State of Iowa
1936

TWENTY-FIRST BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1936

EDWARD L. O'CONNOR
Attorney General

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REPORT OF THE ATTORNEY GENERAL

December 31, 1936.

HONORABLE CLYDE L. HERRING,
Governor of Iowa.
BUILDING.

My dear Governor Herring:

I have the honor to submit herewith the biennial report of the Attorney General covering the period of his regular term beginning with January 1, 1935, and ending with January 1, 1937. This report contains the important opinions rendered by the Attorney General and also the business of public interest transacted during the above term of office. This report is submitted in accordance with Section 249 of the 1935 Code of Iowa. This report also includes a concise resume of the work and activities of the Bureau of Investigation which is a component part of the Department of Justice.

At the outset, I wish to call your honor's attention to the increased amount of work that has been placed upon the Department of Justice by reason of the court tests that have been made and are being made of the new legislation which the general assemblies of the state have enacted into law during the past four years. The depressed condition of the public welfare generally made it necessary and expedient for many new laws to be passed in order to relieve the existing conditions. With the repeal of the eighteenth amendent, new beer and liquor laws have been placed upon the statute books of the state. Many new tax laws have been enacted and other remedial legislation passed by the legislature. It is only natural that many of the persons affected by these new laws felt that their rights and privileges were being infringed upon and as a result, much litigation was caused thereby.

This feeling of unrest which seems to prevail in the period of transition through which we are passing, has increased the burdens of the Attorney General's office as well as the general burdens imposed upon all of the departments of state government.

In accordance with Chapter 12 of the 1935 Code of Iowa, it is the duty and responsibility of the Attorney General to advise the legislature or either house thereof, and all state officers with respect to their official duties. The creation of new departments of state government together with the application of the new laws to all departments of government, has made it necessary for the

Attorney General to prepare and issue an extra large number of official opinions. We have not attempted to include all of the opinions written by this department during the last two years in this report, but have attempted to confine the report so as to include the important opinions.

During the last two years, the Attorney General's department has handled approximately three hundred sixty civil cases, both in the lower courts and the supreme courts, and also one hundred sixty-six criminal cases on appeal in the supreme court, of which only ten are still pending.

Between twenty and thirty different mercantile establishments doing business in the State of Iowa attacked the validity and constitutionality of the Iowa chain store law. The majority of these cases were tried in a three judge federal district court and also in the Supreme Court of the United States. On November 9, 1936, the Supreme Court of the United States handed down its decision affirming the legality of the chain store tax law where the tax was computed upon the unit store basis, but declared the other portion of the act which computed the tax on the volume basis as reflected by the gross receipts, to be unconstitutional and invalid. At the present time, there are between fifteen and twenty oil firms testing the validity of the chain store tax law as applying to oil stations where the large oil companies have attempted to avoid this tax burden by entering into leases with the persons who are actually operating each individual station. These cases are now pending in the federal district court for the southern district of Iowa. Other new legislation has been successfully determined in favor of the new laws.

Four of the most important decisions upholding the constitutionality of such laws are as follows:

The constitutionality of the Iowa Securities Act was upheld in the case of *State vs. Soeder,* 216 Iowa, 815. In the case of *State vs. Engler,* 217 Iowa, 138, the Iowa short form indictment law was attacked for the first time and its validity and constitutionality was upheld by the Supreme Court in this case. Another attack was made upon the Iowa Liquor Control Act which resulted in the Supreme Court upholding the validity and constitutionality of the same in the case of *State vs. Arluno,* 260 N. W. 179. The constitutionality of the state's 3 point tax law was upheld by the Supreme Court in *Scott vs. Board of Assessment and Review.*

During the last two years, the insurance department deter-

mined that fraternal insurance companies were subject to taxation because of their alleged operation as old line insurance companies. Three such test cases were brought in the district court of Polk county and two in the Federal District Court for the Southern District of Iowa. In all instances, the decision of the lower courts was in favor of the exemption of fraternal insurance companies from state taxation. The cases tried in the state court are in the process of appeal to the Supreme Court, but the appeal has not yet been perfected in the cases in the Federal Court. Another important insurance case was the one brought by the Northwestern Mutual Life Insurance Company to restrain the state officers from enforcing the premium tax as computed on their premiums received from the sale and granting of annuities. This case was submitted to the Supreme Court of Iowa on December 15, 1936 and to date, no decision has been rendered.

Twenty-seven homicide cases have been handled on appeal during the last two years, of which four were cases involving the death penalty and eight involving sentences for life. One death sentence was commuted to life imprisonment by the Governor and one convict is awaiting execution.

The state police radio broadcasting system has been completed with the exception that it has become necessary for the state to replace and relocate the central transmitting unit in Des Moines, Iowa. It will be remembered that the State Bankers Association had purchased and installed the equipment for the station which was located in the Liberty building in Des Moines, Iowa. During the year 1936, the owners of the Liberty building served notice upon the Bankers Association demanding that their antenna towers be removed. The vibration of these towers was causing a lot of damage to the ceiling and walls of the rooms of the upper floor of the Liberty building. This necessitated the selection of a new location for the central broadcasting unit. This unit is now being transferred to the state fair grounds in Des Moines, Iowa, which is a far better location than the previous one. It is expected that the new location will be completely equipped and in operation within the next sixty or ninety days. Proper arrangements have been made to continue the services until the new unit is completed at the fair grounds.

The Bureau of Investigation under the immediate leadership of G. W. Schmidt, Chief, has functioned very efficiently in the matter of fighting organized crime of the major type. Chief Schmidt

has been able to develop a fine esprit de corps within the bureau. Many of the members of the bureau have gone far in the development of efficiency in the investigation, apprehension and prosecution of criminals of the public enemy type. One of our agents, E. C. Wenig, was taken into the service of the Federal Bureau of Investigation which is under the direct supervision of J. Edgar Hoover. Another member, agent Paul Gruber, has been under consideration by the Federal Bureau of Investigation for employment in their service. Due to the unceasing fight that our bureau of investigation has made on organized crime of the major type and with the assistance of a state police radio broadcasting system, I am very happy to report that there were only four bank robberies in the State of Iowa during the year 1936. I sincerely believe that this record merits the serious consideration of all law abiding and law observing people in the state. I sincerely recommend that the legislature see fit to increase the force in the Department of Justice by making proper appropriations therefor in order to thoroughly and efficiently equip each and every member with the most up-to-date weapons and also to provide for additional schooling in universities offering such courses, and also with the Federal Bureau of Investigation in Washington, D. C.

It has been our policy to recognize the underlying principle of local self government within the state of Iowa. We have not attempted to usurp the powers, functions and duties of local prosecuting officials. Each and every law enforcing official within the State of Iowa has a proper function to perform. They should be permitted and required to do their duty. The Department of Justice should cooperate to the fullest extent with all other law enforcement agencies and the Attorney General should advise and supervise the work of the County Attorneys throughout the state. In the great majority of cases, I am happy to report that we have received the best spirit of cooperation possible.

In closing, I wish to compliment the members of the Department of Justice who have rendered faithful, efficient and loyal service. It has been a pleasure and an honor to have served the state in the capacity of Attorney General. It is my fondest hope and most sincere desire that this great department of our state government continue to grow and to develop and to spread its influence for the ultimate object of the proper administration of justice.

Respectfully submitted,

ELO:sp

EDWARD L. O'CONNOR, *Attorney General.*

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

Title	County	Decision	Nature of Action
Ackerman, Rube	Black Hawk	Affirmed 11/24/36	Larceny of poultry.
Arluno, John	Appanoose	Affirmed 6/19/36	Liquor nuisance. Unlawful possession with intent to sell intoxicating liquor.
Butler, John E.	Hamilton	Affirmed 2/14/35	Rape.
Bergman, Francis A.	Jasper	Affirmed 6/21/35	Uttering forged instrument.
Berry, Phil A.	Webster	Affirmed 5/18/35	Unlawfully sold intoxicating liquors.
Brooks, Dave	Polk	Reversed 11/24/36	Statutory rape.
Byerly, Guy	Jones	Affirmed 4/ 5/35	Illegal purchase alcoholic liquor from Iowa liquor store under an assumed name.
Berlovich, Dewey	Polk	Affirmed 12/17/35	Murder.
Bilharz, Harriet M.	Cass	Affirmed 5/18/35	Subscribing and making false report of bank condition.
Butler, Ralph	Jasper	Affirmed	Violation of Sec. 5072 (Motor vehicle).
Breeding, Arch	Montgomery	Affirmed 9/24/35	Murder, first degree.
Ball, Roy	Pottawattamie	Affirmed 7/17/35	Breaking and Entering.
Carter, Harley	Jefferson	Reversed 10/27/36	Uttering forged instrument.
Cooley, Robert	Pottawattamie	Affirmed 1/21/36	Breaking and entering in nighttime with intent to comit larceny.
Cooper, Willard	Polk	Affirmed 2/14/35	First degree murder.
Conway, J. M.	Jones	Affirmed 4/ 2/35	Embezzlement of county funds by public officer.
Coppess, Elmer H.	Cedar	Dismissed by Applt. 6/17/35	Illegal transportation intoxicating liquor.
Chapman, John	Wright	Affirmed 5/18/35	Illegal possession intoxicating liquor.
Clarke, Joe	Polk	Affirmed 12/17/35	Malicious injuring building of Skelly Oil Co. service station.
Carr, George	Lee	Dismissed 11/5/35	Receiving stolen goods.
Carr, Leona	Lee	Dismissed 11/5/35	Receiving stolen goods.
Cooper, Harold M.	Linn	Reversed and Remanded 3/17/36	Violation Sec. 85, liquor control act.
Clay, Louis	Johnson	Reversed 12/17/35	Murder first degree.
Cozad, Earl	Page	Affirmed 6/19/36	Larceny of poultry.
Cox, Richard Bland	Sac	Affirmed 7/31/36	Illegal possession alcoholic liquor.
Donovan, Reed	Union	Affirmed 11/19/35	Rape.

SCHEDULE "A"—Continued

Title	County	Decision	Nature of Action
Delevie, Barbara	Polk	Affirmed 5/14/35	Embezzlement of mortgaged property.
Dickerson, James	Polk	Affirmed 2/ 9/35	Operating motor vehicle while intoxicated.
DeKraai, Elmer	Howard	Affirmed 11/24/36	Theft of sheep.
Doe, John, et al.	Polk	Affirmed 11/19/35	Operation of illegal vending machines.
Endorf, Raymond	Osceola	Affirmed 5/14/35	Larceny in nighttime.
Eagon, Leonard	Union	Affirmed (Per Curiam 1/11/35	Illegal possession intoxicating liquor.
Espinoza, Walter	Webster	Affirmed 7/31/36	Larceny.
Ferguson, Wesley	Woodbury	Affirmed 1/19/35	Robbery with aggravation.
Fisher, Eddie	Webster	Affirmed 10/24/35	Bootlegging.
Ford, D. B.	Polk	Reversed 11/24/36	Motor violation—"No tail light."
Farmer, J. LeRoy	Linn	Dismissed11/19/35	Illegal possession liquor.
Froah, Floyd	Polk	Affirmed 11/19/35	Burglary with aggravation.
Fletcher, Edward	Dallas	Dismissed 5/ 7/36	Burglary by explosives.
Fador, John	Harrison	Affirmed 7/31/36	Assault with intent to murder.
Gardner, Fred	Polk	Affirmed 2/14/35	Second degree murder.
Ghrist, J. N.	Story	Reversed 12/15/36	Refusing to send child to school.
Grimm, George	Polk	Affirmed 3/17/36	Robbery with aggravation.
Grattan, Marvin T.	Winneshiek	Affirmed 7/31/36	Murder first degree.
Halley, Cecil	Black Hawk	Affirmed 7/31/36	Violation Iowa liquor control act.
Hagerdon, LeDean	Woodbury	Affirmed 10/20/36	Paternity proceedings.
Harrington, Jos. M.	Lee	Affirmed 12/17/35	Maintain. liquor nuisance.
Hundling, G. P.	Jasper	Reversed 1/21/36	Advertising a lottery (bank night).
Hiviles, Nick	Marion	Dismissed	Violation of Iowa liquor law.
Higgins, Beatrice	Polk	Affirmed 10/24/35	Larceny from a person.
Hawker, Maud, and Robert	Union	Affirmed 1/21/36	Violation liquor control act.
Harper, Amos	Buena Vista	Affirmed 2/12/35	First degree murder.
Hess, C. K.	Union	Affirmed 9/27/35	Selling beer to minor.
Hoskins, O. A.	Clay	Affirmed (Per Cur.) 11/23/35	Operating car while intoxicated.
Ingram, W. A.	Polk	Affirmed 1/ 8/35	Rape.
Johnson, Lyle	Union	Affirmed 10/20/36	Rape.
Johnson, Gale H.	Cerro Gordo	Affirmed (Per Cur.) 2/14/35	Possessing burglar tools.
Johnson, Lawrence	Pottawattamie	Affirmed 12/15/36	Manslaughter.

Johnson, Gale	Des Moines	Affirmed 1/14/36	Murder in first degree.
Johnston, Pearl	Ringgold	Affirmed 6/19/36	Murder.
Kier, Walter	Union	Affirmed 9/27/35	Violation Iowa liquor control act.
Kinney, Ray	Polk	Affirmed 2/14/35	Murder.
Kaasa, Gilbert	Clay	Affirmed (Per Cur.) 11/23/35	Driving while intoxicated.
Kirkpatrick, W. C.	Woodbury	Affirmed 10/23/35	Uttering counterfeit public instruments.
Kenny, Wayne	Delaware	Affirmed 7/31/36	Jointly stealing and carrying away motor vehicle.
Landis, Arthur H.	Jasper	Affirmed 7/17/35	Statutory rape.
Lipsey, David	Polk	Affirmed 10/24/35	Violation of Sections 13064 and 13065, Rule 19, Dept. of Agriculture.
Long, Charles E.	Henry	Affirmed 5/18/35	Aiding in concealing stolen property.
Luth, Harvey	Black Hawk	Affirmed 7/31/36	Illegal transportation of intoxicating liquors.
One Certain 1935 Ford	Woodbury	Affirmed 10/20/36	Condemnation and forfeiture.
McClurg, C. W.	Clay	Affirmed (Per Cur.) 3/ 8/35	Obtaining property by false pretenses.
McCutchan, R. V.	Henry	Affirmed 2/12/35	False uttering of bank check.
McLuen, W. R.	Madison	Reversed and Remanded 2/18/36	Larceny from building in the nighttime.
McNuelty, Emma	Adams	Reversed and Remanded with instruction to dismiss 4/ 7/36	Keeping gambling house.
McGregor, Tom	Polk	Affirmed 3/17/36	Operating motor vehicle while intoxicated.
Mack, George	Black Hawk	Dismissed 1/16/36	Operating motor vehicle while intoxicated.
Madison, Alfred, et al.	Union	Affirmed 9/27/35	Violation of Iowa liquor control act.
Morrison, Samuel	Madison	Reversed and Remanded 2/18/36	Larceny from building in nighttime.
Matheson, George	Pottawattamie	Affirmed 6/21/35	Murder in first degree.
Murray, George	Pottawattamie	Affirmed 12/15/36	Breaking and entering.
Neudick, Ralph	Page	Affirmed 5/17/35	Larceny.
Nordstrom, E. D.	Henry	Affirmed 1/21/36	False entry bank records.
Nelson, Robert	Allamakee	Dismissed 5/12/36	Establish paternity of child.
Peterson, Lloyd	Woodbury	Affirmed 5/16/36	

SCHEDULE "A"—Continued

Title	County	Decision	Nature of Action
Phillips, Harry and Louisa, Mrs. Harry Phillips	Louisa	Affirmed (Per Cur.) 3/18/35	Liquor nuisance.
Porth, Harry	Calhoun	Affirmed 5/18/35	Robbery with aggravation.
Prochaska, John	Linn	Affirmed (Per Cur.) 3/18/35	Burglary with aggravation.
Porter, Bryant	Woodbury	Affirmed 1/19/35	Keeping gambling house.
Pierce, Julia	Polk	Affirmed 10/24/35	Swindling.
Parks, Luther	Linn	Affirmed (Per Cur.) 11/23/35	Larceny from a person.
Poort, Jack J.	Sac	Affirmed 7/31/36	Possession of alcoholic liquors.
Papst, Wm.	Cass	Affirmed 4/ 7/36	Illegal possession alcoholic liquor.
Price, Clarence	Mills	Dismissed 7/31/36	Unlawfully entering bank with intent to rob.
Roberts, Clair	Decatur	Affirmed 6/19/36	Murder.
Sage, Tom and Howard Highley	Jasper	Dismissed 5/11/35	Illegal possession intoxicating liquors and bootlegging.
Sampson, Teddy	Humboldt	Affirmed 6/21/35	Rape.
Schenk, Otto W.	Johnson	Affirmed 7/17/35	Robbery.
Seery, Frank	Warren	Abated 2/20/36	Failure to report automobile accident.
Sigman, Osman C.	Winnebago	Reversed 6/21/35	Receiving stolen goods.
Slaman, Mike	Linn	Dismissed 1/10/35	Burglary.
Smith, Warren	Marion	Affirmed (Per Cur.) 2/ 9/35	
Scott, Gaylord	Hamilton	Affirmed 7/31/36	Rape.
Stennett, Judd	Page	Affirmed 5/14/35	Breaking and entering.
Sweetman, E. J.	Polk	Affirmed 11/19/35	Breaking and entering and larceny in nighttime.
Schreiber, Walter	Lucas	Affirmed 10/20/36	Larceny of motor vehicle.
Stack, Edward	Dubuque	Affirmed 4/ 7/36	Operating motor vehicle while intoxicated.
Spring, Ed.	Dallas	Dismissed 9/22/36	Breaking and entering.
Siegel, Jos.	Woodbury	Affirmed 1/23/36	Driving while intoxicated.
Teager, John	Harrison	Affirmed 10/20/36	Murder.
Thompson, Tony	Louisa	Affirmed 11/17/36	Assault with intent to rape.
Tracy, Reginald S.	Delaware	Affirmed 6/21/35	Murder.
			Murder.

Thompson, George	Pottawattamie	Dismissed 11/12/35	Larceny of automobile.
Vander Linden, Lyle	Polk	Dismissed 2/18/36	Larceny of domestic fowls.
Van Andel, John	Monroe	Affirmed 12/15/36	Larceny of domestic animals.
Warneke, George	Page	Reversed 5/ 7/35	Robbery with aggravation.
Whitney, Harry	Polk	Reversed 12/17/35	Rape.
Williams, Sadie	Woodbury	Affirmed 9/27/35	Intoxication.
Wood, Dave	Polk	Affirmed 2/20/36	Lewd acts with a child.
Wilson, Harold J.	Lee	Affirmed 10/20/36	Appeal from fine and costs imposed by Justice of Peace.
Zelmer, S. O.	Dallas	Dismissed 9/24/36	Larceny in nighttime.

HABEAS CORPUS

Thrasher, Fred vs. Glenn C. Haynes	Lee	Affirmed 2/13/36	Larceny in nighttime.
Barnes, Arlan	Harrison	Pending	Larceny of domestic poultry.
Berryhill, W. H.	Hamilton	Pending	Illegal selling of an estray—steer.
Carlson, Adolph	Marshall	Pending	Operating a motor vehicle while intoxicated.
Chrismore, Alvin	Marion	Pending	Manslaughter.
Clay, Louis	Johnson	Pending	Murder in first degree.
Davison, Joiner	Des Moines	Pending	Embezzlement.
DeBont, Robert	Benton	Pending	Operating motor vehicle while intoxicated.
DeKoning, Leonard	Mahaska	Pending	Larceny of domestic animals.
Fisher, Paul	Polk	Pending	Rape.
Ferguson, E. B. (Lash)	Mahaska	Pending	Larceny of domestic animals.
Hay, Vern	Webster	Pending	Robbery with aggravation.
Holder, Erious	Woodbury	Pending	Murder.
Hamer, Wilson	Harrison	Pending	Operating motor vehicle while intoxicated.
Heinz, Marlo	Dubuque	Pending	Murder.
Horton, Floyd	Taylor	Pending	Murder.
Hooper, Calvert	Lucas	Pending	Operating motor vehicle while intoxicated.
Hathaway, Anna	Black Hawk	Pending	Keeping a house of illegal fame.
Johnson, Bert	Page	Pending	Murder in first degree.
Johnson, Luther	Page	Pending	Illegal possession alcoholic liquor.
Keturokis, Bennie	Polk	Pending	Rape.
Lewin, Thelma	Woodbury	Pending	Petit larceny.

SCHEDULE "A"—Continued

Title	County	Decision	Nature of Action
Mercer, John M.	Cedar	Pending	Murder in first degree.
Ohlquist, Olie V.	Guthrie	Pending	Receiving and concealing stolen property.
Philpott, Ed.	Taylor	Pending	Larceny of coal.
Rhone, Ivan	Madison	Pending	Murder.
Sparks, C. F.	Dallas	Pending	Larceny of wheat.
Theis, John, Jr.	Sioux	Pending	Manslaughter.
Wheaton, Allen B.	Pottawattamie	Pending	First degree murder.
Gillman, Howard	Webster	Pending	
Johns, William J.	Dallas	Pending	
Howard, Theo	Page	Pending	
Besch, Leo vs. Glenn C. Haynes, et al.	Lee	Pending	Robbery with aggravation. Habeas Corpus.
Thilges, Joe vs. Glenn C. Haynes	Lee	Pending	Robbery with aggravation. Habeas Corpus.
Wilson, E. J. vs. Glenn C. Haynes	Lee	Pending	Uttering a forged instrument. Habeas Corpus.
Davison, Joiner, and McCullough vs. Garfield	Des Moines	Pending	Embezzlement. Certiorari.
Krueger, Emil vs. Mun. Ct. of Sioux City, et al.	Woodbury	Pending	Certiorari.

SCHEDULE "B"—CIVIL CASES IN DISTRICT COURT

Case	County	Notation
State of Iowa, ex rel. Mrs. Alex Miller vs. United Investors Corp., et al.	Polk	Action to dissolve corporation. Decree in favor of plaintiffs.
State of Iowa, ex rel Mrs. Alex Miller vs. George M. Bechtel and Co., a co-partnership, et al.	Scott	Action to restrain defendants from selling securities. Decree of injunction in favor of plaintiffs.
Mrs. Alex Miller, Secretary of State, ex rel. John F. Brady, Supt. Secur. Dept., vs. Standard Tung Oil Corp., et al.	Linn	Action to restrain defendants from selling securities. Pending.
State of Iowa, ex rel. Mrs. Alex Miller vs. National Union Loan Society, Inc., et al.	Scott	Action to restrain defendants from selling securities. Writ of injunction in favor of plaintiffs.
Independence Fund of North America, Inc. vs. Mrs. Alex Miller, as Secretary of State, et al.	Polk	Appeal from action of securities Department revoking registration of one security and denial of registration in two other securities. Decision pending.
State of Iowa, ex rel. Mrs. Alex Miller, Secretary of State, et al. vs. Vekol New Years Gift Mining Co., et al.	Polk	Action to restrain defendants from selling securities. Writ of injunction dissolved. Case dismissed.

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

Case	County	Notation
State vs. Joe Siegel	Woodbury	Petition for Certiorari denied. October 26, 1936—Murder case.

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

Case	County	Notation
State of Iowa, ex rel. Edward L. O'Connor, Attorney General, and the State Conservation Commission vs. Otto J. Sorenson, et al..	Johnson.....	Action to quiet title. Pending. January Term, 1937.
State of Iowa vs. George Rorris	Municipal Court, Sioux City, Iowa.....	Suit to determine concurrent jurisdiction of state in regard to hunting on the Missouri river which forms a boundary between Iowa and Nebraska.
State of Iowa, ex rel. E. A. Farnsworth, Mine Inspector for the 1st District of Iowa vs. John Padavich, et al.	Appanoose.....	Appeal from decision declaring rules and regulations of state mine inspection board unconstitutional.
State of Iowa vs. A. S. Van Trump.....	Henry.....	Appeal from ruling under demurrer declaring unconstitutional rules and regulations of the state conservation commission.

SUPREME COURT OF IOWA

Case	County	Notation
Northwestern Mutual vs. Murphy	Polk.....	Enjoin for collection of taxes—pending.
State vs. Clay county	Clay.....	To determine liability for care of Katie Schneider & Burton R. Chase. Insane—pending.
Homesteaders vs. Murphy, et al.	Polk.....	Enjoin for collection of taxes—pending.
Lutheran Aid vs. Murphy.....	Polk.....	Enjoin for collection of taxes—pending.
Yeomen vs. Murphy, et al.	Polk.....	Enjoin for collection of taxes—pending.
Bates, Rec. vs. Nichols.....	Muscatine.....	Liability on contract—pending.
Board of Control vs. M. & St. L. R. R.....	Polk.....	Liability for repairs—pending.
Ind. District of Ogden vs. Samuelson (Baker).	Polk.....	Certiorari to determine review ruling of defendant—pending.

CASES PENDING IN SUPREME COURT

Case	County	Notation
State of Iowa vs. Bert J. Engle.....	Poweshiek.....	Disbarment—Seeking reinstatement. Check with county attorney.

SUPREME COURT

Case	County	Notation
National Benefit vs. Murphy.....	Polk.....	Closed.
Joseph Corso and Catherine Corso vs. State of Iowa	Polk.....	Attorney fees in condemnation case. Closed.
Melvin Fitzgerald vs. State of Iowa.....	Polk.....	Attorney fees in condemnation case. Closed.

II. (SUPREME COURT)

Case	County	Notation
Jones vs. Dunkelberg, et al.	Floyd.....	Decision against state. (Old Age Assistance Commission) 260 N. W. 717.
J. W. Holmes vs. James R. Reese, et al.	Woodbury.....	Soldier's preference case. (Iowa State Employment Service) Decision in favor of state, 265 N. W. 384.
DeVotie, R. G., Adm. of the Estate of Vernon E. DeVotie, Deceased vs. Charles E. Cameron, et al.	Polk.....	Action to recover for personal injuries (State Fair Board) Decision in favor of state, 265 N. W. 637.

CLOSED CASES IN SUPREME COURT

Name	County	Notation
State vs. A. M. Cloud	Delware	Disbarment.
State vs. Joseph F. DeCaro	Clinton	Disbarment.
State vs. J. V. Gregory	Cherokee	Disbarment.
Daniel L. Gervich	Polk	Disbarment.
State vs. A. J. Palas	Polk	Disbarment.
State vs. C. A. Pratt	Tama	Disbarment.
State vs. John L. Sloane	Polk	Disbarment.

SCHEDULE "D"—CIVIL CASES

Case	County	Notation
Board of Control vs. Schaffer	Boone	Action to quiet title. Pending.
Board of Education vs. Leighton	Buena Vista	Foreclosure of mortgage. Pending.
Pyle vs. Ackland	Buena Vista	Trustee action vs. wards of Board of Control. Pending.
Board of Education vs. Ostercamp	Butler	Foreclosure of mortgage. Pending.
State vs. Cerro Gordo Co.	Cerro Gordo	To determine liability for care of Ralph Moore, insane.
State vs. Iowa State Benefit	Cerro Gordo	Quo warranto action. Pending.
State vs. Security Benefit Association	Clinton	Quo warranto action. Pending.
State vs. Fayette County	Fayette	To determine liability for care of Mrs. John (Burgie) Meyer, insane. Pending.
Ben and Belle Bolton vs. American Aid Ass'n of Indiana	Fremont	Claim of Old Age Assistance Commission for portion of insurance money. Pending.
State vs. American Natl. Aid Society	Greene	Quo warranto action. Pending.
Board of Education vs. Kruse	Grundy	Foreclosure of mortgage. In decree.
Tuffree vs. Coulter	Grundy	Foreclosure of mechanical lien. Pending.
State vs. Hamilton County	Hamilton	To determine liability for care of George Hill, insane. Pending.
Winfield State Bank, Receivership	Henry	Claim of Eva Freeman in receivership. Pending.
Board of Education vs. Swartzendruber	Iowa	Foreclosure of mortgage. Pending.
Fahey vs. Board of Education and Iowa City	Johnson	Action for damages. Pending.

Board of Education vs. Kahler	Johnson	Foreclosure of mortgage. In decree.
Board of Education vs. Butler	Johnson	Foreclosure of mortgage. In decree.
Board of Education vs. Fred Miller	Johnson	Foreclosure of mortgage. In decree.
Board of Education vs. Mueller	Johnson	Foreclosure of mortgage. Pending.
Board of Education vs. Borschel	Johnson	Foreclosure of mortgage. Pending.
Iowa Electric Company vs. Board of Control	Jones	Action to quiet title. Pending.
State vs. United Counties Ben. Ass'n	Kossuth	Quo warranto action. Pending.
State vs. Mutual Benefit	Lyon	Quo warranto action. Pending.
Board of Education vs. Locher (Urlaub)	Lyon	Foreclosure of Mortgage. In decree.
Board of Education vs. Bruggeman	Lyon	Foreclosure of Mortgage. In decree.
State vs. O'Brien County	O'Brien	To determine liability for care of Raymond (Sipma) Brinkman, insane. Pending.
Board of Education vs. Klink	O'Brien	Foreclosure of mortgage. In decree.
Aliber & Co. vs. Bates	Polk	Small loan matter. Pending.
Lucy Keefe vs. Price and Board of Control	Polk	Action for damages. Pending.
David vs. Old Age Assistance	Polk	Mandamus action. Pending.
Fraternal Aid vs. Murphy, et al	Polk	Quo warranto action. Pending.
State vs. Midwest Mutual	Polk	Receivership action. Pending.
State vs. Colonial Benefit Ass'n	Pottawattamie	Quo warranto action. Pending.
McGinnis vs. Old Age Assistance Commission	Polk	Mandamus action. Pending.
Miller vs. Schuster	Polk	Small loan matter. Pending.
State vs. Fraternal Aid Ass'n	Polk	Quo warranto action. Pending.
State vs. Farmer Labor Benefit Ass'n	Pottawattamie	Quo warranto action. Pending.
State vs. Republic Mutual Union	Scott	Quo warranto action. In judgment.
State vs. Story County	Story	To determine liability for care of Earl F. Forbes, insane. Pending.
Board of Education vs. Mealey	Warren	Foreclosure of mortgage. In decree.
Estate of Susan McCrea, deceased	Warren	Claim against estate of Old Age Assistance Commission. Pending.
State vs. Washington County	Washington	To determine liability for care of Mary Conklin Leffler, insane. Pending.
Sherman vs. Davis	Washington	To determine priority of liens. Pending.

CIVIL CASES

GASOLINE TAX CASES

Case	County	Notation
State vs. City of Des Moines	Polk	The Supreme Court upheld the state's contention that the city of Des Moines was liable for tax. The result was a judgment against the city of Des Moines in the sum of $12,007.08.
State vs. Woodbury County	Woodbury	The District Court ruled that the state could not tax the county, and that Chapter 56 of Acts of 45th General Assembly, Extra Session, was not constitutionally enacted. The Supreme Court reversed the trial and result was judgment against Woodbury Co. in sum of $4,235.25.
State vs. Story County	Story	Same as Woodbury County. Supreme Court has not yet filed opinion.
State vs. Dallas County	Dallas	Involves the right of the state to tax a county for motor vehicle fuel used by it. Judgment was entered in District Court in favor of State of Iowa for $6,181.23.
State vs. Plymouth County	Plymouth	Involves the same as Dallas County. Decree and judgment entered in favor of State in District Court for $5,792.13.
State vs. Franklin County	Franklin	Involves the same as above case. It has not as yet been tried in District Court, but the county has stipulated. The amount of tax due is $13,037.97.
State vs. J. A. Carlson Construction Company.		To recover gasoline tax which was alleged by the state to have been illegally refunded by Ray E. Johnson, former Treasurer of State. Case settled by payment of $7,500 to State of Iowa.
State vs. Newkirk Service Wins et al. and Merchants Mutual Bonding Company	Dubuque	Foreclosure of gasoline tax lien. Judgment in favor of state for $464.96.

State of Iowa vs. Valley Oil Company and Continental Cas. Co.	.....	Suit to foreclose gasoline tax lien. Judgment againt defendants for $259.84.
State vs. Carlson Construction Company of Marshalltown	Marshall	To recover motor vehicle fuel license fees which was alleged to have been illegally refunded by Ray E. Johnson, former Treasurer. Case pending and not as yet tried.
State vs. Guy Longerbone	Polk	To recover motor vehicle fuel license fees which was alleged to have been illegally refunded by Ray E. Johnson, former Treasurer. The amount involved is $13,169.97. Case pending.
State vs. Standard Oil Co.	Polk	Judgment rendered against defendant in favor of state in District Court for $116,982.11. Case argued to full bench of Supreme Court. Opinion not as yet filed.
State vs. Phillips Petroleum Company	Polk	Judgment rendered in favor of state in District Court in sum of $19,024.22. Case submitted to full bench of Supreme Court. Opinion not as yet filed.

INCOME TAX CASES

Case	County	Notation
Henry O. Hale and Elizabeth Hale vs. Iowa State Board of Assessment and Review	Webster	An appeal from an additional assessment for income tax purposes from Iowa State Board of Assessment and Review. Decree in favor of state in District Court. Appealed to Supreme Court and argued to full bench.
Ray P. Scott vs. Iowa State Board of Assessment and Review	Marshall	Involves question of whether or not Chapter 82 of Acts of 45th General Assembly, Extra Session (Three-Point Tax Act) was constitutional. District Court held that constitution was not violated. Supreme Court affirmed decision of Trial Court.

CIVIL CASES—Continued

Case	County	Notation
Bert Vilas vs. Iowa State Board of Assessment and Review	Buena Vista	To restrain collection of income tax on ground Chapter 82, 45th General Assembly, Extra Session, is unconstitutional. Decree entered in favor of Defendant. Appealed to Supreme Court—hearing in May, 1937.
Oliver Wilbert Vilas vs. Iowa State Board of Assessment and Review	Buena Vista	Same as above.
Anna C. Armstrong vs. Iowa State Board of Assessment and Review	Linn	These cases are appeals from rulings of Iowa State Board of Assessment and Review to District Court of Linn Co. They will be consolidated and tried together at beginning of January Term in Linn county.
Margaret L. Armstrong Race vs. Iowa State Board of Assessment and Review	Linn	
Robt. C. Armstrong vs. Iowa State Board of Assessment and Review	Linn	
Isabel Cook Favorite vs. Iowa State Board of Assessment and Review	Linn	
Irene H. Douglas vs. Iowa State Board of Assessment and Review	Linn	
George Laird vs. Iowa State Board of Assessment and Review	Linn	
A. W. H. Lenders vs. Iowa State Board of of Assessment and Review	Linn	
H. E. Muzzy vs. Iowa State Board of Assessment and Review	Linn	
Sadie W. Palmer vs. Iowa State Board of Assessment and Review	Linn	
Arthur Poe vs. Iowa State Board of Assessment and Review	Linn	
John C. Reid vs. Iowa State Board of Assessment and Review	Linn	
Dr. H. L. Walker and Maude C. Walker vs. Iowa State Board of Assessment and Review	Linn	
Addie L. Van Vechten vs. Iowa State Board of Assessment and Review	Linn	

Van Vechten Shaffer vs. Iowa State Board of Assessment and Review	Linn	
George Ottis vs. Iowa State Board of Assessment and Review	Linn	
Geo. W. Ramsey vs. Iowa State Board of Assessment and Review	Linn	

SALES TAX CASES

Sam Kennedy vs. Iowa State Board of Assessment and Review	Cerro Gordo	Involves question of whether or not sale of manufactured fertilizer used by vegetable growers is taxable under three-point tax act. Decree entered in favor of state.
Kistner vs. Iowa State Board of Assessment and Review	Black Hawk	Involves question of whether funeral directors are taxable on their gross receipts under three-point tax act. Assigned for January Term, 1937.
Albert A. Read, Trustee vs. Henry Field Company, et al.		State and Board of Assessment Intervenors, on account of sales tax due State of Iowa in sum of $1,916.59. Trial not as yet had.

CIVIL CASES IN DISTRICT COURT

Case	County	Notation
320-I Vislissel vs. Iowa State Board of Conservation.	Linn	Appeal from condemnation award of jury in conservation commission matter.
Scandia Coal Company vs. J. E. Jeffreys, State Mine Inspector, 3rd District	Boone	Temporary injunction in behalf of state. Matter to be tried on its merits.
People's Bank of New Market, Iowa (State Sinking Fund Matter)	Taylor	Permission granted to file claim if all public bodies are agreeable. Pending agreement.

CIVIL CASES IN DISTRICT COURT—Continued

Case	County	Notation
State of Iowa vs. Loren Collins	Marshall	License to operate air craft cancelled by aeronautics commission.
United States of America vs. Certain Lands in Scott county, Iowa, etc.	Southern Davenport Division	In re: Islands in Mississippi River.
Julia Rowley vs. Mrs. Henry Frankel, et al.	Linn	Suit for damages in regard to Coggon Dam (Conservation Commission case).
Board of Education vs. Jennie Leusink, Administratrix, et al.	Lyon	Board of Education foreclosure.
State of Iowa vs. Willard M. Gaines, Administratrix, et al.	Pottawattamie	Action to quiet title—Lake Manawha (Besley Tract).
State of Iowa vs. Delphy Brothers and P. S. Pearson	Allamakee	Violation of fish and game laws—shipping game fish illegally.
Big Wall Lake Controversy (Ross fence controversy)	Wright	Controversy in regard to boundaries.
Green's Beach, Lake Okoboji	Dickinson	Title to certain property—pending settlement.
Notes for collection		Settlement being negotiated.

CIVIL CASES DISPOSED OF

I. (DISTRICT COURT)

Case	County	Notation
State of Iowa vs. W. J. Steckel	Davis	Fish and game commission case. Compromised and settled.
L. E. Goode Produce Co. vs. I. T. Bode, et al.	Davis	Decision for plaintiff.
Sioux county vs. City of Hawarden	Sioux	Beer license money matter.

Mary A. French and L. E. French vs. Mrs. Alex Miller, Iowa State Real Estate Commissioner, in her official capacity	Polk	Real estate license matter. Reinstatement of real estate license.
State of Iowa vs. C. S. Brown, et al	Dickinson	Injunction for abatement of a nuisance in Arnolds Park. Decided in favor of state.
State of Iowa vs. Ed Schuppert	Johnson	Suit testing constitutionality of rules and regulations of fish and game commission.
John Rochelle vs. Old Age Assistanct Commission, et al	Polk	Old Age Assistance case—mandamus proceedings.
State of Iowa vs. William Byers and H. R. Inlay	Woodbury	Upheld constitutionality of rules and regulations of fish and game commission.
Jennie F. Beach, What Cheer, Iowa vs. Old Age Assistance Commission	Polk	Dismissed by plaintiff.
Puryear Beverage Company, Clinton, Iowa	Clinton	Proof of priority claim for taxes. Decision in favor of state.
Lillie L. Spoor vs. Old Age Assistance Commission, et al	Polk	Mandamus action. Dismissed by plaintiff.
State of Iowa vs. Josephine Marks, et al	Pottawattamie	Action to quiet title. Decree in favor of state.
Leo Wegman, Treasurer vs. Ben Robinson, operating as Robinson Distribuiting Company	Polk	Case settled by bonding company.
Jay McCool vs. Old Age Assistance Commission, et al	Municipal Court, Des Moines, Iowa	Dismissed by plaintiff.
Jetter Brewing Company, a corporation, bankrupt No. 5161		Claim of state for taxes under Chapter 93-F2 of 1935 Code of Iowa (beer law) allowed by referee in bankruptcy.
State of Iowa vs. Wilford Dwyer	Worth	Constitutionality of beer law upheld.
Catherine Nolan vs. Old Age Pension Board, et al	Chickasaw	Old Age Assistance matter. Decision in favor of state.
State of Iowa vs. Peter Katzenstein, et al	Pottawattamie	State successful in bringing about settlement, payable in installments, in regard to beer law.

CIVIL CASES DISPOSED OF—Continued

Case	County	Notation
Independent School District of Fairfield vs. State Sinking Fund for Public Deposits	Jefferson	Adjustment—allowance of right to file claim.
Vacation of roads—Lake Wapello	Davis	
Condemnation matter for Conservation Commission—		
Four Mile Lake	Emmet	
Swan Lake	Carroll	
Gull Point	Dickinson	
Hardin County	Hardin	
Silver Lake	Worth	
Palisades	Linn	
Backbone State Park	Delaware	Condemnation proceedings.
Ray T. Stout vs. Mrs. Alex Miller	Polk	Real estate matter.

CASES PENDING IN DISTRICT COURT

Case	County	Notation
State of Iowa vs. Ben Hughes	Buena Vista	To restrain from practicing medicine. Check with Board of Health.
State of Iowa vs. Harry W. Harmer	Des Moines	To restrain from practicing medicine. Check with Board of Health.
State of Iowa vs. Louis Noah Smernoff	Lyon	To revoke license to practice medicine. Continued for service.
Nettie Mae Bennett vs. C. B. Murtagh	Polk	Mandamus to compel issuance of warrant. Await trial.
State of Iowa vs. Ewell Niel	Cherokee	To revoke license to practice dentistry. Check with Board of Health.
State of Iowa vs. Mrs. Joseph Frier	Greene	To restrain from practicing medicine. Continued for service.
In the Matter of the estate of Ed Johanson, deceased	Dallas	Escheat. Resist proof of heirs.
State of Iowa vs. James Otis Ewing	Van Buren	To restrain from practicing medicine. Check with Board of Health.

State of Iowa vs. Henry H. Koller	Mitchell	To restrain from practicing medicine. See County Attorney.
State of Iowa vs. Geo. W. Doxsee	Scott	To revoke barbers license. Check with County Attorney.
State of Iowa vs. T. H. Atteberry	Franklin	To revoke barber's license. Check with Supt. of Barber Division.
State of Iowa vs. H. W. Day	Taylor	To restrain from practicing podiatry. Check with County Attorney.
State of Iowa vs. Leo Sturmer	Page	To restrain from practicing medicine. Check with H. B. Carlson—Board of Health.
State of Iowa vs. John Lambert Drees	Carroll	To restrain from practicing dentistry. Check with County Attorney.
State of Iowa vs. Myron Roy Runnions	Woodbury	To restrain from practicing medicine. Check with County Attorney.
Arvid T. Temple vs. Alfred J. Kling, et al.	Scott	Foreclosure. Examine decree if advisable.
State of Iowa vs. Royal Canadian Beverage Co. et al.	Polk	To restrain from operating bottling works. Check with Joe Romans—Dept. of Agriculture.
Elk River Coal and Lumber Co. vs. A. B. Funk, et al.	Butler	Workmen's Compensation. Certiorari. Check with Senator Funk.
State of Iowa vs. Roscoe Moore	Polk	To restrain from practicing barbering. Check with Francis Kuble, Asst. County Attorney.
L. W. Laughlin vs. F. E. Sheldon & Co.	Polk	To restrain Secretary of State from granting reinstatement of corporation. Check with L. W. Laughlin, Attorney at Mt. Ayr.
State of Iowa vs. Town of Maxwell	Story	To recover amount paid examiners. File suit.
State of Iowa vs. J. W. McCann	Dallas	To restrain from practicing medicine. Check with Herman Carlson.
State of Iowa vs. Lewis Levy	Cedar	To restrain from practicing optometry. Check with Herman Carlson.
State of Iowa vs. Don C. Knee	Harrison	To restrain from practicing chiropractic. Check with Herman Carlson.
State of Iowa vs. Exline Fuel Co., et al.	Appanoose	To dissolve corporation. Check with County Attorney.
C. C. Harrah vs. Mrs. Alex Miller, et al.	Polk	To restrain from interfering with plaintiff's trucks. File pleading.
Nancy Ellen Roberts vs. Hosea B. Horn, et al.	Davis	To divest liens of state. Check with County Attorney.

CASES PENDING IN DISTRICT COURT—Continued

Name	County	Notation
Nancy A. Bradley vs. Ira C. Beeler	Poweshiek	Priority of liens. Check with County Attorney.
Alfred McBurney vs. Board of Osteopathic Examiners, et al.	Polk	To restrain from practicing optometry. Check with Herman Carlson.
State of Iowa vs. John B. Eyerly, et al.	Polk	Suit for judgment on bond. Prepare for trial.
Don C. White vs. Board of Examiners	Woodbury	To restrain issuance of certificates without examination. Temporary injunction by agreement. Resist permanent injunction.
State of Iowa vs. John E. Holmes		Disbarment.
State of Iowa vs. Marion Munson	Louisa	To determine rights of inheritance. State Reformatory inmate.

CASES PENDING BEFORE INDUSTRIAL COMMISSIONER

Name	County	Notation
C. D. Royal vs. Central Iowa Fuel Co.	Lucas	Workmen's compensation. Follow up.
Herman Schmidt vs. State of Iowa	Van Buren	Workmen's compensation. Check with Ralph Young.
State of Iowa vs. Henry J. Faber	Lee	Workmen's compensation. Await trial.

DISTRICT COURT

Name	County	Notation
Board of Education vs. Hendricks	Buchanan	Foreclosure of mortgage. Closed.
Board of Education vs. Edward McCabe	Johnson	Foreclosure of mortgage. Closed.
State of Iowa vs. Floerschinger	Johnson	Foreclosure of mortgage. Closed.
National Surety Co. of N. Y.	Polk	Receivership. Closed.
Farmers Union Mutual Ins. Co.	Polk	Receivership. Closed.

In the matter of the condemnation of certain lands for benefit of Board of Control for use of State Quarry	Webster	Closed.
In the matter of the condemnation of certain lands for benefit of Board of Control for use of State Penitentiary at Fort Madison	Lee	Closed.
Radio matter in Federal Communications Commission re: Station WOI at Ames		Closed.
National Life Insurance Company	Polk	Receivership. Closed.

SCHEDULE "F"—MUNICIPAL COURT

Case	County	Notation
Board of Control vs. Pomerantz	Polk	Action on an account. Pending.
Board of Control vs. Brandenburg	Polk	Action on an account. Pending.

SCHEDULE "G"—UNITED STATES DISTRICT COURT

Case	County	Notation
Modern Woodmen of America vs. Murphy, et al.	Polk	Enjoin collection of taxes.
Woodmen of the World vs. Murphy, et al.	Polk	Enjoin collection of taxes.

(Waiting for Court's decision)

SCHEDULE "H"—CIRCUIT COURT OF APPEALS

Case	County	Notation
United States of America vs. First Capital National Bank		To determine liability for admissions tax to university football games. Pending.

SCHEDULE "I"—OUT OF STATE CASES

Case	County	Notation
Claim in Estate of Gallagher		Superior Court at Los Angeles.
Home for Feeble Minded		Claim of Board of Control in estate. Pending.

SCHEDULE "J"

REPORT OF OFFICE OF SPECIAL ASSISTANT ATTORNEY GENERAL AND COUNSEL TO THE IOWA STATE HIGHWAY COMMISSION—PERIOD BEGINNING JANUARY 1, 1935 AND ENDING JANUARY 1, 1937.

Mr. C. E. Walters of Toledo, Iowa, was the Special Assistant Attorney General and Counsel to the Iowa State Highway Commission from January 1, 1935 to February 15, 1936, when he was appointed District Judge and was succeeded by D. Myron Tripp, of Newton, Iowa, who continued in the same capacity until his unfortunate accidental death on May 15, 1936. Mr. Tripp was succeeded by Mr. Henry N. Graven of Greene, Iowa.

Condemnation appeals pending January 1, 1935	56
Appeals instituted during 1935	14
Appeals instituted during 1936	23
	93
Appeals tried or otherwise disposed of during 1935	40
Appeals tried or otherwise disposed of during 1936	24
	64
Appeals pending January 1, 1937	29
Foreclosures pending January 1, 1935	24
New foreclosures during 1935	31
Foreclosures during 1936	6
	61
Disposed of during 1935	25
Disposed of during 1936	26
Still pending January 1, 1937	10
Percentage cases pending January 1, 1935	10
New during 1935	26
New during 1936	13
	49
Settled during 1935	14
Settled during 1936	26
	40
Still pending January 1, 1937	9
Miscellaneous cases pending January 1, 1937—Injunction, etc.	8
Other cases pending (Sioux City Viaduct cases)	13
Quiet Title actions settled during 1936	2
Condemnation appeals in Supreme Court	4
Condemnation proceedings instituted during 1935 (parcels)	78
Condemnation proceedings instituted during 1936 (parcels)	125
Parcels or lots acquired under condemnation 1935	54
Parcels or lots acquired under condemnation 1936	79
Parcels purchased or dismissed—1935	24
Parcels purchased or dismissed—1936	36
Acres acquired under condemnation—1935	115.95
Acres acquired under condemnation—1936	142.25
City lots or parts of lots acquired in 1935	12
City lots or parts or lots acquired in 1936	4

SCHEDULE "K"—REPORT OF BUREAU OF INVESTIGATION

GLEN L. SCHMIDT, 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 of 1935 and 1936 as per Chapter 143 of the 43rd General Assembly of the State of Iowa.

County	1935				1936			
	Accidents	Suicides	Murders	Justifiable homicides	Accidents	Suicides	Murders	Justifiable homicides
Adair								
Adams	6	3			2	4		
Allamakee	2				1			
Appanoose								
Audubon	4	1			1			
Benton	13				5	3		
Black Hawk								
Boone	12	3	1		10	2		
Bremer	6	1			7	2		
Buchanan	8	8	2		2	6	1	
Buena Vista	3	1			7			
Butler	2	1			4	2		
Calhoun	5	7	1		1	2	2	
Carroll	4							
Cass	2	3			6	4		
Cedar					2			
Cerro Gordo	16	3	1		13	3		
Cherokee	3	2			2	3		
Chickasaw	2							
Clarke	3	1			2			
Clay	1	4			3	3		
Clayton	6	2						
Clinton	23	10	1		16	9		
Crawford								
Dallas	6	1						
Davis	1	1			2			
Decatur	3	2			4			
Delaware					1			
Des Moines	8	11				4		
Dickinson								
Dubuque	24	7	2		17	2	1	
Emmet								
Fayette	4				3	4		
Floyd	4	2			3	2		
Franklin					7	4		
Fremont	2							
Greene								
Grundy						1		
Guthrie	3	1			1			
Hamilton					1			
Hancock	4	2	2			1	1	
Hardin								
Harrison		2			1			
Henry	2				1			
Howard								
Humboldt					1			
Ida	1	1	1		1	2		
Iowa	7	2			4	1		
Jackson	4	4	1		2	3		
Jasper	10	6			15	4	2	
Jefferson	4	3						
Johnson	6	3						
Jones	3	1					1	
Keokuk								
Kossuth	8	3	1		13	2		

SCHEDULE "K"—Continued

County	1935				1936			
	Accidents	Suicides	Murders	Justifiable homicides	Accidents	Suicides	Murders	Justifiable homicides
Lee								
Linn	24	15	3		28	8	2	
Louisa	1	2				2		
Lucas	4	1			1			
Lyon	6	3			2	1		
Madison	1				1	1		
Mahaska	1							
Marion	7	4	1		1			
Marshall					10	6		1
Mills	3	2	1		3			
Mitchell		1						
Monona	2	1			1	1		
Monroe		1						
Montgomery	6	3			1	2		
Muscatine	11	1			6			1
O'Brien	1	1			2	1		
Osceola								
Page	2	2	1			1		
Palo Alto	1	3			4	1		
Plymouth	3		2		1	1		
Pocahontas								
Polk	89	19	5	4	80	34	4	3
Pottawattamie	11	5			7		1	
Poweshiek					2	3		
Ringgold	1	4			1			
Sac	1	1						
Scott	36	24	4		18	8		
Shelby	4	5			3	4		
Sioux								
Story	8	5			6	4		
Tama	6	5			11	1		
Taylor	2	2	1		4		1	
Union		1	1					
Van Buren	1	1			2			
Wapello	19	7	1		8	5		
Warren	8	5			4	1	1	
Washington								
Wayne	1				3			
Webster	6	1			8	6		
Winnebago					3	2		
Winneshiek	3	1			4	2		
Woodbury					1			
Worth	1	2				2		
Wright		1						
Totals	495	231	33	4	387	170	17	5

LIST OF PERSONS COMMITTED TO FORT MADISON FOR MURDER DURING THE YEARS 1935 AND 1936.

