered, we believe, by what has been stated above.

OLD AGE PENSION FUND: ASSESSORS: PAYMENT OF SAME: GENERAL COUNTY FUND: How are these assessors to be paid for this extra work? Are they to be paid out of the Old Age Pension Fund after it is created or out of the General County Fund?

April 2, 1934. *County Attorney, Knoxville, Iowa:* This will acknowledge receipt of your letter of the twenty-seventh ultimo in which you request the opinion of this Department on the following question:

"Under Section 35 of Senate File No. 42, Acts of the Extra Session of the Forty-fifth General Assembly, all of our assessors have nearly completed their work and have already consumed the number of hours allotted to them.

How are these assessors to be paid for this extra work?

Are they to be paid out of the Old Age Pension Fund after it is created or out of the General County Fund?"

It is the opinion of this Department that the Board of Supervisors can allow a reasonable number of days for the doing of this work and the expense can be taken out of your general county fund.

OLD AGE PENSION BILL: SENATE FILE NO. 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: EXEMPTION: RELIGIOUS ORDERS: NUNS: Nuns in a convent or in the teaching profession away from the convent in the school year are subject to tax and are not exempted. This includes all members of religious organizations or orders.

April 5, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your request of the third instant for the opinion of this Department on a question submitted to you by E. J. Grier, County Attorney, Wapello County, in which the following question is presented:

Are nuns in a convent or in the teaching profession away from the convent in the school year subject to the tax or are members of religious orders exempted?

Please be advised that in the opinion of this Department, members of religious organizations or orders are not exempted and must pay the tax, as provided in Senate File No. 42, Acts of the Extra Session of the Forty-fifth General Assembly, which is the old age pension law.

BEER BILL: HOUSE FILE NO. 336, EXTRA SESSION, 45TH GENERAL ASSEMBLY: LICENSE TO RESIDENT OF ANOTHER TOWN: SAME COUNTY: No provision expressly stating that the applicant be a resident of the city or town in which he desires to operate.

April 5, 1934. *County Attorney, Osage, Iowa:* This will acknowledge receipt of your letter of the second instant in which you request the opinion of this Department on the following question:

Is it legal and justifiable for a municipality to refuse to grant a beer license to an applicant who is a non-resident of the municipality, but is a resident of a neighboring town in the same county?

Section 12 of House File No. 336, Extra Session, Forty-fifth General Assembly, which is the new beer law, provides:

"Except as otherwise provided in this act a class 'B' permit shall be issued by the authority so empowered in this act to any person who:

1. Submits a written application for a permit, which application shall state under oath:

a. The name and place of residence of the applicant, and the length of time he has lived at such place of residence.

b. That he is a citizen of the State of Iowa.

c. The place of birth of the applicant, and if the applicant is a naturalized citizen, the time and place of such naturalization.

d. The location of the place or building where the applicant intends to operate.

e. The name of the owner of the building and if such owner is not the applicant, that such applicant is the actual lessee of the premises.

f. That the place of business for which the permit is sought is and will continue to be equipped with sufficient tables and seats to accommodate twenty-five (25) persons at one time, and is not within two hundred (200) feet of a building used for school purposes. Provided, however, such area limitation shall not apply to permits in force on March 5, 1934, nor to renewals or transfers thereof, nor to permits in places located within areas now or hereafter zoned as business districts.

2. Establishes:

a. That he is a person of good moral character.

b. That the place or building where he intends to operate conforms to all laws, health and fire regulations applicable thereto, and is a safe and proper place or building.

3. Furnishes a bond in the form prescribed and to be furnished by the treasurer of state with good and sufficient sureties to be approved by the authorities to which application is submitted, conditioned upon the faithful observance of this act, in the sum of one thousand dollars ($1,000.00)."

There is no provision expressly stating that the applicant must be a resident of the city or town in which he desires to operate, under a Class "B" or Class "C" permit.

COURT COSTS: JUDGMENT: "Does the court costs taxed in the former or prior judgment follow the renewal judgment and should such costs be taxed and brought forward when entering up the renewal judgment and included in an execution issued in the new judgment or renewal judgment?

April 5, 1934. *County Attorney, Waukon, Iowa:* This will acknowledge receipt of your letter of the twenty-third ultimo in which you request the opinion of this Department on the following question:

Chapter 178, Laws of the Forty-fifth General Assembly, provides:

Section 1. From and after January 1, 1934, no judgment in an action for the foreclosure of a real estate mortgage or deed of trust or in any action on a claim for rent or judgment assigned by a receiver of a closed bank when the assignee is not a trustee for depositors or creditors of the bank shall be enforced and no execution issued thereon and no force or vitality given thereto for any purpose other than as a set-off or counter claim after the expiration of a period of two (2) years from the entry thereof.

Sec. 2. After January 1, 1934, no action or proceedings shall be brought in any court of this state for the purpose of renewing or extending such judgment or prolonging the life thereof. Provided, however, that nothing herein

shall prevent the continuance of such judgment in force for a longer period by the voluntary written stipulation of the parties, filed in said cause.

You state:

In one of the closed banks in our county, the assets were sold and certain judgments assigned by the receiver. The assignees served notice prior to January 1, 1934, wherein they stated that a petition would be filed asking for a renewal of said judgment or judgments. That said petition was filed and judgment entered renewing the prior judgment sued upon. Assignees in his petition included the amount of the former judgment and interest, but did not include court costs taxed in the former judgment. The clerk of the district court has asked the following question:

Does the court costs taxed in the former or prior judgment follow the renewal judgment and should such costs be taxed and brought forward when entering up the renewal judgment and included in an execution issued in the new judgment or renewal judgment?

It is our opinion that, in the ordinary case, the costs follow the judgment. However, This would be controlled in some degree by the manner in which the judgment and costs were entered on the records in the clerk's office. By this we mean—where one judgment is entered for the principal and interest and another for the costs. It would seem, in filing a petition asking for the renewal of the same, that both of these judgments should be referred to (1) principal and interest and (2) costs. In the event that both were not listed in the petition, of course, the one for principal and interest would be the only one, in the instant case, which was renewed. However, if the judgment as originally entered included the costs, then we would feel that the renewal would carry the court costs with it.

SALES: SALES TAX: INTERSTATE TRANSPORTATION: EXPORTATION FROM TAXING STATE: HOUSE FILE NO. 1, EXTRA SESSION, 45TH GENERAL ASSEMBLY.

April 6, 1934. *Board of Assessment and Review, Des Moines, Iowa:* This will acknowledge receipt of your request of the fourth instant for the opinion of this Department relative to sales in connection with which interstate transportation, by way of exportation from a taxing state, is a requisite to performance or likewise relative to importation under House File No. 1, Extra Session, Forty-fifth General Assembly.

Please be advised that the general rule of law, that the power of congress to regulate commerce among the states (generally referred to as "interstate commerce") is paramount, would apply.

12 C. J. 9, Note 37 and cases cited.

Although the states have powers of a limited extent and nature to regulate interstate commerce as to phases thereof in respect to which congress has not asserted its paramount authority, these powers do not extend to subjects which require a uniform system of regulation nor to the direct burdening of interstate commerce by taxation.

United States Express Company vs. Minnesota, 223 U. S., 335.
Fargo vs. Michigan, 121 U. S., 230.
Ratterman vs. Western Union Telegraph Company, 127 U. S., 411.
Western Union Telegraph Company vs. Pennsylvania, 128 U. S., 39.
Western Union Telegraph Company vs. Alabama Board of Assessment, 132 U. S., 472.
Crew Levick Company vs. Pennsylvania, 245 U. S., 292.

Commerce among the states consists not merely in transportation but includes the purchase, sale and exchange of commodities, since the very purpose and motive of transportation is trade.

Brown vs. Maryland, 12 Wheat. (U. S.), 419.
Rhodes vs. Iowa, 179 U. S., 412.
12 C. J. 26, Note 91 and cases cited.

If interstate transportation is involved in the performance of a contract of sale, the place of making or entering into the contract for sale is immaterial and in such case a tax cannot be laid which impedes or burdens the performance of the contract.

United States vs. Tucker, 188 Fed., 741.
Crew Levick Company vs. Pennsylvania, 245 U. S., 292.
12 C. J. 96, Section 126 and cases cited.

Mere negotiation and solicitation of sales in connection with which subsequent interstate transportation of commodities is contemplated cannot be burdened by a state under the guise of a license or occupation tax upon the soliciting agent.

Robbins vs. Taxing District of Shelby County, 120 U. S., 489.
12 C. J., Sections 104 and 105.

A tax upon gross receipts from interstate and intrastate commerce is, as respects the tax upon receipts from interstate commerce, a burden thereon and consequently invalid as a regulation of interstate commerce.

Crew Levick Company vs. Pennsylvania, 245 U. S., 292.
Case of the State Freight Tax, 15 Wallace, 232.

Whenever the proceeds of taxation may be separated so that which accrues as a consequence of the carrying on of interstate commerce can be distinguished from that which accrues from commerce wholly within the state, the tax will be invalid as respects its imposition upon transactions essential to interstate commerce.

East Ohio Gas Company vs. Tax Commission, 283 U. S., 465.
12 C. J. 97, Note 8 and cases cited.

It is immaterial that the tax levied does not discriminate against interstate commerce if its imposition is a direct burden thereon.

Crew Levick Company vs. Pennsylvania, 245 U. S., 292.
Robbins vs. Shelby County Taxing District, 120 U. S., 489.

A sales tax upon a sale, in connection with which interstate transportation by way of exportation from the taxing state is a requisite to performance, is a direct burden upon interstate commerce and consequently void.

State vs. Albert Mackie Company, Ltd., La. (1918) 80 So., 582.
Heyman vs. Hays, 236 U. S., 178.
Superior Oil Company vs. Mississippi, 280 U. S., 390.
American Manufacturing Company vs. St. Louis, 250 U. S., 459.

A state tax measured in part by amount of sales in or receipts from interstate commerce has in some instances, been sustained. In all such cases, however, the taxing statute has been construed, in effect and intent, as a property tax or other tax actually within the state's powers, and, as nearly measured by amount of sales or receipts, including those from interstate commerce. A direct levy in respect to sales by a wholesaler in interstate commerce, being in addition to normal property taxes, has neither such effect nor intent and cannot be sustained on the line of authorities herein referred to.

Heyman vs. Hays, 236 U. S., 178.
American Manufacturing Company vs. St. Louis, 250 U. S., 459.
State vs. Albert Mackie Company, Ltd., La. (1918) 80 So., 582.
East Ohio Gas Company vs. Tax Commission, 283 U. S., 465.

There is no distinction in principle between taxation of interstate commerce by the state in which the commerce originates and by the state in which the

transaction of interstate commerce ends so that the authorities holding that a tax imposed upon an interstate commerce transaction by a state of importation is invalid require holding that tax imposed by a state of exportation in a like transaction is likewise invalid.

Case of State Freight Tax, 15 Wallace, 232.
Crew Levick Company vs. Pennsylvania, 245 U. S., 292.

It is the opinion of this Department, in accordance with the cases submitted herein, that under House File No. 1, Extra Session, Forty-fifth General Assembly, the retail sales tax would not apply as to commodities handled in interstate commerce, as the same would be a burden on interstate commerce.

We are advised that tax commissions in numerous states have adopted rules and regulations exempting sales of articles handled in interstate commerce and we would feel that your Board, in view of the authorities cited, would likewise be justified in adopting a like rule and regulation.

BOARD OF CONSERVATION: PREPARE SIGNS: SELL SAME: EXHIBITION OF SAID PERMIT: SECTION 1799-b2, CODE: Could the Board have signs prepared and sell the same to holders of such permits on which could be exhibited the permit?

April 9, 1934. *Board of Conservation, Spencer, Iowa:* This will acknowledge receipt of your request for the opinion of this Department on the following question:

Section 1799-b2 of Chapter 87, Code of Iowa, 1931, gives the right to the Board of Conservation to issue permits for the erection of piers, etc.

Could the Board have signs prepared and sell the same to holders of such permits on which could be exhibited the permit?

It is the opinion of this Department that Chapter 87, Code of Iowa, 1931, as amended, relating to the Board of Conservation, its powers and duties does not contain any provision whereby the Board could engage in a business of this nature.

BEER BILL: HOUSE FILE NO. 336, EXTRA SESSION, FORTY-FIFTH GENERAL ASSEMBLY: SALE OF BEER: CONSUMPTION OFF THE PREMISES: AMOUNT: Can a Class "B" permit holder sell beer for consumption off the premises in any amount?

April 9, 1934. *Assistant County Attorney, Denison, Iowa:* This will acknowledge receipt of your letter of the fourth instant in which you request the opinion of this Department on the following question:

Can a Class "B" permit holder sell beer for consumption off the premises in any amount?

Under House File No. 336, Acts of the Extra Session of the Forty-fifth General Assembly, which is the amendment to Chapter 37, as amended by Chapter 38, Acts of the Forty-fifth General Assembly, you will note from a copy of the act which we are herewith enclosing that Section 15 controls the sale of beer by a Class "B" permit holder and that no provision is made with reference to the amount, original containers or refrigeration.

While you did not ask relative to the Class "C" permit holder, will say that Section 16 provides:

"Any person holding a Class 'C' permit issued as herein provided, shall be allowed to sell beer for consumption *off the premises*, provided, however, that such sales when made shall be in *original containers* only."

We construe this to mean the bottle or the keg, while in the case of a Class "B" permit holder, a can or pitcher of beer could be sold for consumption off the premises.

OLD AGE PENSION LAW: 1. If "A" arrived at the age of 21 years after January 1, 1934, he would not be assessed under Senate File No. 42, Extra Session, 45th General Assembly. 2. Residence would be determined as of January 1, 1934. 3. Section 35 is the only section controlling a payment in 1934. No credit is contemplated on poll tax on the payment made this year.

April 9, 1934. *County Attorney, Belmond, Iowa:* This will acknowledge receipt of your request for the opinion of this Department on the following questions:

1. In assessing the tax imposed on all persons of the age of 21 years or over, under the provisions of Senate File No. 42, Extra Session, Forty-fifth General Assembly, what date should the assessor use in making the assessment? By way of illustration—suppose on January first, Mr. "A" was only 20 years of age but arrived at the age of 21 years within a few days—should he be assessed for that year?

It is the opinion of this Department that if "A" arrived at the age of 21 years after January 1, 1934, he would not be assessed under Senate File No. 42, Extra Session, Forty-fifth General Assembly, which is the Old Age Pension Act. The assessment roll is made up as of the first of the year.

2. In fixing the place of residence of the person assessed, shall his residence be determined as of January 1, 1934, or the date the assessment is made or as of the date the law became effective?

In the opinion of this Department, his residence would be determined as of January 1, 1934.

3. Senate File No. 42, Extra Session, Forty-fifth General Assembly, provides that a person who is assessed and pays poll tax is credited with the $1.00. In many rural townships, people have already worked out the poll tax for this year. How are they now to receive credit in view of the fact that they have worked out the tax?

It is the opinion of this Department that Section 35 is the only section controlling a payment in 1934. Said section provides as follows:

"For the purpose of affording old age assistance commencing November 1, 1934, under the provisions of this act prior to July 1, 1935, there is hereby levied on all persons pursuant to Section 34, a tax of one dollar ($1.00), payable on or before July 1, 1934. The Board of Assessment and Review is hereby directed to instruct the auditors of the several counties of the state to have the assessors submit lists of persons over twenty-one (21) years of age, subject to this tax in their respective districts and the said auditor to pass these lists on to the treasurer of such counties for collection."

We have ruled in an opinion under date of the eleventh instant to the Old Age Assistance Commission that no credit is contemplated on poll tax on the payment made this year. A copy of this opinion is enclosed herewith for your convenience.

OLD AGE PENSION BILL: SENATE FILE NO. 42: SECTION 5 THEREOF: OLD AGE ASSISTANCE BOARD IN COUNTIES: OVERSEER OF POOR—EX OFFICIO MEMBER: The Board shall consist of three members which shall include the ex officio member, overseer of the poor.

April 10, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your request of the seventh instant for the opinion of this Department on the following question:

Under Section 5 of Senate File No. 42, Acts of the Extra Session of the Forty-fifth General Assembly, reference is made to the appointment of an Old Age Assistance Board in counties and states that the Board shall consist of three members and that the overseer of the poor shall be an ex officio member. Does this mean that the Board shall consist of three or four members?

Please be advised that in the opinion of this Department, the Board shall

consist of three members to include the overseer of the poor in counties where they have such an officer. The word "ex-officio" means "by virtue of his office." You will note in Section 5 of the act that after stating that "the overseer of the poor shall be an ex-officio member," it goes on in the third sentence of said section as follows:

"The other two members of the board shall be appointed by the Board of Supervisors for a term of one and two years respectively."

While this section of the act may be a bit ambiguous, yet the intention of the Legislature is clear by the reference, as referred to above, to the other two members of the Board and also the mandatory provision that the *Board shall consist of three members.*

RETAIL SALES TAX: The State of Iowa is *not taxable* under the Retail Sales Act passed by the 45th Extra General Assembly, effective between April 1, 1934, and April 1, 1937.

April 11, 1934. *Chairman, Board of Assessment and Review, Des Moines, Iowa:* Your Board has requested an opinion from this Department upon the following proposition:

"Are sales of tangible personal property to the State of Iowa taxable under the provisions of the retail sales tax recently passed by the 45th Extra General Assembly?"

Section 38 of Division 4 of House File No. 1 provides as follows:

"There is hereby imposed, beginning the first day of April, 1934, and ending April 1, 1937, a tax of two per cent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this division, sold at retail in the State of Iowa to consumers or users; * * *"

This section of the act clearly imposes the tax upon all sales of tangible personal property sold at retail in the State of Iowa to consumers or users. "Consumers" or "users" are persons within the meaning and contemplation of the Sales Act itself. What are persons within the meaning of this Act? Division (a) of Section 37 of the Sales Act defines a person as follows:

" 'Person' includes any individual, firm, copartnership, joint adventure, association, corporation, municipal corporation, estate, trust, business trust, receiver, or any other group or combination acting as a unit, and the plural as well as the singular number."

This statutory definition of person so far as the Sales Act is concerned does not include the State, unless the State is a municipal corporation. The law is clear that the State is not a municipal corporation. See 43 C. J. 72, Armstrong vs. Maville State Bank, 177 App. Div. 265, 165 N. Y. S. 5, Bouvier's Law Dictionary.

The Legislature in defining a person under the Sales Act did not include the State in that definition. However, it did specifically include about a dozen other classifications. It is well settled rule in Iowa that where the one is expressed, all others are excluded. Therefore, it must certainly have been the intention of the Legislature not to include the State in its definition of person under the Retail Sales Act. This consideration is controlling from the very Act itself.

On the broad ground of public policy, it would be meaningless for the State to pass an act taxing itself. The ultimate object of State taxation is for the purpose of raising sufficient revenue to operate the State government and its subdivisions. Individuals, property, both real and personal, and business enterprises are generally taxable for the purpose of raising public revenue for the

operation of State government. It would be senseless for the State government to attempt to tax itself.

It is therefore the opinion of this Department that the retail sales tax above referred to does not apply to sales made to the State of Iowa.

BEER BILL: HOUSE FILE NO. 336, EXTRA SESSION, 45TH GENERAL ASSEMBLY: "ZONED": DIVISION F, SUBSECTION 1 OF SECTION 12: What is your interpretation of the word "zoned?" Does it refer to a city or town having the power to zone districts under the Zoning Ordinance law or does it apply to any place in a district commonly used as a business district?

April 11, 1934. *County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your letter of the fifth instant in which you request the opinion of this Department on the following question:

What is your interpretation of the word "zoned" as used in division f of Subsection 1 of Section 12 of House File No. 336, Acts of the Extra Session of the Forty-fifth General Assembly?

Does it refer to a city or town having the power to zone districts under the Zoning Ordinance law or does it apply to any place in a district commonly used as a business district?

Please be advised that it is the opinion of this Department that this applies only to cities and towns which, under the law, are permitted to zone districts. In other words, we think that the Legislature, in the use of the word "zoned," as a business district, was to apply to such districts which were zoned in accordance with the Zoning Ordinance law and the word "zoned" was used advisedly in that connection.

OLD AGE PENSION BILL: SENATE FILE NO. 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: ASSESSMENT: CREDIT ON POLL TAXES: SECTION 35.

April 11, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your request on the ninth instant for the opinion of this Department on the following question:

Our Commission would like your interpretation of the payments to be made under Section 35 of Senate File No. 42, Extra Session, Forty-fifth General Assembly, which is the old age pension law, with reference to the $1.00 to be paid on or before July 1, 1934, on the particular question as to whether or not the credit on poll tax, as provided in Section 34, is applied to this initial payment under the act.

You state that in order to set up the machinery under which this act is to function that it is your opinion that this credit should not be allowed on the first payment to be made under the act.

It is the opinion of this Department that Section 34 of the act relates to the general functions of the act after the same is in operation or, in other words, that the $2.00 payment to be made each year subsequent to 1934 shall be on a $2.00 basis and the credit, as set out in the act on the payment of poll tax, will take effect subsequent to 1934.

Section 35, in our opinion, because of its wording and the special provisions made for the setting up of the Commission, should be paid without the credit on poll taxes as it provides as follows:

"For the purpose of affording old age assistance commencing November 1, 1934, under the provisions of this act prior to July 1, 1935, there is hereby levied on all persons pursuant to Section 34, a tax of one dollar ($1.00) payable on or before July 1, 1934."

It was, undoubtedly, the intention of the Legislature by making a special provision in Section 35 for the initial payment to create a fund whereby the

Commission could afford assistance commencing November 1, 1934, and placing this provision in a separate section in the act undoubtedly was for the purpose of having this payment made in cash and allowing *no credit* as the credit on poll taxes is treated in Section 34 of the act in connection with the $2.00 payment to be made each year.

FISH AND GAME COMMISSION: JURISDICTION: EXERCISE OF CONTROL OVER DEVELOPMENTS OF AREAS ADJOINING ANY OF OUR PROPERTY LINES: What jurisdiction, if any, does the Fish and Game Commission have in the exercise of control over developments of areas adjoining any of our property lines? * * * *. Does the Fish and Game Commission have any similar control?

April 11, 1934. *Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 19th ultimo in which you request the opinion of this Department on the following question:

What jurisdiction, if any, does the Fish and Game Commission have in the exercise of control over developments of areas adjoining any of our property lines?

"I believe the State Board of Conservation has been assigned certain measures of control." Does the Fish and Game Commission have any similar control?

As you know, Section 1704, 1931 Code of Iowa, gives to your Commission the title and ownership of various fish and wild game, including nests and eggs found in the State of Iowa with certain exceptions cited in said section.

Also, Section 1709 gives the right to you to establish and control state hatcheries and game farms.

Section 1709-a1 provides as follows:

"*State game refuges.* 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."

In Section 1706-a2, you have the authority to specify the distance from a state game refuge where shooting may be prohibited.

Under Section 1709-c1, you have the right to set aside certain portions of any state waters for spawning.

In connection with this question, we also wish to call your attention to Section 1741 which is as follows:

"*Dams—fishways.* It shall be unlawful for any person, firm, or corporation to place, erect, or cause to be placed or erected, any dam or other device or contrivance in such manner as to hinder or obstruct the free passage of fish, up, down, or through such waters, except as otherwise provided in this chapter. Dams for manufacturing or other lawful purposes may be erected across the waters of the state. No dam or obstruction across such waters shall be erected or maintained which is not provided with a fishway, nor shall any pumping and dredging machines, in or connected with such waters be constructed or operated which is not provided with screens to prevent fish from entering the pumping station or plant. Such fishways and screens shall be constructed and used according to the plans and specifications prepared and furnished by the state game warden. Any dam, obstruction, or pumping plant which is not so constructed is a public nuisance and may be abated accordingly."

and also see subsequent section, 1742, entitled "Injury to Dam."

Section 5 of Chapter 30, Acts of the Forty-fifth General Assembly, relates to the establishment of a game management area with the consent of the owner thereof upon private lands or waters as well as upon public lands and waters.

The measures of control possessed by your Commission and by you as warden

are contained in the sections cited above and they are broad in the controlling of waters and prohibits the use of waters which are used in such a way as to interfere with wild life under your jurisdiction. In this connection, I wish to call your particular attention to Section 1741 above set out. In all matters, as we view it, you have the same right as would any other owner of property with exception to the particular reference to a game refuge but it is our opinion that you would not have any other control over land owned by private individuals which property adjoins the property owned by you with the exception of the sections as pointed out above which gives you the right to prohibit the use of fire arms within a certain distance from a state game refuge—private property owners of areas adjoining your property could not create a nuisance without being answerable at law or do anything else to interfere with the use of the property belonging to the State under your jurisdiction.

If we understand your question correctly, control over property by private individuals would cease at that point with the exception of where something was done which would interfere with you in the use of property over which you have jurisdiction under the law of this State.

In connection with the use and the rights of property owners to the flow of waters of a stream, the general law is found in the case of Gehlen Brothers, et al., vs. J. F. Knorr, et al., 101 Iowa, 700. The general rule of law as stated is:

"One property owner has no monopoly in the flow of the water; every proprietor above them has the same right to use the water for artificial purposes, and every one of the upper proprietors, for the purpose of enabling themselves to reap the benefit of this right, have, as a natural consequence, the right to temporarily stop the flow of the stream for such length of time as will put them in position to reap the benefits of their rights."

See Willis vs. City of Perry, 92 Iowa, 297:

"In the absence of superior rights acquired by license, grant, or prescription, the rights of such proprietors in the water of the stream are equal."

Your Commission would have additional rights to those stated, that is in these cases which state with reference to the general law with regard to fish and streams and jurisdiction in matters where the stream was polluted in such a way as to cause injury to wild life.

IOWA GASOLINE TAX LAW: HOUSE FILE NO. 185, 45TH GENERAL ASSEMBLY: State not liable for gas tax; therefore, there would be nothing to refund to state.

April 12, 1934. *Board of Control, Des Moines, Iowa:* We have your request for opinion as to the construction of House File 185, Forty-fifth General Assembly, Special Session, entitled "An act revising the Iowa Gasoline Tax Law," and whether under the provisions of this act, the gas tax must be paid by the State and also whether if it is paid, a refund can be made on the tax for motor fuel used in the operation of State owned automobiles on the public highways.

The power to tax is an essential attribute of sovereignty and public property of the State is presumptively immune from taxability, but this immunity does not result from lack of power of the Legislature, but from the presumption that the Legislature did not intend to tax the State. In this act, it is to be noted that the person is defined in Section 2 and the State is not included in that definition, nor is the State included in the ones entitled to a refund in Section 29 of the act, the presumption of law being, as we have heretofore pointed out, that the public property and the State itself is immune from taxability and there being no definite provision in the act requiring the State to pay the tax,

it is clear that the same need not be paid by the State. It is clear from the act that there can be no refund to the State and we presume that the Legislature intended that no tax being collected from the State, there could be nothing to refund to it, and therefore, no provision was made as to refund.

It is, therefore, the opinion of this Department that under the provisions of House File 185 of the Forty-fifth General Assembly, Special Session, the State is not liable for the tax imposed therein.

INDUSTRIAL COMMISSION.

April 14, 1934. *Iowa Industrial Commissioner, Des Moines, Iowa:* This will acknowledge receipt of your favor of the 11th inst. in which you request an opinion from this office upon the following question:

"The Forty-fifth General Assembly amended Section 1457 of the Code limiting re-opening of compensation settlements to a period of five years 'from the date of last payment under such award or agreement.'

Will you kindly give me your opinion as to whether or not this limitation applies to settlements in cases of injuries occurring prior to the date of amendment enactment?"

Section 1457 of the Code of 1931 provides as follows:

"Review of award or settlement. Any award for payments or agreement for settlement made under this chapter where the amount has not been commuted, may be reviewed by the industrial commissioner, at the request of the employer or of the employee at any time, and if on such review the commissioner finds the condition of the employee warrants such action, he may end, diminish or increase the compensation so awarded or agreed upon."

This statute was amended by Chapter 26, Acts of the General Assembly, as follows:

"* * * by adding after the word 'time' in line six (6) the following: 'within five (5) years from the date of the last payment of compensation made under such award or agreement.'"

It is a fundamental canon of statutory construction that unless otherwise plainly expressed statutes are aimed for future operation only. It was said in Culbertson Estate 204 Iowa, 473:

"Statutes should be construed as having a prospective and not a retroactive effect unless a contrary legislative intent appears."

And, in Thomas vs. Disbrow, 208 Iowa, 873:

"Statutes are to be construed as having a prospective operation only unless a contrary intention clearly appears."

Applying these fundamental rules to the question submitted we reach the conclusion that it was the legislative intent that in all cases of injury or where awards or agreements were entered into between the parties with respect to such injuries occurring on or after the passage of Chapter 26 amending Section 1457 of the Code, these would come within the purview of Chapter 26 and would be subject to review by the commissioner within the five-year period therein provided.

Conversely stated, it is our opinion that injuries, awards or settlements occurring prior to the effective date of Chapter 26 would be determinable under Section 1457 of the 1931 Code of Iowa.

ELECTIONS: SELECTION OF PRECINCT ELECTION BOARDS: "Under Chapter 40, 1931 Code, the single election board is to be made up or completed according to the vote in the particular precinct, and we are constrained to the opinion that, under Chapter 42, relative to double election boards, the counting board should also be made up by the appointment of two judges and one clerk from the political party casting the largest number of votes

in that precinct and one judge and one clerk from the party casting the next highest number of votes in said precinct."

April 17, 1934. *Deputy Secretary of State, Des Moines, Iowa:* We acknowledge receipt of your recent letter, in which you ask for an opinion on the following:

"In the selection of precinct election boards, are the Supervisors bound to name a majority of each board corresponding to the majority returns of either of the major parties in the last previous election, and, if so, would the majority in the state, county or precinct govern?"

This question, in so far as it applies to the single election board, generally known as the receiving board, is covered by Chapter 40 of the Code of 1931. Section 730 provides that the election boards shall consist of three judges and two clerks, and that not more than two judges and not more than one clerk shall belong to the same political party or organization.

Section 731 provides as follows:

"731. Judges in cities and towns. In cities and towns, the councilmen shall be judges of election; but in case more than two councilmen belonging to the same political party or organization are residents of the same election precinct, the county board of supervisors may designate which of them shall serve as judge."

Of course, the above Section, in providing that in cities and towns the councilmen shall be judges of the election, means that they shall be judges in the precincts in which they reside, and not in some other precinct in the city or town.

Section 732 provides as follows:

"732. Judges and clerk in township precincts. In township precincts, the clerk of the township shall be a clerk of election of the precinct in which he resides, and the trustees of the township shall be judges of election, except that, in townships not divided into election precincts, if all the trustees be of the same political party, the board of supervisors shall determine by lot which two of the three trustees shall be judges of such precinct."

Section 733, which pertains to the makeup or completion of the single election boards, is as follows:

"733. Supervisors to choose additional members. The membership of such election board shall be made up or completed by the board of supervisors from the parties which cast the largest and next largest number of votes in said precinct at the last general election, or that one which is unrepresented."

You will note that this Section provides that the membership of such board shall be made up or completed by the Board of Supervisors, not from the parties which cast the largest and next largest number of votes in the state or the county, but from the parties which cast the largest and next largest number of votes "in said precinct" at the last general election. There is no question then but that, in so far as the receiving board is concerned, it is to be made up of the trustees and clerk in township precincts, in so far as possible, and from the councilmen in cities and towns, in so far as possible. If a township precinct should have two Democratic and one Republican trustee, or if it should have two Republican and one Democratic trustee, then those officers will act as the judges of the election. However, if all three of the trustees happen to belong to the same political party, the Board of Supervisors shall then determine by lot which two of them shall be judges of such precinct, and the third member shall be chosen by the Board of Supervisors from the opposite political party.

The law relative to the selection of counting boards is found in Chapter 42

of the Code of 1931. Sections 887 and 888 provide, respectively, for the double counting boards and their qualifications. Section 889 provides that the judges and clerks of election, as provided in existing law (meaning Chapter 40 of the Code of 1931), shall be known as the receiving board, and that that board shall supervise the casting of the ballots, and that the judges and clerks, as provided for in Section 887 and Section 888, shall be known as the counting board.

Section 890 provides as follows:

"890. Selection of counting board—duties. The counting board shall be chosen from the two political parties casting the highest number of votes at the last general election. Not more than two judges nor more than one clerk shall belong to the same political organization, provided that two of such judges shall be chosen from the political party casting the highest number of votes at the last preceding general election. The receiving board shall perform all the functions of judges and clerks of election as now provided by law except as to counting and certifying the vote as by this chapter provided."

It will be noted that this Section just quoted is not explicit in its terms as to whether or not the largest number of votes shall mean in the state, the county, or the precinct. However, in view of the fact that the judges are being picked for a precinct and not for a county or a state, and in view of the further fact that Section 733, which applies to the single election board or receiving board, contains the express terms, "in said precinct," we can only say that the Legislature intended that the same rule should apply in Section 890; and that in enacting that portion of the statute, when the Legislature provided that two of the judges should be chosen from the political party casting the highest number of votes at the last preceding general election, it meant casting the highest number of votes in that precinct. We cannot conscientiously say that the Legislature intended to bind the people in each voting precinct, regardless of the vote in that precinct, by the vote which was cast for the head of the ticket in the entire state.

There is no question but that, under Chapter 40 of the Code of 1931, the single election board is to be made up or completed according to the vote in the particular precinct, and we are constrained to the opinion that, under Chapter 42, relative to double election boards, the counting board should also be made up by the appointment of two judges and one clerk from the political party casting the largest number of votes in that precinct and one judge and one clerk from the party casting the next highest number of votes in said precinct.

In so far as determining what is meant by the largest vote, we will say that it means the largest vote cast for the head of the ticket, which in the fall of 1932 would have been the largest vote cast for President of the United States. You may wonder why we say the largest vote cast for the President of the United States, rather than Governor of the State of Iowa, in view of the last paragraph of Section 546 of the Code of 1931. It will be noted, however, that Section 546 applies only to the number of signatures on nomination papers, and has nothing to do with judges and clerks of election. For that reason, we are of the opinion that the only proper method of determining which party had the largest number of votes is by ascertaining the vote for the head of the ticket.

COUNTY: MUNICIPALITY: POWER TO LIMIT AMOUNT TO COVER COST OF EXAMINATION OF RECORDS: "The statutes of this state fix the per diem and provide for the allowance of expenses for the examiners. The cost of an examination of a certain county will differ in different years. We knew of no authority under the statute for the State Auditor to adopt rules

and regulations fixing the amount of expense that shall be allowed to persons employed by the State of Iowa."

April 19, 1934. *Auditor of State, Des Moines, Iowa:* We acknowledge receipt of your letter of recent date, in which you ask for an opinion on the following:

"1. In view of the provisions of Sections 125 and 126 of the Code of 1931, as amended by Chapter 7, Section 8 of the Acts of the 45th General Assembly, has any county or municipality the power to limit the amount that will be paid to cover the cost of an examination of that county or municipality's records? In other words, can a county or municipality by appropriation limit said cost?"

Chapter 7, Section 8, of the Acts of the Forty-fifth General Assembly provides as follows:

"Sec. 8. Section one hundred twenty-six (126), Code, 1931, is repealed and the following enacted in lieu thereof:

"'126. Upon payment by the state of the per diem and expense aforesaid, the auditor of state shall at once file with the warrant-issuing officer of the county, school or municipality whose office was examined, a copy of the vouchers so paid by the state, and thereupon said warrant-issuing officer shall at once draw his warrant for said amount on the general funds of his county, school or municipality in favor of the auditor of state, which warrant shall be placed to the credit of the general fund of the state.'"

In view of the wording of the above enactment, it is the opinion of this office that when the State of Iowa pays the per diem and expense for examination of the accounts of a county, municipality or school district, and has filed with the proper warrant-issuing officer of said county, municipality or school district a copy of the voucher so paid by the state, the warrant-issuing officer has only one choice, that is, to draw his warrant for the amount of the voucher on the general fund of his county, municipality or school district, in favor of the Auditor of State, and forward the same to the said Auditor of State.

The statutes of this State fix the per diem and provide for the allowance of expenses for the examiners. There is no question but that the cost of an examination of a certain county will differ in different years.

"2. Has any governing body of a political division the right to state that it will not pay the expenses of the examiners occupied on an audit, in view of Section 125 of the Code of 1931 and Chapter 7, Section 8, of the Acts of the 45th General Assembly, in addition to Chapter 49, Section 188, of the Acts of the 45th General Assembly?"

There is no question but that, under the provisions of the statute cited in the above question, the governing body of the political division has nothing to say about it. The warrant-issuing officer is the person who issues the warrant, and if he refuses to do so, an action in mandamus will lie to compel him to issue it.

"3. Are we in keeping with the spirit of the law, when we establish a ruling that the actual and necessary expense, as mentioned in Section 49 of Chapter 188 of the Acts of the 45th General Assembly, shall be limited to $2.00 per day. This $2.00 per day allowance is much less than the Board of Audit rule of the Comptroller's Office, and represents a saving of approximately $1.50 over the average per man per day expense of previous years."

We do not believe you have a right to make such a ruling. Section 49, Chapter 188, of the Acts of the Forty-fifth Regular Session, provides that the Auditor is authorized to employ county and municipal examiners and assistants at a per diem not exceeding $7.00 each, "and their actual and necessary expenses, while engaged in the performance of their duties." We do not see how you can limit the expense to $2.00 per day under that act. In fact, we know of no authority under the statute for the State Auditor to adopt rules and regula-

tions fixing the amount of expense that shall be allowed to persons employed by the State of Iowa.

ELECTIONS: CHANGE OF PARTY AFFILIATION: "Party affiliation may be changed in the following manner: 1. By executing the written declaration and filing the same with the County Auditor, which means either appearing personally and presenting the declaration to the County Auditor, or by sending it in with some other person, or mailing it. 2. By making an oral declaration on the day of the primaries, when he appears and calls for his ballot for the purpose of voting."

April 20, 1934. *County Attorney, Nevada, Iowa:* We acknowledge receipt of your letter of recent date, in which you ask for an opinion on the following:

"In making a change of party affiliation, as provided in Chapter 36 of the Code of 1931, is it permissible for the party wishing to make the change to sign a written declaration and mail it to the Auditor or send it in with someone else, or is it necessary that the party signing the declaration appear personally at the Auditor's Office?"

Section 569 of the Code of 1931 provides as follows:

"569. Change of party affiliation. Any elector, who, having declared his party affiliation, desires to change the same, may, not less than ten days prior to the date of any primary election, file a written declaration with the county auditor stating his change of party affiliation, and the auditor shall enter a record of such change on the poll books of the last preceding primary election in the proper column opposite the voter's name and on the voting list."

It will be noted that this section does not require that the person executing the written declaration appear personally before the County Auditor, nor does it provide that he "shall" file the declaration more than ten days prior to the primary election. On the contrary, it provides that he "may" file the declaration not less than ten days prior to the election. There is nothing in the statute, from which even an inference could be drawn to the effect that it was necessary for the elector to appear personally in the Auditor's Office. He has a right to sign the written declaration and mail it to the County Auditor or send it in by any other person, if he so desires.

We also call your attention to Section 572, which is as follows:

"572. Change of affiliation—challenge. Any elector whose party affiliation has been recorded as provided by this chapter, and who desires to change his party affiliation on the primary election day, shall be subject to challenge. If the person challenged insists that he is entitled to vote the ticket of the political party to which he has transferred his political affiliation and the challenge is not withdrawn, one of the judges shall tender to him the following oath: 'You do solemnly swear (or affirm) that you have in good faith changed your party affiliation to and desire to be a member of the .....party.' If he take such oath he shall thereupon be given a ticket of such political party and the clerks of the primary election shall change his enrollment of party affiliation accordingly."

It will be noted from the reading of the section just quoted that an elector may change his party affiliation on the day of the primary election. If he is challenged and desires to take an oath that he has in good faith changed his affiliation, he is then entitled to receive a ticket of the party, to which he claims to belong.

It is, therefore, the opinion of this office that party affiliation may be changed in the following manner:

1. By executing the written declaration and filing the same with the County Auditor, which means either appearing personally and presenting the declaration to the County Auditor, or by sending it in with some other person, or mailing it.

2. By making an oral declaration on the day of the primaries, when he appears and calls for his ballot for the purpose of voting.

SOLDIERS: SOLDIERS' RELIEF ACT: TAX EXEMPTION: "It is, therefore, the opinion of this office that, in order to determine whether or not a soldier or sailor is entitled to the benefits of the Soldiers' Relief Act or the tax exemption provided for in Section 6946, the dates, which should be considered, are April 6, 1917, and November 11, 1918."

April 21, 1934. *State Bonus Board, Des Moines, Iowa:* We acknowledge receipt of your letter of April 17th, in which you ask for an opinion on the following:

"Are soldiers, sailors and marines, who enlisted between the signing of the Armistice on November 11, 1918, and the signing of the Peace Treaty on July 2, 1921, considered to be veterans of the World War, to the extent that they are entitled to benefits from the County Soldiers' Relief Fund, and also entitled to exemption from taxation?"

It is generally conceded that the date, on which the World War ended, was November 11, 1918. To now extend that date to July 2, 1921, for the purpose of assisting persons, who enlisted after November 11th and were sent to Germany in the Army of Occupation, would raise a lot of questions relative to the merits of cases where soldiers claimed that they enlisted for the purpose of being sent to the Army of Occupation, but were sent to the Philippines or Central America, instead, or even sidetracked in some army camp in the United States.

It is, therefore, the opinion of this office that, in order to determine whether or not a soldier or sailor is entitled to the benefits of the Soldiers' Relief Act or the tax exemption provided for in Section 6946, the dates, which should be considered, are April 6, 1917, and November 11, 1918.

SOLDIERS' RELIEF COMMISSION: BOARD OF SUPERVISORS: CARE OF GRAVES OF DECEASED SOLDIERS: "It is the duty of the Board of Supervisors of each county to *appropriate* and pay a sum sufficient to pay for the care of the lots on which the soldiers and sailors are buried. It has no right to pay for anything, except for the current year. Section 5396-a1 does not mean that the trustees of the cemetery are entitled to receive pay for the care of graves from the Soldiers' Relief Fund or general fund of the county, if the graves are being maintained in some other manner."

April 21, 1934. *Executive Secretary, Bonus Board, Des Moines, Iowa.* We wish to acknowledge receipt of your letter of April 17th, in which you ask for an opinion on the following questions:

"1. Is it mandatory upon the Board of Supervisors or Soldiers' Relief Commission to pay for the care of graves of deceased soldiers or sailors of the United States, when bills for the same are not presented during the current year?"

We believe this matter is covered by Section 5396-a1 of the Code of 1931, which provides as follows:

"5396-a1. Maintenance of graves. The board of supervisors of the 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 will be noted from the reading of the section just quoted that it is the duty of the Board of Supervisors of each county to *appropriate* and pay a sum

sufficient to pay for the care and maintenance of the lots on which the soldiers and sailors are buried. The Board, however, has no right to pay for anything, except for the current year. There is no legal excuse for asking the Board to pay for something in the year of 1934, which should have been paid for during the past five or six years, and thereby take all of the Soldiers' Relief Fund for that one item, and thereby cripple the fund to such an extent that the Commission could not grant relief to indigent soldiers and sailors during the current year.

"2. Is it mandatory, under Chapter 273, Section 5396-a1 of the Code of 1931, for the Board of Supervisors or Soldiers' Relief Commission to pay for the care of all graves not otherwise provided for, when the deceased left an ample estate or has relatives financially able to provide care?"

Of course, we realize that the purpose of Section 5396-a1 is to insure the proper care for all soldiers' and sailors' graves. However, in many instances, the purchase price of the lot in the cemetery carries with it a sufficient sum to insure the care of graves. In other instances, the relatives of the deceased have provided and are providing for the care of these graves. When graves are neglected, the Board of Supervisors should appropriate a sufficient sum to care for them. They should not, however, pay for the care of graves, when they are being cared for in any other manner. The section does not mean that the trustees of the cemetery are entitled to receive pay for the care of those graves from the Soldiers' Relief Fund or general fund of the county, regardless of the fact that the graves are being maintained in some other manner. The section provides that such appropriation shall be made in all cases, in which provision for such care is not otherwise made, and we believe it means just that and nothing more.

CANDIDATE FOR COUNTY ATTORNEY: QUALIFICATION: NOT COMPLETED LAW COURSE: A young man who has not taken the bar and has not yet completed his law course can become a candidate for county attorney and hold the office in case he is elected if he is duly admitted to the bar before the second secular day in January of the first year of the term for which such officer was elected.

April 26, 1934. *County Attorney, Boone, Iowa:* I have your letter of April 24th in which you ask my opinion upon the following proposition:

"Can a young man who has not yet completed his law course and who has not taken the bar become a candidate for county attorney and hold the office in case he is elected?"

Section 5179 of the 1931 Code provides:

"County attorneys shall be qualified electors of their respective counties, duly admitted to practice as attorneys and counselors in the courts of this state as provided by law. * * * * *."

Section 1045 of the 1931 Code of Iowa provides as follows:

"Each officer, elective or appointive, before entering upon his duties as such, shall qualify by taking the prescribed oath and by giving, when required, a bond, which qualification shall be perfected, unless otherwise specified, before noon of the second secular day in January of the first year of the term for which such officer was elected."

County officers shall all qualify before noon of the second secular day of January of the first year of the term for which they were elected. Therefore, the qualification test comes at the time the officer presents himself to take the oath of office. If, at that time, he is fully qualified, he may take the oath of office and serve

There are a number of instances where senior law students have become candidates for county attorney in the primary before they were admitted to the practice of law and who later were admitted to practice before they were elected and before they took their oath of office. It appears that a law student is taking quite a few chances if he becomes a candidate before he knows whether or not he can qualify for the office. However, that is a personal matter with the individual and I see nothing in the law to prevent such a person from becoming a candidate for the office.

Hence, it is the opinion of this Department that the law student may become a candidate for the office of county attorney but must be duly admitted to the bar prior to noon of the second secular day in January of the first year of the term for which such officer was elected.

NOMINATION PAPERS: Where a Congressional District is composed of six counties, the signatures required may all come from one county, but the percentage should be figured on the total vote of the party in the entire Congressional District.

April 26, 1934. *Secretary of State, Des Moines, Iowa:* You have requested an opinion from this Department upon the following proposition:

"In a congressional district composed of six counties is it necessary for a candidate in the primary to get 2 per cent of the voters of his party, as shown by the last general election, in each of the one-half of the counties in said district in order to place the candidate's name on the ballot in the primary election?"

As I understand the facts in the particular case, the candidate has in the aggregate 1 per cent of the total vote of his party in such district and also in the aggregate 2 per cent of the total vote of his party in three counties which is one-half of the counties in the district but that the candidate does not have 2 per cent of the voters in each of the three counties to his nomination papers.

A similar question was presented to the Attorney General's office on February 28, 1912, upon which there is an Attorney General's ruling which appears in the Report of Attorney General of Iowa from 1911-1912 on pages 588 and 589. This opinion is as follows, to-wit:

A. D. Nye, Treasurer,
Bedford, Iowa.

Dear Sir:

Yours of the 25th instant addressed to the attorney general has been referred to me for reply.

Your questions are:

"First. In a senatorial district composed of two counties, is it necessary to get signers in both counties on a nomination paper to place a candidate's name on the ballot at the primary election?

"Second. Do signatures on nomination papers necessarily have to be written in ink?"

Subdivision 2 of Code Supplement Section 1087-a10 provides:

"If for a representative in congress, district elector, or senator in the general assembly in districts composed of more than one county, by at least two per centum of the voters of his party, as shown by the last general election, in at least one-half of the counties of the district, and in the aggregate not less than one per centum of the total vote of his party in such district, as shown by the last general election."

Hence, it follows that your first interrogatory should be answered in the negative. However, the signatures should aggregate not less than one per centum of the total vote of the party in both counties of the district.

The statute seems to be silent on the question of whether or not the nomi-

nation paper should be signed in ink. Hence, I am of the opinion that this interrogatory should also be answered in the negative.

Yours very truly,

C. A. Robbins, Assistant Attorney General.

It is apparent that it was the legislative intent to have the candidate secure at least 1 per cent of the total vote of his party in such district as shown by the last general election. In other words, the legislature intended that, in order to place a candidate's name on the primary ballot, he must secure a certain number of signers to his petition. If the candidate secures the total number of signers required in one county of the district, it would be sufficient. It is not required that the candidate secure 2 per cent of the voters in each of the three counties, which is one-half the number of counties in this congressional district.

It is, therefore, the opinion of this Department that, if the candidate has in the aggregate not less than 1 per cent of the total vote of his party in such district as shown by the last general election, he has met the requirements of Section 546 of the 1931 Code of Iowa and is, therefore, entitled to have his name placed upon the ballot as such candidate in the coming primary election.

AUDITOR OF STATE: STATE EXAMINERS: PUBLIC OFFICES: "The examiner should scrutinize carefully all of the official acts and should examine all documents and papers, so that when his examination is completed and his report made, it will not be based upon any suspicions that he might have but upon a true set of facts as he found them to exist. He has the right to examine all checking accounts, check books, etc."

April 26, 1934. *Auditor of State, Des Moines, Iowa:* We acknowledge receipt of your letter of April 25th, in which you ask for an opinion on the following:

"Does this department have the authority to instruct the state examiners to insist on inspecting and examining all checking accounts, check books, check registers and cancelled checks, used and regularly kept in the various county and municipal offices incident to the public business regularly conducted in said office, during the course of any authorized examination of the condition of said office?"

In answering your question, we believe that we have only to cite to you Sections 4 and 5 of Chapter 7 of the Acts of the 45th Regular Session of the General Assembly. Section 4 provides that the examiners shall have the right, while making said examinations, to examine all papers, books, records and documents of any of said officers, and shall have the right, in the presence of the custodian or his deputy, to have access to the cash drawers and cash in the official custody of such officer, and a like right, during business hours, to examine the public accounts of the county, school or city in any depository which has public funds in its custody pursuant to the law.

Section 5 provides in substance that the examination shall be without notice to the office examined, and that inquiry shall be made as to the financial condition and resources of the county, school or city, relative to the cost price for improvements and material; whether the county, school or city authorities are complying with the law; and whether the accounts and reports are being accurately kept.

The purpose of this examination is to ascertain for the benefit of the public just what the financial condition of the county is and just how the offices are being managed and the funds handled. It follows that the examiner should be very careful and thorough in making his examination. He wants to know

exactly everything that is going on in the office, so far as the handling of the funds is concerned, not necessarily for the purpose of finding fault, but for the purpose of giving advice. He may find that a public official is handling funds in a way that is in violation of law, and yet that his intentions are absolutely good and that he has not lost any of the money. If it is apparent to the examiner that such is the case, he naturally will want to give the official the proper advice concerning the method of handling the funds and wherein his present method is wrong. Such advice should be given as constructive criticism and should be received in the same manner and not looked upon by the official as meddling or fault-finding.

On the other hand, it is possible that a public official can switch funds for the purpose of covering up defalcations. These things have been done not only by public officials but by bankers, and so artfully that, upon examination, the defalcation was not discovered for several years. In fact, the writer of this opinion has had recent experience, in which a series of embezzlements had been occurring almost monthly for a period of four years without being discovered.

For the reasons stated, it is, therefore, only natural that, in making an examination, the examiner should scrutinize carefully all of the official acts and should examine carefully all documents and papers, so that when his examination is completed and his report made, it will not be based upon any suspicions that he might have but upon a true set of facts as he found them to exist; that he, therefore, has the right to examine all checking accounts, check books, check registers and cancelled checks, used and regularly kept in the various county and municipal offices incident to the public business conducted in said office.

TAXATION: USED CARS: "If the used car dealer is operating these used cars under his U. D. license as of January 1, 1934, they are to be assessed as personal property. If, however, he places individual license plates, other than U. D. plates, on the second hand cars, the assessor then has no right, power or authority to consider them as personal property and assess them as such."

April 28, 1934. *County Attorney, Sioux City, Iowa:* We wish to acknowledge receipt of your letter of recent date, in which you ask for an opinion on the following:

"1. Are used cars, owned by used car dealers and operated under a U. D. license on January 1, 1934, to be assessed as personal property?

"2. If such cars are assessed as personal property to the used car dealer, is he then entitled to a refund, if he sells the car sometime during the year of 1934 and said car is licensed at the time of the sale?"

You call attention in your letter to two cases, No. 42085 and No. 42153 Equity, which were tried in Polk county, in which cases the court ordered the assessments cancelled. Although it is impossible to determine from the reading of the decree, a copy of which you enclosed with your letter, whether or not these cars were being operated under a U. D. license or whether they bore individual license plates, we have read the petitions, which were filed by the plaintiffs, and we find that in each of those cases the cars, which were assessed as personal property as of January 1, 1927, and were at that time owned by the used car dealers, were being operated on individual license plates and not under U. D. license. Under such set of facts, there is no question but that the District Court was correct in its ruling. We do not find where any court

has passed on the exact questions submitted by you. However, we are convinced that had the facts in the above numbered cases been as submitted by you, the ruling of the District Court of Polk county would have been the opposite of what it was in those two cases.

Section 4888 of the Code of 1931 provides as follows:

"4888. Dealers and manufacturers—fee. Every person manufacturing or dealing in motor vehicles, including used motor vehicles, may instead of registering each motor vehicle, make an application for a general distinctive number for the motor vehicles owned or controlled by such manufacturer, dealer, or used car dealer. On the payment of a registration fee of twenty-five dollars, such application shall be registered in the office of the department."

The above quoted section is the law which authorizes the use of a dealer's license or U. D. license. Section 4900 of the Code of 1931, as amended by Chapter 76, Section 2, of the Acts of the 45th General Assembly, Regular Session, provides that licensed used car dealers, having on hand February 1st of any year for sale or trade used motor vehicles, upon which the license fee in this state for the previous year has been paid, may operate such motor vehicles as provided by Section 4888 above quoted. This section, however, merely gives the used car dealer the right to operate the motor vehicles upon the highways under his U. D. license. It has nothing to do with taxation. Except for the provisions of Section 4900, the used car dealer could not operate his motor vehicles after February 1st of any year, without putting individual license plates on the cars.

The next section provides that he shall list with the County Treasurer those cars upon which the license fee for the current year is not paid.

Section 4927 of the Code of 1931 provides as follows:

"4927. Fees in lieu of taxes. The registration fees imposed by this chapter upon motor vehicles, other than those of manufacturers and dealers and used car dealers, shall be in lieu of all taxes, general or local, to which motor vehicles may be subject."

The section just quoted is the one which calls for a construction. To us, it is so plain and so clearly worded that we cannot understand how anyone could possibly misconstrue it. It provides that the registration fees imposed by Chapter 251 upon motor vehicles, other than those of manufacturers, dealers and used car dealers, shall be in lieu of all taxes, general or local, to which motor vehicles may be subject. Without the exemption furnished by this section, all motor vehicles would be subject to taxation as personal property in the hands of the owner thereof. This section specifically exempts motor vehicles from taxation, when owned by anyone except a manufacturer, dealer or used car dealer, and, of course, when the individual license fees imposed by Chapter 251 have been paid. It, therefore, follows that if a dealer or used car dealer has on hand on January 1, 1934, either new or second-hand cars, if those cars have been licensed by him individually and not under his dealer's license, or U. D. license, they are not to be assessed as personal property or merchandise. However, if they are new cars and have not been licensed, but are being operated under the dealer's license, they are to be assessed as personal property. The same rule governs, in so far as used cars are concerned. If the used car dealer is operating these used cars under his U. D. license as of January 1, 1934, they are to be assessed as personal property. If, however, he places individual license plates, other than U. D. plates, on the second hand cars, the assessor then has no right, power or authority to consider them as personal property and assess them as such.

Our attention has been called to the fact that if the car is assessed as personal property as of January 1, 1934, and if on April 1, 1934, the used car dealer disposes of the car by sale and an individual license plate is at that time placed on the car and the individual license fee paid, it amounts to double taxation. Speaking in a strict legal sense, and following the rules laid down almost unanimously by the courts of this country, this does not amount to double taxation. Double taxation means to tax one person twice on the same property, while other persons in the same community, owning like property under similar conditions, are only being taxed once. In the case of a later sale, it is not the used car dealer who is paying the license fee. It is the person who purchases the car. There is no more double taxation in this case than in a case where one owning real estate is assessed the full market value of the real estate, while a person holding a mortgage on that real estate has the mortgage assessed to him for the full value as moneys and credits. The same thing is true, if a grocer owning a stock of merchandise gave someone a mortgage on his stock of goods, the stock of merchandise would naturally be assessed as personal property to the merchant, and he would be required to pay the tax on that merchandise, while the mortgage would be assessed as moneys and credits to the holder thereof, who would in turn be required to pay the tax on the mortgage.

In the case referred to by you, the used car dealer, if he is operating the motor vehicle under his U. D. license and not under separate individual license plates, is taxed on the value of that car as personal property. When he later disposes of the car, the purchaser thereof must pay a license fee before he is permitted to operate the motor vehicle on the public highways.

In conclusion, we should again call your attention to the fact that if the dealer or used car dealer, having automobiles on hand on the last day of December, 1933, registered those cars for 1934 by paying the individual license fees for each car and procuring individual license plates, such cars cannot then be assessed as personal property or merchandise, because the payment of the individual license fee is in lieu of all other taxes.

OLD AGE PENSION ACT: SENATE FILE NO. 42, EXTRA SESSION, FORTY-FIFTH GENERAL ASSEMBLY: PAYMENT OF TAX BY NURSES AND INTERNES AT BROADLAWNS POLK COUNTY PUBLIC HOSPITAL: A student nurse employed in the Broadlawns Polk County Public Hospital must pay the tax as provided in Section 34 of the act. Internes employed in said hospital must also pay said tax.

April 28, 1934. *County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-fifth instant, in which you request the opinion of this Department on the following questions:

1. Is a student nurse employed in the Broadlawns Polk County Public Hospital an employee within the meaning of Senate File No. 42, Acts of the Extra Session of the Forty-fifth General Assembly, the old age pension law, wherein it creates a liability on the part of the hospital in the payment of the old age pension tax for the student nurses?

2. Is an interne employed by the Broadlawns Polk County Public Hospital termed an employee within the meaning of Section 34 of Senate File No. 42, Acts of the Extra Session of the Forty-fifth General Assembly, the old age pension law, in that the said hospital is liable for the old age pension tax assessed against the interne?

You state:

Student nurses pay $35.00 tuition upon entrance into the hospital and are given a regular course of instruction covering a period of three years. They

are allowed room and board for the first eight months, room and board plus an allowance of $5.00 for the next four months and the next two years room and board plus an allowance of $10.00 per month. At the completion of the course they are graduated and receive a diploma.

In the case of internes, in order to be entitled to practice in the state, it is necessary that an interneship be served for a period of one year in some hospital credited for the training of internes. During the time they serve in such capacity, they receive $45.00 per month.

Please be advised that it is the opinion of this Department that the provisions contained in Section 34 of Senate File No. 42, Acts of the Extra Session of the Forty-fifth General Assembly, the old age pension act, in which it is stated:

"Any person, firm, association or corporation, including municipal corporations and special charter cities, having in their employ continuously for a period of thirty days or more any resident of this state and who is a citizen of the United States, and to whom this act applies and who has not paid the tax provided for in this section, shall deduct said tax from the earnings of such employee and deliver to such employee a receipt for said collection and remit same to the treasurer of state, together with a report showing the amount and name of the person from whom collected; and the treasurer of state shall credit said tax as other taxes provided for in this section and act, and report to the county treasurer of the county from which such remittance was received, giving the name of the employee and the amount of such tax collected; and when said report has been received by the county treasurer, he shall credit such person on his books with said payment. Any employer failing to collect and so report said tax shall be liable therefor. As a condition for obtaining assistance under this act and from this fund, satisfactory proof shall be furnished to the Board or Commission that the applicant for said aid has paid all taxes due to said fund. Any one who becomes in arrears more than three (3) years on this tax for any year shall forfeit all claim to old age pensions provided for herein."

would apply in both of the questions submitted in that in the case of a student nurse, while she does pay a tuition, yet she receives pay for services in some form and in the instant case, receives her room and board for the first eight months and the last four months of the year, in addition to this, she receives $5.00 per month, so that during the year she not only receives the room and board but does receive some compensation.

In answer to your second question, will say that as the interne receives compensation for his services during the year, that part of Section 34 of the act under consideration above quoted would apply.

FISH AND GAME COMMISSION: NEW LICENSE REQUIREMENT PROVISION WITH REFERENCE TO AGE: POSSESSION OF HUNTING LICENSE: The question would be as to what age the applicant was at the time he applied for the license. The fact that the license holder would reach the age of sixteen years during the time for which the permit was issued would not necessitate the taking out of a new license.

May 1, 1934. *Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the sixteenth ultimo, in which you request the opinion of this Department on the following question:

Under the new license requirement provision, persons under the age of sixteen years are required to be in possession of a hunting license and the fee for the same is $1.00. Persons sixteen years of age or over are required to be in possession of a hunting license which requires a fee of $2.00.

A junior or a person under the age of sixteen, at this time, desires to purchase a hunting license, fee for which would be $1.00, but during the license year he will attain the age of sixteen.

Will he be required to purchase the $2.00 hunting license at the time he

becomes sixteen years of age, will the $1.00 license purchased at this time carry him through the entire license year, or, if he should purchase the $2.00 license at this time, would that be in accordance with the law which provides for the fees to be charged?

Please be advised that it is the opinion of this Department that the question would be as to the age of the applicant at the time he applied for the license. The fact that the license holder would reach the age of sixteen years during the time for which the permit was issued would not necessitate the taking out of a new license.

OLD AGE PENSION BILL: SENATE FILE NO. 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: PAYMENT OF TAX BY MEN WORKING UNDER FEDERAL CONTRACT PROVISIONS: Men employed under the federal contract provisions shall pay said tax. (Case of Booth & Olson, Contractors, Sioux City, Iowa.)

May 1, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-eighth ultimo, with enclosure of letter from Booth & Olson, Contractors, Sioux City, Iowa. You request the opinion of this Department on the following question:

Booth & Olson are engaged in highway commission work. How can they withhold the old age assistance head tax, as provided in Senate File No. 42, Extra Session, Forty-fifth General Assembly, from the wages of men working under the federal contract provisions? A provision is made that there shall be no deductions from the men's wages.

It would be our opinion that the provisions with reference to no deductions from the men's wages would refer to matters of a different nature. It would apply in situations where a percentage of their wages might be sought by agencies or persons securing them their positions. Said provision would also apply in the case of garnishments or levies on their wages. The thought of the federal government is, as we view it, that this money should be given to these people without any deductions. However, the pension collection is a state law and is for the benefit of the wage-earner and it would be our opinion that it would come under another head and that the deduction could be made by the contractor without interfering, in any way, with the spirit and intent of the federal provisions in this matter.

OLD AGE PENSION BILL: SENATE FILE NO. 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: ASSISTANCE CONFINED TO RESIDENTS OF EACH COUNTY OR STATE-WIDE PROPOSITION: The assistance is a state-wide proposition wherein the receipts from any of the ninety-nine counties can be used for assistance in any county, and does not have to be confined to the receipts of each county for its own residents.

May 1, 1934. *State Comptroller, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-third ultimo, in which you request the opinion of this Department on the following question:

"In Senate File 42, Acts of the 45th General Assembly in Extra Session, Section 37-a provides:

'There shall be kept on file in the State Comptroller's office an itemized record of all receipts and disbursements showing the money received from each county and the assistance granted to each county. A summary of the said record shall be compiled and published at the end of the tax year.'

"Should the assistance be confined to the receipts of each county for its own residents or is it a state-wide proposition wherein the receipts from any of the ninety-nine counties can be used for assistance in any county?"

It is the opinion of this Department that the intent of the legislature in enacting Senate File No. 42, Extra Session, Forty-fifth General Assembly, was

to make this a state-wide proposition and no county would be limited in assistance to its citizens in the amount raised in such counties. A state commission has been set up to administer the affairs of the ninety-nine counties and the assistance can be granted in any part of the state. Furthermore, under Section 34 of this act, a creation of the old age pension fund is authorized and the expenditures provided for are from said fund and not from any of its ninety-nine component parts.

OLD AGE PENSION BILL: SENATE FILE NO. 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: PURCHASE OF SUPPLIES: PURCHASE OF RECEIPT FORMS: The purchase of supplies necessary for the listing of those liable for the old age assistance tax is an item of county expense. The expense of purchasing the receipt forms to be used by the county treasurer to the individual taxpayers is an item of county expense.

May 1, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your request of this date for the opinion of this Department on the following question:

"Is the purchase of supplies necessary for the listing of those liable for the old age assistance tax; also, the expense of purchasing the receipt forms to be used by the county treasurer to the individual taxpayers, an item of county expense or an expense of the old age assistance commission?"

Please be advised that, in the opinion of this Department, expenditures of the type which you have set out in the question above stated would be a part of the routine work of the county officers the same as in the collection of other taxes except motor vehicle license fees. We are informed that the forms of the treasurer's receipts have been approved by the Auditor of State's office and are known as *Iowa Official No. 1019.*

In keeping with Senate File No. 42, we would construe that the doing of this work by the county officers and the furnishing of the proper forms to expedite the collection of this tax and the work necessary to accomplish this result would be a part of the duties of such county officers.

SALES.

May 2, 1934. *Superintendent of Securities Department, Des Moines, Iowa:* Replying to your letter under date of the 16th, written by Mr. Kenderdine, re selling plan as illustrated in a brief attached to your letter, beg leave to advise you as follows:

We were, at first blush, inclined to the opinion that the Alpha Distributors, Inc., were attempting to sell stock on the installment plan, and therefore would naturally have to qualify under Chapter 392 of the Code. However, as we read the plan, we find that the purchaser on each occasion that he makes a monthly payment, makes a new, distinct and independent purchase. It must be a new, distinct and independent purchase, because the security is set aside immediately, or within two business days following the purchase, for the benefit of the purchaser, and the security immediately begins to draw any dividends paid from the income on this security. This security, even though it be a fractional certificate, is actually set aside for and in behalf of the purchaser who made the monthly payment. In other words, one monthly payment may buy ten shares, whereas the next monthly payment may buy only nine and a fractional shares, and the next monthly payment may buy ten and a fraction shares, all depending upon the prevailing market price at the time the monthly payment is received.

Furthermore, as we understand it, if any purchaser desires to desist from paying these monthly payments, he has a right to do so, and the company will return to him the shares or certificates that his payments have purchased, together with any excess cash that may be set aside to his credit, over and above enough to buy a certain fractional certificate. They do deduct some funds out of these certificates purchased to take care of the expenses of underwriting the original contract.

This form of contract is somewhat different from an installment contract. An installment contract provides for the absolute purchase of a certain number of shares, being one distinct purchase and paid for on monthly payments until the entire certificate or number of shares contracted for are paid for, and no delivery can be made until all installments have been paid.

We therefore conclude that the proposed operating plan of the Alpha Distributors, Inc., would not come under installment sales provided for in Chapter 392 but are sales which should be supervised by your department.

BEER BILL: H. F. 336, EXTRA SESSION, 45TH GENERAL ASSEMBLY: PLATTED AREA: NOT RECORDED: ISSUANCE OF BEER PERMIT: The platted area adjoining the city of Boone, which was platted in June, 1931, though not recorded, would meet the requirements of Section 8 of House File No. 336, Acts of the Extra Session of the Forty-fifth General Assembly, so that the board of supervisors could issue a permit for the sale of beer.

May 5, 1934. *County Attorney, Boone, Iowa:* This will acknowledge receipt of your request of this date for the opinion of this Department on the following question:

Does a platted area adjoining the city of Boone, which was platted in June, 1931, though not recorded, meet the requirements of Section 8 of House File No. 336, Acts of the Extra Session of the Forty-fifth General Assembly, so that the board of supervisors could issue a permit for the sale of beer?

Please be advised that it is the opinion of this Department in accordance with Section 8 of the act under consideration that the wording of that part of the section which is as follows:

"Power is hereby granted to boards of supervisors to issue, at their discretion, class 'B' and 'C' permits in their respective counties in villages platted prior to January 1, 1934, * * * *."

is to the effect that the area must be platted and in the instant case, the area has been platted. Such plat is in existence at the present time. The fact as to whether or not the same were recorded would not be the controlling factor in this matter. We would construe that the provisions of this section of the act have been met by reason of the fact that this area has been platted.

BEER BILL: H. F. 336, S. S., 45TH GENERAL ASSEMBLY: SECTION 8 THEREOF: PLATS: Section 8 applies simply to the plat being on file, and makes no provision with reference to auditor's plat. Villages, such as you suggest, would meet the requirements of said section.

May 7, 1934. *County Attorney, Cedar Rapids, Iowa:* This will acknowledge receipt of your letter of the twentieth ultimo, in which you request the opinion of this Department on the following proposition:

"Our Board now has an application for the issuing of a class 'B' permit, under House File No. 336, Acts of the Extra Session of the Forty-fifth General Assembly, for a place located at the outskirts of Cedar Rapids, and upon investigation it is found to be in an auditor's plat platted in 1924 under the provisions of Section 832 of the Supplement of the 1913 Code, now Section 6293 of the Code. The effect of platting under this section has been construed in

the case of Parrot vs. Thiel, 117 Iowa, page 392, and we were inclined to give this opinion that such a platting would not constitute the territory included a village within the meaning of subsection 4 of Section 5623 of the Code of 1931. The applicant insists, which is true, that there are a collection of dwellings and business places in the territory included in the plat, which would constitute a village in the common law definition of a village, and asks us to get the opinion of your office on the following question:

"Would a platting by the auditor under the provisions of Section 923 of the Code Supplement of 1913 fulfill the requirements of the beer law to constitute the territory included a village?"

Please be advised that it is the opinion of this Department that, as Section 8 of the act under consideration states that the board of supervisors may at their discretion issue class "B" and "C" permits to villages platted prior to January 1, 1934, the same applies simply to the plat and the question as to whether or not it is an auditor's place, done under the law for tax purposes, or whether or not it is prepared by the people owning the property and filed in the recorder's office is not the controlling question. But if a village, such as you suggest, is platted as lots, streets, alleys, etc., it would meet with the provisions of the section under consideration.

We are of the opinion that the case of Parrot vs. Thiel, 117 Iowa, 392, is not in point in this matter.

ACROBATIC FLYING: LOWER PLANE: SECTIONS 8338-c7 AND 8338-c7 12c, CODE OF IOWA, 1931: The Secretary of State does not have the power to issue a waiver for acrobatic flying under a height of fifteen hundred (1,500) feet. No waiver would be issued by any official.

May 7, 1934. *Iowa Aeronautics Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-seventh ultimo, with reference to the following question:

Section 8338-c7, Code of Iowa, 1931, states that "no flight under one thousand feet shall be made over any open-air assembly of persons except with the consent of the Secretary of State. Such consent will be granted only for limited operations." Does this section have any bearing on Section 8338-c7 12c which states that acrobatic flying cannot be done under a height of fifteen hundred feet?

Does the Secretary of State have the power to issue a waiver for acrobatic flying on a lower plane as well as straight flying for air shows?

Please be advised that it is the opinion of this Department that the Secretary of State does not have the power to issue a waiver for acrobatic flying under a height of fifteen hundred (1,500) feet. The Legislature, undoubtedly, had in mind and intended, because of the nature of acrobatic flying, that no waiver would be issued by any official. We would construe that a definite rule applies in the case of acrobatic flying and that the legislature specifically designated that it cannot be done under a height of fifteen hundred (1,500) feet.

BEER LAW: HOUSE FILE NO. 336, EXTRA SESSION, FORTY-FIFTH GENERAL ASSEMBLY: UNINCORPORATED VILLAGE: WOODLAWN PLACE, BLACK HAWK COUNTY: PLATTED ADDITIONS: By platting a piece of ground on which the place seeking a license stands and filing that plat as a first addition to the unincorporated village of Woodlawn Place, can the owner obtain a license? Yes.

May 7, 1934. *County Attorney, Waterloo, Iowa:* This will acknowledge receipt of your letter of the twenty-eighth ultimo, in which you request the opinion of this Department on the following question:

Under House File No. 336, Acts of the Extra Session of the Forty-fifth General Assembly, it is the desire of an applicant to receive a permit to sell beer

in a place adjacent to a platted, unincorporated village called Woodlawn Place, which is located two and one-half miles north of Cedar Falls, on U. S. Highway 218. Woodlawn Place was platted and the plat filed in March, 1932.

By platting a piece of ground on which the place seeking a license stands and filing that plat as a first addition to the unincorporated village of Woodlawn Place, can the owner obtain a license?

Of course, as you know, the law is silent as to platted additions to villages.

It would be the opinion of this Department from the facts submitted to us in your letter that the provisions of Section 8 of the act under consideration would be met in the situation outlined by you.

We construe the wording of Section 8 of the act that if there is a platted area which would constitute a village or that has platted lots, streets, alleys, etc., it meets the requirements of this section. This being true, the unincorporated village of Woodlawn Place was platted prior to January 1, 1934, and meets the requirements of the act. It necessarily follows that the plat could be extended and the supervisors would be allowed under the act to issue a permit in the territory which will be included in the plat of Woodlawn Place.

PERMANENT ENDOWMENT FUND: RE: CONSTRUCTION OF SECTION 3926 OF THE CODE OF IOWA, 1931.

May 8, 1934. *Iowa State Board of Education, Des Moines, Iowa:* We have your request for opinion as to the construction of Section 3926 of the Code, and beg to advise you as follows:

1. The phrase "any portion of said funds not otherwise invested" as used in subdivision 3 of this Code section, in our opinion, pertains to that portion of the fund for investment that has not been loaned upon a mortgage as provided in subdivision 1.

2. In event any such portion not immediately required, is invested as provided therein, the Finance Committee would be obliged to dispose of the bonds so purchased when there was a demand for a loan by one offering to give a mortgage as security, as provided in subdivision 1, but the Finance Committee would not be justified in making a sacrifice of the bonds in such event, but are entitled to use their good judgment as to the time of sale, and if, in their opinion, the rising market would be due in a very short time, they would be entitled to hold the bonds for such rise, so long as such holding was a reasonable time. If, however, there was no application for loan in which the borrower offered to secure by a first mortgage, as provided in the section, then the Finance Committee could retain the bonds for such time as in their judgment, seemed best, and if they thought it expedient at any time, they could sell such bonds and invest any other bonds in the nature provided for in the section.

3. In our opinion, the Finance Committee would not have the legal right and authority to pay a premium for such bonds.

4. In the event there was a loss on the bonds and the permanent endowment fund would thereby be diminished, this loss would have to be made up in the same manner as any other diminishing of the permanent endowment fund.

BANKS AND BANKING: PUBLIC BODIES RIGHTS IN STATE SINKING FUND AS TO TRUST CERTIFICATES: Depository bank must pay interest on 20 per cent released at once, the 40 per cent to remain on deposit, but restricted for a period not to exceed 3 years, but is not liable for the 40 per cent represented by a trust certificate.

May 9, 1934. *County Attorney, Manchester, Iowa:* You advise that Delaware county had on deposit in the State Bank of Earlville, as a duly designated depository bank, a certain amount of money, and that this bank went under Senate File 111 and has since reorganized and been released from Senate File 111, the plan of reorganization providing that 20 per cent of the deposit be paid at once, 40 per cent to be paid within three years, and the remaining 40 per cent to be waived permanently, and in lieu thereof, the county to accept a trust certificate against the segregated fund.

You ask upon what funds the bank must now pay the interest provided for in Chapter 352-D1 and Chapter 352-A1 of the Code. There is, of course, no question but what the interest must be paid on the 20 per cent of the deposit that was released, at once, and there is likewise no question in regard to the payment of interest on the 40 per cent that was restricted for a period not to exceed three years, but nevertheless was to be a deposit of the bank. The serious question arises in regard to the 40 per cent that is now no longer a claim against the bank, but is a claim only against the trust fund and evidenced by a trust certificate.

The Acts of the Forty-fifth General Assembly were not exactly clear as to the right of public bodies in a reorganized bank to participate against the State Sinking Fund and as there might at that time have been a contingent liability against the bank, we held that banks must pay the interest on the entire deposit even though a part of the deposit was now evidenced by trust certificates. The Special Session, however, has completely taken care of all questions in regard to such participation in the State Sinking Fund, and House File 257 of the Extra Session, 45th General Assembly, amended the State Sinking Fund so as to allow public depositors in reorganized banks to participate and provided a definite manner and method of participation. House File 231 of the Extra Session, 45th General Assembly, legalized all depositor agreements entered into before that date, and allows the public bodies to participate under House File 257.

It is, therefore, apparent that the Legislature has done all things necessary to fully protect the rights of public bodies in the State Sinking Fund as to the amount that they do not receive on their trust certificates, and as this is no longer a claim against the bank, but one against the trust fund, it is not a deposit within the purview of Chapter 352-D1 and Chapter 352-A1 of the Code.

It is, therefore, the opinion of this Department that your depository bank must pay the interest on the 20 per cent released at once, the 40 per cent to remain on deposit, but restricted for a period not to exceed three years, but is not liable for the 40 per cent represented by a trust certificate.

BANKS: SERVICE CHARGE FOR HANDLING ACCOUNT: COUNTY: SINKING FUND: "The legislature has placed the burden of paying this interest upon the depository bank. Therefore, it is the opinion of this Department that neither the depository banks nor public bodies have any legal authority to enter into a contract to pay a service charge to the depository banks by the public bodies."

May 8, 1934. *County Attorney, LeMars, Iowa:* We acknowledge receipt of your letter of April fourth, in which you ask for an opinion relative to the right of the county to pay a service charge to the banks for handling county funds.

The questions submitted are as follows:

1. Can the county pay out of the general fund a service charge that the bank

or banks would make for handling the account, so that the bank could still continue to pay the rate of interest required by the statute, and which would be payable to the sinking fund?

Chapter 352-D1 provides for the deposit of public funds. The intent of that act was to require the banks to pay interest on public deposits, said interest to be used for the purpose of reimbursing public bodies for deposits lost in closed banks. This chapter makes it the duty of the local governing body to designate the banks, in which the funds shall be deposited, and the amount of money that may be deposited in each institution. It also provides that if none of the duly approved banks will accept such deposits under the conditions prescribed in said chapter, said funds may be deposited in any approved bank or banks conveniently located within the state. Taking into consideration all of the provisions of Chapter 352-D1, it is our opinion that the legislature foresaw a possibility of some bank refusing to accept the deposits, and for that reason intended to and did take care of just such a situation by enacting Section 7420-d5, authorizing the deposits to be made in any approved bank or banks conveniently located within the state.

Section 7420-d6 provides that said deposits shall draw interest at the rate of not less than 2 per cent per annum on 90 per cent of the collected daily balances, payable by the bank at the end of each month, except that for the months of April and October the interest rate should be 1 per cent.

Section 7420-a13 provides as follows:

"The failure on the part of any depository bank to pay to the county treasurer or the state treasurer any such interest on or before the tenth day of the month same becomes due, shall render such bank liable for a ten per cent penalty on the amount of interest due and the same may be recovered by the state treasurer or the county treasurer."

Hence, it is apparent from the above quoted sections of the 1931 Code of Iowa that it was the real intent of the legislature to require the depository banks to pay this interest. When a deposit of public funds is made in a depository bank, a contractual relationship, in the nature of creditor and debtor, arises as between the public body and the depository bank. Chapters 352-D1 and 352-A1 of the 1931 Code of Iowa are parts of this contract. In other words, the laws of this state with reference to the deposit of public funds and the state sinking fund for public deposits are parts and parcels of this contractual relationship. Each party to this contract is bound by said laws. It is the statutory duty of the depository bank to pay this interest and it is the statutory duty of the several county treasurers to collect the same and remit to the Treasurer of State. The depositing public body and the depository bank cannot enter into any other private contract in derogation of the laws of this state which apply to the deposit of public funds and the state sinking fund for public deposits. The depository banks of this state have been required to pay interest on public funds since 1898.

Chapter 36 of the Acts of the Twenty-seventh General Assembly first provided for this interest to be paid and the rate to be fixed by agreement between the treasurer or board and the depository bank. Chapter 91 of the Acts of the Thirty-third General Assembly, in 1909, amended this section and required the depository banks to pay 2 per cent interest. In addition to this interest, the law required the depository banks to furnish a security bond. This was the law until 1925 when the Legislature created the state sinking fund for the protection of public deposits and by this act, relieved the banks from the neces-

sity of procuring security bonds. The depository banks have the right to use these public deposits for their own commercial gain. When a deposit is made, the title to the money vests in the depository bank but at the same time, the bank becomes indebted to the depositing public body for the amount of the deposit.

The legislature has placed the burden of paying this interest upon the depository bank. If the bank, in turn, were permitted to charge the public bodies a service charge then the bank would, in fact, be requiring the taxpayers to assist them in paying the interest to the state sinking fund. It was not the intent of the legislature to place the burden of the raising of this sinking fund upon the taxpayers of this state. The legislative intent was to require the bank that had the use of these public deposits for commercial gain to pay this interest. If the banks could legally make a reasonable service charge to the public bodies, they could also fix this service charge at the same rate as they are required to pay interest thereon. Such a policy would circumvent the statutes of this state and place the entire burden on the taxpayers to contribute to the state sinking fund for public deposits. There is no levy authorized by law whereby public bodies could raise such a fund by taxation.

Therefore, it is the opinion of this Department that neither the depository banks nor public bodies have any legal authority to enter into a contract to pay a service charge to the depository banks by the public bodies.

2. Another question has been asked concerning whether or not the purchase by a county treasurer with county funds of a cashier's check or draft from a Sioux City bank, drawn on a Chicago bank, would be considered as a deposit in the Sioux City bank.

Generally speaking, it would not be considered as such, unless the parties agreed that, in making such a transaction, it was to be considered as a deposit.

3. The third question is whether or not the county is required to pay the 2 per cent to the sinking fund, in case the governing board decided to keep its money in the treasurer's vault.

Section 7420-d1 of the 1931 Code of Iowa provides that the Treasurer of State and of each county, city, town and school corporation and each township clerk and each county recorder, auditor, sheriff, each clerk and bailiff of the municipal court and clerk of the district court and each secretary of a school board shall deposit all public funds in their hands in such banks as are first approved by their governing boards. This statute specifically directs all such officers to deposit all public funds in the properly designated depository banks. If there is no available bank in their county, then they may select any other bank within the State of Iowa as a proper depository. However, if there is no such bank available within the State of Iowa, then, of course, the public bodies could not be required to pay this 2% interest to the sinking fund. But the officers of the public bodies would not be excused from liability unless they were unable to place such deposits in a depository bank within the State of Iowa. The individual officers of such governing bodies would be personally liable on their bonds in case they ordered the money kept in the treasurer's vault and refused to deposit it in a depository bank when it is possible for them to make such deposits.

Section 7420-a14 provides that the fiscal governing officers of every county, township, school district, city or town shall be personally liable to the sinking fund for any misappropriation of such interest on public balances or for withholding the same when proper call has been made by the state treasurer as

herein provided. Hence, it is the duty of the governing boards of such public bodies to designate depository banks within their counties or within the State of Iowa and it is the duty of their proper officers to deposit all public funds in such depository banks. When the deposits are so made, then it is the duty of the depository bank to pay this 2% interest on public deposits. The officers of these public bodies will not be excused from liability in case there is a depository bank within the State of Iowa in which the public deposit can be made.

UNIVERSITY HOSPITAL FUND: HOUSE FILE NO. 112, 45TH GENERAL ASSEMBLY: REIMBURSEMENT OF FUND OF HOSPITAL FUND FOR COUNTY PATIENTS.

May 9, 1934. *State Comptroller, Des Moines, Iowa:* We have your request for an opinion as to our construction of House File No. 112 of the Forty-fifth General Assembly, Extra Session.

You advise:

Under the provisions of this bill, the University Hospital Fund is reimbursed by remittances from the county treasurer to the state treasurer for the over-quota of patients of the county in the University Hospital.

You further advise:

It is provided that when the said amount has been collected from the patient or any person legally responsible therefor, the act, at Section 9, provides:

"After deducting the county share of such costs, the balance shall be paid into the state treasury to reimburse the University Hospital Fund."

It is our opinion that this last provision of the act applies to each indigent patient within the county's legitimate quota. It does not apply to the over-quota. The county already has a record of the over-quota indigent patients and has paid the expenses of the same to the State Hospital Fund. Of course, it is then the duty of the county to collect from the individual or persons legally responsible for the same for the purpose of reimbursing their own funds. This last paragraph of Section 9 is for the purpose of collecting from the individual indigent or persons legally responsible for his care and maintenance while a patient at the University Hospital under this act, in case it is possible to do so. The expenses of all indigent patients cared for under this act within the county's legitimate quota come from the state appropriation for the support of the same at the State University Hospital. Of course, this fund should be reimbursed in case it is possible to collect the same within five years thereafter from the individual patient or from those legally responsible for his support. After the expenses of the collection or suits thereon are deducted by the counties, then the balance comes to the state for the purpose of reimbursing this fund.

The first paragraph of Section 9 of this act is substantially a copy of Section 3600 of the Code of Iowa, 1931, and it was the apparent intent of the legislature to handle these indigent patients in the same manner as insane persons are handled under Section 3600, 1931 Code of Iowa.

ELECTIONS: BRIBERY: CORRUPTION: CANDIDATES FOR POLITICAL OFFICES: PADS OF MATCHES: The giving and circulating of small pads of matches containing the advertisement of candidates for political offices is legal.

May 9, 1934. *County Attorney, Sioux City, Iowa:* I have your letter of May 8th in which you state that you have received inquiries as to whether or not the giving and circulating of small pads of matches containing the advertisement of candidates for political offices is illegal.

Chapter 605 of the 1931 Code of Iowa relates to bribery and corruption in elections. This chapter specifically prohibits the giving or accepting of a bribe to influence the voters either in voting for a particular candidate or in refraining from casting such vote. I hardly believe that the giving away of a small pad of matches upon which a political advertisement appears would be sufficient to constitute a bribe. It appears to me that the same would be more in the nature of a political advertisement. The recipient of this pad of matches will, no doubt, use the same for several days before the supply of matches thereon is exhausted. Every time this small pad of matches is so used, the candidacy of this particular candidate would be called to the attention of the voters that might be in the presence of the party who possesses this pad of matches. It appears to me that the object in giving this pad of matches is not to bribe the individual voter but to have this voter advertise the candidacy of the aspired for such political office. At any rate, I would not advise criminal prosecution upon the above set of facts.

PERMANENT ENDOWMENT FUND: LOAN: Does the Finance Committee have the legal right and authority to accept Federal Farm Mortgage Corporation bonds in payment of a loan which has been made out of the Permanent Endowment Fund of the State University of Iowa or Iowa State College of Agriculture and Mechanic Arts, and interest thereon?

May 9, 1934. *Iowa State Board of Education, Des Moines, Iowa:* You ask our opinion on the following proposition:

"Does the Finance Committee have the legal right and authority to accept Federal Farm Mortgage Corporation bonds in payment of a loan which has been made out of the Permanent Endowment Fund of the State University of Iowa or Iowa State College of Agriculture and Mechanic Arts, and interest thereon?"

We call your attention to the following provision in the agreement to accept payment in bonds, which agreement is between the holder of the mortgage and the Federal Land Bank:

"The interest rate on the first issue of Federal Farm Mortgage Corporation bonds is 3¼ per cent per annum. The interest rate on subsequent bond issues will be fixed by the corporation at the time of issue subject to the approval of the Secretary of the Treasury. Bonds of the corporation are fully and unconditionally guaranteed both as to principal and interest by the United States and have the same marketability as other government bonds. They mature 30 years from the date of issue and are callable in not less than 10 years from the date of issue."

Subdivision 2 of Section 3926 of the Code provides as follows:

"Such loan shall be for a term not exceeding ten years at the rate of interest to be fixed by said board, payable annually, and the borrower shall have the privilege of paying $100 or any multiple thereof on any interest paying date."

Section 4 of the Act of July 2, 1862, 12 Stat. 504, as amended by the Act of March 3, 1833, 22 Stat. 484 provides that all moneys derived from the sale of public lands donated to States and territories which may provide colleges for the benefit of agriculture and mechanic arts and from the sale of land scrip "shall be invested in stocks of the United States or of the States, or some other safe stocks or the same may be invested by the States having no stocks in any other manner after the legislatures of such States shall have assented thereto, and engaged that such funds shall yield not less than five per centum upon the amount so invested and that the principal thereof shall forever remain unimpaired."