Name	Degree	County	Date
Louis Clay	First	Johnson	Feb. 8, 1935
Joel Jones	First	Linn	Mar. 29, 1935
William Bean	Second	Sac	Mar. 30, 1935
Dewey Berlovich	First	Polk	April 11, 1935
John K. Manley, Jr.	Second	Monroe	May 25, 1935
Clarence Price	First	Mills	May 31, 1935
Donald Lammey	First	Polk	Sept. 19, 1935
Marlo Heinz	First	Dubuque	Dec. 1, 1935
Van Cawley	First	Polk	Jan. 1, 1936
Floyd Horton	First	Taylor	April 26, 1936
Emil Hocke	Second	Scott	April 27, 1936
Alonzo Daniels	First	Lee	May 4, 1936
Rodney Pace	First	Buchanan	June 2, 1936
Allen Wheaton	First	Pottawattamie	July 6, 1936
John Mercer	First	Cedar	Aug. 5, 1936
Walter Price	First	Calhoun	Aug. 26, 1936
Maynard Lennox	First	Clayton	Sept. 2, 1936
Grover Wynn	First	Linn	Sept. 26, 1936
Marvin A. O'Shaughnessy	First	Calhoun	Oct. 15, 1936
Laymon Tatum	First	Polk	Oct. 20, 1936
Emmett Patterson	Second	Dallas	Nov. 30, 1936

FOR MANSLAUGHTER

Name	County	Date
Robert R. Thompson	Johnson	Jan. 12, 1935
John O. Clark	Woodbury	Feb. 22, 1935
Adolph Martens	Jasper	April 20, 1935
Charles H. Brown	Fremont	Mar. 16, 1936
Bryan Van Dorn	Appanoose	Sept. 16, 1936
Harry Evans	Jasper	Sept. 25, 1936
James Commodore	Polk	Oct. 19, 1936
Donald Wernett	Dubuque	Nov. 10, 1936

AT ANAMOSA FOR MURDER

Name	Degree	County	Date
Paul Hake	First	Louisa	Nov. 2, 1935
Garry Ferguson	Second	Marion	Jan. 12, 1935
LeRoy Eubanks	Second	Polk	April 5, 1935
Edwin Flickinger	Second	Cherokee	Nov. 22, 1935
Leonard Cota	First	Dubuque	Nov. 2, 1935
Robert White	Second	Scott	Nov. 2, 1935
George Davis	Second	Scott	Nov. 2, 1935
Lester Mohr	Second	Ida	Nov. 2, 1935
Tom Sexton	First	Johnson	Nov. 2, 1935
Charles Butler	Second	Linn	Nov. 2, 1935
Russell Hockenberry	Second	Scott	Nov. 2, 1935
John Kingery	First	Marion	Nov. 2, 1935
Ed J. Farrant	First	Polk	Nov. 2, 1935
Willard Cooper	First	Polk	Nov. 2, 1935
E. C. Watson	First	Polk	Nov. 2, 1935
(Note: All of the above, with the exception of LeRoy Eubanks, were transferred to Anamosa from Fort Madison.)			
Gus Kull	Second	Woodbury	May 1, 1936
William H. Boyd	First	Polk	Sept. 12, 1936

AT ANAMOSA FOR MANSLAUGHTER

Name	County	Date
Joe Dorgan	Scott	Jan. 15, 1935
Orlando T. Strother	Woodbury	Mar. 12, 1935
J. H. Hunt	Black Hawk	Sept. 10, 1935
John T. Benge	Wapello	Sept. 17, 1935
Frank Travis	Wapello	Oct. 5, 1935
Bert Johnson	Page	June 23, 1936
Lawrence Johnson	Pottawattamie	Oct. 8, 1936
Joe Siegel	Woodbury	Oct. 31, 1936

AT ROCKWELL CITY FOR MURDER

Name	Degree	County	Date
Ellen DeLong	First	Fayette	June 13, 1935
Lorraine A. Zoller	Second	Dubuque	July 9, 1935
Pearl Shine	First	Clayton	Sept. 1, 1936
Anna Johnston	First	Taylor	Mar. 14, 1936

AT ROCKWELL CITY FOR MANSLAUGHTER

Name	County	Date
Pearl Dale Johnson	Ringgold	Oct. 3, 1936

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—1935

Adultery	2
Arson	2
Assault to commit rape	8
Assault to commit manslaughter	1
Assault to commit murder	2
Assault to maim	1
Assault with intent to rob	8
Attempt to break and enter	6
Bootleg	2
Breaking and entering	56
Breaking and entering, a car	3
Burning automobile to defraud insurer	1
Burglary	1
Burglary with aggravation	1
Burglary with explosives	1
Carrying concealed weapons	1
Conspiracy	3
Criminally insane	1
Desertion	2
Entering bank to rob	6
Escape from officer	1
Escape	10
False pretenses	5

False drawing and uttering of checks	1
Forgery	17
Forged auto registration	1
Great bodily injury	2
Incest	1
Jail break	8
Larceny	54
Larceny nighttime	16
Larceny of domestic animals	13
Larceny of motor vehicle	34
Larceny of motor vehicle and breaking and entering	1
Larceny of poultry	18
Larceny from person	3
Lascivious acts with children	6
Malicious mischief	1
Manslaughter	5
Murder—first degree	7
Murder—second degree	8
Operating motor vehicle while intoxicated	5
Operating motor vehicle without owner's consent	14
Perjury	3
Petty Larceny	2
Possession of burglar tools	1
Rape	15
Receiving stolen property	3
Robbery	19
Robbery with aggravation	21
Safe keeping	1
Sodomy	2
Uttering forged instrument	11
Returned from temporary parole	1
Violation of parole	38
Returned from escape	1
Total	457

FORT MADISON—1935

Adultery	3
Arson	1
Assisting prisoner to escape	2
Arson to defraud insurer	1
Assault to commit great bodily injury	11
Assault to commit felony	1
Assault to commit manslaughter	4
Assault to commit mayhem	1
Assault to commit murder	2
Assault to commit rape	8
Assaul to commit robbery	4
Attempt to break and enter	9
Being a common thief	2
Bootlegging	5
Breaking and entering	58
Breaking and entering a car	3
Breaking and entering a dwelling house	3
Breaking and entering and malicious mischief	1
Breaking and entering nighttime	1
Breaking jail	2
Burglary	1
Burglary with aggravation	3
Burglary with explosives	3
Cheating by false pretenses	2
Child desertion	2

Carrying concealed weapons	4
Concealing stolen property	1
Conspiracy	15
Common thief	1
Desertion	3
Embezzlement	4
Embezzlement of mortgaged property	1
Entering bank with intent to rob	5
Escape from penitentiary	6
Escape from jail	7
Escape from custody of officer	1
False pretenses	2
Forgery	25
Illegal transportation of intoxicating liquor	1
Illegal possession	4
Habitual criminal	1
Incest	5
Interfering with administration of justice	1
Keeping house of ill fame	2
Larceny	37
Larceny of chattels	1
Larceny of domestic animals	6
Larceny of domestic fowls	30
Larceny in the day time	6
Larceny in the nighttime	12
Larceny from building	2
Larceny of motor vehicle	18
Larceny of motor vehicle and domestic fowl	1
Larceny by trick	1
Larceny from person	1
Lascivious acts with child	10
Liquor nuisance	2
Malicious mischief	1
Maiming and disfiguring horses	1
Manslaughter	3
Murder—first degree	7
Murder—second degree	2
Obtaining money by false pretense	8
Obtaining property by false pretense	3
Operating motor vehicle while intoxicated	4
Operating motor vehicle without owner's consent	1
Perjury	1
Possession of burglary tools	2
Possession of forged checks	1
Possesion of forged instruments	2
Rape	15
Receiving stolen property	12
Resorting to house of ill fame	1
Returned from escape	11
Returned by order of court	19
Robbery	14
Robbery with aggravation	25
Robbery with aggravation and kidnapping	2
Sodomy	2
Swindling	1
Transferred from Anamosa	4
Uttering false checks	5
Uttering forged instruments	12
Violation of liquor control act	1
Violation of parole	15
Total	524

ROCKWELL CITY—1935

Adultery	2
Assault to commit great bodily injury	1
Assault to commit manslaughter	1
Attempt to commit arson	1
Bigamy	1
Bootlegging	1
Cheating by false pretenses	1
Conspiracy	2
Displaying illegal license plates on motor vehicle	1
Drunkenness and vagrancy	1
Exposing another to infection by sexual intercourse	1
Forgery	2
Grand larceny	1
House of ill fame	2
Illegal possession of intoxicating liquor	4
Illegal possession of narcotic drugs	1
Keeping a nuisance	1
Larceny	4
Larceny from building N. T.	1
Larceny of domestic fowls	1
Larceny D. T.	3
Larceny from person	2
Larceny of property	1
Larceny of motor vehicle	2
Lewdness	3
Maintaining a liquor nuisance	3
Murder—first degree	1
Murder—second degree	1
Operating motor vehicle while intoxicated	2
Obtaining money by false pretenses	1
Possession of obscene literature	1
Prostitution	2
Receiving and aiding in concealing stolen property	1
Return from escape	3
Return from parole	1
Soliciting	3
Transferred from Mitchellville	2
Uttering forged instrument	1
Vagrancy	1
Violation of Iowa liquor laws	3
Total	67
Anamosa	457
Fort Madison	524
Rockwell City	67
Grand Total	1,048

ANAMOSA—1936

Adultery	1
Affixing false signature	1
Aiding inmate	1
Arson	1
Assault to commit rape	2
Assault to commit manslaughter	1
Assault with intent to rob	2
Attempt to break and enter	4
Bigamy	1
Breaking and entering	48
Burglary	1

Burglary with aggravation	1
Carrying concealed weapons	1
Carnal copulation with beast	1
Child desertion	1
Conspiracy	1
Desertion	1
Embezzlement	1
Escape	12
Failure to report auto accident	1
False pretenses	4
False drawing and uttering of checks	2
Forgery	13
Great bodily injury	8
Improper license plates	1
Jail break	4
Kidnapping	1
Larceny	46
Larceny nighttime	6
Larceny daytime	1
Larceny domestic animals	18
Larceny motor vehicle	26
Larceny of poultry	21
Larceny of property	1
Larceny from person	1
Lascivious acts with children	4
Malicious threat to extort	1
Manslaughter	3
Mayhem	1
Malicious injury to building	1
Murder—first degree	1
Murder—second degree	2
Operating motor vehicle while intoxicated	1
Operating motor vehicle without owner's consent	12
Petty larceny	1
Possession of burglar's tools	1
Rape	2
Receiving stolen property	1
Robbery	10
Robbery with aggravation	1
Safe keeping	3
Uttering false checks	3
Uttering forged instrument	6
Returned from escape	7
Returned as insane	1
Returned from appeal bond	1
Returned for violation of parole	24
Total	323

FORT MADISON—1936

Adultery	1
Aiding in concealing stolen property	1
Assault to commit great bodily injury	4
Assault to commit felony	1
Assault to commit manslaughter	2
Assault to commit murder	1
Assault to commit rape	10
Assault to commit robbery	6
Attempt to break and enter	9
Bigamy	1
Breaking and entering	31
Breaking and entering—a car	7

Bootlegging	3
Breaking jail	3
Burglary	4
Cheating by false pretense	1
Child desertion	2
Carrying concealed weapons	3
Conspiracy	5
Conspiracy to commit a felon	2
Desertion	3
Embezzlement	5
Escape from penitentiary	7
Escape from jail	2
Escape from officer	1
Extortion	1
False pretenses	4
Forgery	27
Going armed	1
Grand larceny	10
Illegal transportation of intoxicating liquor	1
Habitual criminal	1
Illegal possession of liquor	1
Incest	5
Kidnapping	2
Larceny	40
Laceny of property	1
Larceny domestic animals	5
Larceny domestic fowls	25
Larceny, from person	1
Larceny, nighttime	6
Larceny of motor vehicle	14
Larceny by embezzlement	2
Lascivious acts with child	9
Liquor nuisance	1
Malicious mischief	1
Malicious injury to building	1
Malicious injury to motor vehicle	1
Manslaughter	5
Making false entry	2
Murder—first degree	11
Murder—second degree	2
Obtaining money by false pretense	10
Operating motor vehicle while intoxicated	6
Operating motor vehicle without owner's consent	6
Petty larceny	1
Poisoning food	1
Possession of stolen property	2
Rape	10
Receiving stolen property	8
Return from escape	12
Returned by Board of Control	2
Returned by order of court	6
Robbery	8
Robbery with aggravation	5
Safekeeping	1
Soliciting	1
Sodomy	2
Selling mortgaged property	1
Transferred from Anamosa	9
Uttering false checks	9
Uttering forged instruments	12
Returned for violation of parole	14
Total	421

ROCKWELL CITY—1936

Adultery	5
Bigamy	2
Bootlegging	2
Defrauding insurers	2
Disorderly house	2
Extortion	1
Illegal possession of intoxicating liquor	2
Incorrigible	2
Larceny	3
Larceny from building, nighttime	1
Larceny of poultry	1
Larceny of motor vehicle	1
Lewdness	4
Maintaining a liquor nuisance	6
Manufacturing beer for sale	1
Manslaughter	1
Murder—first degree	1
Nuisance	1
Operating motor vehicle while intoxicated	1
Operating motor vehicle without owner's consent	1
Possessing stolen property	2
Possessing counterfeit papers	1
Prostitution	3
Return from escape	1
Return from parole	3
Safekeeping	2
Setting fire to chattels to defraud insurer	1
Soliciting	3
Uttering forged instrument	1
Uttering false checks	1
Violation of liquor control act	2
Total	60
Total from January 1 to November 30, 1936 at Anamosa	323
Total from January 1 to November 30, 1936 at Fort Madison	421
Total January 1 to November 1, 1936, at Rockwell City	60
Total prisoners received in 1936	804

SUMMARY OF STOLEN AUTOMOBILES

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

	1935			
	Total Number	Average Estimated Value	Average Total Estimated Value	Total Number Not Recovered
Number of cars stolen	1,375	$400.00	$550,000.00	
Number of cars recovered	1,244	400.00	497,600.00	
Number of cars stolen, not recovered				131

Estimated value of cars stolen and not recovered during 1935.....$52,400.00

1936

	Total Number	Average Estimated Value	Average Total Estimated Value	Total Number Not Recovered
Number of cars stolen.....	1,154	$400.00	$461,600.00	
Number of cars recovered.....	1,024	400.00	409,600.00	
Number of cars stolen, not recovered				130

Estimated value of cars stolen and not recovered during 1936.....$52,000.00

PAROLES

The following is a summary of the paroles granted from the different penal institutions of the state for the years 1935 and 1936:

ANAMOSA

Paroled—1935	250	
Paroled—1936 to November 30, 1936	159	
		409

FORT MADISON

Paroled—1935	122	
Paroled—1936 to November 30, 1936	142	
		264

ROCKWELL CITY

Paroled—1935	34	
Paroled—1936 to November 30, 1936	22	
		56
Grand Total		729

ABSCONDERS FROM PAROLE

ANAMOSA—1935 AND 1936

No. 13896.....Emil Emeringer
No. 13480..... Edward Erps
No. 13577 .....Robert Hansen
No. 14338.....Wm. G. Wright
No. 13526..... Gayle Cain
No. 14542.....William Aldrich
No. 13467.....Edward Russell
No. 13866 .....Earl Parr
No. 14758.....Clarence Tuft
No. 13738 .....Bernard Riley
No. 14344..... William Hahn
No. 15035.....Charles Brock
No. 14357.....Eddie Davis
No. 14360.....Joseph Hepner
No. 12835.....Herbert T. Scovel
No. 14108.....W. L. Rader
No. 14145.....R. Darrell Cooley
No. 14250.....Jack Darragh

No. 13861.....George L. Belew
No. 14370.....Ivyl Hewitt
No. 14827.....Eldred Widel
No. 14564.....David Simon
No. 13951.....Richard Ross
No. 15386.....Arthur Kreischer
No. 14128.....George Zimmerman
No. 15450.....Wayne Logston
No. 15791.....E. G. Barger
No. 15080.....Hjalmer Anderson

ROCKWELL CITY—1935

No. 723.....Ruby Maxine Cordt

State of Iowa
1936

TWENTY-FIRST BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1936

EDWARD L. O'CONNOR
Attorney General

Published by
THE STATE OF IOWA
Des Moines

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EVELYN SHAY	File Clerk
VERNIECE MURPHY	File Clerk
SYLVIA PEROWSKY	File Clerk
MILDRED MOONEY	Stenographer
DELLA HARPER	Stenographer

SOME OF THE

IMPORTANT OPINIONS

OF THE

ATTORNEY GENERAL

FOR

Biennial Period
1935-1936

OPINIONS OF THE ATTORNEY GENERAL

EXECUTIVE COUNCIL: EMPLOYMENT OF POLICE, JANITORS AND EMPLOYEES FOR STATE BUILDINGS: Executive Council does have authority to authorize employment of such persons and to pay expense of same out of any money in State Treasury not otherwise appropriated, all as contemplated by Section 306 of the 1931 Code of Iowa.

January 2, 1935. *Governor of Iowa:* You have requested an opinion from our department on the following proposition:

You ask if the Executive Council of the State can by proper resolution under the provisions of Sections 306 and 307 of the 1931 Code of Iowa, authorize the employment of sufficient police, janitors and other employees, to properly preserve and adequately protect the buildings that are necessary for use of the State of Iowa in the proper administration of the State government and have the expenses for the same paid out of Section 306 of the 1931 Code of Iowa. You further state that for several years prior to 1933 that these policemen, janitors and employees for State buildings were authorized by the Executive Council and the expenses for their salaries were paid for out of Section 306 of the 1931 Code of Iowa.

You will remember that a similar question was asked our department by the Honorable Mrs. Alex Miller, Secretary of State, some time in July, 1933, and that our department issued an opinion to Mrs. Miller under date of August 1, 1933, which opinion is herein set out as follows:

"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 45th 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 the 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."

Since the issuance of the Attorney General's opinion on this matter under date of August 1, 1933, the necessary funds for the payment of these salaries and expenses were taken care of by the transfer from the Executive Council's appropriation under the provisions of Section 59 of Chapter 188 of the Laws of the 45th General Assembly. However, it now appears that there will be insufficient funds in this appropriation to fully meet these expenses for the balance of this biennial period and that unless the expense for these necessary employees can be paid under and by virtue of the provisions of Section 306 of the 1931 Code of Iowa, that the State will be forced to dispense with the services of these necessary employees and that the State property and buildings cannot be properly preserved and protected in accordance with the laws of the State of Iowa.

Since the opinion of the department under date of August 1, 1933, was issued, the Supreme Court of Iowa has handed down a ruling which throws new light upon this question. On December 12, 1933, the Supreme Court of Iowa in the case of Statter vs. Herring, et al., No. 42314, reported in 251 N. W., on pages 715, 716 and 717, held "there is no provision of law giving the State Custodian the authority to hire and discharge employees in his office." In the same opinion, the Supreme Court laid stress upon the fact that the State Custodian was appointed by the State Executive Council and was therefore merely an appointee of said Executive Council. Therefore, it must follow that there is a legal duty imposed upon the Executive Council to employ a sufficient number of police, janitors and other employees to preserve and adequately protect the State Capitol and grounds and other buildings used for the administration of the affairs of the State of Iowa. Of necessity, these duties cannot be performed by the Executive Council and their regular employees and therefore, the Executive Council must employ such persons for the protection of the property of the State of Iowa.

It is, therefore, the opinion of this department that the Executive Council of the State of Iowa does have the authority to authorize the employment of such persons and to pay the expense of the same out of any money in the State Treasury not otherwise appropriated, all as contemplated by Section 306 of the 1931 Code of Iowa.

This opinion necessarily overrules the opinion of our department issued to Mrs. Alex Miller, Secretary of State, on August 1, 1933, and the former opinion is hereby withdrawn.

JUDGES: SALARY: CONTESTED ELECTION: Judge Murray appointed Judge of 15th Judicial District to fill vacancy, November 1, 1932. Judge Tinley took office under certificate of election, December 1, 1932, and served till April 13, 1934 when District Court ruled that there had been no legal election. Supreme Court affirmed decision. Judge Tinley was paid for time he served. Is Judge Murray entitled to pay for his salary and expenses from December 1, 1932 to December 2, 1934 inclusive?

January 3, 1935. *State Comptroller:* We wish to acknowledge receipt of your request for an opinion on the following question:

The Hon. J. A. Murray was appointed Judge of the District Court of the Fifteenth Judicial District by the Hon. Dan Turner, Governor of Iowa, on

November 1, 1932, to fill the vacancy therein created by the death of the Hon. J. S. Dewell, the presiding judge. Judge Murray actually served as judge of this judicial district, holding regular terms of court therein until December 1, 1932, when the Hon. John P. Tinley took office as District Court Judge of the Fifteenth Judicial District, under certificate of election. Subsequently, a quo warranto action was filed in the District Court of Harrison County, Iowa, contesting Judge Tinley's title to this office. Judge Tinley actually served under this certificate of election until April 13, 1934, when the District Court of Harrison County ruled that there had been no legal election and that Judge Murray was the legally appointed judge to serve out the period of the vacancy. The case was appealed to the Supreme Court and a decision rendered in the Supreme Court recently affirmed the holding of the District Court of Harrison County. Judge Murray has actually held court since April 13, 1934, under this appointment, until December 3, 1934, when he received the certificate of election to fill the short term until January 1, 1935. While Judge Murray was serving under this certificate of election, he was paid salary and expenses from December 3 to December 31, inclusive. The 45th General Assembly, by legislative enactment, made extra provision for the payment of Judge Tinley's salary during the period that he acted as a District Court Judge after he had received the certificate of election. Judge Tinley has already been paid for the time that he served under his certificate of election and until April 13, 1934. The money that was regularly appropriated by both the 44th and 45th General Assemblies of the State of Iowa for the payment of the judge's salary for the 15th Judicial District of the State of Iowa, from December 1, 1932, until December 3, 1934, has not as yet been paid to any judge of the 15th Judicial District insofar as this particular judgeship is concerned. The question that now arises is this: "Is Judge J. A. Murray of the 15th Judicial District of the State of Iowa entitled to pay for his salary and expenses from December 1, 1932, to December 2, 1934, inclusive?"

You are advised that a similar question was presented to this department relative to the payment of the salary and expenses of the Hon. George Claussen who was appointed in October of 1932 to fill the vacancy created by the death of one of the Supreme Court Judges. Our department issued an official opinion to your department on November 14, 1933, holding that Judge Claussen was entitled to his salary during the time that the Hon. Hubert Utterback was serving as Justice of the Supreme Court under a certificate of election.

In the Claussen-Utterback case, the Legislature made similar provision for the pay of Judge Utterback when he was serving under that certificate of election and until the quo warranto action was decided holding that Judge Claussen was entitled to the office.

We can see no difference in the legal questions involved in the Claussen-Utterback case than the one presented in the Murray-Tinley case that is now before us. We respectfully refer your department to the opinion which is already on file in your office, issued by our department to you on November 14, 1933, wherein we analyzed all of the legal questions bearing upon this matter and cited a number of Supreme Court decisions supporting our opinion.

It is, therefore, the opinion of this department that the Hon. J. A. Murray is entitled to pay as a District Court Judge of the Fifteenth Judicial District

from December 1, 1932, to December 2, 1934, inclusive, and that the same should be paid from the moneys on hand appropriated for the payment of salaries and expenses of District Court Judges.

INSURANCE COMMISSIONS: IOWA BANKERS ASSOCIATION: Whether insurance commissions earned by Secretary of Bankers Association by writing bank burglary insurance as well as bonds covering bank officials and employees, which is turned into the fund of association which is used to apprehend bank criminals, forgers, etc., would be construed as violation of Section 8666, Chapter 398 or any other section of Iowa Insurance Laws?

January 4, 1935. *Commissioner of Insurance:* We have your letter of December 28th, asking for our opinion on the following proposition:

"For many years, probably for a quarter of a century or more, the Secretary of the Iowa Bankers Association has been a general agent for one or more casualty insurance companies, writing bank burglary insurance as well as bonds covering bank officials and employees. The bank burglary policies are executed directly by the Secretary as agent of the insurance company and several different forms of bonds covering bank officers and employees are signed upon behalf of the company by the secretary in his individual capacity as agent. The secretary as agent makes no personal profit out of the agency but any commission that might be earned by him as such agent in his individual capacity is turned over by him to the Iowa Bankers Association and when they become part of the funds of the Association, is spent with other money in ferreting out, apprehending and prosecuting criminals that operate against banking institutions or their customers, such as check forgers, confidence men, counterfeiters, bank burglars and bank holdup criminals.

The association maintains two attorneys and for years these attorneys have been assigned here and there through Iowa to work under the direction of the Attorney General's office and with county attorneys, all without expense either to the State or the respective counties.

In your opinion, can the plans as above described under which the insurance commissions are turned over to this fund be construed as a violation of Section 8666, Chapter 398 which covers insurance companies, or any other section of the Iowa Insurance Laws?"

On January 5, 1934, we wrote to you, and in that opinion we construed Section 8666 of the Code of Iowa, 1931, and we traced the history of this code section, showing that it was originally enacted by the 23d General Assembly and known as Chapter 33 of the Laws of that General Assembly, and was amended a number of times at subsequent legislatures until the 34th General Assembly when it finally took its present form, the amendment in that Assembly being known as Section 13 of Chapter 18, and in that opinion, we held that the statute applied to all forms of insurance written under the statutes of this State.

The question propounded to us in your request then is not as to the kinds of insurance covered by this statutory provision, but whether the statute applies to the particular set of facts you have outlined. This requires a construction of the last clause of that code section, which is as follows:

"nor shall any such company or association or agent pay or allow, directly or indirectly, as an inducement to insure, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy or contract of insurance."

As pointed out in your request, no particular policyholder benefits from the fact that the commissions from this insurance instead of being retained by

regular selling agent, is placed into a fund for the purpose of the suppression of major crimes and offenses against the people and good order of the State as a whole and that if there is to be any benefit from such an organization which works in conjunction with the State, County and City officials in the apprehension and conviction of criminals and in the dissemination of information by police radio and other means for the detection and ultimate punishment of all types of criminals in this State, such benefit is to all citizens of this State in their safety in their homes and upon the public highways and in the hoped reduction of the cost of such insurance to all policyholders of every company in the State and that therefore, the benefit derived is to the entire public and not to any person or class of persons. So, there is, therefore, no inducement to the purchasers of this insurance as prohibited in the statutory clause above quoted.

It is, therefore, the opinion of this department that on the special facts here involved, your opinion, a copy of which you enclosed in your letter to us, is right and that the facts here do not constitute a violation of Section 8666 of the Code of Iowa, 1931, or any other section of the Iowa Insurance Laws.

LIQUOR COMMISSION: AUDITOR OF STATE: LIVING EXPENSES. It is the opinion of this department that the Iowa Liquor Control Commission could not legally pay the living expenses of the individual commissioners incurred while living in Des Moines, the seat of their official domicile or residence; nor the living expenses of the individual commissioners incurred while living at any residence or domicile other than that of Des Moines.

January 8, 1935. *Iowa Liquor Control Commission:* This will acknowledge your request for an opinion as to whether or not the Commission can legally pay the living expenses of the individual commissioners incurred while living in Des Moines.

The Iowa Liquor Control Act is found in Chapter 24 of the Acts of the 45th General Assembly, Extraordinary Session. The principle place of business of the Iowa Liquor Control Commission is determined by Section 6 of the Act to be in the city of Des Moines, Iowa. It is made the duty of the Executive Council, under that section, to provide suitable quarters or offices for the Iowa Liquor Control Commission in Des Moines, Iowa. It is a matter of common knowledge that the Iowa Liquor Control Commission have their offices in the Mulberry Building in the city of Des Moines, Iowa. The city of Des Moines is therefore constituted the seat of government insofar as the Iowa Liquor Control Commission is concerned and by the same token the city of Des Moines becomes the official residence or domicile of the individual commissioners composing the commission. Sub-section 4 of Section 5 of the Act provides, in part:

"Members and said secretary, assistants and/or employees of the Commission shall be allowed their actual and necessary expenses while traveling on the business of the Commission outside of their place of residence."

Your attention is also directed to the rules issued by the State Comptroller under the effective date of February 1, 1931, Rule No. 9 of which provides as follows:

"Officers and employees, whose residence is at some other place than their official domicile, will not be allowed expense while at such a residence or while traveling to or from the same."

It is, therefore, the opinion of this department that the Iowa Liquor Control Commission could not legally pay the living expenses of the individual commissioners incurred while living in Des Moines, the seat of their official domicile or residence; nor the living expenses of the individual commissioners incurred while living at any residence or the domicile other than that of Des Moines.

LIQUOR COMMISSION: AUDITOR OF STATE: COSTS OF AUDIT OF ACCOUNTS: It is the opinion of this department that the Auditor of State was empowered to make the audit herein referred to, that the audit was made with legal sanction, and that the Iowa Liquor Control Commission is obligated to pay the cost of same.

January 8, 1935. *Iowa Liquor Control Commission:* This will acknowledge receipt of your communication of the 3d instant asking for an opinion as to whether or not a bill from C. W. Storms, State Auditor, in the amount of $4,089.33, representing the costs of the audit of the accounts of the Iowa Liquor Control Commission should be paid.

You ask whether or not this bill can be legally paid under the Iowa Liquor Control Act. The statement enclosed covers an audit from August 18, 1934, to December 1, 1934, and includes 192 days' work of senior examiners and 110⅞ days' work by junior examiners.

Originally the audit of state departments was a duty imposed upon the Director of the Budget, as set forth in Chapter 21 of the Code of 1931. By enactment of Chapter 5 of the laws of the 45th General Assembly these duties of the Director of the Budget were transferred to the Auditor of State. Section 340 of Chapter 21 of the 1931 Code of Iowa provides that:

"The director shall annually, and oftener if deemed necessary, make a full settlement between the state and all state officers and departments and all persons receiving or expending state funds, and shall annually make a complete audit of the books and accounts of every department of the state." (The *Director* above referred to now being the *Auditor* of the State.)

A "department" to which reference has been made in Section 340 has been defined in Section 339 of the 1931 Code as follows:

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

By previous opinion of this department the Iowa Liquor Control Commission has been ruled to come within this definition. Under House File 292, now known as Chapter 24, Acts of the 45th General Assembly, Extraordinary Session, the Iowa Liquor Control Act came into being and Section 50 of this Act provides as follows:

"The auditor of state shall cause the financial condition and transactions of all offices, departments, stores, warehouses, depots and liquid transactions of special distributors of the Iowa Liquor Control Commission to be examined at least once each year by the state examiners of accounts and at shorter periods if requested by the commission, governor or executive council."

Section 51 of the same Act provides:

"All provisions of Chapter 7 of the Acts of the 45th General Assembly of the State of Iowa, relating to auditing of financial records of governmental subdivisions which are not inconsistent herewith are hereby made applicable to the Iowa Liquor Control Commission, the liquor transactions

of its special distributors and any of the offices, stores, warehouses and depots."

Only a cursory examination of Chapter 7 of the Acts of the 45th General Assembly establishes the fact that its provisions are applicable to the Iowa Liquor Control Commission as one of the departments of the State of Iowa.

It is therefore apparent that insofar as the right, power and duty of the Auditor of State to make the audit in question is concerned, he had such right under the provisions of Chapter 21 of the Code of 1931 and Chapters 5 and 7 of the Acts of the 45th General Assembly and it is equally apparent that the Iowa Liquor Control Commission likewise falls within the above provisions.

The rights, powers and duties of the Auditor of State originally found expression in the provisions of Chapter 10 of the Code of 1931 and Section 126 of that chapter made provision for reimbursements to the State Auditor for his expense in making the various audits required of his office. Section 126 was repealed and re-enacted into Section 8 of Chapter 7 of the Acts of the 45th General Assembly and it is as follows:

"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 official 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."

That Section 8 of Chapter 7, Acts of the 45th General Assembly, had direct application to the Iowa Liquor Control Commission is the express wording and construction of the Iowa Liquor Control Act as incorporated in Section 51, Acts of the 45th General Assembly, Extraordinary Session, Chapter 24.

It is therefore the opinion of this department that the Auditor of State was empowered to make the audit herein referred to, that the audit was made with legal sanction, and that the Iowa Liquor Control Commission is obligated to pay the cost of same.

LIQUOR COMMISSION: BOND PREMIUMS: It is the opinion of this department that employees posting bonds would have to bear the expense of the premiums on the same.

January 9, 1935. *Iowa Liquor Control Commission:* This will acknowledge your request for an opinion as to whether or not the Iowa Liquor Control Commission can legally pay the premium on the bonds written on its employees.

It is too well settled to require the citation of authorities, that the public monies of the state may not be expended in payment of the premium upon bonds of public officers or employees, without express statutory authority. The question, insofar as it concerns the members of the Iowa Liquor Control Commission or its employees, is covered by Section 16 of the Iowa Liquor Control Act, same being Chapter 24, Acts of the 45th General Assembly, Extraordinary Session, as follows:

"Sec. 16. The commissioners shall post a bond or bonds, at the expense of the State of Iowa, with such sureties as the Executive Council of the State of Iowa shall approve to guarantee to the State the proper handling and accounting of such moneys and merchandise and other properties as may be required in the administration of this act. It shall be the duty of the com-

mission to secure from all agents, servants, and employees of the commission holding positions of trust a bond or bonds with such sureties as the commission will approve adequate to guarantee to the state the proper handling and accounting of all moneys, merchandise and other properties."

It would seem clear, from the above section, that it was the legislative intent to enjoin upon the commissioners the posting of a bond at the expense of the state as a legal duty and to enjoin upon the commission, as a duty, the obtaining of a bond from such employees as the commission should determine were holding positions of trust. No statutory authority is therein granted to pay the premiums on bonds of any such employees as they should determine were required to post the same at the expense of the state and it is therefore the opinion of this department that such employees posting bonds would have to bear the expense of the premiums on the same.

LIQUOR COMMISSION: TRAVELING EXPENSES: Investigators of the Liquor Commission should file their traveling expenses with the liquor commission and their mileage and per diem witness fees with the Clerk of the Court in which they appear as witnesses. It is suggested that the investigators should then turn in or refund to the liquor commission all moneys received in the nature of court expenses and the same be then credited by the commission as against the traveling expense accounts of the various investigators.

January 9, 1935. *Iowa Liquor Control Commission:* This will acknowledge your request for an opinion asking whether or not the Liquor Commission can assess the traveling expenses of its investigators against the criminal cases in which they appear as witnesses.

Your request impresses us as calling more for a suggestion in bookkeeping than for a matter of legal construction. Rule 8 of the Rules adopted by the State Comptroller, effective as of February 1, 1934, provides, in part, as follows:

"Allowance for transportation by privately owned automobile is fixed by law at a flat rate of 5c per mile. This includes all expense of the auto. No other expense will be allowed. Allowance for transportation in State owned automobile will include all expenses of gasoline, oil, storage, washing, greasing and other necessary expense when receipts for same are attached to claim."

By statute, witnesses in criminal cases are entitled to their mileage and a per diem for court attendance. Your investigators should file their claims for these items with the Clerk of the court in which they appear in obedience to subpoenaes, court orders, or the request of prosecuting attorneys. Their expenses for gas, oil, hotel accommodations, meals, et cetera, should be filed with the liquor commission.

It is suggested that the investigators should then turn in or refund to the liquor commission all moneys received in the nature of court expenses and the same be then credited by the commission as against the traveling expense accounts of the various investigators.

HOME BUILDING & LOAN ASSOCIATION. AUDITS: ILLEGAL INVESTMENTS: Where officers and directors of an association make illegal investments with knowledge and consent of stockholders and the same come under supervision of State Auditor, it is a matter of policy for Auditor to determine whether immediate liquidation of the same should

be compelled or permit the association to carry the same over to a more advantageous time for disposal.

January 10, 1935. *Auditor of State:* This will acknowledge receipt of your favor of the 8th instant, asking for an opinion upon the following state of facts:

The Home Building & Loan Association of Fort Dodge invested, during 1927, $43,000.00 of their funds in bonds which in no way comply with the provisions of Section 9340-b1 of the Code of 1931. This section of the Code became effective under date of April 12, 1927. The evidential facts are wanting as to whether or not the investments were prior or subsequent to the enactment of said statute. During the years of 1927, 1928 and 1929 this Association was audited by the office of the State Auditor and the illegal investment aforesaid was a matter of common knowledge to said Auditor and his examiners. Between the years of 1929 and 1934 no examination was made of this association, due to a change in status from a local building and loan association to a domestic local building and loan association and so in 1934 when all associations were made of one class and an audit required under the supervision of the Auditor of the State, it was discovered upon a review of the record, that these illegal items were held and the matter called to their attention, advising them that these items were not in keeping with the statutory provisions governing same. The association now contends that in view of the fact that an audit has been made and knowledge of the investment had by the Auditor's office over a period of years and that because every annual statement has been submitted at the annual shareholders' meeting showing the statement of the investment of such funds, that the original acts of the directors in so investing has resulted in legal condonation of the investment. It further appears that at each shareholders' meeting a general resolution has been passed each year by the shareholders or stockholders of the association approving all actions of the board of directors and officers, transacted in the name of the association as shown by the books, records and files of the association and that the same were ratified, approved and confirmed.

Your question is as follows:

"Should we insist that the association immediately dispose of these illegal assets and the loss incurred through the disposal of such, be borne by the directors who were responsible for the illegal act, either severally or individually; or should we permit the association to carry the illegal investment until a more advantageous time for a release of the same and then, at the time of release, if any loss is incurred, permit the charging of same as a loss due to the operations of the corporation which would be a reduction in the earnings that such be distributed to the mutual shareholders thereof."

We doubt very much whether or not the facts presented to us either justify or require a legal construction. As distinguished from a matter of policy, it should be determined by your office in relation thereto.

The facts presented find reflection in the following legal principles:

"Where directors and officers, in making an investment, act in perfect good faith and without personal profit to themselves, and with the knowledge, consent and acquiescence of the shareholders or stockholders, the latter are generally speaking, estopped from claiming liability against the former." 14-A Corpus Juris 159.

In the case of Twin Lick Oil Co. vs. Marbury, U. S. 23, L. Ed. Pg. 328,

the Supreme Court of the United States held that a stockholder who had, 17 months after the alleged ultra-vires act of the board of directors, with full knowledge on the part of the stockholders of the act, complained, he was estopped and could not be heard to complain.

In Buchler vs. Blithe, 213 Fed. 880, it was held that a stockholder who waited three years, had acquiesced in the acts of the directors and would not be heard to complain.

Generally speaking, the rule is found to be that the stockholder must complain as soon as he knows of the ultra-vires act.

In the light of the facts presented and the application of these principles thereto, we are of the opinion that this matter should be determined by you as a matter of policy of your office. That is to say, it should be for your determination as a matter of policy whether you should insist that the association immediately dispose of the illegal investments at this time or permit the association to carry these investments until a more advantageous time for their disposal. It is really your problem, after all.

ANTICIPATORY WARRANTS:

1. Is there any doubt as to the legal right of the state to call the present outstanding issue and reissue them at the best possible price?
2. Is the suggested ten per cent certified check with application prescribed by statute or regulation, and could this requirement be modified?
3. Is the allocation of beer revenue to the payment of these warrants irrevocable so long as unpaid warrants are outstanding?

January 10, 1935. *Governor of Iowa:* I have your request of January 4th for an opinion from this department on the following question:

"The State Treasurer is now proposing to issue $3,500,000.00 of anticipatory warrants for the purpose of refunding a similar amount of warrants previously issued, which previous issue was sold to the Carleton D. Beh Company. Under the new proposal by the Treasurer of State, it is planned to advertise publicly for bids. The specific points and questions to be answered are as follows:

"1. Is there any doubt as to the legal right of the State to call the present outstanding issue and reissue them at the best possible price?
"2. Is the suggested ten per cent certified check with application prescribed by statute or regulation, and could this requirement be modified?
"3. Is the allocation of beer revenue to the payment of these warrants irrevocable so long as unpaid warrants are outstanding?"

You are advised that this office has received a similar official request from State Treasurer Leo J. Wegman. Hence, in this opinion, we will attempt to answer the legal questions presented by Your Excellency and also by State Treasurer Leo J. Wegman.

There are now anticipatory warrants outstanding issued against the state sinking fund for public deposits in the amount of $3,500,000.00. These anticipatory warrants were sold and delivered to the Carleton D. Beh Company of Des Moines, Iowa, and paid for by said company and are now owned by said company, which sale was made in accordance with the provisions of Sections 7420-b3 to 7420-b7, inclusive, of the 1931 Code of Iowa and in accordance with the valid amendments as passed by the 45th General Assembly. Under the provisions of the laws of the State of Iowa, there is no statutory requirement

that such an issue of anticipatory warrants must be first advertised for sale and sold at a public bidding or letting similar to the laws relating to the letting of contracts by the State Highway Commission, Printing Board or other public contracts. The sale to the Carleton D. Beh Company was a private one and under the laws of the State of Iowa as they now exist was entirely legal. The question now has arisen as to whether or not the State Treasurer has the power under the law to refund these anticipatory warrants by an additional issue of the same.

Section 7420-b3 of the 1931 Code of Iowa in its original form was 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 anticipatory warrants for the purpose of raising funds for the immediate payment of said claims, but said warrants, outstanding and unpaid, shall not exceed at any one time the sum of three million five hundred thousand dollars."

This section was amended by Section 3 of Chapter 138 of the Laws of the 45th General Assembly, which section is as follows, to-wit:

"Sec. 3. Section seven thousand four hundred twenty-b three (7420-b3) of Chapter 352-A1 of the Code, 1931, is hereby amended by striking the comma (,) after the word 'claims,' in line nine (9), and inserting a period (.) in lieu thereof, and by striking out the remainder of said section."

The effect of this amendment was to remove the $3,500,000.00 limitation in the issuance of said anticipatory warrants as originally provided for by Section 7420-b3 of the 1931 Code of Iowa. In Chapter 138 of the Laws of the 45th General Assembly, there was no saving clause incorporated in said act. Chapter 138 of the Laws of the 45th General Assembly, otherwise known as S. F. 487, was declared unconstitutional by the Supreme Court of the State of Iowa on July 18, 1933, in the case of *Hubbell, et al., vs. Herring, et al.*, reported in 249 Northwestern Reporter on page 430. Therefore, the amendment, which removed the $3,500,000.00 limitation in the issuance of such warrants, has no legal effect for the reason that the same has been declared unconstitutional by the Supreme Court as above pointed out. Hence, the limitation of $3,500,000.00 in the issuance of such warrants is still in full force and effect the same as it originally appeared in Section 7420-b3 of the 1931 Code of Iowa.

Section 7420-b3 of the 1931 Code of Iowa was further amended by Chapter 139 of the Laws of the 45th General Assembly, which amendment is as follows, to-wit:

"Section 1. Section seventy-four hundred and twenty-b three (7420-b3), Code, 1931, be and the same is hereby amended by inserting after the comma at the end of line nine (9) the following words 'and may issue such additional anticipatory warrants as may be necessary to refund or extend the maturity of outstanding warrants,'."

Chapter 139 of the Laws of the 45th General Assembly has never been declared unconstitutional or invalid and is still the law of the State of Iowa.

This Code section, 7420-b3 of the 1931 Code of Iowa, as amended by Chapter 139 of the Laws of the 45th General Assembly, is 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 anticipatory warrants for the purpose of raising funds for the immediate payment of said claims, and may issue such additional anticipatory warrants as may be necessary to refund or extend the maturity of outstanding warrants, but said warrants, outstanding and unpaid, shall not exceed at any one time the sum of three million five hundred thousand dollars."

It is apparently the law in Iowa that when a public body in this state has issued securities up to the limitation permitted by law, those securities cannot be funded by the sale of refunding securities. However, it is possible under the Iowa law to issue new funding or refunding securities for the purpose of exchanging the same for outstanding securities. Public bodies may exchange new bonds or warrants for outstanding obligations.

Heins vs. Lincoln, 102 Iowa 74.
Hibbs vs. Fenton, 255 Northwestern Reporter 688.

There is a distinction between a situation where funding bonds are issued in exchange for indebtedness and where funding bonds are sold and the proceeds applied in retiring indebtedness so far as regards the question of increasing the debt. What is true with reference to bonds is also true with reference to the anticipatory warrants which are involved in the question presented. This distinction is very ably pointed out by Justice Gray of the United States Supreme Court in the case of *Doon Township vs. Cummins* (1892) 142 U. S. 366, 12 S. Ct. 220, 222, 35 L. Ed. 1044. This was a case that was decided in the Supreme Court of the United States arising from litigation started in Lyon County, Iowa. The case involved the question of validity of refunding bonds issued by a "district township" that was already indebted beyond its constitutional limitation. Under the statute of 1880, Chapter 132, an independent school district or district township was authorized to issue bonds in accordance with the following provisions:

"Section 1. Any independent school district or district township now or hereafter having a bonded indebtedness outstanding is hereby authorized to issue negotiable bonds at any rate of interest not exceeding seven per cent per annum, payable semi-annually, for the purpose of funding said indebtedness, said bonds to be issued upon a resolution of the board of directors of said district: provided, that said resolution shall not be valid unless adopted by a two-thirds vote of said directors."

The holding that the district township of Lyon County could not issue such bonds because they would be increasing the indebtedness of said district beyond constitutional limitation, the Supreme Court of the United States in its opinion states as follows:

"By the terms of the statute of Iowa of 1880, c. 132, under which the bonds in question were issued, any independent school district or district township, having a bonded indebtedness outstanding, is authorized to issue negotiable bonds for the purpose of funding that indebtedness; and 'the treasurer of such district is hereby authorized to sell the bonds provided for in this act at not less than their par value, and apply the proceeds thereof to the payment of the outstanding bonded indebtedness of the district, or he may exchange such bonds for outstanding bonds, par for par.'

"There is a wide difference in the two alternatives which this statute undertakes to authorize. The second alternative, of exchanging bonds issued under

the statute for outstanding bonds, by which the new bonds, as soon as issued to the holders of the old ones, would be a substitute for and an extinguishment of them, so that the aggregate outstanding indebtedness of the corporation would not be increased, might be consistent with the constitution. But under the first alternative, by which the treasurer is authorized to sell the new bonds, and to apply the proceeds of the sale to the payment of the outstanding ones, it is evident that, if (as in the case at bar) new bonds are issued without a cancellation or surrender of the old ones, the aggregate debt outstanding, and on which the corporation is liable to be sued, is at once and necessarily increased, and, if new bonds equal in amount to the old ones are so issued at one time, is doubled; and that it will remain at the increased amount until the proceeds of the new bonds are applied to the payment of the old ones, or until some of the obligations are otherwise discharged.

"It is true that if the proceeds of the sale are used by the municipal officers, as directed by the statute, in paying off the old debt, the aggregate indebtedness will ultimately be reduced to the former limit. But it is none the less true that it has been increased in the interval; and that, unless those officers do their duty, the increase will be permanent. It would be inconsistent alike with the words, and with the object, of the constitutional provision, framed to protect municipal corporations from being loaded with debt beyond a certain limit, to make their liability to be charged with debts contracted beyond that limit depend solely upon the discretion or the honesty of their officers."

However, three United States Supreme Court Justices issued a dissenting opinion holding that the majority opinion placed a purely technical construction on the Iowa statute. In 1903, the Supreme Court of Iowa had occasion to refer to the above United States Supreme Court decision and also to analyze the dissenting opinion. This later Iowa case is the case of *Reynolds vs. Lyon County,* decided October 28, 1903, and reported in 121 Iowa 733, the opinion being issued by Justice Ladd. In this Iowa Supreme Court opinion the court cites the United States Supreme Court decision with approval and has this to say concerning the dissenting opinion:

"In the dissenting opinion this construction was denounced as purely technical, as the object of the statute was, not to create a new or increase the old indebtedness, but merely to change its form, and reduce the interest rate. The difficulty in this suggestion is that a new debt is for the time-being created, and one day's continuation of it in addition to that evidenced by the old bonds is as much within the condemnation of the letter and spirit of the Constitution as that of a year. It won't do to say that officers may be relied upon to use the proceeds derived from the sale of bonds to wipe out existing obligations. In that case they were not so applied. The very object of this article of the Constitution is to protect the interests of the people against their own improvidence and extravagance. If such bonds are not within the prohibition, it would be within the power of dishonest officials by indirection to circumvent the fundamental law, and through diversion of the proceeds of new bonds saddle both them and the outstanding debts as burdens on the people."

The latest announcement of the Supreme Court of Iowa on the point under consideration is in the case of *Hibbs vs. Fenton,* 255 Northwestern Reporter 688, which opinion was issued by Chief Justice Mitchell on June 23, 1934. In this latest Iowa Supreme Court case, the court was considering the question of the right and power of Appanoose County to issue funding bonds in exchange for outstanding warrants which the county was unable to pay because of lack of funds. At the time the board of supervisors attempted to issue the funding bonds for this purpose, Appanoose County was up to its consti-

tutional limitation of indebtedness. While the decision of the Supreme Court of Iowa in this case permitted Appanoose County to exchange the funding bonds for the outstanding warrants, yet the court made this observation:

"There is a distinction between a situation where funding bonds are issued in exchange for indebtedness and where funding bonds are sold and the proceeds applied in retiring indebtedness so far as regards the question of increasing the debt. This distinction is very ably pointed out by Justice Gray of the United States Supreme Court in the case of Doon Dist. Township v. Cumming (1892) 142 U. S. 366, 12 S. Ct. 220, 222, 35 L. Ed. 1044."

The above statement of law is to be found in 255 Northwestern Reporter on page 690.

It, therefore, appears to be the Iowa law, as announced in the above decisions from 1892 down to June 23, 1934, that when a public body has outstanding securities up to the limit permitted by law, such securities may not be refunded by the sale of refunding securities. This may be accomplished by an exchange of refunding securities for the outstanding securities in case the holders of the outstanding securities would be willing to surrender them for the new refunding securities. If the holders of such outstanding securities are unwilling to part with them on such a basis, then the public body cannot issue refunding securities for the purpose of selling them and using the proceeds for the purpose of paying off the old obligations.

Section 7420-b11 of the 1931 Code of Iowa provides as follows:

"*Termination of Interest.* After the sale of any series of warrants, the Treasurer of State shall, at least by the twentieth day of each month thereafter, if he has funds in the State sinking fund for public deposits sufficient to pay one or more of said outstanding warrants, mail to the purchaser or holder of said warrant or warrants at his post office address as shown by the record of sale, a notice that said warrant or warrants will be paid on presentation and that interest thereon will cease after the expiration of ten days from the mailing of said notice. Upon the expiration of ten days from the mailing of said notice interest shall cease on said warrant or warrants."

Under the provisions of the above quoted section of the Iowa law, it is apparent that the proceeds derived from the sale of the new issue of refunding anticipatory warrants would necessarily be held by the State Treasurer for at least ten days before the outstanding securities could be called and retired from the proceeds of the new issue. During this ten-day period, there would necessarily be seven million dollars ($7,000,000.00) in anticipatory warrants issued by the State Treasurer as obligations against the state sinking fund for public deposits in violation of the limitation as contained in Section 7420-b3 of the 1931 Code of Iowa in its present form.

In addition to the above provisions of law, I wish to call your attention to Section 1168 of the 1931 Code of Iowa which provides as follows:

"*Unauthorized Contracts.* Officers empowered to expend, or direct the expenditure of, public money of the State shall not make any contract for any purpose which contemplates an expenditure of such money in excess of that authorized by law."

This cannot legally be done under the Iowa law in view of our statutory limitation and in view of the decisions of our Supreme Court.

Therefore, it is the opinion of this department, in answer to the first ques-

tion, that there is a serious doubt as to the legal right of the state to call the present outstanding issue and reissue them by selling a new issue of refunding anticipatory warrants and applying the proceeds derived from such sale to the payment of the present outstanding anticipatory warrants.

In answer to your second question, we wish to state that the suggested ten per cent certified check to accompany the proposed bids is not prescribed by any specific statutory law of the State of Iowa. Such a requirement is governed by a reasonable regulation or rule adopted by the board, commission or official advertising for such bids.

In answer to your third question, we wish to state that the state sinking fund for public deposits is a trust fund created for certain definite and specific purposes. The moneys constituting this fund are derived from the following sources:

1. The two per cent interest on public deposits in depository banks.
2. The dividends received from receivership banks where the public bodies have assigned such claims to the State Treasurer for the use and benefit of the State sinking fund for public deposits.
3. From the revenue derived from beer licenses and the barrel tax as provided for by subsection b of Section 33 of Chapter 25 of the Laws of the 45th General Assembly in Extraordinary Session.

Section 7420-b9 of the 1931 Code of Iowa provides as follows:

"*Payment.* Said warrants and all interest thereon shall be payable by the Treasurer of State solely from the funds paid into said State sinking fund for public deposits, and said funds are hereby exclusively and irrevocably pledged to such payment in the consecutive order in which said warrants are issued."