This Morrill Act was subsequently amended in 1926 and Congress provided then that such funds, instead of yielding not less than five percent as formerly provided, must yield fair and reasonable return. You will note, then, that there is no requirement either of the State Legislature, or by Congress, that these bonds yield any particular per cent, and as the Legislature has stated that the interest may be fixed by the Board of Education, the Board can therefore change any per cent requirement of yield at its will and there is no prohibition in the taking of these bonds then, because of interest.

The Legislature has, however, provided that the loan shall not be for a term of exceeding ten years, this requirement being in Section 3926 of the Code and as hereinbefore set out, and as the acceptance provides for maturity in thirty years, this is in direct conflict with the statutory provision, and of course, the authority of your Board cannot exceed the statutory authority.

We appreciate the fact that the State and all its Boards and Commissions should do everything possible to cooperate with the various governmental agencies in bringing relief to distressed farmers and land owners, but the provisions of our statutes are mandatory and inescapable, and as the Board of Education has no authority to act except in conformity with the statute, and the statute provides that the loan shall be for a term of not exceeding ten years, and the agreement with the Federal Land Bank provides that the loan shall be for thirty years, it is the opinion of this Department that the Finance Committee has no legal right or authority to invest in and accept Federal Farm Mortgage Corporation bonds in payment of a loan which has been made out of the Permanent Endowment Fund, but it is the further opinion of this Department that if the Finance Committee, prior to the time of accepting such Federal Farm Mortgage Corporation bonds, has negotiated the sale of the bonds for the price that they have paid, or have allowed the mortgagor therefor, and only intends holding them for such a time as to complete the sale, and will then turn them over at once to the purchaser of the bonds, then, and in such event, the Finance Committee may accept the Federal Farm Mortgage Corporation bonds in payment of a loan which has been made out of the Permanent Endowment Fund.

You, of course, appreciate that the prohibition in taking these bonds by your Board is because of the maturity date and if the Federal Land Bank would agree that these bonds would mature within the ten year provision of the statute, then there would be no prohibition in taking these bonds.

SCHOOLS: TEACHERS' QUALIFICATIONS: STANDARDS OF SCHOOLS: Superintendent of Public Instruction does have authority to fix standards for the approval of schools, and in fixing these standards, may require minimum qualifications for teachers in such schools to meet standard, but cannot prohibit Board from hiring any teacher, or insist upon hiring a particular teacher, as that power is solely within the local Board, if the Board desires to run an unapproved school.

May 9, 1934. *Department of Pubic Instruction, Des Moines, Iowa:* We have your request for opinion on the following proposition:

"Some question has arisen in regard to the authority of the State Superintendent of Public Instruction to prescribe certain qualifications for teachers in approved schools. These minimum qualifications are set out in Circular 156-a attached hereto. These qualifications are not to prohibit Boards from hiring teachers they desire, but to fix a standard for the approval of schools by this Department. Will you please give us your opinion as to the authority exercised by the State Superintendent in fixing such minimum qualifications as set out in this circular?"

The law providing for the duties and powers of the Superintendent of Public Instruction are found in Chapter 190 of the Code. Section 3831 under this Chapter provides that the Superintendent shall have general supervision and control over schools of the State, and Subdivision 7 of Section 3832 provides that the Superintendent of Public Instruction shall classify and define the various schools under the supervision and control of the Department. As I understand, in making this classification of schools, the Superintendent of Public Instruction has provided certain requirements of teachers if a school is to be placed in a particular classification. Some of these requirements are statutory and others are not, and your question is, as I understand, whether in providing certain requirements and standards for schools, your Department is exceeding its authority and is exercising legislative rather than regulatory powers. All ministerial and executive officers possess administrative powers which may be termed as quasi judicial. They must exercise discretion in performing the duties of their office, and the only true way of exercising such discretion is to have certain rules by which it is exercised so that any person may know in advance what is to be required and may have an opportunity to comply with these requirements. If such discretion were not based upon prescribed rules, serious complaint might arise that the discretion of the administrative officer was not uniform in various territories and as applied to various individuals.

There is no way to classify and approve the schools and fixed standards, therefore, unless a yard stick is set up by which it can be uniformly done, and if this power is not possessed by the Department of Public Instruction, then it has no method by which it can follow the mandate of the Legislature and classify the schools. It appears to us to be very clear that the Department of Public Instruction does have such power and that it does not constitute in any sense the delegation of legislative powers.

It is, therefore, the opinion of this Department that the Superintendent of Public Instruction does have the authority to fix standards for the approval of schools, and in fixing these standards, may require minimum qualifications for teachers in such schools in order to meet the standard, but, of course, cannot prohibit the Board from hiring any teacher, or insist upon the hiring of a particular teacher, as that power is solely within the local Board, if the Board desires to run an unapproved school.

SCHOOLS: TOWNSHIP: RESIDENCE OF CHILDREN—AS TO WHICH DISTRICT WHEN HOME IS LOCATED ON TOWNSHIP LINE BETWEEN LYON AND HAMILTON TOWNSHIPS IN HAMILTON COUNTY.

May 10, 1934. *Department of Public Instruction, Des Moines, Iowa:* You ask for our opinion on the following proposition:

"A man owns a house located on the township line between Lyon and Hamilton townships in Hamilton county, Iowa. There is located on the Lyon township side nearly all of the living room and a porch on the ground floor and a bedroom on the second floor. On the Hamilton township side, there is located on the first floor, a bed room, kitchen and wash house, and on the second floor is located a store room. This township line also constitutes the boundary line between Lyon School Township and Cairo Independent District. Will you please advise us in which of these two school districts will the children living in this home be considered as residents?"

It is the law that as a general rule, a man will be presumed to reside where he exercises the right of suffrage and votes. (See Robinson vs. Charleton, 104 Iowa, 296; In re: Colburn's Estate, 186 Iowa, 590) and naturally, the residence

of the child would follow the residence of the parent for this purpose. You have not, however, advised us as to the place that this man voted so we will advise you as to his residence as based upon the physical facts.

In the case of Mont Peliar vs. City Barre, 66 Atl., 100, a line passed diagonally through a house and the Supreme Court of Vermont in that case, said:

"In a case like this, the legal status of the building as a dwelling place must be determined by the location of that part of the structure most closely connected with the primary purposes of a dwelling."

In an early Massachusetts case, Chenery vs. Waltham, 8 Chush, 327, the court held:

"Where a dwelling house is so divided by a boundary line between two towns so as to leave that portion of the house in which the occupant mainly and substantially performs those offices which characterizes his home (such as sleeping, eating, sitting and receiving visitors) in one town, he is a citizen of that town, and has no right to elect, reside and be taxed for his personal property in the other town."

In another early Massachusetts case, Abington vs. Bridgewater, 23 Pick, 170, the court quoted from Lord Coke and held:

"The occupant must be deemed to dwell in that town in which he habitually sleeps, if it can be ascertained in the case."

The California Supreme Court, in the case of Gray vs. O'Banion, 138 Pacific, 977, held that where a greater part of the dining room was in one district and the other rooms in the house were wholly or in a greater part in a second district, then the occupant was a resident of the second district where the greater part of the house was situated.

In 20 C. J., page 70, the author states the following to be the rule and cites a California case in support thereof:

"Where the line dividing two election districts, runs through an elector's dwelling house, he is entitled to vote in the district in which the larger portion of his residence is situated."

In the case before us, it cannot be said on which side of the diagonal township line is situated that part of the house which characterizes it as a home, as there is no complete home on either side of the line, for, on the Lyon side, there is a bedroom, living room and porch. Such, of course, is not an entire home. On the other side, there is a kitchen and bedroom, but no evidence as to where the stairway is located. This side clearly would not constitute that part of the house which characterizes it as a home. It is, therefore, apparent that the rules set forth in the Vermont and Massachusetts cases cannot be applied in this case, but that the rule cited by the author in Corpus Juris and in the California case, must be applied, viz.: that the floor space on both floors of the house must be measured and the district in which the larger portion of the residence is situated, must be deemed the residence of the occupant of the house and his children, and such is the opinion of this Department.

EXPERIMENTAL FARM: STATE: LAND: STATE COLLEGE OF AGRICULTURE AND MECHANIC ARTS AT AMES, IOWA: PROVISIONS OF FEDERAL LAND GRANT ACT OF JULY 2, 1862, COMMONLY KNOWN AS THE MORRILL ACT: Can the state buy land for an experimental farm in connection with the State College of Agriculture and Mechanic Arts at Ames, Iowa, in accordance with the provisions of the Federal Land Grant Act of July 2, 1862, commonly known as the Morrill Act.

May 11, 1934. *Secretary of Agriculture, Des Moines, Iowa:* I have your request of May tenth for an opinion as to whether or not the state can buy land for an experimental farm in connection with the State College of Agricul-

ture and Mechanic Arts at Ames, Iowa, in accordance with the provisions of the Federal Land Grant Act of July 2, 1862, commonly known as the Morrill Act.

You are advised that Chapter 13 of Title VII of the United States Code Annotated and amendments thereto by the national congress provide that the sum not exceeding ten per centum (10%) upon the amount of the grant received by any state, under the provisions of this chapter, may be expended for the purchase of land for sites or experimental farms whenever authorized by the respective legislatures of said states. The legislature of Iowa authorized the acceptance of this land upon the terms and conditions contained in the above act and this authorization is now contained in Section 4031 of the 1931 Code of Iowa.

You are further advised that the Iowa Agricultural College at Ames was chartered in 1858 and established the following year on a farm of six hundred and forty (640) acres. On September 11, 1862, the state legislature accepted the grant of congress, thus obtaining for Iowa two hundred forty thousand (240,000) acres of land, and conferred it on the Agricultural College at Ames, Iowa. The proceeds from the sale of this land became a permanent endowment fund for Ames College to be expended in accordance with the terms and conditions of the federal act.

Section 305 of Chapter 13 of Title VII of the United States Code Annotated contains the provision that a sum not exceeding ten per centum (10%) of the amount received by the State of Iowa may be expended for the purchase of lands for sites or experimental farms. In case this ten per centum (10%) has not been used for the purpose of purchasing land for sites or experimental farms, in connection with the development of the College of Agriculture and Mechanic Arts at Ames, Iowa, then, of course, such sum may now be expended for these purposes. The state board of education should have the complete record of the administration of this federal grant. This record should show whether or not this ten per centum (10%) has already been used for such purposes. Hence, I advise that this matter be taken up with the board of education and their records carefully scrutinized to determine whether or not this ten per centum (10%) has already been expended.

BOARD OF CONSERVATION: MEMBERS: SERVE WITHOUT PAY: EXPENSE LIMITATION: Do the members of the board who serve without pay coming under the heading of employees of the state come under the expense limitation of $4.00 per day? Are they classed as appointive officers?

May 11, 1934. *Board of Conservation, Des Moines, Iowa:* I have your request of May eighth in behalf of the Board of Conservation as to whether the members of the board who serve without pay would come under the heading of employees of the state and be governed by the $4.00 limit for expenses or whether they would be classed as appointive officers who serve without pay and would not be limited to the $4.00 per day expenses.

You are advised that Section 1795 of the 1931 Code of Iowa provides as follows:

"The governor shall appoint five persons who shall constitute a state board of conservation, the members of which shall serve without pay, except actual and necessary expenses."

Paragraph 16 of Section 6 of Chapter 4 of the Acts of the Regular Session of the Forty-fifth General Assembly of the State of Iowa provides as follows:

"Sec. 6. The specific duties of the state comptroller shall be:

"16. To make such rules and regulations, subject to the approval of the governor, as may be necessary for effectively carrying on the work of the state comptroller's office;"

Section 8 of Chapter 4 of the Acts of the Regular Session of the Forty-fifth General Assembly gives the power to the Comptroller for the authorization of the payment of claims against the State of Iowa.

In accordance with Paragraph 16 of Section 6 of Chapter 4 of the Acts of the Regular Session of the Forty-fifth General Assembly, the State Comptroller with the approval of the Governor has adopted the following rule, which pertains to the matter in dispute:

"Officers and employees shall be allowed hotel and meal expenses when required to travel outside of the city or town of their residence, but in no event shall the amount thereof exceed $4.00 per day in this state. Name of hotel where expense is incurred must be given. Charge for breakfast will not be allowed when claimant leaves his residence or domicile after 7:00 A. M."

It is apparent that Rule 6 applies to appointive officers as well as to employees.

Section 1795 of the 1931 Code of Iowa clearly states that the members of the Board of Conservation shall receive "actual and necessary" expenses. The next question that arises is:

Who is the official that is to determine whether or not the expenses of the officers and employees are "actual and necessary?"

It is obvious that this determination should not be made solely by the claimant. Such claimants might conscientiously feel that they were entitled to a suite in a first class hotel at the rate of $5.00 per day. Other claimants might be more expensive in their tastes, while others might be satisfied with a $1.50 room. Appetites of the different claimants will vary so that the price of meals consumed by the claimants might vary from $0.25 to $2.00 or $3.00. It was the intention of the legislature, in the passage and adoption of the Budget and Financial Control Act, to authorize the State Comptroller to decide as to whether or not such expenses were "actual and necessary." Necessary and actual expenses may vary in the different communities throughout the state. Any hard and fast rule as to the maximum daily expense allowable is bound to work a hardship on claimants in certain instances. Advantage may be taken of such a rule by claimants whose appetites and tastes permit them to actually expend less than the maximum rate allowed. Hence, no rule adopted by the Comptroller would work out with 100 per cent perfection. However, in order to facilitate the work in the Comptroller's office, Rule 6 was adopted by the Comptroller and approved by the Governor as the proper rule applicable in the great majority of cases. We feel certain that, if the facts in the particular case would justify a daily hotel and meal expense in excess of $4.00, the Comptroller would be willing to approve the same.

This rule was adopted with the purpose in mind of determining just what the actual and necessary daily expense for hotel and meals should be. It is not a case of the Comptroller adopting a rule in conflict with the statute. On the contrary, it is a rule adopted for the purpose of the proper administration and application of Section 1795 pertaining to the payment of actual and necessary expenses for the members of the Board of Conservation.

During this period of financial and economic depression existing throughout the state and nation, it is hoped that the members of this board and all other state officers and employees will be willing to cooperate with the Comptroller

and the Governor in a conscientious effort to reduce the burdens of taxation, which have been bearing down most heavily on the people of this state.

ELECTIONS: ABSENT VOTERS: S. F. 223: "When the ballot is delivered by the Auditor, it must be delivered to the voter personally in the office of the County Auditor, to be marked at that time, or must be mailed to the voter, and when the ballot is returned, it must be delivered personally by the voter at the office of the County Auditor or mailed to him, so that it will reach his office prior to election day."

May 12, 1934. *Secretary of State, Des Moines, Iowa:* We wish to acknowledge receipt of your letter of May 11th, in which you ask for an opinion on the following:

"We are receiving numerous inquiries as to Senate File 223 adopted by the Special Session and amending the absent voter's chapter.

"In order that the county auditors and others might be properly instructed in this matter, will you kindly render an opinion, setting out your interpretations of each change made in this chapter by the act referred to?"

Section 1 of Senate File 223 amends Section 927 of the Code of 1931 by striking sub-sections 1 and 2 and inserting in lieu thereof the following:

"1. When, in the conduct of his business or due to other necessary travel, he expects to be absent on election day from the county in which he is a qualified voter.

"2. When, through illness or physical disability, he expects to be prevented from personally going to the polls and voting on election day."

We believe these two sections above quoted are self-explanatory.

The effect of Section 2 of Senate File 223 is to amend Section 928 of the Code of 1931, so that at the present time any voter desiring to vote by absent voters' ballot may make application on any day, except Sunday, election day, or a holiday, and not more than twenty days prior to the day of election. Prior to this amendment, the voter could make application and vote by absent voters' ballot on election days. Under the law as it now reads, he cannot vote by absent voters' ballot on election day.

Section 3 of Senate File 223 merely amends Section 931 of the Code of 1931 by striking the two words, "on or," from the application, so that the application is now to the effect that the ballot will be returned to the officer issuing the same *before* election day.

Section 4 of Senate File 223 amends Section 936 by striking therefrom the words, "or someone makes the request for him." Under this section as now amended, it is not permissible for someone else to request the application for the voter, even though he is absent from the county. The voter must request it himself, and if he makes the request by letter after the ballots are printed, the Auditor may send both the application and the ballot at the same time.

Section 5 of Senate File 223 amends Section 943 of the Code of 1931, so that it reads as follows:

"The sealed envelope containing the said ballot or ballots may be personally delivered by the voter to the auditor, deputy or clerk *at the office of said auditor or clerk prior to election day.*

"If not so delivered, said envelope shall be enclosed in a carrier envelope, which shall also be securely sealed and mailed by the voter, postage prepaid, to reach said auditor or clerk prior to election day."

This means that the voter, in returning the voted ballot, may return it personally to the Auditor, in the case of a primary, general or special election, or to the city clerk, in case of a city election, or that he may mail the same. However, if he mails it, it must reach the Auditor or Clerk prior to election day, or the vote will not be counted.

We might further add, relative to the voting by absent voters' ballot, that there are two ways in which the voter may receive a ballot from the County Auditor. They are as follows:

1. Under Section 937, the officer may deliver the ballot to the qualified elector, who applies in person at the office of the Auditor and subscribes to the application, not more than fifteen days before the date of election. If the application is made in person by the voter, the ballot should be immediately marked "enclosed in the envelope," with the proper affidavit thereon, and returned to the Auditor at that time. This section is for the purpose of taking care of the voter who intends to be out of the county on election day, as provided in Section 927.

2. The other way to receive a ballot is provided for in Sections 935 and 936. Under Section 935, upon receipt of the application, and immediately after the ballots are printed, it is the duty of the Auditor to mail to the applicant, postage prepaid, the official ballot. However, under the provisions of Section 936, if the voter is absent from the county and requests the application by letter, after the ballots are printed, then the Auditor may send both the application and ballot at the same time.

We have explained this, in order that the voters will understand that they have no right to send someone to the Auditor's office to obtain a ballot for them. Nor do the candidates for office, or anyone for them, have a right to take an armload of ballots from the Auditor's office and go out over the county voting sick or disabled voters. The statute is so plainly worded that it would be impossible for us to give any other construction. We believe the law relative to the absent voters' ballot was enacted for the purpose of enabling persons who are sick or disabled or absent from the county to exercise their right of suffrage. The laws certainly were not enacted for the purpose of enabling the candidates for office or the political parties to get out the vote. The right to vote is a privilege which belongs to the individual voter and not to the political parties.

It is, therefore, the opinion of this office that when the ballot is delivered by the Auditor, it must be delivered to the voter personally in the office of the County Auditor, to be marked at that time, or must be mailed to the voter, and that when the ballot is returned, it must be delivered personally by the voter at the office of the County Auditor or mailed to him, so that it will reach his office prior to election day.

ELECTIONS: WITHDRAWAL FROM CANDIDACY: "There is no provision in the law for the withdrawal of his name from the ballot at this time. Hence, the name of this candidate shall appear on the ballot at the coming primary election as a candidate for Congress from his Congressional District."

May 14, 1934. *Secretary of State, Des Moines, Iowa:* I have your request of May 12th, by James C. Green, Deputy Secretary of State, for an opinion of this office with respect to the following question:

"We have a request from a candidate for Congress, who has qualified for a place on the primary ballot and been certified to the County Auditors, that his name be withdrawn.

"I would like your opinion as to whether such withdrawal at this time is permissible."

Sections 542 and 548 of the 1931 Code of Iowa specifically prohibit such a withdrawal. Section 542 of the Code provides:

"A nomination paper, when filed, shall not be withdrawn nor added to, nor any signature thereon revoked."

When such a nomination paper has been filed, the candidate must file an affidavit, stating on oath that if he is nominated and elected, he will qualify as such officer.

Section 548 of the Code provides that the Secretary of State shall, at least thirty days before a primary election, furnish to each County Auditor a certificate under his hand and seal, which certificate shall show:

1. The name and post office address of each person for whom a nomination paper has been filed in his office, and for whom the voters of said county have the right to vote at said election.
2. The office for which such person is a candidate.
3. The political party from which such person seeks a nomination."

Under this section of the Code, it is mandatory upon the Secretary of State to certify to each County Auditor the name and post office address of each person for whom a nomination paper has been filed in his office. It then becomes the duty of each County Auditor to prepare the ballots accordingly.

It appears from your request that this candidate for Congress properly qualified by filing his nomination papers and affidavit, and that the Secretary of State has already certified his name to the County Auditors as such a candidate. There is no provision in the law for the withdrawal of his name from the ballot at this time. Hence, the name of this candidate shall appear on the ballot at the coming primary election as a candidate for Congress from his Congressional District.

ELECTIONS: TIME FOR FILING AFFIDAVIT OF CANDIDATE: "It is, therefore, the opinion of this office that the affidavit of the candidate must be filed more than thirty days prior to the primary election, if he desires to become a candidate for a county elective office."

May 14, 1934. *County Attorney, Tipton, Iowa:* We acknowledge receipt of your letter of May 10th, in which you ask for an opinion on the following:

"One of the candidates, who seeks the nomination for a county office, filed his nomination papers more than thirty days prior to the day fixed for holding the primary election, but due to an apparent misunderstanding, the affidavit of the candidate, required by Section 544 of the Code of 1931, was not filed. A day or two after the time for filing nomination papers had expired, the candidate prepared and filed with the County Auditor an affidavit, as required by Section 544. This affidavit was then attached to the nomination papers previously filed, but of course bears the filing stamp as of the later date.

"The question is whether or not the affiant is a candidate for the public office and whether or not he can be voted for at the June primaries."

Section 537 of the Code of 1931 provides that the nomination papers on behalf of a candidate for an elective county office shall be filed at least thirty days prior to the date fixed for holding the primary election.

Section 544 provides that every candidate shall make and file an affidavit in substantially the form set out in said section.

Section 545 provides as follows:

"545. Manner of filing affidavit. The affidavit provided in the preceding section shall be filed with the nomination papers when such papers are required; otherwise alone."

This case must naturally be governed by a construction of the section of the statute just quoted, that is, as to the meaning of the word, "with," in the third line of said section. The word, "with," as therein used, certainly means

more than filing the affidavit in the same filing case with the nomination papers. Nomination papers are filed, when they are stamped, "filed," and entered in the office of the County Auditor. We are, therefore, of the opinion that the construction to be placed on Section 545 is that the affidavit of the candidate must be filed in the same manner, that is, that it must be filed more than thirty days prior to the primary election. We realize, of course, that filing it one or two days late does not really inconvenience anyone. However, if the rule were to be adopted by all of the County Auditors that the affidavit by the candidate could be filed within the thirty days, then some prospective candidate might file his nomination papers more than thirty days prior to the election, and, on the other hand, might not file his affidavit until after the ballots were printed. Certainly, Section 545 must be interpreted to mean more than the mere annexing the affidavit to the nomination papers when it is filed.

It is, therefore, the opinion of this office that the affidavit of the candidate must be filed more than thirty days prior to the primary election, if he desires to become a candidate for a county elective office, and that if it is not so filed, then the voters do not have a right to vote for him at the June primary election, and the Auditor, therefore, has no right to place his name on the ballot.

SCHOOL FUND LOANS: RE: ACCEPTANCE OF FEDERAL FARM MORTGAGE CORPORATION BONDS IN PAYMENT OF LOAN MADE OUT OF SCHOOL FUND: Board has no right and authority to invest in or accept these bonds in payment of loan. Board may enter in arrangement whereby such bonds would be sold to purchaser at same price Board allowed therefor, and Board could then take bonds in satisfaction of mortgage for purpose of holding them only momentarily until they transferred them to purchaser and received cash therefor.

May 14, 1934. *County Attorney, Red Oak, Iowa:* We have your request for opinion on the following proposition:

"Montgomery county has four school fund loans which are in default. The owners of the land have made application to the Federal Land Bank of Omaha for the purpose of refinancing said loans and the land bank has requested that the county agree to accept bonds at par value in payment of the loan. Does the Board of Supervisors have the right to enter into such agreement?"

I call your attention to the following provisions in the agreement to accept bonds, which agreement is between the holder of the mortgage and the Federal Land Bank:

"The interest rate on the first issue of Federal Farm Mortgage Corporation bonds is 3¼ per cent per annum. The interest rate on subsequent bond issues will be fixed by the corporation at the time of issue, subject to the approval of the Secretary of the Treasury. Bonds of the corporation are fully and unconditionally guaranteed both as to principal and interest by the United States and have the same marketability as other government bonds. They mature 30 years from the date of issue and are callable in not less than 10 years from the date of issue."

Section 4488 of the Code of Iowa, 1931, in providing the terms of a loan of the school funds, states that the loan shall be for at least one and not more than five years, evidenced by promissory notes, bearing not less than five per cent per annum, payable annually, and this being the statutory fund, the Board of Supervisors only has authority to act in conformity with the statute and you will note that the interest agreed to be paid on these bonds is much less than that required by statute; that the maturity date is six times that

required by the statute, and the statute further provides that the loan be evidenced by promissory notes and mentions no other type of instrument. These provisions of the statute are mandatory and there is no longer the discretion in the Board of Supervisors as is noted in the case of Poweshiek County vs. Buttles, 70 Iowa, 246.

We appreciate the fact that the state and all its subdivisions should do everything possible to cooperate with the various governmental agencies in bringing relief to the distressed farmers and land owners, and we are, of course, doing everything that is personally possible to this end, but the provisions of our statute are mandatory and inescapable, and your Board has no authority to act except in conformity with the statutes.

It is, therefore, the opinion of this Department that your Board has no right and authority to invest in and accept Federal Farm Mortgage Corporation bonds in payment of a loan which has been made out of your school fund. It is, however, the further opinion of this Department that your Board may enter into an arrangement with some purchaser whereby such bonds would be sold to the purchaser at the same price the Board allowed therefor and the Board could then take the bonds in satisfaction of the mortgage for the purpose of holding them only momentarily until they transferred them to the purchaser and received cash therefor, as in such case, the Board would not be taking the bonds for the purpose of holding them in satisfaction of the mortgage, but would only be using that plan to secure cash in satisfaction of the mortgage, which in our opinion, they would have the authority to do.

MOTOR VEHICLE: Construction of bill relating to operating cars on highways manufactured or assembled after July, 1935, equipped with shatterproof glass.

May 14, 1934. *Superintendent, Motor Vehicle Department, Des Moines, Iowa:* We have your favor of the 7th inst., in which you make the following request:

"Will you kindly render us an opinion on the recent bill passed by the House and Senate, No. 18, copy of which is enclosed, stating whether or not this applies to cars already operating or merely to new cars?"

Sections one and two of Senate File No. 18, are as follows:

"Section 1. It shall be unlawful after January 1, 1935, to operate on any public highway or street, in this state, a motor vehicle registered in the State of Iowa, manufactured or assembled after said date, designed or used for the purpose of carrying passengers for hire, or designed or used for the purpose of carrying school children, unless such vehicle be equipped in all doors, windows and windshields with safety glass."

"Sec. 2. It shall be unlawful after July 1, 1935, to operate on any public highway or street in this state, any motor vehicle registered in the State of Iowa, manufactured or assembled after said date, designed or used for the purpose of carrying passengers, unless such vehicle be equipped in all doors, windows and windshields with safety glass."

It will be observed, each section contains this language:

"It shall be unlawful after July 1, 1935, to operate on any public highway or street in this state any motor vehicle registered in the State of Iowa *manufactured or assembled after said date*," unless it is equipped, etc.

These sections appear to relate only to motor vehicles registered in Iowa which are manufactured or assembled after July 1, 1935, and not to cars manufactured or assembled prior to that date.

LIQUOR CONTROL ACT: PERMIT FEE: That the various Boards and Institutions under the Boards and Commissions of the State of Iowa are not liable for any permit fee required to be paid under the Liquor Control Act.

May 15, 1934. *Board of Control, Des Moines, Iowa:* We have your letter of May 10th enclosing correspondence of Mr. O. S. Von Krog, Superintendent of Training School for Boys at Eldora, in which you inquire whether your Board must pay the $3.00 permit fee required in Section 21 of House File 292, 45th General Assembly, Special Session, this being known as the Liquor Control Act.

As we understand, the institution uses the liquor and alcohol in the hospital at the Training School and therefore, are seeking a permit pursuant to Section 20, Subdivision B of the act. The Legislature, in providing for various fees is presumed not to tax the state, as nothing is gained, for it is taking out of one pocket and putting it in another. There is nothing in the act to overcome this presumption and it is, therefore, the opinion of this Department that the various Boards and Institutions under the Boards and Commissions of the State of Iowa are not liable for any permit fee required to be paid under the Liquor Control Act.

SALES TAX ACT: INTERPRETATION OF RULE, PROVIDING THAT PRICE MARK SHALL INCLUDE ONLY RETAIL SALE PRICE OF ARTICLE: "It is, therefore, the opinion of this office that the rule * * * is not in the nature of a law, and is further one which is reasonable and almost necessary to effectuate the purposes of the law."

May 16, 1934. *State Board of Assessment and Review, Des Moines, Iowa:* We acknowledge receipt of your letter of May 2nd, in which you ask for an opinion on the question of whether or not your Board has authority under the sales act to promulgate and enforce a rule substantially as follows:

"When any retailer shall price mark any article for retail sale and display or advertise the same with such price mark to the public, the price so marked or advertised shall include only the retail sale price of such article."

We also acknowledge receipt of the brief, which was submitted with the request. This brief, however, deals more with the constitutionality of the act, in so far as class legislation and due process of law are concerned. The question, which really concerns your Board at the present time, is of a two-fold nature, as follows:

"1. Can the Legislature delegate such authority to your Board; and

"2. How far can a Board or Commission go in promulgating and enforcing such rules?"

It is a general rule, recently followed by the Supreme Court of this state in the case of Goodlove vs. Logan, 251 N. W., 39, that the Legislature cannot delegate its legislative power, and that any attempt on the part of that branch of the government to make such a delegation is unconstitutional. On the other hand, it is a well recognized principle that, although the Legislature cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things, upon which the law makes or intends to make its own action depend. It is also a well recognized principle that the Legislature can delegate authority to boards and commissions to adopt rules and regulations for the proper execution of the law, so long as such regulations are merely administrative in character and relate only to the enforcement of the statute.

Some of the provisions of House File No. 1, generally known as the Tax Revision Act of 1934, are as follows:

"Sec. 41-a. Adding of tax. Retailers shall, as far as practicable, add the tax imposed under this division, or the average equivalent thereof, to the sales price or charge and when added such tax shall constitute a part of such price

or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts.

"Agreements between competing retailers, or the adoption of appropriate rules and regulations by organizations or associations of retailers to provide uniform methods for adding such tax or the average equivalent thereof, and which do not involve price-fixing agreements otherwise unlawful, are expressly authorized and shall be held not in violation of Chapter 434, Code, 1931, or other anti-trust laws of this state. It shall be the duty of the board to cooperate with such retailers, organizations, or associations in formulating such agreements, rules and regulations.

"Sec. 42. Unlawful acts. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this division will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded.

"Sec. 53. Powers and duties. 1. The board shall have the power and authority to prescribe all rules and regulations not inconsistent with the provisions of this act, necessary and advisable for its detailed administration and to effectuate its purposes.

"2. The board may, for administrative purposes, divide the state into districts, provided that in no case shall a county be divided in forming a district."

Section 38 of the act provides for the tax upon the gross receipts from all sales of tangible personal property sold at retail in this state to the consumer or user. It is clear under the wording of this section that the intent of the Legislature was to make this tax a tax on the sale to the ultimate consumer. This intention is carried out in the provisions of Sections 41-a and 42. Section 41-a specifically provides that the retailer shall, as far as practicable, add the tax imposed, or the average equivalent thereof, to the sales price or charge, and that the same shall constitute a debt from the consumer to the retailer.

Section 42 prohibits the retailer to advertise or hold out to the public or to any consumer, either directly or indirectly, that he, the retailer, will assume or absorb the tax, or that it will not be considered as an element in the price to the consumer. By these two sections, the Legislature intended to put some teeth in the law and to lay down certain rules relative to the collection of the tax. Under Section 53, the State Board of Assessment and Review is granted authority to prescribe rules and regulations not inconsistent with the provisions of the act, in order to effectuate the purposes of the act and to carry out the detailed administration.

We believe one of the purposes of Sections 41-a and 42 is to do away with unfair competition, and further, to require the retailer to make it plain to the consumer that he, the consumer, is paying the tax.

The question then is whether or not the rule, which you propose to adopt, is one which is unreasonable, or whether it is in the nature of a law. We believe it is reasonable, and we do not believe your body is attempting to assume legislative powers in the promulgation of such rule. We believe such a rule is upheld by the following authorities:

Hubbell vs. Higgins, 148 Iowa, 36.
State vs. Miller, 146 Iowa, 521.
Smith vs. State Board, 140 Iowa, 66.
Pierce vs. Doolittle, 130 Iowa, 333.
12 C. J., 848-852.

The statute in this particular case does not provide for a penalty or fine for the violation of a rule. Hence, it differs in a most important respect from the statute in the Goodlove case. Nor does your rule attempt to prescribe or fix a penalty or fine for its violation. It is merely a rule, which we believe you

have authority to adopt, to aid you in the enforcement of the law and to assist in carrying out the purposes of the act.

It is, therefore, the opinion of this office that the rule, which you propose to adopt and which is hereinbefore set out, is not in the nature of a law, and is further one which is reasonable and almost necessary to effectuate the purposes of the law.

OLD AGE PENSION ACT: RE: employees of State Educational Institutions: Are the educational institutions responsible for collecting tax from employees? Must employees pay the tax?

May 16, 1934. *Iowa State Board of Education, Des Moines, Iowa:* You have submitted the following four propositions to us in regard to the Old Age Pension:

1. Must the employees of the state educational institutions pay the old age pension tax which is to be assessed and collected prior to June 30, 1934?
2. If your answer is in the affirmative, does it apply to students who are over twenty-one years of age and employed on a part-time basis, or only to full-time employees?
3. Are the state educational institutions responsible for collecting the tax from everyone who has been on the institutional staff at any time during the year that began July 1, 1933, or only from those who are employed during the month of June, 1934?
4. Because many of the employees of the state educational institutions are paid on an hourly basis, and, therefore, they work only a relatively small amount of time during the year, must the institution collect a tax from each of them?

Section 34 of the Old Age Pension Act provides in part, as follows:

"To provide money for said fund, there is hereby levied on all persons residing in this state and who are citizens of the United States and of twenty-one years of age and upwards, except inmates of state and county institutions, an annual tax of $2.00 * * * * any person, firm, association or corporation, including municipal corporations and special charter cities, having in their employ continuously for a period of thirty days or more, any resident of this state and who is a citizen of the United States and to whom this act applies, and who has not paid the tax provided for in this section, shall deduct said tax from the earnings of such employee and deliver to such employee, receipt for such collection and remit same to the Treasurer of State together with the report showing the amount and name of the person from whom collected."

It will be noted that every person residing in Iowa, who is a citizen of the United States and of twenty-one years or over, except inmates of county and state institutions must pay the tax, and that if the tax is not so paid, the employer is held liable therefor. You will note, however, that the employees who are held liable, do not include the State of Iowa, and such has been the former ruling of this office.

I also call your attention to Section 35 which provides in part, as follows:

"For the purpose of affording old age assistance commencing November 1, 1934, under the provisions of this act, prior to July 1, 1935, there is hereby levied on all persons pursuant to Section 34, a tax of $1.00 payable on or before July 1, 1934."

We will therefore answer your interrogatories in the same order that you have stated them.

1. Yes, if they are over twenty-one years of age, and citizens of the United States.
2. Yes, as the question of employment does not affect the individuals responsible to pay the tax.
3. The institutions under the Board of Education, being arms of the state, are not required as an employer to pay this tax, if the employee does not pay

it, as the state is not included in the definition of employer under the Old Age Pension Act.

4. This is answered by No. 3, as the state, not being an employer within the provision of the act, is not liable for the tax of those employed by it.

SCHOOLS: UNIVERSITY HIGH SCHOOL AT IOWA CITY: It is not a public high school within the meaning of the tuition law and no tuition can be paid for pupils attending such school by the board of a school corporation unless pursuant to contract provided in Section 3942 of the Code.

May 17, 1934. *Department of Public Instruction, Des Moines, Iowa:* We have your request for opinion on the following proposition:

"At the University of Iowa, the State Board of Education has established in the Department of Education a branch to promote the efficiency of the University in its training of teachers for the elementary and secondary schools of this state. This school is maintained in connection with the University and has a high school which is termed 'University High School.' Under the provisions of Sections 4275 to 4278 of the Code, it is provided among other things, that the pupils shall be permitted to attend any public high school. Will you please advise us whether this University High School is a public high school within the meaning of that law, and whether these sections require the board of a public school corporation that does not maintain an approved public high school to pay the tuition of a resident of school age, eligible to high school, who attends this University High?"

The present high school tuition law as set out in Sections 4275 to 4278 was originally enacted by the Thirty-fourth General Assembly in 1911 and has remained in force continuously since that time without essential modifications or an occasional change in the tuition rate collectible. It is apparent that the purpose of these sections is to permit a person of school age, eligible to high school, who lives in a school district or school corporation that does not maintain an approved high school, to attend any approved public high school that is maintained by the public school corporation. This particular school at the University of Iowa, is maintained, not by a school corporation, but by the State of Iowa, and therefore, if it is a district, its district would embrace the entire state.

Section 3942 and the following sections of the Code provide for entering into contracts with the Board of Education by the Board of Directors of a school district for the furnishing of instruction to pupils of the districts in these particular schools. They, therefore, are not public schools as that term is used in the code as to tuition, but are contract schools.

It is, therefore, the opinion of this Department that the University High School is not a public high school within the meaning of the tuition law and no tuition can be paid for pupils attending such school by the Board of a school corporation unless pursuant to contract provided for in Section 3942 of the Code.

SALARIES: Re: CHAPTER 257, 44TH GENERAL ASSEMBLY: The Department cannot pay salaries in excess of the amount stated, even though such excess payments would not exceed the total appropriation.

May 17, 1934. *Auditor of State, Des Moines, Iowa:* Some time ago, you requested an opinion on the following proposition:

"Chapter 257 of the Forty-fourth General Assembly makes appropriations of certain sums to various departments of the state. After the amount of the appropriation, the Legislature has inserted the following: 'or so much thereof as may be necessary, to be used in the following manner:' Then following this is a list of the various offices under that particular Department, and the particular compensation to be paid to the holder of each office is set opposite

the various offices. May a Department pay salaries in excess of the amount set opposite each office, providing they do not exceed the total appropriation?"

You will note that the Legislature has not appropriated a definite sum, but has set a maximum and appropriated so much of that maximum as may be necessary, and has further definitely provided that it must be used in a certain manner, viz., a certain amount going to the holder of each particular office, and this is true irrespective of whether the amount expended exceeds the total amount appropriated or not.

It is, therefore, the opinion of this Department that under the provisions of Chapter 257 of the Acts of the Forty-fourth General Assembly, the Department can not pay salaries in excess of the amount stated, even though such excess payments would not exceed the total appropriation.

LIQUOR: BUSINESS COLLEGES: A business college *does not* come within the meaning of the restrictions of Section 7, paragraph "B" of the Liquor Control Act prohibiting establishment of liquor stores or special distributors within 300 feet of a school or church.

May 18, 1934. *Iowa Liquor Control Commission, Des Moines, Iowa:* This will acknowledge receipt of your communication under date of the 8th inst. asking for official opinion upon the following question:

"Is as institution, privately owned and operated for private profit, in which bookkeeping, stenography, arithmetic, typing and kindred subjects are taught and which is commonly called a commercial college or business school a school within the meaning of the last sentence of Section 7, paragraph "B" of the Iowa Liquor Control Act which reads: 'However, no liquor store or special distributor shall be established within three hundred (300) feet of any school building used for school purposes or any church used as such.'?"

In response to your inquiry it is our opinion that a business college such as designated in your letter does not come within the restriction of Section 7, paragraph "B" of the Iowa Liquor Control Act. Our reasons follow.

The express mandate of the statute above quoted prohibits the location of a liquor store within three hundred (300) feet of a school building used for school purposes or a church. In the case of Howard Townsend vs. Edward G. Smith, 195 N. Y., 214, 22 L. R. A. (N. S.), page 194, it was held that a building maintained by a hospital as a training school for nurses was not within the meaning of a statute forbidding traffic of intoxicating liquor within 200 feet of a building occupied exclusively as a school house.

In the case of In re Hering, 117 N. Y. S., 747, it was said:

"In a law of this nature the use of the word, 'school house' has in view schools devoted to such general elementary and intermediate instruction as is adapted to the education of children and youth and not so-called schools for boxing, or to give instruction in dancing, or physical culture."

A case more directly in point is that of Granger vs. Lorenzen, 133 N. W. Reporter, page 259, and it was there held in an action to enjoin the maintenance of a licensed saloon within three hundred (300) feet of an institution or "business college" conducted by plaintiff in which he gave instruction in bookkeeping, typewriting, stenography, commercial law, etc., that "school" meant a place for instruction in any branches of knowledge, an establishment imparting education, also the institution or collective body of teachers or learners in such place; and that, without qualification, was used as an institution for teaching children, and that, in view of the express exclusion of such institutions as that of plaintiff, it was not such a school as was comprehended by Section

2859 as amended, and hence, the plaintiff was not entitled to an injunction. We quote the following from the court's opinion:

"A 'school' in its broadest sense may be said to include any institution devoted to instruction of any kind; and in the same broad sense a 'school house' may be defined as a place or building used for any such purpose. But there are a great variety of so-called schools devoted to many special sciences and trades. There are schools of education in the professions of law, medicine, and theology; schools for painting, music, and other advanced arts; schools for stenography and typewriting; schools for dancing, gymnastics, physical culture, and boxing; and schools for almost numberless other more or less practical occupations. Many, if not all, of these special courses, are taken up by persons of mature years who have passed through the earlier educational training which is an essential preliminary to every avocation or vocation requiring intelligence, thought, or talent. All are instructive to a degree, but none are within the usually accepted definition of education. Much less can they be within the purview of a particular statute unless they are plainly specified in its terms, and still less are they to be considered within the definition of 'schools' and 'school houses' as those words are ordinarily understood. In re Townsend, 195 N. Y., 214, 88 N. E., 41, 22 L. R. A. (N. S.), 194."

In the light of these authorities, it is sufficiently established that a business college does not come within the meaning of the statute above quoted, prohibiting location of a liquor store within three hundred (300) feet of any school building used for school purposes.

BEER BILL: HOUSE FILE NO. 336, EXTRA SESSION, 45TH GENERAL ASSEMBLY: SECTION 12: PREMISES: SALE IN TWO PLACES: Sale would be allowed at any place on the premises described in the permit as long as Section 15 was complied with.

May 19, 1934. *County Attorney, Iowa City, Iowa:* This will acknowledge receipt of your letter of the eighth instant, in which you request the opinion of this Department on the following question:

A lodge in an incorporated town has obtained a class "B" permit under Section 12, House File No. 336, Acts of the Extraordinary Session of the Forty-fifth General Assembly, to sell beer upon the lodge premises. The lodge is the owner of a hall situated upon a tract of land 140x140 feet. I am informed that they desire to keep beer for sale in the lodge hall and in addition thereto have a stand with beer on tap on the grounds from which sales of beer are to be made to the public. In other words, there would be two places from which beer could be purchased at the same time, one the main lodge hall and the other the outside stand.

Is such an arrangement permissible, same in effect being two places of sale upon one permit, although both are on the premises of the permit holder, or whether the lodge should be confined to sales from the lodge hall proper?

Please be advised that it is the opinion of this Department that beer may be sold at any place on the premises by the class "B" permit holder as long as Section 15 of the act is complied with, especially with reference to "tables and seats sufficient to accommodate not less than twenty-five (25) persons at one time," in each place where it is sold and that the places where sold on the premises are contained in the original permit. By that we mean, by way of illustration, a permit granted to Lot 2 in Block 8 would allow the sale on any place on Lot 2, Block 8, at which place of sale tables and seats were provided to accommodate not less than twenty-five (25) persons at one time.

BEER BILL: HOUSE FILE 336, EXTRA SESSION, 45TH GENERAL ASSEMBLY: SECTION 8: The board of supervisors can, at their discretion, reject and deny all applications for permits, in accordance with Section 8 of said act.

May 19, 1934. *County Attorney, Waukon, Iowa:* This will acknowledge receipt of your letter of the tenth instant in which you request the opinion of this Department on the following question:

House File No. 336, adopted by the Forty-fifth General Assembly, Special Session, amending the beer act of 1934, provides in part as follows:

"Power is hereby granted to boards of supervisors to issue, at their discretion, class 'B' and 'C' permits in their respective counties in villages platted prior to January 1, 1934, and to revoke same for causes herein provided, or in the event the place of business of the permit holder is conducted in a disorderly manner."

The board of supervisors are not in favor of issuing any beer permits under this act. Under the foregoing provisions of the amended beer act, can the board of supervisors, at their discretion, reject and deny all applications for permits?

Please be advised that it is the opinion of this Department that the legislature, in using the phrase "at their discretion," intended just what was said and that it is a matter of discretion with the board of supervisors as to whether or not they will issue permits. This was done advisedly because of the difficulty of policing the same. Hence, if the board of supervisors, in their discretion, decided not to issue any permits, they would be within their rights under that part of Section 8 of the act above quoted.

OLD AGE ASSISTANCE COMMISSION: PENSION LAW: SENATE FILE NO. 42, EXTRAORDINARY SESSION, 45TH GENERAL ASSEMBLY: EMPLOYER: RESPONSIBILITY: EMPLOYEE: SECTION 34 THEREOF.

May 21, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the seventeenth instant, in which you request the opinion of this Department on the following question:

Section 34 of the old age assistance act provides in part as follows:

"Any person, firm, association or corporation, including * * * *, having in their employ continuously for a period of thirty days or more any resident of this state and who is a citizen of the United States, * * * * shall deduct said tax from the earnings of such employee and deliver to such employee a receipt for said collection and remit same to the treasurer of state, * * * *."

Under this provision, is an employer held responsible for withholding the amount of tax from a person working on a commission basis?

Typical cases follow:

Case 1. "This company has no salaried employees in the state of Iowa. We are, however, represented by agents throughout the state who are paid upon the amount of business produced."

Case 2. An Implement Dealers Insurance Company. "We do our business the same as all other companies, through agents in the state. As such, no one is employed directly by us for any given period."

Case 3. "We operate on a consignment basis through sales agents. Our agents in this state, handle other lines in addition to ours, all of them being handled on a commission basis."

Case 4. "We employ one clerk in Iowa under salary. There are other clerks for whose salary our general agents are responsible, and there are also agents who are not paid a salary at all but who receive a certain commission on any policy they may write."

There are a number of lines of business in the state operating upon the basis covered by these typical cases and our Commission would greatly appreciate a ruling so that we may advise them as to their responsibility.

Please be advised that Section 1421 of Chapter 70, 1931 Code of Iowa, entitled, Workmen's Compensation, gives the following definitions:

1. "Employer" includes and applies to any person, firm, 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.

2. "Workman" or "employee" means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer, except as hereinafter specified.

3. The following persons shall not be deemed "workmen" or "employees":

a. A person whose employment is purely casual and not for the purpose of the employer's trade or business.

b. A person engaged in clerical work only, but clerical work shall not include anyone who may be subject to the hazards of the business.

c. An independent contractor.

While the definitions given above are those used under the workmen's compensation act, yet, under Section 34 of Senate File No. 42, Acts of the Extraordinary Session of the Forty-fifth General Assembly, which is the old age pension law, these definitions do not, in every case, apply, as the legislature under this section of the act has designated those persons who are to be held for the tax in the event that the employee does not pay the same in that it states as follows:

"* * * * *. Any person, firm, association or corporation, including municipal corporations and special charter cities, having in their employ continuously for a period of thirty days or more any resident of this state and who is a citizen of the United States, and to whom this act applies and who has not paid the tax provided for in this section, shall deduct said tax from the earnings of such employee and deliver to such employee a receipt for said collection and remit same to the treasurer of state, together with a report showing the amount and name of the person from whom collected; and the treasurer of state shall credit said tax as other taxes provided for in this section and act, and report to the county treasurer of the county from which such remittance was received, giving the name of the employee and the amount of such tax collected; and when said report has been received by the county treasurer, he shall credit such person on his books with said payment. Any employer failing to collect and so report said tax shall be liable therefor. * * * *."

In answer to your Case No. 1, it would be our opinion that where an agent devotes all his time to the work of the company, the manner in which he was compensated either by commissions or salary and commissions would make no difference. However, in the event that a company would have agents throughout the state who did not draw a salary and whose main business was not representing this company but it was in the nature of a "side line" with the employee, then we do not believe that this is such a case as would necessitate the employer in deducting from the employees' commissions the amount of the head tax under Section 34 of Senate File No. 42, Acts of the Extraordinary Session of the Forty-fifth General Assembly.

In answer to your Case No. 2, in the case of Mallinger vs. Webster City Oil Company, 234 N. W., 554, our Supreme Court, speaking through Justice De Graff, held:

"'Independent contractor' is one carrying on independent business and contracting to do piece of work according to own methods, subject to employer's control only as to result."

will say that under the Iowa law, an employee is defined to be a person subject to order as to hours of service and is assumed to be under supervision, direction and control as to methods employed. An independent contractor controls his hours of service, proceeds with work in accordance with methods of his own choosing, being held in obligation to the employer only as to results. Generally, on this question, see:

Knudson vs. Jackson, 183 N. W., 391,
Norton vs. Day Coal Company, 180 N. W., 905,

Pace vs. Appanoose County, 168 N. W., 916,
Root vs. Shadbolt & Middleton, 193 N. W., 634.

In answer to your Case No. 3, will say that we believe that we have answered this in Case No. 1.

In answer to Case No. 4, will say that the one clerk in Iowa, who is under salary, would be within Section 34 of the act, in our opinion. The other clerks who devote all their time to the business of the employer would also be within this section of the act and in the case of agents who are not paid a salary but receive a certain commission on any policy that they write (we assume this to be insurance) would in the event that they devote all their time to this business come within Section 34. If, however, it is simply incidental to some other business they carry on, they would not come within the classification as set out in said section.

Generally speaking, if the employment is casual in its nature and is not the principal business of the employee, such employment would not be contemplated with relation to the collection of the head tax as set out in Section 34 of the act. In accordance with the cases cited herein, where the employer directs the method, controls the hours and the employee devotes his time in carrying out such directions as are given by the employer and gives his time exclusively to the business of the employer, then such employment would come within the provisions of Section 34 of the act and the means by which the employee is compensated would not be the controlling feature but rather the nature of the employment would control.

OLD AGE PENSION LAW: SENATE FILE 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: Section 11763 of the 1931 Code of Iowa does not conflict with Sections 34 and 35 of Senate File 42, Extra Session, 45th General Assembly. Tax, as provided for in Sections 34 and 35 of the act, is not construed to be a debt.

May 22, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your oral request of the twenty-first instant, for the opinion of this Department on the following question:

Our Commission has received an inquiry in which the following illustration is presented:

John Jones is a married man, a resident of the State of Iowa and is the head of a family. He is employed by the Smith Company. On or before July 1, 1934, he refuses to pay to the county treasurer the $1.00 provided for in Section 34 of Senate File No. 42, Acts of the Extraordinary Session of the Forty-fifth General Assembly, which is the old age pension law. Jones' salary is fifteen dollars ($15.00) per week and he is paid each week.

Can his employer legally deduct the $1.00 from his wages and pay it as provided for in Section 34 of the act in view of the provisions of Section 11763, 1931 Code of Iowa, which exempts wages of this nature from seizure for debt?

Please be advised that it is the opinion of this Department that the provisions of Section 11763 of the 1931 Code of Iowa do not conflict with the provisions of Sections 34 and 35 of Senate File No. 42, Acts of the Extraordinary Session of the Forty-fifth General Assembly, for the reason that we do not construe the payment in question to be in the nature of a debt. In this connection you are referred to the case of:

Forest City Manufacturing Company vs. Levy, (Mo.), 33 S. W. (2d), 984, at page 985.

"Generally, 'tax' is not 'debt' in ordinary sense of word."

See also:

Collector of Taxes of City of Boston vs. Revere Bldg. (Mass.), 177 N. E., 577, at page 578,

in which the court said:

"'Tax' on realty, in its nature, is not 'debt,' but monetary burden for support of government laid on owner and secured by lien on realty."

St. Joseph Land Company vs. MacLean, 32 Federal (2d), 984, at page 987:

"Taxes, being in no sense contractual, are not 'debts,' which are obligations for payment of money founded upon contract, express or implied."

In Re Servel (D. C. Idaho), 45 Federal (2d), 660, at page 661:

"Income taxes are not 'debts' within provisions as to proof of claim."

St. Lucie Estate vs. Ashley, (Fla.), 141 So., 738, at page 739:

"Tax is not a 'debt' in ordinary sense, and is not predicated on contract and cannot be discharged by set-off, counterclaim, or barter."

Livesay vs. De Armond, 284 Pacific, 166, at page 168; 68 A. L. R., 422:

"It is generally held that a tax is not a debt, and therefore an unpaid tax draws no interest unless legislation expressly directs a different result."

The legislature, in enacting Sections 34 and 35 of Senate File No. 42, Extraordinary Session, Forty-fifth General Assembly, states:

"* * * *, there is hereby levied on all persons residing in this state and who are citizens of the United States and of twenty-one (21) years of age and upwards, * * * *, an annual tax of two dollars ($2.00)."

and further, in quoting from the section, states:

"Any person, firm, association or corporation, including municipal corporations and special charter cities, having in their employ continuously for a period of thirty days or more any resident of this state and who is a citizen of the United States, and to whom this act applies and who has not paid the *tax* provided for in this section, shall deduct said *tax* from the earnings of such employee and deliver to such employee a receipt for said collection and remit same to the treasurer of state, * * * * *; and the treasurer of state shall credit said *tax* as other taxes provided for in this section and act, * * * *, giving the name of the employee and the amount of such *tax* collected; * * * *. Any employer failing to collect and so report said *tax* shall be liable therefor. * * * *."

We set out parts of Section 34 of the act in detail to show that the legislature again and again refers to this payment as a tax.

Section 11763 of the 1931 Code of Iowa provides as follows:

"*Personal earnings.* The earnings of a debtor, who is a resident of the state and the head of a family, for his personal services, or those of his family, at any time within ninety days next preceding the levy, are exempt from liability for debt."

Hence, in the case of the Code section under consideration, the legislature had clearly in mind the exemption from a debt, and the payment, as referred to in Sections 34 and 35 of the act under consideration, is a tax. In accordance with the cases cited herein, such a tax is not construed by the courts to be a debt.

OLD AGE ASSISTANCE COMMISSION: STATE OF IOWA: MUNICIPAL CORPORATION OR NOT: The State of Iowa being a sovereign is not a municipal corporation as contemplated in the use of the words "municipal corporation" used in Section 34 of the act under consideration.

May 22, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your request of the twenty-first instant, for the opinion of this Department on the following question:

Section 34 of Senate File No. 42, Acts of the Extraordinary Session of the Forty-fifth General Assembly, which is the old age pension law, provides for the collection of a tax and holds liable the employer if the tax is not paid and if he fails to collect the same and the tax is not paid by the employee.

Do the words "municipal corporation" include the State of Iowa?

Please be advised that it is the opinion of this Department that the State of

Iowa being a sovereign is not a municipal corporation as contemplated in the use of the words "municipal corporation" used in Section 34 of the act under consideration.

McQuillin on Municipal Corporations, Second Edition, Volume I, Chapter 2, gives an extended definition of municipal corporations and the history and growth of corporations of this nature and states:

"While the state may be in its broad sense a municipal corporation yet in its strict legal sense it is not."

In this connection, we refer to several Iowa cases, among them Curry vs. The District Township of Sioux City, 62 Iowa, 102, at page 105, in which it is held:

"A municipal corporation is defined to be 'a public corporation created by government for political purposes, and having subordinate and local powers of legislation; e. g., a county, town, city, etc.'"

Also see Winspear vs. The District Township of Holman, 37 Iowa, 542, to the following effect:

"A school district township is a political or municipal corporation within the meaning of Article 2, Section 3 of the constitution, inhibiting such corporations from incurring indebtedness to any amount exceeding five per cent on the taxable property of the corporation."

In the case of Iowa Railroad Land Company vs. Carroll County, 39 Iowa, 151, at page 166, the court states:

"That 'municipal corporations' includes and especially refers to counties, school districts and cities, etc."

and cites:

Bouvier's Law Dictionary, title Municipal Corporations.
2 Kent's Com., 275.
Jefferson vs. Ford, 4 G. Greene, 367, at page 370.
Hull, et al., vs. Marshall Company, 12 Iowa, 142, at page 154.
The State, etc., vs. The County of Wapello, 13 Iowa, 389, at page 404.
Bell vs. The Railroad Company, 4 Wall., 598.
Pendleton Company vs. Arny, 13 Wall., 297, at page 304.

For an extended discussion of the term "municipal" as used in defining the word "corporation," see Hanson vs. City of Cresco, 132 Iowa, 533, at page 540:

"The term 'municipal' as used in defining a corporation, indicates by its historical meaning a corporation proper, as distinguished from a *quasi* corporation, and designates only cities and incorporated towns which have powers of local self-government, and, in strictness of meaning, would not include counties and school districts, although they are expressly declared by statute to be bodies corporate. But, in common speech, the term municipal corporations is used to include all public or political corporations having corporate powers."

which cites the following:

Winspear vs. District Township, 37 Iowa, 542.
Curry vs. District Township, 62 Iowa, 102.
Iowa Railroad Land Company vs. Carroll County, 39 Iowa, 151, at page 166.
Powder River Cattle Company vs. Board of County Commissioners, 3 Wyo., 597 (29 Pac., 361).
State, Ex Rel., vs. Leefingwell, 54 Mo., 458, at page 465.
Anderson Law Dictionary, 363.
2 Bouvier, Law Dictionary (Rawle's Ed.), 453.
(See cases collected in 5 Words and Phrases Judicially Defined, 4620.)

Also at page 541 (132 Iowa, Hanson vs. City of Cresco) it is stated:

"It is apparent, therefore, that in determining the meaning to be given to the word 'municipality' as used in the statute for the purpose of applying it to this case, we need not be limited to its historical meaning, but may take into account the intention of the Legislature for the purpose of ascertaining whether it was used to include townships."

In Webb City & Carterville Waterworks Company vs. Carterville, 153 Missouri, 128, at page 133, it is provided:

"Municipal corporations are created by the state for the public good. They exercise by delegation from the state a portion of the sovereign power. The principal object of their creation is to act as administrative agencies for the state, and to provide for the police and local government of the different localities. They are charged with governmental authority, and civil, political and municipal duties are imposed upon them."

It is the opinion of this Department, based on the cases cited above, that the State of Iowa is not a municipal corporation but that cities, towns, school districts, counties, townships and all other political subdivisions of the state are municipal corporations.

OLD AGE PENSION LAW: SENATE FILE NO. 42, ACTS OF THE 45TH GENERAL ASSEMBLY IN EXTRAORDINARY SESSION: State employees must pay head tax as provided for in Section 34 of the act but the State of Iowa is not liable as employer for the collection of the same.

May 23, 1934. *State Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the ninth instant in which you request the opinion of this Department on the following question:

"Please advise this Department if we come under the same ruling as industrial firms in the matter of collection of the old age pension tax.

"Also advise, if we do have to make the collection of this tax, if we may take it from the salaries paid to employees of this Department and whether or not the employees can be given the privilege to pay their own tax directly."

Please be advised that it is the opinion of this Department that that part of Section 34 of Senate File No. 42, Acts of the Forty-fifth General Assembly in Extraordinary Session, which is the old age pension law, designates those persons who are employers and who are liable for the tax in the event that the employees do not pay the same and the designation is:

"Any person, firm, association or corporation, including municipal corporations and special charter cities, * * * *."

It is the opinion of this Department that the State of Iowa is not included in the designation of employers who come within Section 34 of the act under consideration, our office having previously ruled that the State of Iowa is not a municipal corporation.

However, our Department had advised other Departments who presented the same question as contained in your communication of the ninth instant that while the State of Iowa is not liable for the collection of this tax, yet it should be the desire of the state to cooperate in the collection of this tax in every way possible.

Mr. Ryan of our office has advised the Board of Education on the same question and stated that the cooperation of the Board is sought and that the matter should be called to the attention of the employees so that they would pay the head tax as contained in Section 34 of the act. Undoubtedly, the old age assistance commission desires the proper official to be present at the time the employees are paid so that the tax may be voluntarily paid and the proper receipt given therefor.

SCHOOLS: TUITION AT UNIVERSITY OF IOWA AND OTHER COLLEGES MAINTAINED BY STATE: Which students should pay non-resident tuition?

May 23, 1934. *Iowa State Board of Education, Des Moines, Iowa:* You ask our opinion as to what students should pay non-resident tuition at the University and other colleges maintained by the state, and you refer in particular

to a case involving a Mr. Harry Hershey who is a student at one of the colleges at the University.

This seems to be a typical example, and the facts in regard to this case, as I understand, are that when he first registered, he registered as a non-resident from New Jersey, or some eastern state. Thereafter, he remained here in Iowa during his summer vacation, working for a relative in Fort Madison, and returning to school the following fall. As I understand, he has voted here in Iowa, and now claims that he cannot be classed as a non-resident, and be required to pay a non-resident tuition. His parents, as I understand, still live in the eastern state and they have no property in this state.

This problem is not necessarily one of residence and non-residence, for it is a classification of students by the Board of Education and students of a particular class are required to pay a certain tuition and students of another class are required to pay a higher tuition. The reason, undoubtedly, for the so-called non-resident class paying a higher tuition than the resident class is that the parents of the resident class contribute by the payment of taxes, to the upkeep of the University or other colleges in the state, and that by reason of this contribution, they pay a part of the tuition in that manner. Ordinarily, the so-called non-resident student pays no tax nor does his family pay any.

It is not, therefore, a question of legal interpretation of the word "residence" because in determining the class in which you put these pupils, you do not need to look strictly to a clear definition of the legal term "residence," but you may define this class in any way that you choose, so long as there is no discrimination between members of a general class.

We have given a great deal of time and thought to this question here in the office, and it is the consensus of opinion of the staff that your Board of Education sits as a quasi judicial body in administering the affairs of the various colleges under it, and may delegate certain duties to a committee, such as the Registration Committee, or to a Registrar, and that they then have the right and power to determine from all the facts submitted whether a student comes within the so-called resident class or non-resident class.

We should call your attention, however, to the fact that there are a number of things that your committee or your board may take into consideration in determining this, such as whether the student has voted, or not; whether he is receiving any money from home, or out of the state, or whether all the money he is receiving is from people within the state; whether he or his family own any property within the state; his intentions, which may be gained, not only from his own word of mouth, but from written or oral statements made; his occupation during vacation periods and his actions generally. These, of course, are only evidence, and no one or all of them may be conclusive, but we think that where a student has first registered as a non-resident student and has come to this state from without the state and his home and the home of his parents has been in some other state than the State of Iowa, then there is a presumption that he is in the non-resident class during the remainder of the time he is at the University or at the college that he attends, and when he subsequently registers, this presumption of non-resident class will prevail unless he produces evidence sufficient to satisfy the Registrar or Registration Committee that he is at the time entitled to be placed in the resident class and we would suggest that the Board of Education prepare a rule or require-

ment to this effect and place it in their catalogue so that all will be advised, and the foregoing is the opinion of this Department.

SCHOOLS: RE: UNIFORM FINANCIAL RECORD SYSTEM: Does the County Board of Supervisors have legal authority to purchase this system?

May 23, 1934. *Department of Public Instruction, Des Moines, Iowa:* We have your request for opinion on the following proposition:

"Chapter 190, Acts of the 45th General Assembly, as amended by Chapter 40, Acts of the 45th Extra General Assembly, authorized the Superintendent of Public Instruction to prepare a uniform financial record system to be used in the public schools of the state, which system when prepared, may be printed by the State Printing Board and sold to the districts at cost, or each district may purchase the system wherever it sees fit. Will you please give us an official opinion on each of the following questions:

1. Does the county board of supervisors have legal authority to purchase this uniform financial record system and distribute the same with or without cost to the school districts of the county?
2. May the county superintendent purchase a supply of such system for resale to the school districts of his county?
3. May the county superintendent accept a quantity of such system on a consignment basis for sale to the school districts of the county?
4. May the county superintendent accept a shipment of such financial system from a commercial firm for distribution to any or all of the school districts of the county, the commercial firm to bill the individual districts direct?"

We will answer these in the same order that you have stated them.

1. Pursuant to Section 5134 of the Code, the Board of Supervisors shall furnish officers of the county with necessary blanks, stationery and so on, to discharge the duties of their respective offices, but this, of course, does not extend to furnishing such supplies to a county officer, to be in turn furnished by him to a board under his jurisdiction, and this is the same, whether they be furnished with or without cost, for the Board of Supervisors has no authority to so invest the funds of the taxpayers, and it is, therefore, the opinion of this Department that the County Board of Supervisors does not have the legal authority.

2. Under the provisions of Section 4468 of the Code, the property of the County Board of Education may not act as agent for school supplies, and Section 4119 of the Code provides that the County Superintendent shall be a member of the County Board of Education, and he, therefore, has no authority to purchase these systems for re-sale.

3. The same prohibition would apply here, as in the two preceding interrogatories, and it is the opinion of this Department that the County Superintendent cannot accept these systems for sale even though it be on a consignment basis.

4. It makes no difference that the district would be billed directly by the commercial firm, and Chapter 608 of the Code, in regard to gratuities and tips, further bears out the intent of the Legislature to require public officers to refrain from any commercial transactions, and it is, therefore, the opinion of this Department that the County Superintendent has no such authority.

OLD AGE ASSISTANCE TAX: P.W.A. PROJECTS: COLLECTION OF TAX FROM CONTRACTORS' EMPLOYEES: "It is, therefore, the opinion of this Department that contractors can legally deduct this tax from the wages of their employees, who might be engaged in the construction of projects under United States Government Form No. P.W.A. 51."

May 24, 1934. *United States Engineer Office, Rock Island, Illinois:* You

request an opinion from my office as to whether or not the State of Iowa can require contractors engaged in P.W.A. projects to deduct the Old Age Assistance Tax from their employees. You also call my attention to Paragraph 18-b of the United States Government Form P.W.A. No. 51, which states as follows:

"* * * and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection *only by legal process.*"

According to the provisions of the Iowa Old Age Pension Act, all residents of the State of Iowa, who are citizens of the United States and twenty-one years of age and upwards, are required to pay this tax. The tax for the year 1934 is $1.00 per person, and thereafter is $2.00 per person. This particular tax is a state obligation, the same as any other state tax. Every person within this classification, who is able to pay, must pay this tax.

Under Section 34 of the Iowa Old Age Pension Act, employers are directly charged with the responsibility of collecting this tax from their employees, who have been in their employ continuously for a period of thirty days or more, provided the employee is a resident of the State of Iowa and a citizen of the United States of America. In case the employer does not do this and the tax is not paid by the individual, then the employer is held liable therefor. Section 34 of this Old Age Pension Act specifically makes such employers agents of the State of Iowa for the collection of this tax. It is a legal process for the collection of taxes due the State of Iowa.

The provision in Section 18-b of United States Government Form No. P.W.A. 51, with respect to deductions or rebates from employees under such projects, applies to private creditors. It does not in any way conflict with the Iowa Old Age Pension Act. It specifically provides that such collections may be made by legal process. The machinery for the collection of this tax, as set forth in Section 34 of the Iowa Old Age Pension Act provides the necessary legal process for the collection of this tax.

It is, therefore, the opinion of this Department that contractors can legally deduct this tax from the wages of their employees, who might be engaged in the construction of projects under United States Government Form No. P.W.A. 51.

ELECTIONS: PUBLICATION OF OFFICIAL BALLOT FOR PRIMARY ELECTION: "It was for this reason, we believe, that Section 551 of the Code of 1931 was enacted, which provides for the publication of a notice of the primary election, and, instead of publishing the names of the candidates for nomination, the Auditor must publish the names of the offices, for which candidates are to be nominated."

May 25, 1934. *Secretary of State, Des Moines, Iowa:* We acknowledge receipt of your letter of May 25th, in which you ask whether or not the official ballot for the primary election should be published.

The chapter on primary elections does not provide for the publication of a ballot. It is provided, however, in that chapter that "the provisions of Chapters 40 and 41 shall apply, so far as applicable to all said primary elections, except as hereinafter provided." Nevertheless, we do not believe this provision requires the publication of the ballots for the primary election.

Sections 772 and 790 of the Code of 1931 are the provisions of the law relative to the publication of the ballot for the general election. It will be noted that Section 790 provides that the Auditor shall publish a list of all nominations made, as provided by law. He could not make such a publication

prior to the primary election, because such nominations have not been made. It is also true that the County Auditor would not be able to tell what is the official ballot to be published at a primary election, for the reason that the names of the candidates for nomination are rotated on the ballot in the different precincts. Certainly, the Auditor could not be expected to publish a ballot to be used in each separate precinct, and, on the other hand, if he did not publish each one, he would not know which one of the forms to choose. It was for this reason, we believe, that Section 551 of the Code of 1931 was enacted, which provides for the publication of a notice of the primary election, and, instead of publishing the names of the candidates for nomination, the Auditor must publish the names of the offices, for which candidates are to be nominated.

SALES TAX: STATE COLLEGE AT AMES: Should staff members who travel at expense of college, pay sales tax on meals? Must college file application for each department which sells products, or will one application be sufficient? Must Veisha collect tax on tickets? Must various student organizations pay tax on purchases and sales?

May 25, 1934. *Iowa State Board of Education, Des Moines, Iowa:* We have your letter of recent date enclosing copy of letter from H. C. Gregg, Business Manager of Iowa State College at Ames, in which he makes certain inquiries in regard to the sales tax. We shall note the interrogatories and answers in the same order that you have set them forth in your letter:

1. A number of our staff members do a certain amount of traveling around the state at the expense of the College. Should such members and employees at State Educational Institutions pay the sales tax on meals, when the expenses are to be paid by the state institutions?

In our opinion, this is not a sale to the state, but a sale to an individual, and therefore, they are required to pay the tax.

2. Must the Iowa State College file an application for each department which sells products, or will one application be sufficient?

It is the opinion of this Department that one application is sufficient.

3. Must the organization known as Veisha at the Iowa State College collect tax on tickets sold for the various entertainments and activities, such as baseball games, evening programs, and so on?

You advise that this is a very comprehensive affair having as its purpose, educational values to students who engage in the program, as well as affording an opportunity for students, parents and others interested, to familiarize themselves with the activities of an educational branch of the state. You further advise that there are no salaries paid and the proceeds are used for educational purposes.

It is the opinion of this Department that if the proceeds of this program are used for educational purposes, they are exempt from the tax under the provision of Section 39-d of the act.

4. Must the various student organizations at Iowa State College pay tax on purchases and sales?

The exemption here is only on the gross receipts from educational, religious or charitable activities, where the entire amount of such receipts is expended for educational, religious or charitable purposes, but does not apply to the purchase by these various activities for their own use and benefit.

You advise that there are a great number of student organizations on the campus and that in none of these are salaries paid or profits earned, but that these organizations exist and are tolerated and sponsored because of their

educational value and that the treasurer of the college is the treasurer of these organizations and that their accounts are regularly audited by the college business office and they are considered a part of the regular college program. I know from my own experience that in every University, there are a number of these organizations, some of which might very logically be said to be a part of the educational activities of the institution. Others are private, having a private and definite group who are chosen to membership, such as fraternities, sororities, literary societies and others of a similar nature, and for this reason, it is impossible to determine in advance whether the sales of such organizations would be subject to the tax, but one of the essential requirements for such educational activities would be that the particular organization must be open to all the students at the institution and should not embrace only a few or a selected group, as such would not then be for the general educational purposes.

In view of this, we cannot rule on this request at this time and I would suggest that at the end of the quarter, each of these various activities forward to the Board of Assessment and Review, the name of each of these organizations and show its activities and functions, as it is not a question that can be ruled on, treating them all alike.

TAXATION: MUNICIPAL: COLLECTION OF PENALTY ON DELINQUENT INTEREST ON STREET IMPROVEMENT CERTIFICATES: In the case of street improvement certificates which are delinquent as to both principal and interest, the county treasurer is required to collect a penalty on the interest which is delinquent the same as on delinquent principal.

May 25, 1934. *County Attorney, Keokuk, Iowa:* Your letter of the 23rd inst., addressed to Hon. Walter F. Maley, Assistant Attorney General, has been referred to me for attention.

You enclose therewith, a letter from the Inter-Ocean Reinsurance Company and in connection with that letter you submit the following question:

In the case of street improvement certificates which are delinquent as to both principal and interest, is the county treasurer required to collect a penalty on the interest which is delinquent the same as on delinquent principal?

We call your attention to Section 6033 of the Code which is as follows:

"6033. Installments—payment—delinquency. The first installment, or total amount of assessment, if less than ten dollars, 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 semi-annual payment of ordinary taxes. Any or 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, and when collected the said interest and penalties shall be credited to the same fund as the said special assessment. 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."

The third paragraph of said section provides that all such taxes *with interest* shall become delinquent on the first day of March next after maturity and shall bear the same rate of interest with the *same penalties* as ordinary taxes, etc. The provision that all such taxes with interest shall become delinquent and shall bear the same rate of interest with the same penalties as ordinary

taxes, surely means that both the delinquent tax and the interest thereon are subject to interest and penalties after they become delinquent. Had the legislature intended that such taxes without interest shall become delinquent and bear interest and penalties, the words "with interest" would have been omitted from their place in that paragraph of the statute.

We return to you, herewith, the letter from Inter-Ocean Reinsurance Company, dated May 19, 1934.

BANKS AND BANKING: RE: HOUSE FILE NO. 6, ACTS OF 45TH GENERAL ASSEMBLY, EXTRA SESSION, which amends 7237 of the Code, 1931, which act provides: "The loss of capital stock in a bank operated within the State of Iowa, and the making and paying of a stock assessment for the year such stock was assessed for taxation shall be a destruction within the meaning of this section."

May 25, 1934. *Superintendent of Banking, Des Moines, Iowa:* You have asked for our opinion as to the construction of House File No. 6, Acts of the Forty-fifth General Assembly, Extra Session. This act amends Section 7237 of the Code of Iowa, 1931, and provides:

"The loss of capital stock in a bank operated within the State of Iowa, and the making and paying of a stock assessment for the year such stock was assessed for taxation shall be a destruction within the meaning of this section."

During the time the bank is a going concern, the taxes on the stock are paid by the bank, but after it is closed and placed in the hands of a receiver, there is no longer any fund in the bank, or in the hands of the receiver, out of which, such taxes can be paid, so they must necessarily be paid by the individual holder.

Prior to the enactment of the above act of the Legislature, an assessment would be made at the first of the year on the supposed value and the tax levied the following September. If subsequent thereto, the bank closed, went into the hands of the receiver and the statutory assessment ordered by the court and paid, there was no relief to the holders of the stock and irrespective of the fact that his stock was worthless and he had paid the statutory assessment thereon to the receiver, he was still required to pay tax on the stock the following year on the assessment during the time the bank was a going concern. This act of the Legislature then was enacted for the purpose of defining destruction of capital stock in a bank and to provide for remission by the Board of Supervisors of the taxes in event of such destruction. The making and paying of the stock assessment as provided in the act does not mean an assessment for taxation purposes nor the so-called assessment upon the stockholders when the bank is a going concern, pursuant to Section 9246 of the Code, but means a stock assessment ordered by the court after the bank has been placed in the hands of a receiver. It could not possibly mean an assessment of the stockholders while the bank is a going concern, as the purpose of such assessment is to restore value to the stock, and the stock thereafter, instead of being destroyed, would be restored, but after receivership and the court orders assessment, it is nearly conclusive evidence that the stock has absolutely no value.

It is, therefore the opinion of this Department that if statutory assessment is levied on the stockholders of a bank which has been closed and been placed in the hands of a receiver, and such statutory assessment so ordered by the court, has been paid during the year that the stock was assessed for taxation, and if the taxes have not been delinquent for thirty days at the time of the

payment of such statutory assessment to the receiver, the said stock shall be deemed destroyed according to Section 7237 of the Code, and the Board of Supervisors shall have the power to remit the taxes thereon.

This act of the Legislature, however, went into effect on January 17, 1934, and as all laws that exempt persons from the payment of taxes or provide for a remission of tax already paid, are to be strictly construed, and as the Legislature has not provided that this shall apply to taxes levied prior to its effective date, it will only affect taxes that have been actually levied subsequent to January 17, 1934.

BEER BILL: HOUSE FILE NO. 336, EXTRA SESSION, 45TH GENERAL ASSEMBLY: DISTANCE: MEASUREMENT: Relative to Section 12 with reference to 200 feet from a building used for school purposes, measurement of this kind is determined by measuring the nearest point of each house to the other.

May 25, 1934. *Treasurer of State, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-first instant in which you request the opinion of this Department on the following question:

Subsection f of Section 12, House File No. 336, Acts of the Forty-fifth General Assembly in Extraordinary Session, provides that the place of business for which a permit is sought "is not within two hundred (200) feet of a building used for school purposes."

What is the method of measurement in determining such distances?

Is it the airline distance from the nearest property line or the distance from the front door of one building to the front door of another building?

While the usual traveled route would seem to be the correct way to measure distance and is used in the ordinary measurement of distance, such as the method adopted in computing mileage for witnesses and jurors, yet our Supreme Court has, in several instances, held that measurements of this kind are to be by measuring the nearest point of each house to the other and that the true measurement is not by the line of streets and walks but in a direct line from one house to another. This point was raised in the case of State of Iowa vs. Harriet Greenway, et al., 92 Iowa 472. In that case, tried under the Iowa Mulct law, the act provided that in no case shall said business be conducted within three hundred (300) feet of any church or school building. The case came up upon appeal from Mahaska County and the saloon in question was operated in the city of Oskaloosa. The facts showed that the Congregational church of that city was within three hundred (300) feet in a direct line but that it is more than that distance by the traveled way. Justice Rothrock, in delivering the opinion of the court, states:

"Distance limits fixed in Iowa liquor laws must be measured in a direct line, and not by the traveled route."

In the case of Woodring vs. Nolan, et al., 135 Northwestern 567, it is held as follows:

"Under a statute, which prohibits the business of selling liquor under the Mulct law within one-half mile of the place where any agricultural fair is being held, the distance must be measured in a straight line and not by the nearest traveled route along the streets and sidewalks."

In this connection see also McColl vs. Rally, 127 Iowa 633, 103 Northwestern 972:

"If a room in which sales of liquor are made is less than fifty feet from the premises of a property owner who does not consent, the occupant cannot by constructing a board partition which is fifty feet from such premises leaving an unoccupied space between such partition and the wall of the room render the consent of such property owner unnecessary."

This case was tried on the consent provision of the Mulct law whereby it was necessary to secure the consent of any property owner within fifty (50) feet of a saloon before the same could be operated.

Also see State of Iowa vs. J. H. Mateer, 94 Iowa 42, in which it is held as follows:

"The 'fifty feet' of the statute are measured from the very room in which the liquor is sold and not from the house containing the room, in cases where the house is and the room is not in said limit, the lease being for said room alone."

While you do not ask this question, yet, undoubtedly, you may have inquiries concerning it in relation to the question you have submitted. The question now under consideration is:

What is the meaning of school in connection with the beer law?

In this connection we wish to refer you to In re Hering, 117 N. Y. S. 747, in which it is said:

"In a law of this nature the use of the word, 'school house' has in view schools devoted to such general elementary and intermediate instruction as is adapted to the education of children and youth and not so-called schools for boxing, or to give instruction in dancing or physical culture."

Also, see the case of Granger vs. Lorenzen, 133 Northwestern 259. In this case it was held in an action to enjoin the maintenance of a licensed saloon within three hundred (300) feet of an institution or "business college" conducted by plaintiff in which he gave instruction in bookkeeping, typewriting, stenography, commercial law, etc. that "school" meant a place for instruction in any branches of knowledge, an establishment imparting education, also the institution or collective body of teachers or learners in such place; and that, without qualification, was used as an institution for teaching children, and that, in view of the express exclusion of such institutions as that of plaintiff, it was not such a school as was comprehended by Section 2859 as amended, and hence, the plaintiff was not entitled to an injunction. In quoting from the court's opinion:

"A 'school' in its broadest sense may be said to include any institution devoted to instruction of any kind; and in the same broad sense a 'school house' may be defined as a place or building used for any such purpose. But there are a great variety of so-called schools devoted to many special sciences and trades. There are schools for education in the professions of law, medicine and theology; schools for painting, music, and other advanced arts; schools for stenography and typewriting; schools for dancing, gymnastics, physical culture, and boxing; and schools of almost numberless other more or less practical occupations. Many, if not all, of these special courses, are taken up by persons of mature years who have passed through the earlier educational training which is an essential preliminary to every avocation or vocation requiring intelligence, thought, or talent. All are instructive to a degree, but none are within the usually accepted definition of education. Much less can they be within the purview of a particular statute unless they are plainly specified in its terms, and still less are they to be considered within the definition of 'schools' and 'school houses' as those words are ordinarily understood." In re Townsend, 195 N. Y., 214, 22 L. R. A. (N. S.), 194.

In the note, in connection with the last named case, starting at page 194, are numerous other cases bearing on this last point.

In answer to your question with reference to the manner in which the distance must be measured will say that it is our opinion, in keeping with the cases cited above, that the distance must be measured from the nearest point of each building to the other.

However, we wish to call your attention to the last sentence of subsection

f of Section 12 of House File No. 336, Acts of the Forty-fifth General Assembly in Extraordinary Session, which provides as follows:

"Provided, however, such area limitation shall not apply to permits in force on March 5, 1934, nor to renewals or transfers thereof, nor to permits in places located within areas now or hereafter zoned as business districts."

BEER BILL: HOUSE FILE 336, EXTRA SESSION, 45TH GENERAL ASSEMBLY: ISSUANCE OF PERMIT BY BOARD OF SUPERVISORS: RIGHT UNDER SET OF FACTS CONTAINED HEREIN: REVOCATION AND TENDER OF MONEY: As this is not a platted village, the board of supervisors would have no right to issue a permit. As the board did not have the right to issue a permit in the first instance, the whole proceeding is a nullity and the money should be returned.

May 26, 1934. *County Attorney, Chariton, Iowa:* This will acknowledge receipt of your letter of the twenty-fourth instant in which you request the opinion of this Department on the following question:

A dispute has arisen relative to the right of the board of supervisors to grant a beer permit outside of the limits of an incorporated city or town in Lucas county. A permit has been granted to an applicant operating a filling station one-half mile from the limits of the incorporated town of Williamson. It is not a platted village. You present two questions which are as follows:

1. Do the board of supervisors have any right or authority to issue a permit to said applicant to sell beer on the premises herein described?
2. If such permission was issued, without authority, should not such permit be revoked and a tender made of the money received therefor?

Please be advised that the only manner in which a permit to sell beer could be granted by the Board of Supervisors in a situation such as you have presented would be under that part of Section 8 of House File No. 336, Extra Session, Forty-fifth General Assembly, which is as follows:

"Power is hereby granted to boards of supervisors to issue, at their discretion, class 'B' and 'C' permits in their respective counties in villages platted prior to January 1, 1934, and to revoke same for causes herein provided, or in the event the place of business of the permit holder is conducted in a disorderly manner."

In answer to your first question will say, as this is not a platted village, that the Board of Supervisors would have no right to issue a permit such as outlined.

In answer to your second question will say that, as the Board of Supervisors, did not have the right to issue a permit in the first instance, the whole proceeding is a nullity and the money, of course, should be returned.

For your information will say that this Department has previously ruled in opinions to several county attorneys that in the event that an area has been platted prior to January 1, 1934, the Board of Supervisors may, at its discretion, issue a permit and that it is a matter, in our opinion, that was made discretionary because of the difficulty of policing certain areas in counties. But, of course, this discretion is only exercised where the other provisions of this section are met with reference to the area having been platted prior to January 1, 1934.

BEER BILL: HOUSE FILE 336, EXTRA SESSION, 45TH GENERAL ASSEMBLY: NECESSITY OF RESTAURANT PERMIT: THREE CASES SUBMITTED: STERILIZATION OF GLASSES OR CONTAINERS.

May 31, 1934. *Department of Agriculture, Des Moines, Iowa:* This will acknowledge receipt of your request of this date for the opinion of this Department on the following question:

In just what cases is it necessary to have a restaurant permit in connection

with the sale of beer under House File No. 336, Acts of the Forty-fifth General Assembly in Extraordinary Session?

"I would like to submit the following questions:

"1. Where a class 'B' permit holder, who has an on or off sale permit, serves pretzels, crackers and cheese alone, is it necessary to have a restaurant permit?

"2. In addition to those articles of food mentioned in question one, if sandwiches which are prepared and brought in are served, is it necessary to have a restaurant permit?

"3. In addition to those articles of food mentioned in questions one and two, if the permit holder has a loaf of bread and ingredients with which to make sandwiches, is it necessary to have a restaurant permit?

"4. What jurisdiction should our Department take over the sterilization of glasses or containers in the place of business of class 'B' permit holders?"

In answer to your first question, please be advised that it is the opinion of this Department that an exception is made under House File No. 336, Acts of the Forty-fifth General Assembly in Extraordinary Session, in that Section 15 provides in part as follows:

"It shall be unlawful for any licensee hereunder to give away beer, or to promote the sale of beer by the gift of any lunch, meal, or articles of food except pretzels, cheese or crackers."

We are of the opinion that where pretzels, crackers or cheese alone are served, it would not be necessary to have a restaurant permit.

In answer to your second question, will say that the factor which, as we view it, is hard to determine is as to where the sandwiches are prepared and made ready for sale. In the case where a class "B" permit holder would prepare the same, by way of illustration, in the back room of his place of business and then have them in a sealed paper or a paper napkin, it is our opinion that he should have a restaurant permit as this is food prepared on the premises and comes within the provisions of what constitutes a restaurant under Section 2808 of the 1931 Code of Iowa which is as follows:

"'Restaurant' shall mean any building or structure equipped, used, advertised as, or held out to the public to be a restaurant, cafe, cafeteria, dining hall, lunch counter, lunch wagon, or other like place where food is served for pay, except hotels and such places as are used by churches, fraternal societies, and civic organizations which do not regularly engage in the serving of food as a business."

We would be of the opinion, in accordance with the section of the Code above cited, that where food is served for pay that a restaurant permit would be necessary.

In answer to your third question, will say, in keeping with the answer to the preceding question, that there would be no question in a case such as this but what a restaurant permit would have to be taken out to allow a procedure of this nature. Also, in the case of where there is any cooking paraphernalia as, for instance, an electric grill or a gas plate, whereby hamburgers or so called "hot-dogs" are prepared, it would be necessary to take out a restaurant permit to make the sale of the said food legal.

In answer to your fourth question, please be advised that it is the opinion of this Department that you have wide powers under the restaurant law of this state with reference to sanitation in the use of containers in which either food or drink is served. This likewise applies to soda fountains and any approved method which you find, by experience, will do the work could be insisted upon by you in keeping with the sanitary methods in the serving of either food or drink.

I find in going over your rules and regulations, under the subhead "Sanitation," that you have the following rule which we believe is in keeping with the powers given you under the restaurant law of this state:

"13. All dishes, including water serving glasses, must be washed in soapy water or some sanitary preparation, and then thoroughly scalded in hot water. This must be strictly obeyed."

We would feel that your Department is justified, in the case of any class "B" permit holder, in making a thorough inspection of the system by which beer "mugs" and other containers are sterilized for use in the serving of beer. Any preparation which you may find to be one which will insure sanitation might properly be the subject of a rule or regulation to be adopted by your Department in this connection.

SLOT MACHINES: A token machine which upon insertion of a coin plays either tokens or coins, or a package of mints providing player trips proper attachment on vending machine, and which gives either token, coin, or candy at each insertion of a coin, is a gambling device in that its purpose is to create a desire to insert coins to receive additional coins.

June 1, 1934. *Chief of Police, Waterloo, Iowa:* This will acknowledge receipt of your communication of the 25th instant asking for opinion upon the legality of the following described machine:

"A token or coin is placed in the machine and the machine played for the purpose of winning tokens or coins. A packet of mints are available each time the machine is played, providing the player chooses to turn or trip an attachment connected with vending device. That, it is commonly known, is seldom done by the player because the machine is being played for the purpose of winning tokens or coins, and not for the purpose of purchasing mints."

Your question is, are such machines illegal or legal?

No other citation of authority is necessary than to call your attention to the case of State of Iowa ex rel Manchester vs. Marvin reported in 211 Iowa 462 to conclude that this machine is a gambling device. In the Marvin case a slot vending machine which upon the insertion of a coin invariably produced a package of mints and occasionally by chance a valuless disk or token which could be played in the machine, not for merchandise but for amusement purposes only, was held to be a gambling device within the purview of Chapter 593, Code of 1927. Every time a nickel was inserted in the machine, the machine returned a package of mints. Occasionally, it releases certain brass disks or tokens which were stamped on one side, "good for amusement only" and on the other side, "no cash value." These disks or tokens remained the property of the vendor and could be used to replay the machine for the customer's sole amusement; nothing of value and no merchandise was ever vended with the token. The only purpose it served was to operate a reel upon which fortunes and funny sayings appeared for the customer's amusement. In passing upon this question the Supreme Court said in part:

"The use of the discs had a manifest purpose. Such purpose was to stimulate the expectation of the buying patron that he might receive something more than a package of mints. The only apparent economic reason for their use was that they would induce a larger deposit of nickels in the slot than would otherwise ensue. Among the patrons of the machine, some, if not many, of them might prefer the feature of amusement, rather than the package of mints. * * * * It must be held, therefore, that the machine in question was a gambling device, within the meaning of the statute."

The opinion concludes in the following language:

"Our own cases on this subject have been a successive consideration of in-

genious attachments intended by the inventor as a near approach to the prohibitive line. Of course, the distance from the inner to the outer side of a line is not great. But in the cases which have so far been brought before us, no inventor has been able to contrive a *non-gambling* device which functions nevertheless as a *gambling* one."

It would seem, therefore, without question that the machine referred to is a gambling device and we so hold.

SECURITIES: REFUNDING OR REFINANCING OF BONDS NOW DUE: QUALIFYING: Iowa Electric Co. wishes to refinance or refund six per cent gold bonds which fall due July 1, 1934, by issuing a new series of gold bonds. New bonds issued to present owners of bonds in return for old bonds now due must be qualified with the Securities Department under the Iowa Securities Act.

June 4, 1934. *Superintendent of Securities Dept., Des Moines, Iowa:* We have received your request of May 29, 1934 for an opinion concerning the proposal of the Iowa Electric Co. to refinance or refund six per cent gold bonds which fall due July 1, 1934.

In our opinion new bonds issued to the present owners in return for the old bonds must be qualified with the Securities Department as provided by law. In our opinion, the refunding operation does not come within the provision of any of the statutes providing for exceptions or exemptions from the operation of the Iowa Securities Act.

The only statute providing for an exemption from the operation of that act which could be applicable is sub-section D of Section 8581, c. 5 which is as follows:

"The distribution by a corporation actively engaged in the business authorized by its charter of capital stock, bonds or other securities to its stockholders or other security holders as a stock dividend or other distribution out of the earnings or surplus; or the issuance of securities to the security holders or other creditors of a corporation in the process of a bona fide reorganization of such corporation made in good faith and not for the purpose of avoiding the provisions of this chapter, either in exchange for the securities of such security holders or claims of such creditors or partly for cash and partly in exchange for the securities or claims of such security holders or creditors; or the issuance of additional capital stock of a corporation sold or distributed by it among its own stockholders exclusively, where no commission or other remuneration is paid or given directly or indirectly in connection with the sale or distribution of such increased capital stock."

The refunding operation described in your communication is not a distribution of securities out of earnings nor is it an issuance of securities on reorganization. A commission is to be received for the transfer of the bonds. There is to be no change in the corporate or financial structure of the Iowa Electric Co. It is clear from the language of the statute that the Legislature had in mind an actual reorganization of the corporation. The plan proposed merely amounts to a discharge of maturing bonds by the issuance of new bonds in the same amounts and at the same rate of interest. It seems clear to us that the proposed refunding or refinancing of the bonds does not come within the terms of the statute above quoted.

You are correct in assuming that the new issue of six per cent first mortgage bonds, dated July 1, 1934, and due in five years, must be qualified in your department upon proper application before they are offered in exchange for the old obligations.

INSURANCE: WORKMEN'S COMPENSATION: Are counties required to take out workmen's compensation insurance for relief workers?

June 4, 1934. *County Attorney, Independence, Iowa:* This will acknowledge receipt of your request on this date for the opinion of this Department on the following question:

Are counties required to take out workmen's compensation insurance for relief workers?

It is our understanding that the federal government furnishes the funds for various projects and that these funds are turned over to the Iowa State Emergency Relief Committee and are dispensed by checks signed by Governor Herring and the funds are administered by the local relief body which is so designated under proper resolution of the Board of Supervisors. The work is performed on various local projects within the county. It is also our understanding that the men who work on these projects are sent from one project to another and that there is a change from time to time.

The difficulty, as we view it, is to determine whether or not the men employed are working on strictly county projects. It has come to our attention from several counties in the state that these men are employed on various projects, by way of illustration, on projects sponsored by the Board of Conservation, the Fish and Game Commission, other state agencies, also by cities or towns and are not employed at all times on the same project.

It is the opinion of this Department that where the men are engaged exclusively on county projects, the county could carry workmen's compensation insurance. But in cases where some other political subdivision of state or agency of the state employs these men, such subdivision or agency would be the employer and not the county and, hence, the county would not carry the insurance.

If you desire further information on this point, we refer you to the Industrial Commissioner who, we understand, has ruled on several cases on a set of facts similar to those contained herein.

BEER BILL: HOUSE FILE NO. 336, EXTRA SESSION, 45TH GENERAL ASSEMBLY: SECTION 16: ORIGINAL CONTAINER: CONSTRUCTION OF MEANING: The original container, under the present law, means the bottle.

June 4, 1934. *Assistant County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-sixth ultimo in which you request the opinion of this Department on the following question:

Section 15 of Chapter 37, as amended by Chapter 38, Acts of the Forty-fifth General Assembly, provided that a holder of a class "C" permit could sell not less than "144 ounces of beer for consumption off the premises, provided however that such sales when made shall be in original sealed packages only and unrefrigerated."

In House File No. 336, Acts of the Forty-fifth General Assembly in Extraordinary Session, which is the new beer bill, Section 16 thereof provides as follows:

"Any person holding a class 'C' permit issued as herein provided, shall be allowed to sell beer for consumption off the premises, provided, however, that such sales when made shall be in original containers only."

Some holders of class "B" permits feel like the holders of class "C" permits are apparently receiving the greater portion of the business for consumption off the premises and we are asking that an interpretation should be made of Section 16, above set out, as to what is meant by "sale in original containers only."

Under the general practice under Section 15 of the first beer act, class "C" permit holders sold twelve bottles containing 12 ounces each in original sealed cardboard boxes complying with the provision that it shall be in original sealed

packages only. Section 16 of the new act, above set out, provides for original containers, not changing the complete wording of the old section. Some of the class "B" permit holders in the county seem to feel that the new provision in Section 16 should be interpreted as in the old Section 15.

In Section 16 of House File No. 336, Acts of the Forty-fifth General Assembly in Extraordinary Session, what is meant by ORIGINAL CONTAINER?

Please be advised that it is the opinion of this Department, when Chapter 37, as amended by Chapter 38, Acts of the Forty-fifth General Assembly, was amended by House File No. 336, Acts of the Forty-fifth General Assembly in Extraordinary Session, that the changing or amending of Section 15 of the original act by Section 16 of the present act allowed the sale of beer by class "C" permit holders in any amount and the same may be refrigerated. We construe the bottle to be the original container, it being our thought in the matter that had the Legislature desired that beer be sold in a quantity not less than 144 ounces in a sealed cardboard box, that the same wording or language would have been used in Section 16 of the new act as that stated in Section 15 of the old act. As the original act stated exactly what was meant by an original container and that there should be in quantity not less than 144 ounces, when this wording was omitted from the present act, we feel that the intent of the Legislature is clearly expressed and that the original container, under the present law, means the bottle and that beer may also be sold in any quantity and refrigerated by a class "C" permit holder.

OLD AGE ASSISTANCE COMMISSION: APPROPRIATION: The sum of ten thousand dollars ($10,000.00) appropriated by the legislature, as set out in Section 40, would be paid from the general fund of the State of Iowa.

June 4, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your request of the twenty-second instant for the opinion of this Department on the following question:

Section 40 of Senate File No. 42, Acts of the Forty-fifth General Assembly in Extraordinary Session, provides as follows:

"The sum of ten thousand dollars ($10,000.00) or so much thereof as may be found necessary, is hereby appropriated to the commission, out of any funds not otherwise appropriated for the purpose of carrying out the provisions of this act."

From what fund is this money to be paid?

Please be advised that it is the opinion of this Department that the sum of ten thousand dollars ($10,000.00) appropriated by the Legislature, as set out in Section 40, would be paid from the general fund of the State of Iowa. The purpose for this appropriation is for the setting up of machinery of the old age assistance commission.

FISH AND GAME COMMISSION: OFFICER OF THE LAW: SHOOTING INTO A BOAT: Does an officer of the law have the right to shoot into a boat that is about to get away from him when the officer or officers are eye-witnesses to the boat being used to violate the law of the State of Iowa?

June 5, 1934. *Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the first instant for the opinion of this Department on the following question:

Does an officer of the law have the right to shoot into a boat that is about to get away from him when the officer or officers are eye-witnesses to the boat being used to violate the law of the State of Iowa?

Please be advised that it is the opinion of this Department that some discretionary powers are given to the peace officers. In this connection, we wish

to call your attention to Chapter 621, 1931 Code of Iowa, entitled *Arrest: General Provisions.* Section 13466 thereof provides as follows:

"*Acts necessary.* An arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest. No unnecessary force or violence shall be used in making the same, and the person arrested shall not be subjected to any greater restraint than is necessary for his detention."

Section 13468 provides:

"*Arrests by peace officers.* A peace officer may make an arrest in obedience to a warrant delivered to him; and without a warrant:

"1. For a public offense committed or attempted in his presence.

"2. Where a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it."

See Section 13471 which provides as follows:

"*Manner of making.* The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of arrest, of his authority to make it, and that he is a peace officer, if such be the case, and require him to submit to his custody, except when the person to be arrested is actually engaged in the commission of or attempt to commit an offense, or escapes, so that there is no time or opportunity to do so; if acting under the authority of a warrant, he must give information thereof and show the warrant, if required."

See also Section 13472 which provides:

"*Resistance to arrest—use of force.* To make an arrest for any public offense, a peace officer, acting with or, when authorized, without a warrant, may break into a house or other building in which the person to be arrested may be, or in which the officer has reasonable grounds for believing he is, after having demanded admittance and explained the purpose for which admittance is desired. In case of a felony, a private person may use like means to make an arrest."

In connection with the Code sections cited above, I wish to refer you to several Iowa cases. In the case of Hobbs vs. Illinois Central Railway Company, 182 Iowa 316, 165 Northwestern 912, the court said:

"Actual force or visible physical restraint is not necessary in order to constitute an arrest."

Miller vs. Dickinson County, 68 Iowa 102, 26 Northwestern 31:

"It is not essential in order to constitute an arrest that the sheriff should have informed the prisoner of his intention to make the arrest, and that he was a peace officer. While the prisoner might ordinarily be entitled to such information, the legality of the arrest as between the sheriff and other parties is in no manner affected by the sheriff's failure in these respects."

See Stewart vs. Feeley, 118 Iowa 524, 92 Northwestern 670, in which the court said:

"A failure of the officer making the arrest to inform the person to be arrested of the intention to arrest him, of the cause of arrest and of his authority to make it, will render the officer liable for damages suffered by reason of such arrest."

and further:

"An officer who makes an arrest without warrant, and does not take the person arrested before a magistrate and make complaint before him, becomes liable for the wrongful arrest."

In McNally vs. Arnold, 127 Iowa 437, 103 Northwestern 361, the court said:

"When a prisoner is under arrest the officer may use reasonable force for the purpose of preventing boisterous and disorderly conduct by him."

In State vs. Howard, 191 Iowa 728, 183 Northwestern 482, the court stated:

"A peace officer, whether he be such de jure or de facto, has no right to kill a person, (1) in order to arrest such person for a misdemeanor, or (2) in

order to prevent the escape of such person from arrest for a misdemeanor. It follows that an instruction, in such circumstances, which inferentially requires the accused to 'retreat' is not prejudicially erroneous."

It might be of interest to go into the facts of the last cited case. Briefly, they are as follows:

"The tragedy occurred on the fair grounds, in or near the city of Clarinda, shortly after midnight on the date mentioned. The defendant, who was employed by the fair association, was assuming to act as a peace officer, in the capacity of a deputy sheriff, and had been for several days, and during the fair. About midnight—perhaps a little thereafter—the defendant and one Pearl Anderson, who was also employed and serving as a police officer on the fair grounds, went to a tent, referred to in the evidence as the implement tent, which was about 40 feet in length, or diameter, the sides of which were open. When they arrived at the tent, they found Terrance Welch, the deceased, William Frederickson, and John Green, sitting near the center of the tent. The tent was lighted only by a nearby electric street lamp; but, according to the testimony of the witnesses, the light was sufficient to make at least the outline of the parties clearly visible. After the exchange of a few words between Welch and Howard, an angry altercation occurred between them, in which there was considerable profanity; and, according to the testimony of several of the witnesses, some threats were made by the defendant, who, in the meantime, had taken a .38-caliber Hopkins & Allen pistol from his pocket, held it in his hand, and, during the conversation, pointed it at Welch. After the controversy began, Welch reached for his coat; whereupon the defendant stepped upon his fingers, and commanded him to be still. The defendant testified that his purpose in stepping upon Welch's fingers was to prevent him from getting the coat, in which he feared he had a gun concealed. The defendant directed Anderson to call Frank Pennington, the sheriff, which he did. Before the sheriff arrived, however, Milton Stafford, another peace officer, entered the tent, at which time the defendant was holding Welch's coat, and had the Hopkins & Allen pistol in his hand. Welch, observing Stafford, turned to him and said, in substance: 'Here is the law. I will go with this man.' Almost immediately, he took hold of Stafford's right arm with his left hand, and the two started to leave the tent, in a southeasterly direction. Stafford testified that, before starting to leave the tent, he told defendant to put up his gun; but this is denied by the defendant. The defendant threw Welch's coat onto the platform, and Stafford picked it up and gave it to Welch.

"The evidence showed that both the defendant and Welch called each other vile names, and that Howard threatened to shoot; but that no shots were fired until Welch and Stafford got outside the tent, after walking perhaps 30 or 35 feet. The defendant followed Stafford and Welch, and, when the latter was about 2 or 3 steps from the tent, Welch turned, and attempted to strike the defendant with his fist. Almost immediately thereafter, Howard fired a shot, the bullet entering Welch's back just below the scapula, taking a somewhat upward course, killing him instantly."

We have set out the facts with reference to the case under consideration to show the attitude of our courts with regard to use of fire arms in the making of an arrest for misdemeanor and which, in the instant case, caused instant death. In this case, the defendant, the public officer, was convicted of the crime of murder in the second degree, sentencing him to imprisonment in the penitentiary at Fort Madison for fifteen years.

Also, see in this connection the case of State vs. Phillips, 119 Iowa 652, 94 Northwestern 229, which deals with the acts of a peace officer in making an arrest which resulted in death which the court determined to be accidental in its nature. Briefly, the court states:

If the officer using no more force than is necessary causes the death of the person arrested for misdemeanor, if he has not employed a deadly weapon in a deadly manner, the result may be excusable as accidental.

A definite rule of law applies in the use of fire arms in the apprehension of

a felon. See the case of State vs. Smith, 127 Iowa 534, 103 Northwestern 944:

"In arresting or resisting the escape of one who has committed a felony the officer may oppose force to force and if there be no other reasonably apparent method for effecting the arrest or preventing the escape of the felon, the officer may, if he has performed his duties in other respects, take the life of the offender or one who is seeking to rescue him."

Also, in this case, we find the rule laid down by the court to the effect:

"An officer is not justified in killing one who is guilty of a misdemeanor only in order to effectuate his arrest or to prevent his escape after arrest. To this rule there are some exceptions as in the case of riot, mob violence, etc."

This rule was also followed in the case of State vs. Howard, 191 Iowa 728, 183 Northwestern 482.

It would be the opinion of this Department, in answering the question submitted by you, that the use of fire arms by a peace officer would only be justified in the case of where one is escaping from the commission of a felony and would not apply in the case of where a misdemeanor has been committed. The shooting into a boat, of course, would be, under any circumstances, a dangerous undertaking because of complications which might follow such an act. We have gone somewhat into detail in this matter because of the importance of a subject of so serious a nature.

For your information, we wish to call your attention to the definition of a felony as contained in Section 12890 which is as follows:

"*Felony defined.* A felony is a public offense which may be punished with death, or which is, or in the discretion of the court may be, punished by imprisonment in the penitentiary or men's reformatory."

And also the definition of misdemeanor as contained in Section 12891 which provides as follows:

"*Misdemeanor defined.* Every other public offense is a misdemeanor."

In other words, it is the opinion of this Department, in compliance with the code sections and cases above cited, that in the commission of a felony, every reasonable method should be pursued by the official to effect the arrest before he resorts to the use of fire arms, while in the case where the person to be arrested could be charged only with a misdemeanor, that the use of fire arms would be unwarranted.

OLD AGE PENSION LAW: SENATE FILE 42, 45TH GENERAL ASSEMBLY, EXTRA SESSION: POLICE OFFICERS: POLICE PENSION FUND: Police officers of any city, who can receive money from the police pension fund, as provided by the act, are subject to the payment of $1.00 prior to the first of July, 1934, and $2.00 a year after that the same as other people in order to be eligible under the old age pension act.

June 5, 1934. *County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-sixth ultimo in which you request the opinion of this Department on the following question:

President Torrence of Local No. 10, Iowa Police Officers Association, has asked the following question:

Are the police officers of any city, who can receive money from the police pension fund, as provided by the act, subject to the payment of $1.00 prior to the first of July, 1934, and $2.00 a year after that the same as other people in order to be eligible under the old age pension act?

Please be advised that Section 34 of Senate File No. 42, Acts of the Forty-fifth General Assembly in Extraordinary Session, which is the old age pension law, provides in part as follows:

"To provide money for said fund, there is hereby levied on all persons resid-

ing in this state and who are citizens of the United States and of twenty-one (21) years of age and upwards, except inmates of state and county institutions, an annual tax of two dollars ($2.00)."

Section 35 thereof provides in part as follows:

"For the purpose of affording old age assistance commencing November 1, 1934, under the provisions of this act prior to July 1, 1935, there is hereby levied on all persons pursuant to Section 34, a tax of one dollar ($1.00) payable on or before July 1, 1934."

It is the opinion of this Department that those parts of Sections 24 and 35, above quoted, control in the matter under consideration.

Therefore, the police officers of any city, who can receive money from the police pension fund, as provided by the act, are subject to the payment of $1.00 prior to the first of July, 1934, and $2.00 a year after that the same as other people in order to be eligible under the old age pension act. The only exception would be in the case of a retired policeman receiving a pension from the police pension fund, as this fund is in part raised by a millage levy and would, we believe, conflict with Section 27 of Senate File No. 42, Acts of the Forty-fifth General Assembly in Extra Session, which provides as follows:

"Recipient not to receive other assistance. No person receiving assistance under this act shall at the same time receive any other assistance from the state, or from any political subdivision thereof, except for medical and surgical assistance, and hospitalization."

OLD AGE PENSION LAW: SENATE FILE NO. 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: Questions submitted by the firm of Roach & Musser, Muscatine, Iowa.

June 5, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your request of the thirty-first ultimo in which you request the opinion of this Department on the following questions as submitted to you by the firm of Roach & Musser, Muscatine, Iowa:

1. If an employee considers himself on our pay roll, and has worked only four or five half days in a period of thirty days or six weeks, and does not take employment elsewhere, but has not worked thirty consecutive days, as far as wages are concerned, on our pay roll, are we responsible for the collection of his tax so long as he considers himself in our employ?

Please be advised that Section 34 of Senate File No. 42, Acts of the Forty-fifth General Assembly in Extraordinary Session, provides in part as follows:

"Any person, firm, association or corporation, * * * *, having in their employ continuously for a period of thirty days or more any resident of this state and who is a citizen of the United States, and to whom this act applies and who has not paid the tax provided for in this section, shall deduct said tax from the earnings of such employee and deliver to such employee a receipt for said collection and remit same to the treasurer of state, * * * *."

It is the opinion of this Department that the provisions with regard to the thirty days does not refer to thirty days of continuous work but to employment during thirty days period. In the event that any firm carries on their payroll an employee for a thirty day period, whether or not such employee works, each day of the thirty day period comes under the provisions of that part of the section of the act above referred to.

2. The assessor has listed, or will list, every person subject to this tax or assessment. Suppose a person has been in our employ but on account of business conditions has not been employed regularly, and has not served with us for thirty consecutive days, but gives the assessor the information that he is employed by Roach and Musser, under this condition are we responsible for the collection of this tax?

Please be advised that it would be the opinion of this Department that where any employee, in keeping with the answer to your first question, is not carried on the employee's payroll for thirty days and where he is given work for a week or so and then laid off, the test would be as to whether or not he is likely to be called into service again. If he were not, the fact that he was under the impression that he might be and so recorded his employment with the assessor, would not make the employer liable under Section 34 of Senate File No. 42, Acts of the Forty-fifth General Assembly, in Extraordinary Session. The test would be as to whether or not he was carried on the employer's payroll for thirty days or more. If he was not carried on the payroll for a thirty day period, then firms such as Roach and Musser would not be responsible for this tax. They could exhibit their employee's payroll showing that such employee did not come under the provisions of the act under consideration as far as they were concerned.

OLD AGE PENSION LAW: SENATE FILE 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: The penalties for failure to pay the tax as levied under Senate File No. 42, Extra Session, Forty-fifth General Assembly, are a lien on real property as Section 34 of the act has expressly created a lien by statute and the authority conferred by statute is such as to create a lien on real property.

June 5, 1934. *Auditor of State, Des Moines, Iowa:* This will acknowledge receipt of your request on this date for the opinion of this Department on the following question:

Are the penalties for failure to pay the tax, as levied under Senate File No. 42, Acts of the Forty-fifth General Assembly in Extraordinary Session, the old age assistance act, a lien on real property?

Section 34 of Senate File No. 42, Acts of the Forty-fifth General Assembly in Extraordinary Session, provides in part as follows:

"From the list certified to the county treasurer under the provisions of Section 36 of this act, it shall be the duty of such county treasurer to place the names of all persons subject to said tax on the tax list, and the said annual tax levied by the provisions of this section and act shall be collected in 1935, and each year thereafter, by the county treasurer at the same time as property taxes and subject to the same penalties, * * * *."

In the case of Jaffray vs. Anderson, 66 Iowa 718, 24 Northwestern Reporter 527, our Supreme Court said:

"It is a general rule appertaining to the law of taxation that taxes are not a lien upon property of the taxpayer, unless a lien is expressly created or provided for by statute."

In the case of Eagle Manufacturing Company vs. Davenport, 101 Iowa 493, 70 Northwestern Reporter 707, it is said:

"It is a general rule that taxes are not liens upon property unless made so by statute or by virtue of authority conferred by statute."

You will note in that part of Section 34, above quoted, that this tax is to be collected by the county treasurer the same time as property taxes and subject to the same penalties.

We find in Section 7189 of the 1931 Code of Iowa the following:

"*Distress and sale.* The treasurer shall collect all delinquent taxes by distress or sale of any personal property belonging to the person to whom such taxes are assessed, and not exempt from taxation, or any real or personal property upon which they are a lien, but he shall continue to receive the same until collected, and any owner or claimant of any real estate advertised for sale may pay to the county treasurer, at any time before the sale thereof,

the taxes due thereon, with accrued penalties, interest, and costs at the time of payment."

It would be the opinion of this Department, in keeping with the cases cited above, that Section 34 of the act has expressly created a lien by statute and also that the authority conferred by statute is such as to create a lien on real property.

OLD AGE PENSION LAW: SENATE FILE 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: The payment of the investigators, under Section 7 of the act under consideration, should rightfully be paid out of the general fund of the county.

June 5, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your request of the twenty-second ultimo for the opinion of this Department on the following question:

Section 7 of Senate File No. 42, Acts of the Forty-fifth General Assembly in Extraordinary Session, provides in part as follows:

"Local investigators. The board may appoint one or more local investigators, at a salary for each to be fixed by the board. * * * *."

Section 7 of the act relates to the general and special functions of the local Board and gives the Board the right, if they see fit, to appoint one or more investigators. It also provides that they, the local Board, shall fix the salary of these investigators appointed by the Board. These investigators are directly responsible to the local Board as to appointment. The acts of such appointees in the administration of the duties imposed, the number to be appointed and the salary to be paid is to be fixed by the Board.

It is, therefore, the opinion of this Department that the payment of the investigators should rightfully be taken out of the general fund of the county.

OLD AGE ASSISTANCE ACT: SENATE FILE 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: NATIONAL GUARD: The members of the Iowa National Guard are not exempted from the payment of the two dollars per year tax to be assessed on and after July 1, 1934, under the provisions of the above named act.

June 6, 1934. *Office of the Adjutant General, Des Moines, Iowa:* This will acknowledge receipt of your request of the thirty-first ultimo in which you request the opinion of this Department on the following question:

Section 34 of Senate File No. 42, Acts of the Forty-fifth General Assembly in Extraordinary Session, which is the old age assistance law, provides in part as follows:

"* * * * provided, however, that said tax, if paid, shall be credited on any poll taxes assessed for street, road, or other purposes against the person paying same. * * * *."

Section 24 of the Military Code of Iowa, exacted by the Forty-fifth General Assembly in Extraordinary Session, provides:

"Every officer and soldier of the national guard shall be exempt from jury duty and the payment of poll tax and/or labor on the road on account of poll tax during his term of service. * * * *."

In view of the foregoing, will the members of the Iowa National Guard be considered exempt from the payment of the two dollars per year tax to be assessed on and after July 1, 1934?

Please be advised that it is the opinion of this Department, while Section 24 of the Military Code of Iowa, enacted by the Forty-fifth General Assembly in Extraordinary Session, provides in part as follows:

"Every officer and soldier of the national guard shall be exempt from jury duty and the payment of poll tax and/or labor on road on account of poll tax during his term of service."

That Section 34 of Senate File No. 42, Acts of the Forty-fifth General Assembly in Extraordinary Session, sets up a new tax and a new system by which old age assistance is granted and that the fact that the tax may be credited on any poll taxes is not the controlling feature. The tax, as we view it, as levied under the old age pension act, must be paid. It would take a special act of the Legislature to exempt anyone from the payment of this tax. You will note that the only persons who are exempted under the provisions of the acts are "inmates of State and County institutions." We view the exemption from the payment of poll tax, given to members of the national guard, as simply an exemption from that tax alone. The fact that Section 34 of the old age pension act provides for credit, as stated before, does not control. All persons not specifically exempted are to pay the tax levied by the act under consideration.

BEER BILL: HOUSE FILE 336, EXTRA SESSION, 45TH GENERAL ASSEMBLY: SALE OF BEER IN ADDITIONAL ROOM IN SAME BUILDING: Is it necessary, under these circumstances, for this individual to obtain a second permit when the rooms used open into one another and located in the same building?

June 6, 1934. *County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-second ultimo in which you request the opinion of this Department on the following question:

A man now holds a class 'B" permit in a building located on two lots which have a partition running through the center of the building at or about the lot line. The original permit was granted for one-half of the building located on one of the lots. Since that time, he has opened the other half by a large doorway so as to make it all one room, and desires to serve beer under the original permit issued to him. Both of the rooms being in one building, the city clerk has informed this individual that he cannot sell beer in the half that has recently been opened into the main room without obtaining another beer permit for that room located on the other lot.

Is it necessary, under these circumstances, for this individual to obtain a second permit when the rooms used open into one another and located in the same building?

In accordance with Section 12 of House File No. 336, Acts of the Forty-fifth General Assembly in Extraordinary Session, it is the opinion of this Department that beer could be sold at any place on the premises described in the permit if, at each place, the provisions with reference to seating capacity to accommodate twenty-five (25) persons at one time are complied with.

In our opinion the matter which controls the situation is as to the description of the premises as it appears in the permit. If the additional room in which the permit holder desires to sell beer, is not described in the permit, then, upon application to the city council, the council could allow the description to be amended to include the additional room. However, if they do not care to allow such an amendment, the only redress of the permit holder would be to make application for a new permit to cover the additional room.

OLD AGE PENSION LAW: SENATE FILE 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: SECTION 22: WHEN PENSION STARTS: DAY RECEIVED OR OTHERWISE: MATTER OF ROUTINE.

June 6, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-eighth ultimo in which you request the opinion of this Department on the following question:

Section 22 of Senate File No. 42, Acts of the Forty-fifth General Assembly in Extraordinary Session, provides as follows:

"When assistance commences. The assistance, if allowed, shall commence

on the date named in the certificate, which shall be the first day of the calendar month following that on which the petition was received by the board; provided, however, that no old age assistance payments shall be made before July 1, 1935, except as provided in Section thirty-five (35) of this act."

"A" makes application on the twenty-fifth day of October, 1934. Pensions may be paid out on November first, as provided in Section 35. Suppose that applications are so numerous that the commission shall be unable to reach "A's" application in order to pass upon it for fifteen days after it has come into the office. Will his pension be retroactive from November first or will it be fixed as the day of approval, November fifteenth or twenty-fifth, as the case may be? Will the same rule apply for any month following the month of November?

It is the opinion of this Department that the illustration as set forth in your communication would be a routine matter with the Commission. If the applicant has his application at the office of the Commission prior to November 1, 1934, but through inability of the office force of the Commission to act upon the same prior to November 1, 1934, this would not be the controlling factor. If the applications were so numerous that an application did not receive the approval of the Commission for some two or three weeks after the same was filed with the Commission, we would be of the opinion that this could be considered as of the date of the first day of the calendar month after the petition was received by the Commission.

The fact that the act clearly states that it "shall be the first day of the calendar month following that on which the petition was received by the board," the Commission could use this as the date even though the same was not reached by the Board to pass on the same.

BEER BILL: HOUSE FILE 336, EXTRA SESSION, 45TH GENERAL ASSEMBLY: CLUB: SALE OF BEER ON SUNDAY: USE OF COOLER: SPENCER GOLF OR COUNTRY CLUB: Is it a violation of this act if members of the club avail themselves of the facilities of the ice cooler on Sunday by having beer purchased on week days iced and go to the cooler and get the same on Sundays?

June 6, 1934. *County Attorney, Spencer, Iowa:* This will acknowledge receipt of your letter of the twenty-fifth ultimo in which you request the opinion of this Department on the following question:

The Spencer Golf and Country Club has a permit to sell beer under Chapter 37, as amended by Chapter 38, Acts of the Forty-fifth General Assembly, and House File No. 336, Acts of the Forty-fifth General Assembly in Extraordinary Session.

Is it a violation of this act if members of the club avail themselves of the facilities of the ice cooler on Sunday by having beer purchased on week days iced and go to the cooler and get the same on Sundays?

It would be the opinion of this Department that the club could not sell to a member any beer on Sundays or at any time subsequent to midnight on Saturday and seven o'clock of the following Monday morning. However, where a member of the club purchases beer during the week, he might avail himself of the cooling system of the club by having his beer "ear-marked" in some way as, by way of illustration, placing beer in the cooler with the designation thereon that the same belongs to him. We would not construe this to be a violation of the law if a member followed such a procedure, that is, if he would go to the cooler on Sunday and take beer which he had previously purchased. However, a club would have to abide by the provision of the act with reference to Sunday sales.

Hence, as stated above, it is the opinion of this Department that if the sale

is consummated on a week day, we would see no objection to a member of a club using the cooling facilities of the club so that he might have his beer cooled on Sunday and partake of the same in the clubhouse.

OLD AGE PENSION LAW: SENATE FILE 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: JOINT STOCK LAND BANK: FEDERAL JURISDICTION: OPERATED IN IOWA: Is a joint stock land bank under jurisdiction of department of interior of the federal government and operated in Iowa, subject to the provisions of Section 34 of said act, relative to the deducting of the tax of employees who have not paid the tax levied under said section of the act?

June 6, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your request of recent date for the opinion of this Department on the following question:

Is a joint stock land bank, which is under the jurisdiction of the department of interior of the federal government and operated in Iowa, subject to the provisions of Section 34 of Senate File No. 42, Acts of the Forty-fifth General Assembly, in Extraordinary Session, relative to the deducting of the tax of employees who have not paid the tax levied under said section of the act?

Please be advised that it is the opinion of this Department that the joint stock land bank operated in Iowa even though under the jurisdiction of the Federal Government comes under the provisions of Section 34 of Senate File No. 42, Acts of the Forty-fifth General Assembly in Extraordinary Session, with reference to the deduction of this tax from the wages or salaries paid to employees in the event that the employees do not pay the tax as provided for in said section of the act under consideration.

You will note that Section 34 of the old age pension law provides in part as follows:

"Any person, firm, association or corporation, including municipal corporations and special charter cities, having in their employ continuously for a period of thirty days or more any resident of this state and who is a citizen of the United States, and to whom this act applies and who has not paid the tax provided for in this section, shall deduct said tax from the earnings of such employees and deliver to such employee a receipt for said collection and remit same to the treasurer of state, together with a report showing the amount and name of the person from whom collected; and the treasurer of state shall credit said tax as other taxes provided for in this section and act, and report to the county treasurer of the county from which such remittance was received, giving the name of the employee and the amount of such tax collected; and when said report has been received by the county treasurer, he shall credit such person on his books with said payment. Any employer failing to collect and so report said tax shall be liable therefor."

FISH AND GAME COMMISSION: TRANSIENTS: IOWA SERVICE BUREAU FOR TRANSIENTS: RACCOON RIVER: If such a strip of land is leased, would the transients in the camp be permitted to fish without a license?

June 6, 1934. *Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the thirty-first ultimo in which you request the opinion of this Department on the following matter:

Mr. Ivan H. Cummings is in charge of the transient camp at Auburn, Iowa. This camp accommodates the transients who drift through Auburn from time to time. These transients, as I understand it, are free to live at the camp as long as they put in their time in accordance with the regulations of the camp. Their period of stay is indefinite.

The transient camp association is planning on leasing in the name of the Iowa Service Bureau for Transients a strip of land about a half mile long along the Raccoon River from a Mr. Corey. Mr. Cummings is of the opinion that these people would probably be considered as tenants on the land.

If such a strip of land is leased, would the transients in the camp be permitted to fish without a license?

You are, of course, familiar with Section 23 of Chapter 30, Acts of the Forty-fifth General Assembly, which provides in part as follows:

"Owners or tenants of land, and their children, may hunt, fish or trap upon such lands and may shoot ground squirrels, gophers or woodchucks upon adjacent roads without securing a license so to do."

In keeping with this section, there is no question but what a tenant would have the right to fish on the premises described without a license. The question would be as to whether or not a transient, in the instant case, would be a tenant.

In the case of Powers vs. Ingraham (N. Y.) 3 Barb. 576 at page 579, the court said:

"A 'tenant' is defined to be one that holds or possesses lands or tenements by any kind of title, either in fee, for life, for years, at will, or upon sufferance."

In stating it another way, the courts have said:

"A 'tenant' is one who occupies the lands or premises of another in subordination to the other's title and with his assent, express or implied; but, in order to create the relation, the two elements must concur."

Francis vs. Holmes, 118 S. W., 881, at page 883.
Alexander vs. Gardner, 96 S. W., 818, at page 819.
Sharpe vs. Mathews, 51 S. E., 706, at page 707.

"The word 'tenant,' in Shannon's Code, Section 5093, declaring that unlawful detainer is where the defendant either by contract or an assignee of a tenant, etc., has reference to the relation of landlord and tenant, and not to the more remote meaning which the word bears when used in the expression 'tenants by the courtesy,' 'tenants in common,' and the like."

Shepperson vs. Burnette, 92 S. W., 762, 116 Tenn., 117.

Also see the case of Chamberlain vs. Brown, 141 Iowa 540 at page 546:

"It is an elementary principle of the law of landlord and tenant that in the absence of restriction, express or clearly implied, in the contract of lease, the tenant is during his term entitled to all of the rights of use which the owner of the property ordinarily exercises and enjoys, and may put the premises to whatever lawful use he may choose not materially differing from that for which they have been specially designed or constructed, so long as he commits no waste and creates no nuisance."

It would be the opinion of this Department, in the instant case, that the transient must be construed to be a tenant in keeping with that part of Section 23 of Chapter 30, Acts of the Forty-fifth General Assembly, and that the transients may fish on the Raccoon River opposite the land, which is to be leased, without a license. We arrive at this conclusion by reason of the cases cited above and the additional fact that the purpose of the Iowa Service Bureau for Transients in leasing this property is that it might be used by the transients and this, as we understand it, is the only purpose for which it is rented.

Consequently, the transients, for whose benefit the land is leased, would have the right to enjoy the privileges as extended to the tenant under Section 23 of Chapter 30, Acts of the Forty-fifth General Assembly.

BEER BILL: HOUSE FILE NO. 336, EXTRA SESSION, 45TH GENERAL ASSEMBLY: Does a class "A" permit holder, under House File No. 336, Acts of the Forty-fifth General Assembly in Extraordinary Session, have the right to store beer for refrigeration purposes in the ice box of another who holds no permit?

June 6, 1934. *County Attorney, Le Mars, Iowa:* This will acknowledge receipt of your letter of the twenty-fourth ultimo in which you request the opinion of this Department on the following question:

Does a class "A" permit holder, under House File No. 336, Acts of the Forty-fifth General Assembly in Extraordinary Session, have the right to store beer for refrigeration purposes in the ice box of another who holds no permit?

It is the opinion of this Department, as given previously that a class "A" permit holder must have a permit for every place wherein beer is stored, warehoused, *or* sold, in compliance with Section 29 which states:

"Every class 'A' permittee having more than one (1) place of business shall be required to have a separate license for each separate place of business maintained by such permittee wherein such beer is stored, warehoused, *or* sold."

As you know, under the act, the Treasurer of State is given the exclusive right to issue class "A" permits and to revoke the same. The office of the Treasurer has adopted the following rule:

A class "A" permit holder may make application to the treasurer to store or warehouse beer in the city for which his permit is granted where at his place of business he does not have refrigeration facilities public and the storehouse or warehouse has refrigeration facilities.

In other words, when he makes application to the Treasurer of State, he designates the city in which his place of business is located. The Treasurer has ruled that a class "A" permit holder may store or warehouse in the city for which his permit is granted but that he cannot go outside of the city and store and warehouse at other points or places.

By way of illustration, a class "A" permit holder giving his place of business as Sioux City and granted a class "A" permit to operate at Sioux City, could not have a warehouse or storehouse at Le Mars, Cherokee, Sheldon, Storm Lake and Ida Grove on one permit. He could store or warehouse in Sioux City exclusively but he must take out an additional permit at each other place where he desires to store or warehouse beer.

It has also been the ruling made by the Treasurer of State that additional warehouses or storehouses cannot be used by the class "A" permit holder in the city at which his place of business is located unless he does not have refrigeration facilities. Then, on a showing of this sort, the Treasurer's office will allow him to use a public warehouse which has refrigeration facilities and such additional place is made a matter of record in the office of the Treasurer.

With this exception, it is our thought that the intent of the Legislature was that the granting of a class "A" permit would not allow the holder thereof to store or warehouse in various parts of the state with just one permit. But if he desires to store or warehouse at other points, he would have to take out a permit at each such place.

It is also the opinion of this Department, as previously given, that class "B" and "C" permit holders do not need a permit except in each separate place of business wherein beer is sold. Section 30 of the act provides:

"Every person holding a class 'B' or class 'C' permit having more than one (1) place of business wherein such beer is sold shall be required to have a separate license for each separate place of business, except as otherwise herein provided."

SCHOOLS: TUITION: HOUSE FILE 194, 45TH GENERAL ASSEMBLY, SPECIAL SESSION: That House File 194, 45th General Assembly, Special Session, applies to tuition paid for school year beginning July 1, 1933, and ending in June, 1934.

June 7, 1934. *Department of Public Instruction, Des Moines, Iowa:* We have your letter of recent date advising us that House File 194 of the Acts of the Forty-fifth General Assembly, Extra Session, goes into effect June 10, 1934,

and you ask whether this will cover tuition for the school year from July 1, 1933.

The history of this appears to be that the Forty-fifth General Assembly, in Chapter 125, repealed Chapters 215-c1 and 215-c2 of the Code and enacted a new act relating to tax free lands and the reimbursement of school districts for such lands. It subsequently developed that this act was a hardship in two or three instances for the reason that the tuition of the children of employees was considerably more than the proportion paid on these unplatted lands pursuant to Chapter 125 of the Acts of the 45th General Assembly.

To take care of this situation, House File 194 was introduced at the Special Session of the 45th General Assembly, and the original bill was amended, as shown at page 676 of the House Journal. This provides that if the computed reimbursement to the school district is not sufficient to cover the tuition, the district is required to pay because of these children, there shall be reimbursed to the district, the difference between the computed reimbursement and the tuition the district is required by law to pay because of such children.

This tuition, pursuant to Section 4277 of the Code, is payable February 15th and June 15th. It is apparent that this act of the Special Session was for the purpose of remedying a situation which existed to the detriment of the school district and that it was intended by the Legislature to be retroactive and pertain to the reimbursement for the school year of 1933-34.

It is, therefore, the opinion of this Department that House File 194 of the 45th General Assembly, Special Session, applies to tuition paid for the school year beginning July 1, 1933 and ending in June, 1934.

BEER BILL: HOUSE FILE 336, EXTRA SESSION, 45TH GENERAL ASSEMBLY: Section 8 discussed. "Village" defined. Meaning of a "plat." Discretion exercised by board of supervisors discussed.

June 9, 1934. *County Attorney, New Hampton, Iowa:* This will acknowledge receipt of your letter of the eighth instant in which you request the opinion of this Department on the following question:

Under Section 8 of House File No. 336, Acts of the Forty-fifth General Assembly in Extraordinary Session, it is provided as follows:

"Power is hereby granted to boards of supervisors to issue, at their discretion, class 'B' and 'C' permits in their respective counties in villages platted prior to January 1, 1934, * * * *."

The board of supervisors of Chickasaw county have been requested to issue a permit to an applicant whose place of business is located at a point approximately one mile north of New Hampton, at which place, about ten years ago, there was a three-acre tract marked out into lots. However, this plat has never been filed in the court house and no buildings were ever erected in the area in question with the exception of about three years ago there was erected a building known as a "roadhouse" and which is operated as such at the present time.

Under this set of facts, would the board of supervisors be warranted in issuing a permit?

The question, as we view it, deals with the definition of a village, and also what the intention of the Legislature was with reference to a plat. In this connection, we desire to go somewhat into detail with reference to what various courts have defined a village to be. First, we wish call your attention to Subdivision 4 of Section 5623, 1931 Code of Iowa, which provides as follows:

"4. *Villages.* Town sites platted and unincorporated shall be known as villages."

In the case of Hebert vs. Lavalle, 27 Ill. 448, at page 454, the court said:

"A 'village' is any small assemblage of houses, occupied by artisans, laboring people, and farmers; in French villages, also by farmers. It is a defined locality, with a name, and its inhabitants are called 'villagers'."

In Mikael vs. Equitable Securities Company, 74 S. W. 67, the court states:

"The term 'village' as used in the Constitution providing for a homestead in a city, town, or village, should be given its ordinary and usual signification. Turning to the lexicons, we find that Webster defines a village to be a small assemblage of houses less than a town or city, and inhabited chiefly by farmers and other laboring people. The definition given by Bouvier is: Any small assemblage of houses for dwellings or business, or both, in the country, whether they are situated upon regularly laid-out streets and lots or not."

Also see In re Tullytown Borough, 1 Pa. Dist. R. 292 (citing Webst. Dict.), in which the court said:

"In the United States any small collection of houses in the country is called a village. The term is derived from 'villa,' a country seat."

See also State vs. Lammers, 89 N. W. 501, at page 502, in which the court said:

"A 'village' means an assembly of houses less than a city, but nevertheless urban or semiurban in its character, and having a density of population greater than can usually be found in rural districts. A very common definition of a village, found in the books, is as follows: 'Any small assemblage of houses for dwelling or business, or both, in the country, whether situated upon regularly laid out streets and alleys or not.'"

In the case of Territory vs. Stewart, 23 Pac. 405, 8 L. R. A. 106, the court said:

The term "village" will be presumed to be used in its ordinary acceptation as meaning an aggregation of houses and inhabitants more or less compact.

In the case of State vs. Village of Minnetonka, 59 N. W. 972, 57 Minn. 526, 25 L. R. A. 755, the court states:

"A village consists of a tract of land, more or less thickly inhabited, forming a nucleus for residence and business purposes. It is an assemblage of houses less than a town or city, but nevertheless urban or semiurban in its character."

In the case of Toledo, W. & W. Ry. Co. vs. Spangler, 71 Ill. 568, the court in stating a definition of what would constitute a village said:

"A place where there is a station house, a warehouse, a store, a blacksmith shop, a post office, and five or six dwelling houses, whether they are situated upon regularly laid-out streets and alleys or not, is a 'village,' for the purpose of excusing a railroad company from fencing its track within the limits hereof."

Another definition is given in the case of In re Incorporation of Village of Edgewood, 18 Atl. 646, 130 Pa. 348, which is as follows:

"'Village' is defined to be any small assemblage of houses in the country; a collection of houses collocated after a regular plan in regard to streets and lanes."

In a Utah case, found in People vs. McCune, 46 Pac.658, 35 L. R. A. 396, the court said:

"A settlement consisting of 14 families, each family on the average containing about 5 persons, all of whom resided along a stream, the distance from one extreme end of the settlement to the other being about 2½ miles, some of the families residing within 40 rods of each other, and others being distant about a mile or more, their chief occupation being farming, and the settlement containing school district and post office, is a 'village'."

This, we believe, gives a clear idea of what the courts have construed to be a "village."

The other question which is presented would be as to what is meant by a

plat. In this connection, I wish to refer you to the case of McDaniel vs. Mace, 47 Iowa 509, at page 510, in which the court said:

"A plat is a subdivision of land into lots, streets and alleys, marked upon the earth and represented upon paper. To constitute it such, within the meaning of the statute, it must conform to the statute; yet a plat is not made by the legislature, nor by a geographer from an act of the legislature; it is made by the proprietor, except in a few instances where it has been made by United States commissioners."

Also, in this same case, the court states:

"By platting the land the proprietor has signified that the destiny of the land is changed; * * * *."

In this connection, also see the case of Ufford vs. Wilkins, 33 Iowa 110, in which it is stated:

"In construing a grant of land which is described by the number of the section, or legal fraction of a section, and the township and range, courts will look to the plat and field notes made and returned by the government surveyors to the surveyor-general's office in order to locate the boundaries of the land."

The above will give a clear idea of the definition placed on the word "village" and on the word "plat" by various courts.

The only remaining question, as we view it, is that of the discretion to be exercised by the Board of Supervisors. It is our thought that the Legislature made this a discretionary matter with the Boards of Supervisors because of the difficulty, in many instances, of determining just what is and what is not a "village" and for the additional reason of the duty of policing the areas under consideration.

In the original beer bill the right to grant a permit was granted exclusively to cities and towns and the Treasurer of State with one exception and that is as contained in Section 19 of the act, which allowed the Boards of Supervisors, if they so desired, to grant a permit to a golf or country club.

The Extraordinary Session of the Forty-fifth General Assembly extended the right to grant permits to Board of Supervisors in the matter under consideration. The average city or town has a police force and, hence, can check up and see if this particular law is being enforced, while in the average county, the office of the sheriff does not have an extensive force to enforce the law.

Accordingly, it is the opinion of this Department that in any platted area which would meet with the definition of a "village" in accordance with the cases cited herein, the Board of Supervisors, if they so desire, could issue a permit for the sale of beer. But we again wish to stress upon you that it is a discretionary matter with the Board. As we view it, the Legislature left it to the Boards of Supervisors to see whether or not a permit would be granted in villages platted prior to January 1, 1934. The definition given by the courts cited herein would give the Board of Supervisors an insight as to what legal significance is given to what is meant by platted villages.

June 15, 1934. *Iowa Liquor Control Commission, Des Moines, Iowa:* This will acknowledge receipt of your oral request on this date for the opinion of this Department on the following question:

It is the intention of our commission to open some liquor stores for the retail sale of liquor on Tuesday, June nineteenth.

Would a sales tax attach to a sale of liquor by the state to the consumer?

Section 38 of House File No. 1, Acts of the Forty-fifth General Assembly in Extraordinary Session, which is the sales tax law, provides as follows:

"There is hereby imposed, beginning the first day of April, 1934, and ending April 1, 1937, a tax of two per cent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this division, sold at retail in the State of Iowa to consumers or users; a like rate of tax upon the gross receipts from the sales, furnishing or service of gas, electricity, water and communication service, including the gross receipts from such sales by any municipal corporation furnishing gas, electricity, water and communication service to the public in its proprietary capacity, except as otherwise provided in this division, when sold at retail in the State of Iowa to consumers or users; and a like rate of tax upon the gross receipts from all sales of tickets or admissions to places of amusement and athletic events, except as otherwise provided in this division."

Subsection (e) of Section 37 of the act under consideration defines what a "retailer" is and states:

" 'Retailer' includes every person engaged in the business of selling tangible goods, wares, or merchandise at retail, * * * * *"

Also see subsections (a), (b), (c) and (d) for the definitions of "person," "sale," "retail sale" and "business." While the definition of a "person" does not include a sovereign, such as the State of Iowa, yet engaging in the business of selling liquor as provided in House File No. 292, Acts of the Forty-fifth General Assembly in Extraordinary Session, the liquor control act, the State is conducting a retail business. The tax is paid by the consumer or user of the merchandise sold by the State in this particular instance. We would view this to not be a tax on the State but one on the consumer or user.

Therefore, it is the opinion of this Department that the sales tax would attach to any sale made by any liquor store maintained by the State of Iowa to a consumer.

We have conferred with the Board of Assessment and Review on this date and find that that Commission concurs in the interpretation of this Department in this matter.

OLD AGE ASSISTANCE LAW: SENATE FILE 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: An appointment of a member of the board of supervisors to serve on the county old age assistance board, because of the duties of the two agencies, would be incompatible.

June 16, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the ninth instant in which you request the opinion of this Department on the following question:

It has come to the attention of the commission that, in several instances, the county board of supervisors are appointing one of their members to serve on the old age assistance board.

Would such an appointment of a member of the board of supervisors to serve on the county old age assistance board, because of the duties of the two agencies, be incompatible?

In the case of State ex rel. Banker vs. Bobst, 205 Iowa 608, the Supreme Court considered the question as to whether or not there was a conflict in the offices of marshal of the city of Hampton and constable of Washington Township, in which the city is located. The court speaking generally on the question of incompatibility said:

"It is well-settled rule of common law that, if a person while occupying one office, accepts 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,' * * * * The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices; and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having,

in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. * * * * But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other, 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' * * * * A still different definition has been adopted by several courts. It is held that incompatibility in office exists *'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both'.*"

The above gives the general rules of law as laid down by our Supreme Court on the test of incompatibility.

Because of the nature of the duties of the board of supervisors and the additional fact that various other relief agencies are administered through the board, we would be of the opinion that situations might arise at any time which would cause a conflict. Therefore, it would be inadvisable for a member of the board of supervisors to serve as a member of the county old age assistance commission.

While you do not bring up any specific instance in your request for an opinion, yet we feel that there might be a number of such situations arising if a member of the board of supervisors serves on the county old age assistance board.

Hence, we feel that the board of supervisors should appoint other persons to the county old age assistance board than one of its own members.

OLD AGE ASSISTANCE LAW: SENATE FILE 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: The county old age assistance board should function entirely apart from any other relief agency in the county, and should have its quarters separate and apart therefrom.

June 16, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the thirteenth instant in which you request the opinion of this Department on the following question:

It has come to the attention of the commission that several of the boards of supervisors throughout the state are contemplating the conducting of the work of the county old age assistance board in connection with emergency relief, county welfare work, widow's pensions, blind pensions, etc., which would bring the operation of the old age assistance act under the same head and using the same quarters as several poor funds of the county.

It is the contention of the commission that such a proceeding would hamper the work of the old age assistance commission and that, in some instances, it is planned to have quarters of the county old age assistance board and other relief agencies at a place apart from the court house.

Please be advised that it is the opinion of this Department, in accordance with the provisions of the Old Age Assistance Act, that it was the intent of the Legislature to set up county boards entirely apart from any other relief agency and that the county board should function entirely apart from any other relief agency in the county. Every facility should be given whereby people of advanced age could meet members of the county board with the utmost convenience.

It is our opinion that, under Section 8, Senate File No. 42, Acts of the Forty-fifth General Assembly in Extraordinary Session, this could be handled by your commission in the adoption of rules and regulations. You will note that said section provides as follows:

"Meetings. The commission and boards shall meet at such times and places as may be fixed by the rules of the commission."

This would enable you to designate a place which would be convenient and accessible to applicants. The functions to be performed by the County Old Age Assistance Boards should not be confused with other relief agencies and should be kept distinctly separate and apart therefrom.

OLD AGE ASSISTANCE ACT: SENATE FILE 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: If a firm reporting a list and paying for them at this office, later finds that some of its employees were not subject to the tax, some being aliens or non-residents of the state, a refund could be made as provided by Section 7235 of the 1931 Code of Iowa. Question submitted by *County Treasurer, Black Hawk County.*

June 18, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the seventh instant with enclosure, copy of letter from the county treasurer of Black Hawk County, in which the following question is presented:

If a firm reporting a list and paying for them at this office, later finds that some of its employees were not subject to the tax, some being aliens or non-residents of the state, what procedure is necessary for making refunds of this nature?

Please be advised that it is the opinion of this Department that the refund could be made as provided in Section 7235, 1931 Code of Iowa, which states as follows:

Refunding erroneous tax. 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.

FIRE AND POLICE RETIREMENT AND PENSION SYSTEMS: SENATE FILE NO. 295: PENSIONS: "There is no question but that the provisions of this act are mandatory, and that the systems are established immediately upon the taking effect of the act and not at the time the organization of the boards is completed."

June 19, 1934. *State Fire Marshal, Des Moines, Iowa:* A few days ago, you forwarded to us a letter addressed to you, under date of June 8, 1934, from Fire Station No. 2, 411 E. Walnut Street, Des Moines, Iowa, asking for an opinion on Senate File No. 295 of the Acts of the Forty-fifth Extra Session. The writer of the letter did not sign his name, and for that reason, I am addressing our answer to you, so that you in turn may forward it to the gentleman desiring the information. His question is as follows:

"Are the police retirement and pension systems and/or the fire retirement and pension systems provided for by Senate File No. 295, 45th General Assembly, Special Session, automatically established in cities having police and/or firemen under civil service, as of the 1st day of March, 1934, or may they be established by the municipality as of the first day of the month, in which the organization of the Board of Trustees is completed?"

Stated in a few words, the above question resolves itself to whether or not the provisions of Senate File No. 295, so far as establishing the systems is concerned, are mandatory. Section 2 of the Act provides in part as follows:

"In any city in which the firemen and/or policemen are or shall be appointed under the Civil Service Law of this state, there are hereby created and established two separate retirement or pension systems for the purpose of providing retirement allowances only for firemen and/or policemen of said cities who shall be so appointed after the date this act takes effect, or benefits to their dependents."

Section 3, relative to membership, is as follows:

"(1) All persons who become policemen or firemen after the date such

Retirement Systems are established by this act, shall become members thereof as a condition of their employment."

A portion of the provisions of Section 5 of the act is as follows:

"(d) Upon the taking effect of this act, such members of each said department in said cities shall elect by ballot two active members of each such department to serve as members of said respective boards; * * * *.

"(e) Upon the taking effect of this act, the mayor, with the approval of the city council, shall appoint two citizens who do not hold any other public office, to serve as members of said Boards of Trustees; * * * *."

There is no question but that the provisions of this act are mandatory, and that the systems are established immediately upon the taking effect of the act and not at the time the organization of the boards is completed. The act is also a mandate to the Mayor to immediately perfect the organization of the boards. The act does not provide that the systems may be established at the discretion of the Mayor or the City Council. The act itself establishes the systems. The only thing that the Mayor does is to set up the machinery for the purpose of carrying out the provisions of the act.

It will also be noted that Section 5 (1) (e) provides that the Mayor, "with the approval of the city council," shall appoint two citizens to act as members of the Board. This provision does not mean that the City Council shall determine whether or not it is good policy to establish the Board or to appoint members. It is a mandate to the Mayor to appoint the members, and the only thing that the City Council has to do is to approve the personnel of the appointment.

SCHOOLS: RESIDENCE OF MEMBER OF BOARD OF DIRECTORS: Evidence of residence is a matter of intention, also as to place where he voted at last primaries. Whether director ceased to be resident of district must be determined pursuant to Section 4216-c29 of Code and if he has ceased to be such resident, his office is vacant.

June 19, 1934. *County Attorney, Marshalltown, Iowa:* We have your request for opinion on the following proposition:

"A member of the Board of Directors of the Ferguson Consolidated School lived on a rented farm in the precinct at the time of his election. He has since moved to Mitchellville with his wife and family and maintains his home there, being employed in Des Moines. A son over 21 years of age, married and with a family of his own, now occupies the house and farm, still rented to Mr. Sexton. Ads in the newspaper give his residence as Mitchellville. He has no relatives in school here and no real estate in the precinct, but claims to have a bed in the house he formerly occupied in the precinct. Is Mr. Sexton a legal member of the Board?"

Section 4216-c29 of the Code provides in part as follows:

"Failure to qualify within the time prescribed by law; the incumbent ceasing to be a resident of the district or subdistrict; * * * * shall constitute a vacancy."

The question then is whether Mr. Sexton is still a resident of the district. Residence, as you know, is a matter of intention and if he has intended to make his permanent residence in Mitchellville, that is, of course, his residence, but if it is only a temporary sojourn and he still maintains his bed in the district and intends to return there, that would be his residence. Also evidence of his residence would be the place where he voted at the last Primaries if he did so vote.

It is, therefore, apparent that this question cannot be answered by us but will have to be determined from the facts.

It is, therefore, the opinion of this Department that whether the director has ceased to be a resident of the district must be determined pursuant to Section 4216-c29 of the Code and that if he has ceased to be such a resident, his office is vacant.

BEER BILL: HOUSE FILE 336, EXTRA SESSION, 45TH GENERAL ASSEMBLY: Petition for refund, submitted by Lagomarcino-Grupe Company of Iowa, of tax paid under duress. Section 28 of Chapter 37, 45th General Assembly. It would be the opinion of this Department that in the absence of any express agreement to the contrary, the law of the jurisdiction of the seller's place of business would control.

June 19, 1934. *Treasurer of State, Des Moines, Iowa:* This will acknowledge receipt of your letter of recent date with enclosure, petition for refund of tax paid under duress by the Lagomarcino-Grupe Company of Iowa, in which petitioner alleges that the assessment of said tax is illegal and sets up several reasons in support of said allegation.

You ask for the opinion of this Department with reference to the same.

Section 28 of Chapter 37, Laws of the Forty-fifth General Assembly, provides in part as follows:

"* * * * there shall be levied and collected from such permittees on all beer manufactured for sale and/or sold in this state at wholesale a tax of one and 24/100 dollars ($1.24) for every barrel containing thirty-one (31) gallons."

It is our understanding that this tax has been paid under this provision.

It is a general rule of law where a buyer residing at one place sends an order for goods to a seller doing business at another place to be shipped to him by carrier, and the order is accepted and filled by the seller at his place of business, the place of sale is to be deemed the seller's place of business. This doctrine is followed by our Supreme Court in numerous decisions.

In American Salt & Coal Company vs. Strange Brothers Hide Company, 201 Iowa 306, the court said:

"Necessarily, no contract of sale results from a mere written order signed by the intended purchaser and delivered to an agent known to have no authority to accept it, and especially so when the order was conditioned on acceptance by the 'general office,' and was affirmatively rejected by the latter."

However, our courts have also said that the intent of the parties should be taken into consideration. In Wesco Supply Company vs. Allerton, 156 Iowa 695, the court said:

"The real question in determining whether title to personalty has passed is the intent of the parties, to be gathered from their contract, acts and conduct with reference to the transaction; and this is generally a question of fact for the jury. In the instant case the evidence is held to justify a finding that it was the intent of the parties that title should not pass until a complete test was made to ascertain whether it was of the kind bargained for and that this condition was not waived."

Section 9948 (19), 1931 Code of Iowa, provides in Rule 5 as follows:

"If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

We note that the petition contains an allegation to the following effect:

"That in no instance herein referred to was beer delivered within the State of Iowa to the purchaser or identified, set apart or segregated within the State of Iowa as the property of the purchaser."

On the question of *intent*, see the case of Moats vs. Strange Brothers Hide Company, 185 Iowa 356, in which the court said:

"A contract of sale may be complete, and therefore pass title, even though delivery and payment are postponed. Whether the title does so pass is, in its last analysis, a question of intent."

Also see the case of Capital City C. Company vs. Moody, 135 Iowa 444, in which it is said:

"An agreement to deliver goods at a named place 'in good condition' is a condition precedent to the passing of title."

See also the case of Petroleum P. D. Company vs. Alton, 165 Iowa 398, in which the court said:

"Under a general order to ship carload lots to a certain town, delivery is complete when the cars are placed on the general receiving tracks at said place and vendee notified accordingly."

In the case of Bishop vs. Starrett, 201 Iowa 493, the court, in laying down rules for ascertaining intent, said:

"The intent of the parties necessarily controls the issues (1) whether, in a parol contract of purchase, title passed on delivery, with a right to rescind if a trial proved unsatisfactory, or (2) whether title passed only after a satisfactory trial. Necessarily, what the parties said to each other at the time the contract was entered into is admissible."

Accordingly, in keeping with the cases cited above, the general rule expressed in the law of contracts is that where orders are taken, an order is simply an offer to buy and when accepted by the seller at his place of business, the contract is consummated at that point and the law which would control is that of the jurisdiction in which the seller resides. However, if the parties intended the sale to be consummated at some other point, their intent at the time of entering into the contract would control under the laws of this state. We assume that the custom of the business would necessarily be an important factor in a transaction such as that under consideration and the intent would be determined by express statements either written, oral or implied from the usual course of business of this nature.

Therefore, it would be the opinion of this Department, in the absence of any express agreement to the contrary, that the law of the jurisdiction of the seller's place of business would control. However, if the Lagomarcino-Grupe Company of Iowa has a different contract with persons purchasing its product or if, in the natural course of business a different contract is entered into either express or implied, then this would be a matter within the knowledge of the Lagomarcino-Grupe Company of Iowa and evidence should be submitted to you that such is the case. If so, you would be justified in making the refund as requested in the petition for refund, which we return to you herewith.

MOTOR VEHICLES: TRUCKS: TRUCKS LICENSED IN OTHER STATES—LICENSE: Trucks from foreign states when operated in Iowa only occasionally are considered visitors and are not required to buy an Iowa license; but trucks doing business or used for hauling on contract in Iowa should have an Iowa license as they are not visitors.

June 20, 1934. *County Attorney, Waukon, Iowa:* Your favor of the 23rd instant, has been referred to me for reply.

You state that motor trucks licensed in Wisconsin and doing a transfer and freight business operate through your territory, and your question is, should these operators be required to pay a license to operate these trucks in Iowa. You state that apparently there is some difference of opinion as to whether or not said trucks should be required to have an Iowa license.

Section 4864 of the Code is as follows:

"4864. When license required. 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 nonresident.

3. When such vehicle is used in this state and not properly licensed under the laws of another state or country."

Section 4865 with relation to nonresident owners, is as follows:

"4865. Nonresident owners. The provisions herein relative to registration and display of registration numbers shall not apply to a motor vehicle owned by a nonresident of this state, other than a foreign corporation, manufacturer, dealer or owner 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."

From the last quoted section you will observe that the provisions relative to registration and display of registration numbers shall not apply to a motor vehicle owned by a nonresident of this state, provided that the owner shall have complied with the provisions of the law of the state of his residence relative to registration and shall conspicuously display his registration numbers.

You will note further that the exemption does not apply to a foreign corporation, manufacturer, dealer, or owner doing business in this state. Section 4866 further limits the scope of the exemption to motor vehicles owned by nonresidents of this state to the extent that under the laws of the foreign state of his residence, like exemptions and privileges are granted to motor vehicles duly registered under the laws of Iowa and owned by residents of this state. A foreign corporation, manufacturer, dealer, or owner doing business in this state should be required to procure licenses for motor vehicles used in such business within this state.

It is our opinion that a motor vehicle owned and licensed in a foreign state and operating only occasionally upon the highways of this state, should not be required to be licensed in Iowa. There are, no doubt, some instances where motor vehicles bearing Wisconsin license numbers are operated upon the highways of this state to such an extent that they should also be licensed in this state. No doubt, in the majority of cases, however, the contrary rule should prevail. Each case must be determined upon its own facts with the sections above quoted stating the rule.

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 2 of Section 4864, as above quoted.

We are not expressing any opinion with reference to the laws, rules and regulations enforced by the Iowa Board of Railroad Commissioners.

EMBALMING: Construction of Section 2585-c3 relating to application for license to practice embalming. Applicants must comply with the section, and must have completed one year of training under a licensed embalmer in good standing, as an apprentice.

June 20, 1934. I have your favor of the 6th instant, requesting a construction of Paragraph 3 of Section 2585-c3 of the Code of Iowa.

In so far as material to your question, the section is as follows:

"2585-c3. License—conditions. No applicant shall be issued a license to practice embalming unless and until he shall: * * * *

3. Have completed one year of training as an apprentice under a licensed embalmer in good standing in this state, and has arterially embalmed not less than twenty-five human bodies during his apprenticeship under the direct supervision of said embalmer."

From this rather clear and unequivocal language, it would seem that any person desiring to receive a license from the State of Iowa based upon and pursuant to the provisions of Section 2585-c3, must comply with all of the provisions of that section and we have no authority to read out of the section that part which provides that such applicant shall have "completed one year of training as an apprentice under a licensed embalmer in good standing in this state."

We call your attention to Sections 2481 to 2491, inclusive, of the Code, relating to reciprocal licenses.

OLD AGE ASSISTANCE ACT: SENATE FILE 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: ARMY SERGEANTS: In view of the fact that neither of these men is a resident of the State of Iowa, and is merely stationed there temporarily in connection with his duties in the United States army, we do not believe that these two men come within the provisions of said act.

June 20, 1934. *County Attorney, Cedar Rapids, Iowa:* This will acknowledge receipt of your letter of the fifteenth instant in which you request the opinion of this Department on the following question:

There are stationed at Coe College in Cedar Rapids, two regular army sergeants, neither of whom makes his home in Iowa, nor does either of them vote here. The college takes the position that it being their employer it is bound, under the law, to deduct from their pay the old age assistance tax. In view of the fact that neither of these men is a resident of the State of Iowa, and is merely stationed here temporarily in connection with his duties in the United States army, should they be required to pay this tax?

Please be advised that these two men do not come within the provisions of Senate File No. 42, Acts of the Forty-fifth General Assembly in Extraordinary Session, as it is provided in Section 34 thereof as follows:

"* * * *, there is hereby levied on all persons residing in this state and who are citizens of the United States and of twenty-one (21) years of age and upwards, except inmates of state and county institutions, * * * *."

We do not believe that it was the intent of the Legislature to levy this tax on persons residing in Iowa under conditions such as are imposed on men doing military duty. These men, undoubtedly, are residents of some other state of the Union and would be liable for a similar tax, if one were levied, in the state of which they are residents.

RESIDENCE, LEGAL: POOR LAWS: COUNTY: "The poor laws, we believe, were established as much for the benefit of the pauper as for the benefit of the counties, and for that reason, we are constrained to the opinion, especially in view of the holdings of our court and the general rule quoted from Corpus Juris, that Virgil Hoffman never lost his legal settlement in Polk county and that it is the county's duty to furnish assistance."

June 21, 1934. We acknowledge receipt of your letter of June 18th, in which you ask whether or not the above named person should be classed as a transient or as having legal settlement in Polk County. The facts, as furnished by you, are as follows:

Virgil Hoffman was born at Bondurant, Iowa, on February 20, 1911. The

parents tried to send him to school, but he was unable to learn. His father died in 1924 of tuberculosis, and his mother died in January, 1929, while an inmate in the Hospital for the Insane at Clarinda, to which institution she was committed from Polk county in 1925.

On June 14, 1924, at the age of twelve years, three months, Virgil was admitted to the institution for the feeble-minded at Glenwood. A psychological test given a few months after his admission showed him to have a M. A. of 7-0 and an IQ of 55. He had attended the public school for four years, but could not read, write, add or subtract. His father had died prior to the boy's admission to the school for the feeble-minded. He was dismissed from the institution by the Board of Control on February 19, 1928, to the custody of Mr. George Thompson, of Ankeny, an uncle of the boy. After he was dismissed from the institution, he resided with relatives in Polk county until some time during the year of 1929, when, at the request of these other relatives, an aunt in Portland, Oregon, agreed to take Virgil. Another brother of Virgil's, who is a minor, furnished the money to pay Virgil's railroad fare to Portland. Virgil was tagged with instructions, so that the conductors would know his destination and condition. He arrived in Portland alone, and made his home with Mrs. Charles Yahm, his aunt, for four or five years, or up to March, 1934, when he was returned alone from Portland to Des Moines, because of the fact that the aunt, with whom he resided and who had since been committed to an asylum in Oregon, had become ill.

When Virgil arrived in Des Moines at the Northwestern Station, there was no one to receive him. It was impossible for the station agent to get any intelligent information from the boy, so Miss Mary Oroake, of the Travelers Aid Society, was called, and after considerable effort, she located a sister, Mrs. Bessie Shannon, who took charge of Virgil.

Most of Virgil's relatives, who now reside in Polk county, are receiving aid from the county or are having all they can do to support their own families. The relatives are willing to keep Virgil with them, if they can get assistance for his care.

It has been suggested by one of the relatives, Mrs. Bessie Shannon, that her uncle, Mr. George Thompson, of Ankeny, had been appointed legal guardian of Virgil before his commitment from Bondurant, Iowa, to Glenwood, although no positive evidence of that fact has been furnished to this office.

Of course, there is a difference between residence or domiciles, on the one hand, and legal settlement, on the other, especially where it concerns different counties in the same state. No one will question the fact that one may acquire a residence in a county for the purpose of voting, without having acquired a legal settlement. However, in so far as the change of residence or change of legal settlement is concerned, and so far as the law applies to a person who is insane or mentally incompetent, we believe it is governed by the same underlying principle, that is, that a person who is totally insane, or one who is so mentally incompetent that he is void of understanding, cannot establish either a legal settlement or a domicile.

In 19 C. J., 417, Section 37, we find the following statement:

"The mere fact that a person is of partially unsound mind does not necessarily preclude him from establishing his domicile, as the question must depend entirely upon the extent to which his reason has been impaired. In general it may be stated that but a comparatively slight degree of understanding is required in order that his action may be recognized. But an adult person who has become a mental imbecile, or who has been judicially declared insane, is incapable of a voluntary change of domicile, and therefore retains the domicile which he had when he became insane. A minor who becomes insane, being incapable of a voluntary change, like other infants, follows his father's domicile, or settlement, even after majority. Where a person has not sufficient mind voluntarily to change his domicile, no one else can effect such change by his removal, as for instance, to an asylum. But the committee of an incompetent, or his guardian may change his domicile, subject to the restraining power of the court. Length of residence is immaterial on the ques-

tion of domicile of an insane person because no question of intent can be involved."

In the case of Scott County vs. Polk County, 61 Iowa, 616; 14 N. W., 206; 16 N. W., 726, it was held that the provisions of the poor laws relative to legal settlement are applicable to the case of an insane person, who becomes a county charge. In that case, the facts were as follows:

Mrs. Cassidy, while sane, removed from Polk county to Scott county. She had a legal settlement in Polk county prior to March, 1879, when she went to live with her brother in Davenport. Before the end of the year, she became insane, and it was held that she was a legal resident of Scott county, and that the becoming insane did not interrupt the acquisition of the settlement.

In the case of Fayette County vs. Bremer County, 56 Iowa, 516; 9 N. W., 372, one Lucy Mix, who was an insane pauper, resided with her brother-in-law and sister in Sumner Township, Bremer County, in which county she had a legal settlement and of which county she was a resident. About the 1st of March, 1876, Eastman rented a farm in Banks Township, Fayette County, but before he removed his family and Lucy Mix to this farm, he consulted the Trustees of Sumner Township, Bremer County, in regard to the support of Lucy Mix by Bremer County, in case he should take her with him to Fayette County. He was informed by the Trustees in substance that Bremer County had no poor farm, and that they knew no reason why Bremer County would not be willing to support her in Fayette County, and advised him to take Lucy along with him. Bremer County continued to furnish support for Lucy Mix for a little over a year after she went with the Eastmans to reside in Banks Township, Fayette County. After the year was up, the Supervisors of Bremer County refused to furnish any more support, whereupon the action was commenced by the plaintiff, after a notice was given by its county Auditor to the defendant county, and after the defendant county had notified the plaintiff that Lucy Mix was not a resident of Bremer County, and that said county was not liable for her support.

Upon the facts as above stated, the District Court held that she had a legal settlement in Fayette County, and that Bremer County was not liable for her support. On appeal to the Supreme Court, the decision of the District Court was reversed, and in passing on the question, the court had this to say:

"The testimony clearly shows that the pauper did not of her own will seek a residence in Fayette county, and that she was incapable of entertaining an intention to acquire a settlement there. The court finds that at the time she was removed to Fayette county she was a 'cripple' and insane. The evidence further shows, and the court may well have found, that she was helpless from a time long before her removal, and that she continued helpless and insane during her residence in Fayette county.

"Can an insane pauper gain a settlement by being removed to another county and there supported by the county wherein she has a settlement? (1) We conclude that, on account of her insanity and helplessness, the pauper did not voluntarily change her place of residence. She was a passive subject, and exercised no volition. In this condition she was incapable of acquiring a settlement. The following authorities sustain this conclusion. Washington Co. vs. Mahaska Co., 47 Iowa, 58; Town of Freeport vs. Board of Supervisors, 41 Ill., 495; Danville vs. Putney, 6 Vt., 512; Woodstock vs. Hartland, 21 Vt., 563. (2) The pauper was taken from Bremer county to Fayette, not with the purpose of changing her settlement, but that the first-named county might continue her in the charge of the same persons who had for years kept her. She was indeed sent to Fayette county for her support, to be paid for by Bremer county. Her condition as to settlement remained just as it would be in case she had been sent to a hospital. Surely an insane pauper cannot acquire a settlement in

the county wherein the hospital is located to which he may be sent. We have so held. Washington Co. vs. Mahaska Co., 47 Iowa, 57. The rule recognized by the court below, if sanctioned by us, would lead to abuses and injustice. Under it insane and helpless paupers could be secretly transported by counties charged with their support, and other counties would become liable therefor."

The facts, as stated to us in the instant case, show that Virgil Hoffman was unable to learn, that he had to be tagged, when he was sent to Oregon, and that when he returned to Des Moines, it was impossible for the station master to get any intelligent information from him. Although a lot might depend on his mental condition, yet taking these facts into consideration, along with the fact that he had been committed to the school for the feeble-minded, we are of the opinion that he never lost his legal settlement in Polk County, Iowa. We might add further that at the time he was sent to Oregon, he was still a minor. One of his parents had died and the other had been committed to the Hospital for the Insane. He was born in Polk County and had always been a resident of Polk County until the time that he was tagged and placed on the train for Oregon. Can it be said that by so tagging an incompetent person, with instructions to the railroad officials to transport him to another state, that incompetent person loses his legal settlement in the state of Iowa?

We call your attention to the further fact that if we should say that this man does not have a legal settlement in Polk County and should be supported by the Transient Bureau, what would become of him, in case the Federal Government ceased to operate these Transient Bureaus? The poor laws, we believe, were established as much for the benefit of the pauper as for the benefit of the counties, and for that reason, we are constrained to the opinion, especially in view of the holdings of our court and the general rule quoted from Corpus Juris, that Virgil Hoffman never lost his legal settlement in Polk County and that it is the county's duty to furnish assistance.

COUNTY RECORDER: MARGINAL ASSIGNMENTS OR RELEASES: RELEASING OF WAREHOUSE CERTIFICATES: "This chapter (427 of Code) does not provide for the charging of a fee for a marginal release. If a written release is executed and filed, it would naturally be necessary to charge the fees, as provided by law."

June 26, 1934. *County Attorney, Humboldt, Iowa:* We acknowledge receipt of your letter of June 20th, in which you ask whether or not the County Recorder of Humboldt County should charge for a marginal release of warehouse receipt.

It is true that Section 5177, sub-section 3, of the Code of 1931 provides that the Recorder shall charge and collect a fee in the sum of 25c for every marginal assignment or release, except those made by the Clerk of the District Court. However, it is also true that Section 10031 provides for the collection of a fee of 25c for filing any instrument affecting the title to or encumbrance of personal property. That section, however, provides for fees to be collected under the chapter in which that section is contained (Chapter 437). Chapter 437 has to do with chattel mortgages and conditional sales of personal property.

In so far as the provisions of sub-section 3, Section 5177, are concerned, we have only to repeat what we said in an opinion dated January 7, 1933, that is, that the act of the Legislature, under which Section 5177 was amended by adding Sub-section 3, does not refer to marginal releases of chattel mortgages, but to marginal releases of real estate mortgages, contracts, or other instruments, constituting an encumbrance on real estate.

It will be noted that Sub-section 3 of Section 5177 was enacted by the Forty-third General Assembly, and is contained in Chapter 142 of the acts of that body. The act is so short that we will set it out in toto, including the title, as follows:

"CHAPTER 142
MARGINAL ASSIGNMENTS OR RELEASES

An act amending Sections fifty-one hundred seventy-seven (5177) and ten thousand one hundred fifteen (10115) of the Code, 1927, relating to marginal assignments or releases of mortgages, contracts or other instruments constituting encumbrances on real estate.

Be it enacted by the General Assembly of the State of Iowa:

Section 1. That Section fifty-one hundred seventy-seven (5177) of the Code, 1927, be amended by adding thereto the following: '3. For every marginal assignment or release (except those made by the clerk of the district court) twenty-five (25) cents.'

Sec. 2. That Section ten thousand one hundred fifteen (10115) of the Code, 1927, be amended by adding thereto the following: 'As soon as a marginal assignment or release has been witnessed by the county recorder, the county recorder shall forthwith index the same just as though such assignment or release had been by separate written instrument.'

House File No. 186. Approved March 27, A. D. 1929."

It will be noted that the title to the act refers only to instruments creating an encumbrance on real estate. Section 1 of the act then amends Section 5177 of the Code of 1927 by adding what is now sub-section 3 of Section 5177 of the Code of 1931.

Section 2 of the act amends Section 10115 of the Code of 1927, which section has to do only with marginal releases of instruments affecting the title to real estate.

Conceding that Section 10031 provides for the collection of a fee of 25c for filing an instrument affecting the title to or encumbrance of personal property, under the provisions of Chapter 437, could anyone contend that the signing one's name on the margin of the index under the column heading, "Remarks," is an instrument? We do not believe that the signing of the mortgagee's name in said column is an execution of an instrument or the filing of an instrument.

Referring now to the releasing of warehouse certificates, which have been executed in the sealing of corn, we call attention to Chapter 427 of the Code of 1931. It will be noted that Section 9776 provides that a duplicate of the certificate may be filed in the Office of the Recorder and indexed in the chattel mortgage index. However, this chapter does not provide for the charging of a fee for a marginal release. If a written release is executed and filed, it would naturally be necessary to charge the fees, as provided by law. However, it is the opinion of this office that no fee should be charged for a marginal release.

You are further advised that an opinion issued by this office under date of June 21, 1934, to Miss Helen Schriver, County Recorder at Tipton, Iowa, on this same subject, wherein it was stated that a fee of 25c should be collected, is withdrawn, but that the opinion of January 7, 1933, addressed to the County Attorney of Muscatine County is still in force.

OLD AGE ASSISTANCE ACT: SENATE FILE 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: Six questions included in this opinion. 1. Penalty. 2. Lien against property. 3. Date, authority and tax lists. 4. Liability of employer. 5. Refunds. 6. Age.

June 25, 1934. *Auditor of State, Des Moines, Iowa:* This will acknowledge receipt of your request on this date for the opinion of this Department on the following questions:

1. Is the $1.00 head tax, provided for in Section 35 of Senate File No. 42, Acts of the Forty-fifth General Assembly, in Extraordinary Session, the old age assistance act, subject to a penalty of three-fourths of one per cent (¾%) per month for each month or fraction thereof that the same remains delinquent after July 1, 1934?

Please be advised that it is the opinion of this Department that the intent of the Legislature, in not taking care of all head tax payments in Section 34, was as expressed in Section 35, to afford old age assistance during 1934. Section 35 is included for this purpose and by reference in the use of the words "pursuant to Section 34," includes the provisions of that section. The penalty would not take effect as of July 1, 1934, but would take effect in 1935 as of April first of that year. We view this in the same category with other special taxes, which are not payable in installments, but are payable on or before March thirty-first of each year and become delinquent on April first. Accordingly, the failure to pay the $1.00 on July 1, 1934, would not make the penalty attach until April 1, 1935.

2. Is the $1.00 head tax a lien against real property?

In the case of Jaffray vs. Anderson, 66 Iowa 718, 24 Northwestern Reporter 527, our Supreme Court said:

"It is a general rule appertaining to the law of taxation that taxes are not a lien upon property of the taxpayer, unless a lien is expressly created or provided for by statute."

In the case of Eagle Manufacturing Company vs. Davenport, 101 Iowa 493, 70 Northwestern Reporter 707, it is said:

"It is a general rule that taxes are not liens upon property unless made so by statute or by virtue of authority conferred by statute."

In the act, the wording used in Section 34 is as follows:

"* * * *, and the said annual tax levied by the provisions of this section and act shall be collected in 1935, and each year thereafter, by the county treasurer at the same time as property taxes and *subject to the same penalties*, * * * *."

In the case of the levying of a tax and providing for a license for dogs, Section 5420 to Section 5457, Code, 1931, and particularly Section 5441 provides:

"On receipt of said certificate, the treasurer shall at once enter, as a tax, against each person the amount therein indicated as owing by him, and said tax shall be attended *with the same consequences*, and be collected in the same manner, as ordinary taxes."

This Department, under date of March 13, 1926, rendered an opinion to the effect that the use of the words "shall be attended with the same consequence" was a sufficient designation to expressly create a lien as against real property.

Later, under date of June 5, 1934, this Department has written an opinion to the same effect with reference to a creation of a lien against real property in connection with Section 34 of Senate File No. 42, Acts of the Forty-fifth General Assembly in extraordinary Session, the Old Age Assistance Act, and we expressed our opinion to the effect that the language used in Section 34 was sufficient to meet the general rule of law as laid down by our Supreme Court in the two cases cited above.

3. If you rule that the head tax of $1.00 is a lien against real property, (a) at what date does it become a lien, (b) on what authority will the county treasurer transfer same from the special list furnished by the auditor pur-

suant to Section 35 to the real property lists, and (c) should all delinquencies that become a lien on real property be added to the 1933 or 1934 tax lists?

In answer to Subdivision (a) of your third question, will say that it would become a lien on December 31, 1934.

In answer to Subdivision (b) of your third question, will say that Section 4644-c64 of the 1931 Code of Iowa provides as follows:

"*Delinquent poll tax list—lien.* The county treasurer shall, on October first of each year, file with the county auditor a list of the names of all persons in each township, who have not paid said poll tax.

"The county auditor shall, in making up the tax books for the ensuing year for each township, enter said unpaid poll tax in connection with any other taxes against the delinquent, and said poll tax shall, on January first, following, become and remain a lien on all real estate of the delinquent until paid."

Section 8 of Chapter 73, Acts of the Forty-fifth General Assembly in Regular Session amends this section by striking from line two (2) thereof, the word "first" and inserting in lieu thereof the word "fifteenth" which in effect changes the filing date from October first to October fifteenth.

It would be the suggestion of this Department that this would set forth a manner in which this could be done.

In answer to Subdivision (c) of your third question, will say that it would be the opinion of this Department that this tax should be listed in the 1934 tax list.

4. Is the employer liable for the head tax of $1.00 levied for the year 1934?

As stated above, Section 34 of the act is made a part of Section 35 by reference, as outlined in our answer to question No. 1. The method of collecting the tax and designation of the liability of the employer would by reference be a part of Section 35 of the act and, hence, in our opinion, the employer would be liable.

5. Can a county make refunds of the payment of the head tax in cases of erroneous assessment or duplicate payments?

Under date of June 18, 1934, this Department rendered an opinion to Byron G. Allen, Superintendent, Old Age Assistance Commission, in which we stated that we were of the opinion that a refund could be made under Section 7235, 1931 Code of Iowa, which provides as follows:

"*Refunding erroneous tax.* 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."

In addition to this, we would suggest that the auditor issue a warrant drawn against any Old Age Assistance funds in the hands of the County Treasurer, which warrant shall be honored by the County Treasurer upon presentation and charged against said fund. We would suggest that matters of this nature be handled entirely in the county and that no refunds be made by the State as such a handling would greatly expedite and tend to lessen confusion in this matter.

6. If a person has not arrived at the age of 21 years at the time of the list being compiled by the assessor but will attain the age of 21 years during the year for which the assessment is being made, should he be assessed or listed for that year?

Under date of April 9, 1934, this Department rendered an opinion to Mr. Roy Henderson, County Attorney, Wright County, to the effect that if "A" arrived at the age of 21 years after January first, he would not be assessed under Senate File No. 42, Acts of the Forty-fifth General Assembly in Extraordinary

Session, the Old Age Assistance Act, as the assessment is made up as of the first of each year.

BOARD OF SUPERVISORS: BANKS AND BANKING: DEPOSITORS' AGREEMENT AS TO DEPOSITS OF PUBLIC FUNDS: "The question of whether or not such waiver should be executed depends upon the facts and the surrounding circumstances relative to the solvency of the bank, or the owners thereof, and the collectibility of the county's claim. After making such investigation, it is then within the discretion of the Board to determine whether or not it would be to the best interests of the county to enter into such depositors' agreement."

June 27, 1934. *County Attorney, Bedford, Iowa:* A few days ago, you were in the office with Mr. Daugherty, a private banker in your county, and Mr. Sharon, who is employed by the Banking Department as an Examiner in Charge of one of the banks at Clarinda, Iowa. The facts, on which you asked an opinion, are as follows:

"About March 16, 1933, the Peoples Bank of New Market, Iowa, a private bank, instead of seeking the protection of Senate File 111, entered into a depositors' agreement with its depositors, by which the depositors agreed to leave all of their deposits in said bank for a period of three years. Since the passage of the Glass-Stegal bill by Congress a few days ago, the Peoples Bank of New Market advises that it will be unable to continue in business without complying with the provisions of that act. Its officers have now prepared new depositors' agreements, which are to supersede the agreements of March 16, 1933. Under the provisions of this new waiver or depositors' agreement of June 11, 1934, the Board of Supervisors of Taylor county are asked to waive 50 per cent of the old deposits, which were covered by the agreement of March 16, 1933, the other 50 per cent to be released immediately.

"The owners of the bank, at the time the first depositors' agreement was entered into, owned several hundred acres of real estate. The new agreement provides that this real estate is to be mortgaged for the purpose of raising funds to pay 50 per cent in cash.

Your question is of a two-fold nature:

1. Whether or not the governing officers of the county can legally enter into the depositors' agreement of June 11, 1934, and
2. Whether or not, if they do have authority to bind the county in the execution of such agreement, they can, as governing officers of the county, become entitled to the benefits of the State Sinking Fund on that portion of the deposit which is waived by the agreement of June 11, 1934.