When the license fees and barrel tax for the sale of beer within the State of Iowa have been collected by the State Treasurer and placed in the state sinking fund for public deposits, then said proceeds are exclusively and irrevocably pledged to the payment of outstanding anticipatory warrants in the consecutive order in which said warrants are issued, the same as the revenue collected from the interest on public deposits and the dividends received from receivership banks.

In case the present outstanding issues of $3,500,000.00 in anticipatory warrants are to be called and paid off from the proceeds of the sale of a new issue of refunding anticipatory warrants, provisions will have to be made therefor by legislative enactment because under the present state of our laws, this cannot now be done.

BEER BILL: ORDERS TAKEN AND SOLICITED: DISTINCTION BETWEEN CLASS "B" AND CLASS "C" PERMITS: ACCEPTANCE OF ORDERS BY TELEPHONE: DELIVERY FROM TRUCKS:

January 14, 1935. *County Attorney, Mason City, 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:

"May a class 'B' permit holder, under Chapter 25, Acts of the 45th General Assembly in Extraordinary Session, take orders by telephone or solicit orders from house to house for beer in case lots, and then deliver same to residents from his place of business?

"What is the distinction between a class 'B' permit holder and a class 'C'

permit holder, where such class 'C' permit holder accepts orders by telephone and makes delivery from their trucks?"

Please be advised that it is the opinion of this department that either a class "C" or class "B" permit holder may take orders over a telephone.

As we view it, the distinction between a class "B" and class "C" permit holder is as follows:

A class "B" permit holder may sell beer for consumption *on or off the premises* by the glass or bottle while a class "C" permit holder may sell for consumption *off the premises only.*

The sale of beer for consumption off the premises may be made in a number of methods, the grocery store having a class "C" permit may accept an order for a case of beer over the telephone the same as any other order for groceries. The same is true of a class "B" permit holder who would, by way of illustration, be a druggist. We fail to see a distinction of soliciting by radio, letter or personal solicitation.

LICENSES: DATED AND SIGNED ON SUNDAY: DOES THIS AFFECT VALIDITY OF LICENSES? Licenses of small loan companies effective from and after December 31, 1934. They were dated December 30, 1934, which was Sunday for no particular reason as they could have been dated December 31, 1934. Does this affect validity of licenses?

January 16, 1935. *Superintendent of Banking:* We have your request for an opinion on the following proposition:

The licenses of small loan companies are effective from and after the 31st day of December, 1934. In filling out these licenses for the signature of the Superintendent of Banking to sign, they were dated December 30, 1934, which is a Sunday. There was no particular reason for doing this as they could have been dated December 31, 1934. Does the fact that these licenses are dated on the 30th day of December, 1934, which is a Sunday, in any wise affect the validity of the licenses?

Section 4, Chapter 125 of the Acts of the 45th General Assembly, Extra Session, which is the small loan law, sets out the procedure of the Superintendent of Banking to follow after an application has been made to him by a small loan company and provides that if he shall find certain things, then "he shall thereupon issue and deliver a license to the applicant to make loans in accordance with the provisions of this act at the place of business specified in said application."

In the case of *Lyman vs. Walker,* 192 Iowa, 982, the court at page 996 quotes from Ruling Case Law, as follows:

"A distinction is made between judicial acts and those of a ministerial character, and it seems to be generally held that in the absence of the statute, ministerial acts performed on Sunday are valid."

In *Puckett vs. Guenther,* 142 Iowa, 35, the court held that the act of a clerk entering a judgment is a ministerial act and may therefore be done on Sunday, and on page 38, the court said:

"It has also been held that a ministerial act is not rendered void because performed on Sunday."

In the case of *State vs. Ryan,* 113 Iowa, 536, the notice was given by the state that a certain witness whose name was not endorsed on the indictment would be examined as a witness, the notice being given on Sunday, and the

court held that this was purely a ministerial act, and therefore, valid. And on page 538, the court said:

"While at common law, as has been seen, no judicial act could be done on Sunday, the authorities are practically unanimous that mere ministerial acts could be performed on that day, and this would seem to be the rule at the present time in the absence of any prohibitory statute."

In the case of *Nixon vs. City of Burlington*, 141 Iowa, 316, the last publication of a notice of resolution of necessity was published on Sunday and this was held to be legal as it was a ministerial act, and the court said on page 322:

"But this court is committed to the doctrine while the transaction of judicial business on Sunday where not clearly authorized is without authority, yet, mere ministerial acts may be lawfully performed on that date * * * * and this is to be the prevailing rule in the absence of any prohibitive statute."

A ministerial act is one distinguished from a judicial act and in Words and Phrases, a ministerial act is said to be the official action, the result of performing a certain and specific duty arising from fixed and designated facts.

In the case of *State, ex rel, Jones vs. Cook*, 73 S. W., 489, the Supreme Court held that under a statutory provision similar to the one set out above in regard to the issuance of licenses the issuance of a charter to a bank was a purely ministerial act.

The issue of a license then, by you being purely a ministerial act and there being no statute prohibiting the issuance of such license on Sunday, it is the opinion of this department that the licenses so issued by you are valid.

BOARD OF TRUSTEES: TOWNSHIP OFFICES: MANDAMUS: VACANCIES: A vacancy occurring in the Board of Trustees, it is the right and duty of the remaining members of the board to select a person to fill that vacancy, and in some jurisdictions the board may be compelled by writ of mandamus to fill the vacancy.

January 18, 1935. *County Attorney, Denison, Iowa:* Your letter of January 5th addressed to the Attorney General has been referred to me for reply. You state that a member of the Board of Trustees of Boyer Township in your county, whose term does not expire until next year, has resigned. You state that the two remaining trustees are unable to agree upon a successor to the member who has resigned, and you present the question how the vacancy may be filled in view of the inability of the two remaining members of the board to agree upon a successor to the member who has resigned.

Section 1152 of the Code, relating to vacancies in office, is in part as follows:

"Vacancies—How Filled. Vacancies shall be filled by the officer or board named and in the manner and under the conditions following:

"* * * * * * *

"7. Township Offices. In township offices including trustees, by the trustees, but where the offices of the three trustees are all vacant the County Auditor shall appoint."

The above section provides that where the offices of the three trustees are all vacant the county auditor shall appoint. Your question does not relate to such a situation; therefore, the auditor is without authority to make the appointment, and the statute above quoted expressly provides that in township offices, including trustees, the appointment to fill vacancies shall be made by the trustees except in the situation where the offices of the three

trustees are all vacant. It is our opinion that the power to appoint the third trustee rests solely and only with the two trustees now holding office.

Section 10 of Article 4 of the Constitution of the State of Iowa is as follows:

"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 the power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the General Assembly, or at the next election by the people."

We are of the opinion this section applies only where no mode is provided by the constitution or laws for filling such vacancy.

Section 1152 provides a mode for filling it, namely, by the action of the two remaining trustees. If some township office other than the office of trustee should be vacant, the three trustees would have the authority under this section to fill the vacancy, and yet if no two of them could agree, such action of the board would result in a deadlock and no appointment could be made.

The question naturally arises whether the two trustees who refuse to agree may be compelled by mandamus to make the appointment of a third member. Section 12440 of the Code, 1931, provides as follows:

"The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station."

Section 1152 of the Code provides that vacancies shall be filled by the officer or board named and in the manner and under the conditions thereinafter set out, but the board has large discretion as to whom it shall select. The law enjoins the duty upon the board of making the selection. An action of mandamus may be brought to obtain an order commanding a board to do an act, the performance of which the law enjoins upon the board as a duty resulting from its office. Section 12441 of the Code provides, however, that:

"Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but cannot control such discretion."

We do not find an Iowa case strictly in point. Looking to the courts of other states we find persuasive authority for holding that a writ of mandamus may issue to compel the board to fill such a vacancy. We quote the Supreme Court at California as follows:

"Since the legislature has made such provision and has expressly directed boards of supervisors to fill existing vacancies, it is the plain duty of appellants to appoint some competent person to the office. The writ of mandamus —'may be issued * * * * to compel the performance of an act which the law specially enjoins, as a duty resulting from an office.' Code Civ. Proc. Sec. 1085. The writ may issue to compel an officer to fill a vacancy. Platnauer v. Board Cal., 225 Pac., 12. City of San Diego v. Capps, 163 Pac. 235; Commonwealth v. Livingston (Ky.) 186 S. W. 916; Wampler v. State, 47 N. E. 1068, 38 L. R. A. 829."

We quote from a Kentucky case as follows:

"If * * * * it should be held that Herman had vacated the office of commissioner and was a usurper, then the mayor and other commissioners, if they refused to fill the vacancy, may be compelled to do so by a mandamus in a suit brought by citizens and taxpayers of the city. Commonwealth v. Livingston, 186 S. W. 916. Hilliard v. Fetter Co., Ky., 105 S. W. 115; Tele-

phone Co. v. City of Louisville, Ky., 113 S. W. 885; Telephone Co. v. Commonwealth, Ky., 161 S. W. 543."

The case of Taylor County Farm Bureau vs. Board of Supervisors (Iowa) 252 N. W. 498, holds

"That the duty is ministerial when it is to be performed upon a certain state of facts, although the officer or body must judge according to their best discretion whether the facts exist, and whether they should perform the act, seems to be the rule established by the weight of authority; otherwise, it is obvious no mandamus could ever lie in any case against public officers. A ministerial act or duty is one which is to be performed under a given state of facts, in a prescribed manner in obedience to the mandate of legal authority, and without regard to or exercise of the judgment of the one doing it upon the propriety of the act being done."

In the above case the Board of Supervisors having determined certain preliminary facts were then required to perform certain other acts prescribed by statute, the performance of which involved no judgment or discretion. In the case before us the preliminary facts are admitted, that is, there is a vacancy, but the remaining members of the Board of Trustees have large discretion as to the person who shall be selected to fill the vacancy. No one would have authority to say that they should select any particular person in violation of the better judgment of either remaining member. The qualifications of no two persons for the office are the same. There is some authority for the rule that where discretion is arbitrarily or fraudulently exercised mandamus will lie to correct this abuse. (Addison vs. Loudon, 206 Iowa 1358; Ford Hopkins v. Iowa City, 248 N. W. 668, Iowa; People vs. Department of Health, 123 N. W. 379, N. Y.). Is there such an arbitrary or fraudulent exercise of discretion by the remaining members of the board in this case that the court would be justified in holding that a writ of mandamus will lie to correct the abuse? It would seem very apparent that with a large number of eligible and reasonably well-qualified persons to select from the remaining trustees should be able to select a third member and that their failure and refusal to do so is somewhat arbitrary and seemingly unjustified.

There would appear to be no good factual reason why they should not select a third member. The law enjoins that duty upon them. In some jurisdictions the trustees could be compelled by writ of mandamus to fill the vacancy. To say what the courts of Iowa would do would be to enter the field of speculation, as there is no precedent as far as we have been able to find. The two members should agree upon a third member without delay and if they refuse to do so and the matter is considered of sufficient importance to justify it, an action should be brought to compel them to act.

BANK NIGHT.

January 21, 1935. *County Attorney, Red Oak, Iowa.* Under date of December 8, 1934, our office wrote an opinion, at your request, holding that the operation of the so-called "bank night" by certain theatres within the State of Iowa constituted a lottery and was therefore unlawful.

On December 20, 1934, our office sent a wire to all County Attorneys suspending any further action under the opinion of December 8th until a supplemental opinion could be issued after making an exhaustive study of this question.

Upon further consideration of this matter in which we have attempted to study and analyze all the decisions bearing upon this question, we now submit the following supplemental opinion modifying the previous one as follows:

The plan or scheme known as "bank night" is calculated to be conducted upon the following conditions, to-wit: An agency or service domiciled in the State of Colorado enters into contracts with certain theatres in the State of Iowa for the evident purpose of advertising said theatre or theatres and is fundamentally an advertising medium. The procedure under this plan is, briefly, as follows: A register book is placed in the lobby of the theatre where those hoping to obtain the bank credit register their names. The public, as well as the patrons of the theatre, may register in the book so provided, each receiving a number corresponding to their names. This register book is supposed to be placed outside the doors of the theatre and also in many instances the public generally is invited and solicited to register their names for this purpose. Once a week, on a designated night, registered coupons corresponding to the number of registrations, are placed in a box and a drawing is had on the theatre stage. The number drawn receives the bank credit. The winning number is announced both within and without the theatre. A certain length of time is given for the holder of the winning number to present himself at the theatre stage and claim the prize. However, this period of time has, as a matter of fact, varied with the different theatre owners. In some places they limit the time to one or two minutes and other places to three to five minutes and in other instances they disregard this requirement and force the person holding the winning number to be in the theatre after having purchased a ticket to the theatre. If, after the announcement and the expiration of the time, no one present claims the reward, the drawing is repeated the next week. In other places some theatre owners hold these drawings two times a week. When no one is present to claim the prize, then upon the postponement of the drawing the amount of the prize increases in an arithmetical ratio or proportion. This procedure is followed as many times as necessary until the person holding the winning number is present to claim the prize. One registration is good for the entire period during the time the plan is in effect. The legal question arising is:

"Does such a plan or plans, constitute a lottery within the meaning of the constitution and statutory laws of this State?"

Section 28 of Article 3 of the State Constitution provides as follows:

"No lottery shall be authorized by this State nor shall the sale of lottery tickets be allowed."

Section 13218 of the 1931 Code of Iowa 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."

There is no statutory definition of a lottery in this state. It is therefore necessary for us to fall back upon the commonlaw definition which states

that there are three elements necessary to constitute a lottery, as follows: first, consideration; second, the element of chance; and third, the element of reward.

Bernard Mfg. Co. v. Jessup & B. Co. 186 Iowa 872, 875, 17 RCL 1222.
United States v. Olney, 1 Deady 1461; 1 Abb. (U. S.) 275.
Society Theatre v. Seattle, 118 Wash. 258, 203 Pac. 21.

In the case of Society Theatre vs. Seattle (supra) certain merchants, manufacturers and grocers furnished goods under an advertising plan whereby tickets entitling the holders to a chance upon such goods were distributed to patrons of motion picture houses *after they had been admitted in the usual manner.* The complainants attempted to enjoin city and county officials from enforcing a city ordinance and a state statute relating to lotteries. A preliminary injunction was granted, which ruling was reversed upon appeal. Speaking of the necessary element of consideration, 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 the 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.*"

In the case of State vs. Danz, 140 Wash. 546, 250 Pac. 37, 48 A. L. R. 1109 (1926), the Supreme Court of Washington, by a divided vote of the judges, held that such a practice was illegal and constituted a lottery. In this Washington case the facts were as follows: One night each week local merchants furnished goods to be distributed by the theatre manager. The distribution was accomplished by drawing numbers corresponding with tickets which were given to the patrons of the theatre upon payment of the theatre price. Such tickets were also, by signs placed at the entrance of the theatre, offered free to those who asked for them and an announcement of the winning number was made both within and without the theatre. The Supreme Court of Washington held that such an arrangement constituted a lottery within the provision of the state statute.

The Court, in its majority opinion, cited the Society Theatre case as controlling, and pointed out that the evidence showed without dispute that *no one ever asked for, or received, a ticket in the drawings without buying an admission ticket.* The extract from the Society Theatre case was quoted with approval by a majority of the court. In line with the above two cases, we find other decisions holding similarly. The following cases fall in a group where the prize tickets were only furnished to customers, those who purchased something. The payment made by the customers was for both the article purchased and the prize ticket—part of the consideration was for the prize ticket.

State vs. Powell, 170 Minn. 239, 212 N. W. 169 and Matta vs. Katsoulas, 192 Wisc. 212; 212 N. W. 261, 50 A. L. R. 291.

Our opinion of December 8, 1934, was based upon the above line of cases. However, there is another line of cases holding that where the winner of a

prize is given a prize ticket free of charge, that the same does not constitute a lottery and is not a violation of law. The decisions of the courts are briefly set forth herein.

In the case of Yellowstone Kit vs. State, 88 Ala. 196, 7 L. R. A. 599 (1890), the Defendant staged a medicine show with free admission. Between acts medicines were sold. Free tickets were distributed to one and all entitling the holders to chances for like prizes drawn at the final performance. There were no tickets given out at this final performance. They were all distributed at previous performances where the only charge was for the occupancy of a seat and admission was free. The Court held that this did not constitute a lottery and set forth their opinion as follows:

"There is no law which prohibited the gratuitous distribution of one's property by lot or chance. If the distribution is a pure gift or bounty, and not in the name of pretense merely, which is designed to evade the law,—if it be entirely unsupported by any valuable consideration moving from the taker,—there is nothing in this mode of conferring it which is violative of the policy of our statutes condemning lotteries or gaming. We may go further and say that there would seem to be nothing contrary to public policy, or per se morally wrong, in the determination of rights by lot. The history of lotteries for the past three centuries in England and for nearly a hundred years in America, show that they have been schemes for the distribution of money or property by lot in which chances were sold for money, either directly or through some cunning device. The evil flowing from them has been the cultivation of the gambling spirit,—the hazarding of money with the hope by chance of obtaining a larger sum,—often stimulating an inordinate love of gain, arousing the most violent passions of one's baser nature, sometimes tempting the gambler to risk all he possesses on the turn of a single card or cast of a single die, and tending, as centuries of human experience fully attest, to mendicancy and idleness on the one hand and moral profligacy and debauchery on the other."

In the case of Cross vs. People, 18 Colo. 321, 32 Pac. 821, the Defendants gave tickets entitling the holder to a chance on a piano. These tickets were given to customers with their purchases but could also be obtained free by calling or writing for them. In holding that this did not constitute a lottery the court said:

"The gratuitous distribution of property by lot or chance, if not resorted to as a device to evade the law, and no consideration is derived, directly or indirectly from the party receiving the chance, does not constitute the offense. In such case the party receiving the chance is not induced to hazard money with the hope of obtaining a larger value, or to part with his money at all; *and the spirit of gambling is in no way cultivated or stimulated, which is the essential evil of lotteries, and which our statute is enacted to prevent.*

"The element of gambling that is necessary to constitute this a lottery within the purview of the statute, to-wit: the paying of money directly or indirectly, for the chance of drawing the piano, is lacking, and the transaction did not constitute a violation of the statute."

In the Iowa case of Bernard Mfg. Co. vs. Jessup & B. Co., 186 Iowa 872, the Court points out that the three elements of consideration, chance and reward must be present to constitute a lottery. The case itself is not authority upon the legality of "bank night" in that it turned upon the fact that the element of chance was lacking in the plan considered—a "vote" contest, decided by mere mathematical calculation.

The Iowa Supreme Court case, Chancy Park Land Company vs. Hart, 104

Iowa 592, is interesting while not, however, exactly in point. The plan there involved was simply the division of property by lot among its owners. It is interesting, however, in that it points out the long-sanctioned character of such plans of distribution. Along this line the Iowa court said:

"We knew of no good reason why these purchasers did not have the right to divide their property or that contracted for according to their own notions and agreement. * * * Joshua so apportioned the promised land among the seven tribes of the children of Israel. The disciples of Christ chose Matthias to succeed Judas by casting lots. Under the laws of this state, the right to an office is determined, when there is a tie vote, by the same method. There is nothing in the transaction opposed to good morals, and it was not a lottery within the meaning of the law."

If any *one* of the three elements necessary in a lottery is missing, the above language becomes applicable.

The latest case examined by us in the preparation of this opinion which is based upon similar facts, is the case of People vs. Cardas, 28 Pac. (2d) 99 (1933), which was decided by the Supreme Court of California on December 27, 1933. In this California case the Defendant offered prize trips to Santa Catalina Island to be awarded by lot to the holder of lucky tickets. The tickets were distributed to the public on hand-bills and by employees of defendant stationed in the lobby. The prize tickets were free. It was not necessary to purchase an admission ticket to obtain them. Winning numbers were announced both within and without the theatre and the winner, if outside, could come in to obtain his prize without paying admission.

"After the drawing had been held on the stage, the lucky numbers were announced both from the stage and outside the theatre doors. Any person outside the theatre who held a winning prize number was entitled to enter the theatre with the purpose of claiming the prize, without charge. If such a person, however, stayed to see the show, he would be required to pay the regular admission charge. The winner of one of the prizes was a patron who had not purchased an admission ticket."

It is important to note that in this California case the person who won the prize had not purchased an admission ticket to the theatre and had not, in any way, parted with any valuable consideration for the purpose of participating in the drawings or in securing the prize which was a free trip to Santa Catalina Island.

The California Supreme Court held that this was not a lottery. The court cited Cross vs. People, 18 Colo. 321, 32 Pac. 821, with approval and also distinguished their holding from the holding of the Supreme Court of Washington in the case of State vs. Danz, 140 Washington 546, 250 Pac. 37, 48 ALR 1109 (1926).

In commenting upon the Danz case, the Supreme Court of California said:

"A word should be said about State vs. Danz, 140 Wash. 546, 250 Pac. 37, 48 ALR 1109 since it was cited by counsel for both sides. In that case the Supreme Court of Washington, by a five to four decision, held a scheme resembling that presented in this case to be a lottery. That case may properly fall in the group last mentioned (which group contained the cases of State vs. Powell, 170 Minn. 239, 212 N. W. 169 and Matta vs. Katsoulas, 192 Wisc. 212, 212 N. W. 261, 50 A. L. R. 291 and Featherstone vs. Independent Service Station Ass'n. (Texas Civ. App.) 10 S. W. (2d) 124.)
since no prize tickets were in fact given to anyone who did not buy an ad-

mission ticket to the theatre. In any event the reasoning in the minority opinion to the effect that no consideration was paid by the holders of the prize tickets, is much more persuasive to us."

An examination of the cases holding certain schemes apparently somewhat similar to the one here in question, to be lotteries, discloses vital points of distinction. In general, they fall into two groups. One group headed by the California decision in People vs. Cardas (supra) holds that there is no lottery where the person claiming the prize secured the prize ticket free of charge.

The other group, headed by the Washington Supreme Court case, State vs. Danz, holds that such a scheme would constitute a lottery where the person holding the ticket for the prize was required to purchase a ticket to the theatre or where the condition apparently permitted the holder of a free ticket to claim the prize was in fact a subterfuge calculated to circumvent the law.

It therefore appears that the operation of the so-called "bank night" scheme in this state may be conducted so that it would not constitute a lottery and it also may be conducted in such a manner as to squarely violate the law.

It is therefore the opinion of this department, after a thorough study of all the cases bearing on this question, that where the scheme or practice known as "bank night" is conducted in such a manner as to permit the holder of a free number or a free chance to claim and procure the prize, that the same would not constitute a lottery and would not be a violation of the laws of this state. As above pointed out, anyone may give away their own property in any manner that they deem fit and proper and may give it away by lot, chance or otherwise.

It is also the opinion of this department that where the operation of the scheme or practice known as "bank night" is so conducted as to require the person holding the winning number or chance to also purchase a ticket of admission to the theatre, that such a practice would constitute a violation of the law in that the holder of the winning number would be required to first part with a valuable consideration before being permitted to participate in the prize drawing.

It appears to us that many of the theatre owners in this state have required the public to first purchase tickets to their theatres before being permitted to register their names for the purpose of securing a number which would qualify them for participation in the prize drawing. This practice is clearly a violation of our law and it should be prohibited and prosecution should be instituted against all theatre owners who are conducting bank night in this manner. Even where free tickets are given to the public generally, and the holders of all the tickets or numbers—whether inside the theatre or outside the theatre when the winning number is drawn—and a reasonable length of time is not allowed within which the holder of the winning number shall present the same and claim the prize, this would be a violation of our law because the same would constitute a mere subterfuge to circumvent the laws of our state against lotteries and gambling.

What is or is not a reasonable length of time would be a matter for our courts to decide. Each case will have to be determined upon the particular facts relative thereto. Where the purchase of a theatre ticket is made a condition precedent to participation in the prize, the same would constitute a lottery and be in violation of law.

In accordance with the provisions of the above supplemental opinion our previous opinion, dated December 8, 1934, is hereby modified.

INDETERMINATE SENTENCE: BOARD OF CONTROL: Robert McElroy and Wayne R. Wellman plead guilty to crime of entering a bank with intent to rob and were sentenced to Men's Reformatory at Anamosa by the court for a term not exceeding 20 years at hard labor. In view of indeterminate sentence statute, what is the proper term for which these prisoners should be entered on records of Men's Reformatory?

January 24, 1935. *Board of Control:* We have your request for opinion on the following proposition:

"Robert McElroy and Wayne R. Wellman plead guilty to the crime of entering a bank with intent to rob and were sentenced by the court to the Men's Reformatory at Anamosa for a term of not exceeding twenty years at hard labor. In view of the indeterminate sentence statute, will you please advise the proper term for which these prisoners should be entered on the records of the Men's Reformatory?"

Section 13002 of the Code provides that if any person shall enter or attempt to enter the premises of a bank with intent to hold up and rob the bank or any persons therein, he shall, upon conviction thereof, be imprisoned in the penitentiary at hard labor for life, or for any term not less than ten years.

Section 13960 of the Code, being the indeterminate sentence statute, provides that whenever a person over sixteen years of age is convicted of a felony, except treason or murder, the court imposing the sentence of confinement in the penitentiary or reformatory shall not fix the limit or duration of the same, but the term of such imprisonment shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted. There is an exception in regard to the crime of rape, the exceptions being Sections 12966 and 12968 of the Code, but these exceptions are immaterial here.

In the case of *Adams vs. Barr,* 154 Iowa, 83, the plaintiff in a Habeas Corpus action was convicted of the crime of burglary. Under the statute then in force, the maximum punishment for such offense was 20 years. In entering the judgment upon conviction, the court did not impose the indeterminate sentence, but fixed the limit of confinement in the penitentiary at two years. After the prisoner was received at the penitentiary, the warden changed the register so as to indicate a sentence for twenty years. The lower court held that it was the right and duty of the warden to keep the plaintiff in restraint for the maximum period of 20 years less good time earned should he not be sooner paroled or pardoned as provided by law. On appeal, the plaintiff argued that the judgment was one within the power and authority of the District Court to enter and having never been appealed from in any manner, modified or set aside, it was the duty of the warden to obey it. In regard thereto, the court said 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 case, 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, is 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 or 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."

In regard to the constitutionality of the indeterminate sentence statute, our court in the case of *State vs. Duff*, 144 Iowa, 142, held that the statute was not unconstitutional merely because it took away the power of the court to sentence a prisoner and made it mandatory that the prisoner be sentenced for the maximum period, for the reason that the legislature had the power to fix the punishment for crime, and if it had this power, it could fix a certain term without placing any discretion into the hands of the court whose duty it is to carry out the legislative mandate.

In *State vs. Perkins*, 143 Iowa, 55, the court said at page 60:

"While the district court has the power under the law to imprison in the penitentiary by the terms of the statute, it is denied the power to fix the terms of such imprisonment and the law itself says what the term shall be. It says, in effect, that it shall be the maximum term provided for in the law fixing the punishment or imprisonment."

In *McKinnon vs. Sanders*, 161 Iowa, 555, the court said at page 558:

"It has been repeatedly held by this court, that, in passing sentence in all cases save for conviction of treason and murder, the court has not the power to fix a definite period as such is done by statute."

In *State vs. Boyd*, 195 Iowa, 1091, the court said at page 1095:

"Our indeterminate sentence law takes care of that feature of the judgment and any penalty imposed where the offense comes under the indeterminate sentence law as in the instant case, is superfluous and unnecessary. Defendant's stay in the penitentiary, if he goes there, will neither be prolonged nor shortened by reason of the statement made in the judgment of the trial court."

In State vs. Draden, 199 Iowa, 231, the court in speaking in regard to the indeterminate sentence statute, said at page 237:

"It was held in McKinnon vs. Sanders, 161 Iowa, 555, that this statute was applicable to the crime of rape as then defined, and where the punishment provided was imprisonment for life or any term of years. It sought to avoid the force of this holding by the argument that in that case the statute providing for an indeterminate sentence was adopted after the statute fixing the punishment, and hence controlled; while the statute which this defendant was convicted was enacted after the statute requiring an indeterminate sentence, and, since it provides for imprisonment for life or any term of years, it is contended that it does not come under the Indeterminate Sentence Law, and the court had power to impose sentence for less than the maximum time. The argument is not persuasive. The Indeterminate Sentence Law is general, and applies to all crimes, except murder and treason, committed subsequent to July 4, 1907. It relates, so far as here involved, to the duty of the court in imposing sentence, and expressly provides that the court shall not fix the limit or duration of imprisonment, but that the term of imprisonment shall not exceed the maximum term provided by law. It does not fix the limit of imprisonment, save by a reference to the various statutes defining and providing a punishment for particular crimes. It is by its terms as applicable to crimes defined, and the punishment for which is prescribed by subsequently enacted statutes, as to those referred to in then existing statutes."

In State vs. Korth, 204 Iowa, 667, the court in speaking of the indeterminate sentence statute, said at page 669:

"Under this statute, the sentence that the defendant 'be imprisoned in the penitentiary according to law' is all that is required. No reference whatever need or should be made to a maximum or minimum period."

In *State vs. Bird,* 207 Iowa, 212, the court said in regard to this statute at page 218:

"The length of the imprisonment and the granting of a parole or pardon are under the control of the Board of Parole and the Governor, and the sentence for the maximum is not now open to the objections here made to it."

It is apparent then, from the above authorities that any attempted sentence here by the court must be treated as surplusage and that the only purpose of Section 13002 of the Code is to state the maximum sentence to be entered by the warden at the time the prisoner is brought to the institution by the sheriff and under the holding of the Supreme Court, in the case of State vs. Draden, this is true irrespective of whether the statute on the specific crime was entered before or after the passage of the indeterminate sentence statute. The indeterminate sentence statute was sponsored at the time of its enactment by those agencies looking to the betterment of criminal conditions and the reason for the act is very apparent. It is in keeping with the present trend of society to give to all criminals an equal chance and then to have the matter of the time of their release from detention heard by a board or commission skilled in such matters. And thus a man cannot be convicted in one part of the state and sentenced to a term of years and the next day, a man be convicted in a court in another part of the state for the same identical crime and under the same facts and be sentenced to a term of imprisonment twice that of the man sentenced the preceding day, and the difference in sentence being based wholly upon the thoughts of the court at the time of entering judgment. Under the indeterminate sentence statute, all are treated alike and all are presumably given fair treatment. Such was the intention of the law and our Supreme Court held the statute constitutional the first time this question was submitted to the court.

We appreciate the fact that in some instances this law may appear to be a hardship as there are in many instances extenuating circumstances which the court has in mind at the time of passing sentence, but the question is not one of dispute in this state, for as noted in the above authorities, every time the matter has gone to our Supreme Court, they have held that the indeterminate sentence statute governs irrespective of other statutes providing for the sentence for any particular crime.

We have gone into this matter quite thoroughly as we appreciate this question comes up quite often in your institutions. We believe that this opinion conforms to all our previous opinions on this proposition, but in event that it does not, all opinions in conflict herewith heretofore rendered by this office, are hereby withdrawn.

It is, therefore, our opinion that the entry on the records of the term of imprisonment of Robert McElroy and Wayne R. Wellman should be the term for life.

I am returning to you herewith the letter of Mr. Fraser under date of January 19, 1935, the letter of Harold J. Fleck, County Attorney of Mahaska County, two copies of the County Attorney's information and the copies of the

mittimus in regard to each of these men, all of which were enclosed in your letters to us.

BANKS AND BANKING: TAXATION BY FEDERAL GOVERNMENT: Compensation received by Examiners in Charge and other regular employees of Superintendent of Banking, as liquidator of closed banks of the State of Iowa are exempt from Federal Income Tax.

January 24, 1935. *State Superintendent of Banking:* We have your request for opinion in regard to the taxable status by the Federal Government of the compensation received by Examiners-in-Charge and other employees of the Superintendent of Banking of the State of Iowa in the liquidation and distribution of assets of closed banks.

At the outset, I should call your attention to the fact that on July 19, 1933, the Commissioner of Internal Revenue ruled that the compensation of all officers and employees of the State Banking Department of Iowa engaged in the liquidation of State banks should not be subject to the Federal Income Tax. Thereafter, an opinion was rendered by the Assistant General Counsel for the Bureau of Internal Revenue in regard to the compensation received by a bank liquidator in the State of Florida, and he held that such compensation was subject to a Federal Income Tax, this opinion being found in the Internal Revenue Bulletin of August 27, 1934, at page 9. Thereafter, and in conformity with that opinion, the Treasury Department on November 2, 1934, reversed their ruling of July 19, 1933, and held that compensation of employees of the State Superintendent of Banking as liquidator of State banks, was subject to the Federal Income Tax.

I will, therefore, devote this opinion to the status of State bank receiverships in this state and the difference, if any, between this and the Florida status.

The statutes of this State pertaining to State banks are found in Title XXI of the Code of Iowa, 1931. Section 9130 of the Code provides that the Superintendent of Banking shall have his office at the seat of government and that his regular term shall be for four years from the 1st day of July of the year of his appointment. Section 9131 of the Code provides for the appointment of the Superintendent of Banking by the Governor with the approval of two-thirds of the members of the Senate in executive session, and Section 9134 of the Code provides that the Superintendent of Banking can only be removed by the Governor with the consent of the majority of the Senate and that such removal can only be for cause. Section 9140 of the Code provides that 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 this State.

There are, then, sections of the Code pertaining to the fees for examination and expenses, and Section 9145 provides that no payments of any kind shall be made by the Treasurer of State to cover expenses and salary of the Banking Department or any part thereof unless there shall be on hand in the office of the Treasurer of State sufficient funds received as income from said department to pay the same and such salaries and expenses shall be paid from such funds.

Section 9236 of the Code provides that the Superintendent may appoint an Examiner to investigate into the affairs of any bank and that all expenses thereof shall be paid by the bank, and Section 9238 provides as follows:

"*Liquidation—right of levy suspended.* If any such bank shall fail or refuse to comply with the demands made by the said superintendent, or if the said superintendent shall become satisfied that any such bank is in an insolvent or unsafe condition, or that the interests of creditors require the closing of any such bank, he may appoint an additional bank examiner to assist him in the duty of liquidation and distribution, whereupon the right of levy, or execution, or attachment against said bank or its assets shall be suspended."

Section 9239 of the Code provides that the Superintendent of Banking may apply to the District Court for that district in which the bank is located or a Judge thereof, for the appointment of said Superintendent of Banking as receiver of such bank and its affairs shall thereafter be under the direction of the court.

Section 9242 provides as follows:

"*Superintendent as receiver.* The superintendent of banking henceforth shall be the sole and only receiver or liquidating officer for state incorporated banks and trust companies and he shall serve without compensation other than his stated compensation as superintendent of banking, but he shall be allowed clerical and other expenses necessary in the conduct of the receivership."

Section 9243 provides as follows:

"*Expenses of liquidation.* All expenses of supervision and liquidation shall be fixed by the superintendent, subject to approval by the court or a judge thereof, and shall upon his certificate be paid out of the funds of such bank in his hands."

In regard to these statutes, our Supreme Court in the case of *Leach vs. Exchange State Bank*, 200 Iowa, 185, said at page 198:

"We therefore hold that Chapter 189 of the Acts of the 40th General Assembly, in connection with the statute thereby amended and prior statutes on the subject, constituted a separate and complete code of laws governing the organization, operation and liquidation of state banks and controlled the distribution of their assets, notwithstanding the general provisions of Section 3825-a. These statutes are now found under Title XXI of the Code of 1924."

And on page 193, the court said:

"The act in question gives the Superintendent of Banking, independently of the appointment of a receiver, the power to liquidate an insolvent bank and distribute its assets. * * * * * It is not difficult to see that many of the affairs of a bank might require the services of a receiver and the direction of the court in their settlement; but the actual 'winding up' of its affairs and distribution of its assets do not, under this statute, necessarily require either the service of a receiver or judicial direction. Furthermore, the present statute expressly provides that the Superintendent of Banking shall be the 'sole and only receiver or liquidating officer' * * * * * It is the Superintendent of Banking and not the receiver who is made the only liquidating officer."

In regard to the status of the Superintendent of Banking as liquidating officer and receiver, our court in the *Receivership of City-Commercial Savings Bank of Mason City*, 210 Iowa, 581, said at page 586:

"Whether or not the statutes which have been quoted, governing the salaries of bank examiners and employees, control in case of liquidation, they mani-

fest the legislative policy of economy, of limitation and of centralization and unification of authority and policy in all state bank matters throughout the state. The Superintendent of Banking, notwithstanding his appointment as receiver of a particular bank, pursuant to statute, *remains a state officer.* The additional bank examiner is appointed by him and *is his assistant.* * * * * That expenses, as fixed by the superintendent of banking, are subject to the approval of court, does not imply that the court has initial or original or primary power to employ an assistant bank examiner, or to fix his compensation. *The initial power of employing* and fixing expense is in the superintendent of banking. The court has merely the power of approval, not of originating."

With these statutes and law of our state in mind, we should turn then to the exemptions under the Federal Income Tax. In the instructions which are on the back page of the blank income tax returns furnished by the Federal government, it will be noted that among the items exempt from tax are the following:

"Compensation paid by a state or political subdivision thereof to its officers or employees for services rendered in connection with the exercise of an essential governmental function."

Article 643, Regulation 77, provides in part in regard to exemptions:

"Compensation paid to its officers and employees by a state or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of a state or political subdivision * * * * is not taxable. Compensation received for services rendered to a state or political subdivision thereof is included in gross income unless (a) a person receives such compensation as an officer or employee of a state or political subdivision; and (b) the services are rendered in connection with the exercise of an essential governmental function."

The law in regard to exemption from taxation by the Federal government of compensation of state officers and employees engaged in the exercise of an essential governmental function is of course well known and is not a matter of dispute, as the Supreme Court of the United States has held many times that the Federal government cannot impose a burden upon the state in connection with the exercise of its essential governmental activities. It appears to us then, that the primary questions involved are whether the liquidation of banks as provided for in our statutes, is an essential governmental function and secondly, whether the liquidators are employees of the state.

In regard to the first, I think there will be very little dispute because ever since the case of *Noble State Bank vs. Haskell,* 219 U. S., 104, the Supreme Court of the United States and all state courts have held that banks and banking are proper subjects of legislative control and strictly within the internal police power of the state, and the author of *Michie on Banks and Banking,* in Volume 3, at page 31, very well states the general rule as follows:

"The safety of banks, and, in case of closing, their liquidation, is a matter of general public interest. State supervision and administrative liquidation are therefore, a proper exercise of the police power of the state. And the various statutes providing when the state officer or department having supervision of banking may take control of a bank's affairs, or close it pending proceedings for liquidation, have generally been held valid. Thus, the police power is validly exercised by statutes which authorize the Superintendent of Banking to summarily take charge of a bank that has violated its charter or any state law, or is insolvent or conducting its affairs in an unsafe or unauthorized manner."

We do not think that anyone disputes the fact that the liquidation of state banks through a state officer as a liquidating officer is an essential governmental function. We then turn to the next question as to whether these liquidators are officers and employees of the state.

We should first suggest the mechanics in regard to liquidation. The statutes as above set out provide that the Superintendent of Banking, when he believes it to the best interests, may close a bank and appoint an additional bank examiner to assist him in the liquidation and distribution of the assets of the bank. These additional examiners are termed Examiners-in-Charge, and necessarily, in the liquidation of the larger banks, they must have assistants and other clerical help, but they are all doing one thing and that is, liquidating and distributing the assets of these closed banks.

If we had only one closed bank in Iowa and it was being liquidated by the Superintendent of Banking, surely no one would question the fact that he was a state officer, and in fact, our Supreme Court in the *City-Commercial Bank case of Mason City*, above set out, expressly held that the Superintendent of Banking was nevertheless a state officer even though he was engaged in the liquidation of closed banks.

The banking department is an arm of the state government and surely, if the Superintendent of Banking is a state officer in doing his work, the employees under him are state employees and it should be kept in mind that he is not a receiver in the ordinary accepted meaning nor are his employees, employees of a receiver, for our Supreme Court in the *City-Commercial* case, held there that under our statutes, the Superintendent of Banking was the sole and only liquidating officer and that as liquidating officer he could liquidate a bank and distribute its assets without the aid of any court and that the only purpose of being appointed receiver was to secure an orderly liquidation.

You will note that the statute provides that these employees be paid out of the funds of the bank in his hands. Does this affect their status? We think clearly not. There are many other self supporting departments in the state, such as the insurance department, the department of agriculture, the state board of assessment and review, the liquor control commission, and others, and the mere fact that the compensation of their employees is paid from a particular source instead of money raised through taxation does not in any wise affect their status as state employees.

Section 69 of the Appropriation Act of the last General Assembly provides that none of the appropriations would be available until the head of the department, bureau, board, commission or institution swore that all moneys received from miscellaneous receipts, fees or other income, have been expended. The professors, then, at the University of Iowa, must first take their salaries from the tuition paid by students before the State Comptroller is authorized to pay them from the general appropriation. Could it be said then, that the time they were paid for out of students' tuition, they were not employees of the state, but that the months they were paid from money received from general revenue, that they were employees of the state? In our opinion, the very stating of the question clearly refutes any argument that could be made on that premise.

One other thought on this. The liquidation of state banks, like the organization and supervision of banks, is a part of the police power of this state. In

the supervision and examination of "live" banks, Section 9143 of the Code provides in part as follows:

"Every bank and trust company shall pay to the superintendent of banking within ten days after the date of such examination, a fee based on the assets of said trust company as the date for the close of business for which such examination is made, as follows:"

This is then turned by him to the Comptroller of the State and the same monthly warrants issued to these bank examiners, and Section 9145 of the Code as hereinbefore pointed out, provides that no payments of any kind shall be made by the Treasurer of State to cover salaries and expenses of the Banking Department, or any part thereof, unless there shall be on hand in the office of the Treasurer of State, sufficient funds received as income from said department to pay the same, and such salaries and expenses shall be paid from such funds.

The salaries of the Examiners-in-Charge of closed banks are paid in exactly the same manner except that the Superintendent of Banking, instead of going through the useless mechanics of turning this money into the State Treasurer and then having a warrant of the Comptroller issued to the Examiner-in-Charge, himself retains these fees assessed against closed banks and issues his own warrant to the Examiner-in-Charge in payment of his salary and expenses.

The liquidation and examination of state banks, then, being a part of the police power, the legislature could provide that the compensation be paid in any way they chose. They could provide that it be paid from general taxation or that it be paid from fees assessed to the banks under examination or in liquidation. Surely, no one can suggest that the examiners of live banks are not State employees or that they are not paid by the State and as their compensation is handled in the exact same way that the compensation is of examiners in charge of closed banks except for the additional mechanics of turning it into the State Treasurer to be held in a separate fund for the use and benefit of them instead of being held by the Superintendent of Banking himself, I do not know how these two classes of employees and the manner of payment for their services could in any wise be differentiated, for surely the Federal government would not hold that their compensation would be exempt if the Superintendent of Banking turns the fees received in to the Treasurer to be held in a special fund for the payment of their salary, but would not be exempt where he himself holds it for that exact same purpose. They are both being paid from the state and their compensation comes to them from the state.

The writer of the opinion in the bulletin of August 27, 1934, of the Internal Revenue Department relied upon a case in regard to consulting engineers who had been employed to advise the State and its subdivisions with reference to proposed water supply and sewage disposal systems, and in that case, the Supreme Court suggested that their employment lacked the elements of both officers and employees for the reason that there was no term of office nor was there anything in the bill of exceptions to establish that they were employees, but under the record, they might be independent contractors as there was nothing to show that they would give their entire time to the performance of these particular duties.

The writer of that opinion also stated at page 12 of the bulletin:

"The statute does not create the office of special liquidator."

Such, of course, is not true in our instance, for in this state, the statute provides that the Superintendent of Banking shall be the sole and only liquidator and further provides that Examiners-in-Charge shall be designated by him to assist in the liquidation of these banks and these Examiners-in-Charge are designated by the Receiver in the application to the court for the appointment of himself as Receiver, and such designation is approved by the court in its order appointing the Superintendent of Banking, as Receiver, and the Examiner-in-Charge of the particular bank, and pursuant to the order of court entered at that time, the Superintendent of Banking as Receiver, files a bond running to the State of Iowa, and the Examiner-in-Charge files a bond in the sum ordered by court running to the Superintendent of Banking, as Receiver.

These bonds are in the usual form and provide for the faithful discharge of their respective duties. These Examiners-in-Charge and such clerical help as may be necessary to assist them in the liquidation must give their entire time to the performance of these duties, and are paid a monthly salary on that basis. For example, the Superintendent of Banking, as liquidator, appoints certain men as appraisers and certain men to sell farms or other property of the trusts on a per diem basis, yet, no one is suggesting that these are state employees, for they are merely acting in the nature of independent contractors as they are hired to do a particular job and can do it in any way that they see fit, but not so with the Examiners-in-Charge and their clerks, for they act solely under the supervision of the Superintendent of Banking and must follow his directions even though at times they might personally have other thoughts and ideas. These are a part of the many distinguishing features between the situation here in Iowa and the situation in Florida.

Likewise, it is suggested in the Florida ruling that the work of the liquidator there is not of a permanent and continuous character. The work, however, of our liquidators is of such character, for the term of their employment is the time that it will take to liquidate state banks, which, at the present time, averages four years, and while, of course, they could be discharged, so could any other state employee in our state house and the only exception, as far as I know, is where the employee is entitled to the benefits of the Soldier's Exemption Act; all other employees being subject to discharge by the heads of the departments.

You appreciate the fact that the opinion of this office is not binding upon the Treasury Department of the Federal Government and we appreciate the fact that the Treasury Deparment has many able counsel on their staff who advise them as to their opinion on various propositions but we also know that in our office, we desire the advice and assistance of counsel who are close to the local situation and while we are not bound to follow them, we do give their thoughts and opinions considerable weight as they are well versed in the laws of their own particular communities. Such is our thought in writing this opinion.

It is, therefore, the opinion of this department that the compensation received by Examiners-in-Charge and other regular employees of the Superin-

tendent of Banking as liquidator of closed banks of the State of Iowa are exempt from Federal Income Tax.

OLD AGE ASSISTANCE ACT: LIABILITY OF FOREIGN EMPLOYER: EMPLOYMENT OF CITIZENS OF IOWA IN OTHER STATES:

We do not feel that an employer residing outside of the State of Iowa and not subject to the laws of this state, could be held liable for the collection of this tax under the laws of this State.

January 25, 1935. *Old Age Assistance Commission:* This will acknowledge receipt of your letter of the eighth instant in which you request the opinion of this department on the following:

"The Loose-Wiles Biscuit Company has its main business offices and bakeries located in Omaha, Nebraska. The firm also has branch offices and warehouses located in Iowa. This company is desirous of knowing as to whether or not they should collect the tax as provided in Section 34, Acts of the 45th General Assembly in extraordinary session, from its employees who reside in Council Bluffs, employed in the main office in Omaha."

You present the following question:

Suppose the Jones Bakery of Omaha employs a baker who resides in Council Bluffs. Would the bakery in Nebraska collect the tax from the employee who is a resident of Iowa?

The act itself in Section 34 provides:

"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 another part of Section 34 it is stated 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 (21) years of age and upwards, except inmates of State and County institutions, an annual tax of two dollars ($2.00)."

It is the opinion of this department that an act of the General Assembly of Iowa levying this tax on residents of the State and providing that the employer failing to collect the same would be personally liable does not have any effect as to persons, firms, associations or corporations who are not doing business under the laws of the State of Iowa. In other words, the act of the legislature could have no territorial jurisdiction outside of the borders of the State and the legislature intended by a statement of "employees liable" that it would apply to employers doing business in the State.

We feel that an employer residing outside of the State of Iowa and not subject to the laws of this State, could not be held liable for the collection of this tax under the laws of this State. However, in the case of a company constituted such as you describe the Loose-Wiles Biscuit Company to be, with

branch offices and warehouses located in Iowa and doing business in this State, by virtue of this, the company would be liable for employees who were residents of Iowa and who are liable for this tax by reason of being residents of Iowa. In this connection, it would seem the following cases are authority for such a finding:

Alaska Packers Association vs. Hedenskoy, 267 Federal 154.
Kelley vs. Rhoades, 188 U. S. 1.
Fennell et al. vs. Pauley et al., 112 Iowa 94.

COMPTROLLER OF STATE: SALARIES AND OPERATING EXPENSES OF PERSONNEL OF CERTAIN STATE DEPARTMENTS FOR NEXT BIENNIUM: Should State Comptroller require an itemized statement of expenditures and receipts and make his recommendations for next biennium for salaries of personnel and other operating expenses, to Governor and 46th General Assembly for certain State departments?

January 25, 1935. *State Comptroller:* I have your request of January 24th for an official opinion from this department on the following questions:

"Should the State Comptroller require an itemized statement of expenditures and receipts and make his recommendations for the next biennium for salaries of personnel and other operating expenses to the Governor and 46th General Assembly for the following state departments:

	G. A. Sections	Code Sections
Banking	115-45 Ex.	9145
Board of Architectural Exams		1905-B12
Board of Accountancy		1905-C4
Board of Engineering Exams.		1861-1865
Board of Court Reporter Exams.		1879
Board of Educational Exams.		3896
Fish and Game		1703-422 1707-d17 1717
Highway Commission		4755-B31
Motor Carrier Admin.	188-54-45	5105-A54
Motor Truck Admin.	188-54-45	5105-C12
Securities (Secy. of State)		8581-C12
Gasoline Administration	56-33-45 Ex.	.....
.....	152-45 Ex.	5093-A11
Beer Administration	38-5-45	.....
Old Age Assistance	19-34 and 40-45 Ex. (See Sec. 4 also)	.....
Iowa Liquor Control Commission	24-7f-45 Ex.	.....

and all other departments operating on special funds other than the general revenue of the state."

For my information, you have called attention to the following parts of Chapter 4 of the Laws of the 45th General Assembly:

Sec. 2; Section 4; Paragraph 17 of Section 6; Paragraph 1 of Section 7; Paragraph 4 of Section 8; Paragraph 1 of Part I of Section 15; Paragraph 2-C of Part I of Section 15; all of Part II of Section 15, and all of Part III of Section 15.

Section 2 above contains a list of statutory definitions. Section 4 above provides for the creation of the office of State Comptroller, fixes his salary and requires the Comptroller to furnish bond before entering upon the discharge of his duties, the premium of which shall be paid out of the State Treasury.

Paragraph 17 of Section 6 above requires the Comptroller to prepare and submit to the Governor and the Legislature on or before December 15th of each year, an annual report setting forth in detail and in summary form the financial condition and operations of the government; shall also contain the Comptroller's recommendations concerning legislation needed to facilitate the work of his office and such other reports as the Governor or the General Assembly may from time to time require of him. The only recommendation for legislation provided for by Paragraph 17 is limited to that which will facilitate the work in the office of the Comptroller.

Paragraph 1 of Section 7 above, gives the Comptroller additional general powers under the provisions of which, the Comptroller may require any person receiving money, securities or property belonging to the State, or having the management, disbursement, or other disposition of the same, an account of which is kept in his office to render statements thereof and information in reference thereto. This is very plain and I believe, self-explanatory.

Paragraph 4 of Section 8 above, provides that no claims for per diem and expenses payable from fees shall be approved by the Comptroller for payment in excess of such fees where the law provides that such expenditures are limited to the special funds collected and deposited in the State Treasury. This is a prohibition placed upon the Comptroller in that he shall not approve of payment of such claims in excess of the fees provided for by law in such departments such as the Board of Architects and Examiners under Section 1905-b12 of the 1931 Code. The expenses to be paid from this fund are those limited to the income derived from the fees as set forth in Section 1905-b11 of the 1931 Code.

Paragraph 1 of Part I of Section 15 above, provides that the Governor in shaping his program for meeting all the expenditure needs of the government for each of the years of the biennium to which the budget relates, indicating the classes of funds, general or special, from which such appropriations are to be made, and the means through which such expenditures shall be financed. This provision simply requires the Governor to include these matters in his budget message and does not specifically refer to the powers, duties or limitations of the State Comptroller. It has to do with the Governor, not the Comptroller.

Part III of Section 15 also relates to the duties of the Governor and do not specifically relate to the Comptroller's duties whatsoever.

In fact, all of Sections 14 and 15 of Chapter 4 of the Laws of the 45th General Assembly relate solely to the Governor's duties with respect to his budget message to the Legislature, wherein he sets forth his financial program for each of the fiscal years of the ensuing biennium, and Parts I, II and III of Section 15 specifically state what this budget shall consist of.