Section 9239-a1 and a2 of the Code of 1931, relative to the reorganization of banks and depositors' agreements, has reference to banks which are in receiverships. Chapter 157 of the Acts of the Forty-fifth Regular Session provides for the execution of depositors' agreements, when the bank is under the management of the Superintendent of Banking, pursuant to the provisions of Senate File 111.

There is no law in this state authorizing public bodies to execute depositors' agreements, thereby waiving public funds deposited in the bank, unless the bank is in the hands of a receiver or is being managed under the provisions of Senate File 111. If then the Board of Supervisors have any authority to execute such an agreement, it is because of their general powers, duties and authority to look after the interests of the county and the public funds.

In the case of Poweshiek County vs. Buttles, 70 Iowa, 246, 30 N. W., 558, it was held that Boards of Supervisors, in the management and control of the school fund, have authority to do acts and make settlements for the protection of said fund, which, in the exercise of wisdom and care, prudent men or men of affairs would do for the purpose of securing or collecting a debt, and further

said that the wisdom and prudence of the act must be determined upon the facts as they appear at the time to the supervisors. This statement was made in sanctioning a settlement made by a Board of Supervisors with one who had purchased school lands, for which he was unable to make settlement. The statute in that case provided as follows:

"That the several Boards of Supervisors shall hold and manage the securities given to the school funds in their respective counties, and also judgments and lands therein belonging to said fund, for the use of said fund; and to that end such counties shall have power to sue in their own name for the use of said fund, either by the District Attorney or such other attorney as such Board shall select, and do all other acts in relation to the same necessary for the protection of said fund."

In the case of McCarty, et al., vs. Eggert, 154 Iowa, 28; 134 N. W., 426, the facts were that the County Auditor had paid himself more money by way of salary than was authorized by the Board of Supervisors, and has also paid more money for assistance in the office than was authorized by the Board under a statute giving the Board authority to fix the salary of the Auditor and compensation for clerk. The Supreme Court said that under the statute (what is now Section 5130, subsection 5), the Board of Supervisors have authority to examine and settle all accounts of the receipts and expenditures of the county and examine, settle and allow claims against the county. We quote from that case the following statement:

"We think that it was competent for the Board to settle with the defendant any claim of the county against him for money drawn in such period, in excess of the salary authorized, by making an allowance, as it did, to that extent."

The court then went on to say that although the acts of the Auditor were irregular, yet the Board of Supervisors had authority to adjust with the defendant any claim which the county might have for money irregularly drawn from the treasury.

Even a stronger case is that of Sac County vs. Hobbs, et al. In that case, the County Treasurer was a defaulter. The Board of Supervisors, at the expiration of the Treasurer's term, accepted a promissory note from the Treasurer for the amount of his shortage, with the agreement that his official bond should be released and cancelled and no action commenced on said bond. When the county sued on the note, two questions were raised: 1. Whether or not the promise of the defendants was supported by consideration; and, 2. Whether the transaction in which the note was given was lawful.

The Supreme Court held that there was consideration for the execution of the note in that the bond was released, and also held that the remedy on the bond was not exclusive, and that it often happens that the interests of the county are better protected by pursuing some other course. In passing on the matter, the court had this to say:

"The board of supervisors are clothed with discretion in the matter, and it is competent for them, after a defalcation has occurred, to take other security than that afforded by the bond, and even to extend the time of payment, if the interest of the county will thereby be better protected. True, such power is not conferred by any express provision of the statute, but it is included in the general power to examine and settle the accounts of the receipts and expenditures of the county, and to settle with the treasurer, conferred by Sections 303, 917, of the Code."

Sac County vs. Hobbs, et al., —— Iowa, ——, 33 N. W., 368.

After citing these authorities, we now call your attention to Section 5130, subsection 6, of the Code of 1931, which is as follows:

"5130. General powers. 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."

Under the provisions of this section, the Board of Supervisors have power not only to represent the county but to have the care and management of the property and business of the county, except as otherwise provided by statute.

Here is a case, in which they are asking the Board of Supervisors to waive 50 per cent of the deposits and permit them to be trusteed and to accept 50 per cent of the deposits in cash. More than a year ago, this same Board executed a waiver for a period of three years of 100 per cent of the county's deposits. If it has no authority to execute the present agreement, it certainly had no authority to execute the agreement of March 16, 1933.

It is, therefore, the opinion of this office that if the Board of Supervisors in its wisdom, and after making a careful examination and investigation, determines positively that it would be to the best interest of the county to execute this agreement, and that it would be impossible to collect 100 per cent of its deposits by action or by any other procedure, it would have authority to execute such agreement on behalf of the county.

It is understood that this opinion deals only with the governing body of the counties, and has nothing to do with city councils, school boards and other governing bodies. We are not determining the question in this opinion, so far as those bodies are concerned.

In conclusion, we state that it is the duty of the Board of Supervisors to make a careful investigation. The question of whether or not such waiver should be executed depends upon the facts and the surrounding circumstances relative to the solvency of the bank, or the owners thereof, and the collectibility of the county's claim. After making such investigation, it is then within the discretion of the Board to determine whether or not it would be to the best interests of the county to enter into such depositors' agreement.

Answering your second question, we will say briefly that you would not be entitled to the benefits of the State Sinking Fund, for the reason that this 50 per cent, which you waive, is not lost through the closing of the bank or placing the same in receivership, or the reorganization of a bank, which is in receivership or operating under Senate File 111.

(LIQUOR LABELS) PRINTING LABELS: DECALCOMANIA PROCESS: UNDER SUPERVISION AND CLASSIFICATION OF STATE PRINTING: It is not mandatory that this process have the O. K. of the Superintendent of Printing but it is advisable that all matters relating to state printing be handled through the State Printing Board.

June 30, 1934. *State Comptroller, Des Moines, Iowa:* I have your request for an opinion from this department upon the following proposition:

"I would like your official opinion regarding Decalcomania Process that is used by the Liquor Commission, as to whether or not it comes under the classification of printing and requires the O. K. of the Superintendent of Printing before the voucher can be submitted for payment. I submit herewith a sample of the job."

As I understand the facts to be, this Decalcomania Process is one whereby printed matter is transferred on to glass by the use of water and that this is the process adopted by the Liquor Commission for the purpose of placing the label of a state in accordance with the provisions of the Iowa Liquor Control Act, upon all bottles of liquor sold by the Commission.

Your attention is called to Section 184 of the 1931 Code of Iowa which contains a statutory definition of printing. This statute provides as follows:

"The term 'printing' as used in this and the two following chapters shall include 'binding' and *may* include material, processes, or operations necessary to produce a finished printed product."

The provisions of the above statute are not mandatory with respect to "processes." The question as to whether or not any certain process would come within the provisions of this section of the Code is one in which a sound discretion can and should be exercised. The approval of the Superintendent of Printing cannot be required where such printing process was not handled by the State Printing Board under the provisions of Chapter 14 of the 1931 Code of Iowa.

MOTOR VEHICLES: MOTOR VEHICLES PREVIOUSLY OPERATED UNDER OFFICIAL LICENSE PLATES ENTITLED TO REDUCTION OF FEES ON FIFTH REGISTRATION: Motor vehicles previously operated under official plates when taken from state use, are entitled to the reduction provided for after the same has been registered five times.

June 30, 1934. *Secretary of State, Des Moines, Iowa:* We have your favor of the 29th inst., in which you request a construction of Sections 4864 and 4867 of the Code, the first section providing for the registration and licensing of motor vehicles operated upon their own power upon public highways of this state, and the second section relating to general exemptions from the payment of the license fee required by Section 4864 and other sections. You submit the following question:

Shall the registration of motor vehicles under "official" plates as permitted by Section 4867 be termed a registration so that upon removal from this class of service the provisions of Section 4910, relating to automatic reduction of license fees may be applicable?

It is the opinion of this department that Section 4867, providing certain exemptions, relates merely to exemption from the payment of fees but does not provide for an exemption from registration. It provides that the department shall furnish upon application, free of charge, distinguishing plates for motor vehicles thus exempted and keep a separate record thereof.

Section 4910 provides that after a motor vehicle has been registered annually five times, that part of the license fee which is based on the value of said vehicle shall be one-half the rate as fixed when new except as provided in the preceding section which provides that no motor vehicle, regardless of age, shall be licensed for a full year for less than $7.00.

If an automobile meets the requirement of Section 4910, of having been registered annually five times, the license fee therefor is then subject to the reduction provided for in said section and this is true regardless of the fact that during some prior years it has been exempt from license fees under Section 4867.

SALES TAX: GREEN FEES FOR PLAYING GOLF: CAMPING IN STATE PARKS WOULD NOT BE TAXABLE: The fees charged for camping in state parks would not be taxable under the provisions of Section 38 and the exemptions contained therein and in Section 39, subsection (d). In the case of a green fee for the playing of golf, in the sale of a ticket to do so, it would be the opinion of this department that the sales tax should be collected.

June 30, 1934. *Board of Conservation, Des Moines, Iowa:* This will acknowl-

edge receipt of your letter of recent date in which you request the opinion of this Department on the following question:

Is it necessary for the state to charge a sales tax on green fees collected at the golf courses or for camping in the state parks?

Please be advised that Section 38 of Chapter 82, Acts of the Forty-fifth General Assembly in Extraordinary Session, provides in part as follows:

"There is hereby imposed, * * * *, a tax of two per cent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, * * * *, sold at retail in the State of Iowa to consumers or users; * * * * and a like rate of tax upon the gross receipts from all sales of tickets or admissions to places of amusement and athletic events, * * * *."

Section 39 provides in part as follows:

"Exemptions. There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it, the following:

"* * * * *.

"(d) The gross receipts from sales of tickets or admissions to state, county, district, and local fairs, and the gross receipts from educational, religious, or charitable activities, where the entire amount of such receipts is expended for educational, religious or charitable purposes."

It would be the opinion of this Department that the fees charged for camping in state parks would not be taxable under the provisions of Section 38 and the exemptions contained therein and in Section 39, subsection (d), as set out above.

In the case of a green fee for the playing of golf, in the sale of a ticket to do so, it would be the opinion of this Department that the sales tax should be collected, in keeping with that part of Section 38 of the act which states:

"* * * * and a like rate of tax upon the gross receipts from all sales of tickets or admissions to places of amusement and athletic events, * * * *." and for the additional fact that the receipts would not be expended for educational, religious or charitable purposes.

While there might be a doubt as to educational purposes, yet we feel, in parks that are open to the public and at which there is a golf course and a green fee is charged, that the sales tax should be collected on the green fee.

BOARD OF CONSERVATION: WILL OF W. Q. STEWART, CALHOUN COUNTY: Would it be possible for the board of conservation to acquire lots 6 and 7 of Sandy Point subdivision at Twin Lakes by direct purchase?

June 30, 1934. *Board of Conservation, Manson, Iowa:* This will acknowledge receipt of your letter of the twenty-first instant, in which you request the opinion of this department on the following question:

The will of W. Q. Stewart, Calhoun county, Iowa, provides in paragraph 2 a bequeath for Hattie S. Stewart, his wife, and the conditions under which she holds the property.

Would it be possible for the board of conservation to acquire lots 6 and 7 of Sandy Point subdivision at Twin Lakes by direct purchase?

Paragraph 2 of the will, above referred to provides:

"I give, devise and bequeath to my beloved wife, Hattie S. Stewart, all and singular, my real and personal estate, of whatever kind and wherever situated, of which I die seized or possessed, subject to the payment of my debts and expenses as indicated in the first paragraph hereof; to have and to hold, enjoy and use, during her natural life with full power to sell and convey and mortgage and pledge the same for the purpose of paying said debts and expenses, and for her own support, comfort and maintenance, without let or hindrance from anyone whomsoever, and at her own discretion."

It is the opinion of this department that she might sell this property in the event she desires to do so to pay debts and expenses and also for her support.

If the estate is still open, I would suggest that you secure an order of court. However, if the estate is closed, paragraph 2 of the will is sufficient to allow her to deed this property to the State of Iowa for a consideration.

We assume that no other paragraph limits the authority as granted in paragraph 2 of the will under consideration.

Of course, in the event that the estate is still open, the money derived from the sale of the lots in question would have to go for the payment of debts but this is a matter to be handled by the executor under the direction of the court.

SLOT MACHINE: GAMBLING DEVICES: A slot machine contains five slots into any one of which a penny can be inserted and when the lever is pulled it releases a so-called poker hand of cards. There is no prize given for inserting the penny, at any time, and apparently players get together and bet on the various hands as they appear. While a machine of this sort is not inherently a gambling device, it becomes a gambling device by illegal use and if gambling is conducted in connection therewith, said machine becomes a gambling device.

June 2, 1934. *County Attorney, Centerville, Iowa:* This will acknowledge receipt of your communication of recent date asking for an opinion from this department on whether or not a certain slot machine constitutes a gambling device. Your description of the machine appears to be as follows:

"This machine contains five slots into any one of which a penny can be played. When the penny has been dropped in the slot you pull a lever and this releases the machinery and displays to the observer a hand of cards—as I am advised such a hand as is used in playing the game of poker. Nothing whatever is returned at any time from the machine. I assume that the way this machine is frequently operated is for several players to get about it and put up a jack pot on the side and then each one takes one of the slots and places his penny in it and the one that gets the best hand gets the money."

The department issued a ruling in a somewhat similar matter today, the abstract of which is as follows:

A token machine which upon insertion of a coin returns either tokens, cash, or a package of mints, providing the player trips an attachment on the vending machine, and which gives either token, coins, or mints, at each insertion of a coin is a gambling device in that its purpose is to create a desire to insert coins in order to receive additional coins, which opinion was based upon the ruling of our Supreme Court in State of Iowa vs. Marvin, 211 Iowa, 462. The pronouncement in the Marvin case appears to be the strongest pronouncement which our court has made upon this subject. The description and operation of the machine to which you refer is materially different from those involved in the cases of State vs. Ellis, 200 Iowa, 1228, and State vs. Marvin, 211 Iowa, 462. In both the Ellis and Marvin cases the machine returned something to the player, whether it be candy, tokens, or coins. The machine which you describe returns nothing. There is no prize to be gained by operating this machine. The only element of chance lies in the possibility of the hand that might be obtained on the machine when it is played. If any gambling is to be done in connection with the machine, it must be done outside of and independent from the machine. We are not prepared to say, under this statement of facts, that such a machine is inherently or per se a gambling device

subject to forfeiture. However, a machine not inherently a gambling device may become so by illegal use and if gambling is conducted in connection with the operation of the machine such a machine then becomes a gambling device and would be subject to forfeiture.

July 2, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your request for the opinion of this department on the following question:

A prospective applicant for old age assistance is over eighty years of age. He resided in Iowa from 1900 to 1912 when he moved to California. In 1914 he returned to Iowa, voted here in the year 1916 and made his residence here. However, in November, 1925, he went to San Diego, California, and stayed in the home of a daughter. He did not vote or exercise any rights of a citizen of California and did not establish a home there. In November, 1929, he came back to Iowa, voted in the primaries the following year and has continued to make his residence here.

Under this set of facts, is he eligible for old age assistance if he meets the other requirements of the act?

Subsection (d) of Section 12 of Chapter 19, Acts of the Forty-fifth General Assembly in Extraordinary Session, provides as follows:

"(d) Has a domicile in the state and

"(1) has had such domicile continuously for at least ten years immediately preceding the date of application, but continuous residence in the state shall not be deemed to have been interrupted by periods of absence therefrom if the total of such periods of absence does not exceed eighteen months and the residence for the last three years preceding the application has been continuous, but absence in the service of the state or of the United States shall not be deemed to interrupt residence in the state if a domicile be not acquired outside the state;"

Courts have defined the word "domicile" as follows:

"The term 'domicile' in its ordinary acceptance means a place where a person lives or has his 'home.' In a strict legal sense that is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which place he has, whenever he is absent, the intention of returning. In a sense domicile is synonymous with home or residence, or 'the house of usual abode'." See:

Pope vs. Pope, 243 P. 962, 964, 116 Okl., 188.

" 'Domiciled' as a verb, means to establish in a fixed residence or a residence that constitutes habitancy or to have one's domicile, to dwell. As a noun, it means a place of residence either of an individual or a family, a dwelling house, or abode, a home or habitation, residence at particular place accompanied with intention to remain there for unlimited time, residence accepted as final abode, home so considered in law."

See:

MacLeod vs. Stelle, 249 P. 254, 256, 43 Idaho, 64.

"In order to establish 'domicile,' there must be actual residence, coupled with intent to establish place of residence as home."

See:

Foss vs. Foss, 136 A. 98, 99, 105 Conn., 502.

19 Corpus Juris 395, in distinguishing domicile and residence, states:

"While the terms 'domicile' and 'residence' are frequently used synonymously, they are not, when accurately used, convertible terms. The former was of more extensive signification and includes, beyond mere physical presence at the particular locality, positive or presumptive proof of an intention to constitute it a permanent abiding place. 'Residence' is of a more temporary character than 'domicile.' 'Residence' simply indicates the place of abode whether permanent or temporary; 'domicile' denotes a fixed, permanent residence, to which, when absent, one has the intention of returning. 'Residence' has a more limited, precise, and local application than 'domicile,' which is

used more in reference to personal rights, duties, and obligations. That there is a difference in meaning between 'residence' and 'domicile,' is shown by the fact that a person may have his residence at one place while his domicile is in another. It has also been said that domicile and residence are not synonymous for the reason that a person may have more than one residence at the same time, but only one domicile."

And on page 397 states:

"Generally, where a statute prescribes residence as a qualification for the enjoyment of a privilege, or the exercise of a franchise, and whenever the terms are used in connection with subjects of domestic policy, domicile and residence are equivalent."

In the case of In Re Estate of J. M. Colburn, 186 Iowa, 590, our Supreme Court said:

"To establish a domicile at any particular place, there must be an intention to do so and the fact thereof; and the mere intention, without, in fact, residing or abiding, cannot constitute a domicile."

The only difficulty with the situation as we view it is the statement in subsection 1 under (d) of Section 12 of the act in that it provides:

"* * * *, but continuous residence in the state shall not be deemed to have been interrupted by periods of absence therefrom if the total of such periods of absence does not exceed eighteen months * * * *."

Apparently, from the statement of facts given to us, there has been a longer period of absence from the state than eighteen months, as set out in the act. In keeping with the Supreme Court decision of our state, above cited, the question of intention must be considered. As our court states:

"To establish a domicile, there must be an intention to do so."

But intention in such a case, in our opinion, would be governed by the facts and the acts done by the person in question rather than the expression of such a person as to what he intended. It is our opinion that it was the intention of the legislature, in a case such as presented, where the acts done by the person in question would express the intention to consider Iowa not only the domicile but the legal residence, such as voting and refraining to do so in California. We believe that both the domicile and legal residence of this particular person was in Iowa and that the legislative intent in including this section of the act, was not to defeat the right to participate of a person who might, during the ten-year period, spend at various times over eighteen months in other places through business reasons or pleasure or through illness in some hospital outside the borders of the state, but that the absence limit referred to is where a domicile or legal residence has been created in another state. In the instant case, we do not believe that either status was created in California but that both the legal residence and the domicile of this person is in Iowa. The legislature did not mean in such a case that absence for eighteen months would defeat a right to participate but only in such cases where either the legal residence or domicile has been created in another state and the absence has been more than eighteen months within the ten-year period.

OLD AGE ASSISTANCE COMMISSION: COLLECTION OF 1935 TAX IN 1934: ILLEGAL: Is it permissible for corporations to collect the 1934 and 1935 payments of the old age assistance tax during the year 1934?

July 2, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your request of the twenty-seventh ultimo, for the opinion of this Department on the following question:

A situation has arisen in Pottawattamie county whereby several large cor-

porations are attempting to collect the 1934 and 1935 payments of the old age assistance tax during the year 1934. Is this permissible?

Please be advised that it is the opinion of this department that such a practice as outlined by you in this question is not the proper procedure under Chapter 19, Acts of the Forty-fifth General Assembly in Extraordinary Session, for several reasons, the principal one being that the tax is not due until 1935, and could not be deducted from an employee's salary by an employer during the year 1934. The reason for this objection, outside of the fact that it violates the provisions of the act, is that the person paying the 1935 tax in 1934 might not live until the tax was due in 1935 and, hence, would never be liable for the payment of the same.

SCHOOLS: TUITION: PAYMENT OF DEBT BY ONE DISTRICT TO ANOTHER: Toledo Township School District No. 4 is indebted to Toledo Independent School District. Debtor school district desires to pay Independent District by County Treasurer warrant and a school warrant. Independent District refuses to accept, stating they will collect from tax moneys to be collected by treasurer. Rural District may pay Independent District directly and cannot be forced to pay through County Treasurer.

July 5, 1934. *County Attorney, Tama, Iowa:* We have your request for opinion on the following proposition:

Toledo Township School District No. 4 is indebted to the Toledo Independent School District in the amount of $721.95 for tuition of pupils living in the rural district and attending the high school in the city of Toledo. The Independent District, pursuant to the provisions of Section 4278 of the Code filed a statement with the County Auditor which was transmitted to the County Treasurer pursuant to law. Your debtor school district has on hand $425 and all but $121.95 of this would be needed for the operation of the rural school district for the ensuing year. The rural district tendered to the Independent District a County Treasurer's warrant in the amount of $121.95 and a school warrant in the amount of $600.00. The Independent District refused to accept this, stating that they will proceed to collect the amount from tax moneys now collected and to be collected by the Treasurer. You ask whether the rural district may require the Independent District to accept the $600 check of the District and the $121.95 warrant of the Treasurer or whether the Independent District may require payment through the County Treasurer.

The purpose of Section 4278 of the Code is only to give to the creditor district another method of collection for you will note that this section provides at the very first: "If payment is not made" and was not intended to be an exclusive method of collection.

It is, therefore, the opinion of this Department that if the rural district is agreeing to pay this amount directly, that the independent district cannot force the same to be paid through the County Treasurer.

SINKING FUND: DEPOSITORIES: Mr. Bode, State Fish and Game Warden, asks that Executive Council designate depository for moneys which he has on hand for the monthly period and which is turned over to the State Treasurer each month. You ask whether Executive Council have this authority, also whether such action will bring this fund within the protection of the State Sinking Fund.

July 5, 1934. *Treasurer of State, Des Moines, Iowa:* Your letter of recent date addressed to the Attorney General and enclosing letter of I. T. Bode, State Fish and Game Warden, has been turned to the writer for attention.

In his letter to the Executive Council, Mr. Bode asks that the Executive Council designate a depository for the moneys which he has on hand for the monthly period and which is turned over to you once each month. You ask

whether the Executive Council have this authority, and also whether such action on the part of the Executive Council will bring this fund within the protection of the State Sinking Fund.

Section 1703-d23 of the Code provides that the State Fish and Game Warden shall at least once a month make a return of all moneys received by the Department to the State Treasurer, to be deposited in the Fish and Game Commission Fund. Under the law, then, he is only to turn this money to you once a month and during the time that he is required to keep the money, he is entitled to protection by designation of depository. Therefore, we believe it is not only proper, but necessary, for the Executive Council to designate a depository in order to fully and properly protect Mr. Bole under this Code section.

In regard to bringing this deposit within the State Sinking Fund, we beg to advise that Section 7420-d1 requires the Treasurer of State and of each county, city, town and school corporation and each township clerk and each County Recorder, Auditor, Sheriff and Clerk of the District Court, and Secretary of School Board, to deposit all public funds in their hands in such banks as are first approved by the governing board. The interest from these deposits then goes to make up the Sinking Fund, and Section 7420-a2 of the Code provides that the purpose of the fund is to secure the payment of their deposits to the state, county, township, municipal and school corporations having public funds deposited in any bank in this state. This money then so long as it remains in the hands of the Warden under the law, is not a deposit of the Treasurer of State, and therefore, irrespective of any resolution designating depository by the Warden, this would not be protected by the Sinking Fund until after the Warden actually turns into the office of the State Treasurer at the end of the monthly period, as required by law.

INSURANCE: Eligibility of bonds of Philippine Islands as an investment for life insurance companies operating under laws of State of Iowa, also as to eligibility of bonds of municipality of Lu Quillo, Puerto Rico.

July 5, 1934. *Commissioner of Insurance, Des Moines, Iowa:* We have your request for opinion, dated some time ago, as to the eligibility of bonds of the Philippine Islands as an investment for life insurance companies operating under the laws of the State of Iowa, and also your recent request for opinion as to the eligibility of bonds of the municipality of Lu Quillo, Puerto Rico.

Subsection 1 of Section 8737 of the Code, as revised and amended by Section 1, Chapter 107, an act of the Forty-fifth General Assembly, Extraordinary Session, in regard to the investment of funds required by law to be deposited with the Commissioner of Insurance, provides in part, as follows:

"Federal and Dominion Bonds. The bond issued or guaranteed by the United States, and Farm Loan Bond issued under the act of Congress approved July 17, 1916, as amended * * * *."

I assisted in revising this statute at the last Special Session and you will note the provision requires that the bonds be issued or guaranteed by the United States.

The Island of Puerto Rico and the Philippine Islands were a conquest of the Spanish-American War, and while there is some difference between the relationship of these to the United States in regard to citizenship and passports and government, both are insular possessions and in effect, the government of the United States functions merely as a guardian over these respective

islands, and supervises their physical and governmental affairs. These bonds are authorized by the National Congress, yet the faith of the United States is not pledged as a guarantee for the payment of the loan or for the due use of the proceeds, or the observance of the sinking fund requirements, and the bonds are issued by the fully constituted governments of these possessions pursuant to the authorization of Congress, but are not issued by the United States.

It is, therefore, apparent that the bonds of these insular possessions are not issued or guaranteed by the United States pursuant to the provisions of Chapter 107 of the Acts of the Forty-fifth General Assembly, Extra Session.

We appreciate the fact that the United States, pursuant to its moral obligation, will do all in its power to protect the holders of the outstanding bonds and see that they do not become impaired nor vitiated, yet, this does not make the United States guarantor of the bonds, within the meaning of our statute.

The bonds of the municipality of Lu Quillo, Puerto Rico, are in the same position as outlined above and do not come within the investment provisions of the statute, for, as we understand, they are issued by the governing board of the municipality, the proceeds to be used for general purposes.

It is, therefore, the opinion of this Department that the bonds of the Philippine Islands, Puerto Rico, and the municipalities of these insular possessions are not eligible for deposit with the Insurance Commissioner by life insurance companies.

TAXES: STATE PROPERTY ACQUIRED THROUGH FORECLOSURE: Where property is acquired by the state through foreclosure, or by quit claim deed to avoid foreclosure, and there are unpaid taxes thereon at the time, that the taxes are extinguished and are not any longer a lien against the property and there is also no liability for penalty.

July 6, 1934. *Board of Education, Des Moines, Iowa:* We have your request for opinion on the following proposition which pertains to Mrs. Clara G. Davis, but which is a general proposition:

"Pursuant to law, the Board of Education loaned out of the permanent fund of Iowa State College and took as security therefor, a mortgage on certain real estate. The mortgage is in default and the taxes for 1931, 1932, 1933 and 1934 are in default. In order to obviate the necessity of foreclosure and the attended expense, the mortgagor gave to the Board of Education a quit claim deed which was accepted as in full of the debt. Should the Finance Committee of the State Board of Education instruct and authorize the Iowa State College of Agriculture and Mechanic Arts to pay either the taxes and penalty or both?"

Section 6944 of the Code, Subdivision I provides as follows:

"The following classes of property shall not be taxed:

1. Federal and state property. The property of the United States and this state, including university, agricultural college and school lands."

Section 7268 of the Code provides in part as follows:

"In all cases where the real estate is mortgaged or otherwise incumbered to the school, agricultural college, or university fund, the interest of the person who holds the fee shall alone be sold for taxes, and in no case shall the lien or interest of the state be affected by any sale thereof. The foregoing provision shall include all lands exempt from taxation by law, and any legal or equitable estate therein held, possessed, or claimed for any public purpose, and no assessment or taxation of such lands nor the payment of any such tax by any person, or the sale and conveyance for taxes of any such lands, shall in any manner affect the right or title of the public therein, or confer upon the purchaser or person who pays such taxes any right or interest in such land."

Section 6956 of the Code requires every inhabitant of this state of full age and sound mind to list for the assessor, all property subject to taxation in the state, of which he is owner, or has the control and management. It is, of course, apparent that after the state or any of its agencies acquires title to real estate, that it is not subject to taxes hereafter, but the question as to the taxes that are already a lien on the property at the time of its acquisition by the state through foreclosure or quit claim deed to avoid foreclosure, is more difficult. Some states have held that the acquiring of title by the state merges the estates and extinguishes the tax lien, holding that this is apparent because of statutory provision similar to our Section 7268 which prohibits any manner of enforcement of the lien so long as the state is the owner. Other courts hold that under the law, the statutory provision similar to Section 6956 of the Code, that all property held by individuals is required to be listed and that based upon this listing, the levy and assessment are made and that it is therefore unfair to withdraw certain property from the liability for taxation after it has been so properly listed.

Our Supreme Court, as far as we are able to find, has not spoken on this proposition, but it seems to us to be the more logical rule that the tax lien is extinguished upon the acquisition of the property through foreclosure or by quit claim deed after default and to avoid foreclosure, as when the property was listed, it was known that the State of Iowa, through one of its agencies, had a mortgage thereon and might be forced to foreclose it, and that is also the more logical rule in view of Section 7268 of the Code which provides that the sale of property for tax will not in any wise affect the lien or interest of the state therein.

It is, therefore, the opinion of this department that where property is acquired by the state through foreclosure, or by quit claim deed to avoid foreclosure, and there are unpaid taxes there on at the time, that the taxes are extinguished and are no longer a lien against the property, and that there is also no liability for penalty.

BEER LAW: CHAPTER 25, EXTRA SESSION, 45TH GENERAL ASSEMBLY: Is it necessary that said club must have been incorporated as of January 1, 1934? Section 19. Can this dealer go to the picnic and sell beer at the picnic for consumption on the picnic grounds?

July 6, 1934. *County Attorney, Fort Dodge, Iowa:* This will acknowledge receipt of your letter of the twenty-sixth ultimo, in which you request the opinion of this department on the following questions:

1. A club applying for a permit to sell beer under Section 19 of Chapter 25, Acts of the Forty-fifth General Assembly in Extraordinary Session, as a golf or country club was incorporated only last week but has been in operation and was on the first day of January, 1934. Paragraph c of said section provides that such club must be incorporated. Paragraph f provides that it must have been in operation on the first day of January, 1934. Is it necessary that said club must have been incorporated as of January 1, 1934?

2. A community group in one of our townships is having a picnic July fourth. In a little town three or four miles from where this picnic is to be held, there is a beer retailer who holds a class "B" permit. Can this dealer go to the picnic and sell beer at the picnic for consumption on the picnic grounds?

In answer to your first question, if all other provisions of Section 19 are met, it would be the opinion of this department that subsection c of Section 19 of the act under consideration does not state as to when the club shall be

incorporated but simply states that it shall be incorporated under the laws of the State of Iowa. Subsection f of this section states that it must be in operation as a club on the first day of January, 1934. As there is no provision with reference to the incorporation of the same, we would think the facts, as submitted by you, would allow the board of supervisors to issue a permit to this club if all other provisions of the act are met, if they so desire. This last statement is made, regarding the desire of the board to issue such a permit, because the act uses the word "may" and not the word "shall." We have previously ruled that this is a discretionary matter with the board.

In answer to your second question, will say that cass "B" permit holders have the right to sell beer, under their permit, for the place described in said permit only.

OLD AGE ASSISTANCE ACT: SENATE FILE 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: Robert Coulter's estate, under the said set of facts, is liable for the payment of the one dollar ($1.00) tax.

July 6, 1934. *County Attorney, Corning, Iowa:* This will acknowledge receipt of your letter of the twenty-seventh ultimo, in which you request the opinion of this department on the following question:

Robert Coulter was listed in this county by the assessor, as provided by Chapter 19, Acts of the Forty-fifth General Assembly in Extraordinary Session, the old age assistance act. He died on the thirtieth day of May.

Is his estate liable for the payment of the one dollar ($1.00) tax?

It is the opinion of this department that, as Robert Coulter was listed by the assessor, as provided by the old age assistance act, his estate would be liable for the one dollar ($1.00) tax levied this year. The law you will note states in part as follows:

"* * * * payable on or before July 1, 1934. * * * *."

From the time that this man was listed by the assessor, he, and later his estate, would be liable for the tax in the year 1934.

IOWA SOLDIERS' HOME: PROBLEM CHILDREN IN INSTITUTION: Board of Control does not have power and authority to place children who have been regularly committed or received in Iowa Soldiers' Home, in a private home, even though it be for temporary special supervision and care, and even though cost of child in such temporary home would not exceed cost of child in institution.

July 7, 1934. *Board of Control, Des Moines, Iowa:* We have your request for opinion on the following proposition:

"Many problem children do not make a satisfactory adjustment in institutions and this is especially true where the institutions are as large as our juvenile homes. We are concerned with devising a plan whereby these children may be temporarily placed in a private residence or home so as to give them a specialized program. We desire your opinion as to whether we may place these children temporarily in a carefully selected and supervised private home where they may be properly developed, and use the support fund of the institution for such boarding home care, the cost of such care, however, to in no event exceed the cost of the child in the institution."

Section 3706 of the Code provides that the object of the Iowa Soldiers' Orphans' Home shall be for the purpose of providing for children *therein* a common school education and such useful and regular employment and training as will enable them to be self-sustaining, the admission to the institution to be either by commitment or on voluntary application by the legal custodian of the child and approved by the judge of a court of record or by the Board of Supervisors.

I have submitted this question to the staff of this office as it presented a very serious problem to me. The staff of this office are of the opinion that the purpose of the law is to provide for these orphans in the Home and that the Board of Control is not authorized to place these children, even temporarily, in private homes for special supervision and care and even where it believes it to be for the best interests of the child, as the commitment and the statutory provision are mandatory. However, if the court making the commitment, would make a supplemental order that the child could be placed in a private home for special supervision and care, it would be wholly within the court's power and you would then have the right and authority to so place the child pursuant to order of court.

It is further the thought of this Department that such placing for special supervision and care is not analogous to placing in a hospital for treatment, as that is an emergency matter which must be met and you could not be required to make the child wait while it was sick for sufficient time to secure a court order, but such is not the case where the child is merely placed in the home for special supervision and care, as suggested in your question.

It is, therefore, the opinion of this Department that your Department does not have power and authority to place children who have been regularly committed or received in your Iowa Soldiers' Home, in a private home, even though it be for temporary special supervision and care, and even though the cost of the child in such temporary home would not exceed the cost of the child in the institution.

SCHOOL BOARD: TERM OF SUBDIRECTOR AND MEMBER OF BOARD: As to expiration when elected for regular term; when appointed to fill vacancy: when elected by voters to fill vacancy, also as to term of member of board.

July 9, 1934. *Department of Public Instruction, Des Moines, Iowa:* We have your request for opinion, dated some time ago, on the following propositions:

1. When does the term of a subdirector elected for the regular term of one year expire?
2. When does the term of subdirector appointed to fill vacancy expire?
3. When does the term of a subdirector elected by the voters to fill vacancy expire?
4. When does the term of a member of the board in an independent district who is *elected* to a regular term expire?
5. When does the term of a member of the board in an independent district who is *appointed* by the board to fill a vacancy expire?
6. When does the term of a member of the board in an independent district who is *elected* by the voters to fill vacancy expire?

We will answer this in the same order in which you have asked them.

1. Under the provisions of Section 4216-c24 of the Code, the term of office of a subdirector is for one year. However, preceding that and in the same section, the Legislature provided that the terms of office of all directors except subdirectors should be for a term of three years and until their successors are elected or appointed and qualified. Clearly the Legislature only intended to differentiate in the number of years and not as to the manner of succession, so it is therefore, our opinion that a subdirector holds office for his term and until his successor is elected or appointed and qualified.

2. The term of a subdirector appointed, likewise is until his successor is elected or appointed and qualified.

3. The term of the subdirector elected by the voters to fill the vacancy expires when his successor is elected or appointed and qualified.

4. The term of an independent director who was elected for the regular term of three years pursuant to Section 4125 of the Code continues until his successor has been duly elected, appointed or qualified.

5. The term of a member who is appointed to fill a vacancy expires at the expiration of the term and until his successor is elected or appointed and qualified.

6. The term of a member of the Board of an Independent District who is elected to fill a vacancy expires at the end of the term he is filling out and until his successor is elected or appointed and qualified.

We appreciate the fact that directors should not by their own acts or negligence be allowed to continue indefinitely as a member of the board, yet, on the other hand, it is imperative that the boards be fully constituted so that no question may arise in regard to their acts, and we will have to presume that the members of these boards will act in good faith and will see to it that their successors qualify at the earliest possible opportunity and will not attempt to keep their successors from qualifying so as to prolong their own term of office.

BEER BILL: CHAPTER 25, EXTRA SESSION, 45TH GENERAL ASSEMBLY: Under the said set of facts, it would be necessary to have two permits.

July 9, 1934. *County Attorney, Iowa City, Iowa:* This will acknowledge receipt of your letter of the twenty-first ultimo, in which you request the opinion of this department on the following question:

A permit holder in one of the towns in Johnson county has been operating a beer parlor under the permit as owner of the property. The permit covers only the beer parlor. This permit expires August first.

The permit holder also owns and operates a dance hall, located in the same town and directly across the street from the place of business where he has been previously selling beer. He owns both properties, the same being divided by a town street.

When he makes application for a renewal of his class "B" permit on August first next, he desires to include in the application the dance hall property and would like to know whether one permit will be sufficient to cover the beer parlor on one side of the street and the dance hall on the other, or whether it will require two permits.

Please be advised that it is the opinion of this department, in a set of facts such as presented by you, that it would be necessary to have two permits.

This department has previously ruled that where a permit has been granted by a city council, by way of illustration, for lot 8, block f, of a certain city or town, the permit holder may sell at any place on these premises where he meets the requirements of Chapter 25, Acts of the Forty-fifth General Assembly in Extraordinary Session, the Iowa beer law, particularly with reference to the provisions in regard to tables and seats sufficient to accommodate not less than twenty-five (25) persons at one time. Also in cases where a permit is granted for lots 8 and 9, which are adjacent and contiguous to one another or where a permit holder has a building which covers both of the lots described in the permit, he may sell at any place on the premises. But where a permit holder, such as you have described, has lots such as are not connected with one another and are not covered by a building or structure, this constitutes two separate places of business and, hence, there should be two separate permits.

We would, therefore, be of the opinion that the city council would not have the right, under Chapter 25, Acts of the Forty-fifth General Assembly in Extraordinary Session, to carry the two separate places of business on the same permit.

BEER BILL: CHAPTER 25, EXTRA SESSION, 45TH GENERAL ASSEMBLY: No provision in the law that prohibits a person under twenty-one years of age from working in a place where beer is dispensed and, therefore, such a person may be employed to dispense beer.

July 9, 1934. *County Attorney, Mason City, Iowa:* This will acknowledge receipt of your letter of the third instant in which you request the opinion of this department on the following question:

Is there any provision in the law that prohibits a person under twenty-one from working in a place where beer is dispensed?

Please be advised that it is the opinion of this department, in view of the fact that the law is silent on the age of employees in places where beer is dispensed, that there would be no prohibition on a person under twenty-one years of age working in such a place.

The law is clear on the question of sale to a person under twenty-one years of age and provides that the only person who could give a minor beer are the parents or guardian of such minor.

SALES TAX: IN RE KATZ' METHOD OF ADVERTISING: "Under Rule 66, adopted by your Department, the retail sales price must be marked for each article, and the purchaser must pay, in addition to this marked price, the sales tax for said article. Adding the tax to the retail sales price and marking and advertising said articles at the price which includes both the retail sales price and the tax, without designating the exact retail price and the exact amount of the tax, would be a violation of Rule 66, and also Section 42 of the Sales Act."

July 9, 1934. *State Board of Assessment and Review, Des Moines, Iowa:* You request an opinion from this Department on the following proposition:

"Pursuant to an opinion of your office that it has authority so to do, this Board adopted the following rule:

"'When any retailer shall price mark any article for retail sale and display or advertise the same with such price mark to the public, the price so marked or advertised shall include only the retail price of such article.

"'EXAMPLE: The advertised or marked price is $1.00. When sale is made, the purchaser pays or agrees to pay $1.02, representing the purchase price plus tax, which, when added, becomes a part of the sales price or charge.'

"This rule does not prohibit advertising or displaying the sales price plus tax as in the following examples:

"'This dress $10.00 plus tax.' or

"'This dress $10.00 plus 20-cent tax.'

"This Board is now advised by the Katz Drug Company of this city that it proposes to advertise and display articles for sale at retail, charging the buyer only the advertised or marked price; but that said company proposes further to post in its place of business and to display in its newspaper ads the following:

"'The retail sales tax of 2 per cent is an element in the price of each article listed herein or sold by the Katz Drug Company and has been added to the retail price of such articles.'

"Upon this state of facts, your opinion is requested as follows:

"1. Is the proposed practice of the Katz Drug Company above set forth a substantial and lawful compliance with said Rule No. 66?

"2. If the said proposed practice is not a substantial and lawful compliance with Rule No. 66, is it nevertheless a substantial and lawful compliance with Sections 41-a and 42 of the Sales Tax Act?

"3. Assuming that said proposed practice is not a substantial and lawful compliance with said Rule No. 66, but is, nevertheless, a substantial and lawful compliance with Sections 41-a and 42 of the Sales Tax Act, does this Board have authority to enforce compliance by said company with Rule No. 66?"

The proposal of the Katz Drug Company is to advertise their merchandise for sale to the public at a certain specified price for each article. In other

words, they propose to advertise the sale price of a tube of tooth paste for 27 cents. The only price mark for the sale of this article is 27 cents. The purchaser pays the marked price of 27 cents for the article. At the time of the sale and purchase, the purchaser is not informed as to just how much tax he is paying or how much the retail sales price of the article is. Neither the state nor the purchaser is correctly informed as to just how much tax is being paid and collected for said article. This would clearly be a violation of Rule 66, which has already been adopted by your Department. The price marked or advertised for each article must include only the retail price of such article. Therefore, the proper and legal method for marking and advertising the 26-cent tube of tooth paste, as above set forth, would be to advertise the same for sale at 26 cents plus tax, or 26 cents plus 1-cent tax.

Rule 66 of your Department is a reasonable one and is in conformity with the law. The purchasing public have a right to know just how much they are paying for the articles purchased, and also how much tax they are paying at the time of each purchase. The state is also entitled to this same information. The practical effect of the proposal of the Katz Drug Company would be to lead the public to believe that the Katz Drug Company was assuming or absorbing the sales tax. Under Rule 66, adopted by your Department, the retail sales price must be marked for each article, and the purchaser must pay, in addition to this marked price, the sales tax for said article. Adding the tax to the retail sales price and marking and advertising said articles at the price which includes both the retail sales price and the tax, without designating the exact retail price and the exact amount of the tax, would be a violation of Rule 66, and also Section 42 of the Sales Act.

Therefore, specifically answering the three questions presented to this Department, we have this to say:

The answer to your first question is "No."

The answer to your second question is that the Katz Drug Company's proposal is not in substantial compliance with Section 42 of the Sales Act.

Answering your third question, it is the opinion of this Department that your Board has the authority to enforce Rule 66.

MOTOR VEHICLE: SUSPENSION OF OPERATOR'S OR CHAUFFEUR'S LICENSE FOR CONVICTIONS IN MUNICIPAL COURTS: Section 4960-d32 and Chapter 55, Special Session, imposing penalties on violations of motor vehicle laws do not apply to municipal courts or any other courts except state courts having jurisdiction of state offenses.

July 9, 1934. *Superintendent, Motor Vehicle Department, Des Moines, Iowa:* We have your favor of the 29th ult., in which you request a construction of Chapter 55, of the Acts of the 45th General Assembly in Extraordinary Session.

You state it has come to your attention that certain judges of municipal courts take the position that the law as set out in this chapter does not apply to their courts in so far as they impose penalties under city ordinances.

Section 4960-d32 of the 1931 Code of Iowa is as follows:

"4960-d32. Court to report convictions and may recommend suspensions. Every court having jurisdiction over offenses committed under this act, or any other act of this state regulating the operation of motor vehicles on highways, shall forward to the department a record of the conviction of any person in said court for a violation of any said laws, and may recommend the suspension of the operator's or chauffeur's license of the person so convicted, and the department shall thereupon consider and act upon such recommendation in such manner as may seem to it best."

This section provides for certain action to be taken by every court having jurisdiction of offenses committed under this act or section or any other act of this state regulating the operation of motor vehicles on highways, and provides that such courts shall forward to the department a record of the conviction of any person in said court for a violation of said laws. The section provides further that such courts may recommend the suspension of the operator's or chauffeur's license of any person so convicted and the department shall act upon such recommendation in such manner as to it may seem best. The section, as quoted, makes no reference as to city ordinances and has nothing to do therewith, and a municipal court passing upon a city ordinance would not be controlled in any way by said section.

The legislature, at the extraordinary session of the 45th General Assembly, amended the above section by adding thereto, the following:

"Upon conviction in all cases where recommendation of suspension or revocation is not made or is not mandatory, every court shall detach one stub of the license of such operator or chauffeur and forward same to the department with notation on such stub of record of conviction." (Chapter 55, Acts of the 45th General Assembly, Extra Session.)

If this amendment stood out as a separate section of the law, it would possibly admit of a construction different from that which must be placed upon it when it is added to and made a part of Section 4960-d32. The amendment having been made a part of this section, we must assume that it has reference only to the courts referred to in the section, viz.: every court having jurisdiction of offenses committed under the motor vehicle law of the state in cases resulting in a "conviction of any person in said court for a violation of any of said laws." The amendment uses the language, "upon conviction in all cases * * * * every court shall detach one stub of the license," etc.

This language is very broad and as stated above, if this amendment were a separate section of the Code and if it were not necessary to construe it in connection with the above section, we should say it included convictions in municipal courts for violations of city ordinances, but the section which it amends expressly excludes any law other than the state law and the language of the amendment makes no reference to ordinances or laws enacted by cities and towns and makes no reference to municipal courts specifically, and we are, therefore, compelled to take the view that the language of the amendment is limited by and applicable to the language of Section 4960-d32 of the Code, and that the language, "upon conviction in all cases," means simply the cases referred to in the section and that the words, "every court," means every court exercising jurisdiction in cases of violation of the laws of the state. The legislature may have intended a broader meaning than this but such conclusion cannot be drawn from the language used, which language must be given a reasonable construction in connection with the entire context.

FISH AND GAME COMMISSION: EASEMENT: 1. Does an easement give ownership status? 2. Is it within the legal powers of the trustees of a drainage district, acting for the drainage district, to grant a lease or easement?

July 9, 1934. *Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-seventh ultimo, in which you request the opinion of this department on the following questions:

1. Does an easement give ownership status?
2. Is it within the legal powers of the trustees of a drainage district, acting for the drainage district, to grant a lease or easement?

You state that you desire this information with reference to taking property for a state game preserve.

In the case of Black vs. Whitacre, 206 Iowa, 1084, 221 N. W., 825, our supreme court said:

"An easement is defined as 'a liberty, privilege, or advantage in land without profit, existing distinct from the ownership of the soil; and because it is a permanent interest in another's land, with a right to enter at all times and enjoy it, it must be founded upon an agreement by writing or upon prescription," which is an adverse holding under color of title or claim of right."

The above expression gives an idea as to the status of one owning an easement and expresses it, in our opinion, completely and gives, as you will note, a permanent interest. As far as the easement is concerned, it gives ownership status, although this might not be the best terms by which to express the right created but rather as the court states:

It is defined as "a liberty, privilege, or advantage in land."

In answer to your second question, we do not believe that the powers and duties of the trustees of a drainage district, as set out in Section 7700 of the 1931 Code of Iowa, are such as would give the right to the trustees to grant a lease or easement. This section is as follows:

"*Powers and duties of trustees.* Trustees shall have control, supervision, and management of the district for which they are elected and shall be clothed with all of the powers now conferred on the board or boards of supervisors for the control, management, and supervision of drainage and levee districts under the laws of the state, unless otherwise specially provided. Such authority shall extend only to the district for which they are elected.

In this connection, Chapter 358 of the Code, entitled, "Management of Drainage or Levee Districts by Trustees," should be read in order to obtain the entire picture of the duties and powers of trustees of drainage districts. Several serious legal difficulties would arise if they sought to enter into a lease or to give an easement to the property under their control, as such, in our opinion, was not the intent of the legislature. The power and duties of the trustees would not extend to the exercise of such a function. Also, the legal difficulty which would arise is the power of trustees of drainage districts to bind their successors in office.

It would be the suggestion of this department, in acquiring a lease or an easement, that the proper way to get the same would be to secure the lease or easement from the owners of the property direct in the drainage district, as the trustees are elected for the exclusive purpose of managing the drainage matters in the district and not for other purposes.

Hence, we would feel that the lease or easement should be secured direct from the owner who would have the right to grant a conveyance of this sort to the State of Iowa.

OLD AGE ASSISTANCE ACT: SENATE FILE 42 (CHAPTER 19), EXTRA SESSION, 45TH GENERAL ASSEMBLY: Indians, living in Tama county, Iowa, are subject to the old age assistance tax.

July 10, 1934. *County Attorney, Tama, Iowa:* This will acknowledge receipt of your letter of the twenty-third ultimo to Commissioner John F. Porterfield, which has been referred to this department for answer. You desire an opinion on the following question:

Are the Indians living in Tama county, who are citizens of the United States, allowed to vote and have the privileges and immunities of United States citizens, subject to the old age assistance tax?

The lands they live on are lands paid for by the tribe, but which are held in trust by the Governor of the State of Iowa for them. They pay certain taxes, such as the state tax, road tax, bond tax, etc., but have not been required to pay some other levies, one in particular being the poor tax.

It would be the opinion of this Department that the only exemptions made in the Old Age Assistance Act, Senate File No. 42 (Chapter 19), Acts of the Forty-fifth General Assembly in Extraordinary Session, are set out in Section 34 thereof, as follows:

"* * * *, except inmates of state and county institutions, * * * *."

Indians of twenty-one (21) years of age and upwards, being citizens of the United States and residing in Iowa, would be subject to this tax.

This Department has previously ruled that the penalty, under the act, would not attach until April 1, 1935. Hence, the penalty of three-fourths of one per cent (¾%) would not have to be paid until April 1, 1935.

FISH AND GAME COMMISSION: LAKE WAPELLO AREA, DAVIS COUNTY, ROAD VACATION: Procedure may be had under Section 4631, 1931 Code of Iowa.

July 10, 1934. *Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your recent request for the opinion of this Department as to the method of procedure to be used in the matter of the vacation of roads in Davis County in the Lake Wapello area.

I have on this date submitted the question to the staff of this Department and it is our opinion, in view of the specific powers given to the commission in Section 1703-d12, 1931 Code of Iowa, as amended by Chapter 30, Acts of the Forty-fifth General Assembly, and particularly subdivision 2 of the section of the code referred to, which provides:

"2. Acquire by purchase, condemnation, lease, agreement, gift and devise lands or waters suitable for the purposes hereinafter enumerated, and rights of way thereto, and to maintain the same for the following purposes, to wit: * * * *."

That procedure may be had under Section 4631 of the code which provides:

"*State road districts.* Highways on lands of the state and highways on which such lands abut shall constitute a separate road district for each state institution, or state park, in connection with which such lands are used, and shall be under the jurisdiction of the board in control thereof."

The difficulty with using this procedure is that the Legislature has not designated by statute any method of procedure and we assume that this being the case, it may be done in either one of the two following ways:

1. A resolution by the Fish and Game Commission to vacate the road, should be passed. If such resolution is passed, barriers should be placed on the road in question to prevent the public from using the same.
2. Follow the procedure as set forth in Section 4755-d2 to Section 4755-d8, inclusive, of the chapter of the Code entitled, "Improvement of Primary Roads."

In arriving at a conclusion in this matter, we are assuming that the road or highway in question is on land owned by the state or abutting the land of the state. Your records would reveal as to whether or not this is the true situation. We are also assuming, in the event that suit was started by persons interested adversely by the closing of the road, that should the matter reach the supreme court, that body would find that the land surrounding Lake Wapello would be a *state park.* This being true, in keeping with the provisions of Section 4631, it would constitute a separate road district and would be under the jurisdiction of your commission.

A form of resolution which we believe would meet the situation and which would give notice to everyone is attached hereto for your convenience.

You will note from the attached resolution that your commission may appoint either a member of the commission or any disinterested person to conduct a hearing at Bloomfield and set the date for the same and that the notice, as prescribed in Section 4755-d4, be given by publishing same in some newspaper of general circulation in such county at least twenty days previous to the date of the hearing. The board of supervisors of such county shall be notified of such hearing by registered letter addressed to the county auditor.

As no method of procedure is set out in Section 4631 of the Code, it was the thought of this Department, rather than proceeding by the method first set out, that the second method should be adopted which would give everyone interested notice of proceedings and that if the matter reached the courts, that the court would take a more favorable view of the situation if everything possible was done with reference to giving of notice to interested parties and the hearing of any objections so that the commission could be fully advised of the rights of alleged rights of all parties. After giving everyone an opportunity to be heard, the board would be in a better position to arrive at a correct finding in the matter of vacating the road and also, under the procedure outlined, could award damages if, in its opinion, any were sustained by the closing of the road.

In other words, it is the opinion of this Department that no procedure being outlined, in the code, that care should be exercised so that the rights of all parties would be considered. It would seem that the next session of the Legislature should provide a method of procedure to be outlined by statute, in matters of this kind.

OLD AGE ASSISTANCE ACT: SENATE FILE 42, (CHAPTER 19), EXTRA SESSION, 45TH GENERAL ASSEMBLY: Warrants shall be issued on November 1, 1934, and not December 1, 1934.

July 10, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the fifth instant in which you request the opinion of this Department on the following question:

Section 35 provides in part as follows:

"For the purpose of affording old age assistance commencing November 1, 1934, under the provisions of this act prior to July 1, 1935, * * * *."

Under this section of Senate File No. 42 (Chapter 19), Acts of the Forty-fifth General Assembly in Extraordinary Session, the question has arisen with the commission as to when, under the provisions of the section above quoted, the issuing of warrants in payment of assistance may start.

Are warrants issued in payment of said assistance on November first or December first of the year 1934?

Please be advised that it is the opinion of this Department that the intent of the Legislature is clearly expressed in this matter in that that part of Section 35, above quoted, provides that said assistance shall commence on November 1, 1934. We are, therefore, of the opinion that said warrants, in payment of old age assistance, shall be issued on November 1, 1934.

BEER LAW: HOUSE FILE 336 (CHAPTER 25), EXTRA SESSION, 45TH GENERAL ASSEMBLY: Two hundred foot limitation would cease to apply in circumstances under consideration.

July 10, 1934. *County Attorney, Waterloo, Iowa:* This will acknowledge re-

ceipt of your letter of the nineteenth ultimo in which you request the opinion of this Department on the following question:

A question has arisen in the county in regard to Section 12 of the beer law, House File No. 336 (Chapter 25), Acts of the Forty-fifth General Assembly in Extraordinary Session, relative to the issuing of a permit if the premises "is not within two hundred feet of a building used for school purposes, provided, however, such area limitation shall not apply to permits in force on March 5, 1934, nor to renewals or transfers thereof, nor to permits in places located in areas now or hereafter zoned as business districts."

You state that it is your thought in the matter that if the property is zoned in the future, the two hundred foot limitation then ceases to apply.

Please be advised that it is the opinion of this Department that as the law under consideration provides that it does not refer to permits in places located within areas now or hereafter zoned as business districts, the intention of the Legislature is clear that if a certain area was, in the future, zoned as a business district, the two hundred foot limitation would cease to apply.

OLD AGE ASSISTANCE ACT: SENATE FILE 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: A member of the county old age assistance board cannot be an investigator also.

July 10, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the second instant in which you request the opinion of this Department on the following question:

Can a member of the county old age assistance board be an investigator? If so, would he be entitled to receive compensation as such and be a member of the board at the same time?

It is the opinion of this Department that it was not the intent of the Legislature that a member of the County Old Age Assistance Board should also serve as an investigator, because the holding of these two positions might create incompatibility. If a person was to hold these two positions, there might be a conflict in administrative matters.

Therefore, it would be the opinion of this Department that a member of the County Old Age Assistance Board cannot be an investigator also.

POLICEMEN AND FIREMEN'S PENSION FUND: BEATTY-BENNETT BILL: The levy provided for in Section 13, of Chapter 175, Laws of the 45th General Assembly, Extraordinary Session, are exempt from the Beatty-Bennett Bill.

July 11, 1934. *State Comptroller, Des Moines, Iowa:* We have your request for opinion on the following proposition:

"Under the provisions of Section 13 of Chapter 75 of the Acts of the 45th General Assembly, Extraordinary Session, being the law relating to Policemen and Firemen's Pensions, it is provided that Section 6310 of the Code, as amended by the 45th General Assembly, be amended as follows: 'provided further that cities in which a police and/or firemen's retirement system, based upon actuarial tables shall be established by law, shall levy for the police and/or fire pension funds, a tax sufficient in amount to meet all necessary obligations and expenditures; and said obligations and expenditures shall be direct liabilities of the cities.' Is the levy for such pensions exempt from the Beatty-Bennett bill, being Chapter 123 of the Acts of the 45th General Assembly?"

The purpose of Chapter 75 of the Acts of the Forty-fifth General Assembly, Extraordinary Session, was to create retirement systems for policemen and firemen, as it was found that the provisions of Chapter 322 of the Code were not sufficient because of the economic and other conditions and that it was impossible to raise sufficient money under the old plan to properly set up and

operate a pension system. The Legislature then provided this new pension system and under Section 13, authorized a levy sufficient to meet all necessary obligations and expenditures. The Beatty-Bennett Bill provides that the total rate of millage levy of tax in each of the years 1933 and 1934, for or on behalf of any taxing district in this State, including special charter cities, shall not exceed 20% of the total rate of millage levy made in the year 1930. The Beatty-Bennett Bill was enacted at the Forty-fifth General Assembly and of course, this levy authorized under the pension act in the Forty-fifth Extra Session was not a law at that time, and therefore, no millage levy was made for the fund for that year and this being true, we do not believe the Legislature intended to reduce this levy as there would, therefore, be no yardstick by which this particular levy could be reduced 20% of the 1930 levy.

We appreciate that this matter is one of much dispute yet, the intent of the Legislature, we believe, in enacting this new pension system was to have a fund with sufficient money to meet all obligations and expenditures and the Legislature authorized a levy sufficient to meet these.

It is, therefore, the opinion of this Department that the levy provided for in Section 13 of Chapter 175, Laws of the Forty-fifth General Assembly, Extraordinary Session, are exempt from the Beatty-Bennett Law.

POOR RELIEF: COUNTY HOME: Family furnished poor relief, was moved into certain dwelling in rural subdistrict—rent paid by county in lieu of being placed in County Home. Neither children nor parents acquired any residence in subdistrict and county is liable for cost of schooling of said children, the same as if located in poor house in subdistrict.

July 11, 1934. *County Attorney, Ida Grove, Iowa:* We have your request for opinion on the following proposition:

"This county has never established a County Home as provided by Chapter 268 of the Code, but in April, 1932, the county rented a certain dwelling house situated in a rural subdistrict and moved a family that was furnished poor relief, into the house and the county since that time, paid the rent on the premises and the children have attended a rural school in the subdistrict. Are the children residents of the district and is the county liable to the rural district for the payment of a ratable proportionate cost of maintaining such school?"

This family and children were moved into this dwelling house in lieu of being placed in a County Home and therefore, neither the children nor their parents acquired any residence in this subdistrict and the County is liable for the cost of schooling of said children the same as if the children were located in the poor house in the subdistrict, and such is the opinion of this Department.

BOARD OF CONTROL: PRISONERS: INDETERMINATE SENTENCE: SECTION 13002, Code, 1931: Prisoner sentenced by court to 30 years of hard labor, should be accepted by warden, but the entry upon record or register of institution should show sentence for life which is maximum period, and warden should then call matter to court's attention in order to allow court opportunity of correcting error made.

July 11, 1934. *Board of Control, Des Moines, Iowa:* We have your request for opinion on the following proposition:

"A man plead guilty to the crime of entering a bank with intent to rob in violation of the provisions of Section 13092 of the Code. He was sentenced by the court to imprisonment in the penitentiary at hard labor for a term of thirty years. In view of the mandatory provisions of Section 13960 of the Code, being the indeterminate sentence provision, what should the warden of

the penitentiary do when the Sheriff presents himself to the warden and has with him a certified copy of the execution together with the body of the defendant?"

Section 13002 of the Code provides that the penalty shall be imprisonment in the penitentiary at hard labor for life or for any term less than ten years. However, the mandatory indeterminate sentence provides that when a prisoner over sixteen years of age is convicted of a felony, except treason or murder, that the court shall not fix the limit or duration of the sentence or confinement, but that the term of imprisonment shall not exceed the maximum term provided by law for the crime. The maximum term under Section 13002 is life and our Supreme Court in the case of State v. Draden, 199 Iowa, 231, held that the indeterminate sentence law applies to all crimes except murder and treason and that even though there is a particular sentence for the crime, the court shall not fix the limit or duration of imprisonment, as the Legislature did not intend to remove particular crimes from the provisions of the indeterminate sentence law.

In the case of Adams vs. Barr, 154 Iowa, 83, our Supreme Court held on page 86:

"By its terms it is provided, as we have already noted, that in imposing judgment of imprisonment, in the penitentiary in cases of the kind therein described, the court 'shall not fix the limit or duration of the same.' In other words, in such cases a judgment or sentence that the defendant 'be imprisoned in the penitentiary according to law' is all that is required, and whatever is added thereto is unauthorized and may be ignored as void or mere surplusage. No reference whatever need be or should be made to a minimum or maximum period. When the record shows the offense of which he has been convicted, and that he is adjudged to suffer imprisonment in the penitentiary, the statute controls the period of term of his restraint, and it is to this statute, and not to the mittimus, to which the warden must look to ascertain the period of time for which he may keep him in custody."

It is plain then that in such instance as you have described above, the warden should accept the prisoner, but the entry upon the record or register of the institution should show a sentence for life which is the maximum period, and the warden should then call the matter to the court's attention in order to allow the court the opportunity of correcting the error made, and such is the opinion of this Department.

OLD AGE ASSISTANCE ACT: SENATE FILE NO. 42 (CHAPTER 19), ACTS OF THE 45TH GENERAL ASSEMBLY IN EXTRA SESSION: SUPPLIES AND EQUIPMENT: The old age assistance commission should pay for said supplies and equipment out of their receipts.

July 11, 1934. *Executive Council, Des Moines, Iowa:* This will acknowledge receipt of your request of the tenth instant for the opinion of this Department on the following question:

The executive council is in receipt of a requisition from the old age assistance commission for supplies and equipment.

Should the executive council furnish and pay for such supplies and equipment or should the commission pay for them out of their receipts?

Section 302 of the 1931 Code of Iowa sets out the officers entitled to supplies and provides:

"The council shall, unless otherwise provided, furnish the following officers and departments with all articles and supplies required for the public use and necessary to enable them to perform the duties imposed upon them by law:"

And sets out a list of thirty-nine (39) offices. Said section further provides:

"This section shall not be construed to prevent the furnishing of supplies to

other officers who are entitled to receive them under other provisions of law."

This section of the Code was amended by the Forty-fifth General Assembly, in Section 32 of Chapter 4, relating to the Board of Audit, Budget Director and State Auditor merging duties with the State Comptroller.

An examination of Chapter 19, Acts of the Forty-fifth General Assembly in Extraordinary Session, fails to reveal any provision whereby the Old Age Assistance Commission would come under the provisions of Section 302 of the Code.

However, Section 34 of Chapter 19, of the act, provides as follows:

"There is hereby created a fund to be known as the Old Age Pension Fund to be administered by the Commission, the proceeds of which shall be used to pay the expenditures incurred under this act."

And then outlines the procedure to be used in the raising of the fund by taxation.

Section 40 of the act states:

"The sum of ten thousand dollars ($10,000.00) or so much thereof as may be found necessary, is hereby appropriated to the commission, out of any funds not otherwise appropriated for the purpose of carrying out the provisions of this act."

In accordance with the above, it would be the opinion of this Department, in the authority set out herein, in Section 34 of the act, in creating a fund to be known as the old age pension fund, that the commission, after using the ten thousand dollars ($10,000.00) appropriated, would have the right, besides the paying of pensions, to use that part of said fund which would be needed for administrative expense. The proper procedure to be followed would be for the Old Age Assistance Commission to estimate the amount necessary for administrative expense from the present date to and including June 30, 1935, in accordance with the provisions of the Comptroller's act, and to secure the approval of the comptroller for that amount and to have the same allocated in a separate fund to be used for this purpose. The procedure would be in like nature to that now used in administrative expenses incurred in the operation of the banking department, motor vehicle department and other departments which are self-supporting.

NOMINATION: CANDIDACY: A municipal court judge may seek nomination and election as district court judge, while holding office as municipal court judge.

July 10, 1934. *County Attorney, Des Moines, Iowa:* I have your request of July 9th for an opinion upon the following proposition:

"I am informed that the Republican District Judicial Convention for this district will assemble Thursday, July 12th, and nominate six Republicans as Judges of the District Court. As you no doubt know, Judge A. A. Herrick will not be a candidate. This will leave one vacancy to be filled by the District Judicial Convention, since all of the other five judges will again be candidates.

Judge Russell Jordan, who has been regularly elected and a qualified Judge of the Municipal Court and whose term of office expires in that capacity in April, 1936, may be one of several nominees. I therefore ask of your office, this question:

'Since he is Judge of the Municipal Court and acting in that capacity, can he be legally nominated by his friends as a Judge of the District Court?'"

Section 5 of Article V of the Constitution of the State of Iowa provides:

"District court and judge. Sec. 5. The District Court shall consist of a single judge, who shall be elected by the qualified electors of the district in which he resides. The Judge of the District Court shall hold his office for the

term of four years, and until his successor shall have been elected and qualified; and shall be ineligible to any other office, except that of Judge of the Supreme Court, during the term for which he was elected."

Section 10664 of the 1931 Code of Iowa provides as follows:

"Laws applicable—rules. All provisions of law relating to the district court and the judges and jurors thereof shall, so far as applicable and when not inconsistent with this chapter, apply to the municipal court and the judges thereof. The judges of the municipal court shall adopt and promulgate rules of practice, which shall conform, as nearly as may be, to the rules of the district court of the district in which said municipal court is located. If not established by statute or rule, the judge hearing the cause may prescribe the method of procedure."

The question for our determination is whether or not Section 5 of Article 5 of the Constitution of the State of Iowa is "a provision of law" within the meaning of Section 10664. In other words, did the Legislature, by the passage of Section 10664, and by the use of the following phrase, "all provisions of law relating to the district court and the judges" by this reference adopt Section 5 of Article 5 and incorporate the same in Section 10664? Does the phrase "all provisions of law" refer to the constitution and legislative enactments or does it refer only to the legislative enactments? We think that it was the intention of the Legislature to have this phrase refer to and apply to legislative enactments only.

In the United States the organic law is termed "the constitution" and the term "laws" generally designates statutes or legislative enactments in contradistinction to the constitution.

36 C. J. 964.
Bouvier L. D. (quoting Los Angeles Gas, etc. Co. vs. Los Angeles County, 21 Cal. A. 517, 132 Pac. 282, 283).
Thrailkill vs. Smith, 106 Ohio St. 1, 138 N. E. 532, 536.
State vs. Tingey, 24 Utah 225, 230, 67 Pac. 33.

Ordinarily, "law" does not include constitutional amendments.

36 C. J. 964.
Hildreth vs. Taylor, 117 Ark. 465, 175 S. W. 40, 44.
Warfield vs. Vandiver, 101 Md. 78, 60 A. 538, 540.
State vs. Silver Bow County, 34 Mont. 426, 87 Pac. 450, 451.

It will be apparent from a close scrutiny of the Constitution of the State of Iowa that the word "law" is used in the Constitution in many instances where the same can only refer to legislative enactments. Section 21 of Article I of the Constitution of Iowa states:

"No bill of attainder, ex post facto law, or law impairing the obligation of contracts, shall ever be passed."

Section 1 of Article III of the Iowa Constitution provides that the style of every law shall be:

"Be It Enacted by the General Assembly of the State of Iowa."

Section 7 of Article III of the Iowa Constitution provides:

"* * * * A contested election shall be determined in such manner as shall be directed by law."

Section 20 of Article III of the Iowa Constitution provides that whether a state officer be convicted or acquitted on impeachment proceedings that he shall nevertheless be "liable to indictment, trial, and punishment, according to law."

Section 25 of Article III of the State Constitution provides that after the first meeting of the General Assembly "they shall receive such compensation as shall be fixed by law."

Section 10 of Article IV of the Iowa Constitution provides:

"When any office shall, from any cause, become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have power to fill such vacancy, * * *"

Section 16 of Article IV provides:

"The Governor * * * shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law."

Section 22 of Article IV provides that the Secretary of State, Auditor of State, and Treasurer of State "shall perform such duties as may be required by law."

In addition to the foregoing quoted sections of the Constitution, there are other similar references which clearly show that the framers of our State Constitution intended to use the term "law" in contradistinction to the constitution. Although the term "law" in its broadest sense includes constitutions, it is clear from its connection in our state constitution that it was not used in its general sense but merely as a designation of "statutory law." In the case of Miller vs. Spencer 14 Utah 273, 277, the Supreme Court of Utah said as follows:

"A word repeatedly used in a statute will be presumed to bear the same meaning throughout the statute unless there is something to show that there is another meaning intended."

In the case of State vs. Tingey 24 Utah 225, 67 Pac. 33, the Supreme Court of Utah held that the rule thus announced in Miller vs. Spencer (supra) is also applicable in construing a constitution. There is nothing in our constitution or in the wording of Section 10664 of the 1931 Code of Iowa which would show a different use or different meaning for the term "law."

It is also worthy of consideration that the Municipal Court is not a constitutional office. Our State Constitution recognizes and provides for three types of courts, first, Justice Courts (Sec. 11, Article I) (Sec. 1, Article XI); second, District Courts and the Supreme Court (Article V of the State Constitution). The Municipal Court is purely the result of legislative enactment. It is apparent that it was the intention of the Legislature in the passage of Section 10664 of the 1931 Code of Iowa to make the legislative enactment applicable to district courts apply to the municipal court. There is no legislative enactment which would disqualify a judge of the municipal court from being a candidate during the term of his office for the office of the Judge of the District Court. The object of the framers of the State Constitution in the adoption of Section 5 of Article V of the Constitution was to keep judges from aspiring to any political office except a higher judicial one. Therefore, the object of this constitutional provision will not be defeated in any manner by a judge of the municipal court in aspiring for the office of judge of the district court for the term during which he was elected.

It is therefore the opinion of this department that the judge of the municipal court mentioned by you in your above request is eligible to seek the office of the judge of the district court and may be nominated and elected by his friends if they so desire.

PROPRIETARY MEDICINE: LABEL TRADEMARK: Placing a trademark or label on a package containing medicine would not bring the medicine within class of proprietary medicine.

July 12, 1934. *Iowa Pharmacy Examiners, Des Moines, Iowa:* You submit to us the following question:

"Would trademarking a label on a package of medicine be sufficient to bring

the same within the meaning of a proprietary medicine as used in Paragraph 4 of Section 2579, Code, 1931, when the ingredients are U. S. P. products and the quantity of each ingredient appears on the package?"

Section 2578 of the Code is as follows:

"2578. Persons engaged in practice of pharmacy. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of pharmacy:

1. Persons who engage in the business of selling, or offering or exposing for sale, drugs and medicines at retail.

2. Persons who compound or dispense drugs and medicines or fill the prescriptions of licensed physicians and surgeons, dentists, or veterinarians."

Section 2579 provides that no section in Chapter 123 of the Code relating to the practice of pharmacy shall include persons who sell, offer or expose for sale proprietary medicines or domestic remedies which are not in themselves poisonous or in violation of the law relative to intoxicating liquors. Under Section 2579 persons who sell proprietary medicines or domestic remedies which are not in themselves poisonous and which do not violate the law relative to intoxicating liquors are not engaged in the practice of pharmacy.

The question now presented is whether trademarking a label on a package of medicine is sufficient to make it a proprietary medicine which may be sold by persons other than licensed pharmacists.

It is the opinion of this office that this question must be answered in the negative. In other words, trademarking a label on a package of medicine is not sufficient to make it a proprietary medicine within the meaning of Paragraph 4 of Section 2579 of the Code of Iowa.

In the case of State vs. Jewett Market Co., 228 N. W., 288, in an opinion written by Mr. Justice Faville, our Court said:

"It is contended that Aspirin comes within the exception of paragraph 4 of Section 2579 of the Code, in that it is a proprietary medicine and hence, may be sold by the appellant as such. An expert witness testified in this case that 'a proprietary medicine is a medicine which has a secret formula'."

In the same opinion the Court further states:

"In State vs. Zotalis, 214 N. W., 766, the Supreme Court of Minnesota said: 'Aspirin is a coal tar product commonly kept in drugstores and is used and sold for medical purposes. It is a drug or medicine within the statute. It is not a proprietary or patent medicine.' The record shows that Aspirin was originally a proprietary medicine. It was discovered in Germany; its formula was secret and the product was originally made only by the possessor of this secret formula. However, the formula has been discovered and Aspirin is now made by different pharmaceutical and chemical manufacturers and it has entirely ceased to be a proprietary medicine. Therefore, it does not come within the exception noted in the statute referring to proprietary medicines."

The Court in this case holds that the appellant was engaged in the business of selling, offering, or exposing for sale Aspirin, which is a drug and which is not a proprietary medicine. If a proprietary medicine is a medicine which has a secret formula, then something more is necessary than merely trademarking the label on a package containing such medicine. The formula must be secret. If the formula is not secret, then the medicine is not a proprietary medicine.

Webster's Dictionary defines "proprietary" thus:

"Belonging or pertaining to a proprietor,"

"Proprietor" being defined:

"One who has the legal right or exclusive title to anything, whether in possession or not; an owner."

For other definitions see State vs. Jewett Market Co., supra.

If a proprietary medicine has a label on the package in which it is contained, it is still a proprietary medicine and would be within the exception contained in Paragraph 4 of Section 2579. Registering a trademark on a package containing a medicine which was not a proprietary medicine would not be sufficient to bring it within the exception. A trademark or trade-name serves merely the purpose of identifying the goods of a particular dealer. Placing a particular name, trademark, or brand on a package of medicine is not sufficient to bring it within the exceptions contained in Section 2579 of the Code.

FOREIGN CORPORATIONS: RENEWAL: Foreign corporations are subject to restrictions and renewals the same as Iowa corporations.

July 12, 1934. *Secretary of State, Des Moines, Iowa:* We have your favor of the 7th instant in which you request the opinion of this Department on the following question:

"Is a foreign corporation that has perpetual existence and qualifies with this department, entitled to exist the entire period for which it is incorporated or for only twenty years; also, is it allowed the same time to requalify that an Iowa corporation has to renew?"

Section 8432 provides in part as follows:

"* * * * all foreign corporations and the officers and agents thereof doing business in this state, shall be subject to the liabilities, restrictions, and duties that are or may be imposed upon corporations of like character organized under the general laws of this state and shall have no other or greater powers."

Corporations organized under the general laws of this state have certain powers granted by the laws of this state and no other powers. Many of these powers are expressly named in the statutes but would not exist except for the statutory law of the state.

Section 8364 limits the period during which corporations may endure without renewal to fifty years in the case of steam railways, interurban and street railways, savings banks and life insurance companies. All corporations organized for other purposes are limited to twenty years. Such corporations may be renewed from time to time for the same or shorter periods within three months before or after the time for the termination thereof if the majority of the votes cast at any regular or special election called for that purpose be in favor of such renewal, etc.

If Iowa corporations are subject to the restriction that they shall exist for only twenty years and must then renew if they are to continue beyond that period, foreign corporations should be subject to the same restriction. If they are not required to renew and pay the same fees for the same periods as Iowa corporations, then such foreign corporations doing business in this state are not subject to all of the liabilities, restrictions and duties that are or may be imposed on corporations of like character organized under the general laws of this state.

It is our opinion that Section 8432 must be given full force and effect and that a foreign corporation that has perpetual existence in the state in which it was organized and which has qualified in the office of the Secretary of State of this state, is not entitled to exist for the entire period for which it was incorporated but is limited by the restriction to which Iowa corporations are subject under Sections 8364 and 8365, limiting the legal life of such corporations with certain exceptions, to twenty years with the right to renew as provided by law.

FISH AND GAME COMMISSION: WELLS: STORM LAKE, IOWA: Is it possible to grant the city of Storm Lake an easement on the ground for use, as above stated, digging wells to relieve the water situation?

July 13, 1934. *Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your request of the tenth instant for the opinion of this Department on the following question:

The fish and game commission has a game refuge just west of Storm Lake in Buena Vista county upon land, the fee title of which is in the State of Iowa. The city of Storm Lake, prior to this time, has been getting its city water's supply from the lake and, therefore, has lowered the lake level considerably, making the water questionable as to its condition for use. The city has also diverted its sewage out of the lake and are now making plans for digging city wells to relieve the present water situation. The best location which the city has found, and the only one which seems to be satisfactory for the size well they will need, is located on the state fish and game refuge grounds at the west end of the lake. In order to put down the well and pumping plant, it is necessary for them to secure the land owned by the State of Iowa.

Is it possible to grant the city of Storm Lake an easement on the ground for use, as above stated?

The city of Storm Lake has put down its test wells and is exceedingly anxious to get the matter concluded at once.

Please be advised that it would be the opinion of this Department, in a matter such as outlined, which deals with the public health and welfare of the residents of the city of Storm Lake, that it would be proper for your commission to adopt a resolution and make application to the executive council of the State of Iowa to authorize the issuance of a lease or an easement to the city of Storm Lake for the purpose outlined herein. In such a resolution, it might also be well to include a provision whereby the city of Storm Lake would agree to furnish water to the state at the fish refuge on which the well is to be located. You will note that Subsection 3 of Section 1703-d12 of the 1931 Code of Iowa provides as follows:

"Extend and consolidate lands or waters suitable for the above purposes by exchange for other lands or waters and to purchase, erect and maintain buildings necessary to the work of the commission;"

In the event that the executive council would act favorably on the resolution, it could authorize the governor and the secretary of state to execute a lease or an easement to the city of Storm Lake for the purpose of securing a water supply.

BEER BILL: HOUSE FILE NO. 336 (CHAPTER 25), ACTS, 45TH GENERAL ASSEMBLY: Beer, under above law, is not an intoxicating beverage.

July 13, 1934. *Commissioner of Labor, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twelfth instant in which you request the opinion of this Department on the following question:

In several instances in Iowa, employees of railroad companies are on leave of absence because of seniority rights or indefinite "lay-offs" and in several instances, these men engage in various lines of business, among which is the restaurant business and beer is sold in the restaurants through a permit granted under the Iowa beer law, Chapter 25, Acts of the Forty-fifth General Assembly in Extraordinary Session.

Several railroad companies have issued a blanket order that all rights held by railroad employees are lost if the employees engage in the sale of intoxicating liquors.

In the sale of beer, as allowed by the Iowa statutes, is such beer an intoxicating beverage?

In the original beer act passed by the Forty-fifth General Assembly, known

as Chapter 37 of said acts, said chapter is entitled *Nonintoxicating Liquors. Beer and Other Malt Liquors.* The act itself states that it amends Sections 1923, 2072, 2130 and 2136 of the Code, 1931, all relating to intoxicating liquors and grants the right to certain political municipal subdivisions of the state to issue permits for the sale of certain nonintoxicating liquors and also grants the right to the treasurer of state to issue permits for the manufacture and sale of beer.

This chapter of the acts of the Forty-fifth General Assembly was amended by Chapter 25 of the Acts of the Forty-fifth General Assembly in Extraordinary Session and said chapter states that it is an act to amend Sections 1923, 2072, 2130 and 2136, all relating to intoxicating liquors and to repeal Chapter 38 of the acts of the Forty-fifth General Assembly and to amend Chapter 37, acts of the Forty-fifth General Assembly, relating to the manufacture, sale and distribution of beer. Section 1 of Chapter 25 provides as follows:

"Section 1. That Section one thousand nine hundred twenty-three (1923) of the Code of Iowa, 1931, be and the same is hereby amended by striking the period after the word 'whatever' in line 6 thereof and inserting in lieu the following:

'provided, however, that the words 'liquor' or 'intoxicating liquor' wherever used in title six (6) of the Code of Iowa, 1931, shall not be construed to include beer, ale, porter, stout, or any other malt liquor containing not more than four (4) per centum of alcohol by weight.'"

Therefore, it is the opinion of this Department that the Code of Iowa, 1931, defines liquor and intoxicating liquor in Section 1923 and that the present beer law, in Section 1 of Chapter 25, Acts of the Forty-fifth General Assembly in Extraordinary Session, states that the words "liquor" or "intoxicating liquor" shall not be construed to include beer, ale, porter, stout, or any other malt liquor containing not more than four (4) per centum of alcohol by weight.

This legislative enactment presents the intent of the Legislature clearly to the effct that beer, ale, porter, stout, or any other malt liquor containing not more than four (4) per centum of alcohol by weight, is not intoxicating.

LABOR: COOPERATION WITH NRA AUTHORITIES: The Bureau of Labor may under Chapter 75 IOWA CODE, 1931, and Chapter 16, Acts of 45th General Assembly, Extra Session, gather information and impart same to the NRA authorities for the purpose of enforcing Public Act No. 30, and Public Act No. 67, commonly known as "NRA."

July 13, 1934. *Labor Commissioner, Des Moines, Iowa:* Your communication under date of July 2nd addressed to the Attorney General has been handed to the undersigned for attention and answer.

Because of the importance of the matter we quote your communication in its entirety.

"Mr. J. J. Hughes of the NRA Compliance Board has made a request to this department for the aid of the inspectors in securing certain information from employers of the state on whom our inspectors call in the course of their duties.

Mr. Hughes desires information as to the wages and hours of employment of concerns visited by the inspectors to determine whether or not such firms are complying with the NRA Code applicable to their industry.

With this in mind, we submit the following questions:

1. Under Chapter 75, Sections 1518, 1519, 1521, and 1522, may this department secure the information desired from employers in Iowa, and transmit that information to the NRA Compliance Board for such use as they care to make of it?

2. Does Paragraph 3 of Section 1525 apply in the securing or disclosing of the information requested by Mr. Hughes?

It is the desire of this department to cooperate to the fullest extent with NRA authorities, but, in so doing, we do not want to assume authority that is not granted under the statute."

Chapter 75 entitled "Bureau of Labor," as amended by Chapter 16, Acts of the Forty-fifth Extra General Assembly, outlines the powers and duties of that Department. Section 1518 of Chapter 75 deals generally with the right of the Labor Commissioner and his inspectors to enter premises of mills, work shops, mines, stores, etc. for the purpose of gathering facts and statistics such as contemplated by the chapter. Section 1519 deals generally with the power of the Labor Commissioner and his deputy to issue subpoenas, administer oaths, and take testimony in all matters relating to the duties of their office. Section 1521 commands the industries designated in Section 1518 to make reports to the Bureau upon blanks furnished by the commissioner and Section 1522 forbids the commissioner from disclosing the private or personal affairs of any such firms, persons, or corporations in the reports or information given by them.

Paragraph 3 of Section 1525 referred to in question No. 2 forbids any officer or employee of the Bureau of Labor to make an unlawful use of the names or information obtained by virtue of his office.

The above code sections, however, are not all embracive nor all controlling. Reference must be also had to part of Paragraph 3 of Section 1513 which outlines the duties of the Commissioner of Labor and charges him with this obligation:

"He shall by correspondence with interested parties in other parts of the United States, impart to them such information as may tend to induce the location of mechanical and producing plants within the state, together with such other information as shall tend to increase the productions, and consequent employment of producers."

On the 6th day of June, 1933, the 73d Congress approved an act (Public Act No. 30) entitled "An act to provide for the establishment of a national employment system and for cooperation with the states in the promotion of such system and for other purposes." This act created an additional bureau in the national department of labor known as "The United States Employment Service." Under it the province and duty of the bureau was to promote and develop a national system of employment systems to maintain a veteran's service, a farm placement service, a public employment service, public employment systems in the several states and political subdivisions thereof, etc. It made provision for the organization of state advisory councils under the direction of the Federal Advisory Council composed of men and women representing employers and employees in equal number and the public.

Public Act No. 30 was expressly adopted by Chapter 16, House File No. 271, of the Acts of the Forty-fifth General Assembly, in extraordinary session, Section 1 of Chapter 16 being as follows:

"The State of Iowa hereby accepts the provisions of the act of congress approved June 6, 1933, entitled, 'An act to provide for the establishment of a national employment system and for cooperation with the states in the promotion of such system, and for other purposes.'"

Section 2 of said chapter is as follows:

"The state bureau of labor is hereby designated and constituted the agency of the State of Iowa for the purposes of such act, with full power to cooperate with all authorities of the United States having powers or duties under such act and to do and perform all things necessary to secure to the State of Iowa

the benefits of such act in the promotion and maintenance of a system of public employment offices."

House File No. 271, hereinbefore referred to, was approved on the 10th day of January, 1934.

On the 16th day of June, 1933, Public Act No. 67 entitled "An act to encourage national industrial recovery to foster fair competition and to provide for the construction of certain useful public works and for other purposes'" was enacted by the Congress of the United States. This act is generally and more popularly known as the "National Recovery Act" or, as more often abbreviated, "N. R. A." In the enactment of this act, it was the policy of congress to remove, as far as possible, obstructions to interstate and foreign commerce, provide for the general welfare by promoting the organization of industries, to induce and maintain a united action of labor, to eliminate unfair competition, to promote the productive capacity of industries, to increase the consumption of industrial and agricultural products by increasing purchasing power, relieve unemployment, improve standards of labor, and otherwise rehabilitate, etc. Public Act No. 67 was a corollary and consequent of Public Act No. 30. Both sought by different methods to attain more or less the same ultimate purpose. Both acts contemplated the active cooperation of the states of the Union to vitalize and make them effective. The states generally and Iowa included have accepted the benefits of both Public Act No. 30 and Public Act No. 67. Under Chapter 16, Acts of the Forty-fifth Extra General Assembly, Public Act No. 30 received legislative recommendation and approval. Under Subdivision 3 of Section 1513 of Chapter 75 outlining the duties and powers of the Bureau of Labor, the Commissioner was and is authorized to impart such information received in the discharge of his duties as to induce the location of mechanical and producing plants within the state and to increase the productions and employment of producers. This is wholly and entirely sympathetic to and a corollary of Public Act No. 67. We reach the conclusion therefore that both by implication and by legislative expression, the Commissioner of Labor and his deputy and investigators may cooperate with N. R. A. authorities in gathering the information referred to in your letter.

It is, therefore, the ruling of this department that in cooperating to the extent and in the manner outlined in your letter with N. R. A. authorities that the same would not constitute any violation of the provisions of the Iowa statutes.

BAND: MUNICIPAL BAND: A city that has voted a band tax under Chapter 296 of the Iowa Code, 1931, and amendment thereto and has thus provided for the maintenance and employment of a band, may not and cannot maintain more than one band and may not officially authorize more than one band as its municipal band.

July 14, 1934. We have your request for an opinion from this department on the following question:

"Can a city that has already voted a band tax under Chapter 296 of the 1931 Code of Iowa and amendment thereto provide for the maintenance or employment of more than one band for musical purposes out of the proceeds of such band tax?"

Your attention is called to the specific wording of the Iowa statutes that are applicable to this question. You will note that Section 5835 of the 1931 Code of Iowa provides that this levy may be made for the purpose of "providing for the maintenance or employment of *a band* for musical purposes." In Section 5338 of the 1931 Code of Iowa we again find the legislature using these

words, "and council or commission shall then levy a tax sufficient to support or employ *such band.*" In Section 5839 of the 1931 Code of Iowa appears the following phrase: "Shall the power to levy a tax for the maitenance or employment of *a band* be cancelled?" Section 5840 of the 1931 Code of Iowa contains the following language, "all funds derived from said levy shall be expended as set out in Section 5835 by the council or commission."