Sections 5, 6 and 7, Chapter 4, of the Laws of the 45th General Assembly, prescribe in detail the power and authority of the State Comptroller. All of Section 8 of Chapter 4 is a limitation on the power of the State Comptroller. Section 9, Chapter 4, abolishes the State Board of Audit. Section 10, Chapter 4, abolishes the office of the Director of the Budget. Section 11 relieves the Board of Control of all duties with regard to institutions under its control in respect to audit, abstracting and certifying claims for pay-

ment, etc. Section 12 of Chapter 4 relieves the Auditor of all duties in respect to the pre-audit and settlement of state accounts and also specifically mentions the sections of the Code of 1931 that are repealed. Section 13 of Chapter 4 relates to the transfer of personnel from the State Auditor's office, the Budget Bureau and Board of Control, the State Board of Audit to the Comptroller's office.

Section 16, Chapter 4, provides and requires all departments and establishments of the State government to transmit to the State Comptroller their estimates of their expenditure requirements for the ensuing biennium.

Section 17 of Chapter 4, requires the Comptroller, prior to legislative session, to prepare an estimate of the total income of the government for each fiscal year of the ensuing biennium in which the several items of income shall be listed and classified according to sources or character, departments or establishments producing said funds and brought into comparison with the income actually received during the last completed fiscal year and the estimated income to be received during the year in progress.

Section 18, Chapter 4, provides and requires the Comptroller, after the requirements in Section 16 and 17 have been completed, to prepare a tentative budget conforming as to scope, contents and character to the requirements of Section 15 and containing the estimates of expenditures and revenue as called for by Sections 16 and 17, which tentative budget shall be transmitted to the Governor.

Sections 19, 20, and 21 of Chapter 4 all relate to the duties of the Governor with respect to this budget and supplemental estimates for such appropriations as in the judgment of the Governor, may be necessary on account of laws enacted after the transmission of the budget, or as the Governor might otherwise deem necessary in the public interest.

Section 22 of Chapter 4 is a limitation on any officer or employee of any department or establishment of the State government in making any additional requests for appropriations unless the same is made at the request of either house of the General Assembly.

Sections 23 to 33 inclusive of Chapter 4, relate to the execution of the budget and do not throw any light on the preparation of the same.

Under the sections of Chapter 4 which you have called to my attention, I fail to find any provision which would authorize you as State Comptroller, to make recommendations for the next biennium as to the fixing of salaries for the personnel in any of the departments of the State government outside of your own department.

Under Sub-section 3 of Section 5 of Chapter 4, you have the right to fix the compensation of the personnel in your own office with the approval of the Governor.

Under the provisions of Sub-section 1 of Section 7 of Chapter 4, you do have the power and authority to call upon any department for information concerning the receipts and expenditures and financial condition with respect to such department. From time to time, this may be necessary in order for you to carry out the duties imposed upon you under Chapter 4.

I have not made a diligent search of any of the sections of Chapter 4 except those which you have called to my attention in your letter of Jauary 24th. I am also unable to discover that any of the sections of the Code mentioned by you in your letter of January 24th have been repealed by Chapter 4 of the 45th General Assembly laws. If there are any other sections of Chapter 4 which you desire us to make any further legal study of, please let us know and we will be glad to assist you in any way that we possibly can.

SCHOOLS: GENERAL FUND: FUND FOR ENTERTAINMENT PURPOSES: $200 accumulated through school having various social events, was placed in general fund with intention to use same for entertainment purposes. State checkers advised that no further withdrawal from general fund can be allowed for such purpose. Is there legal way for $200 to be withdrawn from general fund?

January 26, 1935. *County Attorney, Cherokee, Iowa:* We have your request for opinion on the following proposition:

There are five subdistricts in a certain school district in this county and various of these schools in the district have had social events for which they charge an admission. They accumulated in this way about $200, which money was deposited in the general fund, the intention being to use this money for entertainment purposes such as the hiring of speakers and so on. The state checkers have advised that no further withdrawal from the general fund can be allowed for such purpose. Will you please advise if there is any legal way by which this sum of approximately $200 may be withdrawn from the general fund?

As an ordinary proposition, withdrawals from the general fund could not be allowed for entertainment purposes, but such is not the exact situation here, as in this particular case, this money was inadvertently placed in the general fund through a misunderstanding that the money could be held therein for particular and designated purposes. This fund is clearly not a part of the general fund and is in the nature of a trust fund, and therefore, by proper resolution, the board in finding that this sum was inadvertently placed in the general fund, but that it was not a part of the general fund, could authorize its withdrawal from the fund in toto. This sum could then be turned to anyone designated by the student body or teachers to hold and be expended for the entertainment purposes they desire. After this account gets back into the hands of the person designated by the students or teachers, it would be treated as if it were never in the general fund at any time and could be expended in any way that they chose, as the money does not belong to the district, and such is the opinion of this office.

AMENDMENTS: LEGISLATIVE PROCEDURE, CONSTITUTIONAL: BILLS, PASSAGE OF: CONFERENCE REPORTS: A bill originating in one House and amended in the opposite House, shall be voted upon again in the original House, as amended, the amendment first being voted upon. In a conference report the report is adopted first and then the amendments contained therein.

January 29, 1935. *Honorable John H. Mitchell, Speaker, House of Representatives.*

In re—Constitutional legislative procedure in the final passage of certain bills.

Your letter of January 21st, addressed to the Attorney General, has been referred to me for reply. You present the request, in view of the recent de-

cision of the Supreme Court of Iowa in the case of Smith vs. Thompson, filed December 11, 1934, relating to the constitutionality of the procedure in the passage of Senate File No. 479, that we render to the House of Representatives an opinion setting forth the constitutional procedure to be followed in the final passage of bills after the adoption of:

"Amendments which have been adopted by either House upon bills originating in the opposite House.

"Conference reports, together with amendments contained therein."

Said Senate File is now known as Chapter 89 of the Acts of the 45th General Assembly. The Supreme Court held this chapter unconstitutional on the ground that under the record before it,

"the act in question was never before the House for aye and nay vote on its final passage, and that the adoption of the fragmentary report of the Conference Committee did not suffice and did not meet the constitutional requirement that a vote 'shall be taken immediately upon its last reading and the ayes and nays entered on the journal.' "

We quote from the opinion of the court as follows:

"It nowhere appears in the record that the House ever voted upon the Senate Bill No. 479 or that the ayes and nays were called and recorded on the question of the final adoption or passage of the act."

The Supreme Court of course cannot go outside of the record before it, and if it nowhere appears in the record before it that the House ever voted upon Senate File No. 479 or that the ayes and nays were called and recorded on the question of the final adoption or passage of the act, the Supreme Court could hand down no other opinion than the one pronounced by it.

We have no disposition to say that the Supreme Court's decision lacks support in the record. On the contrary, we accept without question the findings of facts by the court and on the facts as found we agree with the conclusions of law arrived at.

Each and every law passed by the Legislature is subject to judicial review when questions of construction or constitutionality are raised. With the Supreme Court rests the final determination of a question whether statutes are enacted in a legal and constitutional manner. The Legislature does not wish to do futile things. Its members desire that the laws passed by it shall be upheld by the courts rather than nullified by court decision. The members of the General Assembly are familiar with the steps taken in the passage or attempted passage of Senate File No. 479. The Supreme Court has held that the steps taken by the Assembly in the passage of this bill do not meet the constitutional requirements. The questions submitted in your letter then become pertinent questions.

A complete but possibly not a sufficiently definite answer to your questions is contained in Section 17 of Article 3 of the Constitution of the State of Iowa, which is as follows:

"No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the General Assembly, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal."

You are bound by this section, and it is in reality a part of your rules although it is not set out therein specifically. The Legislature has no power to set

aside any part of this section or any other section of the Constitution. The consequences of failing to meet the requirements of this section are so serious that the Legislature cannot afford to fail to do all the things necessary to remove any doubt about the legal and constitutional passage of such legislation as it may enact.

The rules followed by the House and Senate are not new but have prevailed and have been followed for many years. They were found by experience to be adapted to the situations which arise and so far have been deemed the most effective rules which have been brought to the attention of the legislative branch of the state government.

Certain rules with reference to the final passage of bills have now been challenged by the highest authority which may challenge such rules and have been held to be inadequate to accomplish the purpose intended in certain cases. Until a clearer understanding is obtained of the full force, meaning, and effect of the decision in the Smith vs. Thompson case, and until we are better informed as to just how far the court intended to go in that case, we must advise that you take no chances in the passage of bills and that in all cases all the requirements contained in Section 17 of Article 3 of the State Constitution above quoted shall be complied with.

Answering your questions more specifically, it would seem that where amendments, which have been adopted by either House upon bills originating in the opposite House, are adopted by the House in which the bill originated, the bill and amendments each having been passed by a majority of the members elected to each branch, then nothing more would be required as to voting upon the bill and amendments, and the same rule would be true of conference reports. It has been suggested, however, that the highest court takes the view that when a bill passes one branch and is amended by the other and passed as amended, it is a new bill when it goes back to the House in which it originated and that the entire bill as amended, or in other words the new bill, should be voted upon as a new bill and passed in the regular way as such "immediately upon its last reading and the ayes and nays being entered on the journal."

In order that further legislation may not be subject to successful attack on the ground that in its passage all the constitutional requirements were not met, we are of the opinion you should adopt rules which without any question meet the constitutional requirements.

Where a bill originating in the House, for example, is properly passed, goes to the Senate, is properly amended and passed in the Senate and sent back to the House, and the House desires to adopt it as amended, the vote should be taken not merely on the amendment but also upon the bill as amended and immediately upon its last reading the ayes and nays called and recorded on the question of the final adoption or passage of the act, the ayes and nays being entered in the journal. In the case of conference report if it is acceptable to the House, the procedure would be to adopt first the report and then the amendments contained therein, the ayes and nays being entered in the journal. The question upon the final passage of the act as amended should then be taken immediately upon the last reading and the ayes and nays entered in the journal. The same procedure would be applicable to similar situations in the Senate.

The Smith vs. Thompson case supra holds the law of this state to be that:

"The enrolled bill which bears the signature of the presiding officers of both Houses and the Governor and filed in the office of the Secretary of State is the exclusive and conclusive proof and evidence of the text of the law as announced in such bill, and that such bill cannot be impeached except and unless it shows upon its face that it violates some constitutional provision or that it be shown by records which the constitution requires to be kept by the Legislature that some mandatory provision of the constitution has been not complied with in its passage by the Legislature, or the signing by the officers whose signatures the constitution requires to be attached thereto."

We have gone into this matter at some length but if you desire our opinion as to any further questions which may arise in connection with your rules of procedure, we are always glad to serve you.

BOARD OF EDUCATION: IOWA STATE TEACHERS COLLEGE: FEDERAL INCOME TAX: Compensation paid to these employees name in inquiry of President Latham of Iowa State Teachers College is exempt from Federal Income Tax.

February 1, 1935. *Iowa State Board of Education:* I have your letter of January 31st, enclosing copy of letter from President O. R. Latham of the Iowa State Teachers College, Cedar Falls, Iowa. He advises that during the period from 1924 to 1933, a number of the regular faculty members of the college were employed and their compensation fixed by what is termed a multiple-factor method. Under this method of compensation, the exact compensation to be received by the faculty member was not provided for in the contract, but the instructor received an income equal to the fees paid by the students into the office of the college treasurer and also a lump sum, for example, $200 per year for the direction of the two glee clubs. This mostly involves the music department where private lessons are sought and given as a part of the regular college curriculum and these students are required to pay the said definite amount for this special study, the reason being, as I understand, that before the teachers college graduates a student, they desire that they be proficient in some type of music, either instrumental or vocal, so that in that way they can be in a better position to take charge of musical activities in their teaching profession. Some of these students who took this particular special work were charged a special music fee amounting to $18.00 per term for twelve weeks. This fee was collected from the student by the college business office in the same manner that regular tuition fee, gymnasium fee, chemistry laboratory fees and other such fees are collected. These instructors were then paid an amount equal to these fees so collected and regular institutional checks were issued to these instructors every month, these instructors doing the same type of work as other instructors and were from time to time promoted in ranks from instructor to assistant professor, to associate professor and to professor. They devoted their full time to these duties the same as any other instructor or professor and the regular credit was given therefor to the students.

President Latham has stated that some inquiries have been made by the Deputy Collector of Internal Revenue as to this method of compensation and states that some question may arise from these inquiries as to whether these instructors were entitled to exemption from the Federal Income Tax.

We had a somewhat similar proposition before us a short time ago from the Director of Receiverships and the Superintendent of Banking and at that

time, I went thoroughly into the proposition and advised the Director of Receiverships by written opinion as to our thought on the proposition. I pointed out there that the exemption provision on the income tax blanks is as follows:

"Compensation paid by state or political subdivisions thereof to its officers or employees for services rendered in connection with the exercise of an essential governmental function."

Article 643, Regulation 77, provides in part in regard to exemptions:

"Compensation paid to its officers and employees by a state or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of a state or political subdivision * * * * * is not taxable. Compensation received for services rendered to a state or political subdivision thereof is included in gross income unless (a) a person receives such compensation as an officer or employee of a state or political subdivision; and (b) the services are rendered in connection with the exercise of an essential governmental function."

As stated in that opinion, the law in regard to exemption from taxation by the Federal government of compensation of state officers and employees engaged in the exercise of essential governmental function is well known and is not a matter of dispute, as the Supreme Court of the United States has held many times that the Federal government cannot impose a burden upon the state in connection with the exercise of its essential governmental function. There is no question in anyone's mind but what the furnishing of educational facilities such as are furnished students at the Iowa State Teachers College at Cedar Falls, is a governmental function of the State as the college is governed by the Iowa State Board of Education whose members are appointed by the Governor and confirmed by the Senate and therefore exists as an arm or agency of the State. The Legislature appropriates certain sums of money at every session for the ensuing biennium to operate the Iowa State Teachers College and other educational institutions of the State, the Appropriation Act providing that none of the appropriations are available until the head of the department, bureau, board, commission or institution swears that all moneys received from miscellaneous receipts, fees, or other income have been expended so that the Legislature requires that the institutions and all institutions first apply the fees and other income toward their expenses before going into the appropriations, which, of course, is money raised through general revenue.

The teachers, instructors and professors of Iowa State Teachers College are employees of the State as there is every element of employment including term of employment, compensation to be paid and contract entered into by the State through the Iowa State Board of Education, and the teacher or instructor acts in no wise as an independent contractor, but devotes his time to the duties and must act according to the instructions received from the President of the College, who receives his instructions from the Iowa State Board of Education.

The Iowa State Board of Education has the right to determine the method by which it will pay its employees and has the right to require that students pay fees and tuition as these are required in every educational institution in the country. The only possible question that could be raised is, as I understand, whether these employees are paid by the State. According to President Latham's letter, these employees are paid by the State in that an insti-

tutional check is issued to them every month and surely the Federal Government cannot raise any question as to the amount of compensation that the State desires to pay its employees, for the Board can determine whether it desires to pay an employee a flat salary or an amount equal to what is raised by fees and tuition and pay into the school treasury, for in any event, as soon as this money gets into the institutional treasury, whether it comes from tuition fees or from general appropriation, it is state money and is subject to the control of the Legislature and the Legislature has assumed control of this money in providing in the Appropriation Act that no part of the general appropriation be used for payment of the expenses of these educational institutions until the fees and other income have been so used and expended. As I pointed out in the opinion to the Banking Department in regard to this similar proposition, it could not very well be said that these employees who are employed on a yearly basis by the State, were not State employees and not paid by the State during the time that they were paid from these fees, but as soon as the fees ran out and they had to go into the general appropriation, they were State employees, for during the entire period, they are acting under the same contract and under the same direction and supervision and are being paid pursuant to the mandate of our legislature which has the right to provide how any State employee is going to be paid.

You appreciate the fact that the opinion of this office is not binding upon the treasury department of the Federal Government and we appreciate the fact that the Treasury Department has many able counsel on their staff to advise them in regard to various propositions, but this question here is so apparent that I believe when the matter is properly presented to the Treasury Department and they are advised as to the exact facts and the provisions of our laws and appropriation acts, that they can come to only one conclusion and that is the same conclusion that we arrive at.

It is, therefore, the opinion of this department that the compensation paid to these employees named in the inquiry of President Latham hereinbefore pointed out, is exempt from Federal Income Tax.

OLD AGE ASSISTANCE COMMISSION:

Persons who took up a residence in the State of Iowa as of December 31, 1933, would be liable for the $1.00 head tax.

Persons who took up a residence in the State of Iowa as of January 2, 1934, would not be liable for said tax.

February 8, 1935. *Old Age Assistance Commission:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department on the following questions:

The old age assistance act in section 34 provides that the tax is levied on persons who are residents of the State of Iowa and citizens of the United States as of January 1, 1934.

1. If a person who is a resident of another state takes up a residence in the State of Iowa as of December 31, 1933, is he liable for the payment of the special levy tax of $1.00 as provided for in this act?

2. If a person who is a resident of another state takes a residence in the State of Iowa as of January 2, 1934, is he liable for the payment of the 1934 tax or is he exempt from payment until January 1, 1935?

In answer to your first question, in the opinion of this department, persons

who took up a residence in the State of Iowa as of December 31, 1933, would be liable for the $1.00 head tax. In passing we might say that the statute contemplates a levy of the tax against the individual at January first of the year involved.

In answer to your second question, in the opinion of this department, a person who would become a resident of the State on the second day of January, 1934, could only be taxed in accordance with the language used in Section 34 of the old age assistance act, which is as follows:

"* * * * * an *annual tax* of two dollars ($2.00). * * * * *."

The terminology "annual tax" is generally construed to mean that such a tax levy is effective as of January first in the year in which it is levied.

Therefore, a person such as you have described would not be liable for this special tax until the year 1935 in keeping with the interpretation of the general tax laws of the State.

OLD AGE ASSISTANCE ACT:

"Interpretation of Section 5, method of appointing new members and as a matter of law, should the old age assistance commission be advised as to these changes."

February 8, 1935. *Old Age Assistance Commission:* This will acknowledge receipt of your request of this date for our interpretation of Section 5 of the old age assistance act with reference to vacancies which may occur and the method of appointing new members and whether, as a matter of law, the Old Age Assistance Commission should be advised as to these changes.

It is the opinion of this department that Section 5 of the old age assistance act gives the number of members who shall compose the board, said section providing as follows:

"Appointments of Boards in Counties. The Old Age Assistance Board of a county shall consist of three members, no more than two of whom shall belong to the same political party, of which the overseer of the poor shall be an ex officio member. If any county have more than one overseer of the poor, the Board of Supervisors of such county shall designate, by writing, filed with the County Auditor, the overseer who shall serve as a member of such board. The other two members of the board shall be appointed by the Board of Supervisors for a term of one and two years respectively. Upon the expiration of the term of office of a member of the board, his successor shall be appointed by the Board of Supervisors for a full term of two years. If a vacancy occurs, otherwise than by the expiration of a term, in the office of an appointive member of the board, it shall be filled for the unexpired term. At least one member of the board shall be a woman. Appointments shall be made in writing and filed with the County Auditor."

When the last sentence of the section is complied with and the appointment is made and filed with the County Auditor, the certificate from that officer is prima facie evidence that the board is legally constituted and, therefore, that the acts done by such a board would be legal in the absence of any legal attacks upon or against the manner in which the board was appointed. If a legal action was taken with reference to the filling of vacancies, then the question might arise as to whether or not the acts done by such a board would be legal, but this would be a matter for final determination by the courts.

We find no provision in the act whereby the County Board of Supervisors are directed to take the matter up with the State Old Age Assistance Commission.

We assume in the removing of any official that such a person serving as a member of the Old Age Assistance Board would have the same rights as do any other officials under the laws of the State with reference to the removal of officers. However, a situation might arise whereby the first duty of the Board of Supervisors would be to comply with the directions of Section 5 as to the composition of the board in that there be three members, one of which shall be a woman, and also with reference to the party affiliation, likewise the Overseer of the Poor being an ex officio member of the board.

OLD AGE ASSISTANCE ACT:

(Question relative to the receipt of blind pension and old age pension). Section 27 of the act would govern in this regard.

February 8, 1935. *County Attorney, Northwood, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department on the following questions:

One of the residents of this county who is blind has been receiving the blind pension, as provided by law. Now this party has been granted an old age pension in the sum of $15.00 per month.

Does this old age pension supersede the blind pension, or is it in addition to the amount allowed to him as a blind person?

Also, if the old age pension granted him supersedes the blind pension, can he refuse to accept the old age pension and continue to receive his blind pension?

As the person in question is now receiving relief under Chapter 272, 1931 Code of Iowa, entitled "COUNTY AID FOR THE BLIND," it is the opinion of this department that Section 27 of Chapter 19, Acts of the 45th General Assembly in Extraordinary Session, answers the question presented in that it 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."

This section of the old age assistance act would preclude the taking of any other assistance, such as is outlined.

BOARD OF SUPERVISORS: COUNTY SECONDARY ROADS: PURCHASE OF MATERIALS FOR ROAD MAINTENANCE WORK:

"That section (4644-c42) does not require the Board of Supervisors to purchase materials which are to be used in the *maintenance* of secondary roads by advertising for bids."

February 8, 1935. *Auditor of State:*

In Re: Purchase of materials for road maintenance work—county secondary roads.

We have your letter of recent date, in which you ask for an opinion on the following:

"Are purchases by the County Board of Supervisors for materials to be used in the maintenance of secondary roads controlled by the statutory provisions contained in Section 4644-c42, requiring the advertising for bids for materials in excess of $1,500.00?"

It will be noted that Section 4644-c42 provides in substance that all contracts for road or bridge construction work and materials therefor, which exceed the estimate of $1,500.00, shall be advertised and let at public letting. That

section does not require the Board of Supervisors to purchase materials which are to be used in the *maintenance* of secondary roads by advertising for bids. In fact, neither that section nor the preceding section have anything to do with maintenance or materials to be used in maintenance of secondary roads, but apply only to contracts for road or bridge construction work and materials therefor.

OSTEOPATHIC PHYSICIANS AND SURGEONS:

It is the opinion of this department that a duly licensed osteopathic physician in the State of Iowa is a "physician" within the contemplation of Section 2181 of the 1931 Code of Iowa.

February 11, 1935. *Osteopathic Examiners:* We have your request for an opinion from this department relative to the following proposition:

"You will recall that paragraph B of Regulation No. 3 in the recently issued Federal Emergency Relief rules and regulations No. 7 provides that:

'When a program of medical care in the home for indigent persons has been officially adopted, participation shall be open to all physicians licensed to practice medicine in the state subject to local statutory limitations.'

"Please advise as to whether or not we are correct in holding that out of the above quoted provision, relief workers in Iowa may avail themselves of the professional services of those medical practitioners who are licensed under Chapter 118 of the Code in any and all cases, except those where the treatment requires the use of internal curative medicine as prohibited by Section 2554 of the Code."

The question raised by you is whether or not "osteopathic physicians" and "osteopathic surgeons" fall within the statutory definition of a "physician" under the laws of the State of Iowa.

You are advised that Par. 5 of Section 2181 of the 1931 Code of Iowa provides as follows:

" 'physician' shall mean a person licensed to practice medicine and surgery, osteopathy and surgery, osteopathy, or chiropractic under the laws of this state. * * * *"

It will be noted from the above statutory definition that wherever the word "physician" appears in the statutory laws of this State, that it shall include "osteopathy" and also "osteopathy and surgery." An "osteopathic physician" is one who has completed at least a four-year course of nine months each year in actual continuous attendance in an approved college of osteopathy and who has been licensed by the Board of Osteopathic Examiners to practice their profession in the State of Iowa.

An osteopathic physician cannot practice major surgery or prescribe internal curative medicines.

An osteopathic surgeon is one who has already met the requirements for admission to practice as an osteopathic physician in the State of Iowa and in addition thereto has complied with the following requirements:

"Has had a two-year post-graduate course of nine months each in an accredited college of osteopathy involving a thorough and intensive study in surgery as prescribed by the osteopathic examiners or 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, 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." (Section 2551, 1931 Code of Iowa.)

When a person has met these additional requirements and is licensed by the State of Iowa as an osteopathic surgeon, he may practice major surgery in addition to his medical practice of osteopathy, but in no event can either an osteopathic physician or an osteopathic surgeon prescribe or give internal curative medicines. (Sec. 2554 of the 1931 Code.)

It will be observed that similar questions relating to the practice of osteopathy have been passed upon by the Attorney General's office of the State of Iowa previously. On January 14, 1930, the Attorney General's opinion was issued to the State Commissioner of Health in which the Attorney General ruled that osteopaths and chiropractors are entitled to the same consideration in county public hospitals as regular practitioners of medicine. In this ruling, the Attorney General stated as follows:

"We do not believe that the legislature, when they incorporated Section 5364 in the chapter pertaining to county public hospitals, intended to discriminate against any recognized branch of medical service, and that the hospital should therefore, permit osteopaths and chiropractors to have the same recognition in county public hospitals as is given to doctors practicing a regular course of medicine."

On December 3, 1930, the Attorney General of Iowa, in an opinion issued to the Commissioner of Health, held that an osteopath and a chiropractor may certify children to be non-infectious from communicable disease. In arriving at this decision, the Attorney General stated as follows:

"Under Title 7 relating to public health, paragraph 5 of Section 218 states: '*Physician* shall mean a person licensed to practice medicine and surgery, osteopathy and surgery, osteopathy or chiropractic, under the laws of this state."

On July 26, 1932, the Attorney General of Iowa, in an official opinion issued for the County Attorney of Ottumwa, Iowa, held that an osteopath might secure alcohol for disinfecting instruments used in minor surgery.

Again on August 22, 1932, the Attorney General of Iowa issued an opinion to the County Attorney at Osceola, Iowa, in which he stated as follows:

"This will acknowledge receipt of your letter of recent date in regard to the employment, by the overseer of the poor, of an osteopathic physician to take care of an individual case sent to the physician by the said overseer.

"We concur in your opinion that the limitation of Section 5334-c1, Code of 1931, does not apply to this case.

"We are enclosing copy of an opinion rendered to the Department of Health under date of January 14, 1930, sustaining that position. That opinion reaches the conclusion that where medical service is provided for, any recognized branch of the healing arts may be used."

Courts of other states have held that the term "physician" includes "osteopathic physicians" and also "osteopathic physicians and surgeons." *Howerton vs. District of Columbia,* 53 App. D. C. 230, 289 F. 628. *Brandell vs. Dept. of Health of New York City,* 193 N. Y. 133, 85 NE 1067, 21 L. R. A. (N. S.) 49. *Towers vs. Glider,* 101 Conn. 169, 125 Atl. 366. *People ex rel Gage vs. Simon,* 278 Ill. 256. *State vs. Schmidt,* 138 Wisc. 53.

It is therefore the opinion of this department that a duly licensed osteopathic physician in the State of Iowa is a "physician" within the contemplation of Section 2181 of the 1931 Code of Iowa and that he is authorized to

practice his profession but cannot practice major surgery or prescribe or give internal curative medicines; it is also the opinion of this department that an osteopathic physician and surgeon, under the laws of the State of Iowa, may qualify as a "physician" within the contemplation of Section 2181 of the 1931 Code of Iowa and may practice osteopathy and major surgery but cannot prescribe or give internal curative medicines.

BANKS AND BANKING: CAPITAL STOCK TAX: FIRST NATIONAL BANK, LE MARS, IOWA: RE: REMISSION OF CAPITAL STOCK TAX.

February 12, 1935. *County Attorney, Le Mars, Iowa:* We have your request for opinion on the following proposition:

In February, 1932, the holders of capital stock in the First National Bank paid an assessment. The following July, the bank found itself unable to meet its obligations to depositors and on the 11th of that month, requested a waiver to be signed by all depositors extending the time of payment on the obligations for a term of five years. This was done and the bank continued to operate. On March 4, 1933, the time of the bank holiday, the bank was found to be in an unsatisfactory condition and a conservator was appointed who continued in charge of the bank pursuant to the National Banking Act of 1933, until November 1, 1933, when a receiver was appointed for the bank.

In August, 1934, a new bank was organized known as the First National Bank of Le Mars. As a part of the organization of the new bank and with arrangement and agreement of the creditors of the old bank, the new bank assumed 50% of the deposit liability of the old bank and good assets of the old bank were taken into the new bank with which to pay this deposit liability assumed, and approximately $400,000 in undesirable assets of the old bank were turned over to trustees for the benefit of former depositors in the old bank who were given trust certificates against the trust fund. In organizing the new bank, the stockholders of the old bank paid an assessment of 50 per cent.

It is claimed that the financial condition of the bank was about the same in the spring of 1932 as at the date of the appointment of receiver and the date of the origination of the new bank, and it is claimed that if it had not been for the waiver executed on the part of depositors and the bank passing into the hands of a conservator, an assessment would have been necessary in 1932.

An application has been made to the Board of Supervisors for remission of the tax on the capital stock of the bank for the years 1932 and 1933, which taxes would have been payable in 1933 and 1934 upon the theory that such remission should be made in view of Section 1, Chapter 91 of the Laws of the 45th General Assembly, Extra Session. It is contended that the assessment and the money paid by the stockholders was on account of the condition of the bank in the year 1932 when its first financial troubles arose. Should the remission or any part thereof be granted?

We are not clear from the facts, as stated, exactly what happened at the time of the organization of the new bank, that is, whether the old stockholders purchased the stock in the new bank in an amount equal to 50% of their holdings in the old bank and this was credited by way of stock assessment, or whether they paid cash to the receiver of the old bank in the amount of 50%. This is probably immaterial to the question here, as we have involved a national bank, while our definition of a reorganization, being Section 7 of Chapter 112, Acts of the 45th General Assembly, Extra Session, applies to State banks. You appreciate the fact that Section 1, Chapter 91 of the Laws of the General Assembly, Extra Session, was enacted as an amendment to Section 7237 of the Code and in an attempt to give some relief to stock-

holders whose stock had been destroyed and the statutory assessment made and paid for the year such stock was assessed for taxation.

It must be kept in mind in construing this provision that there are two types of assessment upon stockholders of banks, one paid in an attempt to save the bank, which assessment is deemed voluntary and is paid before the bank is placed into the hands of the receiver. The other assessment is the one that is required by law and is commonly called a statutory assessment. This is levied pursuant to order of court and is paid to the receiver for the benefit of the creditors of the trust. Necessarily, the so-called voluntary assessment is paid for the purpose of restoring value to the stock and it is presumed that after it has been paid, the value of the stock is restored and the bank no longer in an unsafe condition, so that the stock cannot be deemed to have been destroyed by the payment of this voluntary assessment, but the stock is destroyed upon the placing of the bank in the hands of a receiver and paying the statutory assessment; and it was this type of an assessment and loss of stock that the Legislature had in mind at the time of the enactment of the above provision.

While the bank is a going concern, the tax on the stock is 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 tax can be paid, so necessarily, it must be paid by the individual holder so that prior to the above enactment of the 45th General Assembly, Extra Session, an assessment would be made the first of the year on the supposed value and the levy would be the following September. If subsequent thereto, a bank closed and was placed in the hands of the receiver, and the statutory assessment ordered by court, and paid by the stockholder, there was no relief from taxation irrespective of the fact that the court had in fact found the stock to be worthless and had ordered the payment of the super-added liability and the stockholder was bound to pay the tax thereon the following year.

It is clear, then, that this enactment of the Legislature can give no assistance to the tax on the stock for the year 1932 and payable in 1933, as during this time, the stock had presumably some value, for the bank might have reorganized and might have been a going concern and at the present time making money as many banks that were in this situation, are now doing.

In regard to the tax of 1933 payable in 1934, this comes squarely within the enactment of the Legislature for the bank was placed in the hands of a receiver in 1933 and a so-called statutory assessment was made and paid, but you will note that this enactment of the Legislature is not retroactive. It is the settled law of taxation, that taxation is the rule and exemption from taxation, the exception, and that there is no exemption from taxation unless so provided by statute. See Security Bank vs. Connell, 198 Iowa, 564, and the cases cited therein.

It is also the rule that the statute under which an exemption is claimed, should be strictly construed and that if property is taxable under the previous general statute and is afterwards claimed to be exempted by a later statute, the exemption must be shown to be clearly and unequivocably expressed. See *Trustees of Griswold College vs. State,* 46 Iowa, 275; *Sioux City vs. Inde-*

pendent District, 55 Iowa, 150; *Cassady vs. Hammer,* 62 Iowa, 359, and *Davenport National Bank vs. Mittelbuscher,* 4 McCrary (U. S.), 361.

This enactment of the Legislature went into effect January 17, 1934, which was after the levy and assessment for the year 1933.

In the case of *First Congregational Church vs. Linn County,* 70 Iowa, 396, the court had before it a question in the construction of present Section 6944 of the Code of Iowa, 1931, and the facts were that certain property was assessed for taxation in January, 1880. In August of that year, the plaintiff purchased the lot for the purpose of erecting thereon a church of worship and the property was so used for that purpose and the question was whether the lot was exempt from taxation for the year 1880 and our court said in regard to this and in the construction of our present Section 6944 of the Code:

"The exemption from taxation under Code Section 797 was not intended to act retrospectively and exempt from prior taxes or prior liability for taxes. The provision was intended to act prospectively, and to exempt property from future liability."

See also *Grand Lodge vs. Madigan,* 207 Iowa, 24.

The enactment of the 45th General Assembly, Extra Session, is silent as to taxes levied prior to its effective date of January 17, 1934, and it is, therefore, apparent that it can only affect taxes levied subsequent to that date.

It is, therefore, the opinion of this department that your Board of Supervisors should not remit the tax on the capital stock of the First National Bank either for the year 1932 or 1933.

BOARD OF CONTROL: FUND IN DEPOSITORY BANKS SIMILAR TO PETTY CASH FUND: WHETHER SUCH FUND COMES WITHIN THE STATE SINKING FUND PROVISION AS TO THE REQUIREMENT FOR INTEREST ON PUBLIC FUNDS TO BE DIVERTED INTO THE STATE SINKING FUND, THIS BEING CHAPTERS 352-d1 and 352-a1 of the Code.

February 13, 1935. *Board of Control:* You advise that there is in the depository banks of your various institutions, certain funds on deposit, which fund is in the nature of a petty cash fund. This deposit is drawn on by checks or vouchers signed by the head of the institution together with someone under him, such as the steward.

You further advise that this fund is kept fairly permanent in amount in that when there is a withdrawal, the amount of the withdrawal is reimbursed by a warrant from the Comptroller, which is placed on deposit to the credit of this fund. This fund then being under the direct supervision of the head of the institution and for the purpose of paying small bills of the institution and for other uses as a petty cash fund would be used, you ask whether such fund comes within the State Sinking Fund provision as to the requirement for interest on public funds to be diverted into the State Sinking Fund, this being Chapters 352-d1 and 352-a1 of the Code.

You will note that Section 7420-d1 of these acts provides in part:

"The Treasurer of State * * * * shall deposit all public funds in their hands in such banks as are first approved by the Executive Council * * * *." There is no other provision in regard to State funds and you will note that the above refers only to funds in the hands of the Treasurer of State. It is

clear that the funds you have inquired about are not in the hands of the Treasurer of State, nor does he have any control over the same, but they are in the hands of the head of the institution and he is the one who controls them, and it is our understanding that it has been your practice to protect these funds by pledged assets of the banks so that therefore, you will not have to look to the Sinking Fund for protection in event of receivership of the depository bank.

It is, therefore, the opinion of this department that Chapters 352-d1 and 352-a1 of the Code of Iowa, do not apply to these funds inquired about.

MOTOR VEHICLE DEPARTMENT: ROAD MACHINERY: TRUCKS—LIGHTS REQUIRED: Although a motor truck may be used in connection with road work it must carry the same lights as motor trucks not used in road work, unless in conjunction with other road machinery.

February 14, 1935. *Motor Vehicle Department:* You submit to this department a request for a construction of Section 5055-B1, and 5055-B2, and 5055-B3 of the 1931 Code of Iowa. I quote the second and third paragraphs of your letter as follows:

"There is no question but that when this was passed by the Legislature and according to the way it has been previously enforced, it was supposed to apply only to road machinery and that trucks operating as trucks were not included—only when in conjunction with road machinery.

"The use of red lights on the front of vehicles is a very dangerous prosposition due to public education that a red light is always on the rear. I would like to know if in your interpretation of the Statutes it would be possible to exclude motor trucks operating as such rather than in conjunction with road machinery."

We set out the three sections of the Code in question as follows:

"5055-B1. *Road machinery—lights required.* No tractor, motor truck, road grader, road drag, or other piece of road machinery operated by gasoline, kerosene, or coal shall be used upon any public highway in this state which is open to traffic by the public, unless there is carried at least two red danger signal lanterns or lights, each capable of remaining continuously lighted for at least sixteen hours.

"5055-B2. *Number of lights—duty to maintain.* It shall be the duty of each person charged with the operation of any tractor, motor truck, road grader, road drag, or other piece of road machinery which is required by the preceding section to carry red danger signal lights, to place and maintain in a lighted condition at least one signal light upon the front and one upon the rear of any such tractor, truck, grader, drag, or other piece of road machinery from the time the sun sets until the time the sun rises the following day, whenever the same is being operated or stationed upon any public highway open to traffic by the public.

"5055-B3. *Duty to enforce.* It shall be the duty of the highway commission, the board of supervisors of each county, and each road patrolman to enforce the provisions of the two preceding sections as to any such tractor, truck, grader, drag or other piece of road machinery under their direction and control, respectively."

It is the opinion of this department that the three sections above quoted relate and apply to motor trucks only when they are being used in conjunction with road machinery. In each of the three sections quoted reference is made to tractors, motor trucks, road graders, and road drags, which reference in each case is followed directly by these words, "or other piece of road machin-

ery," so it is apparent that motor trucks, when used as road machinery, come within the purview of these sections. No one would be heard to claim, of course, that because the words "motor truck" appear in each of the first two sections and the word "truck" appears in the third that therefore all motor trucks used upon the public highways in this State, which are open to traffic, shall carry two red danger-signal lanterns or lights, one upon the front and one upon the rear of such vehicle. These sections are intended to apply to motor trucks only when used as road machinery.

Section 5044 of the Code provides that:

"All motor vehicles in use on the public highways excepting motorcycles, motor bicycles, and such motor vehicles as are properly equipped with one light in the forward center of such motor vehicle, shall, during the period of from one-half hour after sunset to one-half hour before sunrise, display two or more white or tinted lights, other than red, on the forward part of said vehicle, etc."

A motor truck when used in conjunction with other road machinery is itself road machinery, and when it is used as road machinery, that is in conjunction with other road machinery, it should be equipped with the red lights referred to in the section first above quoted. Generally speaking, road machinery does not move rapidly upon the highways, but motor trucks, which may be used generally in connection with road work, are an exception to this rule. They are capable generally of moving at a great and dangerous rate of speed. As a matter of public policy, therefore, when such trucks are being driven upon the public highways, at night, they should be equipped with the same character of lights that other high-speed motor vehicles carry rather than merely one red light on front and rear, such as is required of road machinery.

It might be claimed with some force that a motor truck not used in physical connection with any other road machinery was used exclusively for road work and is, therefore, road machinery, and that one red light on the front and one on the rear of said vehicle brings it within the purview of Sections 5055-B1 to 5055-B3 inclusive. It would, in that case, be road machinery and would be equipped with the lights required of road machinery.

We take the position, however, that while it is a piece of road machinery it is capable of many other uses the same as any other truck which might be used as a piece of road machinery. Primarily it is a motor truck, and secondarily it is road machinery, but it may readily be used for other purposes than road work. Therefore, it is not exclusively road machinery but is a motor truck capable of many uses but perhaps being used for the time being to haul road materials, whereas at any instant it may be subjected to entirely different uses to which it is just as well adapted.

We are of the opinion, therefore, that although a motor truck may be used in connection with road work it must carry the same lights as motor trucks not used in road work, unless it is used in conjunction and actual physical connection with other road machinery.

EASEMENTS: TRANSFER OF LAND TO FEDERAL GOVERNMENT: Land may be turned over to the Government by an easement on which a resolution has been passed and the said resolution approved by the execu-

tive council and the granting of such an easement signed by the governor and secretary of state.

February 14, 1935. *State Fish and Game Department:* We have your request of January 23, 1935, as follows:

"The proposed Ruthven area waterfowl project seems to have reached the stage where we have to make a definite proposal to the U. S. Biological Survey very shortly. If this area is acquired by the Federal Government, it seems almost certain that some state area must be included to produce an average price which the Government can handle.

The state areas which would probably be involved are Trumbull Lake, Lost Island Lake and Dewey's Pasture. The Board of Conservation and the Fish and Game Commission have approved turning these over to the Federal Government, providing it can be done legally.

There are a number of questions involved in such a transfer, and the Commission would like to be informed by the Attorney General's office whether or not such a transfer could be made.

This area is one of the prime duck breeding areas, and its administration as such a refuge would be in the hands of Iowa."

As we understand your request for an opinion, it would be the desire of the Federal Government to invest funds to create such an area in Iowa and to take over land now owned by the State and under the jurisdiction of the Fish and Game Commission and the Board of Conservation.

There would be no question in our opinion, if it were the desire of both your Commission and the Board of Conservation to grant an easement to the Federal Government and this could be done in keeping with previous opinions to your department relating to the situation at Storm Lake.

As you will recall, we advised the passing of a resolution by your Commission to grant an easement to the Highway Commission of the State to certain property in the area which is under your jurisdiction on the west shore of Storm Lake so that the highway might be widened and at a later date, at your request, we rendered an opinion for your department with reference to your granting the right, by easement, to the city of Storm Lake to sink wells for the city water supply.

After such a resolution was passed, it would be approved by the Executive Council and the granting of such an easement, signed by the Governor and Secretary of State; and this, as far as the Fish and Game Commission is concerned (in the event that all you desired to convey would be an easement), could be done in the instant matter.

However, on the question of an outright sale, we would be of the opinion that there is nothing in the laws pertaining to the authority granted to your Commission to allow you to sell land and hence the resolution would avail nothing. However, in the case of the Board of Conservation, in the 45th regular session of the General Assembly, that Board, under Chapter 24, was granted the right by the repeal of Section 1824 of the Code of 1931 and was allowed to make an exchange or sale of lands upon the recommendation by the Board of Conservation to the Executive Council, provided that the money so derived would be used for conservation purposes.

"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 will note that the act above cited allows the sale or exchange of such parts of public lands under the jurisdiction of the board, as in its judgment may be undesirable for conservation purposes, with certain exceptions and those exceptions pertaining to land which has been surveyed and platted at State expense as part of the conservation plan.

A question might arise with reference to the right to sell to the government by reason of the exceptions placed in this enactment with reference to the land not being suitable for conservation purposes; and also it may be that such land has been platted and is part of the conservation plan.

It would therefore be our opinion that the only safe way in which you could proceed in this matter, would be by legislative enactment and with this thought in mind we would suggest that a bill be prepared which could be acted upon by the 46th General Assembly.

BEER TAX, refund of: TAX, refund of beer: Taxes voluntarily paid on a mistake of law cannot be recovered.

February 14, 1935. *Treasurer of State:* This will acknowledge receipt of your request of even date with reference to a refund on the barrel tax paid on beer, with an enclosure, the Application for Refund of Beer Tax or for Credit Memorandum Covering Said Tax of Maude Manderscheid, Executrix of the Estate of Henry Manderscheid, Deceased, which application recites that the decedent, during his lifetime, was engaged in the beverage business at Sioux City and as part of said business, handled 3.2 beer and near beer and after the enactment of the law requiring a tax on beer, that the decedent made remittances to the State on beer so sold but through error and inadvertence the tax was remitted between March, 1933, and 1934, on 11,468 cases of 24 pints each, at 9 cents per case, or a total of $1,032.12, all of which sales were made outside the State of Iowa and therefore were exempt from taxation and further stating that the remittance was made through error and ignorance as to the law permitting such exemption and attaching to the application for a refund a statement showing the sales so made and stating that application is made for refund of tax erroneously paid.

It would be the opinion of this department that the applicant in this case is not entitled to a refund by reason of the fact that our Supreme Court, on numerous occasions, has said that (in Ahlers vs. City of Estherville, 130 Iowa 272, and particularly at page 274):

"However, this was not a mistake of fact, either as such, or arising out of a misconception of the law, but purely a mistake of law, and it is well settled that taxes voluntarily paid on a mistake of law cannot be recovered."

Numerous other Iowa cases and those of other jurisdictions are cited.

It would be our opinion that the only way in which there could be a refund of the tax in question would be in a case where they were all paid under

actual duress and that a protest and a refusal to make the same would have to be made prior to the payment, and as you will recall, in a former opinion of this department to your department in the case of a payment of a tax for sales outside the State, the same was only allowed by reason of the fact that the applicant in that case refused to pay the tax and only paid the same after they were advised by your department that in the event they did not pay it, their permit to sell beer would be revoked; and after such a notice they paid this tax and made their claim for a refund.

As far as we are advised, in the instant matter no such condition exists and therefore it would be our opinion that your department would not be justified in making the refund in question. The fact that the payments were made by check and marked "paid under protest" would not bring it within the rule as something more must be done as in the case referred to, in which we rendered an opinion and in which case payment was not made and was only made after the Treasurer had directed that unless it was made the permit would be revoked.

In keeping with the rule of law also see 134 Iowa 515 and 168 Iowa 505, in which the court states:

"Counsel argued that inasmuch as taxes were paid under a mistake of law, the suit cannot be maintained. That this is the general rule goes without saying."

Ahlers vs. City of Estherville, 130 Iowa 272.

There is no provision in the beer law for the refunding of taxes and hence the matter under consideration comes under the general rule. Therefore the application for a refund should be denied.

FIRE MARSHAL, DUTIES OF: STATE OWNERSHIP OF PARKS AND PROPERTY: A fact question is presented in reference to the fire marshal's duties, and the manner in which the state took title would dictate the extent of fire marshal's authority.

February 14, 1935. *Board of Conservation:* This will acknowledge receipt of your request of the 9th instant with reference to a cottage at Palisades, Kepler State Park, in which you state that a certain cottage in the park is regarded unsafe and as being a fire hazard and that the State Fire Marshal has written Mr. Ewing, the Secretary of your Board, to the effect that an order was issued by the fire department on November 1, 1934, for the removal of a building known as the Miner cottage in Palisades, Kepler State Park. On November 17, 1934, a letter was received from Mr. Miner, 401 Grove Street North, Saint Petersburg, Florida, claiming that a quit claim deed had been given to the State and that he had no interest in the property and directing that by reason of the same the custodian could remove the building at any time.

However, you state further that this property is one to which the State has a deed, but does not get possession until after a term of years and you desire our opinion as to whether or not you can go ahead and remove the building as indicated by the State Fire Marshal.

Section 1805 of the Code of Iowa, 1931, provides that 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.

We simply set out this section as you undoubtedly have in your possession the facts in reference to the manner in which this property was taken and if there was any condition with reference to the taking of this property which complies with the section above cited, then those conditions would have to be followed out. But you will note from a careful reading of the section that such conditions would have to come directly within this section or they would not apply. Also, in connection with the section above cited, you should read section 1806 and 1807 of the Code of Iowa, 1931.

However, in connection with any such condition the duties of the Fire Marshal should be taken into consideration and Section 1633 of the Code of Iowa, 1931, provides that when the Fire Marshal or his deputy shall find any building or structure, which for want of proper repair or by reason of age and dilapidated condition, is especially liable to fire, and is so situated as to endanger other buildings or property therein, or when any such official shall find in any building or upon any premises combustible or explosive matter or inflammable materials dangerous to the safety of any buildings or premises, he shall in writing order the same to be removed or remedied and such order shall be complied with by the owner or occupant of said building or premises, within such reasonable time as the fire marshal shall specify.

Therefore, it would be our opinion that a fact question is presented in your request for an opinion in that the Fire Marshal, as we understand your letter, has ordered that the building in question be removed and the question involved in this matter as to the manner in which the State took title—with reference to conditions and with particular reference to the right of possession and upon whom the duty would fall to see that the building was put in such shape as to meet the approval of the Fire Marshal—would depend upon this.

TAXATION: SCAVENGER SALE: ASSIGNMENT OF TAX SALE CERTIFICATE: "On the other hand, if he purchased it at a scavenger sale for one-tenth the amount of the regular taxes, the person seeking the assignment would pay only the amount to which the tax sale certificate holder was entitled."

February 16, 1935. *County Attorney, Sioux City, Iowa:* We have your letter of February 8th relative to the right of the holder of a special assessment certificate to demand an assignment of a tax sale certificate on property sold at the last scavenger sale upon paying only the portion which the tax sale certificate holder would be entitled to receive, in case of redemption, as provided in Section 7275 of the Code of 1931.

Section 7275 provides that in case a redemption is made of any real estate sold for a less sum than the taxes, penalty, interest and costs, the purchaser shall receive only the amount paid and a ratable part of such penalty, interest and costs. The section then goes on to provide that real estate, which is sold for less than the total amount of taxes, penalties, interest and costs, shall be redeemable in the same manner and with the same penalties as that sold for the taxes of the preceding year, which would mean, of course, that when the owner of real estate, which was sold at scavenger sale, seeks to redeem, he must pay the full amount of the taxes due, together with the penalties,

interest and costs, and not merely the amount that was bid at the sale. However, Section 6041 expressly provides that the holder of a special assessment certificate or the holder of a bond, payable in whole or in part, out of the special assessment against a lot or parcel of ground, or any city or town within which such lot or parcel of ground is situated, when such lot or parcel 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. This section expressly provides that all the holder of the special assessment certificate, and likewise all that the city would have to pay, in order to be entitled to the assignment of the tax sale certificate is *the amount to which the holder of the tax sale certificate would be entitled.* In other words, if the tax sale certificate holder purchased it at a regular tax sale, the person seeking the assignment under Section 6041 would have to pay the amount that he bid plus the interest to which he is entitled. On the other hand, if he purchased it at a scavenger sale for one-tenth the amount of the regular taxes, the person seeking the assignment would pay only the amount to which the tax sale certificate holder was entitled.

It should be noted that under Section 6041 of the Code of 1931, the person seeking to acquire the tax sale certificate is not redeeming. He is purchasing the tax sale certificate with the privilege of later acquiring title to the property through tax deed.

GAMBLING DEVICES: PIN AND MARBLE GAMES:

"We are, therefore, of the opinion that the pin and marble games generally are not games of skill but games of chance, and that if prizes are given on such machines, it is a violation of the law. This is certainly true, in view of Section 13202 of the Code of 1931."

February 16, 1935. *County Attorney, Marshalltown, Iowa:* We have your letter of recent date, in which you ask whether or not marble and pin games constitute gambling devices.

You call attention to two opinions rendered by this office under date of August 3, 1933, and June 2, 1934, and suggest that the opinions are in contradiction.

The opinion of August 3, 1933, has to do with a game in which coins are placed on a table or level board, and the person playing the game attempts to ring the coins. Mr. Garrett, in that opinion, stated that it was a game of skill and not a game of chance. Of course, you understand that if there was any betting on this game, it would make it a gambling game, regardless of the fact that skill might constitute one of the elements.

The opinion of June 2, 1934, was prepared by Walter F. Maley, of this office, at the request of Hugh G. Guernsey, County Attorney, at Centerville, and has to do with the machine which contains five slots, into any one of which a penny may be played. A lever is then pulled, which releases the machinery and brings up a poker hand. Nothing is returned in the way of mints, money, or other token. This, undoubtedly, would be an amusement game, unless there is side betting. Mr. Maley, in that opinion, clearly stated that

if anything was returned by the machine in the way of money or token, or if there was any side betting, it would constitute a gambling device.

Getting now to the question of your marble and pin machines. If these games are played solely for amusement and if no prizes are given or side betting allowed, it certainly would not be illegal. Any man has a right to spend his money as he pleases or even to give it away, and if he uses it to play one of these pin and marble machines, where no prize is given and no side betting allowed, he certainly would not be gambling. He is neither gambling with anyone on the side nor gambling against the merchant. He simply puts a nickel in the machine and tries to see how large a score he can get without any promise of reward.

However, if, as stated in Mr. Maley's opinion of June 2, 1934, side betting is permitted, then the machine constitutes a gambling device and becomes illegal, just as much as an innocent game of pool constitutes gambling when a side bet is made, even for the price of the game. See *State vs. Miller*, 53 Iowa, 154.