From a perusal of the foregoing statutes applicable, it is apparent that it was the legislative intent to provide for the purpose of raising funds for the maintenance or employment of a band. It appears that the legislative intent was to have the phrase "a band" mean the singular rather than the plural. While it is true that paragraph 3 of Section 63 of the 1931 Code of Iowa announces the rule to be that "words importing the singular number may be extended to include several persons or things" still, in order to determine the legislative intent, all relative parts of the act or acts relating thereto must be considered. Had the legislature intended to provide for the support and maintenance of more than one band they have so stated in their acts. The use of the phrase, "a band," and a further reference in the above chapter to "such band" show that it was the intent to provide for the support and maintenance of only one band. Any other construction would defeat the express legislative intent.

Therefore, it is the opinion of this department that a city that has voted a band tax under Chapter 296 of the 1931 Code of Iowa and amendments thereto and has thus provided for the maintenance or employment of a band for musical purposes could not and should not attempt to maintain more than one band and that only one band may be officially authorized by such city as its municipal band.

BANKS AND BANKING: TRUST FUNDS: Trustees under the plan of reorganization of banks under Senate File 483, deposit the collections in an account in their own bank, and such would not constitute a trust fund, but a mere deposit.

July 17, 1934. *Banking Department, Des Moines, Iowa:* We have your request for opinion on the following proposition:

"You are familiar with the plan of reorganizing banks under Senate File 483, and understand that in many of these banks a trust has been created by depositors' agreements, and in practically all cases the board of directors of the reorganized bank are named as trustees.

In all instances, these trustees deposit their collections in an account in their own bank, and the question has been raised as to whether or not such deposits would be legal trust funds in the bank.

The banks are required in their published statements to show the total amount of trust funds separate from other deposits. We would appreciate your furnishing us with an opinion as to whether or not the deposits above referred to should be so segregated and reported."

In the case of Townsend vs. Andrew, 206 Iowa, 1006, the appellant had received certain money from a Mrs. Kalar to be held by him for her use. He consulted the president of a bank as to the proper method of so holding it for her and the president suggested the method. Before the full amount of the money was paid out, the bank went into receivership and the appellant claims the trust on the theory that the president of the bank had knowledge of the trust, character of the funds and knew that the money was only in the bank for safekeeping and until such time as it would be returned to Mrs. Kalar pur-

suant to the arrangement. There was no question but what the appellant was a trustee for Mrs. Kalar, but in regard to this, our Supreme Court said:

"The mere fact that the funds were trust funds in his hands at the time of his deposit, and that this fact was known to the president of the bank, would not in itself constitute the bank a trustee of the funds. A trustee, in the exercise of diligence, may lawfully deposit trust funds in a bank. But such a deposit becomes a general one, notwithstanding knowledge of their trust character by the bank. Such was our holding in an early day. Officer vs. Officer, 120 Iowa, 389. This holding has been repeatedly followed in our later cases. In order to constitute the bank a trustee as to such deposit, it is essential to show that it assumed the obligation of a bailee or agent, either of the depositor or of the cestui que trust. In the case at bar, the bank assumed no obligation to any third party, nor undertook any duty in relation thereto. It did not promise to apply the money in any particular way, other than to pay the same upon the order of the depositor."

Also in the case of Andrew vs. County Savings Bank of Algona, 209 Iowa, 271, money was placed in the bank by the trustee. The records show that there have been four withdrawals, being $25.00 per year, for the purpose for which the trust was created. The question was as to the relationship between the trustee and the bank, and the court said:

"The bank acquired no special control over the fund as a trust fund, nor was it authorized to pay it out without any order from the society * * * * The amount was subject to checks drawn by the treasurer of the society and the bank had no right or authority to refuse payment thereof. The account, therefore, as between the society and the bank was a general account, and their relationship was that of creditor and debtor only. None of the elements of a trust relationship between the society and the bank existed."

Such is the situation you have in your reorganization banks and the mere fact that the trust is created by the bank and that officers and directors of the bank are trustees does not in any wise change the situation, for the bank is under no obligation of any kind or character as to the investment of the funds or otherwise, for the money is merely placed therein by the trustees as it would be placed by any other depositor and is subject to be withdrawn by the trustees and the bank has no authority to in any wise dispute the right of the trustees to withdraw the money or to exercise any control over it that they choose, for the trust relationship exists between the trustees and the holders of the trust certificates as against this segregated fund.

It is, therefore, the opinion of this department that when the trustees under such plan of reorganization deposit the collections in an account in their own bank, that such would not constitute a trust fund, but a mere deposit.

SCHOOLS: RE: LEVY FOR BUILDING OF SCHOOL HOUSE: Electors in township voted for levy in 1926 for $5,800 each year for erection of two new school houses yearly until all completed. There were nine subdistricts. Eight school houses completed four years ago. County Attorney held that it again be submitted to vote of people of entire township as to whether to erect a school in 9th subdistrict. Levy defeated 5 to 1. Irrespective of latter vote, may a levy be made and school house erected pursuant to vote of 1926?

July 19, 1934. *County Attorney, Sac City, Iowa:* We have your request for opinion on the following proposition:

The question was submitted to the electors of an entire township in 1926 as to whether there could be a levy of $5,800 each year for the erection of two new school houses yearly in the township until all are completed. There were nine subdistricts in the township at that time, but no school was at any one of the subdistricts for at least eight years prior to the election, because the number of children in the subdistrict was insufficient and there has been no school in that subdistrict since that time, but this fall presumably there will

be enough pupils in the subdistrict that a school may be legally upheld. In view of the fact that the eight school houses have been completed four years ago and there has been a lapse of four years since the levy under the original vote when the question arose as to the right to erect a school pursuant to the authority given in 1926 by the electors, I held that it would again have to be submitted to a vote of the people of the entire township as to whether to erect a school in the 9th subdistrict. On such a submission, the building of the 9th school house and levy for that purpose was defeated about five to one. Irrespective of the latter vote, may a levy be made and school house erected pursuant to the vote of 1926?

It is the opinion of this office that the second election having been held without question and without anyone attempting to in any wise question it by an action to enjoin the election, that the vote of the voters on the proposition wherein it was defeated five to one, constituted a recission of any right or authority given under the former vote, and that therefore, a levy cannot be made for the erection of such school building.

RETAIL SALES TAX: UNIVERSITY OF IOWA: RELATIVE TO CAFETERIA AND DINING ROOMS FOR STUDENTS: Must State Educational Institutions collect tax from students who eat in dining rooms and cafeteria or from persons who are not students who eat there, etc.?

July 19, 1934. *Iowa State Board of Education, Des Moines, Iowa:* We have your request for opinion on the following proposition:

"The State University of Iowa and Iowa State Teachers College maintains a cafeteria and dining room for students. I shall appreciate your answering the following questions:

1. Must the state educational institutions collect a tax on meals from students who purchase them in a cafeteria?
2. Must the state educational institution collect a tax on meals served to students who eat their meals regularly in a dining room and pay by the week or month?
3. Must the state educational institutions collect a tax from persons who are not students in the institution but who purchase meals in the cafeteria?
4. Must the state educational institutions collect the sales tax from private persons, the consumers to whom products may be sold?
5. Must the state educational institutions collect the sales tax from retailers, such as grocers to whom products may be sold?"

Rule No. 42 of the State Board of Assessment and Review provides in part as follows:

"Public school boards, high school boards, churches, religious organizations, colleges, universities or private schools operating lunch room, cafeteria or dining rooms for the exclusive purpose of providing students with meals, are deemed not to be engaged in the business of selling tangible personal property at retail, and will not be held liable for payment of sales tax with respect to such receipts."

We presume that these cafeterias or dining rooms that you have inquired about, come within this category and therefore, answer your questions, as follows:

1. No.
2. No.
3. Yes.
4. Yes.
5. As we understand, you are selling to a retailer and you are therefore not engaged in the business of selling that particular property at retail and you will not be required to collect the tax from the retailer as he will collect the tax from the consumer.

SCHOOLS: RESIDENCE: TUITION: Residence of parent or guardian is residence of child. Therefore, if guardianship is in good faith and residence in good faith, then residence of ward would be that of the guardian.

July 19, 1934. *Department of Public Instruction, Des Moines, Iowa:* We have your request for opinion on the following proposition:

"An orphan boy, a minor of school age, works for his board and room and lives in the home of a non-relative who is an actual resident of school district X. After this boy began to make his home with this non-relative in district X, a guardian of his person, who is not a relative, was appointed which guardian lives in district Y. The boy attends high school in district Y, but does not live in that district and never has.

Question 1. Is this boy entitled to free school privileges in district Y by virtue of the fact that his guardian of person lives in district Y, even though the boy does not live in district Y and never has, or is this boy entitled to free high school privileges in district X by virtue of the fact that he makes his home, the only home he has, with a non-relative living in district X?

Question 2. If this boy is not entitled to free school privileges in district Y, but should attend high school in that district, would his guardian under the provisions of Section 4269, be permitted to deduct from the tuition this boy is required to pay in district Y, the school taxes that the guardian pays in district Y?"

The question of residence is largely a matter of intention. Under the provisions of Section 4273 of the Code, schools shall be free of tuition to all actual residents, and it is the law that the residence of parent or guardian is the residence of the child. This being true, if the guardianship is in good faith and the residence of the guardian in good faith, then the residence of the ward would be that of the guardian. Our Supreme Court in the case of In Re: Waite, 180 N. W., 159, said at page 161:

"The guardian of an infant stands in loco parentis and may, if for the best interests of the infant, change his residence from one state to another."

Under the provisions of Section 4410 of the Code, any person having a child under his control, is obliged to send it to school. The question of good faith is something that we cannot determine, as that is a question of fact, but if the guardian and minor are acting in good faith and the child is only temporarily in district X, and both he and the guardian intend that district Y shall be his residence and shall remain his residence, then the child is a resident of district Y because his guardian is, and this is true even though the child never actually lived in district Y, and he would be entitled to free school privileges in district Y.

EXEMPTIONS TO DEBTORS: CHAPTER 177, 45TH GENERAL ASSEMBLY, SECTION 11760, CODE, 1931. Total additional exemptions cannot exceed aggregate value of $500, and household goods must be considered part of such total and not in addition thereto.

July 19, 1934. *Banking Department, Des Moines, Iowa:* We have your letter of recent date in regard to the construction of Chapter 177, Acts of the 45th General Assembly, and you ask what additional exemptions this gives to the debtor.

This act of the Legislature amended Section 11760 of the Code, under which the debtor is given certain specific exemptions. Section 1 of Chapter 177, 45th General Assembly, provides as follows:

"In addition to the exemptions provided by section eleven thousand seven hundred and sixty (11760) of the Code, 1931, if a debtor is a resident of this state, and the head of a family, he may hold exempt from general execution, until March 1, 1935, live stock, farm products and/or farming utensils and machinery, or other property, household goods of his own selection not exceeding in value the sum of one hundred dollars ($100.00) whether said exemption be waived or not by such debtor, all of his own selection, in an aggregate value of not to exceed five hundred dollars ($500.00)."

It is our opinion that the total additional exemptions cannot exceed the aggregate value of $500 and this $500 may consist entirely of live stock, farm products, farming utensils and machinery or other property, but it cannot exceed household goods in excess of $100.00. In other words, the total additional exemption provided for is an aggregate value of $500 and the household goods must be considered a part of such total aggregate value and not an addition thereto. For example, if household goods in the value of $100 were selected, then the debtor would only be entitled to $400 addition to other exemptions provided for in the act. You understand that this is in addition to the regular exemptions under Section 11760 of the Code and is only an emergency measure which is to expire March 1, 1935.

SECURITIES: Securities registered by notification as per Section 8581-c7 of the 1931 Code need not be re-registered by qualification in view of the repeal of Section 8581-c7 by the recent legislature, unless the secretary of state would choose to proceed as provided under Section 8581-c10 of the 1931 Code.

July 20, 1934. *Superintendent of Securities, Des Moines, Iowa:* We have received your request of recent date for an opinion upon the question of whether or not securities previously registered by notification must be re-registered by qualification in view of the repeal of Section 8581-c7 of the Code of Iowa, 1931.

It is our opinion that securities formerly registered by notification need not be re-registered by qualification. Section 8581-c7 of the Code of Iowa, 1931, has been repealed. That section provided for registration of securities by notification. Once registered as provided by law, they need not be re-registered. The statute repealing the code section above mentioned did not, by its terms, provide that securities previously registered by notification should be registered by qualification under the law as amended. Code of Iowa, 1931, Section 8581-c10 provides the procedure or method for disqualifying securities previously registered. Therefore, it would appear that the legislature intended that securities previously registered by notification would still be qualified unless the secretary of state, acting through your department, should proceed as provided by Section 8581-c10.

SECURITIES: APPROVAL OF STOCK EXCHANGES ON WHICH SECURITIES MAY BE SOLD EXEMPT FROM THE IOWA SECURITIES LAW: Under Section 2 of Senate File 227 of the Acts of the 45th General Assembly, Extra Session, it will be necessary for the New York, Boston, and Chicago, and other exchanges which have not had the *specific* approval of the Secretary of State to have same before securities sold on those exchanges are exempt from the Iowa Securities Act. Before this enactment, no specific approval was necessary.

July 20, 1934. *Superintendent of Securities, Des Moines, Iowa:* We have received your request for our opinion on the question of whether or not it is necessary to re-approve or approve the New York, Chicago, and Boston stock exchanges in order for the exemption to be effective as provided by Senate File 227 of the Acts of the Forty-fifth General Assembly, Extra Session, also known as Chapter 106 of the Laws of the Forty-fifth General Assembly, Extra Session.

The particular section involved in the above question is subsection f of Section 8581-c4 of the Code of Iowa, 1931, which was amended in the extraordinary session of the legislature. It reads as follows:

"f. Securities appearing in any list of securities dealt in on the New York, Boston or Chicago stock exchange or on any other recognized and responsible

stock exchange which has been previously approved by the secretary of state and which securities have been so listed pursuant to official authorization by such exchange, and also all securities senior to, or on a parity with any securities so listed, or represented by subscription rights which have been so listed, or evidences of indebtedness guaranteed by companies any stock of which is so listed, such securities to be exempt only so long as such listing shall remain in effect. The secretary of state shall have power at any time to withdraw approval theretofore granted by him to any exchange, and thereupon no security listed on such exchange, shall be longer entitled to the benefit of such exemption."

Subsection f of Section 8581-c4 of the Code of Iowa, 1931, was amended by Senate File 227 to read:

"f. Securities appearing in any list of securities dealt in on any recognized and responsible stock exchange which has been previously approved by the Secretary of State and which securities have been so listed and dealt in on said exchange pursuant to the official authorization by such exchange, and also all securities senior to or on a parity with any security so listed, or represented by subscription rights which have been so listed, or evidences of indebtedness guaranteed by companies any stock of which is so listed, such securities to be exempt only so long as such listing shall remain in effect. If, after application by any recognized and responsible stock exchange requesting that exemption be granted to it, the applicant shall fail to convince the Secretary of State that it is entitled to such exemption, it is hereby provided that no order of refusal shall be entered until the applicant has been given due notice of not less than twenty (20) days and a hearing on the reasons for such refusal. The Secretary of State shall have power at any time to withdraw approval theretofore granted by him to any exchange, and thereupon no security listed on such exchange shall be longer entitled to the benefit of such exemption only after due notice of not less than twenty (20) days and a copy of the grounds upon which withdrawal was based has been sent by registered mail to the main office of the exchange, citing it to appear at a regularly held hearing and to show cause why the exemption theretofore granted to the exchange should not be withdrawn. The Secretary of State shall have the power and authority at any time after twenty (20) days' notice and opportunity for hearing has been given to the exchange, and issuer of the security involved, by registered mail, to withdraw from the exemption of any such security listed on one or more of the exchanges that had previously been granted an exemption, when, in his opinion, the further sale of the security would work a fraud. Thereafter such security shall not be entitled to the benefit of the exemption except upon the further written order of the Secretary of State."

Before the amendment, the statute provided that securities sold on the New York, Chicago and Boston stock exchanges were exempt from the provisions of the Iowa Securities Act. As amended, it is left to the discretion of the Secretary of State to grant or withhold the exemption of securities sold on exchanges. It is necessary, under the statute, for an exchange which desires to execute an exemption for the securities listed on that exchange to make an application to the Secretary of State for an approval of the exchange. The original statute exempted securities listed on the three exchanges mentioned above without application to the Secretary of State. If there has been no specific and express approval of those exchanges heretofore by the Secretary of State, as prescribed by statute, it would appear that it is now necessary under Section 2 of Senate File 227 of the Acts of the Forty-fifth General Assembly, Extra Session, for the New York, Chicago, and Boston stock exchanges to file application for approval.

The principal change in the statute made by the amendment is that a method for holding hearings and for refusing and withdrawing approval of exchanges

is provided. If exchanges, other than the New York, Chicago and Boston exchanges, have previously been approved, it would not appear to be necessary for them to file a new application under the amendment. If the Secretary of State has issued an approval to the New York, Boston and Chicago stock exchanges, as distinguished from the mandatory statutory approval, then it would not appear to us to be necessary to grant a new approval. We say this because the statute provides the method for withdrawal of approval and refers to exchanges "previously" approved.

IN THE FOLLOWING OPINION are nine questions relative to legal settlement, poor relief, notice to depart, etc., in matters relative to poor persons.

July 20, 1934. *Special Transient Investigator, Des Moines, Iowa:* We have received your recent request for an opinion upon several questions involving the settlement of poor persons. We will state and answer the questions in the order they came to us.

1. Can a county serve a notice to depart if there apparently is no other county or state which will accept the one so served? Can the court remove such a one from the county or state?

It is our opinion that a county may serve a notice to depart even if the person so served has no legal settlement and can acquire no settlement in any other county or state. It has been held by our supreme court that the liability of a county or state for the support of its poor is purely statutory. In other words, a county owes no obligation to support anyone apart from the statutes imposing such obligations. Cerro Gordo Co. vs. Boone County, 152, Iowa, 692.

Under the statutes, a county is not responsible until a legal settlement has been obtained, and the county has a perfect right to prevent, according to the statutes, any person from acquiring a settlement in that county by serving notice in accordance with Section 5315 of the 1931 Code of Iowa. The court can, in accordance with Section 3 of Chapter 99 of the laws of the 45th General Assembly order the removal of a person from the county or state who has not acquired a settlement and who is a public charge or who is likely to become a public charge. That statute, Section 3 of Chapter 99 of the 45th General Assembly is as follows:

"Sec. 3. Section fifty-three hundred thirteen (5313), Code, 1931, is hereby repealed and the following is enacted in lieu thereof:

'1. Any person who is a county charge or likely to become such, coming from another state and not having acquired a settlement in any county of this state or any such person having acquired a settlement in any county of this state who removes to another county, may be removed from this state or from the county into which such person has moved, as the case may be, at the expense of the county wherein said person is found, upon the petition of said county to the district or superior court of that county.

2. The court or judge shall fix the time and place of hearing on said petition and prescribe the time and manner of service of the notice of such hearing.

3. If upon the hearing on said petition such persons shall be ordered to remove from the state or county and fails to do so, he shall be deemed and declared in contempt of court and may be punished accordingly.'"

2. Does one have to apply or accept relief before a non-resident notice can be served?

This must be answered in the negative because the statute provides that a notice to depart may be served upon one who is a county charge or is likely to become such. Therefore, a county has the right to serve a notice to depart upon anyone likely to become a public charge.

3. Can legal settlement be established in a county in twelve months even

though relief may have been given during this time but no non-resident notice has been served nor any such attempt made by the county?

It is our opinion that a person may not acquire a legal settlement in a county if he has been supported by a county, even though no notice has been served upon him. See subsection 3 of Section 1, Chapter 99, Laws of the 45th General Assembly, which is as follows:

"Any such person who is an inmate of or is supported by any institution whether organized for pecuniary profit or not or any institution supported by charitable or public funds in any county in this state or any person who is being supported by public funds shall not acquire a settlement in said county unless such person before becoming an inmate thereof or being supported thereby has a settlement in said county."

If a person receives relief from a county, he is being supported by the county and in such a case, under the statute, he may not acquire legal settlement.

4. Does Paragraph 3, Section 1, above quoted, include such institutions as Broadlawns Hospital, Public Health Nurse, Public Health Center, Travelers Aid, and such other organizations of similar character?

It is our opinion that the above quoted section does include such institutions as those named. The legislature attempted to make the statute as broad as possible and the institutions named are charitable institutions which derive their support from the public, either in the form of taxation or donation. Therefore, the institutions named should be and are within the meaning of the quoted provision of the statute.

5. If a woman who has legal settlement in some county within the state marries a man, a transient, without legal settlement and continues to reside in said county, with said husband, can she still obtain relief for herself from the county as being a resident of that county?

It is our opinion that she retains her legal settlement in the county where she resides. Subsection 4 of Section 1 of Chapter 99 of the Laws of the 45th General Assembly is as follows:

"A married woman has the settlement of her husband, if he has one in this state; if not, 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 her 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."

This statute provides that if a husband has no legal settlement in this state, a married woman may acquire a settlement as if she were unmarried. In the question it is assumed that she had a settlement prior to her marriage, and if her husband had no settlement, she would retain her settlement.

6. Can a minor coming from within or without the state to live with relatives who have legal settlement in some county take as his legal settlement that of the relatives with whom he lives if the whereabouts of the father and mother is unknown, and it is not known where the parents last had legal settlement? Can such a minor have a non-resident notice served on him by said county?

Ordinarily a minor takes the settlement of his parents. If the whereabouts of his parents is not known, the minor would take the settlement of relatives with whom he resides. If he is not residing with relatives he would have the last known settlement of his parents. Therefore, in answer to your first question, it is our opinion that ordinarily a minor would derive the settlement of relatives with whom he resides. However, if the minor or infant is emancipated, he must acquire a settlement for himself. Emancipation exists when the minor assumes a new relationship inconsistent with being a part of the

family of his father and mother. Thus, where a minor marries, he becomes emancipated. Mere absence from his parents does not amount to emancipation but a minor who is absent with the assent of his parents and is making his own way is emancipated and may acquire a settlement of his own. Unless he is emancipated, the infant derives his settlement from his parents or the relatives with whom he resides if the whereabouts of his parents is unknown.

In answer to the second part of the question, it is our opinion that an infant or minor cannot have a notice to depart served upon him unless he is emancipated. If emancipated, a notice to depart should be served upon the minor.

7. If the state paroles a minor or an adult to someone who has legal settlement in the state, in what way does this parole affect the legal status of such a one if he had or had not legal settlement previously?

It is our opinion that a person who has been paroled would re-assume his former settlement if he had had one. In other words, the parole does not affect the legal settlement of the person paroled. If he had had no legal settlement, it would be necessary for him to acquire one in accordance with the provisions of the statute.

8. If a person who has been gone from a county in a state where he had legal settlement or from the state for a period of twelve months or several years, and it can reasonably be shown that he has not acquired legal settlement in some other county within or without the state, does such a one still have legal settlement within said previous county or state? In what way would the matter of intention affect the situation in the above question? Suppose the above person went into Canada or some foreign county or country having become naturalized, what then is their settlement status?

The answer to this question is found in Section 2 of Chapter 99 of the Laws of the 45th General Assembly which is as follows:

"Section fifty-three hundred twelve (5312), Code, 1931, is hereby repealed and the following is enacted in lieu thereof:

'A legal settlement once acquired shall so remain until such person has removed from this state for more than one year or has acquired a legal settlement in some other county or state.'"

It is seen from this statute that a person who has removed from a county or state for a period of more than twelve months loses his settlement. It is our opinion that it does not make any difference that the person intended to return as long as there has been an absence or removal from a county or state for such period.

9. Can a county serve another non-resident notice on a person after such a one has filed with the board of supervisors of said county "an affidavit stating that such person is no longer a pauper and intends to acquire settlement in that county?" That is providing such a one continues on his own responsibility during the following twelve months?

It is our opinion that the county can serve a notice to depart on any person who is likely to become a county charge in spite of any affidavit that he is, for the present, supporting himself. The county may serve a notice to depart on anyone who is or is likely to become a public charge and that person may not, by any action of his own, deprive the county of that right.

July 20, 1934. *Iowa State Emergency Relief Committee, Des Moines, Iowa:*

We have examined the statutes and the law with reference to the power of the Executive Council of the State of Iowa to issue anticipatory warrants based on revenues to be derived from the net income and retail sales tax.

It is our opinion that if the current revenues of the state are insufficient to pay warrants drawn by the auditor of the State of Iowa, that the Executive

Council may estimate the revenue to be derived from the net income and retail sales tax enacted as Chapter 82 of the Laws of the 45th General Assembly, Extraordinary Session, and issue anticipatory warrants. Section 287 of the Code of Iowa, 1931, which provides for the issuance of such warrants, is as follows:

"The executive council may anticipate the revenues for any year, when the current revenues for such year are insufficient to pay all warrants issued in said year, by causing state warrants, in an amount not exceeding the estimated state revenues for said year, and drawing not to exceed five per cent per annum, to be issued, advertised, and sold on sealed bids to the highest bidder. All bids and all records pertaining thereto, and the names of all purchasers shall be kept on file."

If warrants issued by the auditor during this year are not paid for want of funds from the current revenues of this year, the executive council may estimate the revenues to be derived from the income and retail sales tax and issue anticipatory warrants bearing not more than five (5%) and not in excess of the estimated revenues. These warrants must be advertised for sale and sold on sealed bids to the highest bidder, as provided by the quoted statute.

PRICE FIXING: UNFAIR DISCRIMINATION: MONOPOLY: Code Section 9886 of the 1931 Code is not violated unless it is proven that the price fixing was for the purpose of destroying a competitor or creating a monopoly.

July 20, 1934. *County Attorney, Onawa, Iowa:* We have examined the law with reference to the practice of certain creameries fixing different prices for produce and cream in the neighboring towns of Mapleton and Ida Grove. The question presented by your letter is whether or not the practice described therein amounts to unfair discrimination within the meaning of the Code of Iowa, and particularly Section 9886 thereof. From your letter, it seems to us that one element of unfair discrimination is lacking: viz., that the price fixing was for the purpose of destroying the business of a competitor or creating a monopoly.

Certainly, if all of the facts stated in your letter were proved, that element of unfair discrimination in purchase would be lacking. Furthermore, as you pointed out, the companies have a perfect right to meet competition in Mapleton, and the mere fact that they fail to meet the competition in Ida Grove does not, in our opinion, amount to unfair discrimination in purchases.

In any event, the duty of enforcing the section under consideration is, by statute, placed upon the county attorney unless complaint is made to the Secretary of State, who refers the matter to the Attorney General.

LIQUOR: LIABILITY OF RAILROAD COMPANY: If a carload of liquor remains in the railroad yard 48 hours and has not been accepted by the commission the liability of the railroad company is merely that of warehouse man and is liable only for its negligence if the liquor is stolen or destroyed.

July 20, 1934. *Iowa Liquor Commission, Des Moines, Iowa:* In reply to your inquiry of June 2, 1934, relative to the responsibility of a railroad company in delivering liquor to the commission, after the same has remained in the car for more than forty-eight hours after arrival, we submit the following opinion.

The railroad company is liable as insurer of goods which they have received for transportation from one point to another, and this liability continues until the goods arrive at destination and an opportunity is given to consignee to accept the same. If, however, the goods arrive at destination ready for delivery

and the consignee fails to accept the goods within a reasonable time, then the liability as carrier terminates, and the liability as warehouse man attaches.

The latest on this subject is comprehensively and clearly stated in the case of Nellie M. Hicks vs. Wabash Railway Company, 131 Iowa, page 295. The question is also covered in Vol. 10, Corpus Juris, pages 269 and 270, and cases therein cited.

It is, therefore, the opinion of this office that if a carload of liquor remains in the yard, ready for delivery, for forty-eight hours and has not been accepted by the Commission, that the liability of the railroad company is that of a warehouse man, and is, therefore, liable only for its negligence if the liquor is stolen or destroyed.

BOARD OF EDUCATION: MONEYS OF STATE INSTITUTIONS: Are moneys which Iowa State Educational Institutions deposit in banks, state funds? Does law require Board of Education to collect interest on daily balances belonging to institutions?

July 20, 1934. *Board of Education, Des Moines, Iowa:* We have your letter of July 17th enclosing copy of letter to the Iowa-Des Moines National Bank & Trust Company from Mr. Charles B. Dunn, General Counsel of the Federal Reserve Bank of Chicago. You state that you would like our opinion on the two following propositions:

1. Are the moneys which the Iowa State Educational Institutions deposit in banks, state funds?
2. Does the law require the Iowa State Board of Education to collect interest on daily balances belonging to each of the institutions under its supervision and control.

We will answer your questions in the order in which you have asked them.

1. All moneys which the institutions under the Board of Education deposit in banks, are state funds. They are derived from taxation and are appropriated by the Legislature for the biennium, payable to the institution in installments, and one of the conditions to payments is that all moneys received from other sources be expended and all moneys thus in the hands of the treasurers of the various institutions are state funds.

2. Section 3921, subdivision 8 of the Code of Iowa, 1931, pertaining to the powers and duties of the Board of Education provide: "collect the highest rate of interest consistent with safety obtainable on daily balances in the hands of the treasurer of each institution."

It is, therefore, plain that the payment of interest on these funds is required under the state law.

July 24, 1934. *Treasurer of State, Des Moines, Iowa:* We have your favor of the 20th inst., in which you request a construction of Section 1585 of the Code, particularly, with reference to the following situation:

You state that there are drug stores within the state which are located 400 feet from a public school and the question is raised whether or not the holders of permits to sell cigarettes, whose buildings lie within 400 feet of a school building may accept from cigarette manufacturers and use window displays during the summer months when school is not in session.

Section 1585 in so far as material to the question submitted, is as follows:

"Advertisement near public schools prohibited. No bills, pictures, posters, placards, or other matter used to advertise the sale of tobacco in any form shall be distributed, posted, painted, or maintained within four hundred feet of premises occupied by a public school or used for school purposes."

It is the opinion of this department that the language of this section must be given a fair and reasonable, but not a strained construction. It provides that no such advertising material shall be maintained within four hundred feet of premises occupied by a public school or used for school purposes. It is true that during the summer vacation and at other times when school is not in session, the question might be raised whether the premises are at that particular time occupied by a public school or used for school purposes, but in our opinion, such question would require an affirmative answer. The premises are occupied by a public school even when the school activities are temporarily suspended, and are used for school purposes and for no other purposes.

Stating it somewhat differently, the section provides that no such advertising matter shall be posted or maintained within four hundred feet of premises used for school purposes. If such advertising is permitted to be posted within four hundred feet of public school buildings, it is clearly being maintained within four hundred feet of premises used for school purposes although they are not in actual use during the entire year. The buildings are used for certain school purposes even during the vacation periods, that is, school equipment and records are kept and maintained therein and preserved for immediate and future use. There is no provision in the statute that the prohibitions set out therein shall not be effective when school is not in session.

In view of the rather plain terms of the statute, we are of the opinion the above quoted section applies and is of full force and effect when school is not in session as well as when it is in session.

PABSTONIC: BEER BILL: TONIC: Said tonic does not come within the provisions of the beer law.

July 25, 1934. *Treasurer of State, Des Moines, Iowa:* This will acknowledge receipt of your oral request on this date for the opinion of this department in the following matter:

Premier-Pabst Corporation, Milwaukee, Wisconsin, desires to market in Iowa a tonic under the name of "Pabstonic," which is a malt product containing vitamins B and G, calcium hypophosphite, iron pyrophosphate, through retail druggists for sale for medicinal purposes.

Does a tonic containing the ingredients as above set forth come within the provisions of Chapter 25, Acts of the Forty-fifth General Assembly in Extraordinary Session, entitled, "Beer and Malt Liquors," to the extent that it is necessary to have a permit to manufacture and sell the same in Iowa and to come under the provisions of the act which provides for a tax of $1.24 for every barrel containing 31 gallons?

Please be advised that it is the opinion of this department that this tonic, such as outlined above, does not come within the provision of subsection i of Section 6, Chapter 25, Acts of the Forty-fifth General Assembly in Extraordinary Session, in which it is stated as follows:

" 'Beer' for the purpose of this act shall mean any liquid capable of being used for beverage purposes made by the fermentation of an infusion in potable water of barley, malt and hops, with or without unmalted grains or decorticated and degerminated grains containing not more than four per centum (4%) of alcohol by weight."

We construe a product, such as this, as not being a beverage but strictly a tonic used for medicinal purposes. Hence, the provisions of the act, in regard to the having of a permit and the payment of a tax, would not apply as to this tonic.

The sale of such a tonic, through the retail drug trade, for medicinal purposes, under the State Pure Food and Drug Act, would be the proper way to handle this product and not under the beer act referred to above.

OLD AGE ASSISTANCE ACT: SENATE FILE 42 (CHAPTER 19), EXTRA SESSION, 45TH GENERAL ASSEMBLY: COLLECTION OF THE $2.00 TAX AS PROVIDED FOR IN SECTION 34: The tax is not due until January 1, 1935, and *should not be collected during the year 1934.*

July 27, 1934. *Auditor of State, Des Moines, Iowa:* This will acknowledge receipt of your oral request of this date for the opinion of this department on the following question:

"Our department is informed by a county treasurer in this state that one employer of labor has sent out a general letter to the effect that the $2.00 due under Section 34 of the old age assistance act is payable from the second half of wages paid in July, 1934.

"Is this a correct interpretation of the law?"

Please be advised that it is the opinion of this department that the situation which you have presented is an incorrect way of having this tax paid. Section 34 provides for the payment of $2.00 by certain persons and also makes the employer liable in the event that persons of this class in their employ, who have been continuously employed for a period of thirty days, do not pay the tax.

The question, as we view it, is as to when this tax is payable. It is our opinion in the matter that this tax is not payable until January, 1935. The collection of the $2.00 by an employer, by deducting the same from an employee's wages, during the year 1934, is not proper and legal under this act. The reason is readily determined in that this collection may be made from persons who may not live to be liable for this tax at the time that it is due.

In other words, the tax is not due until January 1, 1935, and should not be collected during the year 1934.

EMPLOYMENT AGENCY COMMISSION: TEACHERS SERVICE BUREAU, STORM LAKE, IOWA: ENROLLMENT CONTRACT: RENEWAL: 1. In a contract such as outlined, the Teachers Service Bureau would have to have a contract for service in Iowa alone and should not include therein the blanket contract for numerous other states. 2. Application for service in Iowa shall provide for a fee not in excess of $1.00.

July 30, 1934. *Bureau of Labor, Des Moines, Iowa:* This will acknowledge receipt of your request of the twenty-eighth instant for the opinion of this Department on the following questions:

The Employment Agency Commission has received an application for the renewal of license of the Teachers Service Bureau, Storm Lake, Iowa. In accordance with the statute, with this application was submitted a copy of the enrollment contract used by this bureau. The contract, in brief provides that the applicant may receive the service of this bureau in Iowa, Minnesota, Nebraska, Illinois, Kansas, Missouri, South Dakota, Kentucky, North Dakota and Arkansas and provides further for service which shall terminate ten months from date and the applicant may state the desire for enrollment and service in the states checked, which are those listed above. $1.00 is paid for such service in each of the states checked. The contract further provides that unless the bureau is notified in writing by the applicant, the service is no longer desired, the contract is automatically renewed by periods of ten months each until a total of five of said periods have expired and the renewals are without charge to the applicant.

May this bureau require a teacher to enroll in additional states in order to secure enrollment for placement in Iowa?

Under this amendment to the law, should not the Teachers Service Bureau

enrollment contract provide for the enrollment of a teacher for placement in Iowa only and if they desire to enroll for placement in other states, should not such enrollment be a separate contract?

It is the understanding of the Employment Agency Commission that the amendment as referred to above intended to limit, without question, the maximum fee to the sum of $1.00.

Chapter 17, Acts of the Forty-fifth General Assembly in Extraordinary Session, which is entitled, "Labor. Employment Agencies, Licensing, Fees.," amends Section 1546-a1 of the Code, 1931, by adding to that section several professions to those already listed in said section and exempted them in the matter of the limitation of fee. Section 2 of Chapter 17 amends Section 1551-c2 of the Code by adding thereto the following:

"Any person, firm, or corporation applying for a license, as provided in this chapter, to operate an employment agency, for furnishing or procuring of employment shall furnish the commission with its contract form, which form shall distinctly provide that no fee or other thing of value in excess of one (1) dollar shall be collected in advance of the procuring of employment and no license shall be issued unless such contract form contains such provision. Thereafter, any person, firm, or corporation to whom a license has been issued that violates this provision of its contract shall have his license cancelled."

You will note that the intent of the Legislature is clearly manifested in that it states:

"* * * * which form shall distinctly provide that no fee or other thing of value in excess of one (1) dollar shall be collected in advance of the procuring of employment * * * *."

Therefore, it is the opinion of this department that the application for service in Iowa with this or any other service bureau of this nature shall provide for a fee not in excess of $1.00 and should the Teachers Service Bureau of Storm Lake, Iowa, have a requirement whereby a teacher would have to take the service in ten states as listed in its contract and pay $10.00, the same would be an evasion of the terms of the act. A more complex problem arises where an applicant could, under this contract, apply for service in Iowa and Minnesota and pay $2.00. As we understand your request, it is your thought that the contract for service in Iowa should relate to Iowa alone and not to other states in any manner. The wording of the amendment is such, whereby it is provided that the contract form "shall distinctly provide that no fee or other thing of value in excess of one (1) dollar shall be collected in advance of the procuring of employment," that the legislative intent, apparently, was to the effect that this is a contract for service in Iowa, that it should provide for Iowa alone and that the fee should not exceed $1.00.

Hence, in a contract such as outlined, the Teachers Service Bureau would have to have a contract for service in Iowa alone and should not include therein the blanket contract for numerous other states, as the Legislature has provided that $1.00 is all that may be collected on a contract of this nature in the State of Iowa for the purpose of procuring employment.

FISH AND GAME COMMISSION: JUVENILE: CONDEMNATION: 1. A boy under 18 years of age is considered legally juvenile and must be given a hearing in a juvenile court instead of a justice court in the instant case. 2. In said matter, your commission should proceed under Sections 6, 7, 8 and 9 of Chapter 30, Acts of the 45th General Assembly.

July 30, 1934. *Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the fourteenth instant in which you request the opinion of this Department on the following questions:

1. At what age is a boy considered legally a juvenile and must be given a hearing in Juvenile Court instead of a Justice Court when he has been apprehended for a violation of the Fish and Game Laws or Regulations? In this respect, we would also appreciate your giving us the Code section number governing the case.

2. Under what section of the Code does it state that a condemnation procedure is necessary to confiscate privately owned property such as guns, nets, boats, etc., when seized by the deputy game warden who has witnessed an act of violation in which the property seized has been used?

Section 3617 of Chapter 180, 1931 Code of Iowa, provides as follows:

"*Applicable to certain children.* 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."

The subsequent sections of said chapter define what is meant by a "dependent and neglected child." The age referred to in other sections, besides the one referred to above, is eighteen years.

Section 3632 provides:

"*Information charging crime.* In any case after an investigation of the facts and circumstances, the court may, in its discretion, cause the child to be charged with either:

1. An indictable offense, in which case the court shall proceed to hold a preliminary examination, and shall exercise the powers of other magistrates; or

2. An offense not triable on indictment, in which case the court may order any peace officer to file forthwith an information against such child and proceed to try the case before a jury of twelve.

When no regular jury is in attendance at the district, superior or municipal court, as the case may be, the judge shall cause to be issued by the clerk and served by any peace officer a summons for such number of persons qualified to act as jurors as in his judgment are necessary to secure an impartial jury, allowing to the state and the defendant, each, three peremptory challenges."

Section 3634 states as follows:

"*Prosecutions transferred.* Any child, taken before any justice of the peace or police court, charged with a public offense shall, together with the case, be at once transferred by said court to the juvenile court."

Therefore, in answer to your first question, it would be the opinion of this Department that a boy under eighteen years of age is considered legally a juvenile and must be given a hearing in a juvenile court instead of a justice court in a case where he is apprehended for a violation of the statute relating to your commission or regulations adopted by the commission.

Sections 6, 7, 8 and 9 of Chapter 30, Acts of the Forty-fifth General Assembly, provide that "any device, contrivance or material used to violate any regulation adopted by the fish and game commission, or any other provision of this chapter, is hereby declared to be public nuisance" and provide a way in which the confiscatory proceedings may be had.

Therefore, in answer to your second question, we are of the opinion that your commission should proceed under the sections of Chapter 30, Acts of the Forty-fifth General Assembly, referred to above. We know of no other code sections which would in any way modify the procedure set out therein.

FUNDING BONDS: Boards of Supervisors may issue funding bonds whenever outstanding indebtedness of county on January 1, April 1, June 1, and September 1 exceeds the sum of $5,000.00. Bonds must be issued upon authorization of supervisors and in hands of county treasurer before latter

can make any arrangements for their sale or exchange; "Upon best available terms (Section 5279) indicates that treasurer should advertise for bids."

July 30, 1934. *Auditor of State, Des Moines, Iowa:* This department has received your request for an official opinion regarding the regularity of the following contract entered into between the Board of Supervisors of Polk County and Central National Bank & Trust Co. of Des Moines which contract was dated December 6, 1933 and is as follows, to-wit.:

"Des Moines, Iowa, December 6, 1933.

Hon. County Treasurer and Board of Supervisors, Polk County, Iowa.

Dear Sirs:

In connection with the issuance of Poor Fund Warrants by Polk county which may be funded into General obligation County Bonds as of January 1, 1934, which warrants are to be issued from time to time, we the undersigned agree to carry for the County of Polk, State of Iowa, legally issued Poor Fund Warrants of the county in an amount not to exceed $300,000, which may be legally funded into bonds as of January 1, 1934, such warrants to bear interest at the rate of 5 per cent.

Prior to taking up and paying for these warrants, we are to receive the approving legal opinion from Messrs. Chapman and Cutler of Chicago, as to the legality of said warrants and the funding of said warrants into an issue of General obligation County Bonds as of January 1, 1934, and also as to the validity of this agreement, which is made subject to such favorable opinion.

At the January meeting of the Board of Supervisors of Polk county, Iowa, you agree to pass a resolution authorizing the issuance and delivery to us of General obligation County Funding Bonds on the basis of par for par for warrants in an amount equal to the warrants which are being carried by us as of January 1, 1934, with appropriate adjustment of interest.

The funding bonds are to be dated January 1, 1934 and are to be delivered to the undersigned as soon as practicable thereafter. They are to bear interest at the rate of 5 per cent per annum and are to mature serially in equal amounts from January 1, 1934, to January 1, 1944, inclusive, the principal and semi-annual interest to be payable at the County Treasurer's office in Des Moines, Iowa.

All legal expenses, the printing of the bonds and the Attorney's opinion in connection with said bond issue and the opinion as to the legality of the warrants and as to this agreement are to be paid for by the county.

Respectfully submitted,
Central National Bank & Trust Co.,
Des Moines, Iowa.
By: Signed T. R. Warden, Asst. Vice President.

Bankers Trust Co.,
Des Moines, Iowa.
By: Signed C. A. Stephenson, Cashier.
Iowa-Des Moines National Bank & Trust Co.,
Des Moines, Iowa.
By: Signed H. P. Klein, A. C.

The above and foregoing proposition is hereby accepted this 11th day of December, 1933.

.....
County Treasurer.
(Signed) C. W. Keller,
Chairman Board of Supervisors.

County of Polk, State of Iowa, ss.

This agreement has been ratified and confirmed by the Board of Supervisors of Polk County, Iowa, at its meeting this 11th day of December, 1933.

(Signed) Ernest S. Olmsted,
County Auditor."

Section 5275 of the 1931 Code of Iowa authorizes the Board of Supervisors to issue funding bonds whenever the outstanding indebtedness of the county on the 1st day of January, April, June and September in any year exceeds the

sum of $5,000.00. Section 5279 of the 1931 Code of Iowa provides "when bonds issued under this chapter shall be executed, numbered consecutively, and sealed, they shall be delivered to the county treasurer and his receipt taken therefor, and he shall stand charged on his official bond with all bonds delivered to him and the proceeds thereof, and he shall sell the same, or exchange them, on the best available terms, for any legal indebtedness of the county outstanding on the first day of January, April, June, or September next preceding the resolution of the board authorizing their issue, but in neither case for a less sum than the face value of the bonds and all interest accrued on them at the date of such sale or exchange."

You will note that the above statute specifically provides that "when bonds are issued" the county treasurer "shall sell the same and exchange them on the best available terms for any legal indebtedness of the county." This statute clearly contemplates that the Board of Supervisors must first authorize the issuance of such bonds and the bonds must be actually issued and in the hands of the county treasurer before the latter can make any arrangements for their sale or exchange. This statute also contemplates that the county treasurer should procure and sell or exchange upon the "best available terms." This latter quoted part of the statute clearly intends that the county treasurer should first advertise for bids for the sale of such bonds. It might be possible to sell such bonds for a larger amount than the outstanding warrants of the county in which event it would be the treasurer's duty to sell the same because by so doing he would then be securing their sale upon the best available terms. While the statute does not specifically require advertising for bids on the exchange of such bonds for outstanding warrants still it would seem that the Legislature intended that this should be done in order to determine whether or not the exchange was being made upon the best available terms.

This Department has repeatedly held that the county funding bonds should not be sold on contract before issue but should only be sold after issue. We refer you to the following opinions:

One prepared by the Attorney General on June 18, 1921 to the Hon. Glenn C. Haynes, Auditor of State found on Page 315 of the opinion records in this office; one prepared by the Attorney General on March 1, 1922 for H. C. Schulz, county attorney at Newton, Iowa on Page 287 of the reports of the Attorney General for 1922; one prepared by the Attorney General for Geo. E. Allen, county attorney at Onawa, Iowa on June 24, 1919 found on Page 668 of the Attorney General's reports for 1919-20; one prepared by the Attorney General on May 22, 1924 found on Page 150 of the Reports of the Attorney General, 1923-24 which was also issued to the auditor of the State of Iowa.

It is therefore the opinion of this Department that Polk County through its Board of Supervisors may not legally enter into a contract for the exchange of outstanding warrants for funding bonds which are yet to be issued by the Board of Supervisors of Polk County.

This opinion must not be construed beyond the finding herein expressed and must not be construed as determining the validity of bonds which may have been issued and delivered without regard thereto, such questions not having been submitted and not being ruled upon in this opinion.

TAXES OF INDIGENT POOR: SUSPENDED OR REMITTED TAXES: Board of supervisors may suspend or remit taxes but may not take money out of poor fund to pay the taxes for any individuals: Taking of public moneys

from county treasury to pay individual taxes is irregular and would render the county officials liable on their bonds.

July 30, 1934. *Auditor of State, Des Moines, Iowa:* This Department has your request for an opinion upon the following proposition:

"Polk county is paying real estate taxes for indigents out of the Poor Fund and officials of Polk county claim there is an old Attorney General's opinion authorizing this procedure.

We have been unable to locate any opinion and it is our opinion that payment can only be paid from the Poor Fund, as authorized in Section 5322 and Section 5323 of the 1931 Code.

Will you kindly advise if there is any authority for allowing the above payments out of the Poor Fund?"

You are advised that there is absolutely no authority whereby the officials of Polk County can pay any one's taxes. It is the statutory duty of the officials of Polk County to collect taxes and not to pay taxes for any private individual.

Taxes may be suspended or limited whenever a person by reason of age or infirmity is unable to contribute to the public revenue. The suspension and remission of such taxes is provided for by Sections 6950 and 6951 of the 1931 Code of Iowa.

Where taxes have been suspended or remitted under the provisions of Sections 6950 or 6951 of the 1931 Code of Iowa and the property is later sold or devised then under certain conditions the grantee or devisee is required to bear the burden of the total taxes that have been thus suspended together with six (6%) per cent interest from the date of said suspension or remission. The object of these provisions of the code is to permit persons who by reason of age or infirmity are unable to contribute to the public revenue to continue to retain possession of their homes so long as they live. However, when they die and have no surviving spouse or minor child the total amount of the suspended or remitted taxes becomes a lien upon the property and must be taken out of the proceeds of said property before any legatee or devisee may take the property. However, these statutes do not contemplate or authorize the officials of the county to pay any one's taxes. The suspension or remission of an individual tax does not mean that the tax is paid. If Polk County is properly following the provisions of these sections there would be no irregularity in such procedure but if public monies are being taken from the county treasury for the purpose of paying the taxes of individual indigents the same would constitute an irregular procedure and render the county officials liable upon their bonds.

BEER BILL: CHAPTER 25, 45TH GENERAL ASSEMBLY, EXTRA SESSION: STORAGE: Does the situation under consideration, with reference to storage, under Section 29 of the beer law, constitute a violation?

July 31, 1934. *County Attorney, Marshalltown, Iowa:* This will acknowledge receipt of your letter of the eleventh instant in which you request the opinion of this Department on the following question:

Does the following situation, with reference to storage, under Section 29 of Chapter 25, Acts of the Forty-fifth General Assembly in Extraordinary Session, constitute a violation:

"A" company in one county sells beer to class "B" and "C" distributors in another county, delivering part of it pursuant to the order and placing the balance of it (keg beer) in a place of storage in the county where the class "B" and "C" distributors are located, subject to their order and the parties who have the class "A" permit pay the storage and make all negotiations for the storage.

As you are aware, Section 29 of the beer law provides as follows:

"Every class 'A' permittee having more than one (1) place of business shall be required to have a separate license for each separate place of business maintained by such permittee wherein such beer is stored, warehoused, or sold."

We have previously ruled that wherever beer is stored, warehoused, or sold by a class "A" permit holder, there must be a separate permit.

We have also previously ruled, under Section 30 of the beer law, that class "B" and "C" permit holders are required to have a separate license for each separate place of business wherein beer is sold and that it is not designated that this type of permit holder need a separate license for each separate place of business wherein beer is stored or warehoused.

The question which you have presented would appear to us to be one of fact. If A company (using your illustration) sells to B and C companies, who are wholesalers having class "A" permits, then it is necessary that an additional permit be secured for the place of storage. If A company places beer in a warehouse for B and C companies who are holders of class "B" or "C" permits or are agents of A company, then it is a storing of beer and the company having a class "A" permit would have to take out an additional permit to equip them to store beer in keeping with Section 29 of the act. If, however, B and C companies, in accordance with your illustration, are not distributors but are engaged in the retail sale of beer, then the fact question would arise as to whether or not there has been a completed sale of beer to B and C companies. If so and if B and C companies, who are retail dealers, have complete control over the beer and it is their property, then Section 30 of the act would control and not Section 29. If, however, A company simply uses this as a warehouse and may sell to others besides B and C companies, then it is a warehouse and under Section 29 of the act it would be necessary that an additional permit be secured.

COMPTROLLER: MUNICIPAL FUNDS: TRANSFER OF SURPLUS EARNINGS: "City Council desires to transfer a portion of the surplus earnings of its light plant to a fund for the purpose of constructing a swimming pool. May such a transfer be made and may the City Council legally enter into such a contract for the erection of swimming pool to be paid out of the earnings of the light plant, without first submitting the question to the voters of the city for approval?"

July 31, 1934. *State Comptroller, Des Moines, Iowa:* You have asked us in regard to the following:

"A city council desires to transfer a portion of the surplus earnings of its light plant to a fund for the purpose of constructing a swimming pool. May such a transfer be made and may the City Council legally enter into such a contract for the erection of a swimming pool to be paid out of the earnings of the light plant without first submitting the question to the voters of the city for approval?"

Section 6151-b1 of the Code provides as follows:

"*Transfer of surplus earnings.* Where waterworks, gasworks, heating plants, or electric plants have been purchased or erected by any city or town, including cities under special charter, and the original purchase bonds or bonds issued for the improvement thereof are paid, or where an adequate sinking fund has been provided for the payment of such bonds, such city or town may, upon the approval of the director of the budget, appropriate and transfer any surplus earnings in excess of the amount required for the retirement of all bonds and interest due in the current year and the succeeding year, from any municipal heating plant, waterworks, gasworks, or electric plant, for the purpose of retiring existing bonded indebtedness of said city or town which is payable by general taxation or for the purpose of making any municipal improvement authorized by law and ordered by the city council."

Section 6151-b2 of the Code provides as follows:

"*General transfer.* Any city or town, including cities under special charter, having a surplus earned from the operation of a municipal heating plant, waterworks, gasworks, or electric plant, and which has no bonded indebtedness against any such plant, or which has sufficient funds on hand to provide for the current year's interest and principal and the succeeding year's interest and principal may on approval of the budget director transfer the surplus earnings of such utilities to any other fund of the municipality."

Section 5746 of the Code, at Subdivision 4 thereof provides that cities and towns shall have the power to establish and regulate swimming pools and to build or purchase the same. This authority was given by the Forty-third General Assembly, the act being entitled as follows: "An act authorizing cities and towns to build or purchase, establish, maintain and operate swimming pools." The last part of Section 6151-b1 of the Code, hereinbefore set out, which is as follows:

"or for the purpose of making any municipal improvement authorized by law and ordered by the city council."

Was enacted by the Forty-fourth General Assembly, the title of the act being in part as follows: "An act * * * * relating to transfer of earnings of waterworks, gasworks, heating plants or electric plants owned by cities and towns, including cities and towns under special charter, so as to authorize the use of surplus funds for municipal improvements."

The Forty-fifth General Assembly, Extra Session, enacted Chapter 71, which provides for the establishment and financing of swimming pools, but this pertains to the right to issue revenue bonds to be financed only through the Federal government, or an agency thereof, and we do not understand that that is in the question that you have presented.

Chapter 319 of the Code provides that no indebtedness shall be incurred until authorized by an election. Our Supreme Court in the case of Fowler vs. Board of Trustees, 214 Iowa, 395, held that an authorizing vote of the electors was necessary to issue bonds for the purpose of extending or improving waterworks, after stating that there was no repealing clause and that the courts frowned upon repeal of another existing statute by implication. In the case of Saltzman vs. City of Council Bluffs, the court goes thoroughly into the question of surplus earnings and held there that there could be no expenditure of money in the water fund for the purpose of erecting municipal buildings.

It will be noted that the Legislature in amending the sections hereinbefore set forth, did not in any wise repeal existing laws in regard to submission of the question to the people and it appears that the Legislature only intended to give to the City Council the right to order such improvements after they had been authorized by law, viz., by a vote of the people. This being true, the opinion of this office of July 21, 1927, is still the law, and the authorization of the electors is necessary.

We should call your attention to the exception in Section 6151-c1 of the Code in regard to cities having a population of 5,000 or less and that the transfer of funds there may be made without the approval of the Budget Director on certain conditions as therein prescribed.

BOARD OF EDUCATION: IOWA SCHOOL FOR THE BLIND: INSTALLATION OF HEATING PLANT: APPROPRIATION: "Does the State Board of Education have the legal authority to install an additional unit in the heating plant and power plant at the Iowa School for the Blind, provided that

none of the money which was appropriated by the Extra Session of the 45th General Assembly, amounting to $15,000 be used for that purpose?"

August 1, 1934. *Board of Education, Des Moines, Iowa:* We have your request for opinion on the following proposition:

"Does the State Board of Education have the legal authority to install an additional unit in the heating plant and power plant at the Iowa School for the Blind, provided that none of the money which was appropriated by the Extra Session of the 45th General Assembly, amounting to $15,000, be used for that purpose?"

We note that the Forty-fifth General Assembly made an appropriation to the Iowa School for the Blind of $105,000 annually, to be used for salaries, support, maintenance, general improvements and betterments, and at the Extra Session of the Forty-fifth General Assembly, appropriated to the institution, $15,000 to be used for the purpose of providing a water system, including a water softener and for fire-proofing the roof and remodelling the attic of the main building of the school.

It is, therefore, the opinion of this Department that the Board does have authority to install the additional unit in the heating and power plant provided that no part of the $15,000 is used.

BOARD OF SUPERVISORS: SCHOOLS: LOAN THROUGH SCHOOL FUND: Has the Board of Supervisors authority to make a loan to another supervisor who is acting as guardian where there is sufficient money in the fund and the security is ample?

August 1, 1934. *County Attorney, Creston, Iowa:* We have your request for opinion on the following proposition:

"One of the members of the Board of Supervisors is guardian for two boys who own 350 acres of land. He desires to make a loan of $5,000 on the land and would like to make the loan through the school fund. Has the Board of Supervisors authority to make a loan to another supervisor who is acting as guardian where there is sufficient money in the fund and the security is ample?"

Section 5130 of the Code, Subsection 7, provides in regard to the power and duties of the Board of Supervisors as follows:

"To manage and control school funds of its county as provided by law."

Chapter 232 of the Code provides for the school fund and Section 4487 of the chapter provides in part as follows:

"Nor shall a loan of said funds be made to or carried by the County Auditor, the Treasurer, or a member of the Board of Supervisors."

It is, therefore, the opinion of this Department that the Board of Supervisors have no authority to loan to another member of the Board even though he is acting as guardian.

BANKS AND BANKING: INVESTMENTS: BONDS: May incorporated state and savings banks invest in bonds issued by the Federal Farm Mortgage Corporation?

August 1, 1934. *Superintendent of Banking, Des Moines, Iowa:* We have your request for opinion on the following proposition:

"May incorporated state and savings banks invest in bonds issued by the Federal Farm Mortgage Corporation?"

The Federal Farm Mortgage Corporation Act was approved January 31, 1934, and is known as Sub-Chapter 2-A, Title XII, U. S. C. A. and is an amendment to the Federal Land Bank Act of 1916, which is Sub-Chapter 1 of the same title. The Federal Farm Mortgage Corporation, among other things, issues bonds which are remitted to the borrowers of the Federal Land banks, of which

there are twelve. The bonds are issued by the corporation and Section 4 of the act provides as follows:

"Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States and such guaranty shall be expressed on the face thereof and such bonds shall be lawful investment and may be accepted as security for all fiduciary, trust and public funds, the investment or deposit of which shall be under the authority and control of the United States or any officer or officers thereof."

Sub-section (b) of the same act provides that the corporation is authorized to purchase from time to time for cash, such consolidated farm loan bonds at such prices and upon such terms as may be approved by the Board of Directors of the corporation, to make loans to Federal Land Banks on the security of such consolidated bonds, and to invest its funds in mortgage loans made under Section 32 of the Emergency Farm Mortgage Act of 1933, as amended.

Section 6 of the Federal Farm Mortgage Act provides that direct loans under Section 7 of the act, as amended, may at the option of the Federal Land Bank, be made in bonds of the Federal Farm Mortgage Corporation. Section 32 of the act above referred to, relates to loans heretofore made by the land bank commission but which are now made by the Federal Land Bank as agent for the land bank commission.

Section 9183 of the Code of Iowa, 1931 provides that banks may invest their funds in (1) Federal securities—in bonds or notes or certificates of the United States; (2) Federal Farm Loan bonds—in farm loan bonds issued under the act of Congress, approved July 17, 1916, as amended, *where the corporation issuing such bonds is loaning in Iowa.* This section was amended by Chapter 118, Acts of the 45th General Assembly, Extra Session, but such amendment merely adds bonds of the Home Owners Loan Corporation and Class "A" stock of the Federal Deposit Insurance Corporation.

You will note that the phraseology of Section 9183 of the Code is much more limited than Chapter 107, Acts of the Forty-fifth General Assembly, Extra Session, which is a revision of Chapter 8927 of the Code and pertains to investment of life insurance companies.

It is apparent that these bonds are not bonds of the United States, but are bonds of the Federal Farm Mortgage Corporation, so therefore, do not come within Sub-division 1 of Section 9183 of the Code, and whether they come within Subdivision 2 depends upon two things—first, whether the Federal Farm Mortgage Corporation Act is an amendment of the act of July 17, 1916, as named in Subdivision 2, and second, whether the Federal Farm Mortgage Corporation is loaning in Iowa, as both of these elements must be present to make these bonds eligible for investment under Subdivision 2 of Section 9183 of the Code.

We have pointed out that the Federal Farm Mortgage Corporation Act appears as Sub-Chapter 2-A and that the Federal Land Bank Act of 1916 appears as Sub-Chapter (1) of Title XII, U. S. C. A.

Therefore, it is apparent that the Federal Farm Mortgage Act is an amendment to the Federal Land Bank Act which was approved July 17, 1916 and is named in Subdivision 2 of Section 9183 of the Code. As to the question of whether the corporation is loaning in Iowa, Sub-Chapter (2), Section 1016 (G) Title XII, U. S. C. A. provides:

"Until February 1, 1936, the Land Bank Commissioner shall in his name, make loans under this section on behalf of the Federal Farm Mortgage Corporation, either in cash or in bonds at his election * * * *."

The provision in regard to direct loaning to farmers provides that the security must either be a first or second mortgage and that no more than $7,500 can be loaned to any farmer.

From all of the foregoing provisions, it appears to us that the Federal Farm Mortgage Corporation is loaning in Iowa within the purview of Subsection 2 of Section 9183 of the Code.

You further asked whether in event these bonds were eligible for investment purposes by banks, such bonds must be limited to those of the Federal Land Bank of Omaha, which loans in this section. In view of the fact that the bonds are bonds of the Federal Farm Mortgage Corporation which loans through the twelve land banks and which we have pointed out above, loans in Iowa, it is immaterial in our opinion, as to which land bank the loan was made through.

It is, therefore, the opinion of this Department that the bonds of the Federal Farm Mortgage Corporation are eligible for investment by State and Savings banks and this is true, no matter which land bank the loan was negotiated through.

SCHOOLS: TRANSPORTATION: CHOICE OF SCHOOL: 1. Should cost of transportation be figured in the cost provided for in Chapter 60, 45th General Assembly, as amended by Chapter 61? 2. Under the above section, may a person who lives in a subdistrict, which school has been closed, but he lives less than two miles to another school, choose the school which is further distant at the expense of the district so long as the expense does not exceed the pro rata cost of each pupil for the school year immediately preceding?

August 1, 1934. *County Attorney, Bedford, Iowa:* We have your request for opinion on the following propositions:

1. Should the cost of transportation be figured in the cost provided for in Chapter 60, 45th General Assembly, as amended by Chapter 61?
2. Under the above section, may a person who lives in a subdistrict, which school has been closed, but he lives less than two miles to another school, choose the school which is further distant at the expense of the district, so long as the expense does not exceed the pro rata cost of each pupil for the school year immediately preceding?

The pro rata cost provided for in the above section does not mean the cost of transportation and merely means the cost of tuition.

The question of pro rata cost only enters into the situation where the pupil is sent to a school of his choice for the district may contract with any school irrespective of the cost of tuition so long as it does not exceed $6.00 and in so contracting, must furnish transportation where it exceeds the required distance, but the pupil is entitled to attend the school of his choice and where he does this, we have held that he is not entitled to transportation and that the pro rata cost to the township for such pupil shall not exceed the pro rata cost in the entire school township during the school year immediately preceding, so that a person in a closed district may send his children anywhere so long as the expense is not greater than the pro rata expense, but he is not entitled to transportation.

BOARD OF CONTROL: PLACEMENT OF WARDS OF IOWA SOLDIERS' HOME IN FOSTER HOMES: Placement is duty of Child Welfare Bureau: Superintendent is agent of the board in carrying out the placement.

August 1, 1934. *Bureau of Child Welfare, Board of Control, Des Moines, Iowa:* Some time ago, you asked for our opinion in regard to placement of wards of the Iowa Soldiers Home, in foster homes, and whether it was the duty of the Superintendent of the institution or the Child Welfare Bureau?

Under the provisions of Section 3661-a1 of the Code, such is the duty of the Child Welfare Bureau, and Section 3716 of the Code does not in any wise vary this, but merely makes the Superintendent the agent of the Board in carrying out the placement.

OLD AGE ASSISTANCE ACT: SENATE FILE 42, EXTRA SESSION, 45TH GENERAL ASSEMBLY: What shall be the term or time of the first certificates under Section 35 of the act?

August 1, 1934. *Old Age Pension Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the twenty-fourth ultimo in which you request the opinion of this Department on the following:

What shall be the term or time of the first certificates under Section 35 of the old age assistance act?

Under Sections 20, 31 and 22, the Legislature has directed the commission with reference to the issuing of certificates and states, in the first named section, as follows:

"The commission shall issue to each applicant to whom assistance is allowed a certificate for one year, stating the amount of each installment, which may be monthly or quarterly, * * * *."

Section 21 provides for the issuing of a new certificate annually. However, Section 22 provides as follows:

"The assistance, if allowed, shall commence on the date named in the certificate, which shall be the first day of the calendar month following that on which the petition was received by the board; provided, however, that no old age assistance payments shall be made before July 1, 1935, except as provided in section thirty-five (35) of this act."

Section 35 of the act provides in part:

"For the purpose of affording old age assistance commencing November 1, 1934, under the provisions of this act prior to July 1, 1935, there is hereby levied on all persons pursuant to Section 34, a tax of one dollar ($1.00), payable on or before July 1, 1934."

In the absence of any direction as to the issuing of any certificates in November, 1934, and as Section 35 is an emergency section, it would be the opinion of this Department that the first certificate, issued on November 1, 1934, would be for a period which is less than one year or to July 1, 1935, as this would make uniformity, which was intended under the act. It being our opinion that when Section 20 directs that the certificate shall be for one year, this, apparently, was the intent of the Legislature, as expressed later in Section 22, that the year would date as from July first with the exception made in Section 35, that these first certificates should run to July 1, 1935, and that this would create a uniform system. In the future, each year will date from July first.

August 1, 1934. *Iowa Industrial Commissioner, Des Moines, Iowa:* We have your favor of recent date in which you submit to us the following question:

If an injury occurs to a man engaged in working out his poll tax, will there be coverage under the workmen's compensation act?

It is the opinion of this Department that a person injured under such circumstances does not come within the provisions of the workmen's compensation law and, therefore, that there is no liability for compensation in such case.

Section 1361 of the Code provides that the chapter providing for workmen's compensation shall not apply to persons whose employment is of a casual nature. The party working out his poll tax is not employed in the sense that there is any contract between him and the governmental authority controlling

his work, but in the sense that he may be said to be employed, his employment being of a purely casual nature. It is not regular or steady employment and under Chapter 73, of the Acts of the Forty-fifth General Assembly, he may at his option pay such tax in labor on county local roads within the township of his residence or he may pay in cash. He has the further option of paying his substitute to perform the labor in his behalf.

Section 1362 provides that where the state, county, municipal corporation, school district, or city, is the employer the provisions of the chapter for the payment of compensation shall be exclusive, compulsory and obligatory upon both employer and employee, except as otherwise provided in Section 1361. This section presupposes a relationship, however, of employer and employee.

As suggested in your letter, the poll tax worker hardly qualifies as an independent contractor. He does not undertake to do ordinarily, or at least, to complete a particular project or piece of work. He simply performs labor as a laborer for a specified period of time. In that sense, he appears to be an employee.

Taxes are not contracts, either express or implied. Personal consent to the enforcement of taxes is not required.

Cooley on Taxation, Vol. 1, Section 22.

They cannot be assigned as debts or be proved in bankruptcy as such.

Ibid.

A road poll tax partakes of the nature of police regulation where performed in labor.

Ibid.

A poll tax is a tax against the person and not a tax on property. A poll tax is, nevertheless, a tax within the constitutional and statutory provisions in relation to taxes.

Cooley on Taxation, Vol. 4, Section 1771.

A tax is not regarded as a debt in the ordinary sense of that term for the reason that a tax does not depend upon the consent of the taxpayer and there is no express or implied contract to pay taxes.

Cooley, Vol. 1, Section 22.

We think this case is to be distinguished from the ordinary case where a debtor undertakes to pay his debt by performing labor. In that case, the laborer receives remuneration in the form of debt payment but as has been stated, taxes are to be distinguished from debts. The taxpayer has the right to pay in labor rather than money because of the law and not because of any contract of employment. The elements are lacking which give rise to the relationship of employer and employee under a contract of employment, either express or implied.

We are, therefore, of the opinion, as stated above, that the workmen's compensation law is not applicable to the case of a poll tax worker who sustains injury while so engaged.

IOWA LIQUOR CONTROL COMMISSION: PRINTING BILLS CONTRACTED: Subsection "q" of paragraph 2 of Section 8 of Chapter 24 of the Acts of the 45th General Assembly, Extra Session, is not in conflict with Chapter 14, Section 183 of the 1931 Code of Iowa; subsection "q" of paragraph 2 of Section 8 of the Acts of the 45th General Assembly, Extra Session, means that this section shall be interpreted to mean that this section shall be followed in accordance with law. Therefore the State Printing Board should let all contracts under subsection "q" of paragraph 2 of Section 8 of the 24th Chapter of the Acts of the 45th General Assembly, Extra Session. State Comptroller may pay Marshall Printing Co. bill if same is fair and reasonable and the state has not been harmed in any way.

August 1, 1934. *State Comptroller, Des Moines, Iowa:* I have your letter of July 31st in which you request an opinion from this Department on the following proposition:

"A list of bills is herewith handed you from the Marshall Printing Co. for printing furnished to the Iowa Liquor Control Commission under contracts previously entered into. They were submitted in the early part of the Iowa Liquor Control Commission's administration before they were thoroughly familiar with the Iowa printing law and the contracts were all let in good faith by the liquor commission, the work was performed according to the specifications of the commission. The same was never presented to the printing board at any time. These claims have now been approved by Mr. Cooper, the same have been examined by Mr. Charles D. O'Donnell, superintendent of printing, a copy of his letter being enclosed herewith.

We would like your official opinion as to whether or not we have authority to issue the warrant in total amount of $9,860.48 in payment of these claims from the funds available for use by the Iowa Liquor Commission. An early reply will be appreciated."

You are advised that under Section "q" of Paragraph 2 of Section 8 of Chapter 24 of the Acts of the Forty-fifth General Assembly in Extraordinary Session provides as follows:

"The Iowa Liquor Control Commission shall prepare, print and furnish all forms required under this act."

Your attention is further called to Section 183 of Chapter 14 of the 1931 Code of Iowa which provides as follows:

"Let contracts, except as provided in Section 205, for all printing for all state offices, departments, boards, and commissions when the cost of such printing is payable out of any taxes, fees, licenses, or funds collected for state purposes."

From a cursory examination of the above provisions of law it would appear that they are in conflict and that the provision that was passed at the later date would prevail. However, such a construction would be untenable when the entire Iowa Liquor Control Act together with its title is carefully scanned. There is nothing in the title to the Iowa Liquor Control Act which shows an intention on the part of the Legislature to amend or repeal Chapter 14 of the 1931 Code of Iowa, which provides for the state printing board and its duties thereunder. The title to the Iowa Liquor Control Act shows that it was legislative intent to change the liquor laws that had heretofore been placed upon the statute books of this state. The Iowa Liquor Control Act serves this purpose and this purpose only. From a reading of the entire act it is apparent that the Legislature did not intend to repeal the state printing laws. Section 29 of Article 3 of the constitution of Iowa provides as follows:

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

From an examination of the above constitutional provision it appears that if there is any conflict between the provisions of the Liquor Act and the state printing laws that the provisions of the liquor act shall be void and that the state printing laws shall govern.

However, it is not necessary to rule that section "q" of Paragraph 2 of Section 8 of the Iowa Liquor Control Act is unconstitutional. What did the Legislature mean when they provided that "the Iowa Liquor Control Commission shall prepare, print and furnish" all forms required under this act? Did the Legislature intend that the Iowa Liquor Control Commission should equip and fur-

nish their headquarters with a print shop? Did the Legislature intend that the members of the Iowa Liquor Control Commission and their employees should actually print all such forms? It is apparent that the Legislature did not so intend that such a meaning be placed upon this provision. It is the opinion of this Department that the Legislature intended that the Iowa Liquor Control Commission should prepare, furnish and print all forms in accordance with law under this act. "Printing all forms in accordance with law under this act" means that all such printing should be handled through the Iowa State Printing Board.

However, there was perhaps sufficient conflict in the law to lead the Liquor Control Commission to interpret Sub-section "q" of Paragraph 2 of Section 8 of the Iowa Liquor Control Act that it was not necessary for them to have their printed forms handled through the Iowa State Printing Board. There can be little question but what the Liquor Control Commission was acting upon this interpretation of the above section of the Liquor Control Act when they entered into contracts for the printing mentioned by you in your letter of July 31st to this Department. These contracts were entered into before this question was submitted to this Department for an official opinion. These claims have already been checked by Mr. Charles D. O'Donnell, Superintendent of Printing, and he has made the following report to me:

"Hon. E. L. O'Connor,
State Capitol,
City.
Dear Mr. O'Connor:

Upon request of Hon. L. E. Francis, I have examined the claims against the Iowa Liquor Control Commission herewith handed you, which I have numbered from 1 to 84 inclusive, and which total $9,860.48. I have deducted $295.15 which I considered an overcharge on one item, and this deduction has been accepted by claimant. After making this adjustment, I pronounce the charges fair and reasonable. I have examined and approved these claims as a printing estimator and not in my capacity as Superintendent of Printing.

Included in these charges are the costs of certain wax plate engraving electrotypes, which are now the property of the Liquor Control Commission.

Yours truly,
(Signed) Charles D. O'Donnell."

Under the provisions of Chapter 4 of the Acts of the Forty-fifth General Assembly, regular session, it is the duty of the State Comptroller to pre-audit the accounts submitted for the issuance of warrants and to control all payments from the treasurer by the preparation of appropriate warrants or warrant checks directing such payments.

It is therefore the opinion of this Department that if you find that these claims and obligations were entered into in good faith by the Iowa Liquor Control Commission and by the claimant and that the claims are fair and reasonable and that the state has not lost any money by reason of such matters not having been handled by the State Printing Board and that the state is in no way defrauded, then you would be authorized to issue the warrant in the total amount of $9,860.48 in payment of such claims from the funds available for the use of the Iowa Liquor Control Commission.

COMPENSATION: RECEIPT OF SAME BY FRED P. HAGEMANN: COLLECTION OF CLAIMS: It is, therefore, the opinion of this department, if it was the intention of the board to employ F. P. Hagemann and that he was so employed and did render valuable service to the county in the collection of these claims, that Attorney F. P. Hagemann would be entitled to the

percentage agreed upon by Mr. Hagemann and the Board of Supervisors as stated in said resolution.

August 1, 1934. *County Auditor, Waverly, Iowa:* I have your request for an opinion from this Department on the following proposition:

You state:

"The Board of Supervisors of Bremer county, Iowa, have requested me to obtain from your department an opinion relative to the report of findings in examination of attorney's office, Bremer county, Iowa, for the year 1933 and supplementary report. I am enclosing herewith affidavits to further explain and to clarify the report. Before taking further action in the matter, it is desired that you should give us an opinion regarding the right of Mr. Fred P. Hagemann to receive compensation provided for in the resolution of the Board of Supervisors in employing the firm of Hagemann & Hagemann to collect claims against persons who are liable because of the support obtained from Bremer county."

From the auditor's report and affidavits furnished, it appears that the board of supervisors of Bremer County, Iowa, on the fourth day of February, 1930, adopted the following resolution:

"Moved and seconded that the firm of Hagemann & Hagemann be allowed 20 per cent on collections it makes on accounts due the poor and insane fund."

At the time this resolution was adopted by the board of supervisors, Harry H. Hagemann, a member of the law firm of Hagemann & Hagemann, was the county attorney of Bremer County. The auditor's report called the board's attention to the employment of this firm for the reason that one of the firm's members was the county attorney at the time and under the law was not entitled to any additional compensation except his regular statutory salary. The board of supervisors could not legally employ the county attorney to make such collections and agree to pay him additional compensation therefor over and above his regular salary. This was the apparent irregularity referred to by the auditor's report. However, since this matter was called to the attention of the board of supervisors of Bremer County, two members of said board, who were also members of the board on February 4, 1930, have made affidavits to the effect that it was their intention on February 4, 1930 to employ Attorney F. P. Hagemann to make these collections and as compensation therefor to pay him twenty per cent (20%) of the amount collected. They further state that because of the large sums of money due the county and the great number of suits necessary in the collection of these accounts, in their judgment it would be necessary to employ assistant counsel for the county attorney. In their affidavits, they positively state that it was their intention to employ Attorney F. P. Hagemann to assist the county attorney by reason of his ability and prestige in the community and that they felt that such employment would be of great benefit to the county in making these collections. It is my further understanding that this employment resulted in the collections of large sums of money for the county, many of which had been due and owing the county for more than five years.

You are advised that under Section 5243 of the 1931 Code of Iowa, the board of supervisors have authority to employ an attorney for this purpose. The board of supervisors are clothed with quasi-judicial functions and in the exercise of such functions they may take such action as will result in the greatest benefit to the county.

If, in the opinion of the board of supervisors, Attorney F. P. Hagemann rendered valuable services to the county and through his employment, large sums

of money were collected and paid into the county treasury, there is no question but what Attorney F. P. Hagemann would be entitled to a fair and reasonable compensation for his services. A fair and reasonable compensation for his services might, in some instances, depending upon the nature of the case and the time spent, amount to more than twenty per cent (20%) of the amount collected.

It is, therefore, the opinion of this department, if it was the intention of the board to employ F. P. Hagemann and that he was so employed and did render valuable services to the county in the collection of these claims, that Attorney F. P. Hagemann would be entitled to the percentage agreed upon by Mr. Hagemann and the board of supervisors of Bremer County, as stated in their resolution of February 4, 1930.

SINKING FUND: TREASURER: CLERK OF THE DISTRICT COURT: What funds duly deposited by a Clerk of the District Court constitutes valid claim against the State Sinking Fund?

August 2, 1934. *State Treasurer, Des Moines, Iowa:* We have your request for opinion on the following proposition:

"What funds duly deposited by a Clerk of the District Court constitute a valid claim against the State Sinking Fund?"

In our talk here at the office, it was the writer's personal opinion that perhaps all funds which the Clerk was authorized or directed to collect under the law constituted such a valid claim, but on submission of this question to the staff of this office, it was decided that only public funds of the Clerk constitute a valid claim against the State Sinking Fund, and this then is only money that actually belonged to the County and did not include copy fees, attorney fees and so on, which the Clerk collects as the statutory officer, but collects for someone else, and such, therefore, is the opinion of this Department.

BANKS AND BANKING: PUBLIC DEPOSITS: Re: payment of interest into the Sinking Fund on public deposits.

August 2, 1934. *County Attorney, Storm Lake, Iowa:* Some time ago, you spoke to my secretary in regard to the question of public funds.

Under the law, as you know, public treasurers must deposit all public moneys in designated depositories, the interest to be diverted into the State Sinking Fund for public deposits, and the law further provides that if the bank in the County will not accept the deposit, then they may deposit in any bank in the State. So, if the banks in Buena Vista County refuse to take this money and pay the interest thereon into the Sinking Fund as required by law, then the public treasurer should try every other bank in Iowa in order to find a bank that will comply with the law.

As far as we are advised, most of the banks in Iowa are accepting public deposits so it has not reached the stage where public bodies are unable to deposit their moneys and the Legislature has never contemplated such a situation as there is no provision in the law for the depositing of money by public treasurers except in banks that will pay the interest into the Sinking Fund.

BANKING INSTITUTION: TAXATION: COUNTY TREASURER: "However, it is our opinion that the County Treasurer ought not to refuse to proceed under Section 7155 of the Code of 1931, and that if he has been apprised of the mistake in the assessment or that property has been omitted, he should not hesitate to act under the provisions of the section just mentioned."

August 6, 1934. *County Attorney, Cedar Rapids, Iowa:* We have your letter of July 23d, in which you request the opinion of this office on the following propositions:

"1. Are taxing officials bound by the statements of a bank made under oath to the Assessor, or can they avail themselves of any other statements of the bank for the purpose of verifying or impeaching such statements? (See Sections 6997 and 7003.)

"2. Does 'capital actually invested in real estate,' as referred to in Section 7002 of the 1931 Code, mean original investment, or does it mean the value shown on the books of the corporation as of the particular date involved?

"3. Are 'reserves for contingencies' surplus funds or undivided profits within the meaning of Section 7003 of the 1931 Code of Iowa?"

Without airing the facts which occasioned these questions, we will state briefly that a banking institution, without charging off paper held by it, has set up a fund amounting to something over $550,000, which has been designated on its books as a "reserve for contingencies." This reserve for contingencies was not listed in the verified statement furnished to the County Auditor under the provisions of Section 7001 of the Code of 1931, but was listed in the statement furnished to the Comptroller. The officers of the institution, in failing to list this reserve for contingencies with the City Assessor, claim that it is not a part of the surplus and undivided profits, and that for that reason it should not be listed.

Another discrepancy between the statements to the Comptroller and to the Assessor is to the effect that the banking house was valued at $883,381.25 in the statement to the Comptroller, while in the statement to the City Assessor the value of the real estate owned by the bank is listed at $1,098,688.59. It is our understanding, from discussing the matter with the county officials and also the counsel for the bank, that the banking house is the only real estate owned by the institution.

We might also state that the tax in question is for the year of 1933, payable in 1934, and that the tax books are now in the possession of the County Treasurer, so that under the holdings of our court, the County Auditor is without jurisdiction to correct the assessment rolls. We are also informed that this matter has been called to the attention of the County Treasurer, and that he has been requested to proceed under the provisions of Section 7155 of the Code of 1931, and that he has refused to do so, giving as his reasons what he claims to be legitimate excuses in the nature of advice from taxing officials.

In passing on this matter, we will answer your questions in the order in which they are asked.

1. This is not a question of whether or not the assessor is bound by the verified statement furnished by the bank, but whether or not the County Treasurer is bound by that statement. We do not believe there is any difference between the procedure to be adopted by the County Auditor and the County Treasurer. We call attention to the case of Avoca State Bank vs. Burke, 193 Iowa, 1055, in which case the court made this statement:

"The capital, surplus and undivided profits as they appear upon the books of the bank, subject to certain specified deductions, are deemed by the statute to disclose with approximate mathematical certainty such value."

Later, in the same opinion, the court made this statement:

"Under the statute, therefore, the books are deemed to be the best evidence of value of the assets. Better evidence could hardly be conceived of. The policy of the statute, therefore, is to adopt it as binding upon the bank and upon the assessor. Such was the substance of our holding in First National

Bank of Remsen vs. Hayes, 186 Iowa, 892. We held, in effect, in the cited case that the verified statement to be furnished by the bank must be predicated upon its books. We held, also, that the statute was mandatory upon the assessor, and that its practical effect was to forbid him to interpose against such evidence his own estimate of values, and that his duty in the premises thereby became ministerial, rather than discretionary or judicial."

It will, therefore, be seen that the values should be determined from the book value, as shown by the books of the bank. Later, in the same opinion, the court makes this statement:

"The effect of the statute is to say that the bank cannot be permitted to carry one valuation upon its books for the purpose of its current expense, and a reduced value for the purpose of taxation. There is no limitation upon the right of the bank to charge off all its bad paper on its books and reduce its assets accordingly. Whether it does charge off becomes the test of value of its assets in the presence of the assessor * * * *."

In the case of Northwest Bank of Ireton vs. County Auditor, 202 Iowa, 237, in holding that the bank's statement to the assessor is not conclusive of value, the court made this statement:

"The most that can be said is that the statement furnished, showing moneys and credits to the amount of $225,000, was evidence binding upon the plaintiff, that such was the amount of its moneys and credits. But this was by no means conclusive."

In view of the case above cited and numerous other Iowa authorities, we are of the opinion that the taxing officials are not bound by the statement furnished to the assessor, and that if such statement is not in accord with the books of the bank, the books are the best evidence and are sufficient to impeach the statement furnished to the assessor.

2. Before answering your second question, we will state briefly that the contention seems to be with relation to the depreciation of the banking house, as shown by the statement to the Comptroller. The institution owns the premises subject to a mortgage. In the statement furnished to the assessor, the officials of the institution have listed the amount of money actually paid on the real estate, which includes the amount of cash actually paid at the time the purchase was made and amounts later paid to reduce the mortgage indebtedness. This amounts to $1,098,688.59. However, in the statement furnished to the Comptroller, this amount is reduced by $215,307.34, being the amount of depreciation.

We call attention to Section 7002 of the Code of 1931, which provides as follows:

"7002. Deductions on account of real estate. In arriving at the amount of capital stock and surplus and undivided profits taxable as such, of such corporations, the amount of their capital stock together with any or all of their surplus and undivided profits that may be 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 total amount of capital stock and surplus and undivided profits, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed."

It will be noted that the above quoted section does not refer to the amount of capital stock, surplus and undivided profits that have been invested in real estate, but refers to capital stock, surplus and undivided profits "that may be actually invested in real estate owned by them." We construe this section to mean the amount that may be invested in real estate as of the date for which the assessment is made, which in this case would be December 31, 1932,

or January 1, 1933. If the books of the bank show that a part of the money invested in this real estate has been charged off on account of depreciation, can the institution then be heard to say that it still has the full amount originally invested now invested in the real estate. We believe, however, that the answer to this question really depends upon how the matter is carried on the books of the bank.

3. In answering your third question, we wish to call attention to the provision of Section 7003 of the Code of 1931, which is as follows:

"7003. Rule of actual and taxable value. The assessor from such statement shall fix the value of such stock based upon the capital, at the same ratio of assessed value to actual value as the assessed value of real estate in the taxing district where such bank is located generally bears to its actual value.

"The taxable value of such shares of stock shall be one-fourth of the assessed value and shall be taxed as other property of such taxing district.

"All surplus and undivided profits of such bank or trust company remaining after the deduction of its real estate, if any, as provided in the preceding section shall be taxed as moneys and credits, but in no event shall the right to offset bad debts or bad loans or any other losses against the amount of said surplus and undivided profits be authorized."

It is argued on the one hand that Section 7003 of the Code, properly interpreted, merely means that the bank cannot reduce the amount of capital, surplus and undivided profits, as carried on its books. It seems to us that that is exactly what the bank is attempting to do in this case. The notes, for which this reserve for contingencies has been set up, are carried as a part of the resources of the bank. They have never been charged off. The statute expressly provides that in no event shall the right to offset bad debts or bad loans or any other losses against the amount of said surplus and undivided profits be authorized. The wording of the statute is so plain that we cannot place any other construction upon it than to say that paper, which is actually carried by the bank as a part of its resources, cannot be offset against the amount of surplus and undivided profits. What is this reserve for contingencies in the amount of $552,000? From where did it come? It came from the undivided profits or earnings of the bank. It is still a part of the undivided profits, regardless of the fact that it is designated as a reserve for contingencies.

We do not wish to be misunderstood. We realize that your second and third questions have not been passed upon by the Supreme Court of this state. We also realize that there is a great deal of merit in the claim made by the counsel for the bank. In fact, were it not for the plain wording of the last four lines of Section 7003, we might be inclined to agree with them.

Summing up the entire matter, we are not unmindful of the fact that this question is of vital interest, not only to the taxpayers of Linn County but to the banking institution itself, and that it should be of interest to the officials of Linn County. If there is any question at all as to whether or not the property of the institution has been correctly listed, the County Treasurer ought not to stand in the way of allowing the matter to be presented to the courts. As we stated before, we realize that there is merit to the bank's claim, and we also acknowledge that the matter has been fairly and honestly presented by the attorneys for the bank. However, it is our opinion that the County Treasurer ought not to refuse to proceed under Section 7155 of the Code of 1931, and that if he has been apprised of the mistake in the assessment or that property has been omitted, he should not hesitate to act under the provisions of the section just mentioned. Further, we do not feel that our office should advise a county

official to refuse to proceed with the collection of taxes, unless we are convinced beyond a doubt that his actions would be illegal. We, therefore, say that it is his duty to proceed.

SCHOOLS: SCHOOL BUILDING: RIGHT OF BOARD TO MOVE SCHOOL BUILDING: The Board has no authority to move school houses from one subdistrict to another.

August 6, 1934. *County Attorney, Boone, Iowa:* We have your request for opinion on the following proposition:

"There are 17 pupils in a subdistrict of a school township which has no building and the pupils are now being sent to various other schools in neighboring townships. Within the same school township, there is a subdistrict where the school has been closed for lack of pupils for over two years. The board has voted to move the school building from the subdistrict where the school is closed to the subdistrict containing 17 pupils, but having no building. Some question has now arisen as to the right of the Board to so remove the building. Will you please give me your opinion on this proposition?"

Chapter 202 of the Code gives to the voters assembled at the annual election, the power among other things, to direct the sale, lease or other disposition of any schoolhouse.