Getting now to the question of the operator of the place of business, where the machine is located, giving a prize or a jackpot, if a certain score is made. We, of course, cannot determine whether or not every such pin and marble machine, in so far as the operation is concerned, is a game of chance or a game of skill, as we do not have an opportunity to examine each particular machine. However, basing our statement on the machines which we have had an opportunity to examine or see in operation, we would say that there is very little skill to any pin and marble game, and that it is practically a game of chance. It may be that, in so far as the putting the marble in the top hole is concerned, the person with the more delicate touch might be able to operate the plunger with greater skill than some other person. However, when the hole at the top of the board contains a marble, we do not believe there is any question of skill, from that time on, for the reason that the marbles, as they pass down over the playing field, strike pins, and are thrown in different directions. Surely, no one would expect us to believe that anyone could be skillful enough to operate the plunger in such a way that the marbles, in passing over the playing field and striking different pins, could be made to carom in a certain direction. We would also say that the line is not drawn in favor of a game which is operated with a very slight degree of skill, but that the determinate feature is whether or not skill is the important part of the game.

We are, therefore, of the opinion that the pin and marble games generally are not games of skill but games of chance, and that if prizes are given on such machines, it is a violation of the law. This is certainly true, in view of Section 13202 of the Code of 1931, which provides that if any person play at any game for any sum of money or property of any value, or make any bet or wager for money or other property of value, he shall be guilty of a misdemeanor.

We have read the case of *Parker Gordon Imp. Co. vs. Benakis*, 213 Iowa, 139, which was cited by you in your letter.

We now call your attention to *State vs. Ellis*, 200 Iowa, 1228, and *State vs. Marvin*, 211 Iowa, 462. In the opinions in those two cases, the Supreme Court has dealt on the subject at length. In the first of the two cases, anyone

could see that the machine in controversy was a gambling device, but in the second case, the court went so far as to hold that a slot vending machine which, upon the insertion of a coin, invariably produces a package of merchandise, and occasionally by chance a valueless disk or token, which may be placed into the machine, not for merchandise but for amusement purposes only, is a gambling device. The court there said that the use of the disk was to stimulate the expectation of the buying patron, that he might receive something more than a package of mints, and that it, therefore, induced a larger deposit of nickels in the slot than would otherwise ensue.

INCLUDED OFFENSES: SECURITIES: An indictment in two counts charging selling or attempting to sell securities not registered and selling or attempting to sell securities without a license, could be safely returned; but an indictment charging the dealing in certain instruments as defined in Sec. 13057 of the Code of 1931 should be a separate indictment.

February 21, 1935. *County Attorney, Waukon, Iowa:* This will acknowledge receipt of your favor of the 16th instant asking for our opinion upon whether or not it would be advisable for you to have one indictment returned charging three offenses, namely: selling or attempting to sell securities which are not registered by the Securities Department; second, selling or attempting to sell securities in the State of Iowa without a license, and third, dealing in certain instruments as defined in Section 13057 of the Code of Iowa for 1931. You state in your letter that all of these offenses grew out of the same transaction and at the same time.

Section 13738 of our statutes makes the following provision:

"In case of compound offenses where in the same transaction more than one offense has been committed, the indictment may charge the several offenses and the defendant may be convicted of any offense included therein."

We are of the opinion that under this statute and upon the first two offenses set forth in your letter, you could safely return an indictment in two counts charging each of the first two offenses in a separate count. We say this because we are satisfied that the first two are compound offenses under the Iowa Securities Act found in Chapter 393-c1 of the 1931 Code.

The third offense, to-wit: dealing in certain instruments, is found in Section 13057 of Chapter 581 entitled "False pretenses, frauds and other cheats." It nowhere makes specific reference to the securities act and we are not at all satisfied that it would be a compound offense within the kindred of the first two offenses named. In any event, it would undoubtedly invite a challenge to the validity of the indictment and this can all be avoided by returning two indictments, the first one charging in two counts the first two offenses named and a separate indictment charging the third offense named. It would be our recommendation that this procedure be followed.

SECURITIES DEPARTMENT: REGISTRATION FEE: In absence of any other specific provision, the department would only be entitled to retain the registration fee where registration was actually granted.

February 21, 1935. *Securities Department:* This will acknowledge receipt of your favor of the 31st ultimo in regard to a construction of 8581-c11, Chapter 393-c11 of the Code of Iowa, 1931, concerning the registration of dealers and salesmen under the Iowa Securities Act.

In particular you require whether or not the registration fee of Twenty-five Dollars ($25) as provided in the above section, when the same is accompanied by the application, must be refunded to the applicant where the application is either withdrawn or denied.

In brief, the section referred to provides that no dealer or salesman shall engage in business in this State as such dealer or salesman or sell any securities except those exempted "unless he has been registered as a dealer or salesman in the office of the Secretary of State pursuant to the provisions of this section."

Thereafter the statute provides the method and manner of making application to the office of the Secretary of State. Provision is made for the registration of both dealers and, as salesmen of such dealers, such natural persons as the dealer may request. Regarding the fee to be paid in either of the above registrations, the statute is as follows:

"The fee for such registration and for each annual renewal, shall be $25 in the case of dealers and $3 in the case of salesmen."

In view of the wording of the statute in relation to the registration fee, we are of the opinion that in the absence of any specific provision for the return of such fee, the department would only be entitled to retain the registration fee where registration was actually granted.

However, we desire to call your attention to another provision of the act, Section 8581-c12 entitled "deposits for special examinations." It provides, in part:

"Whenever it is necessary for the Secretary of State to incur any expense in connection with any application, registration or license, he shall have the power, by written order, to require the interested person to make an advance deposit with the Secretary of State in an amount estimated as sufficient to cover such expense. All such deposits shall be covered (undoubtedly meant 'converted') into the state treasury and credited to 'securities department investigation fund' from which fund disbursements shall be made to the Secretary of State to pay such expenses. Any unexpended portion shall be refunded."

The statute grants a broad discretion to the Secretary of State in demanding and receiving under this section an advance deposit to cover any expense in connection with any application for registration or license and specifically provides that it is only necessary for the Secretary of State to refund any unexpended portion of said deposit.

MUNICIPAL BANDS: TAX FUNDS: Money received from taxation may be used only for purposes expressly authorized by the law.

February 23, 1935. *Mayor, Traer, Iowa:*

Re: Traer Band Fund.

Your letter of January 28, addressed to the Attorney General, has been referred to me for reply. You submit certain questions with reference to the disbursement of the band fund which is collected by taxation. You state that the tax money in former years has been turned over by the town council to the Commercial Club, and that the Commercial Club has conducted the street band concerts during summer months and has employed a band leader who is also employed by the school district, and that the school district has received the tax money for the purpose of applying it on the salary of the

band director. You make this further statement: "Indirectly the band fund money is being used to maintain the music instructor in the public schools."

Chapter 296 of the Code, which comprises Sections 5835 to 5840 inclusive contains the statutory law with reference to municipal bands. It is a well-recognized rule that money received from taxation may be used only for the purposes expressly authorized by the law.

Section 5835 of the 1931 Code provides that cities and towns may levy "for the purpose of providing for the maintenance or employment of a band for musical purposes." Section 5836 provides for the filing with the council or commission of a petition requesting that the question be submitted to the voters whether the town shall levy a tax "for the purpose of furnishing a band fund." Section 5838 provides that the levy shall be deemed authorized if a majority of the votes cast at an election on the question be favorable to said proposition and that the council or commission shall levy "a tax sufficient to support or employ such band, not to exceed two mills on the assessed valuation of such municipality." Section 5840 provides: "All funds derived from said levy shall be expended as set out in section 5835 by the council or commission."

If all the funds are to be expended as provided in Section 5835, they must be expended only for the purpose of providing for the maintenance of a band. It is therefore the opinion of this office that if such fund is used "for the purpose of providing for the maintenance or employment of a band for musical purposes, such expenditure is authorized expressly by the law. If any of this fund is used for any other purpose it is being expended for an improper purpose. It would not be proper to use this money either directly or indirectly for the purpose of paying the salary of a public school teacher. On the contrary if in order to maintain and employ a band it is necessary to employ a leader or director and to pay him a salary and if an instructor in the public schools has the time and qualifications to serve as such leader and perform all the duties required of such leader, we can see no objection to employing such school instructor and paying him a proper salary for performing services as band leader, so long as it is strictly true that the money is being expended for the purpose of providing for the maintenance or employment of a band for musical purposes.

There is no legal requirement that all members of the band shall receive compensation or reward for their services. On the other hand it would be unusual if a city or town could maintain a band without any financial outlay or expense and it is the legitimate and proper expense of maintaining and employing such band and that alone which is provided by Section 5835. When any part of such fund is being used for any other purpose, such use is improper, and the situation should at once be corrected. The council and the board of education should not resort to subterfuge to circumvent the law.

BANKS AND BANKING: SMALL LOAN ACT: CHAPTER 125, Acts of 45th General Assembly, Extra Session.

February 25, 1935. *Superintendent of Banking:* We have your request for opinion on the following propositions in regard to the present small loan act, being Chapter 125 of the Acts of the 45th General Assembly, Extra Session:

1. A licensed small loan company now in operation in this state desires

permission to buy automobile paper and similar lines in the same office in which their small loan business is conducted. They agree to create a separate department in the office and have a separate set of books and keep the two businesses separated. Should such permission be granted?

2. A company not now in the business, desires to enter the small loan business and also in the same office conduct another business consisting of discounting automobile paper, such as conditional sales contracts and chattel mortgages. Should a license and such permission be granted?

3. A company was in the small loan business under chapter 419 of the code at the time Chapter 125, Acts of the 45th General Assembly, Extra Session, was enacted. What must this company do to continue in business in 1935?

4. If an applicant at the time of making application had liquid assets of $25,000, but during the year 1934, only $10,000 was actually used in the small loan business, the balance being either not used or used in another business and the applicant expresses the opinion that not more than $10,000 will be used in the small loan business in 1935, should the fees to be paid be based upon $25,000 or $10,000?

We will answer your questions in the above order.

1. Section 12 of the present small loan act provides in part:

"No licensee shall conduct the business of making loans under the provisions of this act within any office, room, suite, or place of business in which any other business is solicited or engaged in, or in association or conjunction therewith, except as may be authorized in writing by the Superintendent upon his finding that the character of such business is such that the granting of such authority would not facilitate evasions of this act or of the rules and regulations lawfully made by him hereunder."

It is apparent then, that the conduct of any business in the same place of business as the small loan business is expressly prohibited except where authorized by you and based upon your finding that the character of such business is such that its operation would not facilitate evasions of this act or of rules and regulations lawfully made. You will note that the authorization to conduct other businesses is discretionary in you and like all public officers, such discretion must be legally exercised and not arbitrarily and capriciously. In determining this, you should look to the intent of the Legislature in regulating the small loan business and the evils to be corrected.

In the case of *Commonwealth vs. Puder*, 104 Atl., 505, the Supreme Court of Pennsylvania in passing upon the question of the constitutionality of their small loan act, said:

"The subject matter of the act has been before the public and under investigation and discussion for a number of years, not only in this jurisdiction, but in other states as well, and has resulted in the adopting of somewhat similar legislation in probably half the states of the Union. The attempt in recent years to eradicate the evils of the so-called 'money loan sharks' by proceedings instituted in Philadelphia and Pittsburgh is a matter of general public knowledge, and those who have given the matter close investigation and thought concede that a prohibition of the business does not accomplish the desired result, and that the only practical method of dealing with the subject is by proper regulation."

Our own Legislature had a similar thought in the enactment of this law and in inserting the above provision in the law, they wanted to be certain that no other business could be conducted in the same office with small loan business, for to allow such is getting right back to the loan shark evil that was attempted to be eradicated. In our opinion, the Legislature did not intend

to allow the operation of an insurance agency or other loaning agencies, or such similar businesses in the same office with the small loan company. The reason is apparent, for if such is allowed, the poor man whom the Legislature attempted to protect, in making an application for a small loan, might be told that such application would not be granted unless the applicant also turned to the small loan company or another department of the company his insurance business or his automobile paper, or other similar businesses that could be easily twisted into the hands of the small loan company and if such is allowed, these borrowers of small amounts might as well be back in the hands of the loan sharks and it is apparent then to us, that the other businesses permitted by you to operate in conjunction with small loan companies must be ones under the express provisions of the act that will not facilitate evasions of the act and must be businesses that are wholly divorced from the small loan business and in exercising your discretion, we would suggest that it is our opinion that the Legislature did not intend to allow a small loan company to operate another type of loan business in its office even though it be done by separate department and a separate set of books and records kept.

2. This proposition is answered under No. 1 and in our opinion, it makes no difference whether a small loan company is actually in business or contemplates going into business and that where you have been advised in advance that the two businesses will be carried on in the same office, you would have the authority to refuse to grant a license to the contemplated small loan company.

We should perhaps suggest in passing that we realize that this rule may in some instances, work a hardship in that some of these small loan companies may not attract business enough to operate except in conjunction with another business, but this was a matter undoubtedly considered by the Legislature and cannot be questioned by us, for the Legislature undoubtedly thought that such legislation was a wiser and the most beneficial to the State as a whole, even though there might be segregated instances of hardship. It is the law that the Legislature is the sole judge of the wisdom and expediency of the statute as well as the necessity of its enactment and whether the legislation is wise, expedient or necessary is without importance to either the office attempting to administer the act or to any court in event the question is raised, as the Legislature has a free hand to legislate on every subject in such manner as it deems proper unless the act is unconstitutional and no such question could be raised as to this act.

3. Section 22 of the act provides that a licensee under a former act shall be deemed to have a license for a period expiring December 31, 1934, unless revoked, suspended or surrendered. But on and after January 1, 1935, all licensees are to be treated alike irrespective of whether they first secured license under the old act or under this act. Section 2 of the act provides for annual investigation and license fees and the company desiring to continue in the small loan business after January 1, 1935, must pay these two fees irrespective of whether they were formerly licensed or not.

4. In regard to the amount of fees to be paid, you will note that under Section 2, this is based solely upon the liquid assets of the applicant and

not upon the assets of the applicant actually used or contemplated to be used in the small loan business. As we have pointed out above, the wisdom of this legislation was solely for the Legislature and the Legislature has in plain terms provided that the fees shall be based upon the liquid assets of the applicant as they undoubtedly had in mind that the amount of assets actually used in the business the preceding year could not be a criterion of the amount that would be used during the succeeding year in which a license was sought and likewise any opinion as to the amount of the assets that would be loaned in the coming year would be at best a mere guess so that under the example as set forth in question No. 4, the applicant must pay the annual investigation and license fees on the basis of liquid assets of $25,000 and not on the basis of the $10,000 that was actually used in the small loan business or contemplated to be used in the present year.

ARTICLES OF INCORPORATION: ASSOCIATIONS: INSURANCE: National Benefit Accident Association cannot amend their Articles of Incorporation to legally permit them to engage in the business of writing assessment life and health insurance.

February 27, 1935. *Insurance Department of Iowa:* I have your letter of February 5th in which you request an official opinion from this department on the following proposition:

"The Hawkeye Commercial Men's Association was organized May 31, 1906, as a corporation to engage in the business of writing assessment insurance, its Articles of Incorporation providing, among other things, that the object of the Association was 'to perfect and maintain a mutual accident insurance and funeral benefit association for benevolent purposes.' It is our understanding that pursuant to these powers, the Association did in fact extend insurance protection against accident and granted small death benefits for funeral purposes.

"On January 11, 1919, the Articles of Incorporation were amended to provide as follows: 'The object of this Association is to perfect and maintain a mutual accident insurance association upon the assessment plan, under the provisions of Chapter 7, Title IX, and amendments thereto, of the Code of Iowa.' These Articles, as amended, were substituted for the Articles of the year 1906.

"On August 26, 1926, the corporate life of the Association was renewed, and, among other things, provided as follows: 'The object of this corporation is to conduct the business of a mutual accident and health association upon the assessment plan, in accordance with the Associations' Articles of Incorporation, its By-Laws, and the provisions of Chapter 400 of the Code of 1924, and all acts amendatory thereof and supplementary thereto.

"On January 8, 1927, the Articles were amended, changing the name of the Association to Hawkeye Business Men's Accident Association, and in 1929, by appropriate amendment, the name was changed to National Benefit Accident Association, with its principal place of business in the city of Des Moines.

"Section 8718, contained in Chapter 400 of the Code, is as follows: '*Assessment associations prohibited.* No life, health, or accident insurance company or association, other than fraternal beneficiary associations, which issue 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.'

"You will note from the quoted excerpts from the original Articles of Incorporation of the Association that it was authorized to sell funeral benefits, which is, of course, life insurance within the common meaning of the term, and, as previously stated, it is our understanding that pursuant to such power, the Association did sell such funeral benefits. It is also our understanding that Section 8718 was enacted by the legislature in the year 1907, which, as you will note, was subsequent to the organization of the Association in question.

"This Association desires at this time to amend its Articles of Incorporation to permit it to resume the sale of life insurance benefits, such benefits to be valued as yearly renewable term policies according to the standard of valuation of life insurance policies prescribed by the laws of this state, as provided in Section 8718. It is the Association's contention that notwithstanding the abandonment of its right to engage in a life insurance business through the adoption of the amended and substituted Articles in the year 1919, Section 8718 will permit it to again resume the sale of such benefits through appropriate amendment to its Articles of Incorporation.

"Inasmuch as such amendment must be approved by both the Commissioner of Insurance and the Attorney General, it is our desire, before granting such approval, to learn as to whether or not such action would be legal on the part of said Association. I enclose, herewith, a copy of the proposed amendment, and would appreciate your advice as to whether or not same may be properly approved."

It will be observed that this insurance corporation was first organized on or about May 1, 1906, as a corporation whose purpose was to engage in the business of writing assessment insurance.

One of its Articles of Incorporation provided that the object of the association was "to perfect and maintain a mutual accident insurance and funeral benefit association for benevolent purposes." In other words, it was originally authorized, under its Articles of Incorporation, to write assessment accident and life insurance. On March 23, 1907, Chapter 83, Acts of the 32d General Assembly became effective as law in the State of Iowa. This act of the 32d General Assembly as amended by Section 16 of Chapter 18 of the Acts of the 34th General Assembly now appears as Section 8718 in the 1931 Code of Iowa. This legislative enactment prohibited any life, health, or accident insurance company or association other than fraternal beneficiary associations, which issue contracts, the performance of which is contingent upon the payment of assessments of call made upon its members, from doing business within the State of Iowa, except such corporations or associations as were authorized to do such business within the State on March 23, 1907.

The effect of this statute was to prohibit any life, health or accident insurance company or association, other than fraternal beneficiary associations, from doing an assessment insurance business within the State of Iowa after March 23, 1907. The gist of the prohibition as contained in this statute, was to prevent and prohibit such companies from doing insurance business upon the assessment plan. This legislative enactment specifically exempted from its provisions such companies as were authorized to do this type of insurance business prior to the passage of this act.

What type of insurance business was this company authorized to transact when the above legislative enactment became effective on March 23, 1907? We must find the answer to this question from the statutes in force and from the Articles of Incorporation of this association. In the case

of Traer vs. Prospecting Company, et al., reported in 124 Iowa, beginning on page 107, the Supreme Court of Iowa states that the limitations on corporations are as follows:

"The charter of a corporation formed under a general law consists of its articles of incorporations, taken in connection with the law under which the organization takes place. The provisions of the law enter into and form a part of its charger, and the charter, thus construed, contains the 'terms of the agreement of the association between the shareholders, and indicates the character and extent of the business in which the company shall engage.' 1 Morawetz on Private Corporations, Section 318; Cook on Corporations (5th Ed.) Section 669.

"* * * * but it is evident that this statute (the general incorporation law of the state) only designates the powers which a corporation may provide for in its articles of incorporation, and exercise them only when it has so provided, otherwise articles of incorporation, no matter how limited the business they might provide for, would be no check upon the power of the corporation."

It is, therefore, clearly apparent that this corporation could only engage in the business of writing assessment life and accident insurance after March 23, 1907, and during the life of the corporation.

The corporate record of this company, or association, shows that on January 11, 1919, this company adopted, amended, and substituted Articles of Incorporation which were approved by the Attorney General and Commissioner of Insurance. Article XI of the amended and substituted Articles of Incorporation of the Hawkeye Commercial Men's Association of Marshalltown, Iowa, provide as follows:

"The articles of incorporation of the Hawkeye Commercial Men's Association, containing *eleven* articles on file with the Secretary of State, dated May 31, 1906, are *hereby repealed* and these articles containing *twelve* articles are hereby enacted in lieu thereof."

These amended and substituted Articles of Incorporation further provide that:

"The object of this association is to perfect and maintain a mutual accident insurance association upon the assessment plan, under the provisions of chapter 7, title IX, and amendments thereto of the Code of Iowa."

Thus the former Articles of Incorporation, which authorize this company to transact an assessment life insurance business, were abandoned and repealed by the company. This action was taken by the company while the provisions of law, now appearing as Section 8718 of the 1931 Code of Iowa, were in full force and effect in this State. By this action taken by the company in 1919, the company voluntarily limited its activities to an assessment accident business. From thence forward the company could only engage in an assessment accident insurance business because its own articles and the statutory law in the State of Iowa so provided.

Since the last date above mentioned, this company has changed its name to the National Benefit Accident Association with its principal place of business in the city of Des Moines, Iowa. The company now seeks to amend its Articles of Incorporation by attempting to conduct and transact assessment accident, health, and life insurance. When the provisions of the law, as now appear in Section 8718 of the 1931 Code of Iowa, became effective, this company could have continued to engage in the business of

writing assessment accident and life insurance. By its own act in January, 1919, this company prevented itself from ever again carrying on an assessment life insurance business in the State of Iowa. It cannot now so amend its Articles of Incorporation so as to engage in any type of assessment insurance which the law prohibits.

Except insofar as they may be restrained by constitutional provisions, the Legislatures of the several states, as depositaries of the sovereign legislative power, have the inherent power to create a corporation and to determine and prescribe the mode of incorporation, the purposes for which corporation shall be created, the powers which shall be conferred upon them, and the conditions under which they may be exercised. 14 Corpus Juris, page 94.

Section 1619 of the 1897 Code of Iowa, which now appears in the Code of 1931 as Section 8376, provides as follows, to wit:

Section 1619. *Legislative control.* The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended thereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

This law first appeared in the Code of 1873 as Section 1090. Therefore, this law was part of the original charter of the aforesaid company. This company is bound by its provisions and cannot engage in any type of business that might be subsequently prohibited by the General Assembly of the State of Iowa.

As to whether or not Chapter 83 of the 32d General Assembly, as originally passed by the Legislature, was unconstitutional because the purpose of the act was not clearly expressed in the title, we cannot be called upon to pass. Every statute is presumed to be constitutional and valid, and it is the duty of the Attorney General to enforce and uphold the legislative enactments of the General Assembly. The burden of showing the unconstitutionality of any statute clearly rests upon the person whose rights are infringed upon by such enactments.

It is therefore the opinion of this department that the National Benefit Accident Association of Des Moines, Iowa, can not now amend their articles of incorporation so as to legally permit them to engage in the business of writing assessment life and health insurance as proposed by them in their amendment voted on January 12, 1935, and for all the reasons as above pointed out, your department is not authorized to approve such amendment. For similar reasons the Attorney General of the State of Iowa can not approve said proposed amendment. It is our understanding that approval of this proposed amendment is requested under the provisions of Section 8688 of the 1931 Code of Iowa. It is our finding that said proposed amendment does not comply with the provisions of Title XX, Chapter 400, and specifically Section 8718 of the 1931 Code of Iowa.

In submitting this opinion at such a late date, we wish to state that the reason for the delay was in order to give the attorneys for this company an opportunity to furnish us with a legal brief in an attempt to substan-

tiate their claim that the company was entitled to the approval of their proposed amendment by the Attorney General and the Commissioner of Insurance. The company's attorneys have presented their arguments in full and have also called our attention to legal citations, but we are still of the opinion that this proposed amendment can not be approved for all of the reasons hereinabove set forth.

TOWNS: BOARD OF REVIEW: OFFICES—MAYOR AND ASSESSOR: The same person may hold the offices of town mayor and town assessor successively but not contemporaneously.

February 28, 1935. *County Attorney, Clarinda, Iowa:* Your letter of February 20th is received. You refer to an opinion rendered by this office on December 3, 1931, in which it was stated that the offices of town mayor and town assessor are incompatible for the reason that the work of the assessor may be, and usually is, revised by the mayor in his capacity as a member of the Board of Review. I quote the second paragraph of your letter as follows:

"Applying the reasons set out in the above opinion would it also follow that the town assessor, who performs his duties as such during the months of January, February and March, could not be a candidate for mayor at the city election in March, for the reason that if he were elected mayor he would have to sit on the Board of Review and review his own work which he did as assessor during the preceding three months?"

The opinion rendered by this office in 1931 assumes that the same person may not hold the offices of mayor and assessor at the same time. We have no disposition to interfere with that ruling, which is sound. This office has not gone so far as to hold that the same person may not hold the offices of town mayor and town assessor at different times or for terms which do not overlap, nor would we be justified in going that far. If the assessor were elected and qualified as mayor, he should forthwith resign and cease to act as assessor. The fact that if he were elected mayor he would have to sit as a member of the Board of Review and pass on his work as assessor performed during the preceding months should not preclude his candidacy and election to the office of mayor.

It is our opinion he may hold these offices successively but not contemporaneously.

BUILDING AND LOAN ASSOCIATIONS: STOCK: (This is a question involving four different answers. Too lengthy to set out in full here).

March 1, 1935. *Auditor of State:* This will acknowledge receipt of your favor of the 21st ultimo asking for an opinion upon the following questions pertaining to building and loan associations:

(1) Must a majority of the outstanding stock be present either in person or by proxies before a stockholder's meeting may be declared legal and proceed to transact business?

(2) An association has 1,500 shares of outstanding stock. Section 9342 of the 1931 Code states: "No person shall vote more than 10% of the outstanding shares." 10% of 1,500 shares is 150 shares. If the member is present and votes 100 shares of his own stock, can he vote 100 shares by proxy, or is he limited to a total of 150 shares including his own and proxies taken.

(3) A member subscribes for 100 shares and pays the first monthly installment. Is he entitled to 100 votes based on a matured value of $10,000. or is he only entitled to vote his actual equity in the stock represented by the first monthly installment?

(a) Is a borrower who has pledged his stock to the association as security for the loan entitled to vote for each share while the stock is pledged?

(4) If the member is delinquent in payment of dues and the stock is not in good standing, can he still vote the full number of shares standing in his name?

(a) What is the borrower's position?

In answer to question (1) it is our opinion that in the absence of specific statute it would not be necessary for a majority of the outstanding stock to be present either in person or by proxy before a stockholders' meeting would be legal and proceed to transact business. Ordinarily the Articles or By-laws stipulate the number of stockholders necessary to be present to constitute a quorum for the transaction of business. A requirement as suggested in the question would very seriously handicap any corporation, as for example, five members owning $10,000 worth of stock each in a $100,000 corporation could prevent the transaction of any or all business, simply by absenting themselves from all meetings. This would seem to us to be clearly incompatible with any rule of reason or of law.

In answer to question (2) the statute referred to, Section 9342 of the Code of 1931, provides:

"Each member shall have one vote for each $100.00 of stock, par value, owned and held by him at any election and may vote the same by proxy, *but no person shall vote more than ten per cent of the outstanding shares at the time of said election.*"

We conclude from this statute that a stockholder would be limited to voting 150 shares, whether his own or proxies. Code Section 9342 is apparently an attempt to safeguard against combinations in voting upon policies of the corporation or other matters which might properly come before it.

In answer to question (3) we conclude that a person who has purchased and paid the first installment on one hundred shares is entitled to one hundred votes, assuming that the par value on each share is $100.00. It seems clear to us that such a person's rights are clearly contemplated in Section 9342 entitled "Voting Shares of Stock," as follows:

"Anyone depositing or transferring stock to the association as collateral security shall be deemed the owner of such stock within the meaning of this section."

The last sentence of Section 9340, Code of 1931, as follows, is in harmony with this interpretation:

"Said note or bond shall be accompanied by the transfer of the shares of stock of the borrower to the association, to be held as collateral security."

In answer to question (4) we are of the opinion that the articles of incorporation would control the question of the member's status continuing as such member. The corporation would have the right to determine what the status of a person would be after becoming a member therein and determine whether or not his status as a member should continue for

only such a period as he should meet his monthly payments or for any certain period after the delinquency should occur, as for instance thirty, sixty or ninety days. We conceive this to be a matter of corporate policy.

COUNCILMEN: ORDINANCES: SALARIES: Councilmen shall not receive more than one dollar for each regular meeting and shall not receive more than fifty dollars in any one year.

March 2, 1935. *City Attorney, Osage, Iowa:* Your letter of February 26th, addressed to the Attorney General, has been referred to me for reply. You state that the councilmen of your city now receive one dollar ($1.00) for each meeting and have a regular meeting once a month. You state further that they wish to increase the compensation of councilmen to a flat fifty dollars ($50.00) a year and wish to pass such ordinance at an early meeting. You refer to sections 5664 and 5670 of the Code, which we set out as follows:

"5664. *Compensation of councilmen.* Councilmen in cities of the first class shall be paid an amount prescribed by ordinance, not in excess of two hundred fifty dollars per annum, which shall be in full compensation of all services of such councilmen of every character connected with their official duties, except when acting as members of the board of review, for which service they shall receive not more than two dollars a day for each day when acting as a board of review, to be paid out of the county treasury; and in all other cities and towns *they shall receive not to exceed one dollar each for every regular or special meeting,* and in the aggregate not exceeding fifty dollars in any one year; but in such cities and towns the members shall be paid in addition to the foregoing, for services as members of the board of review, an amount not exceeding one dollar for each session of not less than three hours, and the compensation for services as members of the board of review shall be paid out of the county treasury."

"5670. *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."

Your question is whether or not your city council may proceed, under Section 5670, to provide by ordinance for a salary for each councilman of fifty dollars ($50.00) a year in lieu of any other compensation.

Section 5670 states:

"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."

Section 5671 provides in part that:

"All officers in any city or town, whose compensation is not fixed by law, shall receive as compensation the fees of the office, or a salary, or both the fees and a salary, as the council shall prescribe."

We would be inclined to answer your question in the affirmative were it not for the plain provisions of Section 5664 relating to the compensation of councilmen that:

"* * * * * * * they shall receive not to exceed one dollar each for every regular or special meeting, and in the aggregate not exceeding fifty dollars in any one year;"

If we were to say the salary of a councilman may be fixed at a flat sum of fifty dollars ($50.00) per year, it would be in effect to say that the provision above quoted that councilmen "shall receive not to exceed one dollar for every regular or special meeting and in the aggregate not exceeding fifty dollars in any one year" means nothing. We believe it places a definite and positive limitation upon Section 5670 and, therefore, we answer your question in the language of Section 5664 and say the councilmen shall receive not to exceed one dollar ($1.00) for each and every regular or special meeting and in the aggregate not exceeding fifty dollars ($50.00) in any one year.

ANTICIPATORY WARRANTS:

It would be unlawful for the State Treasurer to advertise and sell issues of anticipatory warrants on the state sinking fund for public deposits on sealed bids to the highest bidder.

It is a duty of the Treasurer of State to procure purchasers for these warrants but the statute clothes the treasurer with discretion in this respect.

March 8, 1935. *Anticipatory Warrant Investigating Committee:* Your committee, investigating the sale of the anticipatory warrants on the state sinking fund for public deposits, has requested an opinion from this department on the following questions:

1. Would it be unlawful for the State Treasurer to advertise and sell issues of anticipatory warrants on the state sinking fund for public deposits on sealed bids to the highest bidder?
2. How could prospective purchasers of such warrants be notified that the State Treasurer had such warrants for sale in order to file applications for the purchase of the same unless the State Treasurer did publicly advertise for bids?

In answering the first question, it is necessary to consider and construe Section 287 of the 1931 Code of Iowa together with Sections 7420-b3 to 7420-b12, inclusive, of the Code. Section 287 is as follows:

"*Anticipation of revenues.* 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."

This statute was passed by the State Legislature in the year 1898. This section of the Code is a general one applying only to general State fund warrants. Section 287 does not apply and can have no application whatsoever to the sale of anticipatory warrants on the State sinking fund for public deposits for the reason that when the Legislature passed Section 287, they did not have in mind the Brookhart-Lovrien sinking fund law which is applicable to the sale of anticipatory warrants on this sinking fund. This is apparent for the reason that the Brookhart-Lovrien sinking fund law was not passed by the Legislature until the year 1927. The specific provision of the Brookhart-Lovrien sinking fund law for public deposits, with respect to the sale of anticipatory warrants on this fund, is contained in Section 7420-b6 of the 1931 Code of Iowa, which is as follows:

"*Sale and negotiation.* Said warrants shall be sold by the Treasurer of State at a price not less than par plus accrued interest.

"Preference shall be given in the sale of said warrants to individuals

residing in Iowa, corporations organized under the laws of this state, and resident partnerships, who may file an application with the treasurer of state for an allotment of a definite amount of said warrants. The treasurer of state shall then apportion to the several applicants therefor such an amount of warrants as he may see fit, provided that no allotment shall be made in an amount less than two thousand dollars."

Under the provisions of Section 7420-b6, there is no authority or direction in the statute for the public sale of such warrants. The statute is silent on advertising and selling these warrants at public bidding. In construing Section 287 and Section 7420-b6, it is necessary to apply the rules of statutory construction as decided and announced by our Supreme Court. In the case of *State vs. Marshall,* 202 Iowa 954, our Supreme Court had occasion to construe a general statute passed at an earlier date with a specific statute passed at a later date. In this case, the Supreme Court held that the latter statute was intended to qualify the scope and application of the former statute. The particular language used by our court in *State vs. Marshall* is:

"We must presume that by such enactment the legislature intended to change the law in some respect. * * * * * It is, undoubtedly, true that these two sections run close together and crowd each other upon their respective grounds. But if one actually appears to trench upon the other, then concededly the older statute must recede."

In a later case decided by the Supreme Court of Iowa, the court again adopted and followed this rule. This later case is the case of *State vs. Wall,* reported in 254 Northwestern on page 71. In the Wall case, our Supreme Court stated the rule as follows:

"The old section may be termed a generic statute, and the new one, a specific one. There is in vogue a general rule of interpretation that, as between conflicting statutes, the earlier must yield to the later, and the generic to the specific."

It is clearly apparent that the law regarding the sale of anticipatory warrants on the State sinking fund for public deposits is contained in Section 7420-b6 of the 1931 Code of Iowa. This statute controls the sale of such warrants. Section 287 of the 1931 Code of Iowa has absolutely no application to the sale of such warrants.

There is another rule of statutory construction that should be applied in this case. The plain wording of Section 7420-b6 clearly shows that it was the intent of the Legislature that these warrants should be sold at private sale. This construction can be taken from the wording of the statute wherein it states that preference shall be given to individuals, corporations and resident partnerships in the State of Iowa and also to the provision that such persons may file applications with the Treasurer of State for an allotment of a definite amount of said warrants and also from the wording of the statute that authorizes the Treasurer to apportion to each applicant such amounts as he sees fit and also from the absence of any machinery set forth in the statute providing for a public sale, public advertising or the method or the manner by which said public advertising could be paid from State funds. The statute does state expressly the method or manner by which these warrants shall be sold. It is a canon of statutory construction that where the express mention of one thing is made, it implies the exclusion of the other.

Our Supreme Court has referred to this rule by the use of the following Latin phrase: *Expressio unius est Exclusio Alterius.* See:

Pierce vs. Bekins V. and S. Company, 185 Iowa 1346.
Vale vs. Messenger, 184 Iowa 553.
City of Keokuk vs. Scroggs, 39 Iowa 447.
Slane vs. McCarroll, 40 Iowa 61.
McBride vs. Des Moines City Railway Company, 134 Iowa 398.
Carter vs. City Council of Council Bluffs, 180 Iowa 227.

Therefore, under the above statutory rules of construction as decided and approved by our Supreme Court, the Legislature, by the specific and express provisions of the Brookhart-Lovrien sinking fund law for public deposits, has excluded the public sale of anticipatory warrants on this fund.

We, therefore, must hold that there is no statutory authority for the public sale of warrants and that such a sale would not be authorized by law.

In answer to the second question, it is necessary to carefully read and construe the provisions contained in Section 7420-b6 of the 1931 Code of Iowa. In the sale of these warrants, the Treasurer of State is required to sell these warrants at a price not less than par plus accrued interest and also to give preference in said sale to individuals residing in Iowa, corporations organized under the laws of this State and partnerships residing in the State of Iowa. These are the only prohibitions placed upon the State Treasurer in the sale of said warrants. The latter part of this section, which states: "who may file an application with the Treasurer of State for an allotment of a definite amount of said warrants," is not a prohibition on the Treasurer of State but is merely directory and permits possible purchasers to apply on the same and specifies the manner in which such applications shall be presented to the Treasurer of State. Naturally it is the duty of the Treasurer of State to find purchasers for these warrants. This statute clothes the State Treasurer with discretion in the sale of these warrants and in the finding of possible purchasers of the same. There is no presumption that the State Treasurer failed to respect constitutional and statutory provisions in the sale of the warrants in question. On the contrary, courts have universally recognized the presumption that sworn public officials, in the performance of their duties, have legally acted in the absence of evidence to the contrary. See *Burtch vs. Zeuch,* 200 Iowa 49, at page 55. A statute must be tested, not by what has been done under it, but by what the law authorizes to be done by virtue of its provisions. See *Burtch vs. Zeuch,* supra.

The record shows that there were several possible purchasers of these warrants, namely, The Carleton D. Beh Company, an Iowa corporation, The Toy National Bank of Sioux City, another Iowa corporation, and another big banker residing in the city of Des Moines, Iowa. The record further shows that the State Treasurer did procure a purchaser for the allotment of these funds in their entirety. This purchaser came within the preferential class as specified by Section 7420-b6.

We, therefore, must hold that the latter part of Section 7420-b6, hereinabove quoted, cannot have the force and effect of requiring the State Treasurer to advertise publicly for bids or to sell these warrants at a public sale or to legally incur any advertising costs in the sale of said warrants. There is a duty on the Treasurer to procure purchasers for these warrants but the statute clothes the Treasurer with discretion in this respect.

BANKS AND BANKING: TRUSTS: INCOME TAX:

Whether depositors' trusts created in connection with the reorganization of banks that operated under Senate File 111 are subject to state income tax.

March 11, 1935. *Banking Department:* We have your request for opinion as to whether or not depositors' trusts created in connection with the reorganization of banks that operated under Senate File 111 are subject to the State income tax.

It is my understanding that after a bank took advantage of Senate File 111 (Chapter 156, Acts of the 45th General Assembly) and sought to reorganize, that the plan of reorganization would be submitted to and approved by your department. Thereafter, depositor agreements would be entered into by the depositors which ordinarily provided for a payment of a certain portion of the deposit in cash and the issuance of a certificate of deposit against the bank payable within three years for a portion of the balance and the remaining part of the deposit to be evidenced by a trust certificate which was evidence of the certificate holder's interest in the segregated trust fund. These depositor agreements designated certain trustees to administer the trust fund and provided that the assets of the fund be liquidated and distributed in the following order:

1. Full payment of principal of all trust certificates.
2. Payment of interest upon trust certificates at the rate of 2% per annum.
3. Repayment to stockholders who had paid an assessment into the trust.

The purpose of the trust then was to liquidate the assets and distribute the cash among those entitled thereto as it would be impossible to distribute among these former depositors the so-called undesirable assets which consisted mostly of notes, mortgages and real estate.

At the outset, we should suggest that Section 6, Chapter 159 of the 45th General Assembly, provides:

"The trust certificates issued under the provisions of this act shall be non-assessable and non-taxable."

However, the proposition before us is not as to whether the certificates themselves are taxable, but whether the amount distributed as a dividend by the trustees is taxable as income under Chapter 82 of the Acts of the 45th General Assembly, Extra Session, commonly called the personal net income tax. This act imposes the tax upon every resident of the State, which tax shall be levied, collected and paid annually and with respect to his entire taxable income, and Section 7 of the act defines net income as gross income less deductions allowed by law.

Section 8 defines gross income and provides that it includes gains, profits and incomes derived from salaries, personal service, ownership or interest in property and also the transaction of any business carried on for gain or profit. The definition also includes income by a beneficiary of an estate or trust. The sole question then is whether the dividends payable to holders of trust certificates and others, from this trust fund, is income within the definition of the act and therefore, subject to tax, as it is the law that property is not exempt from taxation merely because it is in the hands of an assignee or trustee.

Cooley on taxation states at Section 892:

"Income, when not qualified in a tax law, may be held to mean that which comes in or is received from any service, business or investment of capital, without reference to outgoing expenditures."

Income as used in income tax statutes is used in its common ordinary sense and means profit or gain from capital, labor, business or property and contemplates an increase of wealth. See

State vs. Wisconsin Tax Commission, 204 N. W., 481.
Noel vs. Parrott, 15 Fed. (2d) 669.
In re: Nirdlinger Estate, 139 Atl., 200.
Alabama Power Co. vs. Herzfeld, 114 So. 49.
Brown vs. Long, 136 N. E., 188.

It appears to us that our Supreme Court in the case of *In Re: Estate of Etzel,* 211 Iowa, 700, has answered this exact proposition. In that case, the deceased was the owner of stock in a light and power company. At a meeting of the company subsequent to his death, it was voted to dissolve the corporation and make a distribution of its assets pro rata to its shareholders according to the number of shares held by each and the provision was made by which a corporation conveyed its assets to the stockholders and they in turn conveyed the entire assets to an agent and trustee who had entered into a contract to sell them to another power company, which contract was subsequently carried out, the purchase price being $250,000.00 in cash for the entire assets and the question in the case was whether the proceeds of the sale of the property which were distributed to the estate of the testator as a liquidating dividend should be placed in the corpus of the estate and the income be paid to the widow during her lifetime or should the amount of the liquidating dividend be deemed an income of the estate and delivered to the widow as her individual property, and the court, after reviewing the number of cases from other jurisdictions and from our own State, said at page 712:

"This case also involves a liquidating dividend and is not a question of mere undivided earnings or what might be called a surplus. It has to deal with the liquidating dividend and this liquidating dividend is in reality only a division of the assets of the corporation. It represents the total value of the physical property franchise, good will and all other things of value owned by the corporation. It is not contended that this liquidating dividend represents earnings of the corporation while the corporate property remained in existence and the corporate life continued. Such dividends have been regularly declared paid. This dividend is properly designated as a liquidating dividend. The corporation ceased to exist. Its entire assets were sold and disposed of. Proper pro rata distribution was made among the shareholders of the corporation and the amount so received. The estate of the testator owned certain shares. The liquidating dividend represented these shares in a new form. We are of the opinion that the entire pro rata amount apportioned to the shares owned by said estate became a part of the corpus of the estate and would pass to the remaindermen, and was not income, passing to the life tenant."

Such, we believe, is the exact situation here and that the liquidating dividend to the holders of trust certificates is not income and it is, therefore, the opinion of this department that such dividends are not income as provided for in Chapter 82, Acts of the 45th General Assembly, Extra Session and are not subject to the personal net income tax.

AUDITING OF LIVING EXPENSES OR ACCOUNTANTS: LIVING EXPENSES: If the accountants hired by the State Auditor to audit the accounts of the Iowa Liquor Control Commission are permanently employed, their living expenses should not be allowed. If they are temporarily employed, their living expenses should be allowed.

March 25, 1935. *Iowa Liquor Control Commission:* This will acknowledge receipt of your favor of recent date asking for an opinion upon the following state of facts:

Frank D. Johnson and Raymond F. Green are and have been employed as accountants by the Auditor of State since August or September of 1934 in helping to make an audit of the accounts of the Iowa Liquor Control Commission, for the period commencing January 1, 1934, and ending January 1, 1935. The Auditor of State has submitted vouchers to the Iowa Liquor Control Commission, including an item of $254.54, for payment, said item representing the living expenses in Des Moines for the above two accountants. You state you do not know the residence of Mr. Johnson or Mr. Green but desire to know whether or not the Iowa Liquor Control Commission is required to pay the living expenses of these accountants as above set forth.

(You cite as a reason for taking the view that the Commission is not so required to pay this item of indebtedness, the fact that this department has, by a previous opinion, held that the living expenses of the commissioners under the Iowa Liquor Control Act, were not entitled to their living expenses, although their residences were in Mason City, Marshalltown, and Davenport respectively.)

With reference to the opinion rendered concerning the living expenses of the members of the Iowa Liquor Control Commission, the same was based upon specific provision of the Iowa Liquor Control Act. Section 6 of the act provides:

"The principal place of business of the Iowa Liquor Control Commission shall be in the city of Des Moines, Iowa, and the Executive Council of the State of Iowa shall provide suitable quarters or offices for the Iowa Liquor Control Commission in Des Moines, Iowa."

By this enactment Des Moines, the seat of the State government, was made the official residence of the Commissioners and they would not be entitled to their living expenses while discharging the duties of their office in Des Moines, Iowa, any more than any other elective or appointive State officer.

Under the State Audit Act, Senate File 471, Chapter 5 of the 45th General Assembly, the duties of the Auditor of State were re-defined. Under this act all post-auditing and examining functions of the local governments were concentrated in the Auditor of State.

Under Section 10 of this act, the Auditor of State was empowered to employ such accountants, examiners, assistants and clerks as were provided by law or might thereafter be appropriated for by the General Assembly.

Section 11 of the act provides:

"There is hereby appropriated from any funds in the State Treasury, not otherwise appropriated, a sum sufficient to defray the salaries and expenses of said additional accountants, examiners, assistants and clerks."

Section 50 of the Iowa Liquor Control Act, the same being House File

292, Chapter 24, Acts of the Extra Session of the 45th General Assembly, provides:

"The Auditor of State shall cause the financial condition and transactions of all offices, departments, stores, warehouses, depots and liquor transactions of special distributors of the Iowa Liquor Control Commission to be examined at least once each year by the state examiners of accounts and at shorter periods if requested by the Commission, Governor or Executive Council."

Section 51 of the Iowa Liquor Control Act, the same being House File 292, Chapter 24, Acts of the Extra Session of the 45th General Assembly, provides:

"All provisions of Chapter seven (7) of the Acts of the 45th General Assembly of the State of Iowa relating to auditing of financial records of governmental subdivisions which are not inconsistent herewith are hereby made applicable to the Iowa Liquor Control Commission, the liquor transactions of its special distributors and any of its offices, stores, warehouses and depots."

With these statutory provisions in mind, certain rules for the auditing of claims have been prepared and adopted by the State Comptroller. Rule 6 provides:

"Rule 6. 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 * * * *."

Rule 9 provides:

"Rule 9. 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."

Rule 11 provides:

"Rule 11. No employee of the State whose residence is Des Moines will be allowed meals or lodging expense while engaged in the performance of his duties at the seat of government."

Rule 12 provides:

"Rule 12. Where State employee works at one place for one week or more, he shall be allowed as expense for lodging only the weekly or monthly rate, as the case may be. Where employee chooses to rent quarters for himself and family, he shall be allowed not to exceed $3.00 per day in lieu of regular hotel expense."

From the above statutes and rules adopted by the State Comptroller, it is apparent that the answer to your question depends upon the residence of the two men in question. If their residence was in Des Moines, then they would not be entitled to be reimbursed for this expense. If the law required them to perform their duties at the seat of government, they would likewise not be allowed to be reimbursed for this expense. However, the law does not require these accountants or special auditors to perform their duties at the seat of government. If the residences of these two men were not in the city of Des Moines, then they should be reimbursed for this expense.

Under the new rules for the auditing of claims, which have been prepared and adopted by the State Comptroller effective April 1, 1935, the place of official domicile or residence of each State officer or employee must be shown on the claim, in addition to the place where the expense is incurred. This

new rule is known as Rule 12. However, this new rule would not apply, for the reason that the expense was incurred and the claims filed prior to April 1, 1935, when the former rules adopted by the Comptroller were in effect, as set forth hereinabove.

It is the duty of the State Comptroller to determine the residence and official domicile of the above named claimants for the purpose of deciding upon the legality of the above claims. When the residence and official domicile of the above claimants are determined, then the above statutes and rules adopted by the Comptroller shall apply.

CLEAR LAKE PROPOSED PAVING PROJECT: ASSESSING STATE FOR SAME:

Section 4634, 1931 Code of Iowa, does not apply to lakes, and in its present state would not include the right to use the funds of the Board of Conservation for this work. The legislature would have to take care of this proposition.

March 25, 1935. *Executive Council:* This will acknowledge receipt of your letter of the first instant with enclosures, letter from Ira W. Jones, attorney at Clear Lake, under date of February 22, 1935, and letter from M. L. Hutton, chief engineer of the Board of Conservation, under date of February 26, 1935, in which the following proposition is presented. You desire the opinion of this department on the same.

Mr. Jones, in referring to a conversation had with you in your office prior to the time the letter was written, states that it is the desire of the city of Clear Lake to pave the block lying between the city park and the shore of Clear Lake and that an effort is being made to provide work for CWA workers. The city has exhausted the funds available for buying material and it would be impossible to provide a means to purchase material with which to do the paving. All of the work of excavating and laying the paving will be done without cost to the city by CWA workers. One-half of the costs of said paving would be assessed to the park and be paid by the park commission out of park funds.

Mr. Jones cites Section 4634 of the 1931 Code of Iowa. He states that the block is about three hundred feet long and that the streets on the northerly and southerly sides of the park have been paved through to the lake, so there would be no intersections to be paved.

The engineer in charge of CWA work thought it might be possible to get the government to pay a portion of the cost of the material for said improvement, but whether they do or do not, the work would cost the state or the city nothing and would be much cheaper to pave while the work is being furnished than it would at some other time.

In his letter, Mr. Jones cites opinions of the Attorney General's office for the years 1925, 1926, 1928 and 1932, and also an act of the 45th General Assembly, Chapter 159, wherein the legislature appropriated $3,224.14 to pay for assessments made by the city of Des Moines against the Capitol grounds and State Fair grounds.

In closing, Mr. Jones states:

"The important question would be just how to proceed. The city would not be in a position to carry the assessment that would be made against the State's property here until the next General Assembly.

"I am wondering if it would be possible to have the engineer estimate this cost, which could be done fairly accurately, and then have an act passed directing the issuing of a state warrant for the payment of the expenses when the work was completed."

Section 4634 of the 1931 Code of Iowa provides as follows:

"Improvement by city or county. When a city, town, special charter city, or county shall drain, oil, pave, or hard surface a road which extends through or abuts upon lands owned by the State, the State, through the Executive Council, shall pay such portion of the cost of making said improvement through or along such lands as would be legally assessable against said lands were said lands privately owned, which amount shall be determined by said council, or board."

It will be noted that the statute refers to land—not to water. The situation at Clear Lake is peculiar in that, by court decision, in the case of *H. A. Merrill, et al., vs. Board of Supervisors of Cerro Gordo County, Iowa, et al.,* 146 Iowa 325, the ordinary high-water mark was fixed at the elevation at the top of the dam at the outlet of the lake. For this reason, apparently, all the State would own would be water. As we understand the situation and as pointed out in Mr. Hutton's letter of the 26th ultimo, there would be no land against which the assessment could be charged.

We have read the opinions of this department as set out in Mr. Jones' letter and find that the first opinion referred to was rendered to the Board of Conservation under date of October 26, 1925. The matter presented was that the Board of Supervisors of Calhoun County graveled the road known as Road District No. 30, against land in what is known as Brushy or Tow Head Lake in Williams Township, Calhoun County. The assessment on the same was $96.00. Attention is called to Chapter 246, Acts of the 40th General Assembly, which is to the effect that the Board of Conservation is in control of these lakes. The following question is presented:

Can said assessment be paid from this chapter, or will it be necessary to have it taken before the legislature and have an appropriation made?

Section 4634 of the Code was called to the attention of the Board of Conservation and the opinion of this department is to the following effect:

The language of Section 4634 of the Code is clear and plain and under it there can be no question but what the Board of Conservation would have the authority to pay the assessment of $96.00, referred to, and we believe that the payment of an assessment of this character was contemplated by the legislature in the enactment of this section.

Under date of March 24, 1926, an opinion was rendered to the auditor of the Iowa State Highway Commission on the following proposition:

The city of Ames recently established College Park Storm Sewer District which includes a portion of the Iowa State College property fronting on Riverside Drive. The storm sewer which has been constructed is a lateral extending along Riverside Drive and along the front of this college property. A special assessment of $500 has been levied against the State owned land within the storm sewer district.

In this request for an opinion, attention is called to Section 14-b, Chapter 218, 41st General Assembly, which act made an appropriation of $20,000.00 for a two-year period for maintenance of State roads at all educational institutions. Section 4634 is cited and the opinion is rendered on the following question:

By the construction of a storm sewer, has the city of Ames constructed drainage for a State road under Section 4634 of the Code?