Section 4379 provides for the reversion of the schoolhouse site, but Section 4385 states that this section is not applicable where the school has been temporarily closed on account of small attendance such as was done in this case.

The rights of the Board are found in Section 4224 of the Code. Section 4359 provides for the location of schools and Sections 4136 and 4137 provide for the establishment of new corporations and division of assets and distribution of liabilities. It is the electors who determine whether or not a new school is to be erected and the Board determines the place in the subdistrict for the location of the school. There is, however, no authority for the removal of a building from one subdistrict to another and the Department of Public Instruction in a ruling made way back in 1873, held that a school board had no power or authority to move a building from one subdistrict to another. This ruling and all other rulings of the Department of Public Instruction have been published from time to time and the Legislature has never seen fit to change this rule. Therefore, under the well settled law in this State, such a departmental ruling possesses all of the aspects of a law and especially is this true where it has been followed for such a period, and the ruling never changed by the Legislature. The theory, I think, is quite plain because some subdistrict during a given year might not have enough pupils to operate. They might have a better schoolhouse than their neighboring subdistrict. The Board would then order the schoolhouse moved to the other subdistrict and then the following year, the first subdistrict would have enough pupils and desire to maintain a school. The electors of the district might refuse to erect such a building and the district would then be deprived of a school. Such is not the law.

It is therefore, the opinion of this Department that the Board has no authority to move schoolhouses from one subdistrict to another.

BEER BILL (CHAPTER 25, EXTRA SESSION, 45TH GENERAL ASSEMBLY): CITY COUNCIL: DISCRETIONARY POWER: QUESTION OF LOCATION OF PLACE OF BUSINESS OF APPLICANT FOR BEER PERMIT: Does the city council have a right to use some discretion in issuing beer permits when the question of location enters into it?

August 6, 1934. *County Attorney, Des Moines, Iowa:* This will acknowledge

receipt of your letter of the thirtieth ultimo in which you request the opinion of this Department on the following question:

Does a city council have the right to refuse to issue a beer permit to an applicant who wishes to use this permit outside of the commercial area in said city or town and in a residential district?

In other words, does the city council have a right to use some discretion in issuing beer permits when the question of location enters into it?

Please be advised that it is the opinion of this Department that city and town councils are given the right, under Chapter 25, Acts of the Forty-fifth General Assembly in Extraordinary Session, in Section 34, to adopt any reasonable ordinance which would be in conformity with the provisions of the act. Also that in the exercising of that grant of authority, in instances where municipal zoning, as provided by Chapter 324 of the 1931 Code of Iowa, has been had or where there are restricted residence districts, such as provided for in Chapter 325 of the Code, the granting of a permit to sell beer would be discretionary with the city or town council. In this connection, I wish to call your attention to the note in 86 American Law Reports, page 678, in which several Iowa cases are cited and which provides:

"On the other hand, it has been held that an ordinance establishing restricted residence districts and forbidding the erection therein of any building, except for enumerated classes, without first securing from the city council a permit therefor, is not unconstitutional because it vests in the city council the power to determine whether a permit shall be granted, or because it fails to prescribe rules and regulations under which a permit will be issued or denied, as the case may be. Marquis vs. Waterloo (1930), 210 Iowa, 439, 228 N. W., 870. As controlling and decisive on this point, the court cites the earlier case of Des Moines vs. Manhattan Oil Co. (1921), 193 Iowa, 1096, 184 N. W., 823, 188 N. W., 921, 23 A. L. R. 1322."

"An ordinance of the character under consideration, establishing restricted residence districts, etc., is not unconstitutional for unlawful discrimination, as against one desiring to erect a prohibited building within such a district, because it exempts from its operation similar buildings or structures already in the district at the time of its enactment. Magruder vs. Redwood (1928), 203 Cal., 665, 265 Pac., 806; Marquis vs. Waterloo (1930), 210 Iowa, 439, 228 N. W., 870."

"Thus, a zoning ordinance forbidding the construction or establishment of any new place of business within a residence district, but permitting the continuance of business establishments existing at the time the ordinance was adopted, is not unlawfully discriminative against the owners of vacant lots and of residences within the affected area, and so is not, as to them, violative of the equal protection clause of the Fourteenth Amendment to the Federal Constitution. Sampere vs. New Orleans (1928), 166 La., 776, 117 So., 827 (affirmed without opinion in (1928), 279 U. S., 812, 73 L. ed. 971, 49 S. Ct., 262)."

"On the other hand, a municipality is not permitted, under the guise of regulating business and segregating it to a particular district, to grant a monopoly within the city to business establishments and enterprises already situated in unrestricted districts. Wickham vs. Becher (1929), 96 Cal. App., 443, 274 Pac., 397. Thus, a zoning ordinance the effect of which was to prevent all business within the city, except that of the favored places already established, was void. Ibid. (involving ordinance limiting business to two small areas, together containing less than 1 acre of land, and already occupied by business places except for a single lot). See to the same effect Andrews vs. Piedmont (1929), 100 Cal. App., 700, 281 Pac., 78."

Also see opinion of Justice Wagner of our Supreme Court, in the case of Marquis vs. City of Waterloo, 210 Iowa 439, at page 443, citing from City of Des Moines vs. Manhattan Oil Co., 193 Iowa 1096, in comparing it with Eubank vs. City of Richmond, 226 U. S. 137.

Therefore, it would be the opinion of this department, where there are restricted residence districts or where the city has been zoned in accordance with the provisions of Chapters 324 and 325 of the 1931 Code of Iowa, that the city council could use its discretion in the issuance of permits in such areas and that such use of the ordinance authority granted under the beer act would be construed by the courts as a reasonable use thereof.

SALES TAX: INTERSTATE COMMERCE: FULLER BRUSH CO: "It is, therefore, the opinion of this office that the statement of facts submitted by you shows that the sales tax act does not apply, and that the State of Iowa cannot collect the 2 per cent tax upon the gross receipts from such sales, for the reason that such sales are made in interstate commerce, and, hence, are specifically exempted, under Section 39 of the sales tax act."

August 10, 1934. *State Board of Assessment and Review, Des Moines, Iowa:* We acknowledge receipt of your letter of July 25th, in which you ask for an opinion on the following question relative to the sales tax:

"Agents of the Fuller Brush Company operating in this state have a line of samples which they exhibit to prospective buyers by door to door canvass.

"Orders received by an agent in a particular town are grouped together and mailed to a distributor located outside the state. In compliance with such orders, the distributor ships to the local agent a consignment of brushes or other articles so sold, sufficient to fill the orders. The orders are not sent by the out of the state distributor direct to the buyer, but are shipped, as we understand, in bulk, and the agent selects the articles ordered by a particular customer and delivers such articles to the buyer, collecting therefor at the time of delivery."

We realize that this question is of considerable importance under the sales tax act, in view of the fact that many agents of the Fuller Brush Company, the Real Silk Hosiery Company, and other non-resident corporations are operating in this state. We believe, however, that under the holdings of the United States Supreme Court, we are bound to rule that the sales tax act does not apply to such sales by reason of the fact that this is interstate commerce.

Section 39 of the Tax Revision Act specifically exempts "the gross receipts from sales of tangible personal property, which this state is prohibited from taxing under the constitution or laws of the United States or under the constitution of this state." The section just quoted clearly evidences an intention on the part of the Legislature to avoid a tax, which would be held unconstitutional as a burden on interstate commerce. The taxing bodies, therefore, guided by the opinions of this office, should not act in such a way as to violate the interstate commerce provision of the Federal Constitution, which is as follows:

"Article 1. Section 8. The Congress shall have power * * * *:

"To regulate commerce with foreign nations and among the several states, and with the Indian tribes."

This question has been before the United States Supreme Court on several different occasions, and the decisions of that court are so numerous that it will only be necessary for us to mention two of the leading cases.

In the case of Real Silk Mills vs. City of Portland, 45 S. Ct., 525; 268 U. S., 325, the facts were as follows:

The company was an Illinois corporation, engaged in manufacturing silk hosiery in Indianapolis, Indiana, and selling it throughout the United States to customers only. Its representatives or agents in many states solicited and accepted orders on behalf of the company. It was required that the purchaser make a deposit of $1.00 on each box listed. This money was collected by the

agent, who forwarded the order to the Real Silk Hosiery Company. The goods were then shipped direct to the purchaser by parcel post C. O. D. In that case, it was contended that because a portion of the purchase price was paid to the agent, it took it out of the interstate commerce class, and that the ordinance of the city of Portland, requiring a quarterly license fee of $12.50 from each person going on foot from place to place, taking orders for goods for future delivery and receiving payment or deposit in advance thereon, was not repugnant to Article 1, Section 8, of the Constitution of the United States by being an interference with or a burden on interstate commerce. After citing numerous cases, the court, speaking through Mr. Justice Reynolds, made this pronouncement:

"Manifestly, no license fee could be required of appellant's solicitors, if it had traveled at its expense and received their compensation by direct remittances from it. And we are unable to see that the burden on interstate commerce is different or less, because they are paid through retention of advance partial payments made under definite contracts negotiated by them. Nor can we acknowledge the theory that an expressed purpose to prevent possible frauds is enough to justify legislation, which really interferes with the free flow of legitimate interstate commerce."

The decision just quoted, therefore, disposes of the question of a collection of a part of the purchase price. We call attention to this case, not so much because it bears on the statement of facts furnished by you, but because it will have considerable bearing on the procedure adopted by numerous other companies who have agents traveling in the State of Iowa.

The next case, to which we wish to call your attention is the case of Caldwell vs. North Carolina, 23 S. Ct., 229; 187 U. S., 622, which case, we believe, is squarely in point with the case submitted by you for our consideration. In the North Carolina case, Caldwell was tried and convicted in the state court of violating an ordinance of the city of Greensboro, North Carolina, which provided that every person engaged in the business of selling or delivering picture frames, pictures, photographs or likenesses of the human face, in the city of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business, for which a license has already been paid to the city, shall pay a license tax of $10.00 for each year.

The Defendant, who was employed by the Chicago Portrait Company, a foreign corporation, came to the city of Greensboro for the purpose of delivering certain pictures and frames, for which contracts of sale had previously been made by other employees of the Chicago Portrait Company, who had preceded the Defendant in Greensboro. The Defendant went to the Railway Freight Station and took therefrom large packages of pictures and frames, which had been shipped to Greensboro, North Carolina, addressed to the Chicago Portrait Company, carried these packages to the rooms of the Defendant in the hotel, and there broke the bulk, placing said pictures in their proper frames and delivering them one at a time to the purchasers in the city of Greensboro.

The Supreme Court of North Carolina, two of the Justices dissenting, affirmed the conviction, and the case was then taken to the United States Supreme Court by a writ of error. After citing numerous cases, among which were Robbins vs. Shelby Taxing District, 120 U. S. 489; Asher vs. Texas, 128 U. S., 129; Stoutenburgh vs. Hennick, 129 U. S., 141; Lyng vs. Michigan, 135 U. S., 161; Crutcher vs. Kentucky, 141 U. S., 47; Brennan vs. Titusville, 153 U. S., 289, and other cases, the court, in a lengthy opinion written by Mr. Justice Shiras, had this to say:

"But it certainly cannot be pretended that, if the pictures and the disconnected frames had been directly shipped to the purchasers, the license tax could have been imposed, either on the vendor out of the state or on the purchaser within the state. If the pictures and the frames intended for them had been shipped directly to the purchasers, whether in the same or separate packages, such a transaction would, beyond question, be interstate commerce beyond the reach of the taxing power of the state. It is too plain for argument that the supposed incomplete condition of articles of commerce, if shipped directly to the purchasers, cannot subject them to the license tax.

"But we are not disposed to concede that, under the facts of this case, the pictures were, in any proper sense, incomplete when received in Greensboro. That the frames and the pictures were in separate packages, if such was the case, was merely for convenience in packing and handling, and 'placing the pictures in their proper places,' (the language of the verdict), meant that each picture was placed in the frame designed for it. The selection of the frame was as much a part of the purchase and sale as the selection of the picture.

"Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate.

"Transactions between manufacturing companies in one state, through agents, with citizens of another constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser, are free from state taxation, but if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution."

We have followed the decisions hereinbefore quoted through Shepard's Citations, and we do not find where either of the cases have ever been overruled.

It is, therefore, the opinion of this office that the statement of facts submitted by you shows that the sales tax act does not apply, and that the State of Iowa cannot collect the 2% tax upon the gross receipts from such sales, for the reason that such sales are made in interstate commerce, and, hence, are specifically exempted, under Section 39 of the sales tax act.

We might also add that Section 46 of the act, which requires permits from persons engaged in retailing in the State of Iowa, does not apply to those engaged in interstate commerce any more than does that provision of the act providing for the payment of the 2% tax on gross receipts.

SCHOOL LEVY: BOARD OF SUPERVISORS: PROVISIONS OF SECTION 4395 MANDATORY: "It has long been the rule of this state that when the statute provides that a certain levy 'shall' be made by a public body for the purposes of taxation, it is a mandatory statute."

August 11, 1934. *County Attorney, Marshalltown, Iowa:* We acknowledge receipt of your letter of August 8th, in which you ask whether or not the provisions of Section 4395 of the Code of 1931, providing for a general school levy, are mandatory or merely directory.

We quote Section 4395, as follows:

"4395. General school levy. The board shall also levy a tax for the support of the schools within the county of not less than one nor more than three mills

on the dollar on the assessed value of all the taxable property within the county."

Although our Supreme Court has held that "may," "must," "shall" and "will" are elastic and are frequently treated as interchangeable, yet those decisions were in cases in which the term, "shall," or "may," was not used in a statute prescribing a duty or method of procedure for public officials. It has long been the rule of this state that when the statute provides that a certain levy "shall" be made by a public body for the purposes of taxation, it is a mandatory statute.

In support of the rule that the term, "shall," when used in the statute, makes it mandatory, we refer you to the following cases:

District Township of the City of Dubuque vs. The City of Dubuque, 7 Iowa, 262.
Jefferson County Farm vs. Sherman, 226 N. W., 182.
State vs. Hanson, 231 N. W., 428.

We realize that at a time in the history of this state when Section 4395 was contained in the same section with 4393 and 4394 of the Code of 1931, the Supreme Court of this state, in passing upon a portion of the section, held that it was directory. That was in the case of Perrin vs. Benson, 49 Iowa, 325, but the question under consideration at that time was not as to the amount of the tax, but merely whether or not a levy, which it was the duty of the Board of Supervisors to make in the year of 1875, could be made in the year of 1876. It will, therefore, be seen that so far as the holding of the Supreme Court in the Perrin case is concerned, it had to do only with the time in making the levy and not with the amount of the levy. In fact, the court in that case said that it was the duty of the Board to make the levy.

NRA: CONSTRUCTION PROJECTS: COUNTY: CONTRACT FEE: "It is, therefore, the opinion of this office that your county, when entering upon a construction project, which is being completed by day labor or by contract, owes no duty to file such contract or to pay a fee therefor."

August 11, 1934. *County Attorney, Oskaloosa, Iowa:* We acknowledge receipt of your recent letter, in which you ask for an opinion on the following:

"Our county engineer has received a letter from the Divisional Code Authority for General Contractors, advising him that it is necessary for the Board of Supervisors to file all contracts or construction projects started since March 19th and costing $2,000 or more, and registering them on blanks furnished by the Code Authority, in addition to paying a fee in the sum of one-tenth of one per cent of the contract or estimated cost of the project. The Secretary of the Code Authority for General Contractors advises that no exemptions are made in the requirement, and that it applies to all such construction projects, whether constructed by contract or by day labor."

You are advised that the State of Iowa, subdivisions and municipal corporations are exempted from the application of the N. R. A. You are further advised that the Government of the United States has no right or authority to impose a tax or license fee upon the State of Iowa or its instrumentalities or subdivisions.

It is, therefore, the opinion of this office that your county, when entering upon a construction project, which is being completed by day labor or by contract, owes no duty to file such contract or to pay a fee therefor.

COUNTY AUDITOR: SALARY FOR MAKING UP TAX BOOKS: "It is, therefore, the opinion of this office that the County Auditor of Lee county is not entitled to the additional $150. for the year of 1933." (Re-enactment of subsection 12 of Section 5220 by 45th Extra Session.)

August 13, 1934. *County Attorney, Fort Madison, Iowa:* We acknowledge receipt of your letter of recent date, in which you ask for an opinion on the following:

"Section 5220, paragraph 12, of the Code of 1931 provided for the payment to the County Auditor in counties of over 25,000, having a special charter city with a population of 5,000 or over, the payment of $300.00, in addition to his other compensation, when the County Auditor prepares and makes up the city tax books for such special charter city. This $300.00 was usually paid to the County Auditor in monthly installments.

"Said paragraph 12 of Section 5220 was repealed by Chapter 91 of the Acts of the 45th Regular Session, which became effective July 4, 1933.

"The Auditor of Lee county had already made up the tax books for the city of Keokuk for that year, but instead of $300.00 being paid to him in a reasonable sum, it had been paid to him at the rate of $25.00 a month, added onto his regular salary. In other words, he received $25.00 a month for the first six months of 1933, but has received nothing for the last six months of that year.

"The 45th Extra Session re-enacted paragraph 12 of Section 5220, which law became effective March 22, 1934.

"The question is whether or not the $300.00, provided for in paragraph 12 of Section 5220, should be paid in a lump sum, or whether it should be paid monthly, and the further question is whether or not the County Auditor is entitled to receive the full $300.00 for the year of 1933 or the $150.00, which has already been paid to him."

You call attention in your letter to the fact that the books had already been made up prior to the time that paragraph 12 of Section 5220 was repealed. In this, we believe you are in error. The County Auditor of your county proceeds to the making up of the tax books after the assessor has completed his returns, which is usually in June. For that reason, the Auditor had done very little work on the books. That, however, we believe, is beside the question. We think the question hinges on the meaning of Section 5220, when read in connection with Section 1218. Section 5220 in each paragraph provides for the annual salary or the additional annual compensation of the County Auditor. We realize, of course, that sub-paragraph 12, which allows the additional $300.00 for making up the tax books of the special charter city, was enacted by the 40th General Assembly, Chapter 250, Section 1. In fact, the entire Section 5220, relative to the compensation of the County Auditors, was rewritten in that act of the Legislature. We know of no instance where the statute fixes the salary of a public officer at a monthly rate. It has always been the policy of the Legislature to fix the annual salary. The payment of the salary is then governed by Section 1218 of the Code of 1931, which provides that the salary of all officers shall be paid in equal monthly installments at the end of each month, and shall be in full compensation for all services, except as otherwise expressly provided.

It cannot be said that the act of the Legislature, enacting the present Section 5220 of the Code of 1931, repealed Section 1218. There is nothing in Chapter 250 of the Acts of the 40th General Assembly, which expressly repeals Section 1218, and our courts have never favored repeal by implication.

We believe the only construction, which could be placed on the act of the Legislature, as it now appears in Section 5220, or as it did appear in said section prior to the enactment of Chapter 91 of the Forty-fifth Regular Session, in so far as the intention of the Legislature was concerned, is that the Legislature intended, in the enactment of said Section 5220, to fix the annual salary of the County Auditor in each of the thirteen instances referred to in said section,

and to allow said salary to be paid under the provisions of Section 1218, that is, in monthly installments.

It is, therefore, the opinion of this office that the County Auditor of Lee County is not entitled to the additional $150.00 for the year of 1933. Of course, you understand that the Legislature can reduce the salary of a public officer during his term in office. The authorities in support of this statement are too numerous to mention.

We note, however, in the letter, which you received from your County Auditor, the statement made by him that when Sub-section 12 of Section 5220 was re-enacted by the Forty-fifth Extra Session, it was enacted to become effective January 1, 1935. In this, your County Auditor is in error. That act became effective on March 22, 1934, upon publication, as provided in the act.

CITIES: COMMISSION FORM OF GOVERNMENT: FREE EMPLOYMENT BUREAUS: A city operating under commission government may appropriate funds to be matched by a like amount of federal funds under the general police powers expressly granted to municipalities.

August 14, 1934. *Director Iowa State Employment Service, Des Moines, Iowa:* We have received your request of recent date for an opinion on the question as to whether or not a city operating under the commission form of government in Iowa may appropriate funds to be matched by a like amount of federal funds, under the provisions of the Federal Wagner-Peyser Act, to augment the state appropriation provided by the Forty-fifth General Assembly, Extraordinary Session (H. F. 271) for the purpose of maintaining quarters for Iowa State Employment offices situated within said city.

It is our opinion that a municipality has the power to contribute, ratably with the county, by way of appropriation to the maintenance of a public free employment service under state supervision, operating within its limits.

Cities and towns, in Iowa, under Section 5738, Code of Iowa, 1931, have

"* * * * general powers and privileges granted, and such others as are incidental to municipal corporations of like character, not inconsistent with the statutes of the state, for the protection of their property and inhabitants and the preservation of peace and good order therein. * * *"

Under Section 5714, Code of Iowa, 1931, municipal corporations are given power to make and publish ordinances

"* * * * for carrying into effect the powers and duties concerned and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, etc., of such corporations, and the inhabitants thereof. * * *"

The above statutes confer upon municipalities a general police power to protect the general welfare of their citizens.

"Courts accord a wide discretion to municipal authorities in the application by them of the police power."

McQuillin, Municipal Corporations, 1928, Vol. 3, Sec. 942.

They have sustained its application in its exercise for purposes more or less indefinite, e. g., the promotion of the general interests and general prosperity, and the validity of any exercise of such power.

"must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designing to accomplish a legitimate corporate purpose."

C., B. & Q. Ry. Co. vs. People, 200 U. S., 561, 592, 26 Sup. Ct., 341.

The same court held that police power

"* * * * extends to so dealing with the conditions which exist in the city as to bring out of them the greatest welfare of its people."

The exercise of such powers is sometimes sustained, therefore, on grounds which do not appear to rest upon any well-defined or generally recognized police basis, provided, of course, that they are reasonable and tend to accomplish some legitimate public purpose. It would seem that to aid a free employment bureau for the public generally, whose purpose is to help alleviate the present conditions of unemployment within the municipality, is well within the police powers of such municipality.

The matter under consideration is distinguishable from the opinion of the court in Hardin vs. City of Shreveport, 178 L. A. 46, 150 So. 665, holding invalid an appropriation by the Shreveport City Council of funds to pay a "civil officer" for advising and assisting ex-service men and their families in securing the benefits of a soldier's bonus, in the absence of legislative authority. The court held that police powers of municipalities do not extend beyond that which concerned the community or public generally, saying,

"Referring again to the police powers of municipalities that this appropriation is legal, it must be admitted that such powers are broad and cover a wide range of subjects. But these powers have limitations. They cannot be extended beyond that which concerns the common welfare and the public generally. Municipalities cannot, under the guise of acting under their police powers, use public funds to aid a designated group or class of its inhabitants who have no inherent right to such aid."

The benefits of a free public employment bureau reach the public at large and are not restricted to a special group. Other cities have formed free employment bureaus by ordinance under a general police power statute. See Christianson vs. City of Portland, 175 Pa. 135; for a summary of cities which have set up such bureaus as an aid to unemployment relief, see also Hurlburt, Municipal Aid for the Unemployed, 20 Nat. Mun. Rev. 277 (1931).

A general principle that a power granted to municipal corporations, without limitation as to the method of its exercise, carries with it the implied power to adopt such measures of execution as may seem best to the local governing body, frequently is applied to justify the appropriation of funds to even private agencies that are engaged in a public work which the municipality is authorized to undertake directly. State ex rel La Crosse Public Library vs. Bentley, 163 Wis. 632, 158 N. W. 306; Fenan vs. Cumberland 154 Md. 563, 141 Atl. 269.

There is little doubt that a municipality in Iowa may set up such a bureau by following the provisions of Chapter 288, Code of Iowa, 1931. The provisions of these sections are broad enough in their scope so as to include an employment service bureau if the municipality wishes to adopt the procedure prescribed for the establishment of such a department.

The fact that the Legislature has at least anticipated the existence of such a municipal agency is found under Chapter 77, Code of Iowa, 1931, relating to the establishment of a State Employment Bureau and Employment Agencies. Section 1544 provides:

"With the approval of the executive council, the (labor) commissioner may establish within the state such branches of free employment agencies as shall afford the best distribution of labor, and for such purposes may cooperate with any federal, state, municipal, or other free employment bureau or association."

Considering, then, these aspects of the problem, it is our opinion that a city, such as Cedar Rapids, in this state may make an appropriation for a state governing free employment bureau, under the general police power expressly granted to municipalities. The object and purpose of such an appropriation is an emergency relief measure which will be of aid to the people at large of

the municipality, and in our opinion is within the police power of such municipality.

CONFISCATION: CONDEMNATION: DOCKET ENTRY: Can the tackle or gun be returned without confiscation if the defendant is found guilty? Can a justice of the peace confiscate tackle belonging to a third party but used by a person found guilty of a violation of the fish and game laws?

August 16, 1934. *Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the fourteenth instant in which you request the opinion of this Department on the following matter:

"Kindly indicate the docket entry you wish the record to show when a justice of the peace condemns or confiscates fishing tackle, net or gun upon conviction of the defendant for a violation of the fish or game law.

"If the defendant is found guilty of a violation of the fish or game law, can the tackle or gun be returned without confiscation?

"Can a justice of the peace confiscate tackle belonging to a third party but used by a person found guilty of a violation of the fish and game laws?"

Please be advised that Sections 6, 7, 8 and 9 of Chapter 30, Acts of the Forty-fifth General Assembly, prescribes the method by which any device, contrivance or material used to violate any regulation adopted by the fish and game commission or any other provision of the chapter under consideration or which is declared a public nuisance, may be confiscated and the method of procedure is outlined in the Sections above referred to.

Section 7 provides that the justice of the peace shall docket the case and in accordance with the provisions contained therein. The trial of the cause, in accordance with Section 8, shall be, as far as practicable, by the same proceedings as is provided in Chapter 96 of the Code, 1931, which outlines the procedure to be used in the case of search warrants. Section 1986 of the Code, 1931, treats the questioning of docketing the judgment and the docket entry should simply show the proceedings had in the case. You will note, in Section 9 of Chapter 30, Acts of the Forty-fifth General Assembly, that the magistrate may order such devices, contrivances or materials confiscated and destroyed or placed at the disposal of the state fish and game warden. If the evidence in the case is such that there would be doubt as to whether or not there should be confiscation, this would be a matter for the magistrate to determine.

In answer to the question, which you submit relative to the confiscation of tackles belonging to third parties, the question would arise as to whether or not the third parties knew of the purpose to which the fishing tackle or other device was used and if he did have knowledge, then the magistrate, in our opinion, would be within his rights in confiscating. However, if the said third party would come into court either at the time of the hearing before the magistrate or by the starting of a new action and would set it out to be a fact that he had no knowledge of any illegal purpose for which his equipment had been used, then it would be the opinion of this Department that upon such a showing, the property of the third person would not be confiscated. This would be a matter for the magistrate to pass upon after hearing all parties entitled to be heard. The same situation would arise, by way of illustration, if "A" loaned his car to "B" and without "A's" knowledge or consent "B" used the automobile to transport illegal liquor. If "A" could show that he had no knowledge that "B" desired to do said illegal act, then "A's" car should not be held, but this would depend upon the facts as submitted. It would be the duty of the magistrate to make a finding in accordance with the true situation. In the case of a

justice of the peace, of course, an appeal could be taken from any ruling which he might make. There would be no difference in the docket entry from any other case which would come before the justice of the peace, as he simply makes his entry in accordance with the proceedings had before him, what his finding is in the matter and he should issue such orders as are in keeping with the duties of his office.

FISH AND GAME COMMISSION: BIOLOGICAL SURVEY: WATERFOWL REFUGES: In regard to disposal of certain lands in the Ruthven area and along the Missouri River, and transfer of same to the Biological Survey, a federal agency.

August 17, 1934. *Fish and Game Commission, Des Moines, Iowa:* This will acknowledge receipt of your request of the seventh instant for the opinion of this Department with reference to federal waterfowl projects, in which communication you refer to Mr. Du Mont's letter of the thirtieth ultimo. You present the following questions:

The Biological Survey has available funds for establishing waterfowl refuges. The State Fish and Game Commission will not be able to accomplish in ten years what the Biological Survey may be able to do in one year if a way may be found for them to acquire certain lands in the state in the near future.

The special session of the 45th General Assembly passed a law permitting the Federal Government to purchase certain lands in the state. Would this statute permit the State of Iowa to dispose of certain lands in the Ruthven area and along the Missouri River without legislative enactment? What method of procedure would be the proper one to follow out to transfer these lands to the Biological Survey?

It is the opinion of this Department, as the Biological Survey is a federal agency, that when land which they would desire to acquire was decided upon, the matter could be called to the attention of your commission if the land would be owned by the state and under your jurisdiction. You could, by resolution to the Executive Council of this state, present the same to the Executive Council in a formal application and ask that a deed be given in accordance with Chapter 3 of the Acts of the Forty-fifth General Assembly in Extraordinary Session, Section 1 of which provides as follows:

"Section 1. The consent of the State of Iowa is hereby given to the acquisition by the United States, by purchase, gift, or condemnation with adequate compensation, of such lands in Iowa as in the opinion of the federal government may be needed for the establishment, consolidation and extension of national forests and/or for the establishment and extension of wild life, fish and game refuges and for other conservation uses in the state; provided, that the State of Iowa shall retain a concurrent jurisdiction with the United States in and over lands so acquired so far that civil process in all cases, and such criminal process as may issue under the authority of the State of Iowa against any persons charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this law had not been passed."

The Executive Council could, by a favorable action on the resolution, authorize the Governor and the Secretary of State to execute the nature of the conveyance desired by the Biological Survey, a federal government agency.

In the event that the Biological Survey would desire land not under the jurisdiction of your commission or under that of some other state board or commission, said Biological Survey would have the right to condemn under the laws of our state. In this connection, I wish to call your attention to Section 7804 of Chapter 365 of the 1931 Code of Iowa, entitled "Eminent Domain," which taken in connection with the preceding section, 7803, provides

that condemnation proceedings may be instituted and maintained by the state of Iowa of private property for the use and benefit of the state. Section 7804 provides as follows:

"*On behalf of federal government.* The executive council may institute and maintain such proceedings when private property is necessary for any use of the government of the United States."

SCHOOLS: TUITION: TRANSPORTATION: Subdistrict school closed for lack of pupils and board arranged for pupils to attend school in adjoining district in same township. Parents chose to send children to town schools seven miles distant. Board of town district submits bill to board of closed subdistrict for tuition. Is closed subdistrict liable for tuition and are they also liable for transportation?

August 17, 1934. *Department of Public Instruction, Des Moines, Iowa:* You ask for our opinion on the following proposition:

"A subdistrict school of a township closed for lack of pupils and the board arranged schooling for four of the five children in a school 1¼ miles from their home in an adjoining township, free of any tuition. The fifth pupil in the closed school was directed to go 1½ miles to another subdistrict in the same township. The parents of the five pupils, however, chose to send their children to town schools seven miles distant. The Board of the Town District submits a bill to the board of the closed subdistrict for tuition. Is the closed subdistrict liable for the tuition and are they also liable for transportation?"

Sections 4233-e1, 4233-e2, 4233-e3, 4233-e4 and 4233-e5 are companion sections, all being a part of Chapter 60 of the Acts of the 45th General Assembly. They are, therefore, to be construed together and you will note that these sections provide for two contingencies, (1) where the school has been designated and the tuition cost mutually agreed upon, and (2) where the pupil desires to go to a school of his choice irrespective of whether it has been agreed upon by the Boards or not, and of course, in such cases, there would be no mutual agreement as to tuition if the pupil would go to the school without any prior agreement. In such case, the last seven lines of Section 4233-e1 of the school laws of Iowa as compiled by you provide that the cost to the school township where a child goes to a school of his choice, shall not exceed the pro rata cost in the entire school township during the school year immediately preceding. So, in such instance, there is no mutual agreement as to tuition, but it is determined by this yardstick.

We have heretofore held that transportation is to be furnished only where the child attends a school provided for by his corporation and that where a child attends a school of his choice, he is not entitled to transportation. I think Section 4233-e4 is clear on this. No Board has authority to pay money for school purposes to the parents of the pupils. Such can only be paid to the district entitled thereto.

In regard to the manner of collecting this tuition, where the subdistrict refuses to pay, there has been some question as to whether Sections 4277 and 4278 apply, so it should be collected, I believe, as any other debt, that is, by instituting a suit.

POLITICAL CONTRIBUTIONS—BY STATE EMPLOYEES: State employees, with the exception of members, officers or employees of the Board of Control of State Institutions, the Commerce Council, and the Industrial Commissioners and his appointees, may contribute to any political party's campaign fund.

August 17, 1934. *Republican State Central Committee, Des Moines, Iowa:* We have your favor of the 16th inst. which is as follows:

"There is some question as to what state employees may legally contribute to a political party's campaign fund. In order that there may be no misunderstanding, would you be kind enough to furnish us with your opinion relative to the same?

Your attention is called to the statutes of the state which prohibit certain state employees from contributing to the campaign fund of any political party, as follows:

"Section 3279. Political activity. No member, officer, or employee of the board, or of any of the institutions under the control of the board, shall, directly or indirectly, exert his influence to induce other officers or employees of the state to adopt his political views, or to favor any particular candidate for office, nor shall such member, officer, or employee contribute in any manner, money or other thing of value to any person for election purposes. Any person violating this section shall be removed from his office or position."

You will note this section prohibits any member, officer, or employee of the Board of Control of State Institutions from contributing "in any manner, money or other thing of value to any person for political purposes."

Section 7916 prohibits the state commerce council from contributing to any political campaign fund.

Section 1427 is as follows:

"1427. Political activity and contributions. It shall be unlawful for the commissioner, or any appointee of the commissioner while in office, to espouse the election or appointment of any candidate to any political office, contribute to the campaign fund of any political party, or to the campaign fund of any person who is a candidate for election or appointment to any political office, and any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined one hundred dollars, and it shall be sufficient cause for removal from office."

Section 13315, relating to contributions for political purposes, is as follows:

"13315. Contributions for political purposes. Any person who demands or solicits, from any member, employee, or officer of the board of control, or from any officer or employee of any institution subject to this board, a contribution of money or other thing of value, for election purposes, or for the payment of expenses of any political committee or organization, shall be deemed guilty of a misdemeanor and punished accordingly."

State employees may properly contribute to any political party's campaign fund unless such contributions are prohibited by express statutory provisions. We have set out or referred above to the statutory law of this state relating to the subject of campaign contributions by state employees to political parties and candidates for political offices.

The above sections clearly make it unlawful for members, officers, and employees of the board of control of state institutions, the commerce council, and the industrial commissioner and his appointees, to contribute to a political party's campaign fund.

We have carefully examined the indices to the Code of 1931 and the subsequent session laws under the headings of political activity and political contributions, and find no other sections precluding state employees from contributing to political party campaign funds, except as above set out.

ELECTIONS: CANDIDATES RUNNING INDEPENDENTLY OF ANY POLITICAL PARTY: Candidates may have their names printed under a proper heading indicating they are running independently of any political party. The word "Independent" is the customary word used, but any other proper word may be used in its place.

August 20, 1934. *Secretary of State, Des Moines, Iowa:* We have your favor of the 6th inst. in which you state that Section 528 of the Code provides that

political organizations which are not political parties may nominate candidates "under Chapters 37-A1 and 37-A2." You then submit this question:

Does this mean that an organization not a political party may choose as between the methods outlined in Chapters 37-A1 and 37-A2, and act under one independent of the other without regard to the word "and" as found in the phrase, "Chapters 37-A1 and 37-A2" of Section 528?

It is our opinion an organization not a political party may choose between the methods outlined in the two chapters referred to in your question, and act under one independent of the other without regard to the word "and" where it is used in the last two lines of Section 528, as follows: "Chapters 37-A1 and 37-A2."

With reference to the construction of the word "and," 2 Corpus Juris, 1337, has the following to say:

"While the word is generally used in a conjunctive sense, that is not its invariable use. The word is sometimes used in the sense, as well as, in addition to, together with."

We quote further from the above authority as follows:

"In order to effectuate the intention of the parties to an instrument, a testator or a legislature, as the case may be, the word 'and' is sometimes construed to mean 'or'."

2 C. J., 1338.

Chapters 37-A1 and 37-A2 relate to different methods of making nominations.

The third paragraph of your letter follows:

"Also will you please cite the authority, if any, under which a party designation on the ballot is assigned to such organizations as act under 37-A1, as well as the authority for designating candidates qualified under 37-A2 as Independents, which is the customary procedure."

The authority under which a party designation on the ballot is assigned to such organizations as act under 37-A1 is found in Section 655-a3, as follows:

"655-a3. Contents of certificate. Said certificate shall state: * * * *

3. The name of the political organization making such nomination, expressed in not more than five words."

There appears to be no specific authority for designating candidates qualified under Chapter 37-A2 as independents, but such designation has been used and accepted following what you describe as customary procedure and would seem to imply that the candidates whose names appear under that heading are independent of any other political organization.

You then submit the following question:

"Also under 37-A2, is there any direct or implied authority permitting the use of any other words than 'Independent' over the names of candidates qualifying under that chapter?"

Chapter 37-A2 makes no reference to any party name and designates no name under which candidates qualifying under this chapter shall have their names printed. It has been the practice to use the word "Independent" as the designation under which candidates nominated as provided in this chapter may have their names printed on the ballot and the word is probably used to indicate not a party name but that the candidates so nominated are running independently so far as party affiliation is concerned. There is no direct authority for permitting the use of the word, "independent," or any other word over the names of candidates qualifying under this chapter, nor is there any implied authority for using the word, "independent," in preference to any other word. We are inclined to say there is implied authority to use a word at the head of the proper column indicating the candidates are running independently of any

political party designated on the ballot and just as much authority to use other proper words as there is to use the word, "independent," although "independent," is the best word we can think of to designate candidates nominated under this chapter. If the petition provided for under this chapter should designate a party name not appearing elsewhere on the ticket under which the candidate desired his name printed, there might be authority for the use of such designation at the head of the column. This chapter does not expressly so provide, but neither does it expressly provide for the use of the word, "independent,."

TAX SALE DEEDS: CONSTRUCTION OF CHAPTER 81, 45TH GENERAL ASSEMBLY, EXTRA SESSION: "Therefore, special assessment installments, which became due March 1, 1934, which was twenty days prior to the effective date of the act, would not become delinquent after the taking effect of the act."

August 20, 1934. *Auditor of State, Des Moines, Iowa:* We acknowledge receipt of your letter of August 9th, in which you ask for the construction of Chapter 81, Acts of the Forty-fifth Extra Session of the Legislature of this state, relative to extending the period of redemption.

For convenience in the construction of Chapter 81, we will set it out in full. It is as follows:

"CHAPTER 81

TAX SALE DEEDS. DELIVERY TIME AND REDEMPTION PERIOD

H. F. 232

An Emergency Act relating to the execution and delivery of treasurers' deeds conveying real estate sold at tax sale; to prohibit the delivery of such deeds until December 2, 1935, and to extend the period of redemption.

Be it enacted by the General Assembly of the State of Iowa:

Section 1. In any case where real estate has, in any year preceding 1932, been sold for taxes and the time for redemption had not already expired, a treasurer's deed therefor shall not be delivered prior to December 2, 1935, and the period during which redemption from such sale may be made is hereby extended to said date; provided, however, if the owner of such real estate shall hereafter permit any taxes to become delinquent against the same and remain so delinquent after the 1st of September of any such year the county treasurer shall upon surrender to him of the tax sale certificate, execute and deliver such deed.

Sec. 2. Any provision of any law or laws now in force which are in conflict with this act are hereby suspended until December 2, 1935.

Sec. 3. On and after December 2, 1935, this act shall cease to be in force or effect.

Sec. 4. This act, being deemed of immediate importance, shall be in full force and effect from and after its publication in the Mount Pleasant Daily News, a newspaper published at Mount Pleasant, Iowa, and the Cantril Register, a newspaper published at Cantril, Iowa.

House File No. 232. Approved March 10, 1934."

Prior to the enactment of this law, it was necessary that the holder of a certificate wait two years and nine months from the date of the sale, before giving notice to the person in whose name the real estate was taxed. The notice required was ninety days from the completed service of the notice. In other words, the holder of the certificate was not entitled to a tax deed for at least three years from the date of the sale, and if he overlooked giving the notice at the expiration of two years and nine months, he still could not obtain a deed until ninety days after the completed service of the notice required by Chapter 348 of the Code.

Your first question is as to the meaning of the term, "provided, however, if the owner of such real estate shall hereafter permit taxes to become delinquent against the same and remain so delinquent after the 1st of September of any such year." We construe this to mean that it applies to taxes which became delinquent after the effective date of the act and not to taxes which were already delinquent. The statute uses the term, "become delinquent and remain delinquent." If the taxes were already delinquent, they would not become delinquent "hereafter," meaning after the effective date of the act. Therefore, special assessment installments, which became due March 1, 1934, which was twenty days prior to the effective date of the act, would not become delinquent after the taking effect of the act.

Your second question is as follows:

"Suppose the regular 1931 tax sale was postponed one month and held on the first Monday in January, 1932. Would such a sale be within or without the purview of this statute?"

The first part of Section 1 of the act provides:

"In any case where real estate has, in any year preceding 1932, been sold for taxes * * * *."

We construe this phrase to mean exactly as stated, that is, that in any case where the property *has been sold* in any year preceding 1932. The statute does not say, "sold for the taxes of any year preceding 1932." The wording is so plain that we can only place upon it the construction just stated.

We might also raise one question, which was not mentioned in your request, but which undoubtedly will come up in the near future. Section 1 provides that if the owner of such real estate shall hereafter permit any taxes to become delinquent against the same and remain so after the 1st of September of any such year, the County Treasurer shall, upon surrender to him of the tax sale certificate, execute and deliver such deed. Someone might say that this provision means that even though the notice, as required by Chapter 348, had not been given, the Treasurer would have to issue a deed. We cannot place such a construction on the statute. Chapter 81 was enacted as an emergency measure. The title provides that it is an emergency act and that the purpose of it is to extend the period of redemption. It was not intended that this act should do away with the notice, required by Chapter 348 of the Code of 1931, or to repeal any of the provisions of that chapter. Further, prior to the enactment of Chapter 81, the person, in whose name the property was taxed, was entitled to three years in which to redeem, and was entitled to a ninety day notice of the expiration of the period of redemption. The enactment of Chapter 81 of the Acts of the 45th Extra Session and the suspension of any of the provisions of Chapter 348 by said Chapter 81 could not affect any right which had accrued to the person having the right of redemption.

COUNTY OFFICERS: DEPUTY COUNTY CLERKS: ACKNOWLEDGMENTS OF REAL PROPERTY: Deputy clerks are not authorized to take acknowledgments of deeds of conveyance of real property, or other instruments in writing.

August 23, 1934. *Hon. C. L. Beswick, Representative, Stockport, Iowa:* Your question of the 13th inst., is as follows:

"Has the deputy clerk of the district court authority to take acknowledgments of conveyances of real property?"

Section 5242 provides as follows:

"5242. Powers and duties. Each deputy, assistant, and clerk shall perform

such duties as may be assigned to him or her by the officer making the appointment, and during the absence or disability of his principal, the deputy or deputies shall perform the duties of such principal, except a deputy superintendent of schools shall not perform the duties of his or her principal in visiting schools or hearing appeals."

There is nothing in this section that authorizes the deputy clerk to take acknowledgments to conveyances of real property.

We next turn to Section 1215, with relation to the administration of oaths, which in so far as it is material is as follows:

"General authority. The following officers are empowered to administer oaths and to take affirmations: * * * *

3. Clerks and deputy clerks of the supreme, district, superior, police, and municipal courts."

Section 10085 of the 1931 Code of Iowa is as follows:

"Acknowledgments within state. The acknowledgment of any deed, conveyance, or other instrument in writing by which real estate in this state is conveyed or incumbered, if made within this state, must be before some court having a seal, or some judge or clerk thereof, or some county auditor, or justice of the peace within the county, or notary public within the county of his appointment or in an adjoining county in which he has filed with the clerk of the district court a certified copy of his certificate of appointment. Each of the officers above named is authorized to take and certify acknowledgments of all written instruments, authorized or required by law to be acknowledged."

You will note it provides that acknowledgments of deeds, conveyances, and other instruments in writing by which real estate in this state is conveyed or incumbered, if made within this state, must be before certain officers named in the section, and deputy clerks are not included therein.

Section 277 of the Code of 1873 was somewhat broader than this section. It provided, in part, as follows:

"The following officers are authorized to administer oaths and take and certify acknowledgments of instruments in writing."

Thereafter, the section enumerated among others, each deputy clerk of the district and circuit courts.

Long vs. Schee, 86 Iowa, 619.
Hilpire vs. Claude, 109 Iowa, 159.

The Supreme Court decisions holding that the deputy clerk had legal authority to take and certify acknowledgments were rendered at a time when the statutes were different from those in effect at the present time. In view of the language of the statutes, we are of the opinion deputy clerks are not authorized to take acknowledgments of deeds of conveyance or other instruments in writing.

SALES TAX: ALLOCATION OF PROCEEDS: BOARD OF ASSESSMENT AND REVIEW: "It is the opinion of this Department that it is the duty of the State Board of Assessment and Review, under the provisions of Chapter 82, Laws of the 45th General Assembly in Extraordinary Session, to eliminate the last half of the 1933 state levy, payable in 1934, and to allocate from said collected and anticipated sum of $8,000,000.00 the sum of $3,230,000.00 for the purpose of such elimination."

August 23, 1934. *State Board of Assessment and Review, Des Moines, Iowa:* I have your letter of August 23rd, in which you request an opinion from this Department upon the following proposition:

"Your opinion is requested upon the questions hereinafter set forth.

"Preliminary thereto, please be advised that it is anticipated by this Board that taxes on the gross receipts from retail sales as defined and provided in Chapter 82, laws of the 45th General Assembly, Extraordinary Session, will

have been collected in an amount equal to or in excess of eight million ($8,000,000.00) dollars by December 31, 1934. Of this amount specific allocations are made by the act, as follows:

1. Three per cent for administrative and collection expense.
2. $3,000,000.00 for the state emergency relief fund.
3. On January 1, 1934 (and quarterly thereafter) $1,500,000.00 to pay expenses of state government.

"Assuming such amount to be $8,000,000.00, the sums to be allocated would be:

1.	$ 240,000.00
2.	3,000,000.00
3.	1,500,000.00
Total	$4,740,000.00

"The last half of the 1933 biennial state levy is fixed at $3,230,000.00 by Chapter 247 of the 45th General Assembly, Regular Session. Deducting from the sum of $8,000,000.00 the above total of $4,740,000.00, a balance of $3,260,000.00 would remain.

1. QUERY: Is it the duty of this Board, under provisions of Chapter 82, laws of the 45th General Assembly, Extraordinary Session, to eliminate the last half of the 1933 state levy, payable in 1934, and to allocate from said collected and anticipated sum of $8,000,000.00 the sum of $3,230,000.00 for the purpose of such elimination?

2. QUERY: If your opinion is in the affirmative upon the above question, does this Board have full power and authority to prescribe all rules and regulations necessary and advisable to effectuate such purpose, i. e., the elimination of the second half of the 1933 state levy?"

In answer to your first query as to the duties of your Board, under provisions of Chapter 82, Laws of the Forty-fifth General Assembly in Extraordinary Session, in eliminating the last half of the 1933 state levy, payable in 1934, and allocate from said collected and anticipated sum of $8,000,000.00 the sum of $3,230,000.00 for the purpose of such elimination, we wish to call your attention to the following provisions of said act:

The first clause of the title to Chapter 82 of the Acts of the Forty-fifth General Assembly in Extraordinary Session reads as follows:

"An act to equalize taxation and *replace* in part the tax on property."

The title to said act also includes this clause:

"to repeal the provisions of Chapter two hundred forty-seven (247), Acts of the Forty-fifth General Assembly, insofar as in conflict with the provisions of this act."

Section 2 of Chapter 82 of the Acts of the Forty-fifth General Assembly in Extraordinary Session is as follows:

"This act shall be known as the 'property relief act,' and shall have for its purpose the *direct replacement* of taxes *already levied* or to be levied on property to the extent of the net revenue obtained from the taxes imposed herein, which shall be apportioned back to the credit of individual taxpayers on the basis of the assessed valuation of taxable property as provided in division VI of this act."

The title and Section 2 of said act clearly show that it was the Legislative intention that the levy for state purposes, to be collected during the year 1934, should be replaced as money was available to replace the same from the revenues derived from the provisions of this act.

In the allocation of the revenues derived from the enforcement of this act, it is mandatory on your Board to first set aside 3% of said fund and to transfer said 3% to the general fund of the state as the same is collected, for the purpose

of defraying the expenses in connection with the administration of said act. The next sum, which must be apportioned and set aside by your Board during the year 1934 only, is a fund to be known as the "State Emergency Relief Fund," which fund shall be in the total amount of $3,000,000.00. The next allocation that shall be made by your Board is on January 1, 1935, and quarterly thereafter your Board shall set aside and cause to be paid into the general fund of the state from the balance of said special tax fund a sum of not to exceed $1,500,000.00 quarterly, which, together with other state revenues expendable for such purposes, shall be for the purpose of defraying the general expense of the state government for the current calendar year, as authorized and appropriated for by the General Assembly. When the above three sums can be allocated and transferred by your Board, in accordance with Paragraphs 1, 2 and 3 of Section 61 of said act, then it is also mandatory on your Board to comply with Paragraph 4 of Section 61 of said act, which is as follows, to-wit:

"4. The balance of said fund, after the provisions of paragraphs one (1), two (2) and three (3) hereof have been complied with and any sums payable thereunder anticipated and set aside, shall be distributed from time to time upon order of the board in accordance with the provisions of this act, on warrants drawn by the Comptroller upon direction of the board, and made payable to the county treasurer of the several counties of the state."

A careful scrutiny of the above quoted sections of said act clearly shows that it was the intention of the Legislature to have the proceeds from said sales tax apply as a replacement of taxes already levied, as well as taxes to be levied in the future. Further, it was the apparent intent of the Legislature to have 3% of the tax so collected first set aside for administrative expense and to have the next $3,000,000.00 collected set aside for emergency relief for the year 1934, and that $1,500,000.00 of the sales tax collected in 1934 should be set aside on January 1, 1935, for the defraying of the expenses of the state government for the first quarter of the year 1935, and that quarterly thereafter a similar sum of $1,500,000.00 should be set aside for the payment of the expenses of the state government. All sums over and above these amounts are to be allocated and distributed to the taxpayers of the several counties of the state. In other words, after the Board has set aside the 3% for administrative expenses and the Emergency Relief Fund of $3,000,000.00 and made provision for the allocation of the first quarter's state expense for 1935, the balance, if any, should be applied as a replacement of taxes already levied. The only state taxes already levied and uncollected are the second half of said state tax levy, which must be paid before October 1, 1934.

After setting aside the 3% for administrative expenses and the $3,000,000.00 for emergency relief and making provision for setting aside the $1,500,000.00 on January 1, 1935, you state that you will have a surplus from the 1934 collections of at least $3,260,000.00. The question now arises as to what disposition your Board shall make with respect to this surplus of $3,260,000.00, which you will have collected during the year 1934.

There can be no question but that this surplus must be used as a direct replacement of property tax levies. The only question that can possibly arise is as to whether this surplus should be used for the purpose of eliminating the second half of the state levy made in 1933 and payable in 1934, or as to whether or not the surplus should be allocated back to the counties, under the provisions of Section 62 of said act.

Paragraph 2 of Section 62 of said act specifically states and provides that

the allocation back to the counties of any surplus, after the provisions of Paragraphs 1, 2 and 3 of Section 61 have been complied with, shall not be made until August 1, 1935. Paragraph 2 of Section 62 of said act reads as follows:

"2. On August 1, 1935, and annually thereafter, the board shall certify to the county treasurer of each county in the state, the total amount of the money which has been apportioned and/or is then apportionable to that county."

Therefore, under the provisions of Paragraph 2 of Section 62, this apportionment back to the counties could not be made until August 1, 1935. Taxes collected for the state in any year should be legally applicable to the expenditure by the state during that year, unless there is a Legislative prohibition against such use. There appears to be no Legislative prohibition against the use of this surplus as a replacement of the second half of the 1933 state tax levy due, payable and collectible before October 1, 1934. There would be little sense or reason in the state holding this surplus, which would eliminate the second half of the state levy payable in 1934, until August 1, 1935, before using it as a replacement of taxes already levied. This act specifically authorizes your Board to use the proceeds of this new tax as a replacement of taxes already levied, as well as taxes to be levied.

Therefore, in answer to your first query, it is the opinion of this Department that it is the duty of the State Board of Assessment and Review, under the provisions of Chapter 82, Laws of the Forty-fifth General Assembly in Extraordinary Session, to eliminate the last half of the 1933 state levy, payable in 1934, and to allocate from said collected and anticipated sum of $8,000,000.00 the sum of $3;230,000.00 for the purpose of such elimination.

Your second query is as follows:

"If your opinion is in the affirmative upon the above question, does this board have full power and authority to prescribe all rules and regulations necessary and advisable to effectuate such purpose, i. e., the elimination of the second half of the 1933 state levy?"

The answer to your second query is contained in Section 53 of Chapter 82 of the Laws of the Forty-fifth General Assembly in Extraordinary Session, which section is as follows, to-wit:

"Sec. 53. Powers and duties. 1. The board shall have the power and authority to prescribe all rules and regulations not inconsistent with the provisions of this act, necessary and advisable for its detailed administration and to effectuate its purposes.

"2. The board may, for administrative purposes, divide the state into districts, provided that in no case shall a county be divided in forming a district."

Therefore, in answer to your second query, it is the opinion of this Department that the State Board of Assessment and Review does have full power and authority to prescribe all rules and regulations necessary and advisable, not inconsistent with the provisions of said act, to effectuate the elimination of the second half of the 1933 state levy.

SALES TAX PROCEEDS: STATE BOARD OF ASSESSMENT AND REVIEW: ELIMINATION OF ENTIRE STATE LEVY: "It is, therefore, the opinion of this Department that it is the duty of the State Board of Assessment and Review to eliminate entirely the levy for general state purposes provided for in said Chapter 247, Laws of the 45th General Assembly, Regular Session."

August 24, 1934. *State Board of Assessment and Review, Des Moines, Iowa:* We have your written request of August 23rd for an opinion from this Department on the following proposition:

"Your opinion is requested upon the question hereinafter submitted.

"It is provided by Section 61 of Chapter 82, Laws of the 45th General Assembly, Extraordinary Session, that this Board shall on January 1, 1935, and quarterly thereafter, set aside from the tax revenues raised and to be raised under the provisions of said chapter, the sum of $1,500,000.00 to pay all items of general expense of the calendar year as authorized and appropriated for by the general assembly, and said section further provides that if the sum to be so set aside, 'together with other state revenues expendable for such purposes, is insufficient to pay all of said items of general expense for said year, a levy and certification shall be made by the Board under the provisions of sections seventy-one hundred eighty-two (7182) and seventy-one hundred eighty-three (7183), Code, 1931.

"Provided further, that commencing with the 1934 state tax levy the Board in making such levy and certification * * * shall take into consideration the anticipated amount of quarterly payments to be made as provided herein for the next ensuing calendar year, and shall reduce accordingly the levy and certification by such amount so anticipated.

"The provisions of Chapter 247, Acts of the Forty-fifth General Assembly are hereby repealed insofar as they conflict with the provisions of this act.'

"Chapter 247, laws of the 45th General Assembly, Regular Session, fixes the amount of revenue for general state purposes to be provided by the state levy of 1934, at $6,460,000.00, said levy to be made as provided for in Sections 7182 and 7183 before mentioned.

"This Board anticipates that the revenues to be derived from the special taxes provided for in said Chapter 82, 45th General Assembly, Extraordinary Session, will be amply sufficient to permit elimination of the entire 'state levy' for 1934, payable in 1935.

"QUERY: Is it the duty of this Board to eliminate entirely the levy for general state purposes provided for in said Chapter 247, laws of the 45th General Assembly, Regular Session?"

Chapter 82 of the laws of the Forty-fifth General Assembly in Extraordinary Session clearly shows the legislative intent to use the proceeds of the taxes collected under and by virtue of said chapter as a direct replacement of general property tax levies, in so far as they may be available. The general object of this legislative enactment was to use the proceeds of these new taxes as a direct replacement of the general property tax levies. From a careful reading of this entire act, it is apparent that the Legislature intended that the first replacement was to apply to the levies for state purposes. When the levy for state purposes has been replaced, then the proceeds or the balance of said new funds are to be allocated back to the several counties of the state for the purpose of giving each individual taxpayer his proportionate refund on the general property tax levies.

Paragraph 2 of Section 62 of Chapter 82 of the Acts of the Forty-fifth General Assembly in Extraordinary Session provides that this allocation back to the counties for the benefit of the individual taxpayers in the way of refunds on their general property levies shall begin on August 1, 1935, and annually thereafter. However, it is the general intent of this law that the state levies should first be replaced, before this allocation is made back to the counties.

It is, therefore, the opinion of this Department that it is the duty of the State Board of Assessment and Review to eliminate entirely the levy for general state purposes provided for in said Chapter 247, Laws of the Forty-fifth General Assembly, Regular Session.

OLD AGE ASSISTANCE ACT: SENATE FILE 42 (CHAPTER 19), EXTRA SESSION, 45TH GENERAL ASSEMBLY: It would not be incompatible to serve as county relief chairman and also as a member of the county old age assistance board.

August 24, 1934. *County Attorney, Marshalltown, Iowa:* This will acknowledge receipt of your letter of the thirteenth instant in which you request the opinion of this Department on the following question:

Can one individual hold the position as County Relief Chairman under Governor Herring's appointment and at the same time, serve as a member of the County Old Age Assistance Board?

Please be advised that I have gone over the duties of a county relief chairman with a county chairman of another county and find nothing incompatible.

Therefore, it would be the opinion of this Department that it would not be incompatible to serve as county relief chairman and also as a member of the county old age assistance board. We are advised that the duties are not similar and do not conflict with one another. The test, however, would be based on the facts as to the duties of the two positions and how they work out. By so doing, the conflicts which would make for incompatibility or otherwise would appear.

OLD AGE ASSISTANCE ACT: CHAPTER 19, EXTRA SESSION, 45TH GENERAL ASSEMBLY: In the matter under consideration, the commission or board ordering said hearing should bear the expense. As nearly as possible, Chapter 494 of the 1931 Code of Iowa should be followed as to the general principles of evidence.

August 24, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the thirty-first ultimo in which you request the opinion of this Department on the following question:

Under the provisions of Section 19, it is possible, when necessary, for the state old age assistance commission or a county old age assistance board to subpoena and compel the attendance and testimony of witnesses when said commission or any of said boards are conducting a hearing relative to the granting of old age assistance.

Is there any statute which would apply in a case of this kind and compel the payment of witness fees and mileage to witnesses subpoened to attend a hearing under the provisions of said Section 19, old age assistance act? If so, who should bear this expense?

Please be advised that it is the opinion of this Department, if the state old age assistance commission orders the hearing, that the expense should be taken out of the expense fund of the commission. In the case of a county old age assistance board ordering a hearing, the expense should be part of the county's administrative expense.

In the case of a hearing, Chapter 494 of the 1931 Code of Iowa, as nearly as possible, should be followed as to the general principles of evidence. However, in a case where the hearing is more of an informal nature, it would not be necessary to stay within all the confining rules of evidence as in a formal hearing in court. Yet the sections of the chapter referred to should be followed as nearly as possible in conducting such a hearing.

OLD AGE ASSISTANCE COMMISSION: CHAPTER 19, EXTRA SESSION, 45TH GENERAL ASSEMBLY: A prisoner of a penal institution is not liable for the tax under Sections 34 and 35 of the old age assistance act.

August 24, 1934. *Superintendent Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the third instant in which you request the opinion of this Department on the following question:

Is a man who has been released from a penal institution as a paroled prisoner liable for the payment of the $1.00 head tax for 1934 and the $2.00 head tax for 1935, under the provisions of Sections 34 and 35 of Chapter 19, Acts of the Forty-fifth General Assembly in Extraordinary Session?

It is the opinion of this Department that such a person is not liable for the $1.00 head tax for 1934 nor the $2.00 if his status is the same in the year 1935 and subsequent years, as he is still a prisoner on parole, which parole might be revoked at any time. Such a person is still a prisoner but is outside the walls of the penal institution under a very great restriction as to his personal liberty. However, he should still be considered an inmate of said penal institution and, as stated above, is not liable for said tax.

OLD AGE ASSISTANCE COMMISSION: CHAPTER 19, EXTRA SESSION, 45TH GENERAL ASSEMBLY: The provisions of Section 34 of the act grant authority to the employer to collect the current installments of the tax levied against the employee *only*.

August 24, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the tenth instant with enclosure of letter from Attorney H. A. Poley of the Northwestern Bell Telephone Company which was forwarded to the Commission by this Department. You request the opinion of this Department on the following:

The Northwestern Bell Telephone Company is the employer of over 3,000 employees. Attorney Poley states that he construes Section 34 of the old age assistance act to mean that the company must deduct the tax from the wages of an employee having been in their employ continuously for thirty days or more. Where an employee has not been previously employed by the Northwestern Bell Telephone Company, and where he has not paid his tax, is the company liable for back taxes?

It is the opinion of this Department that taxes levied against an individual are never canceled and in previous rulings, we have stated that a tax is a lien on real estate owned by the individual. We feel that the provisions of Section 34 of the act, which are as follows:

"Any person, firm, association or corporation, including municipal corporations and special charter cities, having in their employ continuously for a period of thirty days or more any resident of this state and who is a citizen of the United States, and to whom this act applies and who has not paid the tax provided for in this section, shall deduct said tax from the earnings of such employee and deliver to such employee a receipt for said collection and remit same to the treasurer of state, together with a report showing the amount and name of the person for whom collected; and the treasurer of state shall credit said tax as other taxes provided for in this section and act, and report to the county treasurer of the county from which such remittance was received, giving the name of the employee and the amount of such tax collected; and when said report has been received by the county treasurer, he shall credit such person on his books with said payment."

grant authority to the employer to collect the current installments only of the tax levied against his employee.

We believe that this is as far as the Legislature placed responsibility on the employer.

COUNTY AUDITOR: SUPPORT OF INSANE IN STATE HOSPITALS: Some counties are indebted to the state for the support of the insane in state hospitals. The insane levy pursuant to Section 3603 of the Code is not sufficient and the general county fund is also exhausted. May the County Auditor issue warrant in payment of such indebtedness?

August 30, 1934. *State Comptroller, Des Moines, Iowa:* We have your request for opinion on the following proposition:

"Some counties are indebted to the state for the support of the insane in state hospitals. The insane levy pursuant to Section 3603 of the Code is not sufficient and the general county fund is also exhausted. May the County Auditor issue warrant in payment of such indebtedness?"

Section 3603 of the Code provides for the levying of taxes to meet the expense of insane patients cared for in state hospitals and also provides that any deficiency shall be paid from the general county fund. Because of the mandatory reduction in tax levies pursuant to law, these funds may be insufficient to reimburse for the care of these patients who must be taken care of.

It is apparent that the other counties of the state should not be called upon to bear this burden. The public is entitled to the protection from these insane and the relatives of the insane are entitled to place them where they will not be harmed or do harm. They are at all times entitled to receive help from public funds and therefore, come squarely within exception 4 in Section 5259 of the Code, which section sets out the exceptions to Section 5258 of the Code.

It is, therefore, the opinion of this Department that where both the state insane fund and the general county fund are exhausted, that the County Auditor issue a county warrant on the state insane fund in favor of the Treasurer of State in the amount due and the same be stamped "Unpaid for want of funds," and we suggest this procedure be followed instead of a transfer to general revenue.

It is further the opinion of this Department that such procedure is legal and lawful and that Section 5258 of the Code will not apply for the reasons above stated.

SCHOOLS: TEXTBOOKS: PRIVATE AND PAROCHIAL SCHOOLS: School boards may purchase and loan textbooks for use of children or scholars in private and parochial schools if authorized by a vote of the school district.

August 31, 1934. *County Attorney, Waterloo, Iowa:* This Department has your request for an official opinion upon the following proposition:

You state in your letter that "the school board at Waterloo is apparently very willing to pay for textbooks at public expense for use of school children in private and parochial schools in your city. The question, therefore, is, is there any plan by which the textbooks for this purpose may be bought by the public school board, or by any other, at the expense of the taxpayers."

Under certain conditions the school board may furnish school books to indigent children when they are likely to be deprived of the proper benefits of the school unless so aided, and the board shall, when directed by a vote of the district, purchase and loan books to scholars and shall provide therefor by levy of general fund. See Section 4238 of the 1931 Code of Iowa. The object of this statute is to assist and aid school children in the pursuit of their education in the elementary and secondary schools, and is not for the purpose of aiding or assisting any particular school whether public or private.

Section 5256 of the 1931 Code of Iowa provides as follows:

"Money for sectarian purposes. 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."

Section 5257 of the 1931 Code is as follows:

"Violations. Any officer of any county, or any deputy or employee of such officer, who violates any of the provisions of the two preceding sections, shall be guilty of a misdemeanor, and fined not less than one hundred dollars, nor more than five hundred dollars, for each offense."

It is obvious from the above sections of the Code, that public money cannot be appropriated, given, or loaned by the corporate authorities of any county or township for the purpose of favoring any institution, school, association, or object which is under ecclesiastical or sectarian management or control.

Section 5256 of the 1931 Code of Iowa is a specific prohibition against the use of any public moneys by any county or any township for the purpose of favoring or assisting any institution, school, association, or object which is under ecclesiastical or sectarian management or control.

No county or township in the State of Iowa could appropriate or furnish money for the benefit of aiding or favoring any institution, school, association, or object, which is under ecclesiastical or sectarian management or control. However, your question does not deal with the right of a county or a township to furnish any assistance but deals primarily with the right of a school board to furnish public school textbooks for the benefit of school children or scholars in the pursuit of an elementary or secondary education.

Your attention is called to the case of Cochran vs. Board of Education, decided by the United States Supreme Court on April 28, 1930, and which is reported in 281 U. S. at page 370. This case arose in the State of Louisiana. In 1928, the legislature of Louisiana passed Act No. 100, which provided that the severance tax funds and appropriations, as required by the State Constitution, should be devoted, "first, to supplying school books to the school children of the state." The board of education was directed to provide "school books for school children free of cost to such children." Act No. 143 of the Louisiana legislature in 1928 made appropriations in accordance with the above provisions. The plaintiff in this case brought an action to enjoin the State Board of Education and certain officials from expending tax funds for the purchase of free school books which were to be used by school children while attending private or parochial schools within the state. The opinion of the United States Supreme Court was written by Chief Justice Hughes which affirmed the decision of the Louisiana Supreme Court in denying the writ of injunction to the plaintiff.

"One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children. What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected, adapted to religious instruction."

In commenting upon the above decision, Chief Justice Hughes stated as follows:

"Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

From a perusal of the above decision of the highest court, it is apparent that Section 4238 of the 1931 Code of Iowa does not limit the furnishing of public school textbooks to children or scholars who are in attendance in public schools only. The Iowa statute above referred to, states that school boards "may furnish school books 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." It will be noted that our statute in the first instance uses the words, "indigent children," and in the second instance uses the word, "scholars." This statute is of general application and does authorize under certain conditions, school boards to furnish school books to indigent children, and upon a vote of the district to purchase and loan books to scholars. The object of this statute is to assist school children and scholars in the primary and secondary schools of the state in securing an education. However, this statute does not authorize sectarian, ecclesiastical, or religious books to be furnished to school children at the public expense. But, on the other hand, it does authorize school boards to furnish public school textbooks to school children and scholars pursuing elementary or secondary education.

If the school board desires to furnish free textbooks to school children and scholars, it must first receive authorization by a vote of the school district. If such an election were held and the majority of the electors of the school district vote in favor of furnishing free textbooks to school children or scholars, as above outlined, then the board would be authorized to purchase said textbooks and to loan them to the school children or the scholars, whether the school children or scholars were pursuing their education in a public or a private or a sectarian school. These textbooks would always remain the property of the school board but the school children or scholars would be entitled to the free use of the same while pursuing their education.

LIQUOR CONTROL COMMISSION: INSURANCE COVERING STOCK: CONTINGENT FUND: "In view of the section just quoted, it is the opinion of this office that any loss caused by fire, storm, theft or unavoidable cause is replaced as provided in said section, and is paid for out of the contingent fund."

August 31, 1934. *State Comptroller, Des Moines, Iowa:* We acknowledge receipt of your letter of August 15th, in which you ask for an opinion on the following:

"The Iowa Liquor Control Commission has filed claims with this department for various insurance companies for premium on insurance covering stock of liquor stores in the various towns. The policies are for fire, tornado, etc., and seem to be in reasonable amounts.

"The question we wish decided is whether or not we should pay the premium from the funds available of the Liquor Control Commission, or should the claims be refused and any loss from fire, tornado, etc., in any liquor store be paid from the providential contingent fund."

Section 7 of Chapter 24 of the Acts of the Forty-fifth Extraordinary Session provides the functions, duties and powers of the Liquor Commission. At no place in that section is there any authority conferred on the Commission to take out insurance on fixtures and stocks of merchandise, consisting of liquors and belonging to the State of Iowa. In fact, there is no provision in Chapter 24 which grants such authority. For that reason, we must look to the general laws of the state for the purpose of determining what authority the different

Boards or Commissions have with reference to purchasing insurance on the buildings or equipment under their jurisdiction. Section 286 of the Code of 1931 is as follows:

"286. Contingent fund. A contingent fund set apart for the use of the executive council may be expended for the purpose of paying the expenses of suppressing any insurrection or riot, actual, or threatened, when state aid has been rendered by order of the governor, and for repairing, rebuilding, or restoring any state property injured, destroyed, or lost by fire, storm, theft, or unavoidable cause, and for no other purpose whatever."

In view of the section just quoted, it is the opinion of this office that any loss caused by fire, storm, theft or unavoidable cause is replaced as provided in said section, and is paid for out of the contingent fund. It is the further opinion of this Department that the Liquor Control Commission does not have authority to enter into contracts for insurance on the fixtures or merchandise under its jurisdiction, and that you, as the Comptroller, have no authority to allow or pay claims of insurance companies for said insurance.

MUNICIPALITIES: INVESTMENT OF PUBLIC FUNDS IN REVENUE BONDS FOR PUBLIC IMPROVEMENTS: Cities and towns may not invest public funds or issue revenue bonds to pay for the construction, operation, etc., of public improvements as outlined in Chapter 111, Acts of 45th General Assembly as amended by Chapter 71, Acts of 45th General Assembly, Extra Session, such as swimming pool, sewage disposal plant, golf course, etc.

September 6, 1934. *Des Moines Park Board, Des Moines, Iowa:* We have your favor of the 30th ult., in which you state that the Federal Works Administration has under consideration your application for a loan and grant totalling $91,000.00, for the construction of a swimming pool in one of your parks and that you propose to secure the loan by the issuance of revenue bonds authorized by Chapter 111 of the Acts of the Forty-fifth General Assembly as amended by Chapter 71 of the Acts of the Forty-fifth General Assembly in extra session. You state that the city has accumulated something in excess of $100,000 in cemetery funds under authority of Section 6579 of the Code of Iowa, which are referred to as the Permanent Cemetery Maintenance Funds. Your question is whether or not this permanent maintenance fund may be invested in the revenue bonds above referred to.

Chapter 111 of the Acts of the Forty-fifth General Assembly is an act to authorize cities and towns to construct, own, equip, operate, maintain and improve works for the disposal of sewage and garbage, and to authorize cities and towns to issue revenue bonds payable solely from the revenue of such works. Said chapter was amended by Chapter 71 of the Acts of the Forty-fifth General Assembly in extra session to include swimming pools and golf courses. Said chapters authorize such cities and towns "to issue revenue bonds to pay the cost of such improvement to be financed only through the federal government or an agency thereof as hereinafter provided."

Section 5, of said Chapter 111, as amended, provides that cities and towns are authorized to borrow money from the federal government or any agency thereof for the purpose of constructing and operating said improvements. As evidence of such loan such city or town may issue its bonds payable solely and only from the revenue derived from such improvement. Bonds issued under the provisions of this act are declared to be negotiable instruments, shall be executed by the mayor and clerk of the municipality and shall be sealed with the corporate seal of the municipality. The principal and interest of said

bonds shall be payable solely and only from the special fund herein provided for such payment and said bonds shall not in any respect be a general obligation of such city or town, nor shall they be payable in any manner by taxation, nor shall the municipality be in any manner liable by reason of the earnings being insufficient to pay said bonds.

Section 6579 of the 1931 Code of Iowa is as follows:

"Fund for cemeteries. Every such city shall have power to create a fund from tax levies heretofore or hereafter authorized for cemeteries or from the sale of lots in cemeteries, or from other sources, including bequests or donations for the permanent maintenance of cemeteries, and the fund thus created shall not be used for any other purpose; and the city council shall have authority to cause such accumulations to be invested in bonds of the United States, or in municipal bonds or certificates, or other evidence of indebtedness issued by authority of and according to law of this or any other state, when such bonds are at or above par."

You will note from this section that the city council shall have authority to cause such permanent maintenance fund to be invested in (1) bonds of the United States, (2) municipal bonds or certificates, or (3) other evidence of indebtedness issued by authority of and according to law of this or any other state. Investment in the above described bonds is subject to the further provision that such bonds must be at par or above. This section clearly is ample authority for the investment of such funds in municipal bonds or other evidences of indebtedness issued by authority of and according to the law of this state.

"Laws in many states authorize the issuance of bonds to pay for public improvements and such bonds are generally payable only from special assessments on property benefited as they are collected from time to time. These bonds have been held to be constitutional."

McQuillin on Municipal Corporations, 2nd Edition, Section 2428.

Section 5, of Chapter 111, of the Acts of the Forty-fifth General Assembly provides that bonds issued under the provisions of said chapter are to be declared negotiable instruments, shall be executed by the Mayor and clerk, and sealed with the corporate seal of the municipality. Such instruments, though not general obligations of the city, are referred to in said legislation as bonds and are issued and held out as such. The question then arises, are they municipal bonds within the contemplation of Section 6579 of the Code, which provides that funds known as permanent cemetery maintenance funds may be invested in municipal bonds. So far as we have been able to discover, the Supreme Court of this State has not passed upon this specific question. It would be impossible for anyone to say in advance what the holding of our own Supreme Court will be on this question if it is presented.

"According to the great weight of authority, a municipality or other political subdivision does not create an indebtedness or liability within the meaning of a constitutional or a statutory debt limitation by purchasing property to be paid for wholly out of the income or revenue to be derived from the property purchased."

72 A. L. R., 688;

Johnson vs. Stewart (Iowa), 226 N. W., 164.

Briefly stated, a somewhat difficult question which arises here is whether or not a special revenue bond, such as is contemplated, is a municipal bond within the contemplation of Section 6579. There would seem to be very good reason for holding that it is such a municipal bond, but there is also authority to the contrary. The case of State vs. Claussen, 40 Washington, 95, 82 Pac., 187, and 74 Washington, 17, being authority for the proposition that such a

special revenue bond is not a municipal bond within the contemplation of such statutes as Section 6579.

Confronted by these decisions from another state, which are not binding on the courts of this state but are somewhat persuasive, we would not wish to express it as our definite opinion that such an investment of your cemetery funds as is contemplated, is justified under Section 6579 of the Code.

SCHOOL BOARD DIRECTOR: RESIGNATION BECAUSE OF PLEA OF EMBEZZLEMENT: "A plea of embezzlement and abstraction in the Federal Court, the same being a violation of Section 592, Title 12, U. S. C. A., constitutes an infamous crime and under Section 4216-c29 of the 1931 Code of Iowa entitled "Vacancies," conviction of an infamous crime is cause for removal from office and constitutes a vacancy in the office held by him.

September 10, 1934. *County Attorney, Creston, Iowa:* This will acknowledge receipt of copy of letter which you addressed to this Department under date of July 28th and the original of which has apparently been lost or mislaid.

You desire the opinion of this Department as to whether or not one Glenn Bacon, an active member of the school board of Lorimor, Iowa, should resign or be discharged from his membership on the school board by virtue of the fact that he entered a plea of guilty to embezzlement and abstraction in the Federal Court, the same being a violation of Section 592, Title 12, U. S. C. A. as follows:

"Section 592, Title 12, U. S. Code Annotated. Any Federal reserve agent, or any agent or employee of such Federal reserve agent, or of the Federal Reserve Board, who embezzles, abstracts, or willfully misapplies any moneys, funds, or securities intrusted to his care, or issues or puts in circulation any Federal reserve notes, shall be guilty of a misdemeanor and upon conviction in any district court of the United States shall be fined not more than $5,000.00 or imprisoned for not more than five years, or both, in the discretion of the court. R. S. 5209.

The only Iowa statute relevant or material to your inquiry is Section 4216-c29 of the Code of Iowa entitled, "Vacancies," as follows:

"Failure to qualify within the time prescribed by law; the incumbent ceasing to be a resident of the district or subdistrict; the resignation or death of incumbent or of the officer-elect; the removal of the incumbent from, or forfeiture of, his office, or the decision of a competent tribunal declaring his office vacant; the conviction of incumbent of an infamous crime or of any public offense involving the violation of his oath of office, shall constitute a vacancy."

It will be unnecessary to determine whether or not the person inquired about has committed any public offense involving the violation of his oath of office as required by Section 1054 if it should be determined that he entered a plea of guilty to an infamous crime as set forth in your letter. There is a division of legal thought in the United States as to what constitutes an infamous crime and the same is briefly and succinctly set forth in 16 Corpus Juris Section 11, Paragraph 6, entitled "Infamous Crimes," as follows:

"An 'infamous' crime is one which works infamy in the person who commits it. At common law it was one which involved moral turpitude and which rendered the party convicted thereof incompetent as a witness. The old test, which was the character of the crime rather than the nature of the punishment inflicted, has been adopted to some extent in the United States. The modern view, however, is that the question is determined by the nature of the punishment, and not by the character of the crime, and that any crime is infamous that is punishable by death or by imprisonment, with or without hard labor, in a state prison. The decision turns not upon the punishment actually inflicted, but upon the punishment which the court is authorized to impose."

In sub-note 7 to Section 11, Paragraph 6, above quoted, the following citation may be found:

"In the fifth amendment of the United States constitution providing that 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury,' an 'infamous crime' means a crime punishable by imprisonment in the state prison or penitentiary, with or without hard labor; and in determining whether the crime is infamous, the question is whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one. Bannon vs. U. S., 156 U. S. 464, 15 S. Ct. 467, 39 L. ed. 494; In re Claasen, 140 U. S. 200, 11 S. Ct. 735, 35 L. ed. 409; Mackin vs. U. S., 117 U. S. 348, 6 S. Ct. 777, 29 L. ed. 909;."

Under the old test referred to in the citation from Corpus Juris, the authorities cited thereunder have application to those cases wherein a witness is cross-examined as to the commission of former infamous crimes such as would disqualify him from testifying and in the application of the rule in those cases the nature of the crime therein and not the punishment has been the test.

In the only Iowa case which we have been able to find as bearing upon the question reference is made to the civil case of Palmer vs. C. A. & M. Ry. Co., 113 Iowa 442.

The application for the old test rule not being involved in the request for the instant opinion by virtue of the fact that the modern view is supported by the greater weight of authority and recognized by the Supreme Court of Iowa in the above case, this Department is of the opinion that the crime committed and referred to in your letter is an infamous crime under the law.

SALES TAX: SALES OF MATERIALS TO CONTRACTORS FOR PUBLIC PROJECTS: HIGHWAY COMMISSION: "Division 4 (Sections 37 to 51, inclusive), of Chapter 82, Acts of 45th Extra Session, does not impose a sales tax upon materials or articles sold directly to the state, nor does it impose a tax when a sale is made to it through a contractor for use in construction of a public project, of which such materials and articles become a component part, and where such project is paid for wholly from state funds."

September 12, 1934. *State Board of Assessment and Review, Des Moines, Iowa:* Your letter of August 2nd addressed to Honorable Edward L. O'Connor, Attorney General, State House, Des Moines, Iowa, wherein you request an opinion "as to whether or not sales of materials or articles made to contractors for use in public projects paid for in whole or in part from State funds, are exempt from the Iowa Sales Tax," received.

Answering the above question, we would say:

Division 4, (Secs. 37 to 51 incl.) of Chapter 82, of the Acts of the Extra Session of the Forty-fifth General Assembly of Iowa, does not impose a sales tax upon materials or articles sold directly to the State, nor, does it impose a tax when a sale is made to it through a contractor for use in the construction of a public project of which such materials and articles become a component part, and where such project is paid for wholly from State funds. Neither does it impose such sales tax upon materials and articles purchased through a contractor for use in the construction of a public project where such materials and articles become a component part thereof and State funds are advanced for the payment of the cost of such project and the State is thereafter reimbursed from funds granted for such payment, of such project, by the Federal Government.

This Department has prepared blanks which it believes will furnish a satis-

factory method of handling this exemption or immunity as the same applies to Highway Projects, and attaches the same hereto.

No. 1. Certificate of Highway Commission as to estimates of materials to be used in a project paid for wholly from state funds.

Certificate of Highway Commission as to estimates of materials to be used in a project paid for wholly from state funds and to be repaid by the Federal government.

No. 2. Affidavit of contractor as to the securing and use of said materials in a project paid for wholly from state funds.

Affidavit of contractor as to the securing and use of said materials in a project paid for wholly from state funds and to be repaid by the Federal government.

No. 3. Affidavit of seller furnishing the same in a project paid for wholly from state funds.

Affidavit of seller furnishing the same in a project paid for wholly from state funds and to be repaid by the Federal government.

The following course is suggested in the use of the same:

No. 1 will be sent direct from the Highway Commission to your office. The original of No. 2 will be sent by the contractor to the seller and duplicate forwarded at the same time to your office. The original of No. 3, together with the original forwarded by the contractor attached thereto, will be forwarded to your office by the seller furnishing the materials and articles, and duplicate sent by him, or it, to the contractor.

The certificates referred to in the foregoing may be changed or altered to fit the requirements of different Departments.

Project.....
County.....

ESTIMATE OF MATERIALS REQUIRED FOR USE IN SAID PUBLIC PROJECT

I, ... as .....of the Iowa State Highway Commission, do hereby certify that said Commission on the.....day of....., 1934, awarded to.....
.....
a contract for the construction of.....
on the above described Project, and do hereby estimate the materials required for said Project as follows:
.....

I further certify that said Project is a public project, the cost of which will be paid for wholly from state funds.

In Witness whereof I have hereunto set my hand this.....day of ....., 1934.

.....
Name.
.....
Title.

This estimate is only approximate, and is subject to change during construction of Project.

(For use in State Projects.)

Project.....
County.....

ESTIMATE OF MATERIALS REQUIRED FOR USE IN SAID PUBLIC PROJECT

I, ... as .....of the Iowa State Highway Commission, do hereby certify that said Commission on the.....day of....., 1934, awarded to.....
.....
a contract for the construction of.....

on the above described Project, and do hereby estimate the materials required for said Project as follows:

.....

I further certify that said Project is a public project, the cost of which will be paid for wholly from state funds as authorized by Chapter 70 of the Acts of the Extra Session of the 45th General Assembly, and to be repaid by the Federal government.

In Witness whereof I have hereunto set my hand this.....day of ....., 1934.

.....
Name.

.....
Title.

This estimate is only approximate, and is subject to change during construction of Project.

(For use in Federal Grant Projects.)

Project.....
County.....

CONTRACTOR'S AFFIDAVIT AS TO MATERIALS USED IN A PUBLIC PROJECT

STATE OF IOWA, }
} ss.
COUNTY OF ..... }

I, ..., being first duly sworn, do say that I am .....
(If individual, name or employment; if copartnership, name and affiant's official connection; if corporation, official position of affiant and name of corporation) ....., and that said..... (Name of person, co-partnership or corporation) purchased from ..... the materials or articles at the prices set out in the invoice attached hereto as Exhibit "A," which is approved by the Resident Engineer in charge of said Project, and that said materials or articles were used in the construction of, and became a part of said public Project No....., which is being paid for wholly from state funds.

.....

Subscribed and sworn to before me by..... this.....day of....., 1934.

.....
Notary Public in and for said County and State.

The original of this Affidavit should be furnished to the seller and one copy filed with the Board of Assessment and Review at Des Moines, Iowa.

(For use in State Projects.)

Project.....
County.....

CONTRACTOR'S AFFIDAVIT AS TO MATERIALS USED IN A PUBLIC PROJECT

STATE OF IOWA, }
} ss.
COUNTY OF ..... }

I, ..., being first duly sworn, do say that I am .....
(If individual, name or employment; if copartnership, name and affiant's official connection; if corporation, official position of affiant and name of corporation) ....., and that said..... (Name of person, co-partnership or corporation)

purchased from.....the materials or articles at the prices set out in the invoice attached hereto as Exhibit "A," which is approved by the Resident Engineer in charge of said Project, and that said materials or articles were used in the construction of, and became a part of said public Project No....., which is being paid for wholly from state funds as authorized by Chapter 70 of the Acts of the Extra Session of the 45th General Assembly, and to be repaid by the Federal government.

.....

Subscribed and sworn to before me by.....
this.....day of....., 1934.

.....

Notary Public in and for said County and State.

(For use in Federal Grant Projects.)

The original of this Affidavit should be furnished to the seller and one copy filed with the Board of Assessment and Review at Des Moines, Iowa.

Project No.....
County.....

SELLER'S AFFIDAVIT AS TO MATERIALS SOLD AND USED IN A PUBLIC PROJECT

STATE OF IOWA, }
} ss.
COUNTY OF ..... }

I, ..., being first duly sworn, do say that I am
.....
(If individual, name or employment; if copartnership, name and affiant's offi-
.....
cial connection; if corporation, official position of affiant and name of cor-
....., and that said.....
poration) (Name of person, co-partnership or corporation)
purchased and delivered to.....
the materials or articles at the prices set out in the invoice attached to the affidavit of said contractor as Exhibit "A," which is approved by the Resident Engineer in charge of said Project, all of which is hereto attached as Exhibit "B"; and that said materials or articles were furnished to said contractor for use in, and used in, the construction of, and became a component part of said public Project No....., which is being paid for wholly from state funds.

.....

Subscribed and sworn to before me by.....
this.....day of....., 1934.

.....

Notary Public in and for said County and State.

(For use in State Projects.)

The original of this Affidavit, with the original Affidavit furnished by contractor to seller attached thereto, should be filed with the Board of Assessment and Review at Des Moines, Iowa.

Project No.....
County.....

SELLER'S AFFIDAVIT AS TO MATERIALS SOLD AND USED IN A PUBLIC PROJECT

STATE OF IOWA, }
} ss.
COUNTY OF ..... }

I, ..., being first duly sworn, do say that I am
.....
(If individual, name or employment; if copartnership, name and affiant's offi-
.....
cial connection; if corporation, official position of affiant and name of cor-

....., and that said.....
poration) (Name of person, co-partnership or corporation)
purchased and delivered to.....
the materials or articles at the prices set out in the invoice attached to the affidavit of said contractor as Exhibit "A," which is approved by the Resident Engineer in charge of said Project, all of which is hereto attached as Exhibit "B"; and that said materials or articles were furnished to said contractor for use in, and used in, the construction of, and became a component part of said public Project No....., which is being paid for wholly from state funds as authorized by Chapter 70 of the Acts of the Extra Session of the 45th General Assembly, and to be repaid by the Federal government.

.....

Subscribed and sworn to before me by.....
this.....day of....., 1934.

.....

Notary Public in and for said County and State.

(For use in Federal Projects.)

The original of this Affidavit, with the original Affidavit furnished by contractor to seller attached thereto, should be filed with the Board of Assessment and Review at Des Moines, Iowa.

DRUGGISTS—CONTRACEPTIVES: The sale of contraceptives by druggists would come within the exception as stated in Section 13195 of the 1931 Code of Iowa.

September 14, 1934. *Iowa State Board Pharmacy Examiners, Des Moines, Iowa:* Your favor of the 10th inst., addressed to the Attorney General, has been referred to me for reply.

You state the Iowa Pharmacy Examiners would like an opinion from this office as to whether or not the sale of contraceptives by druggists would come within the exception as stated in Section 13195 of the 1931 Code of Iowa."