The opinion is to the following effect:

The improvement to which you refer cannot be classed as "maintenance" of a State road, and we are, therefore, of the opinion that the appropriation in question cannot be used to pay the amount levied as a special assessment for this purpose.

Under date of December 28, 1926, the Attorney General rendered an opinion to the Auditor of State with reference to the same act of the General Assembly, wherein $20,000.00 was appropriated for "maintenance of State roads at any or all State institutions under the Board of Education." The opinion goes into detail with regard to the word "maintenance" and reaches the same conclusion as the opinion cited above, that is, that maintenance would not permit an interpretation allowing construction. Cases are cited to the effect that the terms "maintenance" and "repair" are synonymous. The following question is also presented:

Can the term "abut" as used in Section 4634 of the Code of 1924, be construed to mean "adjacent" property?

The case of *Millan vs. City of Chariton,* 145 Iowa 648, in which the term "abut" was construed and defined, was cited in the following manner:

"By the term 'abutting property' is meant that between which and the improvement is no intervening land. 24 Am. Eng. Ency. (2nd ed.) 11a."

The opinion of the Attorney General is to the following effect:

"We are therefore of the opinion that under the decision of the Supreme Court of this State, the term 'abut' in reference to the assessment of property for state or road improvements, does not include "adjacent' property."

Under date of June 1, 1928, this department rendered an opinion to the Executive Council with reference to the State Fair Board paying the State's assessment for the oiling of Dean Avenue. Again reference is made to Section 4634 of the Code.

The opinion states as follows:

"It will be noted from reading said section that the State is required to pay their portion of the assessment against any State lands, and that said payment is to be made through the Executive Council.

"We, however, do not find where any appropriation was made by the 42d General Assembly for such purposes. It will, therefore, be necessary to have the matter presented to the next legislature so that a special appropriation may be made to take care of this obligation. We might also suggest that the obligation is still an obligation of the State."

Under date of October 8, 1931, an opinion was rendered by this department to the Executive Council on the following question:

Is the State liable for its proportionate share of the cost of a street improvement inside a city or town when the State owns land which abuts upon such improved highways?

Section 4634 of the Code is again cited. The opinion is as follows:

"The liability provided for in the section above set forth is definite and positive, and it is the opinion of this office that the Executive Council in case such improvement is made, has no alternative excepting to make payment after due investigation, as provided in said section."

As stated above—Section 4634 of the 1931 Code of Iowa refers to land and not to water.

For your information, we will say that it has been the contention of this

department for a number of years that the State owns the beds of all lakes. It has been our thought that the only superior right to that of the State is in the Federal Government and that the State stands as trustee for the Federal Government.

The Supreme Court of the United States, in the case of *Barney vs. Keokuk*, 94 U. S. 324, made reference to the leading Iowa case, *McManus vs. Carmichael*, 3 Iowa 1. So it will be seen that Iowa, very early in its history, followed the rule that inland streams which were above the tide waters and which were navigable in fact, were governed by the general rule applicable to tide waters and that ownership of riparian properties extended only to high-water mark.

Also Mr. Justice Holmes, in deciding the case of *Marshall Dental Manufacturing Company vs. State of Iowa*, 226 U. S. 460, states:

"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."

It is, therefore, the opinion of this department that while there might be some question with reference to the ownership of the bed of Clear Lake, yet we believe that the decisions of our Supreme Court and those of the United States Supreme Court are sufficient to place title in the State.

OLD AGE ASSISTANCE LAW: LIABILITY OF EMPLOYER FOR FAILURE TO MAKE REMITTANCE BEFORE APRIL FIRST WHEN SAID TAX WAS COLLECTED BEFORE THAT DATE. RECEIPT OF PAYMENT THROUGH MAIL POSTMARKED APRIL FIRST:

March 26, 1935. *Old Age Assistance Commission:* This will acknowledge receipt of your letter of the 14th instant in which you request the opinion of this department on the following questions:

With reference to delinquent payments of the old age assistance tax, the provisions of Section 34, in part, are to the effect that the $2.00 per capita tax is collectible "at the same time as property taxes and subject to the same penalties."

In opinions heretofore rendered, the date on which the penalty accrues is April 1st and the rate of penalty is three-fourths of one per cent. It is the understanding of the commission that an individual taxpayer, tendering his payment of the per capita tax as of April 1, 1935, or any day thereafter, is subject to the penalty above stated.

Are the penalties which will accrue in the remittances made by employers who, under the provisions of Section 34 of the old age assistance law, are made collectors of the tax from their employees and are liable for the failure of employees to pay said tax, collectible from employer or employee?

Suppose an employer withholds the $2.00 head tax from the pay check of an employee which was payable to said employee as of the last day of March, or customarily paid on Saturday, March 30, and employer then mails his remittance to the Treasurer of State as of April 1st and 2d. Would the employer then be liable for the payment of the penalty in such delinquent tax payment, or would the employee he held for such penalty?

Would the Treasurer of State and our office be justified in accepting all remittances without penalty which are received through the mails in envelopes postmarked prior to April 1st?

Under Section 34 of the act, in ordinary cases arising by late payments of the per capita tax, the employee would be primarily liable. However, in the case above set out, the employer would become liable for the penalty.

Any payment made which was postmarked prior to April 1st, though not received through the mails until after that date, shall have no penalty attached.

TAXES: POOR RELIEF: COUNTY INDEBTEDNESS: Indebtedness incurred for poor relief purposes is to be considered as indebtedness for "general and ordinary purposes" rather than for "special and extraordinary purposes."

March 26, 1935. *Auditor of State:*

In re: The interpretation of the statutory meaning of the words "for its general or ordinary purposes" as used in Section 6238, Code of Iowa, 1931.

You state that a certain county has property with a total assessed valuation in the year 1935 of $36,262,740, and that based upon this valuation the statutory limit for which this county may become legally indebted for its general and ordinary purposes is $453,289.25. You state further that at the present time the county has direct bond obligations of $680,000, which is made up of the following: Bridge and Road Bonds outstanding, 1935, $147,000.00; all other Funding Bonds, $369,000.00; new issue of Funding Bonds issued this year, $164,000.00. The Funding Bonds outstanding represent the funding of obligations which existed in such funds as the Poor, General County, Soldiers' Relief and Court Expense. After taking into consideration what the bond and interest levies for 1935 will produce there will be approximately, you state, $624,000.00 of bond obligations outstanding, which amount is considerably above the 1¼% limit. In connection with the above situation you desire a construction of Section 6238 of the 1931 Code of Iowa, which we set out as follows:

"6238. *Limitation.* No county or other political or municipal corporation shall become indebted in any manner for its general or ordinary purposes to an amount exceeding in the aggregate one and one-fourth per cent of the actual value of the taxable property within such corporation. The value of such property shall be ascertained by the last tax list previous to the incurring of the indebtedness."

You state your question as follows:

"The main reason for our question is to determine whether such bonds as Poor Fund Bonds, the issuance of which was brought about by the present emergency, should be considered as for "general and ordinary purposes," or whether bonds such as these would be considered as for extraordinary purposes."

The question naturally arises, do the bonds now outstanding represent indebtedness incurred by the county for its "general or ordinary purposes." Before this question could be answered definitely and certainly, it would be necessary to know all the facts and circumstances under which the bonds were issued. In the case of C. W. Wyatt vs. Town of Manning, 217, Iowa 929, the court quoting the case of Swanson vs. City of Ottumwa, 118 Iowa 161, and citing many other cases, held that cities may construct a municipal light and power plant and pledge the plant as security for the payment of the expenditure for the establishment thereof without incurring indebtedness, within the constitutional and statutory limitations on indebtedness. In those

cases the "limited obligation was not one within the constitutional and statutory limitations because the indebtedness was not general." Such indebtedness is generally declared by Sections 6134 d-1 and 6134 d-2 not to constitute a general obligation or to be payable in any manner from taxation.

The indebtedness referred to in your letter, as evidenced by outstanding bonds, is general indebtedness for the payment of which all the taxable property of the county may be taxed if the indebtedness is lawfully incurred. The question submitted here is whether or not the indebtedness evidenced by said outstanding bonds is for the general or ordinary purposes of the county or for special and extraordinary purposes. Section 6239 of the Code provides that cities and towns when authorized by proper election may incur indebtedness for the purpose of purchasing, erecting, extending, reconstructing, or maintaining and operating water works, gas works, electric light and power plants, and for constructing city and town halls and hospitals, and for many other purposes.

The purposes for which indebtedness may be incurred, as provided by Section 6239, are, by Section, 6240, declared to be extraordinary purposes. What is meant then by indebtedness of a county for its general and ordinary purposes, as is stated in the case of France vs. City of Des Moines, 183 Iowa 1311, "the building of a bridge in a great city is not an expenditure for general or ordinary municipal purposes." Yet the city has authority under certain conditions to erect a bridge across a stream within its borders. The words "general or ordinary purposes," as used in Section 6238, mean in substance the opposite of "special or extraordinary purposes." In other words, may it be said, in view of the present generally recognized emergency, that some or all of the Poor Fund Bonds may be considered and held to have been issued for "special and extraordinary purposes" as distinguished from "general and ordinary purposes"?

An emergency has for some years existed in the State of Iowa which has brought about constructions of the law different from those which had previously prevailed. With reference to the existence of a similar emergency in the State of Minnesota, the Supreme Court of the United States spoke as follows:

"The declarations of the existence of this emergency by the legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking in adequate basis. * * * * The finding of the legislature and the State Court has support in the facts of which we take judicial notice * * * * that there were in Minnesota conditions urgently demanding relief, if power existed to give it, is beyond cavil." Home Building and Loan Association vs. Blaisdell, 290 U. S. 398.

The Legislature of the State of Iowa in the enactment of Chapter 145, Acts of the 45th General Assembly, declared a public emergency to exist affecting the welfare of the people of the State of Iowa, and authorized the Commissioner of Insurance, with the approval of the Governor, to make, appoint, and rescind the rules and regulations with reference to insurance. The same Legislature also enacted Chapters 179 and 182, Laws of the 45th General Assembly, in the last of which chapters it declared:

"The Governor of the State of Iowa having declared that an emergency now exists, and the General Assembly having determined that such emergency does exist, which is general throughout the State, and that the safety and

future welfare of the State as a whole is endangered thereby, the General Assembly, acting under the power reserved by the people of Iowa, does hereby enact the following" etc.

The chapter just referred to relates to extension of the period of redemption and emergency delay in foreclosure mortgages. The Supreme Court of Iowa in upholding said Chapter 179 and in sustaining the Legislature in its finding and declaration that an emergency exists, states:

"Generally speaking, the emergency which called forth the moratorium has not passed." Des Moines J. S. L. Bank vs. Nordholm, 217 Iowa 1319.

Exemption from the restriction fixed by law applies only in favor of levies required to meet extraordinary conditions resulting from some unexpected or unforeseen occurrence such as the destruction or damage to highways by fresh land slides or other casualty. State vs. Zangerle, 115 N. E. 498 (Ohio). Neglect or inattention of public officers to the repair of public highways does not constitute an emergency even though they cause damage or delay. Ibid. The word "emergency" is used in its ordinary significance to mean a sudden, unexpected happening, an unforeseen occurrence or condition, specifically a perplexing contingency or complication of circumstances, a sudden or unexpected occasion for action, exigency, pressing necessity. Ibid. A tax levy for maintaining public ferries, building roads, and meeting other current expenses was not for a "special purpose." Southern Railroad Company vs. Cherokee County, 97 S. E. 758, North Carolina.

Indebtedness incurred for the building of a court house is incurred for special and extraordinary purposes. 1930 Attorney General's Opinions, 181.

Section 5337 of the Code, relating to the expense of supporting the poor is as follows:

"5337. *Poor tax.* The expense of supporting the poor shall be paid out of the County Treasury in the same manner as other disbursements for county purposes; and in case the ordinary revenue of the county proves insufficient for the support of the poor, the board may levy a poor tax, not exceeding one and one-half mills on the dollar, to be entered on the tax list and collected as the ordinary county tax."

"It will be observed that the law imposes a duty to relieve the poor and provides that the expense of such relief shall be paid out of the County Treasury the same as other disbursements for county purposes. If the ordinary revenue is not sufficient for the support of the poor, the board may then levy a poor tax not exceeding three mills on the dollar." Council Bluffs Savings Bank vs. Pottawattamie County, 216 Iowa 1123.

Section 5337 provided that the expense of supporting the poor shall be paid out of the county treasury in the same manner as other disbursements, for the law appears to make expenditures for relief a part of the general and ordinary expense of the county. Poor Fund Bonds then represent indebtedness of the county for its general and ordinary purposes and are subject to the limitations contained in Section 6238, unless an emergency can clearly be shown to exist, resulting in an unequivocal demand for poor relief and making necessary an expenditure of money in such an amount as absolutely and necessarily to exceed the amount which can be raised for general and ordinary purposes. Certain relief must be furnished without making it impossible to carry on the other functions of the county government. The county government must function, and this requires certain revenue. The

hungry also must be fed; this also requires the expenditure of money. If a situation arises where an emergency in the nature of an unprecedented demand for relief makes it imperative to exceed the limitations set by Section 6238, with no alternative other than to require a large number of the population of the county to go hungry and to suffer otherwise from lack of the necessities of life, then it might be said, and with considerable force, that indebtedness to relieve such persons in want is indebtedness for a special and extraordinary purpose.

We are confronted, however, with the terms of Section 5337, which provides that:

"The expense of supporting the poor shall be paid out of the County Treasury in the same manner as other disbursements for county purposes, and in case the ordinary revenue of the county proves insufficient for the support of the poor, the board may levy a poor tax not exceeding one and one-half mills on the dollar, to be entered on the tax list and collected as the ordinary county tax."

We quote again from Council Bluffs Savings Bank vs. Pottawattamie County, supra:

"If the ordinary revenue is not sufficient for the support of the poor, the board may then levy a poor tax not exceeding three mills on the dollar."

The section last above quoted and the case just referred to seem to be legislative and judicial authority of a sufficiently persuasive character to require us to hold that indebtedness incurred for the support of those in need is indebtedness for general and ordinary purposes. In case the ordinary revenue of the county proves insufficient for the support of the poor, the board may levy an additional poor tax not exceeding one and one-half mills on the dollar. In view of the authorities above quoted, it is the opinion of this department that indebtedness incurred for poor relief purposes and whether evidenced by poor fund bonds or otherwise, which indebtedness was brought about by the present emergency, is to be considered as indebtedness for "general and ordinary purposes" rather than for "special and extraordinary purposes" and is subject to the limitation contained in Section 6238, namely that such indebtedness shall not exceed in the aggregate one and one-fourth per cent of the actual value of the taxable property within such corporation.

REAL ESTATE LICENSE LAW: ADVERTISING: MINNESOTA FIRM: If a Minnesota firm desires to advertise and do business in Iowa, said firm must secure a license.

March 26, 1935. *Real Estate Commissioner:* This will acknowledge receipt of your letter of the 25th instant, in which you desire the opinion of this department on the following question:

Can a firm residing in Minnesota advertise Minnesota land in the newspapers in the State of Iowa without violating the real estate license law?

You are advised that the real estate license law does not relate exclusively to the buying and selling of land located in Iowa but relates to the business of selling land as transacted in Iowa. Section 1905-c23, 1931 Code of Iowa, 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.

This section relates to all real estate transactions in Iowa regardless of where the real estate is located. You will note that this section of the Code also provides with regard to the advertising of the business of being a real estate broker or salesman. The situation is analogous to that where a broker sells securities in Iowa, which represents the stock or bonds of some company doing business outside the State of Iowa. In order that such broker comply with the Iowa law, it is necessary that he be granted a license to do so by the Securities Commissioner, if he desires to sell securities in Iowa.

Also see Section 1905-c57 with reference to nonresidents, which section provides, among other things, for the filing of an irrevocable consent that suits and actions may be commenced against such applicant in the proper court of any county of this State in which a cause of action may arise in which the plaintiff may reside, by the service of any process or pleading authorized by the laws of this State on the Commissioner.

It is the opinion of this department, as the real estate license law was enacted for the protection of the public, that if a Minnesota firm desires to advertise and do business in Iowa, said firm must secure a license. The only exception would be in cases of persons and transactions exempted by Section 1905-c26 of the 1931 Code of Iowa as amended by Chapter 23, Acts of the 45th General Assembly in Extraordinary Session, which section and act provides as follows:

Nonapplicability of chapter. 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, nor shall the provisions of this chapter apply to persons acting as attorney-in-fact under a duly executed power of attorney from the owner authorizing the final consummation by performance of any contract for the sale, leasing, or exchange of real estate, nor shall this chapter apply to an attorney admitted to practice in Iowa; nor shall it be held to include, while acting as such, a receiver, trustee in bankruptcy, administrator or executor, or any person selling real estate under order of any court, nor to include a trustee, acting under a trust agreement, deed of trust, or will, or the regular salaried employees thereof, nor shall it be held to include any state or national bank, chartered to do business in its charter.

CHAPTER 23—REAL ESTATE BROKERS—H. F. 98.

AN ACT to amend Section 1905-c26, Code, 1931, relating to real estate brokers. Be it enacted by the General Assembly of the State of Iowa:

Section 1. Section 1905-c26, Code, 1931, is amended by striking the period at the end of the section and inserting in lieu the following: "; nor shall it be held to include any auctioneer while selling real estate at public auction for any of the parties exempted under this section."

OLD AGE ASSISTANCE COMMISSION:

Renewal of applications. The holdover applications that were filed with either the local boards or in the hands of the commission, including both those allowed and those not allowed because of lack of funds, with respect to having the applications renewed, is a matter of administration to be worked out by the old age assistance commission.

March 26, 1935. *Old Age Assistance Commission:* This will acknowledge receipt of your letter of the eighth instant in which you request the opinion of this department on the following question:

All certificates of allowance for pensions issued lapse on July 1, 1935. 8,500 pensioners have received an assigned allotment up to July 1, 1935, of an average of $13.25 a month each. It is estimated, between those applications on file with county boards and those in the office of the commission, that there will be 55,000 applications. It is also estimated that between 25,000 and 30,000 applications were made and filed with either the local county boards or with the commission.

Because of the lack of funds, no allowance could be made on these applications. Under the interpretation of Section 35 of the old age assistance law, it is necessary that all pensioners renew the application made.

What is the commission to do with the holdover applications that were filed with either the local boards or in the hands of the commission, including both those allowed and those not allowed because of lack of funds, with respect to having the applications renewed?

In this situation, it is the opinion of this department that the matter presented would be an administrative matter for your commission to determine. If you feel that you have sufficient information in the application now on file, it would be unnecessary, as we view it, to go through the routine of having a new application made out and filed.

There may be cases where some change has occurred in the status of the applicant. This matter could be taken care of by having this additional information added to the application now on file or in some cases, a new application can be made out. But where no change has occurred, we feel that the old application could be used.

As above stated, it is the opinion of this department that the proposition under consideration is an administrative policy to be worked out by the commission. In working out an administrative policy, we would suggest that it might be handled in the following manner: The preparation of a short statement which could be presented to each applicant, requesting information as to whether or not the status of such applicant had changed since the making of the original application. If the answer was in the affirmative, such additional information could be given on such a blank.

SETTLEMENTS: CITIZENSHIP: TRANSIENTS: The party here concerned has no legal settlement in Iowa and his legal settlement is in New Mexico, unless he abandoned his settlement there and took up his legal residence in some other state.

March 28, 1935. *County Attorney, Pocahontas, Iowa:* Your letter of March 5th, addressed to the Attorney General, has been referred to me for reply. You state that on or about the year 1929, a resident of your county moved to New Mexico, in which state he resided in different counties for a period of about 14 or 15 months continuously. That thereafter he was in other states a part of the time, that on October 1, 1932, he returned to Iowa and located in Gilmore City, Humboldt County, that he resided in that part of Gilmore City which is in Humboldt County for about nine months and then removed to that part of Gilmore City which is in Pocahontas County, where he lived for a period of 60 days and then returned to Humboldt County and remained there, where on or about December 14, 1933, he was served by the county authorities of said county with the statutory notice notifying him not to become a resident of said county, but that since that time he has resided in Humboldt County, and a similar notice has been served regularly upon him. The ques-

tion you present is whether this man is a resident of Humboldt County or Pocahontas or the State of New Mexico.

In answering this question it will be assumed that each removal was made in good faith and with the purpose of establishing a residence in the new location and abandoning the residence and legal settlement in the old. We assume that when he moved with his family to New Mexico and resided there continuously for 14 or 15 months, he abandoned his residence in Pocahontas County and established it in New Mexico. Whether he established a legal settlement in some other state before returning to Iowa, of course, we do not know.

Section 2 of Chapter 99, Acts of the 45th General Assembly, provides as follows:

"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."

This man had removed from this state for more than one year and we assume acquired a legal settlement in another state. Thereafter upon his return to Iowa he located in Humboldt County where he remained for nine months and then removed to Pocahontas County before he had acquired a legal settlement in Humboldt County.

Section 1 of Chapter 99, Acts of the Forty-fifth General Assembly, as amended, provides as follows:

"A legal settlement in this State may be acquired 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 is our opinion this man did not acquire a legal settlement in Humboldt County in view of the statutory provision above quoted, he having resided in that county for a period of less than one year. Without having acquired a residence in Humboldt County, he removed to Pocahontas County where he resided for a period of 60 days, after which he returned to Humboldt County where he has since remained. It is our opinion he did not acquire a legal settlement in Pocahontas County, where he lived for only two months in the past several years. Chapter 99 above referred to, prescribing the manner in which one may obtain a legal settlement in any county in this State, precludes the gaining of a residence in a county unless a continuous residence for one year is maintained therein.

Some time after the return of this party to Humboldt County and before he had resided there one year, he was served with a notice warning him to depart, as provided in said Chapter 99, and that notice, with successive notices served upon him, if they were served in accordance with the law, have prevented his acquiring a legal settlement in Humboldt County.

It is our opinion, therefore, that he has no legal settlement in Iowa and that his legal settlement is in New Mexico, unless he abandoned his settlement there and took up his legal residence and settlement in one of the other

states he visited before returning to Iowa. Whether or not such foreign state will accept its responsibility in the matter and make settlement with Humboldt County for the expense it has incurred is problematic, but the obligation is a just and proper one and the matter should be taken up with such state.

LEGISLATURE: STATE INCOME TAX: LEGISLATORS: May a State legislator, whose residence is not in Des Moines deduct his necessary expenses while engaged in the conduct of legislative business during a session of the Legislature here at Des Moines, in computing his state income tax?

March 28, 1935. *House of Representatives:* I have your request for an opinion from this department relating to the following proposition:

"May a state legislator, whose residence is not in Des Moines, deduct his necessary expenses while engaged in the conduct of legislative business during a session of the Legislature here at Des Moines, in computing his state income return?"

Sub-section 1 of Section 9 of Chapter 82 of the Laws of the 45th General Assembly, Extraordinary Session, is as follows:

"Sec. 9. *Allowable deductions on gross income.* In computing net income there shall be allowed as deductions:

"1. All the ordinary and necessary expenses, paid or incurred, in case of report on an accrual basis, during the tax year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal service actually rendered, traveling expenses while away from home in pursuit of trade or business, and including rentals or other payments required to be made as a condition to the continued use or possession, for the purpose of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

Section 8 of the act is in part as follows:

"The term 'gross income' includes gains, profits and incomes derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, * * *"

Section 10 of the act provides in part as follows:

"In computing the income, no deductions shall in any case be allowed in respect to the following:

1. Personal, living or family expense."

The principal question to determine then, is whether a legislator attending a legislative session is carrying on a trade or business, for it will be noted that under Section 9 of the act, ordinary and necessary expenses paid or incurred in carrying on any trade or business are allowable deductions.

The State to exist as such, must have laws and the power to make such laws is solely in the legislative department, and therefore, when members of the Legislature are in attendance at a session of the Legislature, they are not carrying on an independent trade or business, but are representatives or employees of the people in carrying on the business of the State and for such services, they receive a salary as compensation. Their expenses, while in the performance of such duties, are necessarily personal and therefore, under the provisions of Section 10 of the act, are not allowable deductions. We appreciate that the personal expenses of legislators in attendance at sessions at the state house are substantial and in many instances, constitute nearly a double expense, as the residence at the home of the legislator is

also maintained during the same period, but the provisions of the income tax law are so apparent as to this proposition, that no other conclusion is reachable.

It is, therefore, the opinion of this department that your inquiry must be answered in the negative and that such legislators are not entitled to deduct the expenses inquired about.

SALARY REDUCTION: LEGALIZING ACT: H. F. 141.

"Thus, after the services have been performed by the official under such law, it constitutes a completed contract. * * * if H. F. 141 is enacted into law, it cannot have any legal force or effect."

March 28, 1935. *House of Representatives:* I have your official request of March 26, 1935, for an opinion from this department on the following proposition:

"House File No. 141 passed the House and the Senate and the House concurred in the Senate amendments. As you will notice in the bill, it provides that all salaries paid to public officials, as designated in Chapter 89 of the Acts of the 45th General Assembly, have been paid and accepted as full compensation by the said public officials. The Senate amended the Act to provide that all salaries paid up to the time the Supreme Court held the Act unconstitutional shall have been paid and accepted by said public officials in full compensation for their services.

"As soon as the Act was passed, a great many public officials made a claim for their back salary, which in some instances was paid to them. The problem I am interested in is this: Under the terms of House File No. 141, I believe that the public officials who did not take the additional compensation are barred from making a claim for it. However, my interpretation of the Act is that where a public official secured the additional compensation before House File No. 141 was passed, he will be entitled to keep the additional compensation, and that the County will have no recourse against him.

"You can see that this penalizes the public official who was willing to wait until the Supreme Court finally passed on a petition for a rehearing. In other words, the official who did not make the claim cannot now make it, and the official who immediately rushed in and secured the additional compensation will be permitted to keep it.

"This situation is of great importance in Webster County. As soon as the Supreme Court handed down their decision, the Board of Supervisors of Webster County immediately paid themselves the additional compensation for the period that House File 89 of the Acts of the 45th General Assembly was in force. The other County officials did not do so. Under my construction of the Act, the other County officials cannot now make a claim, and the Board of Supervisors will be entitled to retain the additional compensation. This is an obviously unfair situation, and I desire that you should render an opinion on this question for the benefit of the House of Representatives."

I have examined the copy of House File No. 141 which you have attached to your official request. This proposed act attempts to legalize the reduced salaries paid to public officials under and by virtue of Chapter 89 of the Acts of the 45th General Assembly, and further seeks to prevent said officials from claiming and receiving the balance of said salaries as fixed by the former law, which law the Legislature sought to repeal by Chapter 89 of the Acts of the 45th General Assembly.

The Supreme Court of Iowa on December 11, 1934, in the case of F. Price Smith vs. Thompson, reported in 258 N. W., 190, Advance Sheet No. 2, handed down a decision declaring Chapter 89 of the Acts of the 45th General Assembly unconstitutional and void. The effect of this Supreme Court decision is that

Chapter 89 of the Acts of the 45th General Assembly never had any legal force and effect, and that the salaries for all public officials affected thereunder are the same as though Chapter 89 of the Acts of the 45th General Assembly never had been passed. The public officials that were in office at the time this salary reduction act became effective and the officials that are still serving are entitled to the salaries as provided by law.

The questions raised in the consideration of House File No. 141 are as follows:

1. May the Legislature subsequently legalize a former legislative Act which is declared unconstitutional, null and void by the Supreme Court of Iowa?

2. May the Legislature, after the officials have served, pass a legalizing Act, depriving said officials of a part of their statutory salary?

In order to answer these questions properly, it is necessary to examine the authorities bearing upon this subject. It is a general rule of law that a public officer is entitled to the salary provided by law, because the law attaches the salary to the office as an incident thereof and not by force of contract.

22 R. C. L., Page 532.

When an official takes office, there is no contract which binds him to perform for the existing compensation all the duties which may pertain to the office at the time of his election or appointment (James vs. Duffy, 140 Ky., 604; 131 S. W., 489; 140 A. S. R., 404; 22 R. C. L., Page 533), nor is there any contract which binds the government to maintain unchanged the duties which at the beginning of his term he may be required to perform for a designated compensation.

Louisiana vs. Jefferson Police Jury, 116 U. S., 131; 6 S. Ct., 329; 29 U. S., L. Ed., 587; 22 R. C. L., 533.

The Legislature, not being bound by any contract, may abolish the office (22 R. C. L., 533); or it may impose extra duties without providing compensation for them (supra); or it may diminish his emoluments (supra); or change the rate of compensation for services to be rendered after the change is made. (Supra). If the duties of the office are diminished, he is entitled to the same salary for those which remain; and where the compensation is paid in the form of fees, he has a right to enjoy the same scale of fees for what he may do; and on the other hand, if new duties are added he must perform them for the same salary. (Supra). *But after the services have been rendered, under a law, resolution or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect and rests on the remedies which the law then gives for its enforcement.* This is the rule as announced by the United States Supreme Court in the case of Louisiana vs. Jefferson Police Jury, 116 U. S., 131, hereinabove cited.

No law impairing the obligation of contract shall ever be passed.

See Section 21, Article 1, Constitution of Iowa, and Section 10, Article 1, Constitution of the United States of America.

As a general rule, even an agreement by a public officer to render the services required of him for less than the compensation provided by law is void as against public policy.

See *Bodenhofer vs. Hogan,* 142 Iowa, 321; 120 N. W., 659; 134 A. S. R., 418; 19 Ann. Cas., 1073, and note.

In the above Iowa case, a deputy sheriff had entered into a contract with the sheriff to accept a lesser salary than the law provided. After serving for some time and accepting and receiving the smaller stipend, the deputy sheriff brought suit to recover the balance in amount between his contract agreement and the salary as provided by law. Our court permitted the deputy to recover in full. Even the actual receipt of less than the legal rate of compensation for the services rendered by a public officer does not estop him from recovering the full amount which may by law be due to him.

Bodenhofer vs. Hogan, 142 Iowa, 321.
Gelavey vs. United States, 182 U. S., 595; 21 S. Ct., 891; 45 L. Ed. 1247.
Whiting vs. United States, 35 Ct. Cl., 291.
Adam County vs. Chapman, 22 Ind. App., 60; 53 N. E., 187.
Breathitt County vs. Noble (Ky.), 116 S. W., 777.
Bowe vs. St. Paul, 70 Minn., 341; 73 N. W., 184.

The fact that an officer, acting together with a paying body, under an erroneous assumption, accepted the salary provided for by a law subsequently held unconstitutional does not estop the officer from claiming the legal salary fixed by the proper board.

Santa Cruz County vs. McKnight, 20 Ariz., 103; 177 Pac., 256.

Our own court has gone so far as to declare a County Recorder, elected by the people, disqualified from holding office where, during the campaign for the office, he promised to accept the office and serve for less money than the law permitted as compensation for the office.

See *Carrothers vs. Russell,* 53 Iowa, 346.

From the above authorities, it is clearly apparent that the Legislature cannot pass any law or legalizing act affecting the salaries for public officials, which attempts to have a retrospective effect. The Legislature may pass laws affecting the salaries of public officials, but such laws must have a prospective effect. In other words, the Legislature can pass laws changing salaries for public officials which take effect in the future, but they cannot pass laws affecting the salaries of officials prior to the time the act goes into effect. The United States Supreme Court has squarely held that after the services have been rendered under a law which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. Thus, after the services have been performed by the official under such law, it constitutes a completed contract. Obviously, under our State and Federal constitutions, the Legislature cannot pass any law impairing the obligation of such contracts.

It is, therefore, the opinion of this department that if House File No. 141 is enacted into law, it cannot have any legal force or effect for the reasons hereinabove set forth.

SCAVENGER SALE: TAXATION: BOARD OF SUPERVISORS:

"If the Board are satisfied that they are getting a fair price for the certificate, they would have a right to sell it. This, however would only apply to tax sales held prior to the time that S. F. 150 of the 46th G. A. became effective, which, I believe, was within the last day or two."

March 29, 1935. *County Attorney, Garner, Iowa:* The reason your letter of March 18th has remained unanswered is because I left the office on that date and have been engaged in litigation ever since and did not return to the office until noon today.

Your question is as follows:

"The County Board of Supervisors purchased considerable property at the scavenger sale in January of this year. We wonder whether or not the Supervisors have a right to assign the tax certificates to an individual for less than the full amount of the taxes due but for more than the amount which was bid by the County at the scavenger sale."

Generally speaking, the Supervisors, acting on behalf of the county and using such judgment and discretion as ordinary prudent business men would use in the handling of their own affairs, would have authority to sell and assign the tax certificates to an individual, if they obtained more than the amount which had been bid by the county at the tax sale. This would not, however, be a redemption. The certificate would still be outstanding in the hands of an individual, and if the owner of the property attempted to redeem, he would have to pay the full amount of the tax.

You understand, of course, that the Supervisors would not have a right to assign and sell this certificate to the owner of the property for less than the full amount of the taxes, for the reason that when the owner of the property redeems from a scavenger sale, he must redeem, not from the amount of the bid but from the full amount of the taxes due, together with interest and penalties.

Your question, therefore, deals merely with the authority of the Board of Supervisors to sell the certificate to some individual other than the property owner. Our answer to that question is that if the Board are satisfied that they are getting a fair price for the certificate, they would have a right to sell it. This, however, would only apply to tax sales held prior to the time that Senate File 150 of the 46th General Assembly became effective, which, I believe, was within the last day or two.

BANKS AND BANKING: TAX ON CAPITAL STOCK: The Legislature passed Chapter 86, 45th G. A., Extra Session, so as to place bank capital on the same basis as other competing capital, and under section as amended, bank capital is taxable as moneys and credits, and is, of course, then on basis of 100%.

March 30, 1935. *County Attorney, Davenport, Iowa:* We have your letter of March 25th for our opinion on the following proposition:

The assessor of the city of Davenport desires to know whether under Section 7003 of the Code of Iowa, 1931, as amended by Chapter 86 of the Laws of the 45th General Assembly, Extraordinary Session, the capital stock of a bank should be assessed at 100% or 60%.

The Legislature passed Chapter 86, Laws of the 45th General Assembly, Extraordinary Session, so as to place bank capital on the same basis as other

competing capital, and to give them a flat millage, and under the section, as amended, bank capital is taxable as moneys and credits, and is, of course, then on the basis of 100%. You will note that deductions on account of real estate, are provided for in Sections 7002 of the Code.

OSTEOPATHS: BOARD OF HEALTH: USE OF DRUGS: HOUSE FILE 174.

1. If H. F. 174 is adopted without amendments, will osteopath operating in Iowa be any more restricted in the use of drugs in his profession than medical doctor under Code today?

2. Does H. F. 174 increase liberties of osteopathic profession?

April 1, 1935. *House of Representatives:* I have your written request of March 28, 1935, in which you ask the following questions with regard to the interpretations of House File 174:

1. You ask if House File 174 is adopted without amendments, will the osteopath operating in the State of Iowa be any more restricted in the use of drugs in the practice of his profession than the medical doctor under the Code today?

The only restriction placed on the osteopath in the use of drugs under House File 174 is that the osteopath cannot independently prescribe drugs unless the drug is prescribed in connection with manual treatment. If in the usual osteopathic manual treatment, an osteopath decides that it is necessary to give a drug in connection therewith, he may do so under the provisions of House File 174. To illustrate, if an osteopathic surgeon is performing a tonsillectomy and the patient is bleeding to death, an osteopathic surgeon may then prescribe and give a drug to coagulate the blood and thereby stop the bleeding. The giving of such a drug would be the practice of internal medicine, which is now prohibited under the Code.

2. You further ask if House File 174 will increase the liberties of the osteopathic profession insofar as the use of drugs are concerned in connection with the art of healing.

Our answer to the second question is that House File 174 will increase the liberties of the osteopathic profession in the use of drugs in connection with the art of healing.

OLD AGE ASSISTANCE LAW: EX-SERVICE MEN:

The tax is not a premium on retirement insurance, but a tax levied in accordance with Section 34 of the old age assistance law.

April 2, 1935. *Old Age Assistance Commission:* This will acknowledge receipt of your request for the opinion of this department on the following:

The judge advocate's office of the Iowa department of American Legion has received a letter from an ex-service man who desires to know:

Why should ex-service men pay the old age pension?

This ex-service man further states:

"If the interpretation is correct, ex-service men cannot hope to receive any of the benefits from the old age pension because the law says that we shall be provided for by the soldiers' relief commission.

"Why should not ex-service men who have paid the old age pension be refunded the amounts they have paid?

It is the opinion of this department that the person inquiring does not realize that the law levies a tax in accordance with Section 34 thereof. This

tax is in no sense a premium on retirement insurance. Furthermore, we are informed at this time that there are Spanish-American war veterans who are receiving old age assistance.

As pointed out in the request for the opinion, Section 27 provides:

"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."

However, there is nothing in the old age assistance law which prevents an ex-service man, who comes within the classification of those entitled to pension, from receiving the assistance.

GREEN BAY: FISHING: TRAVERSING: WADING:

In order to cross privately-owned property, either traversing, wading or fishing, it would be necessary to get permission of the owner, even though water owned by the State cover said property.

April 2, 1935. *State Fish and Game Commission:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department on the following question:

Green Bay in Lee County is a part of the Mississippi River System. The State holds title to Green Bay proper. During recent years, pumping has ceased, and, as a consequence, thousands of acres of privately-owned land surrounding Green Bay proper have been inundated. Green Bay proper has been stocked with fish by the State, and the title to all fish in the bay and other flooded waters remains in the State.

To reach the bay proper, it was formerly not necessary to trespass on privately-owned land, because a road system had been developed in the area now inundated. Since the flooding of the privately-owned area the road system has naturally been abandoned, leaving to the public only one method of transportation to the bay proper—by means of boats.

It is now only possible to put in a boat at a public highway which is at the edge of the inundated area and travel by boat over privately-owned land to reach the bay proper, which is State land.

The water and fish contained on the privately-owned land have been placed there by reason of overflow from State-owned or public-owned lands.

1. Is it unlawful or considered trespassing on privately-owned land to traverse the private area on water?

2. Is it unlawful for a person to wade in the water and fish when such water is on privately-owned land?

3. Is it unlawful for a person to fish from a boat in water covering privately-owned land?

The situation which you have presented is somewhat difficult by reason of the fact that the thing which has occurred was not contemplated by anyone, we presume, at the time that this water was stocked with fish belonging to the State.

In answer to your first question, it is the opinion of this department that in order to cross privately-owned property, it would be necessary to get permission of the owner, otherwise anyone trespassing would be violating the law.

The situation would also exist in answer to your second question.

Likewise, this would be true in answer to your third question, as in each of the questions, the matter of trespassing on privately-owned land enters into the situation.

It is true that the fish now on the private property belong to the State and that the State originally stocked public waters which, through overflow, now cover private property. While the fish are public property, yet under the Iowa law private property cannot be used by way of trespassing for fishing without the consent of the owner.

By way of illustration, it would seem to us that the same situation exists as in the case of game birds, the title to which is in the State, yet they do go on private property. In order that anyone may hunt on private property, it is necessary to secure the owner's consent.

OLD AGE ASSISTANCE LAW: PENALTIES FOR NONPAYMENT: The penalties would follow the fund created.

April 2, 1935. *Auditor of State:* This will acknowledge receipt of your request of this date for the opinion of this department on the following question:

Section 34 of Chapter 19, Acts of the 45th General Assembly in extraordinary session, provides in part that "* * * * 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. * * * *"

To what fund shall the penalties accrue?

Please be advised that it is the opinion of this department that the penalties would accrue to the old age assistance fund. The same rule would apply as applies in penalties on special taxes, such as the old age assistance per capita tax, in accordance with Paragraph 3 of Section 6033, 1931 Code of Iowa, which is 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 penalties as ordinary taxes, and when collected the said interest and penalties shall be credited to the same fund as the said special assessment."

Therefore, the penalties would follow the fund created.

OLD AGE ASSISTANCE LAW: OPERATORS OF BULK STATIONS FOR PHILLIPS PETROLEUM COMPANY: LIABILITY OF EMPLOYER FOR PER CAPITA TAX:

It is the opinion of this department that the question submitted would be answered by the definitions adopted in the rules and regulations of your commission.

April 2, 1935. *Old Age Assistance Commission:* This will acknowledge receipt of your letter of the 29th ultimo in which you request the opinion of this department on the following:

The Phillips Petroleum Company has some seventy-five (75) men who work for them and whose compensation is based solely on the amount of sales they make within a certain specified territory or territories. These men are known as "operators of bulk stations." Their sales are usually to independent oil stations, farmers and large users of gasoline who have their own tanks, such as road graders, dry cleaners and persons similarly situated.

The company is concerned with the question of recognizing these men as employees because of the liability which arises not only for the payment of the old age assistance tax, but for the additional reason that there might arise liability for accidents on the highways where such men, driving their

own trucks but handling Phillips products, might involve the Phillips Petroleum Company.

The case of Lang vs. Siddall, 254 N. W. 783, recently decided by our Supreme Court, is cited by the attorney for said company as proof of the point that bulk station operators who work on a commission basis and work practically on their own time are not employees in the sense that the Phillips Petroleum Company would be liable for accidents in which such men are involved on the highways. Said attorney also stresses the point that the same legal liability would prevail with reference to the old age assistance tax.

As your files will reveal, we have advised your department on several instances with reference to the liability of a company for its employees as set out in Section 34 of the old age assistance law and we wish now to call your attention to an opinion rendered to your department under date of May 21, 1934, addressed to Commissioner A. L. Urick. In your request for an opinion, typical cases are outlined.

In rendering the opinion of this department, we called attention to Section 1421 of the 1931 Code of Iowa, giving definitions of "employer," "workman" or "employee" and "those persons who are not deemed to be workmen or employees." In answering the question presented we stated in the closing paragraph of this opinion as follows:

"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."

In many instances we find that there is a mistaken impression on the part of employers, employees and other persons with reference to the payments under the old age assistance act, which payment is a tax and not the payment of a premium as in retirement insurance.

In the case of *Lang vs. Siddall, et al.*, 254 N. W. 783, the question involved was one for damages because of personal injuries alleged to have been caused by the negligence of the defendant. As we view it, there is a distinction between the rule applying in the case of damages and responsibility for the cause of injuries, and the rule for the collection of a tax. The court, in the above cited case, states as follows:

"It appears without dispute in the evidence that a short time prior to the trial of the case the plaintiff entered into a covenant not to sue with the Phillips Petroleum Company and thereafter, before trial, dismissed his cause of action as against said Phillips Petroleum Company. Appellant alleges that the Phillips Petroleum Company was liable for any negligency of the appellant in operating the truck, because it was a joint owner with the appellant of the truck, and because the appellant was an employee of the Phillips Petroleum Company and was *in the scope of his employment at the time of the accident.* The evidence showed that the truck itself belonged to the appellant, Siddall, but that the tank and grease rack carried thereon were the property of the Phillips Petroleum Company. We do not think this evidence is sufficient to show such ownership of the truck on the part of the Phillips Petroleum Company as would make it liable under the statute imposing liability upon the owner of a motor vehicle when operated

by another person with the consent of the owner. * * * * Nor do we think that the Phillips Petroleum Company was liable to the appellee because the Acts of the appellant were those of its employee performed within the scope of his employment."

For a case showing the extent to which the Circuit Court of Appeals of the 9th circuit has gone in holding an employer liable for employees' per capita tax, see *Alaska Packers' Association vs. Hedenskov*, 267 Federal 154, in which the court held:

"Men employed by a salmon packing company, who were employed within the territory of Alaska for several months, though they were hired and finally paid off and discharged in California, are subject to the school tax imposed by Act Alaska May 1, 1919 (Laws 1919, c. 29), on all male persons within the territory."

It had been our understanding that your commission had adopted rules and regulations with reference to defining "employer" and "employee" and other persons affected by this act on the basis of the opinion which we rendered to Commissioner Urick. Therefore, we would construe this to be an administrative matter which should be exercised by your commission. A rule and regulation adopted by your commission should define "employer" and "employee" for the purpose of collecting the tax under this act. This, of course, could not be construed to extend the liability of an employer for an employee for any other purpose than for the old age per capita tax.

Therefore, it is the opinion of this department that the question submitted would be answered by the definitions adopted in the rules and regulations of your commission.

CHAIN STORES: TAX: RE: VALIDITY AND LEGALITY OF HOUSE FILE 311:

April 2, 1935. *House of Representatives:* I have your written request for an opinion respecting the validity and legality of House File No. 311 with the submitted proposed amendments, which proposed legislation is calculated to tax chain stores, with certain exceptions, operated within the State of Iowa. In connection with your written request, you have furnished me a copy of the decision of the Supreme Court of the United States in the case of *Stewart Drygoods Company, et al., vs. John B. Lewis, et al.*, which decision was handed down on March 11, 1935.

A study of this proposed legislation shows that there are three major considerations. The first two are the classification for the purpose of taxation and the third one is the exemptions set forth in the bill. This act proposes to impose an occupational tax upon mercantile establishments with certain exceptions, operating on a chain store basis. The class to be taxed is within the designation of chain stores. The tax imposed falls within two classifications. Under the first classification, a graduated tax, based upon the number of stores owned or operated by the chain, is imposed. Under the second classification, the tax imposed is one graduated upon the size of the business, based upon the total volume of same.

The underlying theory of taxation as set forth in this proposed legislation, is that the State is levying an occupational tax for the privilege of operating and maintaining chain stores with certain exceptions, in the State of Iowa. The power of taxation is fundamental to the very existence of the govern-

ment of states. The restriction that it shall not be so exercised as to denying to any the equal protection of the laws, does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification of taxation of properties, businesses, trades, callings or occupations.

Bell's Gap Railroad Company vs. Pennsylvania, 134 U. S., 232, 33 L. Ed., 892, 10 S. Ct., 533.

The fact that a statute discriminates in favor of a certain class does not make it arbitrary if the discrimination is founded upon a reasonable distinction.

American Sugar Refinery Co. vs. Louisiana, 179 U. S., 89, 45 L. Ed., 102, 21 S. Ct., 43.

Chain stores constitute a proper classification for the purposes of taxation. They may be taxed as a class but the tax must apply equitably to all persons falling within such a classification. There is always the question of whether or not the rates are so oppressive as to amount to arbitrary discrimination or to unlawful confiscation. When the power to tax exists, the extent of the burden is a matter for the discretion of the law makers.

Magnano Co. vs. Hamilton, 292 U. S. 40, 78 L. Ed., 1109, 54 S. Ct., 599.

Even if the tax should destroy the business, it would not be made invalid nor require compensation upon that ground alone. Those who enter upon a business take that risk.

See *Alaska Fish Salting and By-Products Company vs. Smith,* 255 U. S., 44, 65 L. Ed., 489, 41 S. Ct., 219.

In the Magnano case, supra, the Supreme Court of the United States made the reservation that an act might be so arbitrary as not to be an exercise of the taxing power at all, the form of a tax being a cloak for something else.

In the case of Fox vs. The Standard Oil Company, the Supreme Court of the United States handed down a decision on January 14, 1935, upholding the right of West Virginia to tax chain stores on the numerical basis, including all the stations operated by the Standard Oil Company.

In this case, the Supreme Court, in defining a chain store for tax purposes, stated as follows:

"A chain store, as we have seen, is a distinctive business species with its own capacities and functions. Broadly speaking, its opportunities and powers become greater with the number of component links; and the greater they become, the more far-reaching are the consequences, both social and economical. For that reason the State may tax the large chains more heavily than the small ones and upon a graduated basis as indeed we have already held.

State Tax Commissioners vs. Jackson (Ind.), 283 U. S., 527, 75 L. Ed., 1248, 51 S. Ct., 540, 73 A. L. R., 1464, 75 A. L. R., 1536, supra;
Liggett Company vs. Lee (Florida), 288 U. S., 517, 77 L. Ed., 929, 53 S. Ct., 481, 85 A. L. R., 699, supra.

"Not only may it do this, but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden, develop other forms of industry.

Quong Wing vs. Kirkendall, 223 U. S., 59, 56 L. Ed., 350, 32 S. Ct., 192."

Businesses may become as harmful to the community by excessive size as by monopoly of the commonly recognized restraints of trade. If the State should conclude that bigness in retail merchandising, as manifested in corporate chains, menaces the public welfare, it might prohibit the excessive size and extent of that business as it prohibits the excessive size or weight in motor trucks or excessive height in the buildings of a city.

Citing *Morris vs. Duby*, 274 U. S., 135, 71 L. Ed., 968, 47 S. Ct., 548; *Welch vs. Swasey*, 214 U. S., 91; 53 L. Ed., 923; 29 S. Ct., 567. *Euclid vs. Ambler Realty Co.*, 272 U. S., 365, 71 L. Ed., 303, 47 S. Ct., 114, 54 A. L. R., 1016.

The elimination of chain stores deemed harmful or menacing because of their bigness may be achieved by leveling the prohibition against the corporate mechanism, the means of which excessive size is commonly made possible. Or, instead of absolutely prohibiting the corporate chain store the State might conclude that it should first try the more temperate remedy of curbing the chain by imposing the handicap of discriminatory license fees.

St. Louis Adv. Co. vs. St. Louis, 249 U. S., 269; 63 L. Ed., 599, 39 S. Ct., 274;

Hammond Packing Company vs. Montana, 233 U. S., 331, 58 L. Ed., 985, 34 S. Ct., 596.

"Taxation is regulation, just as prohibition is."

Compania General de Tabacos de Filipinas vs. Collector of Internal Revenue, 275 U. S., 87, 72 L. Ed., 177, 48 S. Ct., 100.

From these decisions rendered by the United States Supreme Court, it is apparent that the States' power to make social and economic experiments is a broad one. Justice Brandeis of the United States Supreme Court, in writing his dissenting opinion in the case of Liggett Company vs. Lee, supra, uses the following strong language:

"There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality i nthe distribution of wealth and income which giant corporations have fostered; that by the control which the few have exerted through giant corporations, individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunites for leadership, can confidence in our future be restored and the existing misery be overcome; and that only through participation by the many in the responsibilities and determinations of business, can Americans secure the moral and intellectual development which is essential to the maintenance of liberty."

The tax imposed by sub-division "a" of Section 4 of Senate File 172 being a graduated tax based upon the number of stores within a chain, would undoubtedly be upheld by the courts. The following cases recently decided by the United States Supreme Court are clearly in point.

State Board of Tax Commissioners vs. Jackson (Indiana), 283 U. S., 527, decided May 18, 1931;

Fox vs. Standard Oil Company, (W. Va.), reported in Volume 79, No. 6, page 339 of the United States Supreme Court, L. Ed., advance opinions for 1934 and 1935.

At this time, we are not passing upon Sub-section "b" of Section 4 to and including line 78 thereof, for the reason that you have submitted an amendment striking out this part of the original bill for our consideration. This proposed amendment levies an additional occupational tax upon the chain stores within the classification set forth in the bill, which tax is based on the maximum volume of the business gauged and based upon the combined gross receipts. This additional tax is also a tax graduated upon the total gross receipts. It starts out with an annual tax of $25.00 upon chain stores where the combined gross receipts are not in excess of $50,000 and the amount of the tax is gradually increased to the sum of $950,000 when the gross receipts are in excess of ten million dollars. An additional amount of tax is levied where the gross receipts of the business are in excess of ten million dollars.

The additional tax sought to be levied by the above amendment, has been upheld by the United States Supreme Court in the case of *Clark vs. Titusville*, 184 U. S., 329. This decision of the United States Supreme Court was apparently upheld by the same court on March 11, 1935, in the case of *Stewart Drygoods Company, et al., vs. John B. Lewis, et al.*, and in this latter decision, the Pennsylvania law that was previously upheld in Clark vs. Titusville was distinguished from the Kentucky statute that was declared unconstitutional by the Supreme Court of the United States in the Stewart Drygoods Company case. We, therefore, feel that this type of an occupational tax on chain stores would be upheld by the courts.

The exempted occupations as set forth in this proposed enactment are as follows:

(a) Co-operative associations not organized for profit under the laws of this State and not for the purpose or with the intent of evading the tax hereby imposed.

(b) Persons exclusively engaged in gardening or farming, selling in this State products of their own raising.

(c) Persons principally engaged in selling at retail, lumber, coal and building materials.

The occupational tax proposed by this amendment does not appear to discriminate in favor of the above classes. However, the fact that a statute discriminates in favor of a certain class does not make it arbitrary if the discrimination is founded upon a reasonable distinction.

American Sugar Refining Co. vs. Louisiana, 179 U. S., 89, 45 L. Ed., 102, 21 S. Ct., 43.

Nor will such a discrimination be held invalid in a statute if any set of facts reasonably can be conceived to sustain it.

Rast vs. Van Denaman & L. Co., 240 U. S., 342, 60 L. Ed., 679, L. R. A. 1917-a, 421. 36 S. Ct. 370;
Quong Wing vs. Kirkendall, 223 U. S., 59, 56 L. Ed., 350; 32 S. Ct., 192.

In the case of Brown-Forman Co. vs. Kentucky, 217 U. S., 563, 54 L. Ed., 883, 30 S. Ct., 578, the Supreme Court of the United States stated the rule as follows:

"A very wide discretion must be conceded to the legislative power and the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification was neither a capricious nor arbitrary one and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."

All of the above holdings of the United States Supreme Court were cited with approval by the same court in the very recent case of *State Board of Tax Commissioners vs. Jackson*, 283 U. S., 527, 75 L. Ed., 248, 51 S. Ct., 549, 73 A. L. R., 1464.

From a consideration of the above decisions of the Supreme Court, it is quite plain that the exemptions provided for in divisions "a" and "b" above would be considered and upheld as reasonable distinctions and classifications. However, some question might arise as to the exemptions provided for by sub-section "c" above. In order to sustain this last exemption, proponents of the same would be required to show that this discrimination was founded upon a reasonable distinction and that the facts surrounding the conduct of chain store, management of retail lumber, coal and building material businesses could reasonably distinguish and differentiate said businesses from the others that are taxed by this proposed act.

We do not wish to be understood as clearly holding that this last exemption would be held unconstitutional, but we desire to call your attention to the fact that a serious question might be raised against it.

While we have not specifically gone into all of the provisions of this proposed legislation, we have felt that the above were the most important questions involved, and submit the results of our studies for your serious consideration.

OLD AGE ASSISTANCE LAW:

By entering the county farm, a person would not lose old age assistance by reason of Section 27 of Chapter 19 of the Acts of the 45th General Assembly in Extraordinary Session.

April 3, 1935. *County Attorney, Fairfield, Iowa:* This will acknowledge receipt of your letter of the 29th ultimo in which you request the opinion of this department on the following question:

A woman in Jefferson County, who has been granted relief by the old age assistance commission, now wishes to enter the county farm for a time at least and the Board of Supervisors is willing to grant her that right.

Will she lose her old age assistance by entering the county home because of the provisions of Section 27 of Chapter 19, Acts of the 45th General Assembly in Extraordinary Session, or any other provision thereof?

If she does not lose her assistance, will the county be entitled to such assistance, as provided for in Section 26 of the Act?

Please be advised that it is the opinion of this department that Section 27 would preclude such a person from receiving pension from the old age assistance commission in that said section provides as follows:

"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."

It is further the opinion of this department that Section 26 of the act does not apply to a person entering the county home. It applies exclusively to

inmates of "charitable, benevolent, or fraternal institutions." The county home does not come within said classification, and that it was not the intent of the Legislature that county homes be included in Section 26.

BOARD OF CONTROL: STATE JUVENILE HOME: EMPLOYMENT OF HOUSEKEEPER FOR SUPERINTENDENT: Board of Control may employ housekeeper if they believe in their judgment, that the employment is necessary to the proper operation of the home and is for the good of the institution.

April 3, 1935. *Board of Control:* We have your request for opinion in regard to the following proposition:

"The Superintendent of the State Juvenile Home at Toledo, Iowa, a single person, has requested the Board to employ a housekeeper for her residence at a salary of $40.00 per month, and maintenance. Will you kindly advise this Board as to whether it has such authority?"

Section 3287 of the Code gives to the Board of Control, the full power to contract for, manage, control and govern, subject only to limitations imposed by law, the institutions under it, included among these being the State Juvenile Home.

Section 3293 of the Code gives to the Board the authority to determine the number and compensation of subordinate officers and employees for each institution. Chapter 188 of the Laws of the 45th General Assembly, being the Appropriation Act, provides at Section 45 (7) for the appropriation for the State Juvenile Home at Toledo, for salaries, support, maintenance and improvements, but does not in any wise designate the employees or their salaries, but leaves this to the Board of Control.

59 Corpus Juris, page 173, Section 289, states:

"Any general state officers, charged with the performance of certain duties, have implied authority to employ such assistance as may be necessary for the efficient discharge of their duties, but persons so employed cannot be paid without an appropriation and they can be paid no more than the legislature may deem reasonable."

As pointed out above, the Legislature has not set the salaries here and there has been an appropriation so there would be no bar on account of this. Section 3297 of the Code states that the board shall furnish the executive head of each institution, in addition to salary, with a dwelling house or with appropriate quarters in lieu thereof, and also the necessary household provisions for himself, wife and minor children. Section 3745 of the Code provides for labor of inmates for domestic service in the homes of the wardens of the penitentiary and the men's reformatory. There is, however, no similar provisions for the Superintendent of the State Juvenile Home. It is apparent, then, that under the law, there is no prohibition on the part of the Board of Control in making the employment requested and if the Board believe in their judgment, that the employment of a housekeeper for the Superintendent of the State Juvenile Home is necessary to the proper operation of the home and is for the good of the institution, they have the authority and power to so do in our opinion, at such salaries as they may fix.

OLD AGE ASSISTANCE LAW: TEACHERS: IOWA SCHOOL FOR THE DEAF:

We are of the opinion that those residing in this State should pay this per capita tax.

"Residence" defined.

April 3, 1935. *Iowa School for the Deaf:* This will acknowledge receipt of your letter of the 29th ultimo in which you request the opinion of this department on the following question:

We have a number of teachers here from different states, Kentucky, Virginia, Arkansas, Missouri, Oklahoma, etc., and some of these claim that they are obliged to pay the old age pension tax in the State from which they come. They are here in Iowa nine months of the year, but they do not vote in this State. They receive State salary for their service. Perhaps they might establish voting privileges if they so desire, but the majority have not done so. They may be here three, four, or five, or even ten years, or longer, but as soon as they sever their connections with the school, they go back to the State from which they came.

Must such teachers or other persons pay the old age pension tax in Iowa?

You are advised that Section 34 of Chapter 19, Acts of the 45th General Assembly in Extraordinary Session, 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 (21) years of age and upwards, except inmates of State and County institutions, an annual tax of two (2) dollars."

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, it is stated:

"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 referring to that part of Section 34 of the old age assistance law set out above, you will note that the tax is 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." Therefore, we are of the opinion that those residing in this State should pay this per capita tax.

However, we wish to call your attention to the fact that that part of Section 34 to the effect that the employer must collect the tax of the employee

does not refer to the State of Iowa, as the State used in this sense is not a municipal corporation.

SOLDIERS' RELIEF: CHILDREN OF FORMER MARRIAGE:

If a veteran would marry a woman who, by previous marriage, had children under the age limit as fixed in the law, these children could not receive the relief from the fund created unless legal adoption was had.

April 3, 1935. *Palo Alto County Soldiers' Relief Commission:* This will acknowledge receipt of your letter of the 21st ultimo in which you request the opinion of this department on the following question:

The soldiers' relief commission of Palo Alto County, Iowa, are frequently asked to give relief to veterans who have married a widow with children by former marriage. In no application thus far submitted to us has it been shown that the veteran husband has legally adopted said children.

Should the soldier relief funds be applied to support such children of a previous marriage on the part of the wife?

Please be advised that it is the opinion of this department, under Section 5385, 1931 Code of Iowa, which creates the soldiers' relief fund, that relief may be given only to honorably discharged, indigent United States soldiers, sailors, marines, and nurses who served in the miltary or naval forces of the United States in any war *and their indigent wives, widows, and minor children,* nor over 14 years of age if boys, nor 16 if girls, having a legal residence in the county.

Therefore, only children of persons who come within the classification set out in the statute would be entitled to the relief. In the event that a veteran would marry a woman who, by previous marriage, had children under the age limit as fixed in the law, these children could not receive the relief from the fund created. However, if legal adoption was had of these children, by the veteran, it would be our opinion that they would come under the law and would be entitled to the relief.

GAME BIRDS: PURCHASE: RATING OF BIRD DOGS: FIELD TRIAL: FISH AND GAME COMMISSION:

Where game birds were purchased from a game breeder, they could be used for the purpose of testing and rating bird dogs, but where the birds were shot at as a target or as a test of skill or markmanship, then it is forbidden.

April 3, 1935. *Fish and Game Commission:* This will acknowledge receipt of your letter of the 20th ultimo in which you request the opinion of this department on the following question:

"The Des Moines Field Trial Association is contemplating conducting a field trial sometime in April at the Fort Des Moines Army Post.

"Their committee on arrangements has discussed their plans with representatives of this department but are in doubt whether a trial can be conducted legally according to Section 1778 of the 1931 Code of Iowa.

"They are planning to purchase game birds from a licensed breeder to be released and shot during this trial. Only one of the judges in charge will kill the birds when deemed necessary.

"Can they so purchase game birds and release them for the purpose of testing and rating their bird dogs? Would this be classed as 'using birds as targets'?"

Section 1778 of the 1931 Code of Iowa provides as follows:

"*Using birds as targets.* No person shall keep or use any live pigeon or other bird as a target, to be shot at for amusement or as a test of skill in marksmanship, or shoot at a bird kept or used for such purpose, or be a party to such shooting, or lease any building, room, field, or premises, or knowingly permit the use thereof, for the purpose of such shooting."

In accordance with the wording of this section, it would be the opinion of this department, in cases where game birds were purchased from a game breeder, that they could be used for the purpose of testing and rating bird dogs, but where the birds were shot at as a target or as a test of skill or marksmanship, then it is forbidden.

In the event that it is the desire of the Des Moines Field Trial Association to test bird dogs and not to shoot the birds, then it would be permissible for said association to legally conduct said field trial.

AUDITOR: POST AUDIT: "Post Audit" as used in Chapter 5, Section 9, Laws of the 45th G. A. means an examination of the books and records together with a check and ascertainment of the physical property of the institution under examination.

April 4, 1935. *Senator George Parker:* You have asked for our opinion as to construction of the term "post audit" as used in Chapter 5, Section 9, Laws of the 45th General Assembly, and you ask whether this has reference to only an examination of the books and records of the institution, or whether it also means that the individual items covered by the audit must be checked.

There is a wide difference in accounting between an audit and an examination. There was a case involving this question in the Supreme Court of Montana, that case being Judith Basin County vs. Livingston, 298 Pac., 356, wherein the court said:

"But defendant contends that the State examiner only examines the books and accounts of the various officers, while the contract with Dwyer provides for audit; that an audit is more comprehensive and is required in order that the board may properly supervise the County officers. It is true an audit is more comprehensive, yet an audit includes an examination."

That case very well states the rule, as an examination means only to examine the books and records as produced, but an audit means to examine the books and records and in addition thereto, verify the same, so that the one taking the audit can certify that the entire assets or property as shown by the books and records are actually there. In other words, if you were operating a store and hired someone to make an examination of your books and records, he would merely examine those produced and certify that they were correct, while if you hired him to make an audit, he would examine your books and records and then be obliged to take a complete inventory of everything in the store so as to thus determine your actual worth. Our own Supreme Court has defined what an audit is in McGuire vs. Iowa County, 133 Iowa, 641, and Sinclair & Company, 132 Iowa, 549, and some later cases, in the exact language as used in these two. The courts have generally defined an audit to mean to examine, settle and adjust accounts; to verify the accuracy of the statements submitted to the auditing officer.

I should perhaps suggest that the term "post audit" here merely means that the audit of the Auditor's office is to be after the transaction is completed, for under our present set-up in State government, all claims are pre-audited

by the Comptroller's office and award is issued therefor by the Comptroller if the claim is found correct. Then warrant is drawn on the State Treasurer who acts merely as a banker. After the transaction is completed and at the periods required by law, it is post audited by the Auditor's office to ascertain if the State actually secured the property which they purchased and which was approved in the pre-audit.

It is apparent then, from the above, that it is the opinion of this department that audit as used in the statute inquired about means an examination of the books and records together with a check and ascertainment of the physical property of the institution under examination.

PHOTOGRAPHY: EXECUTIONS:

The Board of Control has the right to grant permission to take pictures of executions.

April 4, 1935. *Board of Control of State Institutions:* This will acknowledge receipt of your favor of the 30th ultimo in which you state that the Board of Control have before them an application for permission to take pictures of the execution of Pat Griffin and Elmer Brewer to be held April 5, 1935, at the state penitentiary at Fort Madison. You state there is a difference of opinion on the question of authority to grant or deny such request between the Board of Control of State Institutions and the Sheriff of the county from which the prisoners were committed under judgment of the District Court.

The law governing the Board of Control of State Institutions is set forth in Chapters 166 and 167 of the Code of Iowa for 1931. Section 3287 of Chapter 167 provides:

"The Board of Control shall have full power to contract for, manage, control and govern, subject only to the limitations imposed by law, the following institutions: * * * 15. State Penitentiary."

Code Section 3288 of the same chapter provides:

"Nothing contained in the foregoing section shall limit the general supervisory or examining powers vested in the governor by the laws or constitution of the State or legally vested in him or any committee appointed by him."

And Section 3290 provides:

"The board shall prescribe such rules not inconsistent with law as it may deem necessary for the discharge of its duties, the management of each of said institutions, the admission of inmates thereto, and the treatment, care, custody, education and discharge of inmates. It is made the particular duty of the board to establish rules by which danger to life and property by fire will be minimized. In the discharge of its duties and in the enforcement of its rules, it may require any of its appointees to perform duties in addition to those required by statute."

Do the following provisions of law create an exception or limitation imposed by law in behalf of the sheriff charged with the duty of performing the execution, when considered and construed with the above and foregoing statutes?

Chapter 657 of the Code of 1931 makes provision for the execution of the death penalty, and Section 13985 of Chapter 657 provides, in brief, that when judgment of death has not been executed on the day appointed by the court,

the governor shall, by executive warrant, fix the day of execution and such warrant shall be obeyed by the sheriff. Section 13986 provides as follows:

"Judgment of death must be executed by the Sheriff of the County in which the judgment was rendered, or his deputy, within the walls of the penitentiary where the defendant is confined or within a yard or enclosure adjoining thereto on the day fixed in the judgment between sunrise and sunset by hanging by the neck until dead."

Section 13987 makes provision for the witnesses to such execution. It is as follows:

"The Sheriff or his deputy must, at least three clear days before executing a judgment of death, notify the judge of the District Court who tried the case, or, if he be not in office, another judge of such court, the County Attorney and the Clerk of the District Court of the County in which the judgment was rendered, the Sheriff of the County in which the offense was committed, if other than that in which judgment was rendered, and two physicians and twelve respectable citizens of the State to be selected by him to be present as witnesses at such execution. He must also, at the request of the defendant, permit one or more ministers of the gospel named by him, and any of his relatives, to attend the execution, and also such magistrates, peace officers, and guards as the Sheriff shall deem proper, but no minor, and no person other than those herein authorized, shall be present."

Section 13988 makes provision for the certificate of execution:

"The Sheriff or his deputy executing the judgment of death must prepare and sign with his name of office a certificate setting forth the time and place of the execution and that judgment was executed upon the defendant according to the foregoing provisions and cause the certificate to be signed by the public officers and at least twelve persons not relations of the defendant who witnessed the same."

Except by analogy it is doubtful if the exact question here presented has ever been passed upon. However, it has been held that if any unauthorized individual takes it upon himself to execute the death sentence he will be guilty of murder for the reason that the person of the party convicted is as much under the protection of the law as that of any other subject. 16 C. J. 1379, Section 3254.

Among the absolute rights of personal security and personal liberty which the law protects is the "right of privacy" and it has been held that this is a legal right for an invasion of which the law gives relief in equity by injunction and that such right extends to the unauthorized use by one person of the picture of another. Munden vs. Harris, 134 S. W. 1076, 153 Mo. App. 652.

With these pronouncements in mind, we entertain the conviction that the statutory duty and power imposed upon the sheriff in the matter of the execution of the death penalty, are strictly limited by statute and in no sense supersede the general power of the Board of Control of State Institutions to determine by rule or regulation the subject matter herein inquired about.

FAIRS: O'BRIEN COUNTY FAIR: GRANTING OF STATE AID:

(The fair grounds under consideration are adjoining the town of Sheldon, but are over the line in Sioux County).

April 4, 1935. *State Fair Board:* This will acknowledge receipt of your letter of the second instant in which you request the opinion of this department on the following question:

"The O'Brien County Fair has been held at different points in the County for the past few years. The fair is under the management of the Farm Bureau. A fair was held and drew State aid in 1926 which, it is my understanding, permits them to draw State aid whether they own or lease any grounds or own any buildings, as provided for in Section 2902-d1, 1931 Code of Iowa.

"This year it is the desire to hold the fair at Sheldon, which is in O'Brien County. They have an old fair grounds at Sheldon, which was used several years ago for fair ground purposes. While the grounds adjoin the town of Sheldon, yet the grounds are over the line in Sioux County.

"A fair is held at Orange City in Sioux County that draws State aid regularly. Should State aid be allowed for this fair as the O'Brien County Fair or as the Sioux County Fair?

"In going back over the old records, I find that years ago, the O'Brien County Fair drew State aid and it was held on the grounds they propose to use this year."

You are advised that we find nothing in Chapter 136 of the 1931 Code of Iowa with reference to this matter with the exception of the definition section which is Section 2894. Subdivision 2 thereof states as follows:

"2. 'Society' shall mean a County or District Fair or Agricultural Society incorporated under the laws of this State for the purpose of holding such fair, and which owns or leases at least ten acres of ground and owns buildings and improvements situated on said ground of a value of at least eight thousand dollars, or any incorporated farm organization authorized to hold an agricultural fair which owns or leases buildings and grounds especially constructed for fair purposes of the value of fifty thousand dollars in a County where no other agricultural fair receiving State aid is held."

As a practical matter, we believe that the fact that the grounds adjoining a town in a county which might be partly or all over the county line of another county would not be the controlling factor, as, by common consent the farm bureau of O'Brien County desires to hold a fair at Sheldon this year, which city is in the county of O'Brien.

CITY OF CEDAR FALLS: EXECUTIVE COUNCIL: DAMS: The Executive Council would have power to cancel or revoke the permit issued to the present owner of the dam if the dam is not being properly used and maintained by said owner.

April 5, 1935. *Executive Council:* On March 28th you wrote me with reference to a dam in the river at Cedar Falls, which is owned by the Iowa Public Service Company. You say the company is not maintaining the dam in a proper manner and as a consequence private as well as city property is threatened with damage. You state further that the dam was constructed under the provisions of the 1931 Code of Iowa, and the Public Service Company has paid the license fees up to and including this year. You ask the opinion of this department as to what steps the Executive Council can take to force the Iowa Public Service Company to maintain this dam. You also ask whether if the company refuses to maintain the dam and abandons it the city of Cedar Falls can take it over and maintain it. You will recall I have discussed this matter with you personally and also with Senator Berg, and this letter will confirm what I stated in those conversations.

Section 7767 of the 1931 Code provides that 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 maintaining it. Section 7776 of the Code is as follows:

"7776. *Construction and operation.* The Executive Council shall investigate methods of construction, reconstruction, operation, maintenance, and equipment of dams, so as to determine the best methods to conserve and protect as far as possible all public and riparian rights in the waters of the State and so as to protect the life, health, and property of the general public; and the method of construction, operation, maintenance, and equipment of any and all dams in such waters shall be subject to the approval of the Executive Council."

This section provides that the method of construction, operation, maintenance, and equipment of all dams in such waters shall be subject to the approval of the Executive Council. In other words, the method of maintenance shall be subject to the approval of said Council.

Section 7782 provides that if any dam is maintained or operated in violation of the law, the State may have such dam abated as a nuisance. Section 7792 provides that if any permanent holder does not furnish and have in operation the plant for which the dam is constructed within three years after the granting of the permit, unless for good cause, the Council has extended the time for completion, such permit shall be forfeited. Section 7793 is as follows:

"7793. *Legislative control.* No permit granted or rights acquired hereunder shall be perpetual, but they shall be subject to restriction, cancellation, and regulation by legislative action, and subject to all the provisions of this chapter."

It will be observed the Legislature under this section has the power to cancel permits. The questions involved herein are of some importance. The Constitution of the State does not permit the taking of property without due process of law, and if the company wishes to preserve its rights in the dam in question the courts would be slow to deprive it of its property and property rights. The city of Cedar Falls and the people of this city and State have some rights also.

The language of Chapter 363 of the Code in which the above quoted Sections appear is broad and definite, and the provisions of this chapter should be adequate to meet the situation prevailing at Cedar Falls. If, as provided by Section 7776, the maintenance and equipment of all dams in such waters shall be subject to the approval of the Executive Council, then it would seem clearly that the Executive Council, acting freely and exercising a sound discretion, would have the power to cancel or revoke the permit issued to the present owner of the dam in question, upon a showing that the dam is not being used for the purposes for which it was constructed and is not being maintained in such a way as to protect the property of the city and those owning property in close proximity to said dam. If, as provided in Section 7792, any permit holder does not have in operation the plant for which the dam is constructed within three years after the granting of the permit, unless for good cause shown the Council has extended the time for completion, such permit shall be forfeited.

The permit was issued for the maintenance of a certain dam. If it is not maintained in a reasonable way and as contemplated by all parties when the

permit was issued, and if it is allowed to disintegrate and cease to be an effective dam, and if public and private interests demand that the dam be maintained as originally contemplated, then surely the Executive Council has a right to revoke the permit. If the city of Cedar Falls contemplates taking over the dam and maintaining it, that would be a matter for the City Attorney and City Council to work out with the present owner of the dam and with the Executive Council. If the Iowa Public Service Company refuses to maintain the dam and refuses to relinquish it on proper terms, there is, no doubt, a remedy available to those whose property is affected by the failure to properly maintain the dam. It seems reasonable that the company cannot refuse to maintain the dam and at the same time prevent the city or other parties from establishing and maintaining a dam at or near the same place.

The Executive Council probably would not desire greater power and authority than is given it by this chapter. In case the company should abandon the dam, the city of Cedar Falls probably would find it necessary to buy some property adjoining the dam or lease it in order to have access to the dam for purposes of construction and maintenance, but these matters are of details to be worked out by the city, which first must determine what it desires to do in the premises.

HOUSE OF REPRESENTATIVES: RIGHTS OF MEMBERS IN VOTING UPON PENDING MATTERS:

"Rule 18 of the House of Representatives of the 46th General Assembly requires every member who is present in the House to vote, unless the House for special reasons shall excuse him. If the demand is made by two members, then every member present must vote, unless executed by the House. If the House refuses to excuse the member, then the member is required to vote."

April 8, 1935. *House of Representatives:* I have your written request of April 6, 1935, for an opinion interpreting the law and rules of the House of Representatives concerning the rights of its members in voting upon pending matters.

You want to know if resolutions are classed in the same category with laws and to what degree, if any, do they have the status of a law.

Webster's International Dictionary defines a resolution as "a formal expression of the opinion or will of an official body or a public assembly adopted by a vote."

It has otherwise been defined as "the determination or decision with regard to its opinion or intention of a deliberative or legislative body; * * * also a motion or formal proposition offered for adoption by such a body."

See *Black's Law Dictionary;*
El Paso Gas, etc., Co. vs. El Paso, 22 Tex. Civ. App., 309; 54 S. W., 798.
State vs. Delesdenier, 7 Tex., 76.

The above definitions have been cited with approval by the Supreme Court of Iowa in the case of *Sawyer vs. Collins,* 148 Iowa, 712, on page 714.

The term, "resolution," has been distinguished from a "bill," "law," "order," and also "ordinance."

See 54 C. J., 721 and 722.

The chief distinction between a resolution and a law seems to be that the

former is used whenever the legislative body passing it wishes to merely express an opinion as to some given matter or thing and is only to have a temporary effect on such particular thing; while by the latter it is intended to permanently direct and control matters applying to persons or things in general.

See *Conley vs. United Daughters of the Confederacy* (Tex. Civ. App.), 164 S. W., 24.

The Supreme Court of Missouri held that a resolution was a very different thing from a law.

See *Cape Girardeau vs. Fougeu*, 30 Mo. App., 551 and 556.
Moulton vs. Scully, 111 Me., 428; 89 A., 944.

A resolution may or may not take effect as a law, depending upon the occasion and object of its use. It may be resorted to as a vehicle to convey the opinions or wishes of the Legislature on any subject without prescribing any rule of conduct to be observed, but whenever a joint resolution does undertake to lay down a rule of conduct for any portion of the people of the State, it becomes a law and will take effect as such, notwithstanding the use of the word, "resolved," in its style, instead of the word, "enacted."

See *Swann vs. Buck*, 40 Miss., 268.

There has been the recognized practice in this state to distinguish a joint resolution from a concurrent resolution. The joint resolution has been recognized more or less as law, while a concurrent resolution has not been so recognized.

You also ask if when a call of a House is on and Rule 18 invoked, and when a member asks to be excused from voting, but is refused, does the Speaker or members have authority to force said member to vote? When the vote being taken is not on a bill but on a resolution, should a member refuse to vote what penalty attaches?

You are advised that Section 10 of Article 3 of the State Constitution provides as follows:

"Protest—record of vote. Sec. 10. Every member of the General Assembly shall have the liberty to dissent from, or protest against any act or resolution which he may think injurious to the public, or an individual, and have the reasons for his dissent entered on the journals; and the yeas and nays of the members of either house, on any question, shall, at the desire of any two members present, be entered on the journals."

This constitutional provision clearly answers your question. Any two members present may require the members present to cast a yea and nay vote and have the same entered on the journals. Rule 18 of the House of Representatives of the 46th General Assembly requires every member who is present in the House to vote, unless the House for special reasons shall excuse him. If the demand is made by two members, then every member present must vote, unless excused by the House. If the House refuses to excuse the member, then the member is required to vote. In case the member still refuses to vote, he might be punished by the House for disorderly or contemptuous conduct, tending to disturb its proceedings, in accordance with Paragraph 3 of Section 23 of the 1931 Code of Iowa. Sections 24 to 27, inclusive, of the 1931 Code

of Iowa provide for the manner of the punishment for contemptuous conduct of either House of the General Assembly.

CORPORATIONS: REORGANIZATION: BANKRUPTCY: Any organization which would come under Section 77B of the Bankruptcy Act must comply with Sections 8413 and 8414 of the 1931 Iowa Code.

April 8, 1935. *Executive Council of State:* This is to acknowledge receipt of your inquiry of March 11th relative to construction of Sections 8413 and 8414 of the 1931 Code of Iowa with reference to the question of whether a corporation which is subject to reorganization under Section 77B of the Bankruptcy Act passed by the 73d Congress, Second Session, approved and effective June 7, 1934, would have to comply with the aforesaid sections of the Code of Iowa, which read as follows:

"8413. *Payment in property other than cash.* If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the Executive Council of the State for leave so to do. Such application shall state the amount of capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock."

"8414. *Executive Council to fix amount.* The Executive Council shall make investigation, 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 the stock. It shall enter its finding, fixing the value at which the corporation may receive the same in payment for capital stock; and no corporation shall issue capital stock for the said property or thing in a greater amount than the value so fixed."

The Bankruptcy Act fully intended to obviate the necessity for resort to cumbersome and expensive procedures and to lessen all possible expense which may have been caused by receiverships heretofore. Still, we are unable to find any power delegated to the United States by its constitution or prohibited by it that they would take away the right which is reserved by the State under the above sections.

Therefore, it is our opinion that the above sections of the Iowa Code must be complied with.

BOARD OF CONTROL: PRISONER: AS TO WHETHER ENTITLED TO SUIT OF CLOTHES, GIFT MONEY, ETC. Whether Russell Thomson committed to prison on charge of robbery with aggravation and whose conviction was later reversed by Supreme Court—on retrial found not guilty, is entitled to suit of clothes, etc. He comes under same class as man released by expiration of sentence or parole.

April 8, 1935. *Board of Control:* I have your letter of recent date in which you state that Warden Haynes of the State Penitentiary desires our opinion on the proposition as to whether Russell Thomson, committed to the prison on a charge of robbery with aggravation and whose conviction was later reversed by the Supreme Court, and upon retrial he was found not guilty, is entitled to a suit of clothes, gift money and so on.

I note under Section 3779 of the Code, when a prisoner is discharged, the warden shall furnish him with a railroad ticket, a suit of clothing and a sum of money, and it is clear that this prisoner comes within that classification the same as a man would be if he were released by expiration of sentence or parole.

It is, therefore, our opinion, that the warden is authorized to furnish Russell Thomson with those matters set forth in Section 3779 of the Code.

CERTIFICATES OF PURCHASE: TAXABILITY OF CERTIFICATES: MONEYS AND CREDITS:

If the certificate comes within the definition of a credit as provided in Section 6984 of the 1931 Code, it is taxable.

April 8, 1935. *County Attorney, Spirit Lake, Iowa:* We wish to acknowledge receipt of your letter of April 4th in which you ask for an opinion on the following question:

"Is a certificate of purchase, issued by the County Treasurer to a purchaser of real estate at tax sale, taxable as moneys and credits?"

Although we are forced to disagree with your conclusion as to the taxability of these certificates of purchase, we cannot overlook the opportunity of commending you for the excellent way in which you have requested this opinion. We have always urged that county attorneys, in requesting opinions from this office, should give us their own ideas of the law and any citations which they have. Your letter of April 4th is the best example of this that we have received in the last two years. We therefore feel that we would not be doing right if we failed to mention the fact to you.

Section 6984 of the Code of 1931 defines the term "credit" as including every claim or demand, due or to become due for money, labor or other valuable thing; every annuity or sum of money receivable at stated periods and all money or property of any kind secured by deed, title bond, mortgage or otherwise.

What is a certificate of purchase or, as we generally refer to it, a tax sale certificate? It is the evidence of a payment of money made by the purchaser and a right either to have that money repaid to him along with the statutory penalties and interest within a designated period, or have the real estate described in the certificate conveyed to him. Is it not then a chose in action and does it not definitely come within the provisions of Section 6984 of the Code of 1931? Is not the payment made by the so-called purchaser secured by his statutory right to have the real estate conveyed to him if the money is not repaid within a designated period? He is not the owner of the real estate and consequently he does not pay the taxes on the real estate or at least, he is not compelled by statute to pay those taxes, except to protect the property from further sale.

Section 6944 of the Code of 1931 which provides that bonds or certificates issued by any municipality, school district or drainage or levee district or county within the State are exempt from taxation. We do not believe that certificates of purchase issued by the County Treasurer come within the contemplation of that section. The word "certificates" as used in Section 6944 refers to certificates of indebtedness, similar to bonds or warrants.

In the case of Kleinwachter vs. County Treasurer of Hughs County, 159 Oklahoma 215, 11 P. (2d) 1073. There is nothing in this case to show whether or not there is any other statute providing for taxation of moneys and credits as distinct from personal property. In Iowa, if the certificate comes within the definition of a credit as provided in Section 6984 of the Code of 1931, then it must be taxable. It is the opinion of this department that it is taxable.

BOARD OF EDUCATION: INSURANCE ON BUILDINGS ON FARMS:

Whether insurance is taken under Chapter 404 or 406 of the Code, your board has the power and authority to make application, enter into agreements for, and hold policies in either a mutual insurance company or association.

April 9, 1935. *Board of Education:* We have your request for opinion on the following proposition:

"The Iowa State Board of Education own several farms that have been acquired through foreclosure proceedings or by quit claim deeds. The board desires to insure the buildings on these farms against fire, lightning, wind and tornado. Will you please advise us if the board have the legal right and authority in taking such insurance, to become a member of a mutual assessment association and to insure buildings in such organizations against loss by fire, lightning, wind and tornado?"

Section 8907 of the Code, which is under Chapter 404, which chapter pertains to insurance other than life, gives to public and private corporations, boards and associations, the right and authority to enter into agreements and hold policies in the mutual insurance companies provided for in Chapter 404. I presume, however, that you have in mind insuring in the mutual insurance associations under Chapter 406 of the Code. These are commonly referred to as County Mutuals and State Mutuals. Section 9029 of the Code defines a person or member as a trustee, administrator and other individuals, public or private corporations, or associations. The State is a public corporation in that it is a political corporation, for in a State, there are two classes of political corporations, one of which is the State and the other, a municipal corporation.

It is, therefore, the opinion of this department that whether the insurance is taken under Chapter 404 of the Code, or under Chapter 406 of the Code, your Board has the power and authority to make application, enter into agreements for, and hold policies in either a mutual insurance company or association.

DODGE LIGHT GUARD ARMORY TRUST: TAXABILITY OF TRUSTS FOR SCIENTIFIC, EDUCATIONAL, RELIGIOUS OR CHARITABLE PURPOSES: INCOME TAX EXEMPTIONS:

Dodge Light Guard Armory trust exempt from income tax under Section 6, Par. 2 of the property relief act. Chap. 82, 45th General Assembly, Extra Session.

April 9, 1935. *State Board of Assessment and Review:* We have your request of March 27th with which you enclosed the letter written by Willard M. Gaines, Captain of the Iowa National Guard and addressed to the Adjutant General of the State of Iowa; and also the instrument designated as a trust agreement and executed by the trustees of the estate of Grenville M. Dodge as first parties and the trustees of the Dodge Light Guard Armory Trust as second parties.

Your request is for an opinion as to the taxability of the Dodge Light Guard Armory Trust under Division 2, Chapter 82 of the Acts of the 45th General Assembly, Extra Session.

We believe the trust is exempt from the income tax under Section 6, Paragraph 2, of the property relief act and that that exemption is granted not because of Section 49, Chapter 10 of the Acts of the 45th General Assembly,

Extra Session, generally known as the Military Code of Iowa, but because of the provisions contained in Chapter 82 of the Acts of the 45th General Assembly, Extra Session. Section 6, Paragraph 2 of said Chapter 82 of the Acts of the 45th General Assembly, Extra Session, provides that the person making the return shall be allowed, as a deduction, any part of the gross income which, pursuant to the terms of the will or deed creating the trust is, during the taxable year, paid to or permanently set aside to any corporation or association operating exclusively for religious, charitable, scientific or educational purposes.

The National Guard is an organization operated for the furtherance of military science. In view of that fact it is an organization operating for a scientific purpose.

TAXES: EXEMPTIONS: SOLDIERS:

Exemption shall extend only to the period during which the beneficiaries of the original exemptions remain the owners of the property.

April 10, 1935. *County Attorney, Osage, Iowa:* We have your letter of March 25th in which you ask for an opinion on the following:

The widow of a civil war veteran died April 1, 1934. She was assessed in 1934 prior to her death and was given her usual exemption of $3,000. Her real estate descended to her heirs, who are all of age, and they want to know what exemption, if any, they have in the 1934 taxes payable in 1935.

We note that you quote in your letter, an opinion issued by the Attorney General in the year 1922 in which the Attorney General at that time said that the Board of Supervisors might allow the exemption to the heirs for that portion of the year during which the widow lived.

We cannot agree with the statement contained in that opinion because we do not believe that the Board of Supervisors have anything to say about whether or not the exemption should be allowed for that portion of the year. We believe it must be determined from a proper construction of the last sentence in Section 6947 of the Code of 1931, which reads as follows: "Such exemption shall extend only to the period during which such persons remain the owners of such property." The words "such persons" used in the portion of the section just quoted refers to the persons named in Section 6946 as beneficiaries of exemptions granted under that section. The words do not refer to the heirs of the person who had been granted the original exemption.

It is the opinion of this office that if an exemption was claimed at the time the assessment was made as of January 1, 1934, and if the beneficiary of that exemption or the person claiming the exemption should die on July 1, 1934, there could be no exemption for the second six months of that year and it would be the duty of the proper county officials to re-apportion the taxes for that year or to list the property as the case might require.

The opinion referred to by you as appearing on page 191 of the Attorney General's Report for the year of 1922, and any other opinions of this office holding contrary to the conclusion reached in this opinion, are hereby withdrawn.

COUNTY: SHERIFF'S OFFICE: INJURY RECEIVED: LIABILITY FOR EXPENSE:

"If, therefore, a person thus summoned to service is not a deputy in contemplation of law and is not entitled to either fees or compensation,

because no statutory compensation is provided * * * * we are of the opinion that persons summoned as the claimant in question was would not be entitled to compensation from the County * * * * for any damages sustained."

April 10, 1935. *County Attorney, Clinton, Iowa:* This will acknowledge receipt of your request for an opinion on the claim of Howard Gill, of Clinton, Iowa, relative to an injury received while assisting the Sheriff's office in making an arrest. You ask what liability, if any, there is upon the county for injuries which Gill received, and if the county is liable, in what manner payment should be made.

By statute, the Sheriff of any county is empowered to demand and receive the assistance of any person in making an arrest. Section 5182 of Chapter 259 of the 1931 Code of Iowa provides:

"The Sheriff by himself or deputy may call any person to his aid to keep the peace or prevent crime or to arrest any person liable thereto or to execute process of law, and when necessary the Sheriff may summon the power of the County."

We have been unable to discover any judicial determination of the exact question here presented, but as early as the first printed volume of the Iowa Reports in the case of *Board of Commissioners of Jefferson County vs. Wollard,* 1 (Greene) Iowa, Page 430, a rule of law was laid down which by analogy has application here. In that case, the County Treasurer was held to be not entitled to compensation from the county for making out a list of school taxes with a statement of taxes paid and unpaid, as required by statute. The following pertinent language is found in the opinion:

"A man is not compelled to accept the office of treasurer, and if he do so, he will take it with all the honors, emoluments, and burthens pertaining to the same. There being no law making it the duty of the plaintiffs in error to provide compensation for the services specified, he has no legal demand against them. This question was settled in the case of Whichen vs. The Board of Commissioners of the county of Cedar, tried at the January term of this court, 1848, in which it appeared the plaintiff in error was appointed by the District Court, to defend a pauper indicted for a crime, the statute requiring the court to appoint an attorney to defend paupers in certain cases. In this case we decided that the plaintiff's remedy was by petition to the legislature for relief, there being no law making it the duty of the defendants to compensate him for such services."

In *Howland vs. Wright County,* 82 Iowa, 164, it was determined that the mayor of an incorporated town, who served as a magistrate upon the hearing and trial of criminal cases in which the prosecution failed, was not, in the absence of any provisions therefore by law, entitled to recover from the county for the reasonable value of services performed. An excerpt from the opinion follows:

"It was said in Moore vs. Ind. Dist., 55 Iowa, 654, of school directors, that, being public officers, with duties prescribed by statute, they were only entitled to such compensation for the performance of their prescribed duties as were fixed by statute; and the case of Upton vs. Clinton Co., supra, was cited as an authority to that effect. In Foster vs. Clinton Co., 51 Iowa, 541, it was said that a claim against a county is not just unless the law somewhere either requires or authorizes its payment. See, also, Turner vs. Woodbury Co., 57 Iowa, 440. The rule that a public officer cannot recover compensation not provided for by law is recognized by numerous decisions of this court, and is approved by considerations of public policy. If follows that a County cannot be made liable for such compensation."

In *Mousseau vs. City of Sioux City and Woodbury County*, 113 Iowa, 246, it was held that a special policeman appointed to serve at a general election could not recover for his services from the city or the county, unless statutory provision for his compensation was made, the opinion and brief holding that a claim against a city or county is not just, unless the law somewhere requires or authorizes its payment.

In *Power vs. Douglas County* (Neb.), 106 N. W., Page 782, it was held that persons summoned by the Sheriff under his authority to summon the power of the county are not deputies in the proper sense of the term, and that the Sheriff is not liable to them for compensation.

If, therefore, a person thus summoned to service is not a deputy in contemplation of law and is not entitled to either fees or compensation, because no statutory compensation is provided, and if the Sheriff and his deputies or law enforcing officers generally should sustain accident and injury in the performance of duty and would not be entitled to compensation from their county, we are of the opinion that persons summoned as the claimant in question was would not be entitled to compensation from the county, and that there would be no liability upon the county for any damages sustained. It may be that the Legislature intended that persons thus summoned should receive compensation for injuries sustained in the line of duty, and it may be unfortunate that such legislative enactment was not provided, but the fact remains that it is neither the province of this office nor of the courts to supply legislative omission.

We are of the opinion, therefore, that the claimant should present his claim to the Legislature for its consideration and action.

See also 43 C. J., Page 936, Section 1713. It cites as authority the case of Cobb vs. Portland, 55 Me., 381; 92 A. M. D., 598.

TAXATION: REDEMPTION OF PROPERTY AT TAX SALE:

When redemption is made, should the rate of penalty and interest be charged as provided by Code of 1931 prior to its amendment by Chap. 132 of Acts of 45th General Assembly.

When subsequent taxes are paid by holder of a certificate, should he receive only interest on that, or both interest and penalty.

April 10, 1935. *County Attorney, Sioux City, Iowa:*

In re: Section 7272, Code of 1931 as amended by Chapter 132, Acts of the 45th General Assembly.

We have your letter of recent date in which you asked us to determine what penalty should be charged on subsequent tax paid by the holder of a certificate of purchase when there is an attempt to redeem by the property owner. You state that someone in the office of the State Auditor has advised the Auditor of Monona County that he should charge the former rate of 8% penalty and 8% interest on the tax paid by the certificate holder even where it is paid by April 1st or later. We believe we could answer your request by separating it into two questions, as follows:

First—When redemption is made, should the rate of penalty and interest be charged as provided by the Code of 1931 prior to its amendment by Chapter 132 of the Acts of the 45th General Assembly?

Our answer to this question is that if the property was sold at tax sale prior to the enactment of Chapter 132 of the Acts of the 45th General As-

sembly, then the rate of interest and penalty should be charged according to the law that was in force at the time the property was sold, for the reason that that law suit was a part of the purchaser's contract and he is entitled to receive his interest and penalty according to the law that was in force at that time. However, if the tax sale was held after the taking effect of Chapter 132 of the Acts of the 45th General Assembly, then the interest and penalty, if a penalty should be collected on subsequent tax, would be as provided by the amendment.

Second—When subsequent taxes are paid by the holder of a certificate, should he receive only interest on that, or both interest and penalty?

We believe that Section 7273 of the Code of 1931 answers this question. It will be noted that Section 7272 provides for the method of redeeming as well as the penalties and interest to be paid. If that section is read by itself, one would naturally conclude that upon the payment of subsequent tax by the certificate holder, he would be entitled to receive a penalty of 8% of that subsequent tax, and 8% interest on the total amount of the subsequent tax and penalty.

If Section 7273 is read in connection with 7272, it will be observed that the 8% penalty for non-payment of taxes of a subsequent year, shall not attach unless the tax shall have remained unpaid until the first day of April after they became due and delinquent. This provision, we believe, was to give the property owner an opportunity to pay the subsequent tax and thus save the penalty.

It is therefore the opinion of this office, in so far as the second question is concerned, that if the holder of a certificate pays the subsequent tax prior to April 1st of the year in which they become due, he is not entitled to the penalty but merely the interest. However, if he waits until after April 1st to pay them, he is then entitled to the penalty of either 8% or 4% according to the law in force on the day he purchased the property at tax sale.

SCHOOLS: SUPT. OF SCHOOLS: CONTRACT FOR MONTHLY SALARY: School Board entered into 3-year contract with Superintendent at stipulated monthly salary—at end of 1st year, Superintendent entered into oral agreement to accept reduction in salary. As to liability of board, if it does not enter into new contract—the liability here depends upon agreement of parties, which is a question of fact and which we cannot determine.

April 10, 1935. *Superintendent of Public Instruction:* You ask for our opinion upon the following proposition:

"A School Board entered into a three-year contract with the Superintendent at a stipulated monthly salary for the three years. At the end of the first year under the contract, the superintendent entered into an oral agreement with the board to accept a reduction in monthly salary which reduced salary was accepted during the balance of the three-year contract period. Is the board liable for the balance of the salary stipulated in the three-year contract if it does not enter into a new contract with the superintendent?"

As I understand, the three-year period covered by the contract has fully expired and the service fully performed. The question of liability, then, for that period would not be in any wise affected by a subsequent contract unless that was part of the oral agreement at the time of the reduction of salary,

that is, if at the time the reduction of salary was accepted, it was part of the oral agreement for reduction that the superintendent would be entitled to a new contract at the end of the three-year period, then, if a new contract was not offered to him, the board would not have fully performed its agreement, but if there was nothing said in regard to a new contract at the end of the three-year period, then the liability for compensation under the three-year contract would not be in any wise affected by the fact whether a new contract is entered into at the present time or not.

Sections 4228, 4229 and 4230 provide for entering into contracts by teachers and superintendents and one of the provisions is that the contract be in writing and state the compensation. This was done in this case, but subsequently, the compensation was modified by oral agreement and there is no prohibition to the modification of such written contract by oral agreement. It being legal, then, to so modify this contract in this manner, the liability pursuant to the modification, depends upon the agreement of the parties. If it were agreed that the reduced salary be taken in full of all compensation due under the terms of the contract, then, of course, there is no further liability on the part of the board, but if the agreement was that the superintendent was to accept this reduced salary for the time being, but that as soon as the board was able to do so, to make up the difference between the reduced salary and the salary stated in the contract, then the board would be liable to fully carry out that agreement and to pay to the superintendent the difference.

Also, as stated earlier in this opinion, if as a part of the oral agreement as to reduced salary, the board agreed with the superintendent that at the expiration of his present contract, they would give him another contract if he would agree to the reduced compensation, then they would be bound to carry out such an agreement and upon failure, would be liable.

It is, therefore, apparent that the liability here depends upon the agreement of the parties, which is a question of fact, which we cannot determine.

CHAIN STORE BILL: EXEMPTING OIL FILLING STATIONS:

The legislature would have the power to make a classification exempting oil stations from the payment of the chain store tax.

A statute would not be unconstitutional if it included oil stations in the class to be taxed on the chain store basis.

April 11, 1935. *House of Representatives:* I have your written request of April 10, 1935, for an opinion as to whether or not a provision in the chain store bill, No. 311, exempting oil filling stations, would be constitutional.

You are advised that the United States Supreme Court, in the case of Liggett Company vs. Lee, 288 U. S. 517, 77 L. Ed. 929, held that a Florida statute exempting oil stations from the payment of the chain store tax was constitutional. In this case, it appears that the United States Supreme Court based their ruling upon the fact that the State of Florida already was levying an occupational tax on oil stations, which tax was a five-dollar ($5.00) license fee per annum on each station and in addition, a tax of seven cents ($0.07) per gallon for every gallon of gasoline or other like products of petroleum sold. See *Laws of Florida,* Acts of 1931, Chapters 15659 and 15788. In this Liggett case, the United States Supreme Court stated the rule as follows:

"It has long been settled that the 14th amendment does not prevent a State from imposing different taxes upon different trades and professions, and varying the list of excise upon various products. Bells Gapp Railway Company vs. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. 533; Southwestern Oil Company vs. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. 496. Clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our government, may be obnoxious to the constitution. *But in view of the imposition of taxes on the operation of filling stations by other acts, pursuant to the Legislature's power of classification, we cannot declare their exemption from the tax laid by the chain store act offensive to the guarantees of the 14th Amendment.*"

A similar statute of the State of Michigan was upheld by the Supreme Court of Michigan on March 6, 1935, in the case of *C. F. Smith Company, et al., vs. Fitzgerald, et al.* In this Michigan case, the court followed the decision of the United States Supreme Court in the Liggett case, supra. In laying down this rule, the Supreme Court of Michigan used the following language:

"Gasoline filling stations are in Michigan subject to ad valorem taxes on their real estate. The owner or operators thereof pay a gasoline tax to the State and another gasoline tax to the government of the United States. They are also subject to the general sales tax imposed by the State. We need add nothing to the reasoning of the Supreme Court of the United States in Liggett Company vs. Lee, 288 U. S. 517."

However, in Iowa it will be observed that gasoline stations are not subject to the payment of the sales tax. It also should be observed that the motor vehicle fuel license fees are not a tax upon the gasoline stations. The Iowa motor vehicle fuel tax is not an occupational tax, nor is it a personal property tax. It is an excise upon the use of such fuel for the propulsion of motor vehicles on the highways of the State. The levy is not on property but on the specified use of property. See *Mona Motor Oil Company vs. Johnson,* 292 U. S. 86. Nevertheless each distributor of motor vehicle fuel and oil is required to collect the motor vehicle fuel tax and pay it over to the State and Federal governments. Every gasoline station in the State of Iowa that uses or displays for use any gasoline pump must secure a license from the State for said pump and pay a license fee therefor of three dollars ($3.00) per annum.

It, therefore, would appear that the Legislature would have the power to make a classification exempting oil stations from the payment of the chain store tax in view of the Supreme Court decisions hereinabove cited. On the other hand, a statute would not be unconstitutional if it included oil stations in the class to be taxed on the chain store basis. See *Fox vs. The Standard Oil Company,* 55 Supreme Court Reporter 333. A West Virginia statute included oil stations under their chain store tax and the United States Supreme Court upheld the constitutionality of the same in the Fox case, supra.

REFUNDING BONDS: CONSTITUTIONAL LIMITATION: SCHOOL BUILDINGS: The Martensdale School District may refund the bonds inquired about and such refund will be legal if they follow method set forth in decision of Supreme Court in Clarke County case, for trustee can be created for the purpose even though one is not provided for by the refunding statute, for court points out that such provision in S. F. 65 of 46th General Assembly merely follows the law on the proposition. If this procedure is followed, refunding bonds will not exceed constitutional limitation.

April 11, 1935. *County Attorney, Indianola, Iowa:* We have your request for opinion on the following proposition:

"The Martensdale School District of Warren County has about $51,000 of bonded indebtedness for school building and other improvements. Because of the reduced valuation of real estate in the last few years, this debt of the district is about $14,000 over their constitutional limit although it was within the limit when contracted. The district is unable to meet the interest and principal payments and desires to issue refunding bonds in accordance with Section 4405 of the Code, if such can be done. This will spread the payments over a longer period of time and will also reduce the interest. Would you please give to me your opinion on this proposition together with the general outline of the method of procedure?"

The recent case of Banta vs. Clarke County, et al., handed down by our Supreme Court on April 3, 1935, and which is not as yet in the advance sheets, goes into the law on this proposition quite thoroughly. That case involved refunding bonds issued under the provisions of Senate File 65 of the 46th General Assembly. Under the provisions of this act, a county which had a primary road bond indebtedness was authorized to issue and sell primary road refunding bonds notwithstanding the fact that the indebtedness at the time of the refund exceeded the legal limitations. The act provided that the proceeds from these refunding bonds together with all other funds coming into the control of the County Treasurer for the purpose of paying interest or principal thereon should be converted into a separate account and be held by the County Treasurer in a special trust fund in a depository bank, which fund should be regarded as a sinking fund and used only for the retirement of present bonds outstanding. It was further provided that this procedure should not constitute the incurring of an indebtedness of the county within the meaning of the constitution or of the statutes and that withdrawal from the trust fund could not be made except in payment for interest or principal on these primary road bonds.

The court in this decision points out that it was stipulated in the record that none of the refunding bonds would be delivered to the purchasers until the purchaser had paid for them in full and that the proceeds would be retained by the County Treasurer and handled as required by law. The court also points out that there are two methods of refunding outstanding bonds. One is to issue and place in the hands of the County Treasurer or trustee, new bonds to be delivered to the holders of outstanding bonds, bond for bond. The second method is to sell the new bonds and retain the proceeds to take up and extinguish the old bonds. As to the first procedure, there is very little question in regard to it, but as to the second, there has been a conflict in the authorities as to whether this constituted an excess of the constitutional indebtedness. Heretofore, our court has followed the minority rule and held that such did exceed the limitation of indebtedness, but in this case, the court holds that prior holdings on this proposition have been dictum, as such question was not in the cases decided and the court then also expressly overrules the Lyon County case so far as it is in conflict with the decision, and the court thus places Iowa with the majority of states on this proposition.

The court, in construing the statute, said:

"Under the new statute, such money is required to be placed in the sinking fund and used solely and only for redeeming the outstanding bonds. The

actual total indebtedness of the County, within the meaning of the constitutional debt limit provision should be determined by deducting the cash on hand, segregated to meet the payment of certain designated bonds from the gross indebtedness, because of the actual available cash to meet the payment of an equal amount of such certain outstanding bonds. After the new bonds are sold, the total cash on hand, including the segregated cash received from the sale thereof will be increased by the amount so received. Therefore, the actual aggregate indebtedness of the County, within the meaning of the debt limit constitutional provision, will be no more after the new bonds are sold than it was before."