Section 13190 provides that whoever sells, offers for sale, or gives away or has in his possession with intent to sell, loan, or give away, any medicine, article, or thing designed or intended for procuring an abortion or preventing conception, or advertises the same for sale, shall be guilty of a misdemeanor.

Section 13195 is as follows:

"Exceptions—doctors—druggists—artists. Nothing in Sections 13190 to 13194, inclusive, shall be construed to affect teaching in regularly chartered medical colleges, or the publication or use of standard medical books, or the practice of regular practitioners of medicine or druggists in their regular business, or the possession by artists of models in the necessary line of their art."

This section provides, in substance, that nothing in Section 13190 shall be construed to affect the practice of regular practitioners of medicine or druggists in their regular business. If then, nothing in said Section 13190 shall be construed to affect the practice of practitioners of medicine or druggists in their regular business, the exception expressly includes druggists when engaged in their regular business.

COUNTY OFFICERS: BOARD OF SUPERVISORS—REDUCE NUMBER: The Board of Supervisors shall submit to the qualified voters of the county at any regular election—"shall the proposition to reduce the number of supervisors to three be adopted?"

September 14, 1934. *County Attorney, Estherville, Iowa:* Your favor of the 12th inst., addressed to the Attorney General's office, has been referred to me for reply.

You state that a petition signed by certain electors of your county has been filed with the Board of Supervisors, requesting that the Board submit to the voters the proposition to reduce the number of supervisors from five to three.

Your first inquiry relates to Section 4 of Chapter 88, of the Acts of the Forty-fifth General Assembly which is as follows:

"Sec. 4. When the proposition is voted upon, the qualified electors residing in the county and outside of the city, shall vote separately upon the proposition, and there shall be cast a majority vote of such electors outside of the city, and a majority vote of the qualified electors of the city, before such change shall be effective."

You ask whether this section applies in all cases or whether it is qualified by Section 3 of said chapter relating to cities with a population of more than 75,000.

It is our opinion Section 4 is applicable in all cases and is not limited by Section 3 to cities with a population of more than 75,000.

Section 1 of said chapter amends Section 5107. Section 2 relates to an entirely separate section, namely, Section 5108, which it amends. Sections 3 and 4 are separate and distinct sections of the chapter and we have no reason to say that one limits the other any more than we would have reason to say that Sections 1 and 2 of said chapter limit each other. The title to this act, which is now Chapter 88, states that it is an act to amend Sections 5107 and 5108 of the Code, relating to method of increasing or reducing the number of members of boards of supervisors. In other words, it is an act to amend the two sections, and it would appear to have been clearer had the title and the act stated that Sections 3 and 4 were to amend one section or the other or both. It is our opinion Sections 3 and 4 of said chapter were intended by the Legislature to amend both of said sections of the Code.

Your second question is whether or not this proposition should be submitted at the regular election or whether at a special election called for that particular purpose.

Section 5108 provides that the Board shall submit to the qualified voters of the county at any regular election, the question—"shall the proposition to reduce the number of supervisors to three be adopted."

MOTOR VEHICLES: TRAILERS: FEE AND PLATES: Trailers of less than 1,000 lb. weight but hauling up to 2 tons of freight is subject to a license fee. It is compulsory to have "Distinguishing plates" on small trailers used upon the public highways, with the possible exception of such small trailers as are used to convey merely the personal baggage of passengers.

September 14, 1934. *Superintendent Motor Vehicle Department, Des Moines, Iowa:* We have your letter of August 16th last, with which you enclose a letter from Robert Waldburger, Sheriff of Webster County, Iowa, submitting certain questions to which you desire an answer. The first question is as follows:

"Are trailers of less than 1,000 lb. weight but hauling up to two tons of freight, subject to a license fee?"

It is our opinion this question should be answered in the affirmative.

Section 4920 of the Code provides, in part, as follows:

"Trailers weighing less than one thousand pounds, or with a loading capacity of less than one thousand pounds, shall not be subject to a license fee."

It is our opinion the Legislature intended by the above provision to exempt from the payment of a license fee only trailers weighing less than one thousand pounds and with a loading capacity of less than one thousand pounds.

The second question is as follows:

"Is it compulsory to have 'distinguishing plates' on small trailers used upon the public highway?"

Section 4867 of the Code, in so far as material to this question, is as follows:

"All * * * * small trailers under one thousand pound capacity equipped with rubber tires used with pleasure motor vehicles and used for carrying personal baggage or effects * * * * are hereby exempted from the payment of the fees in this chapter prescribed but shall not be exempt from the penalties herein provided. The department shall furnish on application, free of charge, distinguishing plates for motor vehicles thus exempted and keep a separate record thereof."

Section 4921 of the Code is as follows:

"4921. Designation of weight and loading capacity. All motor trucks, trailers, and motor vehicles used for other than the conveyance of passengers and the personal effects of said passengers shall have attached thereto a conspicuous metal plate giving the actual weight of the vehicle equipped and weight of loading capacity as specified by the manufacturer or maker and no license shall be issued until the vehicle is so equipped."

It will be noted this section provides that all trailers used for anything other than the conveyance of passengers and the personal effects of said passengers, shall have attached thereto a conspicuous metal plate giving the actual weight of the vehicle, etc. If the small trailer is used to convey the personal effects of passengers, it would appear to be within the exception contained in this statute providing for plates giving the weight of the vehicle equipped and weight of loading capacity.

Under these sections, it would appear that if any trailer is exempted from carrying "distinguishing plates," it would be merely the small trailer used for carrying baggage and personal effects of passengers. Under Section 4867, the Department shall furnish on application, free of charge, distinguishing plates to such trailers as are exempted by that section. This section does not expressly provide that such trailers shall bear such distinguishing plates, but Section 4921 does provide that all trailers used for other than the conveyance of passengers and the personal effects of said passengers, shall carry, attached thereto, a conspicuous metal plate.

It is our opinion that it is compulsory to have distinguishing plates on small trailers used on the public highways of this state with the possible exception of such small trailers as are used to convey merely the personal baggage and effects of passengers.

MOTOR VEHICLE: SHATTERPROOF GLASS: Construction of Chapter 54, Acts of the 45th General Assembly, Extra Session, which relates to motor vehicles being licensed and equipped with shatterproof glass.

September 14, 1934. *County Attorney, Fort Dodge, Iowa:* Your favor of August 1st, addressed to the Attorney General, has been referred to me for reply.

You request a construction of Chapter 54 of the Acts of the Forty-fifth General Assembly in Extraordinary Session, and particularly, Sections 1, 2, and 4 thereof, which are as follows:

"Section 1. It shall be unlawful after January 1, 1935, to operate on any public highway or street, in this state, a motor vehicle registered in the State of Iowa, manufactured or assembled after said date, designed or used for the purpose of carrying passengers for hire, or designed or used for the purpose of carrying school children, unless such vehicle be equipped in all doors, windows and windshields with safety glass."

"Sec. 2. It shall be unlawful after July 1, 1935, to operate on any public highway or street in this state, any motor vehicle registered in the State of Iowa, manufactured or assembled after said date, designed or used for the purpose of carrying passengers, unless such vehicle be equipped in all doors, windows, and windshields with safety glass."

"Sec. 4. The secretary of state shall maintain a list of approved types of glass which conform to the requirements of Section 3 hereof and shall not

issue a license for or relicense any motor vehicle subject to the provisions of Section 1 and Section 2 after the effective date of each section unless said motor vehicles are equipped as therein provided with such approved type of glass."

Section 1 has reference only to certain motor vehicles manufactured or assembled after January 1, 1935. Section 2 has reference only to certain motor vehicles manufactured or assembled after July 1, 1935. Section 4 provides that the secretary of state shall not issue a license for or relicense any motor vehicle subject to the provisions of Sections 1 and 2, after the dates, January 1, 1935, and July 1, 1935, respectively. In other words, Section 4 relates only to motor vehicles which come within the provisions of Sections 1 and 2 and does not apply to motor vehicles designed for the purpose of carrying passengers or designed or used for the purpose of carrying school children where such motor vehicles were manufactured or assembled prior to the dates referred to in Sections 1 and 2.

LEGAL SERVICE OF NOTICE TO DEPART: POOR RELIEF: Section 1, Chapter 99, 45th General Assembly, provides that notice must be served on persons prior to the residences of such person in a county for a period of 12 months, or legal residence is established.

September 15, 1934. *Overseer of the Poor, Clarion, Iowa:* This will acknowledge receipt of your communication of the 7th inst. asking whether or not it is necessary to serve notices each twelve (12) months to prevent families from gaining legal settlement.

You are advised that it is so provided in Section 1 of Chapter 99, Acts of the Forty-fifth General Assembly and that you should therefore serve notices prior to the residences of such persons in your county for a period of twelve (12) months.

INTOXICATING LIQUOR: LIQUOR CONTROL ACT: Illegal transportation and illegal possession are two separate and distinct offenses and are provided for in Section 3 of the Iowa Liquor Control Act. Section 84 of the Liquor Control Act supersedes Section 1945-a1 of the 1931 Code of Iowa only insofar as the same has to do with the penalty for illegal transportation and possession of intoxicating liquor.

September 15, 1934. *County Attorney, Marshalltown, Iowa:* This will acknowledge receipt of your request for an opinion upon the following questions:

1. Does Section 84 of the Iowa Liquor Control Act supersede to the extent of repealing Section 1945-a1 of the 1931 Code of Iowa insofar as the same concerns attorney's fees and costs of prosecution?
2. Under Section 3 of the Iowa Liquor Control Act are there two offenses, to-wit, first, illegal possession, and second, illegal transportation, or is there only one combined offense of both illegal possession and transportation?

It may be generally stated in answer to both propositions above that the Iowa Liquor Control Act provides for the repeal only of such portions of the then existing liquor laws as should be in conflict with the act itself. The general canon of construction should therefore be that the old liquor laws as found in the 1931 Code of Iowa and as amended are still in full force and effect save only as in irreconcilable conflict with the present liquor control act.

Section 1945-a1 of the Code of Iowa 1931 providing a penalty for illegal transportation of intoxicating liquor to be in a sum not exceeding $1,000.00 or imprisonment in the county jail not exceeding one year or by both such fine and imprisonment and to pay the cost of prosecution including a reasonable

attorney's fee to be taxed by the court. Section 3 of the Iowa Liquor Control Act makes unlawful transportation a crime and Section 84 declares the penalty for such crime to be a fine of not less than $300.00 nor more than $1,000.00 or imprisonment for not less than three months nor more than one year or by both such fine and imprisonment. It is therefore evident that Section 84 only superseded Section 1945-a1 as to the nature and extent of the punishment and that inasmuch as the provisions of the Iowa Liquor Control Act are silent upon the question of payment of costs of prosecution and the taxing of a reasonable attorney's fee, the provisions of Section 1945-a1 have not been superseded and are in full force and effect.

In answer to your second proposition as to whether or not Section 3 of the Iowa Liquor Control Act providing for two separate and distinct offenses, to-wit, illegal possession and illegal transportation, we find that part of Section 3 insofar as the same is material to the question asked is as follows:

"It shall be unlawful to manufacture for sale, sell, offer or keep for sale, possess and/or transport vinous, fermented, spirituous, or alcoholic liquor, etc."

In view of the plain wording of the statutes it is quite clear to us that the two separate and distinct offenses inquired about, to-wit, illegal possession and illegal transportation are provided for in Section 3.

POOR RELIEF: LEGAL RESIDENCE: Under subsection 3, Section 1, Chapter 99, laws of the 45th General Assembly, a person may not acquire a legal residence in a county if he has been supported by a county even though no legal notice, or notice of any kind, has been served upon him.

September 15, 1934. *County Attorney, Knoxville, Iowa:* This will acknowledge receipt of your favor of the 13th inst. asking for an opinion upon substantially the following statement of facts:

A family moved from Mahaska county to Jasper county March 1, 1932, and on March 6, 1933, the family moved to Marion county. The authorities of Jasper county continued to furnish the expense of moving the family to Marion county and of furnishing assistance to this family from March 6, 1933, the date of removal until December, 1933, at which time the head of the family secured employment on the CWA. After discontinuance of the employment, Marion county gave assistance to this family. No notice to depart has been served by the authorities of Marion county upon the family and you ask whether or not, under the circumstances, the legal settlement is not still in Jasper county.

Your question, we believe, is answered by the following part of an opinion issued by this Department under date of July 20, 1934 to C. W. Wolf, Special Transient Investigator, at Des Moines. His question was:

"Can legal settlement be established in a county in twelve months even though relief may have been given during this time but no non-resident notice has been served nor any such attempt made by the county?"

Our answer being as follows:

"It is our opinion that a person may not acquire a legal settlement in a county if he has been supported by a county, even though no notice has been served upon him. See subsection 3 of Section 1, Chapter 99, Laws of the 45th General Assembly, which is as follows:

'Any such person who is an inmate of or is supported by any institution whether organized for pecuniary profit or not or any institution supported by charitable or public funds in any county in this state or any person who is being supported by public funds shall not acquire a settlement in said county unless any such person before becoming an inmate thereof or being supported thereby has a settlement in said county'."

It would appear from your letter that this family resided in Jasper County

for over one year and then removed to Marion County and for approximately nine months after such removal the authorities of Jasper County furnished assistance to this family in Marion County and to that extent recognized the family in question as a charge of Jasper County and as having obtained legal residence in Jasper County. Section 5312 is repealed by Section 2 of Chapter 99 of the laws of the Forty-fifth General Assembly and the following enacted in lieu of Section 5312 of the 1931 Code of Iowa:

"A legal settlement once acquired shall so remain until such person has removed from this state for more than one year or has acquired a legal settlement in some other county or state."

We are therefore of the opinion that under the circumstances outlined in your letter the family in question obtained a legal settlement in Jasper County and that such settlement still exists.

POOR RELIEF: LIABILITY OF COUNTY FOR CHILDREN IN IOWA SOLDIERS' ORPHANS' HOME: County is not liable for payment of expenses of children of soldiers, sailors, or marines under Section 3720 of the 1931 Code of Iowa—in Iowa Soldiers' Orphans' Home.

September 17, 1934. *County Attorney, Manson, Iowa:* This will acknowledge receipt of your communication of the 30th ult. upon the following proposition:

A veteran of the World War, the father of seven (7) children, desires to have said children admitted to the Iowa Soldiers' Orphans' Home. If so admitted by the Iowa Soldiers' Orphans' Home would Benton county be liable for the support of these children?

The law governing the Iowa Soldier's Orphans' Home is contained in Chapter 185 of the 1931 Code of Iowa. Section 3708 relative to admissions to such home is as follows:

"Admissions. Admission to said home shall be granted to resident children of the state under eighteen years of age, as follows, giving preference in the order named:

1. Destitute children, and orphans unable to care for themselves, of soldiers, sailors, or marines.
2. Neglected or dependent children committed thereto by the juvenile court.
3. Other destitute children."

The liability of the respective counties from which children have been admitted is governed by Section 3720 as follows:

"Counties liable. Each county shall be liable for sums paid by the home in support of all its children, other than the children of soldiers, to the extent of a sum equal to one-half of the net cost of the support and maintenance of its children. The sums for which each county is so liable shall be charged to the county and collected as a part of the taxes due the state, and paid by the county at the same time state taxes are paid."

It is very plain that Section 3720 makes an exception in the case of children of soldiers and therefore in the particular case referred to in your letter, Benton County would not be liable for the expenses of the care and support of these children.

BEER BILL: CHAPTER 25, EXTRA SESSION, 45TH GENERAL ASSEMBLY: Is beer, the manufacture, distribution and sale of which is authorized by Chapter 25, Extra Session, 45th General Assembly, intoxicating? The question presented is a fact question. "Hence, * * * *, the matter of intoxication is one of fact and not of law regardless of what beverage it may be shown that the person had consumed.

September 17, 1934. *County Attorney, Waukon, Iowa:* This will acknowledge receipt of your request of the twenty-eighth ultimo for the opinion of this Department on the following question:

Is beer, the manufacture, distribution and sale of which is authorized by Chapter 25, Acts of the Forty-fifth General Assembly in Extraordinary Session, intoxicating?

In a previous opinion to the Bureau of Labor, rendered by this Department under date of July 13, 1934, relative to an order sent out by railway companies to employees to the effect that any employee, engaging in the sale of intoxicating liquor, would lose seniority rights, we pointed out that the original beer act, as contained in Chapter 37, Acts of the Forty-fifth General Assembly, amended Section 1923 of the Code, 1931, which section is as follows:

"1923. *Definition.* The word 'liquor' or the phrase 'intoxicating liquor' when used in this title, shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, wine, spirituous, vinous, and malt liquor, and all intoxicating liquor whatever."

We also pointed out that Section 1 of Chapter 37, Acts of the Forty-fifth General Assembly, amends Section 1923 in the following respect:

"Section 1. That section one thousand nine hundred twenty-three (1923) of the Code of Iowa, 1931, be and the same is hereby amended by striking the period after the word 'whatever' in line six (6) thereof and inserting in lieu thereof the following:

'provided, however, that the words 'liquor' or 'intoxicating liquor' wherever used in title six of the Code of Iowa, 1931, shall not be construed to include beer, ale, porter, stout, or any other malt liquor containing not more than three and two-tenths per centum (3.2%) of alcohol by weight.'"

And that Chapter 25, Acts of the Forty-fifth General Assembly in Extraordinary Session, amends Chapter 37, Acts of the Forty-fifth General Assembly. Section 1 of the most recent beer enactment is as follows:

"Section 1. That section one thousand nine hundred twenty-three (1923) of the Code of Iowa, 1931, be and the same is hereby amended by striking the period after the word 'whatever' in line 6 thereof and inserting in lieu the following:

'provided, however, that the words 'liquor' or 'intoxicating liquor' wherever used in title six (6) of the Code of Iowa, 1931, shall not be construed to include beer, ale, porter, stout, or any other malt liquor containing not more than four (4) per centum of alcohol by weight.'"

The question, as presented to us in the opinion just referred to, was for the legislative definition and as the Legislature had defined "liquor" and "intoxicating liquor" in Section 1923 of the Code of Iowa, 1931, and this section was amended, as set forth above. By the amendment, beer, ale, porter, stout and other malt liquor containing a certain percentage of alcohol is not included. The correct legal answer to the question is readily presented—that the Legislature does not, at this time, define beer as intoxicating liquor.

The question which you have presented raises the point as to whether or not the drinking of this beverage would, in fact, produce intoxication, although the Legislature does not define beer, at this time, as being intoxicating liquor. Sections 1931, 1932, 5027 and 5076 of the 1931 Code of Iowa define intoxication. In other words, may a beverage or tonic be intoxicating in fact?

In State vs. Huxford, 47 Iowa 16, the court in quoting states that a lucid instruction is found in Elkin vs. Buschner (Pa.), reported in 16 Atl. 102, in the following manner:

"There are degrees of intoxication or drunkenness, as everyone knows. A man is said to be dead drunk when he is perfectly unconscious—powerless. He is said to be stupidly drunk when a kind of a stupor comes over him. He is said to be staggering drunk when he staggers in walking. He is said to be foolishly drunk when he acts the fool. All these are cases of drunkenness—

of different degrees of drunkenness. So it is a very common thing to say a man is badly intoxicated, and again that he is slightly intoxicated."

Beer has been defined in the Code of Iowa for many years as intoxicating liquor prior to the time it was amended, as cited herein. Numerous cases in the Iowa Reports deal with the question of beer being intoxicating, which, of course, are based upon Section 1923 of the Code, which formerly defined beer as intoxicating liquor. In these cases, many definitions of intoxication are given, which relate to the behavior of a defendant accused of being intoxicated and cite various tests with reference to the appearance, the method of speaking, the question of whether or not the one accused was himself at the time in question, but these cases all were tried under a statute which defined beer as intoxicating liquor.

For a good statement on this question, see 15 Ruling Case Law, under the subhead, *Intoxicating Liquors*, Section 142, which provides as follows:

"*Cider, 'Near Beer,' etc.* While it is generally held that the intoxicating character of cider must be shown, and this rule has been applied even in the case of 'hard cider,' or peach cider containing six per cent of alcohol, the contrary view has been taken as to both cider and hard cider. Cider has been held to come within the term 'spirituous liquor,' although there is authority for the view that the question is for the jury; and as to whether it is 'vinous liquor,' courts have variously held that it is, that it is not, and that the question is for the jury. With the growth of prohibition and local option legislation, manufacturers have endeavored to put on the market beverages that will be within the law, and yet be as near the forbidden line as possible; and many have also sought to evade the law by resorting to novel, deceptive and ingenious names, such as near beer, hop ale or beer, hop jack, mead, malt mead, extract or tonic, pop, rice beer, orange mint, lemon ginger and the like. Whether any particular compound or preparation of this class is then within or without the statute is a question of fact, to be established by the testimony and determined by a jury, and the courts may not say as a matter of law that the presence of a certain per cent of alcohol brings the compound within the prohibition, or that any particular ingredient does or does not destroy the intoxicating influence of the alcohol, or prevent it from ever becoming an intoxicating beverage. Of course the larger the per cent of alcohol or the more potent the other ingredients, the more probably does it fall within or without the statute; but in each case the question is one of fact, to be settled as other questions of fact, and is a matter for proof, not judicial notice or inference."

It would be the opinion of this Department, under the present law, that the imbibing of any medicine, tonic or beverage, of which one of the ingredients is alcohol, might produce intoxication and evidence, undoubtedly, would be admitted by the court to show what the effect was on a person drinking the same and that witnesses might testify as to the appearance and general behavior of a person even though the particular thing partaken of might not be defined by the Legislature as intoxicating liquor. This being true, the jury could pass on the fact as to whether or not the person was intoxicated after drinking any medicine, tonic or beverage to excess. Then, the question of intoxication would be one of fact upon which the jury could make its finding. Beer might be intoxicating in fact even though it were not so defined by the Legislature.

BANKS AND BANKING: CHARGE ON CHECKS: It is the practice of most banks in the state to charge 10 cents for out of town checks. May the County Treasurer allow such charge on out of town checks deposited by him in his designated depository?

September 17, 1934. *County Attorney, Bedford, Iowa:* We have your request for opinion on the following proposition:

"It is the practice of most banks in the state today to charge 10 cents for

out of town checks. May the County Treasurer allow such charge on out of town checks deposited by him in his designated depository?

As suggested by you in your letter, this matter, we believe, is covered in our opinion of May 8th to E. P. Murray, County Attorney of Le Mars, Iowa, and it is therefore the opinion of this Department that the County Treasurer cannot allow such charges by his depository bank.

WAREHOUSE RECEIPTS: LIQUOR COMMISSION: A warehouse receipt is not known in common parlance as a security so as to fall within the meaning of Section 8581-c3, paragraph 1, of the 1931 Code of Iowa. * * * * Bonded warehouse receipts for liquor do not constitute securities within the meaning of the Iowa Securities Law.

September 18, 1934. *Superintendent of Securities, Des Moines, Iowa:* This will acknowledge receipt of your request of recent date for an opinion on the question of whether or not warehouse receipts for liquor stored in government bonded warehouses in Iowa or elsewhere are securities within the meaning of Section 8581-c3, Paragraph 1, Code of Iowa, 1931.

As a basis for such opinion, we acknowledge receipt of sample copies of bonded warehouse receipts issued by the Continental Distributing Corporation, the Associated Distillers Products, the L. L. Harr & Co. Inc., and the Jo Daviess County Distillery, Inc. For the purpose of this opinion, each of the above receipts may be said to be practically identical in form and content.

Code Section 8581-c3, Paragraph 1, of the 1931 Code of Iowa provides:

"'Security' shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest in an oil, gas, or mining lease, collateral trust certificate, pre-organization certificate, pre-organization subscription, any transferable share, investment contract, or beneficial interest in title to property, interest in or under a profit-sharing or participating agreement or scheme, or any other instrument commonly known as a security."

"Securities," as the term is generally used in the Blue Sky Laws, means written assurance for the return or payment of money or evidences of indebtedness. The Iowa statute has added several other instruments which shall be deemed securities but none of these, in our opinion, includes within its meaning a warehouse receipt. A warehouse receipt is not a contract for the payment of, nor is it evidence of an obligation to pay, money, but it is a written acknowledgment by the warehouseman that he has received and holds goods therein described for the person to whom it is issued. Vannet vs. Reily-Herz Automobile Co., 42 N. D. 607, 173 N. W. 466.

The transferee of such a receipt, both under the law merchant and the uniform act, acquires title to the property to which it refers, subject to the agreement with the transferor, R. C. L. Vol. 27, Section 24.

A warehouse receipt does not merely represent, therefore, a "beneficial interest in title to property" but represents title to certain specific goods designated in the receipt itself. Thus, in legal contemplation, a transfer of the warehouse receipt constitutes a transfer of title to property specified therein. Under this construction of the legal effect of a warehouse receipt and the transfer thereof, such an instrument cannot be said to be a security within the meaning of the Iowa Securities Act. This ruling accords with the general proposition that a transfer of an instrument which has the effect of transferring title to specific property which it represents does not fall within the provisions of the securities acts. Glick vs. Daniel, 184 Ark. 576, 42 S. W. (2nd) 1007.

A warehouse receipt is not known in common parlance as a security so as to fall within the meaning of Section 8581-c3, Paragraph 1, of the 1931 Code of

Iowa. Although warehouse receipts are frequently used as security for loans in the same manner as other documents of title; they are not generally referred to as such when speaking of investment or other speculative securities.

We therefore conclude that the bonded warehouse receipts for liquor above enumerated do not constitute securities within the meaning of the Iowa Securities Law.

MUNICIPALITIES: RECOMMENDATIONS ON PUBLIC IMPROVEMENTS TO CITY PLAN COMMISSION: SCHOOL BUILDING: No public building shall be located or erected or a site therefor obtained, nor shall any permit be issued by any department of the municipal government for the erection or location thereof, until and unless the design and proposed location of any such improvement shall have been submitted to the city plan commission and its recommendations obtained.

September 19, 1934. *County Attorney, Ames, Iowa:* You submit to this Department the following question:

Is it necessary under Chapter 294-A1, and particularly Section 5829-a10, for the school board of the city of Ames, to submit to the City Planning Commission its plans for the location and erection of a school building before determining the location and contracting for the erection of the same on such location, or does Section 5829-a10 of the Code refer exclusively to the improvements that are to be located and constructed by the city council?

You state that the City of Ames, by its Ordinance No. 407, as embraced in a publication of the ordinances of said city known as Revised Ordinances of 1930 of the City of Ames, Iowa, has provided for and created a City Plan Commission.

Section 5829-a10 of the Code is as follows:

"5829-a10. Recommendations as to improvements. No statuary, memorial, or work of art in a public place, and no public building, bridge, viaduct, street fixture, public structure or appurtenance, shall be located or erected, or site therefor obtained, nor shall any permit be issued by any department of the municipal government for the erection or location thereof, until and unless the design and proposed location of any such improvement shall have been submitted to the city plan commission and its recommendations thereon obtained."

Sub-section F of Ordinance 407, is in substantially the same language.

Said Section 5829-a10 provides in substance, that no public building shall be located or erected or a site therefor obtained, nor shall any permit be issued by any department of the municipal government for the erection or location thereof, until and unless the design and proposed location of any such improvement shall have been submitted to the city plan commission and its recommendations thereon obtained.

A school building is a public building more important and often more ornamental than statuary, memorial buildings, and monuments and other works of art located in public places. Such buildings serve a very useful purpose, as do bridges, viaducts, street fixtures, and other public structures. The language of the section is broad enough to cover all public buildings. There would be no logical reason for omitting schoolhouses from the scope of this act, and since they are not expressly excluded therefrom and since they are public buildings which are included by express language of the statute, we are of the opinion Section 5829-a10 and Ordinance 407 include public school buildings within their scope.

OLD AGE ASSISTANCE ACT: In the case under consideration, the old age pension tax, as it is a special tax, should be paid for said incompetent veteran.

September 21, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your request of recent date for the opinion of this Department on the following matter submitted to you by Mr. Dutton Stahl, Assistant Trust Officer of the Iowa-Des Moines National Bank and Trust Company:

Andrew Parsons of Des Moines, Iowa, has been adjudged incompetent by the district court. He is a veteran of the world war and by reason of a service connected disability, was entitled to a compensation from the federal government. To receive these funds, the Iowa-Des Moines National Bank and Trust Company was appointed by the district court as guardian of his property. All of the funds that we have in our hands in the guardianship account are derived either from the proceeds of United States government compensation, insurance or from the interest on non-taxable securities which were purchased by the guardian from the proceeds of compensation or insurance as received aforesaid.

Our question is as to whether it will be necessary for us, as guardian, to pay the old age pension tax for this incompetent veteran as assessed by Senate File No. 42, Acts of the Forty-fifth General Assembly in Extraordinary Session.

We also desire a ruling where the facts are the same as above stated, with the exception that the incompetent veteran is now confined in and undergoing treatment at the United States Veterans' Hospital.

It has been our understanding and contention that our wards in the above and similar cases are not subject to taxes imposed by the State of Iowa or any of its various taxing branches, the theory being that the funds so received by us, as guardian, from the United States government still remain government funds in our hands and do not actually belong to the incompetent ward until they have been used by us for his benefit and further that these funds, even when invested in the interest-bearing securities or other types of investment (except real estate) do not lose their identity but continue to be the proceeds of government compensation or insurance.

In this connection we cite the following Iowa cases:

Manning vs. Spry, 96 N. W., 873.
Appanoose County vs. Henke, 223 N. W., 876.

We also call your attention to the Attorney General's opinion upon this subject rendered on July 8, 1932, to Mr. H. F. Dickensheets, Regional Attorney, United States Veterans' Bureau, Des Moines, Iowa.

In connection with the request above stated, we have examined the cases cited and find that the case of Manning vs. Spry, decided in the Supreme Court of Iowa, on October 10, 1903, is to the following effect:

Pension money paid to the guardian of an insane pensioner, and by him loaned, is in process of transmission, to the pensioner, and still under control of the federal government and so is exempt from taxes as a pension.

We find further:

This was a suit in equity to restrain the defendant, the county treasurer of Wapello county, from collecting a tax assessed against plaintiff, as guardian of one John Schwabkey, insane, on property held by him as such guardian, on the ground that the property was and is exempt from taxation.

We also find that the facts in this suit reveal that the county treasurer of said county sought to tax funds in the hands of the guardian, listed and assessed against plaintiff as moneys and credits, which would be a direct tax on the fund, and, of course, is a general tax. The court, in its decision, states as follows:

"And Section 1309 of our Code reads in this wise: 'The term credit as used in this chapter includes every claim or demand due or to become due for money * * * * and all money or property secured by deed * * * * mortgage or otherwise, but pensioners 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.'"

Hence, it would be our thought that a definite rule might apply where the

claim is not for a general tax but for a special tax, such as an inheritance tax or other forms of special taxes. In the instant case, the court construes the federal statute and the statute of moneys and credits together.

In the other case cited, Appanoose County vs. Henke, 223 N. W. 876, we find that this is not a taxation case but that the finding of the court is to the following effect:

Under Code of 1927, Section 11761, principal of United States government pension money in hands of guardian of insane person held exempt from execution for judgment debt.

The proceeding arose in an action instituted by the plaintiff to satisfy its judgment against Alice Henke, defendant, through the appropriation of pension money in the hands of a guardian. The district court denied the relief, and plaintiff appealed. The judgment entered was modified and affirmed. The judgment was sought by reason of the fact that Alice Henke, the defendant, was a person of unsound mind and the basis for the judgment was her care and support at the state hospital for the insane at Mount Pleasant. Resistance was made by appellee guardian on the ground that all the property in his possession belonging to the ward consisted of United States government pension money and interest which had accumulated thereon. The court states:

"There arises but one question for determination, and that is whether or not the funds applied for are exempt from execution for the judgment debt. This problem presents two phases, one involves the principal of the exemption money, and the other the interest thereon.

For authority on the broad proposition, among other cases, the case of Tama County vs. Kepler, 187 Iowa, 34, is cited and the court states:

"It is the settled law of the United States and of this state that the guardian in such case (while holding the funds of an insane ward) 'is nothing more than an agent for the government, and that pension money in his hands is still under its control and management.' * * * * These authorities (Manning vs. Spry, and United States vs. Hall) make it clear that this pension fund, which, concededly, had never reached the hands of the deceased, became no part of his estate, and his creditors have no standing in court to require its subjection to the payment of their claims."

The Supreme Court, in the Henke case, modified the judgment of the lower court by exempting the principal from the payment of the debt, but states that the interest, less deductions for actual expenses of the ward, are subject to the debt.

Under date of May 22, 1934, this department, in an opinion to Commissioner John F. Porterfield, ruled that Section 11763 of the 1931 Code of Iowa does not conflict with Sections 34 and 35 of the old age assistance act for the reason that the tax, as provided in said sections, is not construed to be a debt. In this connection, numerous cases are cited, among which is the case of Collector of Taxes of City of Boston vs. Revere Bldg. (Mass.), 177 N. E., 577, at page 578, in which the court said:

" 'Tax' on realty, in its nature, is not 'debt,' but monetary burden for support of government laid on owner and secured by lien on realty."

We also cited the case of St. Joseph Land Company vs. MacLean, 32 Federal (2d), 984, at page 987, in which the court said:

"Taxes, being in no sense contractual, are not 'debts,' which are obligations for payment of money founded upon contract, express or implied."

The case of Livesay vs. De Armond, 284 Pacific, 166, at page 168, 68 A. L. R., 422, was cited and the court, in its decision, stated as follows:

"It is generally held that a tax is not a debt, and therefore an unpaid tax draws no interest unless legislation expressly directs a different result."

We find that one of the latest expressions of the United States Supreme Court on the question is found in Volume 288, U. S. 433, 77 Law Edition, October term, 1933, at page 878, in which the following proposition was before the court:

"Petitioner relies upon the clause of Section 3466 declaring that whenever any person indebted to the United States is insolvent the debts due to the United States shall first be satisfied. He asserts that, under Acts of Congress later to be considered, the war risk insurance and disability compensation paid to a guardian of an incompetent veteran remains the money of the United States so long as it is subject to his control and suggests that the guardian is a mere instrumentality of the United States for the disbursement of such money for the benefit of the veteran. And he maintains that the deposit here involved is money of the United States and that the bank is indebted to it therefor.

"The pertinent substance of the provisions invoked by petitioner follows. Section 21 (1) and (2) of the World War Veterans' Act, 1924, provides that where any payment under the act is to be made to a person mentally incompetent, it may be made to the person who is constituted guardian by the laws of the state or is otherwise legally vested with responsibility or care of the claimant or his estate. It authorizes the director to suspend payments to a guardian who shall neglect or refuse to render to the director from time to time an account showing the application of such payments for the benefit of the incompetent. Section 22 declares that such payments shall not be assignable or subject to the claims of creditors and that they shall be exempt from taxation, but makes them subject to claims of the United States under the act against the veteran. Sections 21 (3) and 26 provide that in specified cases insurance and disability compensation remaining unpaid or in the hands of a guardian at the death of the veteran shall escheat to the United States. Section 214 provides that where an incompetent veteran receiving disability compensation disappears the director may make payments to his dependents. Section 505 provides for punishment of guardians who shall embezzle such funds.

"The guardian, appointed by the county court, was by the laws of the state given the custody and control of the personal estate of his ward and was authorized to collect and receive the money in question. And unquestionably payment to the guardian vested title in the ward and operated to discharge the obligation of the United States in respect of such installments."

In support of this proposition, citing, among other cases, the case of Re Stude, 179, Iowa, 785.

"The provisions for exemption, non-assignability and suspension of payments plainly imply the passage of title from the United States to the veteran. The denunciation of embezzlement by guardians is not inconsistent with that intention. These regulations, like many to be found in pension laws, disclose a purpose to safeguard to beneficiaries the appropriations and payments made for their benefit, and evince special solicitude for the protection of veterans who by reason of mental incompetency are unable to protect themselves. The clauses subjecting such payments to claims of the United States against the veteran and providing for escheat to the United States make against petitioner's claim. Neither would be appropriate or necessary if the money paid to such guardian continued to belong to the United States until actually disbursed by him for the veteran's benefit.

"Petitioner cites United States vs. Hall, 98 U. S., 343, 25 L. ed., 180, supra. The question there was whether Congress has power to prescribe punishment for the embezzlement by guardians of pension money paid them in behalf of their wards. The indictment showed that the money alleged to have been embezzled was the property of the accused guardian's ward. The court held that to insure transmission unimpaired to the beneficiary the United States might annex such conditions to the donation as it deemed appropriate and that the guardian was bound to accept the payment subject to the terms of the grant and that Congress had power to protect its gifts until it passed into the hands of the beneficiary. *There is no suggestion in the opinion that the United States had any interest as owner in the money embezzled.* The power of Congress to punish such misappropriation is not limited to acts causing loss to

the United States. (Cases cited.) But in that case the United States itself was the guardian and through its officer, the superintendent of an Indian reservation, made the deposit which upon insolvency of the bank was held a preferred claim under Section 3466. The case is not in point as here the guardian was appointed pursuant to state law to act for and on behalf of his ward. He was not an agent or instrumentality of the United States. It results that the deposit in question does not belong to the United States and, as indebtedness to it is essential to priority, the guardian's claim under that section is without merit."

We go into detail in the court's finding in this recent case to show a recent expression of the United States Supreme Court on the question raised in Mr. Stahl's letter to you, in which he states:

"It has been our understanding and contention that our wards in the above and similar cases are not subject to taxes imposed by the State of Iowa or any of its various taxing branches, the theory being that the funds so received by us, as guardian, from the United States government still remain government funds in our hands and do not actually belong to the incompetent ward until they have been used by us for his benefit and further that these funds, even when invested in the interest-bearing securities or other types of investment (except real estate) do not lose their identity but continue to be the proceeds of government compensation or insurance."

It is, therefore, the opinion of this department that a special tax, such as the old age assistance tax as levied in Sections 34 and 35 of the act, or a special tax for the benefit of the veteran, can be distinguished from the one upon which the court based its opinion in the case of Appanoose County vs. Henke. A practical application of this ruling can be shown in the following respect—it is for the veteran's own benefit. In the event, through some change in his status, that a veteran would not receive compensation or insurance from the United States government, by reason of his disability and incompetency he would be eligible for the old age assistance upon reaching the age set out in the act, if not confined in a state or county institution, in the event that he had paid the payments assessed as to him by reason of being a citizen of the United States and a resident of Iowa within time limit specified.

TAXATION: SOLDIER'S EXEMPTION: An honorably discharged soldier who enlisted in the United States Army and served with the Army of Occupation in Germany after the signing of the Armistice and prior to July 2, 1921, would be entitled to soldier's exemption from taxation under paragraph 3, of Section 6946 of the 1931 Code of Iowa.

September 24, 1934. *County Attorney, Spencer, Iowa:* I have your letter of September 22nd, in which you request an opinion from this Department on the following state of facts:

"An honorably discharged soldier, who enlisted on April 1, 1919, and served with the A. E. F. at Brest, France, and also the Army of Occupation in Germany, for the past five years has been granted soldier's exemption from taxation under the provision of Section 6946 of the Code of Iowa. Now the contention has been made that this man is not entitled to soldier's exemption under the provision of this section.

"Inasmuch as the peace treaty with Germany was not signed until after this soldier was in the army of occupation we are inclined to the view that he should be allowed this exemption, especially in view of the fact that the property involved is his homestead and he has been having difficulty in holding it."

Paragraph 3, of Section 6946 of the 1931 Code of Iowa provides that "the following exemptions from taxation shall be allowed: 3. The property, not to exceed five hundred dollars in actual value, of any honorably discharged soldier, sailor, marine, or nurse of the war with Germany."

It will be noted that this exemption applies to honorably discharged soldiers, sailors, marines, or nurses of the war with Germany. The material question that arises is, when did the war with Germany cease.

67 Corpus Juris on page 429, answers the question as follows:

"Termination of World War. The World War was terminated as between the United States and both Germany and Austria-Hungary by joint resolution of Congress on July 2, 1921."

Those who complain about this exemption to the soldier mentioned in your letter, have based their objection on the theory that the war ended with the signing of the Armistice on November 11, 1918. Corpus Juris also answers this objection very plainly and squarely in the following language:

"War may come to an end by the simple cessation of hostilities, although this has been said to be not a normal course; but the mere cessation of actual hostilities does not terminate the war in the legal sense until followed by formal proclamation or declaration of peace.

"An armistice is not a termination of war and does not operate to terminate it but effects merely the suspension of hostilities, the state of war continuing."

67 Corpus Juris, pages 429 and 430.

There are a number of cases cited in the notes to the above rules of law as expressed and set forth in 67 Corpus Juris on pages 429 and 430, which are not necessary to include in this opinion.

It is, therefore, the opinion of this department that an honorably discharged soldier who enlisted on April 1, 1919, and served with the A. E. F. at Brest, France, and also the Army of Occupation in Germany, and prior to July 2, 1921, would be entitled to exemption from taxation under paragraph 3, of Section 6946, of the 1931 Code of Iowa.

LIQUOR CONTROL COMMISSION: INSURANCE ON MERCHANDISE IN LIQUOR STORES: "There is no provision in the Iowa Liquor Control Act which affirmatively authorizes the Iowa Liquor Control Commission to make contracts for insurance on the state property which might be under their control. If there is any loss to such property * * * *, such losses are to be paid from the providential contingent fund, as set forth in Section 286 of the 1931 Code of Iowa."

September 26, 1934. *Governor of Iowa, Des Moines, Iowa:* In response to your request, I wish to report that our Department has reconsidered the opinion written by Assistant Attorney General Clair E. Hamilton, which opinion was furnished to the Hon. Charles Murtagh, State Comptroller, with respect to the legality of the claims for premiums on insurance contracted for by the Iowa Liquor Control Commission for insurance on their stocks of merchandise in the several liquor stores throughout the state.

From a thorough study and examination of the authorities, we arrived at the conclusion that the opinion written by Assistant Attorney General Clair E. Hamilton is legally correct.

The question as to whether or not the state could and should pay premiums for insurance taken out on state property first arose in this present administration with the State Board of Education several months ago. The Board of Education had taken out about seven million dollars' worth of insurance on buildings and equipment at the University of Iowa. At that time, the Attorney General advised Your Excellency and the State Comptroller that such contracts were not authorized by the laws of this state, and that losses to state property caused by fire, theft or unavoidable cause were to be paid from a providential contingent fund, as provided for by Section 286 of the 1931

Code of Iowa. As a result of this advice, Your Excellency ordered the cancellation of such insurance policies.

Based upon experience covering a period of years, our legislators early found that the state would pay a greater amount for insurance premiums on state property than the total losses sustained. The Legislature, therefore, decided to carry its own insurance and thereby save the difference for the tax-paying public. Provision for this purpose was made by the Legislature as far back as 1873. The first recorded Attorney General's opinion, interpreting this provision, was written by the Hon. Milton Remley to the State Executive Council on January 8, 1897.

Public officers have and can exercise only such powers as are conferred on them by law, and a state is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the constitution, unless such authorized contracts have been afterwards ratified by the Legislature.

59 C. J., 172.
State vs. Young, 134 Iowa, 505.
State vs. Torrinus, 26 Minn., 1; 49 N. W., 259.
Shipman vs. State, 42 Wis., 377.
State vs. State Bank, 45 Mo., 528.
In Re Incurring State Debts, 37 A., 14; 19 R. I., 610.
An agreement not legally binding on a state might impose a moral obligation.
59 C. J., 172.
Urquhart vs. State, 23 S. W. (2d), 963; 180 Ark., 937.

Section 286 of the 1931 Code of Iowa is still in full force and effect. Chapter 24 of the Acts of the Forty-fifth General Assembly in Extraordinary Session, known as the Iowa Liquor Control Act, did not repeal or suspend the operation of Section 286 of the Code. The Iowa Liquor Control Act was a new law, calculated to suspend and repeal existing state liquor laws in conflict with the provisions of the Iowa Liquor Control Act. The act was not intended by the Legislature to repeal or suspend any other laws, except the existing liquor laws that were on the statute books. This is very obvious from a careful scrutiny of the title to Chapter 24 of the Acts of the Forty-fifth General Assembly in Extraordinary Session, commonly known as the Iowa Liquor Control Act.

Section 29 of Article 3 of the State Constitution provides as follows:

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

This constitutional provision requires that every act passed by the Legislature shall embrace but one subject and matters properly connected therewith. The subject embraced in the Iowa Liquor Control Act is intoxicating liquors. The title to the act states that the act, amongst other relative matters, is "to provide that whenever the provisions of any existing laws *relative hereto* are or may be inconsistent or in conflict with the provisions of this act, that the provisions of this act shall control and supersede such laws * * * * *." It is apparent from the title to this act that the only laws that are suspended or repealed are existing laws "relative hereto." This plainly and clearly means existing intoxicating liquor laws, and none other. If any provision of the Iowa Liquor Control Act should be in conflict with Section 286 of the 1931 Code of

Iowa, it would be in direct violation of Section 29 of Article 3 of the Constitution of the State of Iowa, and, therefore, void and invalid. There is no provision in the Iowa Liquor Control Act which affirmatively authorizes the Iowa Liquor Control Commission to make contracts for insurance on the state property which might be under their control. All the merchandise in the state liquor stores is state property. If there is any loss to such property by reason of fire, storm, theft or unavoidable cause, such losses are to be paid from the providential contingent fund, as set forth in Section 286 of the 1931 Code of Iowa. If this fund is insufficient, then appropriation therefor can and will be made by the next legislative session.

It may be argued that the state should not have to bear the loss occasioned by the destruction of merchandise in the state liquor stores by fire, storm, theft or unavoidable cause, but the same argument could be applied to the destruction by such causes of the State Capitol Building or the buildings under the control of the Board of Education or Board of Control. The Iowa Liquor Commission is a part of the State Government, the same as any other state board or commission. Its property is state property. It has been and still is the policy of the State of Iowa to carry its own insurance, as specifically provided for in Section 286 of the 1931 Code of Iowa.

Argument has been made that the Liquor Commission has the power to purchase insurance under their broad powers, as expressed in the Iowa Liquor Control Act, to establish, maintain, manage and control liquor stores and the equipment and merchandise therein. However, similar powers are given to the Executive Council, Board of Education and the Board of Control. These general powers do not authorize any of those boards to enter into contracts in violation of the provisions of Section 286 of the 1931 Code of Iowa. There is no statutory or constitutional provision authorizing the Iowa Liquor Control Commission to enter into contracts for the purchase of insurance on state property under their control or management.

Argument has been advanced that the Attorney General and the Executive Council would have the power and authority to compromise such claims, under the provisions of Section 288 of the 1931 Code of Iowa. This argument is also untenable. The power of the Executive Council to compromise claims upon the recommendation of the Attorney General, as provided for in Section 288 of the Code, is for claims of doubtful equity or collectibility "*in favor*" of the state. The claims in question are claims against the state and not "in favor of the state."

Our Department was not consulted by the Iowa Liquor Control Commission or by any other interested official prior to the execution of these contracts and their presentation to the State Comptroller for payment. The first information our Department had of the existence of these claims was when the State Comptroller made a written request to our Department for an official opinion as to the legality of said claims. However, there can be no doubt but that these contracts were entered into by the Iowa Liquor Commission and by the several insurance companies in good faith. There may be a moral obligation on the state to pay these claims, but there is no legal obligation. Hence, before these claims could be legally paid by the State of Iowa, the Legislature of this state would have to pass an act ratifying and legalizing such contracts.

WAREHOUSE RECEIPTS: SALE OF: Orders solicited in Iowa for the purchase of Warehouse Receipts to be accepted at some point outside of Iowa constitute contracts executed (in Milwaukee)* (in this instance) and the acceptance of such orders under the conditions described in your inquiry would not be violative of the Iowa Liquor Control Act.

*Some point outside of Iowa.

September 27, 1934. *County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your request for an official opinion under date of September 21, 1934 on the following question:

"A public warehouse, operating under both the state and national warehousing laws, located in Milwaukee, Wisconsin, sends salesmen to the State of Iowa, who in turn offer to investors of Iowa, subject to acceptance or rejection, Milwaukee, Wisconsin, warehousing receipts representing a specified barrel or barrels of spirituous distilled products.

These receipts, as I understand it, are the same as any ordinary warehouse receipts, and actually deliver title to the purchaser subject, of course, to both the state and national warehousing laws. I can readily understand that if the liquor was to be transported into Iowa to be delivered upon the release of the receipt and to be transported into the state, that there would be a violation of the Iowa Liquor Law, but the question that I am confronted with is, does the transaction in which the salesman takes orders for these receipts, which order is accepted or rejected in Milwaukee, or some point outside of Iowa, constitute a violation of the Iowa Liquor Laws?"

The entire liquor traffic including the sale of alcoholic liquor in the State of Iowa is now regulated under the provisions of the Iowa Liquor Control Act passed by the extraordinary session of the Forty-fifth General Assembly. By express provision of that Act, prior existing liquor laws were not repealed unless and except the same were in conflict with the provisions of the Iowa Liquor Control Act and to that extent were superseded by the provisions of the act. We have recently held in an opinion handed down on the 18th day of September 1934 to the Superintendent of Securities of the State of Iowa that whiskey warehouse receipt is not a security within the meaning of the Iowa Securities Act. Your inquiry is to what effect the sale of the warehouse receipt in Iowa would have where the sale is in fact consummated in Milwaukee, Wisconsin.

The lex loci contractus has been stated in County Savings Bank vs. Jacobson, 202 Iowa 1263:

"It is a general rule, too well settled to need the citation of authorities, that the law of the place where the contract is made, in the absence of any stipulation to the contrary, governs the contract which must be construed according to the law of the place of its execution. In fact, such law becomes a part of the contract. The real difficulty lies, ordinarily, in determining what is the place of the contract. This much may be taken as settled, however, that a contract is, for the most purposes, deemed to have been made at the place or within the state where the final act necessary to make it a binding obligation is done."

And, again, in Service System, Inc. vs. Johns, 206 Iowa 1164 (221 N. W. 777) as follows:

"This case announces the general rule that where an order for goods or merchandise is taken in one state and forwarded to another, which is the home office of the corporation or the principal of the agent who took the order, and such order is subject to acceptance or approval by the principal, the contract is not a contract of the state where the order is taken, but is one of the state where the principal resides."

This rule has been consistently followed in this state. (See Iowa Cases cited therein.)

The last case above cited, in brief, held that a contract for the sale of goods was consummated in the State of New Jersey by a New Jersey corporation

of an order taken by an agent in Iowa subject to the approval of the corporation, the legal result being that it constituted a New Jersey contract. In the last case above cited, the court refers to Tegler & Co. vs. Shipman, 33 Iowa 1941, with approval. This case involved a suit on a promissory note given at Jefferson, Greene County, Iowa for intoxicating liquor. The plaintiff requested an instruction embodying the above rules of law as follows:

"The jury are instructed that if they believe from the evidence that the order or orders, some or all of them, on the plaintiffs were procured by their agent for procuring orders in the State of Iowa, and that said orders were given by the defendant, on the plaintiffs, who were doing business at Rock Island, in Illinois, subject to their approval or disapproval, then no sale would take place until the orders were accepted or approved by them in Rock Island, and the place of contract would not be by such order determined to be in Iowa; that the mere giving of an order does not fix the place of contract."

In that case the lower court was reversed for failure to give this instruction.

There is another canon of construction which would seem to have some application and that is the presumption that the parties intend their contract to be performed in the state where it can be validly performed according to its terms rather than in a state where it would be wholly or in part invalid. Thus, it was said, in *Green vs. Northwestern Trust Co.* 150 N. W. 232:

"It cannot be presumed that the parties intended to enter into an illegal contract. The presumption is rather in favor of its validity. The law will presume an honest intention unless there is something in the nature of the transaction or in the proofs to establish the contrary." (And cases cited.)

We therefore conclude that if orders are solicited in Iowa for the purchase of warehouse receipts to be accepted in Milwaukee that such contracts would be executed in Milwaukee and that acceptance or orders under the conditions described in your question would not be violative of the Iowa Liquor Laws.

SOLDIERS' RELIEF COMMISSION: TRANSFER OF SOLDIERS' RELIEF FUND TO COUNTY POOR FUND: BOARD OF SUPERVISORS: "It is, therefore, the opinion of this office that neither the Soldiers' Relief Commission nor the Board of Supervisors have any authority to transfer the Soldiers' Relief Fund to the County Poor Fund."

October 1, 1934. *County Attorney, Iowa City, Iowa:* Your letter of September 26th came during my absence from the office.

In this letter you state that a representative of the Federal Relief authorities is insisting that the Soldiers' Relief Commission transfer the balance in the Soldiers' Relief Fund to the Poor Fund of the county.

The only provision for transfer of funds which could possibly have any application is contained in Section 388 of the Code of 1931. This section provides for a temporary or permanent transfer from one fund of a municipality to another fund, upon the approval of the Budget Director.

It will be noted that in an ordinary transfer of county funds, it would be up to the Board of Supervisors to make such transfer. The Soldiers' Relief Fund, however, comes under the provisions of Chapter 273 of the Code of 1931. The first section of that chapter, to-wit, Section 5385, provides for the levying of a tax for the purpose of creating a fund for the relief of honorably discharged indigent United States soldiers, sailors, marines and nurses, who served in any war in which the United States took part, and also for the relief of their indigent wives, widows and minor children. Section 5386 provides that said fund shall be expended for the aforesaid purposes by the joint action and control of the Board of Supervisors and the Relief Commission. Section 5387

then provides that the said funds shall be disbursed by the Soldiers' Relief Commission, consisting of three members, and the remaining sections provide just how the fund shall be disbursed.

This Soldiers' Relief Fund was not created or provided for, for the purpose of relieving all indigent persons of the county, but was provided for the relief of a certain and particular class. The purpose of the act was to prevent the necessity of veterans and their families being placed on the pauper list. For us to rule that the balance on hand at the end of any year should be paid over to the Poor Fund of the county would be equivalent to a ruling that the Board of Supervisors would have authority to transfer the particular fund at any time during the year, and would be an absolute contradiction to the avowed purpose and intent of the Legislature.

It is, therefore, the opinion of this office that neither the Soldiers' Relief Commission nor the Board of Supervisors have any authority to transfer the Soldiers' Relief Fund to the County Poor Fund.

BOARD OF ACCOUNTANCY: RE: REGISTERING OF FIRM NAME: It is the opinion of this Department that Accountancy Board has the legal right and authority to register a firm name which is composed of all the names of the individuals comprising the firm and in addition the words 'and company,' when it is obvious that the term 'and company' does not and cannot refer to any individuals.

October 2, 1934. *Iowa Board of Accountancy, Cedar Rapids, Iowa:* We have your request for opinion on the following proposition:

"Can the Board of Accountancy legally under provisions of Section 12 (c), Chapter 91-C1 of the Code register a firm name which is composed of all the names of the individuals comprising the firm and in addition the words 'and company' when it is obvious that the term 'and company' does not and cannot refer to any individuals?"

It is the opinion of this Department that your Board has the legal right and authority to register such firm name.

SCHOOLS: NON-RESIDENT PUPILS: TUITION: Whether the fact that a student has been allowed to vote in this state requires the registrar to admit the student as a resident student, paying the lower tuition."

October 4, 1934. *Board of Education, Des Moines, Iowa:* We have your letter of September 24th in regard to the question of whether a student is a non-resident or not. You advise that in many instances students come from foreign states and register for the first year or so as non-resident students. Thereafter, they vote here in Iowa and then claim that by reason of their being allowed to vote, they are residents of the state and demand to be classified as resident pupils and pay the lower tuition. You ask whether the fact that a student has been allowed to vote in this state requires the registrar to admit the student as a resident student, paying the lower tuition.

We call your attention to Paragraph 3 of Section 392 under the Code, which is as follows:

"The Board shall make rules for admission to and for the government of said institution, not inconsistent with law."

The agent of the Board in carrying out these rules and in applying them is the registrar. The board on this question of determining the classification of resident or non-resident pupils acts in a quasi judicial capacity and it may be, of course, accepted as evidence, the fact that a student has voted in this State, but that is not at all conclusive as the registrar may determine whether he believes that the student is actually in good faith attendance at the University

with the intention of remaining in Iowa permanently, or whether he is merely in the state for the purpose of obtaining an education and after that is obtained, to leave the State. The registrar could also take into consideration whether the student has received any money from home and where his family live and what arrangements he has made, if any, for the practice of his profession or employment after he has left school.

In other words, if a student registers first as a non-resident student, then the burden is upon him to show to the satisfaction of the registrar who acts for the Board of Education, that he should at some time thereafter be classified as a resident student and the registrar is not bound by the mere fact that a student has been allowed to vote in this state, but may consider this along with other facts.

In regard to your further question as to whether a student could be punished for perjury if he signed an affidavit that he intended to practice or live in Iowa after the completion of his school and then had failed to do so, I doubt very much if there could be a conviction on this, for the reason that a man's intentions sometimes change over night and intention is a matter in a man's own mind and where he states that such a thing is his intention, the mere fact that something else is done subsequently does not utterly disprove his intention as he may have had cause to change it subsequently. But as pointed out above, this mere fact of intention or signing of affidavits is not conclusive, but may be considered along with the other facts by the registrar.

BANKS AND BANKING: PAR VALUE OF STOCK: Is there anything in the Iowa banking laws or corporation laws that prohibit any Iowa bank, savings, state or trust company from fixing the par value of its stock, either common or preferred, at any amount above $100 per share.

October 5, 1934. *Superintendent of Banking, Des Moines, Iowa:* You have submitted to us the following question:

"Is there anything in the Iowa banking laws or corporation laws that prohibit any Iowa bank, savings, state or trust company from fixing the par value of its stock, either common or preferred, at any amount above $100.00 per share?"

Prior to the Forty-third General Assembly of the Legislature, the law provided that the capital of banks and trust companies shall be divided into shares of $100.00 each. The Legislature at that time amended this provision and Section 9261-c1 of the Code is the exact wording of the other statutory provisions in regard to banks and trust companies. This provides:

"The capital of trust companies shall be divided into shares of $100.00 each or into shares of such less amount as may be provided in the Articles of Incorporation."

See Section 9209 of the Code as pertaining to State banks and Section 9192 of the Code as pertaining to savings banks.

This amendment was undoubtedly for the purpose of making our State statutes conform to the national provisions, as the original Bank Act passed by Congress on June 3, 1864, being 12 U. S. C. A., 52, provided that "The capital stock of each association shall be divided into shares of $100.00 each." This was amended by Congress as a part of the act of February 25, 1927, the amendment being: "or into shares of such less amount as may be provided in the Articles of Incorporation."

Chapter 385-c1 of the Code of Iowa, 1931, gives corporations power to create

and issue stock without par value. However, banks, savings banks and trust companies excepted.

The powers of every corporation, like its corporate existence, are derived from some legislative act and to determine whether its officers have the power to do a given act, resort must be had to the statutes and general laws. The right to issue stock is not one of the implied or incidental powers of a corporation and no such rights exist unless it is expressly conferred by the statutes under which the company is incorporated or by the general laws, or by the charter under legislative sanction and authority, and without authority from the Legislature, the corporation has no power to make any change in the value of its shares. With this thought in mind, we turn to the statutes above enumerated and find that their mandatory requirement is that the capital shall be divided into shares of $100.00 each or into shares of such less amount as may be provided in the Articles of Incorporation. The Legislature has used the word "shall" and has definitely set forth the limitations as to the value of the stock.

Does Chapter 119 (House File 87) of the Laws of the Forty-fifth General Assembly, Extra Session, change this statutory provision? Section 4 of this law gives banking corporations power "to create and issue preferred stock of one or more classes as well as common stock, and to fix the rights, privileges, preferences, limitations and conditions of such stock." These words are all synonymous and interchangeable and as used in statutes, have nothing to do with the value of stock, for as you will note in Section 8419-c1 of the Code, which gives corporations the right to create and issue stock without par value, the Legislature there provided: "Any corporation * * * may create one or more classes of stock without nominal or par value, with such rights, preferences, privileges, voting powers, limitations, restrictions and qualifications thereon not inconsistent with law as shall be expressed in its Articles of Incorporation, or any amendment thereto."

It is, therefore, apparent that such words have only to do with the rights of a holder of such stock and nothing to do with the placing of value thereon. It is also, therefore apparent that your question must be answered in the affirmative and that the laws of this State do prohibit savings banks, state banks and trust companies from fixing the par value of their stock at any amount above $100.00 per share, and such is the opinion of this Department.

WILLIAM GEORGE: DELINQUENT TAX COLLECTOR: Sections 7222, 7223, 7225 and 7215, 1931 Code of Iowa: It is our opinion that Mr. George would be entitled to 3½ per cent of the total amount of delinquent taxes collected by him which, of course, must include the additional 5 per cent, as provided for by Section 7215 of the 1931 Code of Iowa.

October 5, 1934. *County Attorney, Des Moines, Iowa:* I have your letter of October second in which you request an opinion of this Department on the following set of facts:

"William George has been by the Polk County Board of Supervisors appointed delinquent tax collector. He receives on all delinquent taxes collected by him, in accordance with the statute, a three and one-half per cent commission.

"On one item collected by him from the Iowa-Des Moines National Bank, being the 1933 tax, he collected the following sum of $16,539.12, and in addition thereto the sum of $661.56, which item is a four per cent penalty to July 31, 1934. In other words, he collected the total of $17,200.68, which was paid to him and through him to the County Treasurer on July 31, 1934. He claims of the Board of Supervisors a three and one-half per cent commission of this

item and in addition thereto on several items where persons have requested home loans through the United States Home Loan Department, and in each of these instances he has computed the taxes and added five per cent as a delinquent fee of which he claims three and one-half per cent.

"In other words, the total collection made by him, including delinquent taxes paid through the proceeds of obtaining a home loan, amounts to $20,298.60, of which he claims $710.45 commission. He claims to have personally been responsible for the collection of these delinquent taxes, that is to say through his own efforts. Is the payment of this item legal and proper?

Assuming that William George, the delinquent tax collector, has actually collected the above mentioned delinquent taxes for Polk county, our opinion is based on this assumption. Your attention is called to Section 7222 of the 1931 Code of Iowa, which is as follows:

"*Collectors—appointment.* Immediately after the taxes become delinquent, each county treasurer shall proceed to collect the same by distress and sale of the personal property of the delinquent taxpayers, and for this purpose he may appoint one or more collectors to assist him in collecting the same."

Under the provisions of this statute, it is entirely lawful for the county treasurer of Polk county, Iowa, to appoint William George as a delinquent tax collector to assist the county treasurer in collecting delinquent taxes.

Section 7223 of the 1931 Code of Iowa provides:

"*Compensation and accounting.* 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."

Section 7225 of the 1931 Code of Iowa also provides that the board of supervisors may, in their discretion, authorize the appointment by the treasurer of one or more collectors to assist in the collection of such delinquent personal tax as the board may designate. Under this section, the board is authorized to pay such delinquent tax collector as compensation for all services rendered and expenses incurred the sum of not to exceed ten per cent of the amount collected.

Section 7215 of the 1931 Code of Iowa provides that on all personal taxes not paid on or before the first Monday in December a penalty of five per cent shall be added and collected in addition to the monthly penalty as now provided for by Chapters 124 and 132 of the Acts of the Forty-fifth General Assembly.

It is, therefore, the intent of the law that a delinquent tax collector shall collect an additional sum of five per cent on the total amount of delinquent tax due and payable for the purpose of defraying the compensation and expenses of such delinquent tax collector. From your statement of the facts, we assume that this tax collector agreed to perform these services on the basis of three and one-half per cent of the total amount collected in full payment for his compensation and expenses. We see nothing in the law to prevent the delinquent tax collector from agreeing to receive less than the statute allows him for these services.

Based upon the statement of facts as presented to this Department in your letter of October second, it is our opinion that Mr. George would be entitled to three and one-half per cent of the total amount of delinquent taxes collected by him, which, of course, must include the additional five per cent, as provided for by Section 7215 of the 1931 Code of Iowa.

RESIDENCE: SETTLEMENT: A married woman has the settlement of her husband if he has one in this state. If he does not have such settlement in

this state, or if she lives apart from him or is abandoned by him, she may acquire a settlement as if she were unmarried. Upon the death of her husband, or if she is divorced or abandoned by him, she may resume any settlement she had at the time of her marriage.

October 10, 1934. *County Attorney, Des Moines, Iowa:* I acknowledge receipt of your favor of the 30th ult. in which you request the opinion of this Department upon the following question:

A man having settlement in another county in the state has lived in Des Moines for more than a year but had non-resident notices served on him which was acknowledged by a county of legal settlement, namely, Cerro Gordo county, married a woman who has had a legal settlement in Polk county, having lived here for a number of years, does the woman lose her settlement in Polk county having acquired a legal settlement in Cerro Gordo county, or may she elect to retain her settlement in Polk county?

You call our attention to Chapter 99, of the Acts of the Forty-fifth General Assembly, and particularly, Section 4 thereof which, we agree with you, is decisive of this question, said section being as follows:

"4. A married woman has the settlement of her husband, if he has one in this state; if not, 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 her 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."

Under this section, a married woman has the settlement of her husband if he has one in this state. If he does not have such settlement in this state, or if she lives apart from him or is abandoned by him, she may acquire a settlement as if she were unmarried. Upon the death of her husband, or if she is divorced or abandoned by him, she may resume any settlement which she had at the time of her marriage.

BOARD OF SUPERVISORS: COMPROMISE SCHOOL FUND MORTGAGE: "It is, therefore, the opinion of this office that if the Board of Supervisors of your county, in its wisdom, and after making a careful examination and investigation, determines positively that it would be to the best interest of the county to make such a compromise and that a compromise settlement would be better than foreclosure, it would then have authority to take such action."

October 15, 1934. *County Attorney, Winterset, Iowa:* We acknowledge receipt of your letter of September 27th, in which you ask for an opinion concerning the authority of the Board of Supervisors to compromise school fund mortgage. Your question is really threefold, as follows:

"1. Has the Board authority to settle for less than the full amount of the mortgage and interest?

"2. Are the members of the Board of Supervisors or the county, as a legal entity, liable for the deficiency?

"3. How much latitude is the Board allowed in affecting a settlement or compromise of a school fund mortgage?"

We note with interest that in one paragraph of your letter you state that the Board is of the opinion that the land is worth $15.00 an acre, and that the Board members are faced with the proposition as to whether or not they would be justified in accepting an amount below what they believe to be the present value of the land.

The Supreme Court of this state has on at least three occasions passed on the powers of the Board of Supervisors. It might be well to discuss these cases.

In the case of Poweshiek County vs. Buttles, 70 Iowa, 246, 30 N. W., 558, it

was held that Boards of Supervisors, in the management and control of the School Fund, have authority to do acts and make settlements for the protection of said Fund, which, in the exercise of wisdom and care, prudent men or men of affairs would do for the purpose of securing or collecting a debt, and further said that the wisdom and prudence of the act must be determined upon the facts as they appear at the time to the Supervisors. This statement was made in sanctioning a settlement made by a Board of Supervisors with one who had purchased school lands, for which he was unable to make settlement. The statute in that case provided as follows:

"That the several Boards of Supervisors shall hold and manage the securities given to the school fund in their respective counties, and also judgments and lands therein belonging to said fund, for the use of said fund; and to that end such counties shall have power to sue in their own name for the use of said fund, either by the District Attorney or such other attorney as such Board shall select, and do all other acts in relation to the same necessary for the protection of said fund."

In the case of McCarty, et al. vs. Eggert, 154 Iowa, 28; 134 N. W., 426, the facts were that the County Auditor had paid himself more money by way of salary than was authorized by the Board of Supervisors, and had also paid more money for assistance in the office than was authorized by the Board under a statute giving the Board authority to fix the salary of the Auditor and compensation for clerk. The Supreme Court said that under the statute (what is now Section 5130, sub-section 5), the Board of Supervisors have authority to examine and settle all accounts of the receipts and expenditures of the county and examine, settle and allow claims against the county. We quote from that case the following statement:

"We think that it was competent for the Board to settle with the defendant any claim of the county against him for money drawn in such period, in excess of the salary authorized, by making an allowance, as it did, to that extent."

The court then went on to say that although the acts of the Auditor were irregular, yet the Board of Supervisors had authority to adjust with the defendant any claim which the county might have for money irregularly drawn from the Treasury.

Even a stronger case is that of Sac County vs. Hobbs, et al. In that case, the County Treasurer was a defaulter. The Board of Supervisors, at the expiration of the Treasurer's term, accepted a promissory note from the Treasurer for the amount of his shortage, with the agreement that his official bond should be released and cancelled and no action commenced on said bond. When the county sued on the note, two questions were raised: 1. Whether or not the promise of the defendants was supported by consideration; and 2. Whether the transaction in which the note was given was lawful.

The Supreme Court held that there was consideration for the execution of the note in that the bond was released, and also held that the remedy on the bond was not exclusive, and that it often happens that the interests of the county are better protected by pursuing some other course. In passing on the matter, the court had this to say:

"The board of supervisors are clothed with discretion in the matter, and it is competent for them, after a defalcation has occurred, to take other security than that afforded by the bond, and even to extend the time of payment, if the interest of the county will thereby be better protected. True, such power is not conferred by any express provision of the statute, but it is included in the general power to examine and settle the accounts of the receipts and expenditures of the county, and to settle with the treasurer, conferred by Sections 303, 917, of the Code."

Sac County vs. Hobbs, et al., —— Iowa, ——, 33 N. W., 368.

After citing these authorities, we now call your attention to Section 5130, sub-section 6, of the Code of 1931, which is as follows:

"5130. General powers. 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."

Under the provisions of this section, the Board of Supervisors have power not only to represent the county but to have the care and management of the property and business of the county, except as otherwise provided by statute.

From the reading of the cases hereinbefore cited, the Boards of Supervisors, in the management and control of the school fund, should exercise such wisdom and care as prudent men or men of affairs would exercise for the purpose of securing or collecting an ordinary debt.

It is, therefore, the opinion of this office that if the Board of Supervisors of your county, in its wisdom, and after making a careful examination and investigation, determines positively that it would be to the best interest of the county to make such a compromise and that a compromise settlement would be better than foreclosure, it would then have authority to take such action.

We understand from your letter that the Board would realize about $1,100.00 or 72% of the face of the mortgage. The question then is whether or not it would be to the better interest of the county to accept that money than to foreclose or to go through a long drawn out litigation under the Frazier-Lemke Bill. That is a question, in so far as the discretion is concerned, which should be answered by the Board of Supervisors, acting as careful, prudent men. It is not for this office to pass on each set of facts. Those are among the duties of the Supervisors. We only state, as a cold, legal proposition, that Boards of Supervisors, in looking after the affairs of the county, have authority to do such acts as would be done by the ordinary prudent business man in securing or collecting debts which are due him.

We believe the opinion thus far answers fully your first and third questions. Your second question pertains to the personal liability of the members of the Board of Supervisors and the liability of the county itself. In answer to that question, we will say that if the Board of Supervisors act as careful, prudent men should act, they are not personally liable. However, in so far as the liability of a county is concerned, it is liable, regardless of how the matter is handled. Even though your Board should decide to foreclose the mortgage and sell the land at sheriff's sale, the county is liable, under Section 4505, for whatever loss is sustained, when the land is resold. Therefore, in so far as the liability of the county is concerned, it would make no difference whether the mortgage is foreclosed or whether the Board of Supervisors decided to compromise the matter. The county would be liable for the deficiency in either event.

REGISTRATION OF VOTERS: REGISTRARS OF OSKALOOSA, IOWA: Interpretation of Sections 677 and 678 of the 1931 Code of Iowa.

October 15, 1934. *County Attorney, Oskaloosa, Iowa:* I have your letter of October thirteenth in which you request an official opinion from this Department upon the following question:

"A question has arisen under Chapter 39 of the Code of Iowa, as to registration of voters and the registers in Oskaloosa. Under the provisions of Section 677 of the Code, the City Council shall for each precinct in the city and on or

before the sixth Monday preceding each general election, appoint one suitable person from each of the two political parties which cast the greatest number of votes at the last general election from three names presented by each chairman of the City Central Political Committee of such parties to be registers of voters.

"The city of Oskaloosa has a population of over ten thousand, and has had for a number of years the registration boards and registers of voters as set forth in Chapter 39. At no time in recent years has there been a city central political committee of either party, and during the year 1934 no lists were submitted by a chairman of any political party to the Council for the purpose of the appointment of the registers for each voting precinct in the city. Also the City Council did not make any appointment of registers. The mayor of the city called to the attention of the Council, in ample time, the fact that such appointment of registers should be made, and as soon as they failed to do so on or before the sixth Monday preceding the general election, he started to work on a list of such registers and after working on the list for some time, he informed the County Auditor by phone as to who was on the list and on this date, October 13th, sent a typewritten certified copy to the County Auditor.

"The validity of the action of the mayor has been questioned by a number of different persons of both political parties, and I would appreciate your early opinion as to which registration board is the legal board entitled to act, the old board as hold-overs, or the new board as a legally appointed and constituted board."

Section 677 and Section 678 of the 1931 Code of Iowa specifically and authoritatively answers the question submitted. Section 677 of the 1931 Code of Iowa is as follows:

"*Appointment of registers.* The city council shall, for each precinct in the city and on or before the sixth Monday preceding each general election, appoint one suitable person from each of the two political parties which cast the greatest number of votes at the last general election, from three names presented by each chairman of the city central political committee of such parties, to be registers of voters."

Section 678 of the 1931 Code provides as follows:

"*Vacancies.* If for any cause any register shall not be appointed at or before the time above mentioned, or, if appointed, shall be unable for any cause to serve, the mayor of such city shall forthwith, on similar recommendation, make such appointments and fill all vacancies."

You state that the city council of Oskaloosa, Iowa, did not comply with the provisions of Section 677 of the 1931 Code of Iowa in that they did not appoint one suitable person from each of the two political parties which cast the greatest number of votes at the last general election from three names presented by each chairman of the city central political committee of such parties, to be registers of voters. You further state that such lists were not presented to the council before the sixth Monday preceding the 1934 general election. You state further that after the sixth Monday preceding the general election of 1934 had expired and no such action was taken by the council, the mayor of Oskaloosa, at a later date, selected and attempted to appoint such registrars without recommendations from the chairman of both political parties and since has sent such lists to the county auditor of Mahaska County.

The mayor of Oskaloosa, Iowa, does not have any authority, under the law, to make such appointments without securing similar recommendations from the chairmen of the two major political parties. Section 678 of the 1931 Code of Iowa specifically provides for the filling of such vacancies by the mayor. This section states that "the mayor of such city shall forthwith, *on similar recommendation*, make such appointments and fill all vacancies." This statute plainly and clearly means that the chairmen of the city central political com-

mittees of such parties shall recommend three suitable persons for such appointments from their own political parties. Section 678 of the 1931 Code provides that in case of vacancies, such as exist at the present time in Oskaloosa, the mayor shall fill the vacancies by making appointments from such lists as recommended by the chairman of the central committee of both such political parties. In other words, such appointments must be made from lists that are satisfactory to both parties. The mayor is without authority to appoint anyone unless that person has been recommended by the chairman of either of such major political parties.

At the last general election, the two political parties which cast the greatest number of votes were the Democratic and Republican political parties. At the time that election was held, there were seven precincts in the city of Oskaloosa. Therefore, there should be seven Democratic registrars and seven Republican registrars at this time from a list of twenty-one Democrats and twenty-one Republicans recommended to the mayor by the Republican chairman of the city central committees and by the Democratic chairman of the city central committee. Each chairman is to submit a list of twenty-one persons from his political party. The mayor cannot go outside and appoint any registrar unless such person is on this list as recommended by the chairman of each political party.

The city central political committee of each party is composed of a man member and a woman member for each political party elected at the primary election from each precinct. These committeemen and committeewomen from each precinct in Oskaloosa can hold a meeting and select one of their members as chairman. If this has not been done, it should be done immediately. The chairman of each political central committee of Oskaloosa should and must be a committeeman or committeewoman. As soon as such chairmen are selected by their respective central committees of the city of Oskaloosa, they should present a list of twenty-one persons from their own party to the mayor and the mayor can then select one of each political party for each precinct as such registrar.

In your letter you ask an opinion as to which registration board is entitled to act, "the old board as hold-overs, or the new board as a legally appointed and constituted board." Our answer is that neither of such boards would be the board legally entitled to act. The old board could not act as "holdovers," because Section 677 of the 1931 Code of Iowa provides that these appointments shall be made every two years and Section 678 of the 1931 Code of Iowa contemplates that at the end of each two years and no appointments are made, in accordance with Section 677, for any reason that there shall be existing vacancies in regard to such registrars, Section 678 of the 1931 Code of Iowa specifically provides for the legal manner in which such vacancies shall be filled, by appointment by the mayor. In the filling of such vacancies, the mayor must comply with Section 678 and must make these appointments on similar recommendation from the chairmen of both political parties, as provided for by Section 677 of the 1931 Code of Iowa. The clause "on similar recommendation," which appears in Section 678, refers to the recommendation provided for in Section 677. Any other construction would be meaningless.

Copies of this opinion are being sent to the mayor of Oskaloosa, Iowa, and to the county chairmen of Mahaska County of both the Democratic and Republican political parties. We also advise that this opinion be called to the attention of

the newspapers printed and published in Oskaloosa, Iowa, in order that proper notice be given to each member of the city central political committee of both political parties mentioned herein.

BOARD OF EDUCATION: DEPOSIT OF ATHLETIC FUNDS WITH UNIVERSITY FUNDS: The depositing of athletic funds in the one bank account with other university funds will not obligate the State of Iowa for any liabilities incurred by the board of athletics of the university of Iowa as long as treasurer keeps an accurate account of all revenues and expenditures, (Paragraph 4, Section 3935, Code). Neither will it impair the authority of the board of athletics in expending the said funds for current indebtedness or to apply on the interest and principal of its bonded indebtedness on account of field house and stadium.

October 17, 1934. *State University of Iowa, Iowa City, Iowa:* I have your request for an opinion upon the following proposition:

"1. Will the consolidation of the receipts of the board in control of athletics in the University of Iowa, from gate receipts at athletic events, and otherwise, with the general university funds belonging to the state, so that they will be deposited in the same bank account but separately accounted for on the books of the University, in any way commit the State Board of Education to an acknowledgment of or assumption of the indebtedness of said board in control of athletics?

2. Will such consolidation accompanied by entirely distinct accounting showing at all times the complete receipts and disbursements of the board in control of athletics in any extent impair or limit the authority of the board of control of athletics to expend or order the expenditure of funds received from the sale of tickets, etc., for admissions to athletic events in payment of current obligations of said board, as for supplies, salaries, etc., or the application of the same to the payment of interest and principal on account of the bonded indebtedness on the field house and stadium?"

In answer to your first question, you are advised that it is our opinion that the deposit of these funds in one bank account will not in any manner obligate the state of Iowa for the liabilities incurred by the board of athletics of the state university of Iowa so long as the treasurer of the university of Iowa keeps an accurate check and account of all revenues and expenditures of said institution so that the receipts and disbursements of each of its several departments shall be apparent at all times.

In answer to your second question, it is our opinion that the deposit of receipts from athletic events with the treasurer of the university of Iowa for consolidation with and bank deposit as a part of the general university funds will not limit or impair the authority of the board in control of athletics in ordering the expenditure or application of such funds in payment of its current expenses or in payment of interest or principal upon its bonded indebtedness on account of the field house and stadium. It is to be understood, however, that in no case may the board in control of athletics expend or authorize the expenditure of university funds in excess of the balance shown by the books of the university treasurer as having been received from the sales of tickets or other legitimate income of the board in control of athletics.

You are further advised that it is the duty of the treasurer of the State University of Iowa to keep an accurate accounting of all revenue and expenditures of said institution so that the receipts and disbursements of each of its departments shall be apparent at all times. (Par. 4, Sec. 3935, 1931 Code of Iowa.)

ELECTIONS: BALLOT: PARENTHETICAL GUIDES: Parenthetical guides such as "Vote for One," etc., were adopted by the legislature for primary

ballots, but were not adopted for use on the official ballot to be used in a general election.

October 25, 1934. *Secretary of State, Des Moines, Iowa:* This will acknowledge receipt of your favor of the 24th inst., enclosing request for an official opinion upon the following questions:

In certifying the qualified candidates to the county auditors for the approaching general election, the caption, "Vote for Three" was carried on the ballot form above the names of the three candidates on each ticket for the full term of Supreme Court, and over the single candidate for the short term of the court we carried the caption, "To fill vacancy." I would like your opinion as to whether the caption referred to constitutes sufficient guidance for the voters in this connection.

Dropping down to the district offices, it is the practice of this office merely to list the names of the candidates, leaving other details to be properly filled in by the county auditors. The reason this detail is not carried on to the end of the ticket by this department is that districts vary as to the number of candidates and overlap county lines to the extent that there is less likelihood of confusion when the auditors attend to this detail than if the state department should attempt it.

Will you kindly give me an opinion as to whether this practice is proper and state whether you consider the attached certification of form of ballot complies with the law on the points I have outlined?

We have examined the specimen ballot referred to in your communication and the statutes applicable thereto. The ballot conforms to Section 760 of the Code of 1931. This statute deals with the form of ballot for a general election. Section 553 deals with the form of ballot to be used in a primary election.

The Legislature adopted in the form of ballot to be used in a primary election the use of certain parenthetical guides as an aid to the voter such as, "Vote for One," "Vote for Two," or "Vote for Three." Such parenthetical guides were not adopted by the Legislature for use on the official ballot to be used in a general election as provided by Section 760. Undoubtedly, it was the thought of the Legislature that by reason of the difference in situations existing in a general election as distinguished from that prevailing in a primary election, might render such caption or guide either proper or necessary in a primary election and improper or unnecessary in a general election.

It is a matter of common knowledge that a primary ticket usually carries the names of one or more candidates on the same ticket for the same office, and that it is of some aid and guidance to the voter to know that not more than one or two of such candidates are to be voted for. Conversely, on a general election ticket, it is impossible for the names of more candidates to appear for a given office than there are candidates to be elected to that office and, therefore, the assumption by the voter could and would be that he or she is entitled to vote for any or for all of the candidates so listed.

Examination of sample copy of the official ballot submitted to us reveals no discrimination throughout as between contending candidates for the same office, and inasmuch as the Governor of the State of Iowa by proclamation issued on the 6th day of October, A. D. 1934, advised the people of the State of the offices of state officers to be filled, of the offices of representatives in congress of the senatorial districts, of the representative districts, and of the judicial districts to be filled by the general election on the 6th day of November, A. D. 1934, it must be assumed that the electorate of the State of Iowa, either have taken or will take cognizance of the same before proceeding to ballot on that date.

ELECTIONS: PERSONS PERMITTED AT POLLING PLACES: "Certainly, the people who remain within the polling place for the purpose of checking up on the voters would come within the meaning of Section 824, which prohibits loitering or congregating and would, undoubtedly, be violating that section."

October 31, 1934. *Secretary of State, Des Moines, Iowa:* We have your request for an opinion on the following:

"Is it permissible for any political party to have persons or committees inside of the polling places with a card index system or other system of checking on the persons as they vote, in order to determine whether or not all of the persons affiliated with that party have voted?"

Section 821 of the Code of 1931, which makes provision for the persons or committees permitted at polling places, reads as follows:

"821. Persons permitted at polling places. The following persons shall be permitted to be present at and in the immediate vicinity of the polling places, provided they do not solicit votes:

"1. Any person who is by law authorized to perform or is charged with the performance of official duties at the election.

"2. Any number of persons, not exceeding three from each political party having candidates to be voted for at such election, to act as challenging committees, who are appointed and accredited by the executive or central committee of such political party or organization.

"3. Any number of persons not exceeding three from each of such political parties, appointed and accredited in the same manner as above prescribed for challenging committees, to witness the counting of ballots."

It seems clear that the persons or committees referred to in your interrogatory are not named in the provisions of the preceding section.

Section 805 of the Code of 1931, which limits the time for voting, provides as follows:

"805. Limitation on time for voting. No voter shall be allowed to occupy a voting booth already occupied by another, nor remain within said inclosed space more than ten minutes, nor to occupy a voting booth more than five minutes, in case all of said voting booths are in use and other voters waiting to occupy the same, nor to again enter the inclosed space after having voted; nor shall more than two voters in excess of the whole number of voting booths provided be allowed at any one time in such inclosed space, except by the authority of the election officers to keep order and enforce the law."

It will be noted from the reading of the last quoted section that no voter shall be allowed to remain within the inclosed space more than ten minutes, nor shall he be allowed to remain within the voting booth more than five minutes, if anyone else is waiting to vote, nor is he permitted to enter the inclosed space after having voted.

Section 824 of the Code of 1931 prohibits loitering, congregating, electioneering, treating voters, or soliciting votes, during the receiving of the ballots, within one hundred feet of any outside door of any building affording access to any room where the polls are held. Certainly, the people who remain within the polling place for the purpose of checking up on the voters would come within the meaning of Section 824, which prohibits loitering or congregating and would, undoubtedly, be violating that section.

ELECTIONS: V. C. C. C. CAMP: AUTHORITY OF MEMBERS TO VOTE IN PRECINCT IN WHICH CAMP IS LOCATED: "It is, therefore, the opinion of this Department that so far as the single or unmarried man is concerned, if he came to the camp with the intention of establishing a residence there, he is entitled to vote in the precinct in which the camp is located."

November 1, 1934. *County Attorney, Winterset, Iowa:* We have your request for an opinion on the following proposition:

"Just south of Winterset in Madison county is located a V. C. C. C. Camp. This camp has been established at Madison county more than sixty days, and in the voting precinct in which it is located more than ten days. Some of the men are married, and some are unmarried. Of those men who are married, some of them moved their families to Winterset and established them in homes, while others left their families at their former places of residence.

"The question is whether or not any of these men are permitted to vote in the township in which the camp is located."

So far as the married men are concerned, the question is very easily answered. Those who continue to maintain their homes in other counties undoubtedly must vote in the county of their residence, while those who moved their families to Winterset or to the community in which the camp is located and established them in homes would without doubt be entitled to vote in Madison County, and in the precinct in which they have established their homes, provided they moved their families to Winterset with the intention of making that place their residence. Residence, you know, is more or less a matter of intention.

So far as the single men are concerned, the question is more difficult. It could be that some of the men, although they are single and possibly have never been married, have always maintained their homes with their parents, and that when they came to Madison County they had no intention of changing their residence and, therefore, would be required to vote in the county in which they claim their residence. Others of those men, and especially those who have not maintained homes, but merely have lived in rooming houses and hotels, could without question intend to make their home in the place in which they are rooming or staying.

The Supreme Court of this state passed squarely on that question in the case of Dodd vs. Lorenz, 210 Iowa, 513; 231 N. W., 422. That was a case in which three unmarried school teachers voted in the general election at Traer, Iowa. They had been teaching in the Traer schools for three or four years and had roomed at private homes. None of these three teachers had spent any of their vacations in the town of Traer. Parts of them were spent with their parents, and parts in taking trips and attending school during the summer. They all contended, on the trial of the case, that when they came to Traer they intended to make it their home or their residence as long as they were teaching school there. In view of this recent decision, there is no question but that one is not of necessity required to maintain a house, in order to vote. The question then resolves itself to whether or not a residence may be established at the V. C. C. C. Camp.

The Civilian Conservation Corps is not established along the lines of a standing army, nor does it in any way compare with the standing army in the sense that the land, upon which the camp is located, is an army or government reservation. These men are merely employed by the Federal Government. If they are single men, past twenty-one years of age, qualified voters in other respects, and came to the camp with the intention of making their home in that precinct, it is the opinion of this Department that the question of intention should govern, and that they would have a right to vote in the precinct in which the camp is located.

Although the Supreme Court of this state has held that a soldier cannot establish a residence in a state by residing on a Federal Government Reservation, such as an army post, yet a C. C. C. Camp is not in the same class as a Government Reservation. The land is not owned by the Federal Government, and

in most instances is not even rented by the Federal Government, while the men are merely employed by the Federal Government. The establishment of such camps is more in the nature of a form of relief. Certainly no one could be heard to say that a single man, who goes to the State of Arizona to be employed in the building of the Roosevelt Dam, a federal project, and resides in a camp in that state with the intention of making his home in Arizona, could not establish a residence in the camp. Nor could we dispute the fact that a single man, who is employed by a contractor in the building of a road, and who resides in a camp with the intention of making his home there, would not have a right to vote in the precinct in which the camp is located. We do not believe that the V. C. C. C. Camp in Madison County is in any different category.

It is, therefore, the opinion of this Department that so far as the single or unmarried man is concerned, if he came to the camp with the intention of establishing a residence there, he is entitled to vote in the precinct in which the camp is located.

OLD AGE ASSISTANCE ACT: LIEN: Same category as other special taxes of like nature as poll taxes and dog taxes: Lien as provided by Section 7203, 1931 Code of Iowa, as amended by Chapter 90, Acts of the 45th General Assembly in Extra Session.

November 1, 1934. *Deputy Auditor of State, Des Moines, Iowa:* This will acknowledge receipt of your request of the thirty-first ultimo for the opinion of this Department on the following question:

"In former opinions rendered from your office you have held that the old age pension tax as provided for by Senate File 42, Section 35, is a lien on real property and that the tax due July 1, 1934, becomes delinquent and subject to the same penalty as real estate taxes if not paid prior to April 1, 1935.

"In keeping with these rulings, we are of the opinion that it will be the duty of the county treasurers to comply with the provisions of Section 7190 and Section 7203 as amended by Chapter 90 of the Acts of the 45th Extra General Assembly with reference to the handling of this item and the perpetuating of the lien involved therein. This would mean that between October 1, 1935, and December 31, 1935, the treasurers shall carry forward to the delinquent personal property tax list all items of the 1934 Old Age Pension Tax levy that remain unpaid, and that in so doing he perpetuates the lien as is provided in Section 7203 as amended."

Please be advised that it is the opinion of this Department that your analysis of the situation, as stated in your letter, is correct and that the creation of a lien by the old age assistance tax would be in the same category as other special taxes of like nature, such as poll taxes and dog taxes, and would become a lien as is provided in Section 7203 of the 1931 Code of Iowa, as amended by Chapter 90, Acts of the Forty-fifth General Assembly in Extraordinary Session.

ELECTIONS: F. E. R. A. SUBJECTS: AUTHORITY TO VOTE: "* * * * persons who have bona fide intent to make a locality a place of residence or domicile and have remained for a sufficient length of time to comply with Section 1, Article 2, of the State Constitution, if not otherwise disqualified, would have a right to vote whether the intent was to make such locality as a lifelong home or not, * * * *."

November 2, 1934. *Secretary of State, Des Moines, Iowa:* Your request for a legal opinion "as to whether or not persons receiving relief under F.E.R.A., standing for Federal Emergency Relief Administration, who are housed and cared for in buildings or camps in or adjacent to municipalities in the State of Iowa, are entitled to cast a vote at the November 6, 1934, general election in the State of Iowa" at hand, and in reply this Department would say:

The Constitution of the State of Iowa provides, Article 2, Section 1, as follows:

"Electors. Section 1. 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."

Section 4 of Article 2 of the State Constitution provides as follows:

"Persons in military service. No person in the military, naval, or marine service of the United States shall be considered a resident of this state by being stationed in any garrison, barrack, or military or naval place, or station within this state."

Those who are disqualified are likewise designated in said Article, Section 5, as follows:

"Disqualified persons. No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector."

We have, therefore, the Constitution of the State of Iowa, prescribing who is and who is not entitled to vote at all elections. In the list of disqualified persons, we do not find listed either paupers, inmates of county homes or those receiving aid otherwise from the State or Nation, or other or different public or private charity. Inmates of charitable institutions and county homes have always, under the policy of the State of Iowa, been permitted to cast their ballots under the constitutional privilege prescribed by the statute. To say that a person, because he is receiving relief from the Federal Government under F.E.R.A. from the State Government, the Municipal Government of the county or city, or other charitable institution, may not vote is in strict violation of the constitutional provision of the State of Iowa and absurd, and would lead eventually to a disfranchisement of a large portion of our people, who at this time especially, through no cause of their own, are forced to receive relief from some public or private source.

The matter of acquiring a settlement for the purposes of becoming a charge upon the county is an entirely distinct and separate matter from the right to vote, as is evidenced by the fact that Chapter 99 of the Forty-fifth General Assembly, as amended by Chapter 61 of the Extra Session of the Forty-fifth General Assembly, which provides:

"Section 1. Section fifty-three hundred eleven (5311), Code, 1931, is hereby repealed and the following enacted in lieu thereof:

"'1. Any person continuously residing in any one county of this state for a period of ONE YEAR without being warned to depart as provided in this chapter acquires a settlement in that county, * * * *.'"

It will readily be seen that it was the intention of the Legislature to make a clear distinction between the right of residence of sixty days, prescribed in Article 2, Section 1 of the Constitution for residence, entitling persons to vote, and the acquisition of settlement entitling the person to county aid. And the Legislature nowhere in said Chapter 99 of the Forty-fifth General Assembly, as amended, intended to make the year's residence necessary for acquisition of settlement the test of a right to vote, and had it so done, it would be in plain violation of the constitutional provision designating who is entitled to vote.

The Legislature cannot add to or take from the qualifications prescribed in Article 2, Section 1 of the State Constitution. True it is, the Legislature may establish courts or administrative boards for the purpose of determining the question of the qualification in the first instance, but the voter has the right on

election day to demand a ballot, and, if challenged, to make the proper affidavit as to qualification, and the ballot must be received. No board of registration may refuse registration, and no board of election may refuse to receive the ballot of a person who offers to swear to his qualifications, as by law required.

The Federal Government can in no wise undertake to constitutionally determine the qualification of a voter in the various states. It is a fundamental rule of law that the qualification of the voter, as prescribed by the state, is the qualification of the voter for federal offices, and in the use of the word, "transient," Congress in no wise intended or attempted to prescribe the qualification of a voter in the relief legislation it enacted.

The matter of residence qualifying a person to vote is one largely of intent. In the last expression of our Supreme Court on the question of residence qualification, the Court, speaking through Justice Faville, said in Volume 210, on page 520:

"The acquisition of a residence or domicile is largely a matter of intent. The undisputed evidence in the instant case shows that as to each of said voters it was an intent to make Traer a permanent residence for so long as the party was employed as a teacher in said school. The fact that the parental home was referred to as a sort of home does not change the legal status of the voter. It is a common thing for a person to refer to his birthplace or the residence of his parents as home, although he may have an established home of his own at another place."

And in coming to this conclusion, the Court quotes from previous decisions of this Court to the same effect, and in further support of its conclusion quoted from Goodrich on Conflict of Laws 35, wherein it was announced:

"It is believed that in this country at least, a domicile of choice may be acquired by persons for whom it is impossible to establish a lifelong home, and it is sufficient that the intent be to make a given place a home here and now."

It is, therefore, the conclusion of this Department, based upon the holdings of our Supreme Court, that persons who have bona fide intent to make a locality a place of residence or domicile and have remained for a sufficient length of time to comply with the provisions of Section 1, Article 2 of the State Constitution, if not otherwise disqualified, would have a right to vote whether the intent was to make such locality as a lifelong home or not, and that no commission or board of registration should arbitrarily prevent such qualified voter from casting his ballot by withholding registration.

Married persons receiving such aid from said F.E.R.A. at what may be designated transient camps, may and would have more difficulty in establishing places of residence at such camps, but such married person may change his or her place of residence and be entitled to vote, although the husband, or wife and children or remaining members of the family have not followed him to his newly acquired place of residence. The qualification to vote of married men is, however, governed and controlled by the general rule which is largely a matter of intent, and a vote may be cast when challenged by having been properly sworn in. Neither source of income or classification of persons, whether paupers or otherwise, controls as to the qualification and right of a person to cast his or her ballot and can in no wise be taken into consideration in passing upon the right of such person to vote.

RESIDENCE: NOTICE TO DEPART: CHAPTER 99, ACTS 45TH REGULAR SESSION: "We believe the only construction that can be placed on the act is that it refers to all cases in which the notice had already been served or in which it might be served in the future."

November 8, 1934. *County Attorney, Webster City, Iowa:* We acknowledge receipt of your letter of October 17th, in which you ask for an opinion on the following:

"Our Welfare Office has called to my attention a family who has resided in Cedar Rapids for a number of years, going there from Hamilton county. For several years, they had the regular settlement notice served upon them, the last one being about six months prior to the enactment of Chapter 99, Acts of the 45th Regular Session.

"The question is whether or not a notice served within the year prior to the enactment of that law is sufficient, or whether one notice would have to be served after the enactment of the law, in order to prevent the acquisition of a settlement in a county."

Paragraph 1 of Section 1 of Chapter 99, Acts of the Forty-fifth General Assembly, Regular Session, provides as follows:

"'1. Any person continuously residing in any one county of this state for a period of one year without being warned to depart as provided in this chapter acquires a settlement in that county, but if such person has been warned to depart as provided in this chapter, then such settlement can only be acquired after such person has resided in any one county without being warned to depart as provided in this chapter for a continuous period of one year from and after such time as such persons shall have filed with the board of supervisors of such county an affidavit stating that such person is no longer a pauper and intends to acquire a settlement in that county.'"

It will be noted that Chapter 99 purports to repeal and amend certain sections of the Code of 1931, which are contained in Chapter 267. Consequently, when in Chapter 99 of the Acts of the Forty-fifth General Assembly we find the statement, "but if such person has been warned to depart, *as provided in this chapter* * * *," it means provided in Chapter 267 of the Code of 1931 and not as provided in Chapter 99 of the Acts of the Forty-fifth General Assembly.

We call your attention to this, because of the fact that Chapter 99 of the Acts of the Forty-fifth General Assembly does not provide the manner of warning the person to depart.

It will be noted from the reading of Paragraph 1, hereinbefore quoted, that the person who has continuously resided in the county for one year, without being warned to depart, as provided in Chapter 267 of the Code of 1931, acquires a settlement in that county. The act further provides that if such person has been warned to depart, as provided in Chapter 267, then he can only acquire a settlement by filing an affidavit with the Board of Supervisors and residing in the county for one year after the filing of the affidavit. The act does not in express terms provide that it shall only apply to cases in which notices are served after the taking effect of the act. It applies to all cases in which the person has not acquired a legal settlement at the time the act took effect, and we believe that such was the intention of the Legislature, as evidenced by the reading of the act itself. What is the meaning of the provision, "but if such person has been warned to depart, as provided in this chapter," if it does not mean to include cases in which the notice was served prior to the taking effect of the act? We believe the only construction that can be placed on the act is that it refers to all cases in which the notice had already been served or in which it might be served in the future.

FAIR BOARD: Federal excise tax on gasoline and oil should not be paid.

November 13, 1934. *State Fair Board, Des Moines, Iowa:* This will acknowledge receipt of your letter of the thirtieth ultimo in which you refer to your letter of September twenty-fourth. The following question is presented:

The Standard Oil Company furnished gasoline and oil for tractors and automobiles owned and used by the Iowa State Fair, which tractors and automobiles were in service on the State Fair grounds. Said company has sent a statement of account for $27.95 which represents the federal excise tax, which they state has been disallowed.

You state further that the Standard Oil Company, at a later date, has written you a letter, in which they state:

"The ruling given us by the Governmental Auditor is that the Iowa State Fair Board is not an essential governmental function, and Federal Excise Tax must therefore be charged in every case, and we are forced to pay this tax to the government."

The Iowa Supreme Court, in the case of De Votie vs. Iowa State Fair Board, 249 Northwestern Reporter 429, ruled on the question as to whether or not the Fair Board is or is not an arm of the state and, speaking through Justice Evans, states as follows:

"We have heretofore answered the question both directly and indirectly. In Hern vs. Iowa State Agricultural Society, 91 Iowa, 97, 58 N. W., 1092, 24 L. R. A., 655, we answered it directly in the affirmative. We did likewise in State vs. Cameron, 177 Iowa, 262, 158 N. W., 470, L. R. A., 1916F, 578. We answered the same question indirectly in Hollingshead vs. Board of Control, 196 Iowa, 841, 195 N. W., 577, which was an action brought against the board of control. We answered it likewise in Cross vs. Donohoe, 202 Iowa, 484, 210 N. W., 532, which was an action against the superintendent of the insane hospital. We answered it likewise again in Long vs. Highway Commission, 204 Iowa, 376, 213 N. W., 532, which was an action against the highway commission, as such. In view of these settled precedents, we are not disposed to discuss at length the pros and cons of the question. The contention of appellant that the purported defendant is a voluntary corporation interested as such in the actual ownership of property is thoroughly negatived in the cited cases. This board is purely a legislative creation. The method and purpose of its creation are set forth in Chapter 135, Code, 1931 (Section 2873 et seq.). It will be noted that the Governor of the state is made a member of the board ex officio. The same is true of the secretary of agriculture. The method of the selection of its officers and employees is provided. No one is allowed to have any stock therein nor to have any pecuniary interest therein other than the statutory salaries, which are awarded to certain of the officials. No power is conferred upon any member thereof to do aught than to perform the specified duties assumed by the state and imposed upon this agency. We are not alone in our holding on this question. It has arisen at various times in other states, and has been passed upon by their respective courts. These courts have spoken with one voice and have held without exception to the same effect as we ourselves have done."

And again Justice Evans, speaking for the court says, in quoting from page 100 of 91 Iowa, 58 N. W. 1092, at page 1093:

"Not being a corporation for pecuniary profit, the defendant society's liability is not controlled by the rules of law applicable thereto. The society is an arm or agency of the state, organized for the promotion of the public good, and for the advancement of the agricultural interests of the state."

In keeping with the case above cited, which in turn cites numerous other cases when this question has been before our Supreme Court, it would be the opinion of this Department that as the Iowa State Fair Board is an arm or agency of the state, engaged in a governmental function to advance the agricultural interests of the state, the federal excise tax should not be paid by the State Fair Board.

HUMBOLDT COUNTY FAIR: FINANCIAL STATEMENT: PUBLISHING OF SAME IN GILMORE CITY ENTERPRISE LEGAL: QUESTION AROSE BECAUSE OF SITUATION OF TOWN IN TWO COUNTIES.

November 14, 1934. *Iowa State Fair Board, Des Moines, Iowa:* This will aoknowledge receipt of your letter of recent date in which you request the opinion of this Department on the following matter:

The Humboldt County Fair has published its financial statement in the Gilmore City Enterprise, Gilmore City, Iowa, which is on the county line between Pocahontas and Humboldt counties. The printing establishment of the Gilmore City Enterprise is on the Humboldt county side of the main street, but the paper is mailed at the post office, which is on the Pocahontas county side of the street.

You state:

"I also understand that it has been held by a former Attorney General that the Gilmore City Enterprise was entitled to do official publishing for Pocahontas county."

The question you submit is as follows:

Does the printing of the financial statement of the Humboldt County Agricultural Society, as published in the Gilmore City Enterprise, meet the requirements set out in Section 2901 and paragraph 4 of Section 2902 of the Code relative to the publishing of financial statement of county agricultural societies?

In view of the fact that Section 2901, 1931 Code of Iowa, provides as follows:

"*Publication of financial statement.* Each society shall annually publish in one newspaper of the county a financial statement of receipts and disbursements for the current year."

It is the opinion of this Department that this code section must be interpreted to read that this statement may be published in any newspaper in the county. This would, however, mean a newspaper of general circulation through the mail and would not refer to some mimeographed sheet which was circulated by placing the same on door steps and not sent through the mail. As the Gilmore City Enterprise is a newspaper published in Humboldt County, it would be our opinion that it would meet with the requirements of Section 2901 of the 1931 Code of Iowa.

ANTICIPATORY WARRANTS: ISSUANCE AND SALE OF SAME: SECTION 7420-b3: It is the opinion of this department that you are authorized and directed to issue and sell anticipatory warrants not to exceed in the aggregate the sum of $3,500,000.00. See Code Section 7420-b3 and Chapter 139, Acts of the Forty-fifth General Assembly.

November 15, 1934. *Treasurer of State, Des Moines, Iowa:* This will acknowledge receipt of your request of the twenty-third ultimo for the opinion of this Department on the following proposition:

As an officer of the State of Iowa, I respectfully request your opinion covering the validity and legality of the authorization and issuance of anticipatory warrants of the state sinking fund for public deposits of the State of Iowa, in the aggregate amount of $3,500,000.00, dated November 1, 1934, which warrants, I believe, have been authorized and will be issued pursuant to the provisions of Section 7420-b3 et seq. of Chapter 352-A1 of the Code of Iowa, 1931, as amended by Chapter 139 of the Forty-fifth General Assembly of Iowa, Regular Session, and paragraph b of Chapter 37 of said laws.

Please be advised that it is the opinion of this Department that you are authorized and directed, in accordance with the code sections and amendments thereto, which you have cited, to issue and sell anticipatory warrants not to exceed in the aggregate the sum of $3,500,000.00. The authority is expressly given in Section 7420-b3 in which it is provided as follows:

"*Anticipatory warrants.* Whenever duly allowed and certified claims are on file with the treasurer of state to the amount of fifty thousand dollars or more, and the state sinking fund for public deposits contains insufficient funds for the immediate payment of said claims, the treasurer of state shall issue antici-

patory warrants for the purpose of raising funds for the immediate payment of said claims."

I am omitting that part of the section which was amended by the Acts of the Forty-fifth General Assembly, which appears in Chapter 139. Said chapter adds to the code section above cited the following:

"and may issue such additional anticipatory warrants as may be necessary to refund or extend the maturity of outstanding warrants."

BOARD OF PAROLE: PRISONERS: Where prisoner is sentenced for more than one offense and is serving first sentence and application is made for parole, whether Board of Parole has jurisdiction under the law and order of court to grant a parole prior to completion of the first sentence.

November 15, 1934. *Board of Parole, Des Moines, Iowa:* We have your letter of recent date.

It appears that certain subjects are now serving sentences for forgery from Guthrie County, Iowa. It further appears that additional mittimuses have issued from the Clerk of the Court of that county, charging them with other crimes, the mittimuses stating, "The service of said sentence to commence and take effect at the expiration of the sentence in criminal case No. 1422 upon which judgment has heretofore been rendered by this court, and under which sentence said defendants are now inmates of said institution."

These prisoners are now serving their first sentence and an application has been made for their parole. You ask whether under the law and order of court, if your Board has jurisdiction to entertain and grant a parole prior to the completion of the first sentence.

Section 3786 of the Code of Iowa, 1931, provides as follows:

"*Power to parole after commitment.* 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.

The parole may be to a place outside the state when the board of parole shall determine it to be to the best interest of the state and the prisoner, under such rules and regulations as the board of parole may impose."

Section 13959 of the Code of Iowa, 1931, provides as follows:

"*Cumulative sentences.* 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 upon anyone shall commence at the expiration of the imprisonment upon any other of the offenses."

Under Section 13961 of the Code, 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.

It is, therefore, apparent that these prisoners are serving one continuous term and it is the opinion of this Department that the Board of Parole can grant a parole if the prisoner is eligible, before the completion of the first sentence, the parole to be from the entire sentence which would be the first and second in this particular instance, and that you have jurisdiction to entertain and grant the parole at this time if the prisoners are eligible.

SOLDIERS: TAX EXEMPTION: ENLISTMENT NOVEMBER 11, 1920: "It is the opinion of this office that if he served in the Army of Occupation in Germany, he is entitled to the exemption. However, if he merely enlisted in the United States Army and served in this country, he is not entitled to the exemption."

November 17, 1934. *County Attorney, Des Moines, Iowa:* We have your letter of recent date, in which you ask for an opinion on the following:

"One John Davis was an enlisted man in the United States Army, having enlisted on November 11, 1920, and having been honorably discharged on March 24, 1922. He contends that, by reason of the date of enlistment and the period covered by such an enlistment, he is entitled to an exemption from taxation, as provided by Section 6946 of the Code of 1931."

We call your attention to an opinion issued by this Department over the signature of Edward L. O'Connor, Attorney General, dated September 24, 1934, addressed to Mr. Gilbert S. James, County Attorney, Spencer, Iowa, in which this Department ruled that an honorably discharged soldier, who enlisted on April 1, 1919, and served with the A. E. F. at Brest, France, and also in the Army of Occupation in Germany prior to July 2, 1921, would be entitled to the exemption from taxation under Section 6946 of the Code of 1931.

The opinion referred to was prepared with one particular case in mind, that is, the case of a soldier who actually served in the Army of Occupation. The effect of that ruling was that the World War terminated as between the United States and both Germany and Austria-Hungary by a joint resolution of Congress on July 2, 1921. The question presented in that case did not concern the status of a soldier who enlisted after November 11, 1918, in the regular Army of the United States of America, but not for service in the Army of Occupation.

In the case of John Davis, which you have just referred to us, there is no showing that the man either enlisted for service in the Army of Occupation or that he actually served in the Army of Occupation. It is the opinion of this office that if he served in the Army of Occupation in Germany, he is entitled to the exemption. However, if he merely enlisted in the United States Army and served in this country, he is not entitled to the exemption.

BOARD OF HEALTH: CHIROPRACTORS: Whether a chiropractor has authority under the law to commit patients to state institutions and sign the necessary papers to do so.

November 19, 1934. *Iowa Chiropractors' Association, Iowa Falls, Iowa:* Your letter of October 23, addressed to the Attorney General, has been referred to me for reply.

You ask the question whether a chiropractor has authority under the law to commit patients to state institutions such as insane hospitals, the university hospitals, etc., and sign the necessary papers therefore. You state the social service workers insist that only a medical doctor can commit the patients to state institutions. Since you refer to social workers, we presume your inquiry is intended to relate particularly to the right to receive compensation for services as a physician in connection with the commitment of such persons.

On page 387 of the "Report of the Attorney General" for the year 1928, appears an opinion of the Attorney General, holding that an osteopath cannot make the examination of indigent persons. Under the provisions of Chapter 199 of the Code, he is not a physician and surgeon. He sets out Section 4008 of the Code, which is as follows:

"Examination by physician. 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 said pregnancy, malady or deformity."

And he holds that under said section the words "physician" and "surgeon" would not include an osteopath, and that an osteopath therefore cannot make

the examination or report required in sending such patients to the university hospitals.

In view of such prior ruling by this Department, we take the view that a chiropractor does not have authority under Sections 4008 and 4009 to make the required examination and report incident to committing such patients to the hospital.

OLD AGE ASSISTANCE ACT: CITIZENSHIP IN IOWA: ELIGIBILITY FOR PENSION: It would be the opinion of this department, in keeping with the decisions cited above, that X, by his acts, signified his intention of being a resident of Nebraska and, hence, he would not be eligible for the old age assistance in this state, if the matter under discussion occurred within a period of ten years prior to the time that he applied for old age assistance.

November 20, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your request of the sixteenth instant for the opinion of this Department on the following proposition:

Numerous inquiries having to do with the question of citizenship have been received by our commission under the provisions of the old age assistance act which provides that one eligible to receive old age assistance must have had ten years' continuous residence in the State of Iowa, excepting that they may have been absent a total number of months not to exceed eighteen months during the period of the ten years.

You submit a specific case as follows:

X, who has been a resident of the state of Iowa for a number of years exceeding the period of ten years and has been a continuous resident for the last past three years, was absent from the State of Iowa in the state of Nebraska where he went primarily to spend some time with his son and daughter, not intending at the time, to establish a residence in the state of Nebraska. But during his stay there, an election came on and because of the importance of said election he was persuaded by his friends to vote in said election. Question: Did X lose his citizenship in the State of Iowa (a) because he was in the state of Nebraska long enough to entitle him to vote in said state or (b) because he really illegally voted in said state of Nebraska but under pressure of the influence that was brought to bear upon him?

Subsection (d) of Section 12 of Chapter 19, Acts of the Forty-fifth General Assembly in Extraordinary Session, provides as follows:

"(d) Has a domicile in the state and

"(1) has had such domicile continuously for at least ten years immediately preceding the date of application, but continuous residence in the state shall not be deemed to have been interrupted by periods of absence therefrom if the total of such periods of absence does not exceed eighteen months and the residence for the last three years preceding the application has been continuous, but absence in the service of the state or of the United States shall not be deemed to interrupt residence in the state if a domicile be not acquired outside the state;"

19 Corpus Juris 395, in distinguishing domicile and residence, states:

"While the terms 'domicile' and 'residence' are frequently used synonymously, they are not, when accurately used, convertible terms. The former was of more extensive signification and includes, beyond mere physical presence at the particular locality, positive or presumptive proof of an intention to constitute it a permanent abiding place. 'Residence' is of a more temporary character than 'domicile.' 'Residence' simply indicates the place of abode whether permanent or temporary; 'domicile' denotes a fixed, permanent residence, to which, when absent, one has the intention of returning. 'Residence' has a more limited, precise, and local application than 'domicile,' which is used more in reference to personal rights, duties, and obligations. That there is a difference in meaning between 'residence' and 'domicile,' is shown by the fact that a person may have his residence at one place while his domicile is in another. It has also been said that domicile and residence are not synonymous

for the reason that a person may have more than one residence at the same time, but only one domicile."

And on page 397 states:

"Generally, where a statute prescribes residence as a qualification for the enjoyment of a privilege, or the exercise of a franchise, and whenever the terms are used in connection with subjects of domestic policy, domicile and residence are equivalent."

In the case of In Re Estate of J. M. Colburn, 186 Iowa 590, our Supreme Court said:

"To establish a domicile at any particular place, there must be an intention to do so and the fact thereof; and the mere intention, without, in fact, residing or abiding, cannot constitute a domicile."

In answering your question (a), it would seem that the controlling factor would be as to whether or not X intended to make the state of Nebraska his home and, secondly, whether the period of absence exceeds eighteen months in the period of the ten years, taking into consideration, of course, that he would have to be in Iowa three years prior to the time of making application. The courts generally say that "to establish a domicile, there must be an intention to do so." But intention in such a case would be governed by the facts and acts done by the person in question rather than the expression of such a person as to what he intended.

In the case of Pope vs. Pope, 243 Pacific 962, at page 964, which is also reported in 116 Okl. 188, "domicile" is defined as follows:

"The term 'domicile' in its ordinary acceptance means a place where a person lives or has his 'home.' In a strict legal sense that is properly the domicile of a person where he has his true, fixed, permanent home and principle establishment, and to which place he has, whenever he is absent, the intention of returning. In a sense domicile is synonymous with home or residence, or 'the house of usual abode.'"

Also see Macleod vs. Stelle, 249 Pacific 254, at page 256, also reported in 43 Idaho 64, in which it is provided as follows:

"'Domiciled' as a verb, means to establish in a fixed residence or a residence that constitutes habitancy or to have one's domicile, to dwell. As a noun, it means a place of residence either for an individual or a family, a dwelling house, or abode, a home or habitation, residence at particular place accompanied with intention to remain there for unlimited time, residence accepted as final abode, home so considered in law."

In continuing to answer (a) of your question, it would be our opinion that the controlling factor would not be that X was in Nebraska long enough to entitle him to vote but as to what his intention really was and, as stated above, the courts have said that while the intent of the person is to be the governing factor, yet intention is not always conclusive as expressed in what the person says but rather in the acts and things done by such a person. Apparently, in this case, X must have intended to have considered Nebraska his residence or he would not have exercised the right of franchise in Nebraska. Apparently, he signified by his act in voting to consider Nebraska his place of residence. Therefore, the question of whether or not he had been out of the state of Iowa eighteen months out of ten years would not be the controlling factor.

In answer to (b) of your question, it would be our opinion that the question is so phrased as to assume the fact of the illegal voting. We do not have sufficient facts in our possession to determine whether or not the voting in Nebraska was an illegal act but certainly X must have had the intention to make Nebraska his residence or he would not have desired to exercise the right of

franchise in that state. In other words, there must have been a well-founded idea on his part that Nebraska would be his future home and by voting it would seem that he abandoned his residence in Iowa or he would not have taken sufficient interest in the affairs which would be primarily to the exclusive interest of residents of Nebraska by exercising the right to vote in that state.

It would be our opinion in keeping with the decisions above cited that X, by his acts, signified his intention of being a resident of Nebraska and, hence, he would not be eligible for the old age assistance in this state, if the matter under discussion occurred within a period of ten years prior to the time that he applied for old age assistance.

BOARD OF HEALTH: PHARMACY EXAMINERS (Licensed): LICENSE (Pharmacy Examiners): A division of money received from the sale of prescriptions by a licensed pharmacist with a licensed physician constitutes unprofessional conduct, and constitutes a ground for the revocation of the pharmacist's license.

November 22, 1934. *Pharmacy Examiners, Des Moines, Iowa:* You state that the Pharmacy Examiners desire an opinion from this Department on the following question:

"Would the division of money received from sale of prescriptions by a licensed pharmacist with a licensed physician, constitute unprofessional conduct as defined in Paragraph 4, Section 2493, Code of Iowa, 1931, and be sufficient grounds for revocation of the pharmacist's license as provided under Section 2492?"

Section 2492 provides that a license to practice a profession shall be revoked or suspended when the licensee is guilty of immoral, unprofessional, or dishonorable conduct. Section 2493, so far as material to the question presented, is as follows:

"Unprofessional conduct defined. For the purposes of the preceding section 'unprofessional conduct' shall consist of any of the following acts:

"* * * *

"4. Division of fees * * * * received for professional services with any person for bringing or referring a patient or assisting in the care or treatment of a patient without the consent of said patient or his legal representative."

The first question for determination is whether subsection 4, above quoted, refers to persons engaged in the practice of pharmacy. The sections herein referred to are a part of Chapter 115 of the Code, relating to the practice acts and revocation of licenses. Section 2438, the first section in this chapter, setting forth certain definitions, provides that "licensed," when applied to a physician and surgeon or pharmacist shall mean a person licensed under Title 8 of the Code. This section also provides that "profession" shall mean medicine and surgery, pharmacy, etc.

Pharmacy is defined as a profession. It naturally follows that a person practicing pharmacy is practicing a profession, or performing a professional service rather than merely selling an article or a commodity, and the money received by persons engaged in the practice of pharmacy may properly be said to be in part, at least, a fee for professional services.

Section 2578 provides that the following classes of persons shall be deemed to be engaged in the practice of pharmacy:

"Persons who engage in the business of selling, or offering or exposing for sale, drugs and medicines at retail.

"Persons who compound or dispense drugs and medicines or fill the prescriptions of licensed physicians and surgeons, dentists, or veterinarians."

Pharmacists guard jealously their exclusive right to sell prescriptions, drugs, and medicines. They do not claim the exclusive right to sell proprietary medicine or domestic remedies. The exclusive right to sell drugs and fill prescriptions is granted pharmacists because a quality of service is required in connection therewith which the layman is incapable of rendering. The pharmacist, therefore, should not be heard to deny that the money he receives for the sale of prescriptions is a fee, or in part a fee for his professional service.

The question then arises whether the purchaser of the prescription is a patient. Without question, he is a patient of the physician, and in a sense may be said to be the patient, or, at any rate, he is the customer of the pharmacist. The statute prohibits the division of fees with any person for bringing or referring patients. The question relates to the case where a doctor refers or brings his patient to the pharmacist to get the prescriptions filled.

It is our opinion a division of money received from the sale of prescriptions by a licensed pharmacist with a licensed physician constitutes unprofessional conduct, as defined by Paragraph 4, Section 2493 of the Code of Iowa, and constitutes a ground for the revocation of the pharmacist's license under Section 2492, but the evidence of such unprofessional conduct to justify the revocation of licenses should be clear, satisfactory, and convincing.

SCHOOLS: TEACHER'S CONTRACT: Whether contract of teacher is legal and if school has been legally opened where no consent has been given by County Superintendent.

November 23, 1934. *County Attorney, Algona, Iowa:* We have your request for opinion on the following proposition:

"The school in subdistrict No. 7 was closed for seven years because of lack of pupils. Last summer, the Board voted to open the school and at that time, hired a teacher for the ensuing year. At the time, a contract was entered into. There was a family in the district who had six children of school age in the grades under the eighth grade. Nothing was said to the parents of these children at the time as to where they desired their children to be sent. However, these parents now advise the board that they desire to send the children to public school in Bancroft instead of to this school in subdistrict No. 7. Will you please advise whether the contract of the teacher is legal and if the school has been legally opened where no consent has been given by the County Superintendent?"

Chapter 39, Laws of the 45th General Assembly, Extra Session, provides that a contract shall not be entered into with a teacher for the next ensuing year when it is apparent that the average daily attendance will be less than five or the enrollment less than six pupils. This is then followed by a clause which provides that unless the parents or guardians of seven or more elementary children subscribe to a written statement, sworn to before a County Superintendent or Notary Public, certifying that the children will enroll in and will attend such school if opened, and secure from the County Superintendent, written permission, that the school will not be opened, nor may a contract be entered into. This last clause, however, does not apply in this particular case for it is apparent here that there were actually in the district at the time of entering into the contract, six children of school age, and the last clause is only in event that it is not apparent that there are six children of school age in the district at the time, but others who do not live in the district at the time, subscribe to an oath they will be in the district when school is opened or for other reasons that their children will attend the school, and therefore, in order to protect the Board in opening such school where the children are

not actually in the district at that time, the oath is provided for, but is not necessary in this case where the children are actually in the district.

It is, therefore, the opinion of this department that a contract with the teacher is legal and that the school has been legally opened.

INSURANCE: COMMISSIONER OF INSURANCE: May Insurance Commissioner, when designated by State of Missouri together with two commissioners from other states, to act with Superintendent of Insurance of Missouri to examine reinsurance contracts, charge for such service and retain amount so charged?

December 4, 1934. *Commissioner of Insurance, Des Moines, Iowa:* We have your letter of recent date asking for our opinion on the following proposition:

"The law of the State of Missouri requires that wherever there is a reinsurance contract between two companies domiciled within the State of Missouri, that such companies be examined relative to the merits of the reinsurance contract approved or disapproved by a commission consisting of the Superintendent of Insurance of the State of Missouri together with two Commissioners of Insurance from other states. May I, when designated as one of these two Commissioners of Insurance, charge for such services and retain the amount so charged?"

Section 5731, Revised Statutes of Missouri, 1929, provides in part as follows:

"The superintendent shall request the assistance of the insurance commissioners or superintendents of two other states as experts who with the superintendent of this state, shall form a commission to hear said petition. * * * * Compensation of the commissioners or superintendents acting under the provisions of this article, together with the expenses and costs incident to proceeding under this section shall be paid by the company or companies bringing said petition."

Section 8605 of the Code of Iowa, 1931, in regard to the appointment and term of the Commissioner of Insurance provides in part, as follows:

"He shall * * * * devote his entire time to such duties and serve for four years from the July 1st of the year of appointment.

Section 8612 of the Code provides in regard to fees as follows:

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

Section 25 of the Appropriation Act, being Chapter 188 of the Acts of the Forty-fifth General Assembly, Regular Session, states the salary of the Commissioner of Insurance at $4,000.00 per annum.

Section 62 of the Appropriation Act provides in part as follows:

"All salaries provided for in this act are in lieu of all existing statutory salaries, for the positions 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."

Section 31 of the Constitution of Iowa provides:

"No extra compensation shall be made to any officer, public agent or contractor, after the services shall have been rendered or the contract entered into."

Our Supreme Court in the case of Burlingame vs. Hardin County, 180 Iowa, 919, had before it the question whether the Clerk of the District Court could retain fees for acting as Referee in Probate, and the court there, after stating that when the Clerk acted as Referee in Probate, he was performing an extra official service and receiving payment therefor in his individual right and

not as Clerk of the Court and the court in holding that the Clerk could retain as his own the extra fees as Referee in Probate, said on page 925:

"A county officer does not contract to give all his time to the public service in any such sense that all the money he may earn or receive from any and every source during his term of office must be accounted for to the county."

However, as pointed out above, Section 8695 of the Code requires that the Commissioner of Insurance shall devote his entire time to his duties and when the Commissioner of Insurance goes down to Missouri to sit as a member of their Insurance Commission in approving or disapproving the reinsurance contract, he acts under the statutes as Commissioner of Insurance of Iowa and not as a private individual, such as the Clerk of the Court does when acting as Referee in Probate and while the Commissioner of Insurance of this state, in performing the duties down in Missouri, is not performing a statutory duty imposed by the statutes of Iowa, yet, he is acting in his official capacity and as a matter of comity between states, for all states are necessarily concerned with reinsurance contracts, for it is common knowledge that insurance companies do not ordinarily limit their business to one particular state, and while they may have an office in one state, they are selling insurance in a number of states and the holders of these policies are necessarily very much interested in the doings of their company and it is really a part of the duties of the Insurance Commissioner to so protect the people of Iowa.

It is, therefore, the opinion of this department that pursuant to Section 8612 of the Code that this fee to the Commissioner of Insurance to be paid by the reinsuring company must be paid over to the Treasurer of State and cannot be retained by the Insurance Commissioner of Iowa.

BANKS AND BANKING: PUBLIC FUNDS: COUNTY: BOARD OF SUPERVISORS: STATE SINKING FUND: 1. Whether county has legal right to enter into compromise settlement with receiver of bank. 2. Whether county can file against State Sinking Fund for balance of account in bank.

December 4, 1934. *County Attorney, Manson, Iowa:* I wrote you hurriedly about the Farmers Bank of Yetter last evening so that you would have a letter for your meeting today, and am writing you at length now in regard to our thoughts on this proposition.

As I understand the facts, the Farmers Bank of Yetter is now in receivership. This bank was a private bank and as such was designated as depository for public funds for your county pursuant to Section 7420 d1 of the Code of Iowa, 1931. Your county had moneys on deposit in the bank at the time of the appointment of receiver and the receiver who was appointed by the District Court, has asked your county whether it would accept an offer of 50 per cent of the amount of its deposit, the same to be accepted in full by the county, and release the individual owners of the bank from any further liability, and also release the receiver.

You further advise that in your opinion, such a compromise settlement would be advantageous to the county and you ask our opinion whether the county has the legal right to enter into such a compromise and if so, whether the county can file against the State Sinking Fund for public deposits for the balance of their account in the bank.

Section 5130 of the Code of Iowa sets forth the general powers of the Board of Supervisors, and Subdivision 6 thereof states that they have the authority "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.

In the case of Poweshiek County vs. Buttles, 70 Iowa, 246, our Supreme Court held that Boards of Supervisors in the management and control of the school fund, had the authority to do acts and make settlements for the protection of said fund, which, in the exercise of wisdom and care, prudent men or men of affairs would do for the purpose of securing or collecting a debt.

In the case of McCarty, et al., vs. Eggert, 154 Iowa, 28, the court held that the Board of Supervisors had the right and authority to settle with the County Auditor a claim of the county against him.

In the case of Sac County vs. Hobbs, 33 N. W., 368, our Supreme Court said:

"The Board of Supervisors are clothed with discretion in the matter, and it is competent for them, after a defalcation has occurred, to take other security than that afforded by the bond, and even to extend the time of payment, if the interest of the county will thereby be better protected. True, such power is not conferred by any express provision of the statute but it is included in the general power to examine and settle the accounts of the receipts and expenditures of the county."

It is, therefore, apparent that pursuant to the general powers, your Board of Supervisors does have the legal right and authority by proper resolution duly entered in its official records, to compromise and settle claims of doubtful equity or collectibility, which fact, of course, must be determined by you and the Board and this, of course, would include such a claim as you have mentioned, and such is the opinion of this department.

In regard to your further question, as to whether the balance of the claim could be filed against the State Sinking Fund for public deposits, a more serious question arises.

Theoretically, when the legislature created the State Sinking Fund, there was supposed to be enough money in the fund to pay the claims of public bodies as depositors in closed banks and immediately upon the bank being placed in the hands of receiver, the public body was to file their claim against the State Sinking Fund and obtain a check for the amount of their deposit and then assign to the State Treasurer, as custodian of the fund, the public body's right to participate in the liquidation of the bank and the Sinking Fund then to participate in such liquidation in the same manner as any depositor and to receive, of course, the regular dividends.

Because of the general economic condition a few years ago these banks began to fail and close in wholesale lots so that it not only made a terrific demand upon the Sinking Fund but also cut the income of the fund because the banks that had been paying the interest into the fund, were closed, and so therefore, the fund no longer had a great portion of its income, so that is the reason why today the Sinking Fund is about twenty-five million dollars in the red and it is estimated that it will take at least ten or twelve years for the claims that are now filed against it to be paid, as its only income is the interest on public deposits plus the revenue from beer.

You have two serious situations then confronting your right to make a settlement and reserve your right to file against the State Sinking Fund. First, if a settlement was made, it would be a complete release as against the owners of the bank and therefore, the Sinking Fund would not obtain anything itself from the receivership and even though you did reserve in your settlement, the right to file against the Sinking Fund, the right for any additional amount from these individual owners of the bank would be lost. The second proposition is whether the State Treasurer, as custodian of the Sinking Fund, would

have the right and authority to join with you in the settlement of your claim for 50 per cent, reserving to you the right to file against the Sinking Fund for the balance for the reason that there is no provision in the law whereby the State Treasurer is given this right, nor are there any general powers and duties conferred upon him as custodian of the Sinking Fund, his only right being under the provisions of Section 7420-a18 of the Code, to pay your claim and be subrogated to all your rights in the receivership.

You appreciate the fact that the Sinking Fund is directly interested in every settlement for the reason that all claims against the fund are directly interested. As an illustration, if you settled for 50 per cent and had a total deposit in the bank of $1,000, you would file for $500 against the Sinking Fund under your thought of what the county would desire to take, but if you settled for 75 per cent, you would only file for $250. The claimants filing after you did, would be directly interested for the smaller your claim, the sooner they would be paid, and so the smaller the claim that each public body files against the fund inures to all other claimants against it.

It is, therefore, the opinion of this department that if your board feels that it is for the best interests of the county, it may settle and compromise its claim with the receiver, but in doing so, it cannot reserve a right to file against the Sinking Fund for the balance and such amount obtained would be in full of what they would receive. But it is our suggestion that the county give due consideration to any settlement for cash, for it might be that 50 per cent received in cash from the receiver would be better than receiving what they could from the receivership and filing against the State Sinking Fund for the balance which as I have outlined above, is greatly in the red at this time and it is problematical when it will pay out or pay any claims that will be filed against it at this time.

PRISONERS: REWARD FOR APPREHENSION: BOARD OF CONTROL: What officers are entitled to the reward offered for the apprehension and delivery of a convict escaped from the penitentiary or reformatory?

December 6, 1934. *Board of Control, Des Moines, Iowa:* We have your letter enclosing copy of letter from Col. Haynes, Warden of Iowa State Penitentiary, asking our opinion as to what officers are entitled to the reward offered for the apprehension and delivery of a convict escaped from the penitentiary or reformatory.

Section 3770 of the Code of Iowa, 1931, provides that the warden may offer a reward not exceeding $50, to be paid by the state, and Section 3770-a1 of the Code provides the method and manner of payment of the reward. Our Supreme Court, in the case of Maggie vs. Cassidy, 190 Iowa, 933, had before it this identical question and the court on page 935, said:

"Our statute of the Code, Section 4885, makes it unlawful for any officer to accept or receive any gratuity or thing of value for the performance of any official duty. It is also a general rule of law, irrespective of statute, that a public officer cannot earn a reward for making an arrest which it is his duty to make."

And the court then after stating that it would be contrary to sound public policy to permit a public officer to demand or receive a gratuity or reward for making an arrest which it was his duty to make and that this might lead to fraud and corruption, said on page 938:

"The trend of judicial opinion is quite in accord with the view that a reward for the arrest or arrest and conviction of an alleged criminal may be earned

and properly received by an officer who has no official duty to do the act without such reward."

And in that case, our Supreme Court held that the sheriff of the county where the crime was committed and who was armed with a warrant, was not entitled to any part of the reward. But that the sheriff of another county where the prisoner was apprehended, was entitled to the reward as was also an officer of the State of Nebraska who assisted in apprehending the prisoner in Iowa, and also the city constable in the county where the crime was committed, the court stating on page 398:

"We find no precedent for denying the right of a town marshal or a local policeman or constable to compete for a reward for making an arrest of one for whom he holds no warrant where the scene of the crime and of the arrest are both outside of the officers' territorial jurisdiction."

It is, therefore, the opinion of this department that if the arrest is made by an officer within his territorial jurisdiction, he is not entitled to any part of the reward, and as to the sheriff, this would include his county; as to the policeman, the city, and as to the constable, his township. But where they go outside of their territorial limits, they are entitled to a reward.

BOARD OF CONTROL: PRISONERS: SENTENCES: If two sentences run concurrently even though the prisoner is sentenced by one court to the reformatory and by another court to the penitentiary and is serving his time in the penitentiary but has never been confined in the reformatory.

December 6, 1934. *Board of Control, Des Moines, Iowa:* We have your letter of recent date and also letters of some time ago from Mr. Scholes enclosing copy of letters from Colonel Glen Haynes, Warden of the Iowa State Penitentiary at Fort Madison, asking for our opinion as to the status of Byron Green, No. 15157.

It appears that he was sentenced in the District Court of Ida county and that he appealed therefrom, the sentence being to the reformatory at Anamosa. While he was free on bond and waiting the decision of the Supreme Court, he was convicted in Muscatine county and sentenced to the penitentiary at Fort Madison. He is now serving his sentence at the penitentiary at Fort Madison and Colonel Haynes desires to know if the two sentences run concurrently even though the prisoner is sentenced by one court to the reformatory and by another court to the penitentiary, and is serving his time in the penitentiary and has never been confined in the reformatory.

Our Supreme Court in the case of Dickerson vs. Perkins, 182 Iowa, 871, construed the statutes of this state and held that terms of imprisonment run concurrently unless the court entered judgment otherwise, and holding that this rule is true, even though the sentence be from two different district courts.

As to the question whether this rule is affected by the fact that the prisoner was sentenced by the two courts to two different institutions, we do not find an Iowa case exactly in point. However, in the case of Kirkpatrick vs. Hollowell, 197 Iowa, 927, the prisoner was sentenced to Anamosa and subsequently paroled. While so on parole, he was convicted of a crime in another county and sentenced to Fort Madison. The question primarily involved in that case was the status of the prisoner on parole and on page 933, the court discusses the question before us and at no time suggests that for the sentences to run concurrently, the prisoner must be committed to the same institution under both sentences. See also Humphrey vs. Hollowell, 199 N. W., 164; Sutton vs. Hollowell, 199 N. W., 273.

It is, therefore, the opinion of this department that these sentences run concurrently even though he is sentenced under one to Fort Madison and under the other, to Anamosa.

BOARD OF CONTROL: WOMEN'S REFORMATORY: IMPRISONMENT FOR PROSTITUTION: Two girls, sentenced for prostitution by Judge Johnston, mittimus stating they be confined for not exceeding two years. May they be released at that time?

December 7, 1934. *The Women's Reformatory, Rockwell City, Iowa:* You advise us that there are two girls in your institution that were indicted for the crime of prostitution and were sentenced by Judge Johnston of the Third Judicial District of Iowa. You further advise that the mittimusses state that they are to be confined at The Women's Reformatory for a term of not exceeding two years at hard labor. You ask whether they may be given their release at that time.

Under the provisions of Chapter 591 of the Code of Iowa, 1931, any person guilty of prostitution shall be imprisoned for not more than five years. The sentence of the court as to the girls is at variance with the mandatory provisions of the law and the question is as to which governs.

Under the provisions of Section 13960, being called the "indeterminate statute," when any person over 16 years of age is convicted, the court in imposing a sentence of confinement, shall not fix the limit or duration of the same, but the term of imprisonment shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted. You do not state in your letter the age of the girls so we do not know whether they are over 16 years of age or not. If they are over 16 years of age, the indeterminate sentence statute controls and under the decisions of our Supreme Court, the court in sentencing the prisoner within the provisions of the indeterminate sentence act, need only sentence them for a term as provided by law and any attempt by the court to state the exact limit of sentence is treated as surplusage. This was first held by our Supreme Court in the case of Adams vs. Barr, 154 Iowa, 83, and has been followed in the case of State vs. Draden, 199 Iowa, 231; State vs. Korth, 204 Iowa, 667; State vs. Bird, 207 Iowa, 212, and State vs. Hixson, 208 Iowa, 1333.

It is, therefore, the opinion of this department that if the girls were over 16 years of age when convicted, they shall be detained by you for a period not to exceed five years irrespective of the provisions of the mittimus, but that if they were under 16 years of age, the provisions of the mittimus would control and they should be released at the end of the two-year period.

We appreciate very much the statements in your letter in regard to this particular case and would suggest that you write to Judge Johnston and explain the matter to him so he will know the status of the detention and you might also take the matter up with the Board of Parole if the girls desire to be released prior to the expiration of the five-year maximum period.

BANKS AND BANKING: DEPOSITORS' AGREEMENTS: TRUST CERTIFICATES: As to the rights, privileges and preferences of the holders of trust certificate under these depositors' agreements (a) when the bank is in operation and (b) when the bank is in liquidation.

December 8, 1934. *Superintendent of Banking, Des Moines, Iowa:* You have forwarded letter from Mr. Charles B. Dunn, General Counsel for the Federal Reserve Bank of Chicago, and also copies of depositors' agreements, and you ask us our opinion as to the rights, privileges and preferences of the holders

of trust certificates under these depositors' agreements (a) when the bank is in operation, and (b) when the bank is in liquidation.

You have forwarded two copies of depositors' agreements. The first type provides for payment into the trust fund of the net earnings of the bank until an amount equal to 100 per cent of the capital of the bank has been so paid or contributed and thereafter, the bank to be released from contributing earnings into the trust fund, but this type of agreement is silent as to the rights of the parties in event of liquidation of the bank. The second type of depositor agreement forwarded with your letter provides for a waiver of the future earnings and also a waiver of the preference or priority in event of liquidation of the bank, and further provides that the holder of the trust certificate shall only participate in the liquidation of the assets trusteed. In other words, in the "second type," the depositor has waived every right except the right of actually participating in the segregated assets set over into the trust fund by the Superintendent of Banking at the time of the reorganization of the bank.

The manner and method of reorganization of state banks, savings banks and trust companies is provided for by statute and therefore, the provisions of the statute must be construed as a part of each depositor agreement and correlative trust agreement unless such provisions have been duly waived and can be duly waived. Our bank reorganization statute is Chapter 159, Acts of the 45th General Assembly and amendments thereto, which was originally known at the time of passage as Senate File 483 and in your pamphlet of banking laws, 1934, is designated as Sections 9283-e12 to 9283-e24 inclusive. For convenience, we will refer to the sections by the number given to them in your pamphlet.

Section 9283-e14 provides that unless otherwise agreed, a dividend shall be declared each year to the holders of trust certificates covering the entire net earnings of the bank plus the earnings and collections from the trust fund. It further provides that the certificate shall be preferred in earnings and have preference in liquidation over the common stock of the bank.

Section 9283-e15 provides that such trust certificates shall have preference and priority over all of the assets of the bank ahead of the holders of common stock and shall be paid in full before the common stockholders shall be entitled to any dividends or profits unless there is an agreement otherwise as to these matters by the requisite number of certificate holders.

From a plain reading of the statute then, unless it is otherwise agreed upon as provided in the act, the certificate holder is entitled to the net earnings of the bank and the preference and priority in liquidation, until his certificate is paid in full.

It is also equally plain that the liability of the bank as to the payment of earnings into the trust fund is contingent upon the operation of the bank and the earning of net earnings, so if the bank ceases to operate, it no longer has net earnings, and therefore, its liability to contribute this into the trust fund would cease.

May the depositors by entering into agreements to that effect take less than the amount given to them by statute? The statue itself says they can and they are also entitled to so contract as a matter of general law, for the right of earnings, preference and priority is an additional right given to certificate

holders by statute, and therefore, like any such statutory preference, may be waived or released.

In the depositors' agreements heretofore denominated as "first type," the holders of such have waived earnings in excess of an amount equal to the capital stock of the bank and in the "second type" they have waived all rights to any future earnings or any preference or priority in event of liquidation.

Would such waiver of earnings be binding in event the bank goes into liquidation before the trust certificate is paid? Would the waiver of right of preference and priority be binding in event of liquidation? It seems that such agreements clearly would be binding. The contract is fully executed. It is a definite settlement of an obligation. The consideration has passed. There is no condition that the bank continue to operate. If it made the other payments or performed the other acts provided for in the depositors' agreements and has reorganized, it has done all that it contracted to do under its agreement with its former depositors who are now certificate holders.

In the "first type" of depositors' agreements, there is no waiver of the preference or priority given by statute in event of liquidation. The only waiver is the waiving of the contribution of the entire net earnings of the bank into the trust fund until the certificates are paid in full, the waiver providing that the holder waives the contribution of all earnings in excess of an amount equal to the capital stock of the bank. Would such waiver of the net earnings in excess of an amount equal to the capital stock also constitute a waiver of the preference or priority in event of liquidation of all amounts above the amount equal to the capital stock? We think it does not. Under the statute, the priority and preference of certificate holders in event of liquidation, over common stockholders would obtain until the certificates are paid in full, and this, irrespective of what the agreement of the parties was as to contribution of earnings during the time that the bank was a going concern, for they are definitely separate provisions, the waiving of one not in any wise waiving the other, for the certificate holders have not agreed to a reduction in the amount of their certificate.

It is, therefore, the opinion of this department that depositors may waive the rights given to them by statute, and that in event of liquidation, the certificate holders of the "first type" would have no claim for earnings of the bank subsequent to the closing thereof, even though the net earnings equal to the capital stock had not been paid into the trust fund during the time the bank was a going concern, but such certificate holders would have a preference and priority in liquidation over the holders of common stock to the full amount of their trust certificates, this, of course, to be subject to any credits on the certificate by way of dividends prior to liquidation. As to the "second type" of depositors' agreements, there is contained therein an absolute waiver of both earnings and preference, so in event of liquidation, such certificate holders would not be entitled to any earnings of the bank and also would not be entitled to any statutory preference over common stockholders, and whether the bank is going, or is in liquidation, they would only be entitled to participate in the liquidation of the segregated assets placed in the trust fund for their benefit at the time of the reorganization of the bank.

LOTTERY: It is lottery when the three elements of chance, consideration, and a prize enter into the scheme; "consideration" need not be cash but may be anything "furthering a merchant's pecuniary profit"—i. e., trade

stimulated by giving of prizes at a drawing is considered as sufficient consideration and if the element of chance, and a prize are present, there is a lottery.

December 8, 1934. *City Attorney, Anita, Iowa:* We have your request for an opinion upon the following state of facts:

"One of our local merchants gives away four baskets of groceries each Saturday evening. Tickets are drawn from the box and the element of chance enters into the drawing for the prize. However, there is no consideration required for a chance ticket on the prize as all who enter the store, whether purchasers or not, are entitled to have a ticket, entitling them to a chance at the baskets."

You desire our opinion as to whether or not the necessary elements are present to constitute a lottery.

Lotteries are outlawed in Iowa both by constitutional provision and by statute. Section 28 of Article III of the Constitution of Iowa provides:

"Lotteries. Section 28. No lottery shall be authorized by this state; nor shall the sale of lottery tickets be allowed."

Section 13218 entitled "Lottery and Lottery Tickets," is 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."

It is generally accepted law that the essential elements constituting a lottery are consideration, prize and the element of chance. The Supreme Court has so held in Brenard Mfg. Co. vs. Jessup & Barrett Co., 186 Iowa, 872. There can be no question but what the element of chance is present and also the prize. It remains to be seen whether or not the third essential, consideration, is present. If so, undoubtedly the scheme is a lottery and forbidden by law. It does not appear that this precise question has ever been passed upon by the Supreme Court of this state. Therefore, we must resort to the pronouncement of other jurisdictions. In Glover vs. Malloska, decided by the Supreme Court of Michigan April 1, 1927, and reported in 213 N. W., 107, the following scheme was denounced as a lottery.

Malloska, doing business as the "Lincoln Petroleum Products Co.," procured tickets which he sold to his retail dealers for a chance drawing upon an automobile at monthly drawings. These tickets were given away by the retail dealers to anyone making a purchase or asking for one of the tickets. Once a month stubs of the tickets were placed in a barrel and a drawing made and the winner determined by chance. In holding this scheme to be a lottery, the Supreme Court of Michigan said Malloska sold the tickets to his customers for distribution in the course of trade to further his pecuniary interest and this established consideration. The fact that Malloska gave some tickets away at fairs and exhibitions and the purchasers for use in the retail trade gave them away without pay to their customers and sometimes to others did not at all save the scheme from being a lottery. There was a prize furnished by Malloska at each monthly drawing and paid for in whole or in part by his customers in the purchase of tickets to be given out in the course of retail trade. Chance determines the winner at the drawings. As supporting the opinion the following cases were cited: People vs. McPhee, 139 Mich., 687; 103 N. W. 174, 69 L. R. A. 505, 5 Ann. Cas. 835; People vs. Wassmus, 214 Mich.,

42, 182 N. W. 66; American Copying Co. vs. Thompson (Tex. Civ. App.), 110 S. W. 777; and for complete annotation on this question see State of Washington vs. Simon Danz, et al., 250 Pac., 37 (48 A. L. R. 1109).

In the light of these authorities, we hold the proposed scheme to constitute a lottery.

REAL ESTATE LICENSE: "Can X operate these two companies doing real estate business under one real estate broker's license?"

December 8, 1934. *Real Estate Commissioner, Des Moines, Iowa:* This will acknowledge receipt of your oral request for the opinion of this department on the following question:

A real estate broker in the city of Des Moines desires to operate more than one real estate office. By way of illustration, he desires to operate the X real estate agency, a real estate agency carrying on a general real estate business. X also desires to incorporate a company which will be known as the Y corporation and engage in a different phase of the real estate business. X is the sole owner of the X real estate agency and X is one of the incorporators and, as we understand it, the guiding force which will incorporate the Y company and he will be an official in said corporation.

Can X operate these two companies doing real estate business under one real estate broker's license?

It would be the opinion of this department that this question is answered in Section 1905-c23 of Chapter 91-C2 of the 1931 Code of Iowa, which provides as follows:

"*License required.* It shall be unlawful for any person, copartnership, association or corporation, to act as a real estate broker or real estate salesman, or to advertise or assume to act as such real estate broker or real estate salesman, without a license issued by the Iowa real estate commissioner."

Section 1905-c24 provides:

"*License to legal entity.* No copartnership, association, or corporation shall be granted a license, unless every member or officer of such copartnership, association or brokerage business of such copartnership, association or corporation, shall hold a license as a real estate broker, and unless every employee who acts as a salesman for such copartnership, association or corporation shall hold a license as a real estate salesman."

In the case presented X, when he engages as an individual in the real estate business, shall have a license in order to sell real estate or to actively engage in the real estate business and the Y corporation in which X is to be a stockholder is another legal entity and another person under the law. Hence, the Y corporation would have to have a real estate broker's license and X could do business through each of these legal entities.

X, by his real estate broker's license, would be one licensed under the law as a real estate broker under the license issued to him as owner of the X real estate agency and he would serve in the capacity of an official, when the Y corporation is formed. Therefore, as he is already licensed, he would not have to take out another individual real estate license.

OLD AGE ASSISTANCE ACT: ACCEPTANCE OF DEEDS ON REAL ESTATE: PAYING OFF MORTGAGES: TAKING ASSIGNMENTS OF LIFE INSURANCE POLICIES AND KEEPING UP OF PREMIUMS: Can we, under the law, take deeds to real estate, pay off mortgages, take assignment of life insurance policies and keep up the premiums and charge premiums to applicants as part of his allowance?

December 8, 1934. *Old Age Assistance Commission, Des Moines, Iowa:* This will acknowledge receipt of your request of the nineteenth in which you request the opinion of this department on the following question:

Section 16 of the old age assistance act provides in brief that where it is necessary to protect the interest of the state, the commission on granting assistance can take the property of the beneficiary and pay the net income to the persons entitled thereto and also, the commission has the power to sell, lease or transfer such property or defend and prosecute all suits concerning it, and to pay all just claims against it, and to do all other things necessary for the protection, preservation and management of the property. Upon the death of the applicant, the property shall be disposed of and the proceeds shall be transferred to the old age pension fund of the state.

"I have received several letters desiring information as to whether or not our commission will be willing to take over property and pay the owner whatever sum may be determined by the commission as assistance to the aged person owning said property. Also, as to whether or not certain insurance policies being carried by prospective applicants for old age assistance might be assigned to the commission and the applicants receive old age assistance. Most of these applicants are without heirs and in some instances, the heirs are not interested in assisting and maintaining the property or the insurance in its present status and that, in other instances, the property is incumbered and the mortgagee is about to foreclose. It is contended that the equity is greater than the sum of the mortgage."

Also, in the case of insurance policies, they have been carried for many years and now the applicant has reached the place where he is no longer able to pay the premium and he has no one who is interested in keeping the same paid up.

You desire our opinion on the following:

Can we, under the law, take deeds to real estate, pay off mortgages, take assignment of life insurance policies and keep up the premiums and charge premiums to applicant as part of his allowance?

It is the opinion of this department that Section 16 of the act pertains only to the taking of a lien on property to the amount of relief actually furnished and does not give the board the power or authority to make advances to property owners for any purpose except that paragraph 2 of Section 16 provides the duties and rights of the commission in regard to the management of the property and its control of the same after it has taken title, but it has no such right to sell, lease or transfer such property or defend or prosecute any suits against it or to pay any claims against it until it has taken title. In our opinion, the legislature intended that title should only be taken where your commission actually advanced an amount as old age assistance equal or nearly equal to the value of the property.

On the other part of your question, which relates to the taking of assignments of life insurance policies and the keeping up of premiums, it would be our opinion that this should not be undertaken. There would be many ways in which the commission might lose funds. The process of changing the beneficiary is so easy that we would feel that the old age assistance act would not be broad enough in its present state to undertake this and I doubt the advisability of efforts to change the law with respect to insurance.

REAL ESTATE LAW: BURLINGTON CORPORATION: CEMETERY LOTS: DEFINITION OF EMPLOYEE: BROKER'S LICENSE.

December 8, 1934. *Real Estate Commissioner, Des Moines, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department on the following question:

An Iowa corporation at Burlington has acquired title to a piece of ground and has subdivided it into cemetery lots and are proposing to issue warranty deeds to said real estate. This is different from the cemetery propositions which have been put up to us in the past, for the reason that most of these companies sell a perpetual burial right and retail a fee simple title. This

Burlington firm is using salesmen to *sell* these lots and we have notified them that it will be necessary for each one of their salesmen to either take a broker's license, or the corporation may take a broker's license and each salesman take a salesman's license to work thereunder.

Should our department designate these people as coming under the real estate law? Also advise us regarding Section 1905-c26 as to the meaning of "the regular employees thereof." Does this word "regular" apply to men on straight salary, devoting all of their time to the business of the company which employs them, or would it apply in this case to salesmen working strictly on a commission basis either part or full time?

It would be the opinion of this department that Section 1905-c26 of the Code of Iowa, 1931, would control in this situation although the question as presented by you presents a fact question which could only be determined by additional investigation of the company or the further investigation of the corporation as to the method by which they employ salesmen to sell these lots. This section is entitled "*Nonapplicability of chapter*" and provides in part as follows:

"The provisions of this chapter shall not apply to any person, copartnership, association or corporation, who as owner or lessor shall perform any of the acts aforesaid with reference to property owned or leased by them, *or to the regular employees thereof, with respect to the property so owned or leased, where such acts are performed in the regular course of, or as an incident to, the management of such property and the investment therein,* * * * *."

In the case of Mallinger vs. Webster City Oil Company, 234 N. W. 554, our Supreme Court, speaking through Justice De Graff, held:

" 'Independent contractor' is one carrying on independent business and contracting to do piece of work according to own methods, subject to employer's control only as to result."

The Iowa law, apparently, defines an "employee" to be a person subject to order as to hours of service and is assumed to be under supervision, direction and control as to methods employed. An independent contractor controls his hours of service, proceeds with work in accordance with methods of his own choosing, being held in obligation to the employer only as to results. Generally, on this question, see:

Knudson vs. Jackson, 183 N. W., 391,
Norton vs. Day Coal Company, 180 N. W., 905,
Pace vs. Appanoose County, 168 N. W., 916,
Root vs. Shadbolt & Middleton, 193 N. W., 634.

Words and Phrases, Vol. 2 of the Second Series, page 265, in defining the words "as engaged in," referring to employer, cites the case of United States vs. Morris, 14 Pet. (39 U. S.) 463, 475, 10 L. Ed. 543, and states:

"To be 'employed' in any thing means not only the act of doing it, but also to be engaged to do it; to be under contract, or orders to do it."

You state that the corporation owns the cemetery property which is being sold to purchasers. The only question, as we view it, is as to whether or not there should be a real estate license secured to sell this property by these employees. Section 1905-c26 would take this corporation outside of Chapter 91-C2 of the Code by reason of the fact that in the particular matter presented to us, the corporation is selling only property which the corporation owns and in the selling of this property, regular employees would be allowed to sell the property of the corporation "where such acts are performed in the regular course of, or as an incident to, the management of such property and the investment therein," in accordance with the wording of this section. It would be our opinion that generally speaking, if the employment is casual in its

nature and is not the principal business of the employee, such employment would not result in making this section of the real estate law nonapplicable to the sale of these lots and a real estate license should be taken out by those persons engaging in selling. But if the employees in question are under the direction of the employer as to methods and if the employer has the controlling of the hours and the employee devotes his time in carrying out such directions and gives his time exclusively to the business of the employer, then the real estate brokers' law as contained in Chapter 91-C2 would not apply in this instance. In other words, we are of the opinion that the words used in Section 1905-c26, wherein it refers to the regular employees of such a corporation, is to the effect that the employer in order to escape the necessity of taking out a real estate broker's license for these employees would have to control the method, the hours, and in every sense, the employee would be subject to the control of the employer. If you find that this is not true, after investigating the status of these employees and that these men are simply casually employed on a commission basis and that they are not under the control of the employer as to hours and method of procedure and that this employment is casual and a side line to some other business in which they engage, then it will be necessary for this corporation to take out a broker's license in accordance with real estate brokers' law of this state.

LOTTERY: BANK NIGHT: A lottery must have the three elements of consideration, the element of chance, and a prize to be a lottery; *consideration* in the case of where theatre tickets are sold and chances given on a certificate of deposit is held to be the increase in patrons at theatres giving such prizes, in that it furthers a merchant's or theatre owner's "pecuniary profit" by increasing the number of theatre-goers, thus increasing his profits. "Bank Night" is a lottery.

December 8, 1934. *County Attorney, Red Oak, Iowa:* We have received your request for an opinion concerning the operation of the so-called "Bank Night" by theaters. The plan is for the owners or operators of theaters to deliver to a lucky person a certificate of deposit in a local bank for a substantial amount of money once each week. Every attendant at a theater is given a number and the drawing is not limited to those in actual attendance. However, the winner must present his lucky number within a very short period of time in order to take advantage of the drawing.

Does the plan described in your letter and summarized above come within the statutes and the constitution prohibiting lotteries? It is our opinion that it does.

There are three essential elements of a lottery: first, the distribution of money, property, or a prize; second, the element of chance; third, a valuable consideration for the chance. All the elements of a lottery are present in the scheme known as "Bank Night." A case in point is that of State vs. Danz, 250 Pac. 37, 48 A. L. R. 1109 (Wash.), where it was held that the distribution on particular nights of groceries to patrons of a theater who were given tickets to the drawing when they purchased admission tickets, was a lottery, notwithstanding the fact that tickets were offered free to persons not in attendance at the theater and the groceries were donated by local merchants. The court said:

"But it is argued that the element of consideration does not appear because the patrons of the theatres pay no additional consideration for entrance thereto, and pay nothing whatever for the tickets which may entitle them to prizes. But while the patrons may not pay, and the respondents may not receive, any

direct consideration, there is an indirect consideration paid and received. The fact that prizes of more or less value are to be distributed will attract persons to the theatres who would not otherwise attend. In this manner those obtaining prizes pay considerations for them, and the theatres reap a direct financial benefit."

See also Society Theater vs. Seattle, 118 Wash. 258, 203 Pac. 21; Glover vs. Malloska, 213 N. W. 107, 238 Mich. 216. In the operation of "Bank Night" there is a distribution of a prize based on chance. In our opinion the authorities mentioned above are sound in holding that the promotion of a scheme like "Bank Night" and distribution of tickets is supported by a valuable consideration.

Therefore, in our opinion, the operators of "Bank Night" are conducting a lottery which is prohibited by law. They may be prosecuted under Chapter 593 of the Iowa Code of 1931.

BOARD OF SUPERVISORS: SETTLE CLAIM OF FORMER SHERIFF: PRISONERS' LODGING: "* * * * the former sheriff, could legally plead the amounts due him for the care of all prisoners committed to him for this period on the basis of 15 cents for each prisoner for each night's lodging. The Board of Supervisors should adjust, settle and compromise the same."

December 10, 1934. *County Attorney, Estherville, Iowa:* You have requested an opinion from this Department on the following question:

"You state that the checkers from the State Auditor's Department, who checked the records in connection with the sheriff's office in Emmet county for the year 1932 and again refer to it in the checkers' report for 1933, disclose that there was an item reported to the effect that there was an overpayment on meals to the prisoners, extending from the period beginning January 2, 1932, to and including the last item, being December 1, 1932, the total amount of overpayments being $204.95. These overpayments were caused by paying 25 cents per meal to prisoners in place of a 20 cents per meal limit, which is fixed by Paragraph 11 of Section 5191 of the 1931 Code of Iowa.

"This practice of paying 25 cents per meal arose by reason of the fact that previously arrangements were made between the county of Emmet and the city of Estherville, Iowa, whereby many of the county prisoners were kept in the Estherville City jail and the food for the county prisoners was secured by the sheriff from different restaurants and cafes in Estherville and then taken to the prisoners at the jail. That for some time it had been the practice for the warrants to be drawn directly in favor of the cafe or restaurant furnishing these meals, but this practice was discontinued on the recommendation of the checkers from the State Auditor's Department, and the warrants were then drawn payable to the sheriff, who in turn endorsed all these warrants, the same being cashed by the cafes or restaurants furnishing the meals.

"That the total amount of overpayments for meals shown on the State Auditor's Report was in fact paid to the cafes and restaurants, and that the sheriff of Emmet county did not personally receive any portion of these payments or overpayments. That extending over the same period as covered by the Auditor's Report above referred to, the then sheriff of Emmet county did not make any charge against Emmet county for the care of the prisoners, which, under Paragraph 11 of Section 5191 of the 1931 Code of Iowa, the sheriff would be entitled to in the sum of 15 cents per prisoner for each night's lodging, but in no event should the sheriff receive more than $250.00 for any calendar year.

"You further state that it had been the custom in Emmet county, for several years prior to the incumbency of Sheriff W. G. Gordon, for the sheriff not to make any charge for caring for the prisoners, and that a sum of 25 cents per meal had been paid for boarding prisoners. Mr. W. G. Gordon, the former sheriff and the sheriff involved in this claim, takes the position that it will be unfair to attempt to collect this sum of $204.95, which appears from the Auditor's Report to be an overcharge on meals to prisoners, when he did not receive any compensation for the care of those same prisoners. Mr. Gordon feels that

if the former practice is not technically and legally correct, then he would be entitled to an offset on this claim for overpayment on meals to the prisoners in the full amount of the statutory allowance for caring for the prisoners. You further state that the records of caring for the prisoners during this period at the statutory rate of 15 cents per night would total $240.45, and that Mr. Gordon claims an offset for this amount.

"The questions that you would like to have an opinion on are as follows:

"1. Does the Board of Supervisors of Emmet county have the authority to compromise and settle these claims?

"2. Is the claim of Mr. W. G. Gordon, former sheriff, a legal and statutory one?"

In answer to your first question, let me call your attention to Paragraphs 5 and 6 of Section 5130 of the 1931 Code of Iowa, which outline the general powers of Boards of Supervisors. These particular paragraphs are as follows:

"5130. General powers. The board of supervisors at any regular meeting shall have power: * * * *

"5. 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.

"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."

These provisions of Section 5130 have already been interpreted by the Supreme Court of Iowa in the following cases:

Poweshiek County vs. Buttles, 70 Iowa, 246; 30 N. W., 558.
McCarty, et al., vs. Eggert, 154 Iowa, 28; 134 N. W., 426.
Sac County vs. Hobbs, et al., —— Iowa, ——; 33 N. W., 368.

The above Supreme Court cases hold that the Board of Supervisors do have discretionary or quasi judicial powers in managing and caring for the business of the county. The Supreme Court has held that the Board of Supervisors do have authority to perform acts and make settlements for the protection of the county's interests, which, in the exercise of wisdom and care, prudent men or men of affairs would do for the purpose of securing or collecting a debt, and further that the wisdom and prudence of their acts must be determined upon the facts as they appear at the time to the supervisors.

In the case of Sac City vs. Hobbs, et al., 33 N. W., 368, the Supreme Court holds as follows:

"The board of supervisors are clothed with discretion in the matter, and it is competent for them, after a defalcation has occurred, to take other security than that afforded by the bond, and even to extend the time of payment, if the interest of the county will thereby be better protected. True, such power is not conferred by any express provision of the statute, but it is included in the general power to examine and settle the accounts of the receipts and expenditures of the county, and to settle with the treasurer, conferred by Sections 303, 917, of the Code."

In answer to your first question, it is the opinion of this Department that the Board of Supervisors of Emmet county do have the authority to make compromise settlements which, in their opinion, are for the best interests of their county.

In answer to your second question, we again call your attention to Paragraph 11 of Section 5191 of the 1931 Code of Iowa, which is as follows:

"5191. Fees. The sheriff shall charge and be entitled to collect the following fees: * * * *

"11. For boarding a prisoner, a compensation of twenty cents for each meal, and not to exceed three meals in twenty-four consecutive hours; and fifteen cents for each night's lodging. But the amount allowed a sheriff for lodging prisoners shall in no event exceed in the aggregate the sum of two hundred

fifty dollars for any calendar year. In counties where district court is held in two places and jails are maintained in two places the amount allowed a sheriff for lodging prisoners shall in no event exceed in the aggregate the sum of two hundred fifty dollars for each of said jails for any calendar year.

Under the above statutory provision, the sheriff of a county is entitled to 15 cents for each night's lodging in caring for prisoners committed to the county jail. The fact that through an arrangement, because of lack of facilities at the county jail, a large part of the county prisoners were kept at the city jail would not in itself defeat the statutory right of the sheriff to be compensated for caring for the prisoners. The prisoners would still be county prisoners, and the sheriff would be charged with their proper care. No doubt, it caused the sheriff more bother and trouble to look after these prisoners that were held at the city jail than if they were committed to the county jail. As we understand the location of the court house and the city jail at Estherville, Iowa, they are located at a distance of about three blocks. Hence, when the sheriff is called upon to wait on or care for a prisoner, it would be necessary for him to leave his office or his home at the sheriff's residence and walk three blocks to the city jail. However, the legal fact does remain and is so stated by Paragraph 11 of Section 5191 of the 1931 Code of Iowa that the sheriff is entitled to 15 cents per prisoner for each night's lodging. It is the duty of the sheriff to look after the well-being of his prisoners, to see that they are properly fed, clothed and kept in decent, humane and sanitary surroundings. If their health is endangered, it is the sheriff's duty to secure medical aid for them. It is for these services that the Legislature has provided the extra compensation to the sheriff of 15 cents for each night's lodging.

It is, therefore, the opinion of this Department that Mr. W. G. Gordon, the former sheriff, could legally plead the amount due him for the care of all prisoners committed to him for this period on the basis of 15 cents for each prisoner for each night's lodging. Hence, it would appear advisable for the Board of Supervisors of Emmet county to go into this matter, and, if they are satisfied that the facts pertaining to this matter are as you have stated them to me, to adjust, settle and compromise the same without the necessity of filing an action in court.

BOARD OF SUPERVISORS: PREMIUMS ON BONDS: COUNTY TREASURER: Can Board of Supervisors pay the premium on the bond of the Deputy County Treasurer?

December 11, 1934. *County Attorney, Harlan, Iowa:* I have your request for an opinion from this department upon the following proposition:

"Can the Board of Supervisors pay the premium on the bond of the Deputy County Treasurer? At the present time, the deputy's salary is $92.00 per month and the premium on his bond would amount to $65.00 per year. The Board of Supervisors of our county is willing to pay this premium if they can legally do so."

You are advised that it is the law that public bodies cannot pay bond premiums for officials unless the legislature has so provided. There is no provision in the statutes of our state whereby the Board of Supervisors would be authorized to pay this bond premium. If possible, the salary might be raised a sufficient amount to offset this premium.

TAXATION: PROPERTY OF SCHOOL DISTRICT: The Independent School District of Sioux City owns three vacant lots near the business section of Sioux City, and is about to enter into a long term lease with a private

concern that expects to build thereon. Will it be the duty of the City Assessor to list for 1935 at the same value as abutting property?"

December 12, 1934. *Board of Assessment and Review, Des Moines, Iowa:* We have your request for opinion on the following proposition:

"The Independent School District of Sioux City owns three vacant lots near the business section of Sioux City, and is about to enter into a long term lease with a private concern that expects to build thereon. Will it be the duty of the City Assessor to list for 1935 at the same value as abutting property?"

Section 6959 of the Code of Iowa, 1931, provides for the method and manner of listing and assessing property and this property would be governed by that section unless it comes within the exemption provided for in paragraph 2 of Section 6944 of the Code, which provides in part in regard to classes of property that shall not be taxed:

"The property of a county, township, city, town, school district or military company when devoted to public use and not held for pecuniary profit."

If this property is held for pecuniary profit, then it does not come within the exemption above provided.

In the case of Fort Des Moines Lodge vs. County of Polk, 56 Iowa, 34, the building was erected on real estate of a charitable organization. The building was leased for business purposes and the income appropriated to paying for repair of the building and necessary expenses and the balance turned into the charitable fund. The question is in regard to the taxability of this property and our Supreme Court said on page 35:

"Keeping in view the rule above stated, this section of the statute must be construed as requiring the property in question to be taxed. Indeed, it, in effect, declares that leased property shall not be exempt from taxation. Under the statute, it is immaterial to what the income from leased property is devoted. The property being leased for business purposes and an income obtained therefrom, its status as taxable property is thereby fixed."

In the case of Town of Mitchellville vs. Board of Supervisors, 64 Iowa, 554, the court said at page 555:

"Now, it appears that the property is not devoted to public use, but an income is derived therefrom. The condition of the trust imposed by the donor is that the property itself shall not be devoted to public use but the profit arising therefrom shall be. It is, therefore, obvious that a pecuniary profit is derived from the property. It is, therefore, not exempt. It is true, the profits are devoted to public use, but the statute does not, because of this fact, provide that the property is exempt from taxation."

In the case of City of Osceola vs. Board of Equalization, 188 Iowa, 278, the court held that where a charge is made for the use of property, which charge is consistent with and incidental to the public use, it does not change the character of the property. This was a case in which a municipal reservoir as a part of the city waterworks, was seeded to prevent erosion and a part of this was leased for grazing purposes and rental was thus obtained therefrom, but the court held that this was merely incidental, so is much different than the facts presented above.

In Corpus Juris 61, page 370, Section 367, the author states:

"So, in the absence of an express exemption, land of a city or other municipal corporation which is rented out to private parties and from which it derives a revenue is subject to taxation."

It is, therefore, the opinion of this department that this property is subject to taxation and should be listed at the same value as abutting property.

STATE BOARD OF HEALTH: LOCAL BOARD OF HEALTH: MODIFICATION AND ENFORCEMENT OF RULES: The State Department of Health has the authority to reverse or modify a decision of the local board of health if the conditions so warrant, and the power to enforce these modifications within the territorial jurisdiction of the local department, if said department fails to carry them out.

December 15, 1934. *State Department of Health, Des Moines, Iowa:* Your letter of October 11, addressed to the Attorney General, has been referred to me for reply. I quote from your letter as follows:

"In the majority of cases wherein citizens of a locality make a formal complaint to the local board of health that a certain nuisance exists and should be abated, the local board invariably corrects the situation. Occasionally, however, the complainants are not satisfied with the decision of the local board and appeal to our Department, requesting the sanitary engineer to make a further and independent investigation. Therefore, this department is desirous of your opinion on the following question:

Where a local board investigates and officially acts on complaint of citizens who may contend that a certain nuisance exists, may the Department of Health interfere under Sections 2212-13 and reverse the decision of the local board if conditions should so warrant?"

In answer to your question you are advised it is the opinion of this Department that the Department of Health, under Sections 2212, 2213, and other sections of the 1931 Code of Iowa, may reverse or modify the decision of the local board, if the conditions so warrant.

Chapter 107 of the Code provides for and prescribes the duties of local boards of health. Section 2191 provides the powers and duties of the State Department of Health. Subsection 6 thereof is as follows:

"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."

This subsection is not limited by any action that the local board may have taken. This subsection provides that the Department shall issue directions for the improvement of unsanitary conditions in any locality in the state, which directions shall be executed by the local board.

On January 25, 1928, this office issued an opinion holding that the State Department of Health may proceed on petition where the local board of health refuses to act. We quote the last paragraph of that opinion as follows:

"Under this paragraph (6 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."

Section 2212 of the Code is as follows:

"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."

This section gives the State Department of Health authority to enforce its rules and carry out its lawful directions within the territorial jurisdiction of local boards of health, when such local boards fail to enforce and carry out the same.

COMMITMENT: PAROLE BOARD: It is our opinion that the district court of Cherokee county has lost jurisdiction over this matter, and that the pris-

oner is now under the jurisdiction of the sovereign power of the State of Iowa, acting through the state's official board of parole.

December 18, 1934. *Iowa State Board of Parole, Des Moines, Iowa:* I have your request of the seventeenth instant for an opinion from this department on the following question:

"One James W. Loucks was convicted in Cherokee county for the crime of breaking and entering and received an indeterminate sentence of not to exceed ten years.

"We are advised that the case was appealed to the Supreme Court and has now been affirmed. Commitment was issued and the Governor has granted a stay to the 21st of this month for the purpose of permitting attorneys to appear before this Board with an application for parole.

"The question now arises under Code 3788, in the absence of a recommendation from the trial court and prosecuting attorney as to whether or not this board has the authority to parole. The contention of the attorneys appearing for the prisoner is that the commitment is synonymous to the mittimus, that is, when the commitment issues, the prisoner is technically in the penitentiary and that the Board of Parole has absolute jurisdiction to grant a parole without the recommendation of the trial court and the prosecuting attorney."

Under the provisions of Section 3786 of the 1931 Code of Iowa, the board of parole has power to parole prisoners after commitment except those serving life terms or under sentences of death or infected with venereal disease in communicable stage. This statute seems to imply that the prisoners coming under the jurisdiction of the board of parole would be those who are actually committed to the state penitentiary or some reformatory. This interpretation arises from the language used in the statute wherein it says that the board shall have this power "except as to prisoners *serving* life terms" and "have power to parole persons convicted of crime and *committed* to either the penitentiary or the men's or women's reformatory." Therefore, under the provisions of Section 3786, your board would have no power to parole any prisoner unless such prisoner had been convicted of a crime and *committed* to some state penitentiary or reformatory. The word "committed" means the actual incarceration of such prisoner in a state penitentiary or reformatory. No other construction of this statute would be sane or reasonable.

In addition to the powers granted to the board under Section 3786, the legislature has granted the board the power to parole as provided for by Section 3788 of the 1931 Code of Iowa which is as follows:

"*Parole before commitment.* Said board may, on the recommendation of the trial judge and prosecuting attorney, and when it appears that the good of society will not suffer thereby, parole, after sentence for less than life imprisonment, and before commitment, prisoners who have not been previously convicted of a felony."

The particular question that you wish our department's opinion on is:

What does the term "before commitment" in Section 3788 of the 1931 Code of Iowa mean? Does it mean before the court issues the warrant of commitment or does it mean after the warrant of commitment has been issued by the court and before the prisoner has actually been placed in the penitentiary or reformatory?

The word "commitment" has in law a well defined meaning, and signifies the act of sending an accused or convicted person to prison.

Guthmann vs. People, 203 Ill. 260, 67 N. E. 821.
Anderson Law Dictionary.
Bouvier Law Dictionary.

The word is often used in statutes as applying to the order and warrant of commitment.

Reardon vs. People, 123 Ill. Appeals 81.

It also has been defined as being similar to an execution after judgment in a civil case and is a final process for carrying into effect the judgment of the court.

Scott vs. Speigel, 67 Conn. 349.
Taintor vs. Taylor, 36 Conn. 242.

In other words, the word, "commitment," may mean the act of sending a convicted prisoner to the penitentiary, or may simply refer to the order or warrant of commitment. The entire language of the statute and the relationship of this statute to other statutes in the same chapter of the Code, referring to the same subject matter, must be examined thoroughly, in order to determine just what meaning the Legislature intended should be applied to this word.

However, it appears to us it will make little practical difference whether the word, "commitment," means the order or warrant of commitment or the act of sending the prisoner to the penitentiary, for the reason that after the commitment has been issued by the court, it is the duty of the sheriff to take the prisoner to the penitentiary forthwith.

We are advised that the entire facts concerning the question submitted are as follows:

One James W. Loucks was convicted in Cherokee county for the crime of breaking and entering, and received an indeterminate sentence of not to exceed ten years. As soon as sentence was pronounced and before commitment, the defendant perfected an appeal to the Supreme Court and was at liberty under bond pending this appeal. The Supreme Court of Iowa affirmed this conviction, and the procedendo was sent to the District Court of Cherokee county. Upon the receipt of this procedendo, commitment was issued from the District Court of Cherokee county and placed in the hands of the sheriff, who apprehended the prisoner and placed him in jail preparatory to taking him to the penitentiary. The sheriff was prevented from doing this forthwith, on account of the severe snow storm which covered the state. While the prisoner was being held in the county jail of Cherokee county, a stay order was secured from the Governor of Iowa until December 21st, during which time the Governor and the Board of Parole could thoroughly investigate the reasons advanced pertaining to the prisoner's request for a parole. Since the Governor issued a stay order, the prisoner has been held in the county jail of Cherokee county, Iowa, under a warrant committing the prisoner to the state penitentiary or reformatory. Were it not for the order of the Governor, the prisoner would now be actually confined in the state prison.

Under this particular set of facts, the prisoner is being held in the Cherokee county jail not as a county prisoner but as a state prisoner. The question now arises as to whether or not the prisoner's confinement under this commitment at the Cherokee county jail would be equivalent in law to actual confinement in the state prison under the same commitment. We are inclined to believe that the legal status of this prisoner is the same as though he were actually confined in the state penitentiary.

Your attention is called to Section 3787 of the 1931 Code of Iowa, which provides as follows:

"Rules. Said Board shall have power to establish and enforce the rules and conditions under which paroles may be granted."

Unless the rules adopted by your Board would prevent your consideration of a prisoner who has served only such a short time under commitment to the state prison, you would have the legal right and authority to consider this prisoner for parole. Whether or not you assume jurisdiction of this case for the purpose of considering this parole is a matter for your Board to decide

on the exercise of a sound and wise discretion. It is our opinion that the District Court of Cherokee county has lost jurisdiction over this matter, and that the prisoner is now under the jurisdiction of the sovereign power of the State of Iowa, acting through the state's official Board of Parole.

BONUS FUNDS: IOWA DIRECT BOND OBLIGATIONS: FEDERAL DIRECT BOND OBLIGATIONS: Nothing could be invested in but the direct bond obligations of the State of Iowa or the direct bond obligations of the United States government.

December 18, 1934. *Treasurer of State, Des Moines, Iowa:* This will acknowledge receipt of your letter of the fourteenth instant in which you request the opinion of this Department on the following question:

"May the state treasurer, on direction of the state bonus board, invest bonus funds in anything but State of Iowa direct bond obligations, or the direct bond obligations of the federal government?

"It is my thought that we are restricted in our investments to either the State of Iowa or federal bonds, and nothing else."

As you are aware, Section 145-b1 of the 1931 Code of Iowa provides as follows:

"*Investment of bonus and disability fund.* The treasurer of state upon the order of the bonus board established by Chapter 332, Acts of the Thirty-ninth General Assembly, shall invest such portions of the additional bonus and disability fund created by Section 8 of said chapter as said board may from time to time specify."

And Section 145-b2 provides:

"*Choice of securities.* In issuing such order to the treasurer of state said bonus board shall specify the securities in which such sums are to be invested, but in no event shall the board specify securities other than those issued by the United States or the State of Iowa."

As the Legislature has directed that "in no event shall the board specify securities other than those issued by the United States or the State of Iowa," it is our opinion that nothing could be invested in but the direct bond obligations of the State of Iowa or the direct bond obligations of the United States government.

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