And the court further said in regard to the question of increasing the debt:

"The new bonds are not issued for the purpose of increasing the indebtedness of the County. The result of the action taken under the new statutes is simply to change the form of the present bonded indebtedness by issuing and selling an equal amount of bonds at par, the proceeds of which are segregated in a trust fund for the sole and express purpose of redeeming certain bonds."

The court then quoted with approval from an Arizona case, as follows:

"We hold, therefore, that where bonds are issued for the purpose of refunding other outstanding indebtedness and where the proceeds of such refunding bonds are placed in a trust fund for the sole and express purpose of paying off the original indebtedness, the latter bonds, so far as the amount which is placed in the trust fund is concerned, are not to be considered as an increase in the indebtedness of the corporation within the charter and statutory provisions limiting it."

The court thus holds that the statute under construction in this Clarke County case merely followed an existing law on this proposition and held that wherever a trustee is provided for and the purchase price of the refuning bonds which are to be sold at par, is paid either simultaneously or prior to the issuing of the refunding bonds and is held by a trustee expressly for that purpose, that the same constitute an offset and that the indebtedness of the county is not increased, and that if the outstanding bonds were valid when issued, a refund of these bonds in the manner pointed out in the Clarke County case is valid even though the value of the property of the county has shrunk so that the bonds to be refunded exceed the 5% debt limitation of the statute, as the court points out clearly that the refunding bonds do not create a debt or increase a debt as bonds are merely evidence of the debt and that, therefore, they constitute merely a continuation or extension of the old debt and are evidence of it by substitution. The very far reaching effect of the opinion of the Supreme Court in this Clarke County case is apparent, for it relieves municipal corporations such as you have suggested, from a terrific interest burden for it provides a method of refunding maturing bonds or bonds that are callable for refunding purposes, when without such relief, serious results might follow. The opinion of Justice Kintzinger shows learned conception of the question involved and the great time and effort he gave and expended in writing the opinion. It is apparent from the above that it is the opinion of this department that the Martensdale School District may refund the bonds inquired about and that such refund will be legal if they follow the method set forth in the decision of the Supreme Court in the Clarke County case, for a trustee can be created for the purpose even though one is not provided for by the refunding statute, for the court points out that such provision in Senate File 65 of the 46th General Assembly merely

follows the law on the proposition. And if this procedure is followed, it is our opinion that the refunding bonds will not exceed the constitutional limitation.

I understand that amendment to Senate File 65 is to be presented to the Legislature, which might in some way change the handling of the fund after it gets into the hands of the Treasurer or trustee and I would suggest that if such amendment is adopted, that the practice set forth therein be followed by this school district, for while Senate File 65 applies only to primary road refunding bonds, yet as pointed out above, the plan has been approved by the Supreme Court generally.

DEPARTMENT OF AGRICULTURE: DEAD ANIMALS: It is not permissible for persons not holding a license under Chapter 131 of the Code to transport animals that have died otherwise than by slaughter to a licensed disposal plant.

April 12, 1935. *Secretary of Agriculture:* You have submitted to this department a request for an opinion on the question of whether or not it is permissible for any person who does not hold a license authorizing him to engage in the business of disposing of the bodies of dead animals under Chapter 131 of the 1931 Code of Iowa to transport the bodies of dead animals other than slaughtered animals, to a licensed disposal plant.

Section 2758 of the Code provides in part as follows:

"*Transportation of dead animals.* Any person holding a license under the provisions of this chapter may haul and transport the carcasses of animals that have died from disease, except those prohibited by the department, in a covered wagon-bed or tank which is water-tight, and is so constructed that no drippings or seepings from such carcasses can escape from such wagon-bed or tank, and said carcasses shall not be moved from said wagon-bed or tank except at the place of final disposal."

Sections 2745 and 2746 are set out in full as follows:

"2745. *Disposal of dead animals—license.* No person shall engage in the business of disposing of the bodies of dead animals without first obtaining a license for that purpose from the department of agriculture."

"2746. *Disposing of dead animals defined.* Any person who shall receive from any other person the body of any dead animal for the purpose of obtaining the hide, skin, or grease from such animal, in any way whatsoever, shall be deemed to be engaged in the business of disposing of the bodies of dead animals."

The license contemplated by this chapter is a license to engage in the business of disposing of the bodies of dead animals, and any person who shall receive from another the body of any dead animal for the purpose of obtaining the hide, skin, or grease from such animal shall be deemed to be engaged in such business. An inspection of the place of business of any prospective licensee is provided for.

Section 2758 above quoted in part provides that any person holding a license under the provisions of this chapter may haul and transport the carcasses of animals. It does not in express terms say that persons not holding a license are prohibited from transporting such carcasses, but Section 2761 provides that:

"*Duty to dispose of dead bodies.* No person caring for or owning any animal that has died shall allow the carcass to lie about his premises. Such

carcass shall be disposed of within twenty-four hours after death by cooking, burying, or burning, as provided in this chapter, or by disposing of it, within said time, to a person licensed to dispose of it."

Section 2761, it will be observed, makes it unlawful for any person owning the carcass of an animal which has died of disease to dispose of it to any person not licensed to dispose of such carcass. A person or corporation engaged in the business of disposing of dead animals requires but one license, and that license gives such person or corporation authority to carry on the business on either a large or small scale with the aid of such agent and employees as it may be deemed necessary or desirable to employ.

It is our opinion that any holder of such license is not required to procure an additional license for each truck or conveyance used in transporting the bodies of dead animals. The transporting of such carcasses is incident to the business for which one license is required. Where the licensee owns the trucks and operates them by employees the license to operate the business is a license to carry on all of the reasonable and necessary incidents and activities of that business. We think a different rule applies when a licensee engages in an independent contract with other parties to transport the bodies of dead animals in the truck or conveyance of the person so contracted with. It is our opinion each person who uses his own truck or conveyance to transport dead animals is required by Chapter 133 to procure a license.

Quoting again from Section 2758: "Any person holding a license under the provisions of this chapter may haul and transport the carcasses of animals that have died from disease, etc." Conversely then it may be said that any person not holding a license under the provisions of this chapter may not haul and transport the carcasses of such animals. If a corporation is engaged in the business for which a license is required under this chapter and operates only one truck, that truck must be operated by an agent, but it is the corporation which in reality is engaged in operating the truck. The truck must necessarily be operated by the corporation through an agent or employee. There is no other way that a corporation can transact its business. If such corporation operates merely one truck, only one license would be required, and if it operates many trucks there is no requirement in the law that it should procure more than one license. The independent contractor who transports such carcasses in his own truck is required by this chapter to procure a license. Under the construction we have here placed upon Chapter 131, and particularly Section 2758, we must say that it is not permissible for persons not holding a license under Chapter 131 to transport animals that have died otherwise than by slaughter to a licensed disposal plant. This answer must be qualified, of course, by the further statement that where the licensee owns and controls several trucks, which are operated by it through its agents who act only under its direction and control, the transportation of dead animals in such trucks is transportation by the company which holds a license and not by the agent or employee who operates a truck.

SECURITIES: REVOCATION OF REGISTRATION: AUTHORITY TO REGULATE TRANSACTIONS WHERE EXEMPTION HAS BEEN WITHDRAWN:

"It is clear that the previous privilege granted to stock exchanges has been taken away, and, therefore, dealers handling securities listed previous

to the amendment upon stock exchanges approved specifically by statute or by the Secretary of State would be prohibited from further dealing, buying or selling such securities without registration for approval of the Secretary of State."

April 12, 1935. *Securities Department:* This will acknowledge receipt of your favor of the third instant, asking for an opinion on the following two questions:

a. Does the revocation of a registration of a security prohibit the further dealing, buying or selling of the securities in the State of Iowa, except in exempt transactions stated in the law?

b. Is a dealer, registered under the Iowa securities law, prohibited from handling a security previously listed upon a stock exchange approved specifically by statute or by the Secretary of State or a security, the registration of which has been revoked by order of the Secretary of State?

The above questions both fall within the same classification, namely, is it lawful to buy, sell, offer for sale, deal in or handle a security, except under an exempt transaction as stated by statute, which at one time was qualified for sale in the State of Iowa either by direct qualification or exemption under the statutes, which exemption or qualification was later revoked?

The securities act, before it was amended at the Special Session of the 45th General Assembly, provided exemptions for listings upon the New York, Chicago and Boston stock exchanges. The securities act, however, as amended at the Special Session of the 45th General Assembly, eliminated the above exchanges and instead granted exemption only to those exchanges that are specifically approved by the Secretary of State.

You state in your letter:

"The question to be determined is whether or not securities appearing in listings of any one of the stock exchanges approved by law or by order of the Secretary of State, before withdrawal of approval, are at the present time exempt under the Iowa securities law, regardless of the fact that the securities were at one time exempt, since the approval of the exchanges has been withdrawn by the Secretary of State."

The practical problem presented in your letter questions the continued dealing in securities which were at one time properly qualified by operation of law, notification, exemption, etc., and whether or not a dealer registered in your department is allowed under the law to deal in the security in a secondary market; further, whether or not your department has authority under the law to regulate transactions involving securities that at one time could be lawfully handled under registration or exemption and which registration or exemption has been withdrawn by virtue of the amendment to the statute or by order of the Secretary of State.

Your question was answered by opinion of this department under date of April 11, 1933, prior to the amendment of the statute, in the following language:

"It is the opinion of this department that it is not permissible for a dealer to purchase stocks and to reoffer 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 had purchased. We can find nothing in the securities act, either in Section 8581-c3, subsection 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 dealer of unauthorized stock and would be contrary to the terms of the act."

However, the securities act, Chapter 393-C1 Code of 1931, was amended by Senate File 227, 45th General Assembly, Special Session, and the amendment became effective by publication on March 23, 1934. Application of the amendment, in so far as it relates to the question here presented, consists of the following two material things: (a) Section 8581-c7 of the original act, entitled "Registration by Notification," was repealed in its entirety by Section 7 of the amendment; and (b) Section f of Section 8581-c4, entitled "Exempt Securities," was amended by striking all of Paragraph f and substituting a new paragraph in its place. Under original Paragraph f, securities which had been listed on the New York, Boston or Chicago stock exchange and which had been previously approved by the Secretary of State were held to be exempt securities subject to the right of the Secretary of State to at any time withdraw approval theretofore granted to any such exchange. Under the new Paragraph f created by the amendment, securities listed upon any recognized and responsible stock exchange required approval by the Secretary of State, and the Secretary of State was empowered to either approve or reject their application, and was further empowered in a case where the application was approved to withdraw the exemption of any such security listed after 20 days' notice and opportunity for hearing had been given to the exchange and when, in the opinion of the Secretary of State, the further sale of the security would work fraud.

It is clear that registration by notification has been eliminated. It is clear that the previous privilege granted to stock exchanges has been taken away, and, therefore, dealers handling securities listed previous to the amendment upon stock exchanges approved specifically by statute or by the Secretary of State would be prohibited from further dealing, buying or selling such securities without registration for approval of the Secretary of State. This at least would seem to conform to the spirit, intent and purpose of the act, which was to safeguard and protect the investing public as distinguished from issuers, dealers or salesmen of securities.

VACATION: LEAVE OF ABSENCE: STATE EMPLOYEES:

"Thus, during the first year period of employment, the employee would be entitled to thirty day's sick leave with pay at the discretion of the head of the department; during the second year, thirty days, and if the thirty day period above referred to were not utilized, then sixty days; during the third year, thirty days, and if no period were utilized during either the first or second year, then ninety days."

April 13, 1935. *State Comptroller:* This will acknowledge receipt of your favor of the second instant, asking for an official opinion construing the following paragraph of Section 62, Chapter 188, Acts of the 45th General Assembly:

"The employees provided for in this act are granted one week's vacation after one year's steady employment and two weeks' vacation after two or more years' employment with pay. Leave of absence of thirty days is granted to employees on account of sickness or injury accumulative for three consecutive years with pay at the discretion of the heads of departments."

The paragraph deals with two separate and distinct matters. In the first sentence, the right to and period of vacation of employees are considered and determined, and in the last sentence of the paragraph the right to and period of leave of absence on account of sickness or injury are considered and determined. Definitely the statute provides on the question of vacation that employees are entitled to a vacation of one week after one year's steady employment and two weeks' vacation after two or more years' employment with pay, or in other words, the right to any vacation at all only accrues after one year's employment. This clearly is a condition precedent.

On the question of leave of absence on account of sickness or injury, employment for one year is not necessary before the right accrues. It is not conditioned upon any particular period of employment. The wording of the second sentence in the paragraph as compared with the wording of the first sentence thereof impels us to the belief that it was the legislative intent that an employee of the State would be entitled to 30 days' sick leave every year of employment, accumulative over a period of three years. Thus, during the first year period of employment, the employee would be entitled to 30 days' sick leave with pay at the discretion of the head of the department; during the second year, 30 days', and if the 30-day period above referred to were not utilized, then 60 days'; during the third year, 30 days', and if no period were utilized during either the first or second year, then 90 days'. Common sense would indicate that the Legislature intended to vest the heads of the various departments with more discretion in the matter of applying the rule on leave of absence in cases of sickness and injury than in determining the question of vacation. Any other construction would give paramount consideration in determining the right and period of vacation as distinguished from the right and period of leave of absence on account of sickness and injury, and this we do not believe the Legislature intended.

BANKS AND BANKING: NOTICE. Where a bank desires to renew its corporate existence pursuant to Section 8371 and 8372 of the Code, is the notice of the meeting complete on the day of the last publication, or after a period of 28 days?

April 20, 1935. *Banking Department:* We have your letter and also copy of memorandum brief from the Reconstruction Finance Corporation on the following proposition:

"Where a bank desires to renew its corporate existence pursuant to Sections 8371 and 8372 of the Code, is the notice of the meeting complete on the day of the last publication, or after a period of twenty-eight days?"

Section 8372 provides in part:

"And the time and place thereof published once a week for four consecutive weeks before the time at which the same is to be held."

As far as I can ascertain, this particular provision of the Code section has never been construed by our Supreme Court, and as pointed out in the brief of the R. F. C., there is a split of authorities of other jurisdictions on this proposition. This is a very common statutory provision and it seems to us that the courts which have held that the notice is not complete until the expiration of 28 days take a very strained position, which position, we do not believe would be taken by our court.

For example, we have a very similar section in regard to service of notice of suit by publication on non-resident. This is Section 11084 of the Code and is in part as follows:

"The publication must be of the original notice required for the commencement of actions once each week for four consecutive weeks."

Our court has uniformly held that service of notice pursuant to this section is complete on the day of the last publication, the first case on this being Banta vs. Wood, 32 Iowa, 469, wherein the court said at page 474:

"The order for publication conforming to the statute directs that it be made for four weeks, that is, printed in four issues of a weekly newspaper. The service was completed at the last publication * * * *. This was ten days before the term of court, as required by the Code, Section 1720."

For example, in Polk County, Iowa, where I am familiar with the practice, our term of court always begins on a Monday and we always have service by publication completed on the second preceding Thursday which is the last day for personal service within the county and we have always considered service completed on the last day of publication, which is the same as if the sheriff had served the defendant with notice on that date.

You will notice at Section 8372 of the Code, it says: "once a week," and Section 11084 states: "once each week," but I do not believe that our Supreme Court would see any distinction in this language, for in the case of *Phelps vs. Thornburg*, 206 Iowa, 1150, the statute stated in part:

"The Board shall cause a notice to be published for two consecutive weeks, in two official County papers, of the date of hearing on said petition, which shall not be less than five days * * * *"

In that particular case, the hearing was set for the 17th of August and notice was published on the 6th of August, and the 13th of August, and the only question discussed by the court was whether five days' time had intervened between August 13th and August 17th and no question was raised as to whether it was 14 days from the 6th of August to the 17th of August. It clearly was not and you will notice there the section is much broader, for the Legislature provided that the notice should be published for two consecutive weeks and if the Supreme Court would ever suggest the full seven-day week rule, it would surely have done so under such a broad provision, but it failed to do so.

The rule for publication of notice is found in Section 11104 of the Code, which provides:

"When the publication is in a newspaper which is published oftener than once a week, the succeeding publications of such notice shall be on the same day of the week as the first publication. This section shall not apply to any notice for the publication of which provision inconsistent herewith is specially made."

You will note there that our Legislature has only provided that the notice be on the same day of the week and I am quite sure that if the matter ever went to the Supreme Court, they would determine that due notice was given to the publication you have inquired about, which was published on February 21st, February 28th, March 7th and March 14th, 1935, and the meeting held on March 18th, which was four days after the last publication, but in view of the fact that where jurisdiction is obtained by notice of publication, the

statute providing therefor must be strictly construed, I would suggest that you have the bank secure waiver of notice of time of the meeting and ratification of the acts of the meeting by all stockholders not personally present, for it is clear that those who were present can in no wise object to the notice of the meeting.

SCHOOLS: CONTRACTS: Board has power to enter into contract with Mr. Axel for one year at stipulated salary, the duties of Mr. Axel to be Superintendent of buildings and janitors and as sort of purchasing agent to make recommendations to Board, even though such power is not given by express statute as it lies within the necessary implication.

April 22, 1935. *Superintendent of Instruction:* I have your letter of recent date enclosing copy of memorandum agreement entered into between the Independent School District of the city of Muscatine and one Werner Axel. This agreement generally provides that the Board hires Mr. Axel for a period of one year from the 1st of February, 1935, at a stipulated salary, and under the contract, the duties of Mr. Axel are to be Superintendent of Buildings and Janitors and I assume from the terms of the contract that he is to act as a sort of a purchasing agent and is to make recommendations to the Board. You ask our opinion as to whether such a contract is legal.

School districts as quasi corporations, have only such power as is given to them by statute or as necessarily implied therefrom and the power of the Board to contract by which a liability is created is quite limited, for school funds are in the nature of trust funds and belong not to the district or to the officers of the school district, but to the public. We have no statutory provision as far as I can find, expressly authorizing the Board to enter into such contracts, but it is common knowledge that such contracts are ordinarily entered into and generally work to the advantage of the district, as it puts the whole problem of supervision of the buildings and grounds and employees relating thereto and the investigation of supplies, in the hands of one who is to devote his time to that and to make recommendations to the Board. Of course, they are not bound to follow his recommendations and can accept or reject them at pleasure, for it is only the Board that can make such purchase. It, therefore, appears to us that the Board has power to enter into such a contract even though such power is not given by express statute as it lies within the necessary implication.

Your other question is as to the duration of the contract. You will note that it extends past the period of organization of the new board and it appears to be the law that Boards can enter into contracts which do not run an unreasonable length of time past the personnel of the Board making the contract, as the Board is the continuing body and the only tests are whether the contract is for a reasonable length of time and whether it is free from fraud. It appears to us that the one-year contract is not an unreasonable length of time and does not usurp the powers of the successor personnel of the Board, for it would take such a man some time to make himself familiar with his duties.

I am enclosing herewith the contract enclosed with your letter.

CHAIN STORE TAX BILL: Taxes under Section 4A of this bill are not termed as a license fee; Section 19 is constitutional; it is unlawful for chain stores to enter lease with owner of property requiring him to pay any of chain store tax.

April 22, 1935. *Governor of Iowa:* I hereby acknowledge receipt of Representative Don W. Burington's letter to you of April 17, 1935, in which he has suggested that you secure an opinion from this office relative to the chain store tax bill which is now before the Senate for their consideration. In this letter he has submitted three questions which I shall answer in the order in which they are asked.

The first question submitted is as follows:

"1. Whether the taxes imposed under Section 4-a should be termed a license fee instead of an occupation tax as section 'b' under four, which is the graduated rate, is also termed as an occupation tax."

The chain store tax has been upheld by the United States Supreme Court as an occupation tax. See State Board of Tax Commissioners vs. Jackson (Indiana), Indiana Case, 223 United States 527; Fox vs. Standard Oil Company of New Jersey, No. 69, decided January 14, 1935, West Virginia Case. It is not necessary to term this as a license fee.

The second question is as follows:

"2. Whether Section nineteen under the bill is constitutional."

Section 19 of the act will exempt the Amana Colony stores and all other stores which may in the future come within this classification. It appears that the main reasons why the Supreme Court has upheld the tax on chain stores is because of the type of management, control, and operation that is being exercised by these giant chain store corporations, and the resultant effect upon the social and economic life of the communities is far different from that of the independently owned store. The Supreme Court has held that chain stores can be set apart for the purpose of taxation because of the above distinctions. The stores operated by the Amana Colonies, or similar communal organizations, do not have the management, operation, and control similar to that of the typical chain store. The effect of the colony stores upon the social and economic life of the community is far different from that of the typical chain store. The operation of the colony stores does not in any manner contribute to unemployment within the community. On the contrary every able bodied person living within the Amana Colonies is employed. It appears to me that there are many reasons justifying this exemption which the courts would approve. In my opinion Section 19 is constitutional.

The third question requested is as follows:

"3. Whether five under Section 16 does abrogate the terms of written contracts which provides that the lessor of the building leased to a chain store is to assume any additional taxes imposed on the chain store at any date after the signing of the lease."

Paragraph 5 of Section 16 provides that it shall be unlawful for any chain store, as defined by the act, to shift or attempt to shift the taxes imposed by this act to the buying people, or to anyone else. This section is calculated to require the chain store to pay this tax. Insofar as contracts are concerned, this section cannot have a retrospective effect or application. No law impairing the operation of contracts shall ever be passed. See Section 21 of the Constitution of the State of Iowa, Article 1, and Section 10 of the Constitution of the United States of America, Article 1.

Therefore, insofar as contracts are concerned, this section of the chain store bill would have to have a prospective effect. Paragraph 5 of Section 16 of the act is a penal statute. Penal statutes cannot have any ex post facto application whatsoever. After the enactment of such a provision in the law of this State, it would be unlawful for a chain store to enter into a lease with the owner of the property requiring the owner of the property to pay any of this chain store tax. The prospective effect and application of this section would be entirely constitutional.

CHAIN STORE TAX ACT: LEGISLATIVE INTENT:

April 24, 1935. *House of Representatives:* I have your written request for an opinion from this department relating to House File No. 311 known as the Chain Store Tax Bill, in which you ask the following questions:

"1. Does the amendment to Section 3—adding subsection 'e' as follows; 'Hotels or rooming houses, including dining rooms or cafes operated in connection therewith and by the same management,' create a classification which may render the act unconstitutional and by reason thereof destroy the entire act notwithstanding the saving clause in Sections 18 and 20 (the exemption provision of Section 20 having been stricken out by the Senate)?"

"2. Does not the exemption clause in Section 20, if re-instated in bill, give the court a better chance to uphold the act even though a certain exemption is invalid under the act?"

In answer to your first question, it is my opinion that Sub-section "e" of Section 3 of the act would not create a classification which would render the act unconstitutional. The Supreme Court of the United States has held that the power of reasonable classification rests with the Legislature and that states may levy different taxes upon different business enterprises. Citations of the United States Supreme Court decisions have previously been furnished to the Legislature.

In answer to your second question, it is our opinion that if Section 20 is reinstated in the bill it would give the court more evidence of the legislative intent in upholding the constitutionality of the act.

CITY COUNCIL: SALARIES OF CITY OFFICIALS: Where the city council passed an ordinance fixing the salary of assistant fire chief, such ordinance could not be changed thereafter or modified merely by resolution.

April 25, 1935. *Mayor, Boone, Iowa:* We have your letter of April 18th in which you state the retiring city council fixed the salary of all legal employees by ordinance and that the new council immediately raised the salary of the assistant fire chief by a resolution, placing it where it was before the resolutions were made. Your question is:

Did the council have a right by resolution to raise the salary of the deputy fire chief, which salary had previously been fixed by ordinance?

"An ordinance can be suspended by ordinance only, not by mere resolution." McQuillin on Municipal Corporations, Second Edition, Section 705.

"An ordinance revising or amending an ordinance or a section thereof shall specifically repeal the ordinance or section amended or revised, and set forth in full the ordinance or section as amended or revised." Section 5715 of the Code of Iowa, 1931.

It is our opinion that where the city council passed an ordinance fixing the

salary of the assistant fire chief, such ordinance could not thereafter be changed or modified merely by a resolution.

MOTOR VEHICLE: REFUNDS: FEES: Section 4924 of the 1931 Code does not authorize a refund to an owner of a motor vehicle who during the first half of the year permanently leaves the State and whose motor vehicle is not thereafter on the highways of this State.

April 25, 1935. *Motor Vehicle Department:* Your letter of April 23d is received. You state your department desires an opinion regarding the construction to be placed on Section 4924 of the Code of Iowa, 1931, with reference to the payment of refunds on motor vehicles removed from the State of Iowa by the owner, who has made his permanent residence in another state prior to July 1st of any year.

We set out said section as follows:

"4924. *Refund.* If during the first half of the year for which a motor vehicle was registered and the required registration fee paid therefor, such car is destroyed by fire or accident, or junked and identity as a motor vehicle entirely eliminated, or stolen and not recovered by the owner before the expiration of the registration period for which such fee was paid, or sold and continuously used beyond the boundaries of the State, said owner shall upon the first day of January following such theft or destruction by accident, or the junking and entire elimination of identity as a motor vehicle or sale be paid a refund to the amount of one-half the motor vehicle license fee paid for such year."

The statute provides for a refund of one-half of the license fee in certain cases, and one question is whether or not such a refund may be made to the owner of a motor vehicle who moves permanently out of the State prior to July 1st of any year, taking with him his motor vehicle on which he has paid the license fees.

It is clear that such refund may be made where the required registration fee has been paid during the first half of the year and such car is destroyed by fire or accident or junked and its identity as a motor vehicle entirely eliminated, or where it is stolen and not recovered by the owner before the expiration of the registration period for which such fee was paid, or where it was sold and continuously used beyond the boundaries of the State. Said section provides further that the "owner shall upon the first day of January following such theft or *destruction by accident,* or the *junking and entire elimination of identity* of the motor vehicle *or sale,* be paid a refund to the amount of one-half of the motor vehicle fee paid for such year."

Section 4925 of the Code is as follows:

"4925. *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."

This section authorizes payment of the refund when sufficient proof of *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. Other statutes provide for the collection of the license fee and for the disposition of the proceeds thereof when collected. The Motor Vehicle Department has no right or authority to refund any part of license fees collected under the law unless especially authorized by statute to make such refunds.

Sections 4924 and 4925 authorize refunds in the case of sales during the first half of the year of motor vehicles where the sale is followed by continuous use beyond the boundaries of the State of such vehicle during the remainder of the year. The statutes grant no authority for a refund to an owner who during the first half of the year moves permanently out of the State, taking his properly registered car with him.

In view of the other provisions of Section 4924, a refund to the owner under such circumstances would be preeminently fair and proper if there were legal authority therefor. Such owner would no doubt be required to register the car in the state of his newly acquired residence, thus being subjected to the burdensome obligation of carrying double registration and paying double license fees on his motor vehicle.

If a refund should be made to an owner who during the first half of the year sells his car to be thereafter used beyond the boundaries of the State, it seems both fair and logical that a refund should be made to an owner who during the same period removes with his motor vehicle from the State. However, if this situation is to be corrected, the correction must be made by the Legislature. It cannot be made by legal construction. This statute probably invites resort to the subterfuge of actual or fictitious sale from one member of a family to another or from the owner to a friend merely for the purpose of securing a refund of one-half the annual license fee. It is our opinion, however, that the sections quoted do not authorize a refund to the owner who during the first half of the year permanently leaves that State and whose motor vehicle is not thereafter on the highways of this State.

SCHOOLS: MINIMUM WAGE FOR TEACHERS: That after July 4, 1935, all teachers in public schools of this State shall be paid for their services a minimum wage of not less than $50.00 per month irrespective of the provision of a contract that may have been entered into prior to that time. (Re: House File No. 4, 46th G. A.)

April 30, 1935. *Department of Public Instruction:* We have your request for opinion on the following proposition:

"House File No. 4 of the Acts of the 46th General Assembly strikes the figures '$40.00' from Chapter 65 of the Acts of the 45th General Assembly pertaining to minimum wages for teachers and inserts in lieu thereof, the figures '$50.00.' This act goes into effect on July 4th and I wish that you would advise this office whether this will affect contracts that have been entered into prior to July 4th."

Chapter 65 of the Acts of the 45th General Assembly, amended Section 4341 of the Code so that the section, as far as it pertains to your inquiry, reads:

"All the teachers in the public schools of this State shall be paid for their services, a minimum wage of not less than $40.00 per month."

This figure has been changed by the present Legislature to provide that teachers shall not be paid less than $50.00 per month.

The general law on such propositions is clear, but its application to this particular set of facts is not quite so simple. Our Supreme Court in the case

of *Butters vs. City of Des Moines,* 202 Iowa, 30, had before it the question of the effective date of a statute. The defendant city on October 9, 1924, passed a resolution of necessity for improvement; in June, 1925, a resolution was passed ordering the construction of the improvement and the contract awarded August 9, 1925. The Special Session of the Legislature on the 26th day of April, 1924, passed an act providing for procedure in such cases, which act went into effect on October 28, 1924, pursuant to the constitutional provision. The question was whether the Council should have followed the old law or the new law, and in regard thereto, the court on page 32, said:

"The city council, having taken the necessary preliminary steps leading to the passage of the resolution of necessity, met on the 9th of October, 1924, to consider it. The question is, to what law should it look, for jurisdiction to act on that particular date? There can be but one answer to this question, and that is, the law as it existed on that date, to wit, the law as it stood prior to these amendments, which were added thereto by the special session of the 40th General Assembly. It cannot be urged that they were bound to take notice of and act under the amendatory law, which was not effective and operative at the time the city council acted. Until the time arrives when a law is to take effect, and be in force, a statute which is passed by both houses of the legislature and approved by the executive has no force whatever, for any purpose. Before that time, no rights may be acquired under it, and no one is bound to regulate his conduct according to its terms. The fixing of a date, either by statute itself or by constitutional provision, when a statute shall be effective is equivalent to a legislative declaration that the statute shall have no effect until the date designated. Such seems to be the consensus of opinion."

In the case of *Benshoof vs. City of Iowa Falls,* 175 Iowa, 30, the court also had before it the question of legality of special assessment proceedings. In this case, the act specifically provided that after January 1, 1914, certain proceedings were to be had. The resolution was made and the contract entered into in the year 1913 and under the original agreement, all work was to be completed by November, 1913. However, subsequently, the city entered into an extension agreement with the contractor whereby the contractor was given until the summer of 1914 to complete the job and it was accepted by the city in June, 1914, and on July 6th, the Council passed a resolution making the levy for the improvement and authorizing the issuance of bonds and directed the Clerk to give notice of the assessments, which notice was given to the plaintiff and others. The court there held that the Legislature undoubtedly intended that the statute should be prospective only and should not interfere with projects already properly instituted and therefore, the old law governed.

In *Burroughs vs. City of Keokuk,* 181 Iowa, 660, the same statute was under construction by the Supreme Court. The court points out that the statute was approved April 19, 1913, and became a law July 4, 1913, and by its terms applied to procedure after January 1, 1914. The proceedings in the City Council for the assessment were instituted December 22, 1913, and publication given in December, 1913, but all subsequent proceedings took place in January, 1914. The court distinguished this case from the Iowa Falls case on the facts and held that as only the preliminary resolution had been passed in December, 1913, that the law prescribed in the procedure to be followed after January 1, 1914, should be followed.

On the proposition involved in your inquiry, however, we have a very dif-

ferent proposition. Section 4229 of the Code gives to the directors the power to enter into contracts with teachers, stating that they shall be in writing and among other things, shall state the length of time school is to be taught and the compensation, so that the contracts in question are in effect statutory contracts entered into by officers of a subdivision of the State pursuant to statute and this being true, all statutory provisions are considered a part thereof.

Two elementary rules of statutory construction are:

1. That statutes shall be prospective and not retrospective unless the Legislature so specifically provides, and

2. That the Legislature cannot impair the obligations of an existing contract.

But here, after July 4th, we are going to have contracts with teachers which provide for the payment of $40.00 per month, which were legal when entered into and we are going to have a statute which says that teachers shall not be paid less than $50.00 a month. We are going to have then a direct conflict between a contract in existence after that date and a statutory provision and it appears to us that the Legislature, having practically unlimited control over the subdivisions of the State, and that these are contracts entered into pursuant to statute and by officers of these subdivisions, that the minimum wages thereunder cannot be less than the minimum set up by the law effective after July 4th of this year, for you will notice the Legislature has said they cannot be paid less than $50.00 per month.

It is, of course, hornbook law that a State or its subdivisions cannot impair the obligations of their contracts or refuse to be bound thereby any more than anyone else, but on the other hand, if it is a matter over which the Legislature can assume control and has assumed control by setting a minimum wage, they can enact a law which shall state what the minimum wage shall be to teachers. There can be no question of impairment for the teacher cannot complain that her contract is impaired when she is getting more than set by contract, as the test of impairment under the present holdings by courts of last resort is, whether the one complaining of impairment has suffered pecuniary damage, and the State having entered into the contract through the officers of its subdivisions, can through the Legislature as its duly elected representative, agree to pay the teachers more than it originally contracted to do, as the Legislature is supreme on such matters.

Our opinion does not make the statute retrospective as the payments are to be made after the effective date of the act and the statute applies only to payments thereafter and not before.

It is, therefore, the opinion of this department that after July 4th, 1935, all teachers in public schools of this State shall be paid for their services a minimum wage of not less than $50.00 per month irrespective of the provisions of a contract that may have been entered into prior to that time.

SECRETARY OF STATE: ANNUAL REPORTS: CORPORATIONS: A corporation organized after January 1st of any year is not exempt from legal duty to file annual report on March 1 of succeeding calendar year.

May 1, 1935. *Secretary of State:* We have your letter of recent date, the first three paragraphs of which are as follows:

"Section 8508, Chapter 390 provides that cooperative associations shall file annual reports on or before March 1st and that such reports shall cover the 'Calendar or fiscal year immediately preceding the said first day of March, provided that a calendar or fiscal year has been completed on said date."

"Section 8508-A1 exempts corporations, organized after January 1st of any year, from filing these reports in the year in which they were organized.

"I would like your opinion on the question as to whether a corporation, organized after January 1st of any year and which is exempt under the subsection A1, would be required to file such a report covering the two months period from January 1st to March 1st of the following year."

The sections to which you refer are set out in full as follows:

"8508. *Annual report—penalty.* Every association organized under the terms of this chapter shall annually, on or before the first day of March of each year, make a report to the Secretary of State; such report shall contain the name of the company, its principal place of business in this State, and generally a statement as to its business, showing total amount of business transacted, number of members, total expense of operation, amount of indebtedness, and its profits or losses. Such reports shall be for the calendar or fiscal year immediately preceding the said first day of March, provided that a calendar or fiscal year has been completed upon said date.

"Failure to comply with this section before April first of each year shall subject the delinquent association to a penalty of ten dollars."

"8508-A1. *Exemption from report.* Any corporation organized under the provisions of this chapter after the first day of January shall be exempt from the provisions of Section 8508 for the year in which incorporated, after which it shall, however, be subject to all of the provisions of said section."

The section first above quoted provides that every association organized under the terms of Chapter 390 of the Code shall annually on or before the first day of March of each year make a report to the Secretary of State. This provision, of course, could not apply in any calendar year to associations organized after the first day of March of that year. This section by its terms requires every association organized prior to March 1st of any year to make a report.

Section 8508-A1, which was enacted as a part of Chapter 160 of the Acts of the 41st General Assembly, however, provides an exception to the requirements set out in Section 8508. It provides that any corporation organized under Chapter 390 after the first day of January shall be exempt from the provisions of Section 8508 for the year in which incorporated. What is meant by the language "shall be exempt from the provisions of Section 8508 for the year in which incorporated"? Does this language mean only the balance of the calendar year in which the association was incorporated, or does it mean the full first year of its corporate existence? We are of the opinion that the Legislature, when it provided the exemption "for the year in which incorporated" intended the exemption to cover only the balance of the first calendar year of the corporate existence of any such association.

Any corporation organized under the provisions of this chapter after the first day of January and before the first day of March would necessarily have transacted business for less than two months when March 1st arrived, and Section 8508-A1 was intended to exempt such corporations less than two months old from the duty of making the annual report required by Section

8508. It is true that a corporation organized in the latter part of December would, on the following March 1st, be slightly more than two months old, but we are of the opinion it would not be exempt from the duty to make such annual report.

Section 63 of the Code of Iowa, 1931, is in part as follows:

"63. *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:

"11. *Month—year—A. D.* The word 'month' means a calendar month, and the word 'year' and the abbreviation 'A. D.' are equivalent to the expression 'year of our Lord'."

From this section it will be seen that unless such construction would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the statute, the word "year" means "year of our Lord" or in other words the calendar year.

In the case of Sawyer vs. Steinman, 148 Iowa 610, the court had under consideration the construction of the expression, "in any one year." Section 2450 of the Code of Iowa provided that "only one statement of general consent * * * * shall be canvassed by the Board of Supervisors in any one year." Appellant contended that the words "in any one year" should be construed as equivalent to "within twelve months." We quote from the opinion as follows:

"The word 'year' is, of course, often used as meaning a period of twelve months. But it is manifest that a clear distinction may exist between the expressions 'within twelve months' and 'in any one year.' Under our statute of definitions, the word 'year' is presumptively equivalent to 'year of our Lord.' Section 48, par. 11. This latter expression undoubtedly means an identical year as indicated by the Christian calendar, commencing January 1st and ending December 31st. And we think that must be the construction to be placed upon the statute under consideration. No cases are cited to us which hold to the contrary."

Section 8508 provides that such reports shall be for the calendar or fiscal year immediately preceding the said first day of March provided that a calendar or fiscal year has been completed upon that date. If any corporation were permitted to operate more than one year without making an annual report and were then required to make a report only for the calendar or fiscal year immediately preceding the said first day of March, there would be in the case of some corporations a period of corporate activity which would not be covered by an annual report. In other words, if a corporation was organized on April 1st and was exempt from making an annual report on the following March 1st because it had not had corporate existence for one year, it would be exempt from the duty of making any report for the first 11 months of its existence.

It is therefore our opinion that a corporation organized after January 1st of any year is not exempt under Section 8508-A1 from the legal duty to file an annual report on the first of March of the succeeding calendar year. It is the duty of every corporation organized under Chapter 390 to file the annual report required by Section 8508 on or before March 1st immediately following the expiration of the calendar year in which such association is incorporated. Such report shall be for the calendar year immediately pre-

ceding the first day of March or for that portion of the calendar year during which the association had its corporate existence, or if a fiscal year has expired prior to the first day of March, the report shall be for the preceding calendar or fiscal year at the election of the corporation. Such report would not cover the period from January 1st to March 1st of the year in which the report is made unless the fiscal year should extend into that period.

LEGISLATURE: CHAIRS—SALE OF: A resolution authorizing members of the Legislature to purchase their chairs is without force and effect when passed by only one house.

May 3, 1935. *Secretary, Executive Council:* Your letter of May 3d, addressed to the Attorney General, has been referred to me for reply. You state the Executive Council desires an opinion as to whether or not the Iowa Senate has power, by virtue of a Senate resolution, to authorize the individual Senators to purchase the chairs which they used during the session of the Legislature at the nominal price of $10.00, the original cost of the chairs being $40.90 each.

It has been the practice for many years for the members of the Legislature to purchase from the State the chairs occupied by them in the House and Senate Chambers at a nominal price of $10.00 or $15.00 per chair. I assume such practice was authorized by an act or joint resolution passed or concurred in by both houses.

For the purposes of this opinion I am assuming that the chairs in question are of the reasonable value of $40.90 each and that that amount, or substantially that amount, must be expended to replace any chair that is removed. The resolution then would have the effect of giving to members of the Senate who chose to pay the $10.00 purchase price, compensation for their services additional to that provided for by statute. Such a transaction would be equivalent to the appropriation of public property for private purposes, and such an appropriation requires the favorable votes of two-thirds of the members elected to each branch of the General Assembly.

Section 31 of Article 3 of the Constitution of Iowa is as follows:

"Sec. 31. No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor, shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, and no public money or property shall be appropriated for local, or private purposes, unless such appropriation, compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly."

Section 296 of the Code provides that the Executive Council may contract for the supplies for the capitol buildings and grounds and for all necessary furniture for the capitol buildings and for the various departments of the State government at the seat of government.

Section 300 of the Code provides that said Council may dispose of any personal property when the same shall for any reason become unfit for any further use for the State. Section 17 of Article 3 of the Constitution provides that no bill shall be passed unless by the assent of a majority of all the members elected to each branch of the General Assembly.

The question presented is not whether the House and Senate can by proper legislation authorize the sale at an inadequate price of such property but is

whether the Senate has the power, by virtue of a Senate resolution, to authorize individual Senators to purchase such chairs at a nominal and inadequate price. It is the opinion of this department that such a resolution is without force or effect and confers no authority upon the Executive Council whatever. Since the Executive Council had no authority prior to the passage of said Senate resolution to dispose of such State property at an inadequate price, and since said resolution conferred no additional authority, we assume the Council will take no steps to divest the State of its ownership of the chairs occupied by members of the Senate and House.

DEPARTMENT OF HEALTH: NURSE EXAMINERS: Senate File No. 50 transfers to the Board of Nurse Examiners and to the secretary thereof the duties heretofore held and discharged by the Department of Health.

May 6, 1935. *Commissioner of Health:* We have by this morning's mail your letter of May 3d in which you submit several questions, the first of which is as follows:

"1. Prior to the enactment of S. F. 50, the State Department of Health sent out all applications for renewals of licenses to members of the nursing profession and collected all fees. Inasmuch as this bill states specifically that all applications for licenses to practice the profession of nursing are to be made direct to the secretary of the Board of Nurse Examiners and that all examination, license and renewal fees are to be paid direct to and collected by the Secretary of the Board, is this department required to furnish to the State Board of Nurse Examiners, the supplies, equipment and personnel necessary for the functioning of their division?"

It is our opinion after Senate File No. 50 becomes effective your department will no longer be required to furnish to the State Board of Nurse Examiners the supplies, equipment and personnel necessary for the functioning of their division. Sections 6 and 7 of Senate File No. 50 are as follows:

"Sec. 6. All records which pertain to the licensing of nurses in this State shall be kept by the secretary who shall keep a record of all proceedings of the board of nurse examiners and perform such further duties as the board shall generally or specifically determine."

"Sec. 7. Every application for a license to practice nursing in this State shall be made direct to the secretary of the board of nurse examiners, and upon the granting of any such license the secretary shall certify to the Department of Health that such license has been granted. Every reciprocal agreement for the recognition of any such license issued in another State shall be negotiated by the board. All examination, license and renewal fees received from such persons licensed to practice nursing shall be paid to and collected by the secretary of the board, who shall remit to the Treasurer of state quarterly all fees collected, and at the same time render to the State Comptroller an itemized and verified report showing the source from which said fees were obtained. All such fees collected and remitted shall be placed in a special fund by the Treasurer of State and the State Comptroller to be known as the 'Nurses' Fund,' to be used by the board to administer and enforce the laws relating to the practice of nursing, to elevate the standards of schools of nursing, and to promote the educational and professional standards of nurses and nursing in this State, and no part of such expense shall be paid out of the State Treasury. Any remainder in said fund at the end of each fiscal year, after all expense in carrying out the provisions of this act have been paid, or a sum sufficient for payment thereof set apart, shall be paid into the general fund of the State. Said fund shall be subject at all times to the warrant of the State Comptroller, drawn upon written requisition of the chairman of the board and attested by the secretary, for the payment of all salaries and other expenses necessary to carry

out the provisions of this Act, but in no event shall the total expenses therefor exceed the total fees collected and deposited to the credit of said fund."

Under these sections all records which pertain to the licensing of nurses shall be kept by the secretary of the Board of Nurse Examiners. The secretary shall also keep a record of all proceedings of the Board of Nurse Examiners. Upon the granting of a license to practice nursing, the secretary shall certify to the Department of Health that such license has been granted. All examination, license, and renewal fees shall be paid to and collected by the secretary of the Board, who shall remit to the Treasurer of State quarterly all fees collected. At the same time she shall render to the State Comptroller an itemized and verified report showing the source from which such fees were obtained, and such fees shall be placed in a special fund to be known as the "Nurses' Fund." This fund shall be used by the Board to administer and enforce the laws relating to the practice of nursing. No part of this fund is turned over to the State Department of Health. It is contemplated that the nurses' fund will be adequate to pay all of the expenses incurred by the Board and its secretary. We do not believe it was contemplated by the Legislature that the State Department of Health should furnish and pay for supplies, equipment, and personnel necessary for the functioning of the department placed by Senate File No. 50 under the rather exclusive control of the Board of Nurse Examiners.

Your second question is as follows:

"2. Will the State Department of Health be required to turn over to the new board its records pertaining to nursing licensure?"

Under the law, as it exists at the present time, the State Department of Health is required to keep certain records pertaining to nursing licensure. Those records belong primarily to the State of Iowa. They are compiled and preserved in their present form by the State Department of Health and belong to and should remain with that department unless there is some statutory requirement that they be transferred to the secretary of the Board of Nurse Examiners. Section 6 above referred to provides that all records which pertain to the licensing of nurses in this State shall be kept by the secretary. Since the secretary of the Board of Nurse Examiners has maintained an office for some years, she has, no doubt, accumulated rather extensive records which in part are a duplication of those now in the possession of the State Department of Health.

It is our opinion said Section 6 does not require the State Department of Health to turn over to the new Board and its secretary its records pertaining to nursing licensure. Such records are, however, public records and the secretary to the Board of Nurse Examiners should have free access to and the use of all records pertaining to the practice of nursing and nursing licensure now or hereafter in the offices of the State Department of Health. We do not believe Section 6 is retroactive or that it means that the secretary has the duty or right to go through the departments and take over all records made in the past which pertain to the licensing of nurses, but all records which pertain to that subject in this State shall hereafter be kept by such secretary.

The following is your third question:

"3. Are we correct in assuming that the Commissioner of Public Health is not required to sign and issue certificates to practice nursing? Under Section 2442 the Commissioner of Health, formerly, under the seal of the department, signed all licenses issued authorizing licentiates to practice the profession of nursing. Section 7 of the new bill states that 'upon the granting of any such license the secretary shall certify to the Department of Health that such license has been granted,' indicating in effect that the application has been received by the secretary of the new board—statutory fee paid—that the applicant has successfully passed the examination and received a certificate to practice the profession of nursing and that the secretary of the Nurses Board is required, merely as a matter of course, to certify to this department a list of the successful applicants in order to keep our present records up to date."

It is the opinion of this department that you are correct in assuming that the Commissioner of Public Health is not required to sign and issue certificates to practice nursing. Section 7 of Senate File No. 50 provides that "upon the granting of any such license the secretary shall certify to the Department of Health that such license has been granted." The certification to the Department of Health is not made until the license has been granted. It seems obvious then that your department is not required to sign and issue certificates to practice nursing but merely has the duty of keeping and properly filing such records as are certified to your department with reference to the granting by the Board of Nurse Examiners of licenses. The fact that it is made the duty of the secretary to certify to your department the granting of licenses indicates it was the intention of the Legislature to provide that your department should retain such records as it now has and add to them from time to time as the secretary certifies that new licenses have been granted.

Section 8 of Senate File No. 50 provides that subject to the approval of the Commissioner of Public Health the Board of Nurse Examiners may appoint such assistants and inspectors as may be necessary to properly administer and enforce the provisions of the act. They shall perform such duties as the Board shall assign to them and their compensation shall be fixed by the Executive Council.

It would seem then that except for the duty of receiving occasional reports from the secretary of the Board of Nurse Examiners certifying lists of applicants who have passed the examinations given by such Board, the duty to properly file and keep such records and the duty to approve appointments made by the Board under Section 8, this bill transfers to the Board of Nurse Examiners and to the secretary of said Board the duties heretofore held and discharged by the State Department of Health.

SENATE FILE 335: PUBLICATION CLAUSE: SECRETARY OF STATE: Secretary of State does not have authority to select newspapers for publication of bill when enrolled bill contains merely the words "publication clause."

May 13, 1935. *Secretary of State:* We acknowledge receipt of your letter of May 7th in which you state that the last section of Senate File 335, passed by the 46th General Assembly, purports to be a publication clause, but reads merely "publication clause." You submit this question:

Will you please advise if we may regard this form of publication clause as clear in purpose and as sufficient authority for this office to select newspapers for publication of this bill under the authority of Section 55?

Section 55 of the Code of Iowa, 1931, is as follows:

"55. Designation of papers. In case either or both of the papers named in the Act shoud fail or decline to publish said Act as required therein, the Secretary of State may designate another paper or papers in which publication shall be made, and if such papers are not designated in the Act, the same may be designated by the Secretary of State, and the Act published Accordingly."

It will be noted the section just quoted provides that "if such papers are not designated in the act, the same may be designated by the Secretary of State, and the act published accordingly."

Section 26 of Article 3 of the Constitution of Iowa provides, however, that "If the General Assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state."

We have before us a printed copy of this bill, being a copy printed by order of the Senate, which contains a Section 5 as follows:

"Sec. 5. This Act being deemed of immediate importance shall be in full force and effect from and after its publication in....., a newspaper published at....., Iowa, and the....., a newspaper published at....., Iowa."

If the printed copy which is referred to is a correct copy of the original bill and if the bill, as passed by the House and Senate, contained a publication clause in the form above quoted, then the question resolves itself into whether or not the signatures of the President of the Senate and the Speaker of the House and the approval of the Governor attested by his signature are necessary to give the bill the force and effect of law. We do not have before us a correct copy of the bill as voted upon by both branches of the Assembly, unless the printed copy is a true copy, but we are assuming, so far as the publication clause is concerned, that it is a correct copy and that the bill, as passed by the General Assembly, contained an adequate publication clause with the provision in it that the "act being deemed of immediate importance shall be in full force and effect from and after its publication" in two newspapers of the State.

Section 15 of Article 3 of the Constitution provides that "every bill having passed both houses shall be signed by the Speaker and President of their respective houses."

Our Supreme Court has spoken on this subject as follows:

"The enrolled bill in the instant case contains thereon the names of the officers whose signatures are required by the Constitution. Article 3, Section 15. An Act which bears the signatures of the proper officers of the two houses and of the governor, is presumed to have become a law, pursuant to the requirements of the Constitution." Dayton vs. Pacific Mutual Life Insurance Company, 202 Iowa 753, 758.

"The enrollment of a legislative bill and the due authentication of such enrollment by the signatures of the Speaker of the House, President of the Senate, and Governor, constitute an unimpeachable attestation of what the legislative department has done. In other words, such a bill is conclusively presumed to have been regularly and legally enacted, and the courts have no power to go behind such enrolled bill, and to look to the legislative journals or other records for the purpose of determining whether constitutional requirements as to form and procedure were observed." Davidson Building

Company vs. E. H. Mulock, 212 Iowa 730. Also see F. Price Smith vs. Thompson, 258 N. W. 190.

Since the Constitution provides that every bill having passed both houses shall be signed by the President and Speaker of their respective houses, we must take the view that we cannot go back of the enrolled bill bearing their signatures and the signature of the Governor for the purpose of ascertaining the contents of the bill. The enrolled bill is the ultimate proof of the text of the law. Smith vs. Thompson, supra.

Section 5, as it appears in the enrolled bill, consisting merely of the words "publication clause" is not sufficient authority for the insertion of a publication clause authorizing you to publish the bill under the provisions of Section 55. The Legislature may provide that laws shall take effect upon being published in newspapers in the State, but in Section 5 of the enrolled act there is no provision as to whether the publication shall be in newspapers or in some other manner, and if the Secretary of State were to assume from the words in Section 5 that the Legislature deems the act of immediate importance and that publication necessarily meant publication in two newspapers in the State, she would be assuming more than is justified by the language of the act. The Secretary of State has no authority to usurp the functions of the Legislature and to write into an act the provision that the General Assembly deems the law of immediate importance and that it shall take effect by publication in two newspapers.

There is more lacking here than the mere failure to designate the newspapers, and we must therefore hold that Section 5 of the act in question, as set out in the enrolled bill, is not sufficient authority for the publication of said act under the provisions of Section 55 of the Code.

BANKS AND BANKING: REFUNDS ON ACCOUNT OF TAXES PAID ON BANK STOCK. Bank having closed and been placed in hands of receiver. Petition of the stockholders who have not paid their taxes, should be granted by Board of Supervisors, but that stockholders who have paid their taxes are not entitled to a refund.

May 17, 1935. *County Attorney, Tama, Iowa:* I have your letter of some time ago in regard to refunds to certain individuals on account of taxes paid on bank stock, the bank having closed and been placed in the hands of a receiver. We have held this in abeyance as I wanted to wait until House File 471 became a law, so as to advise you as to the present status of this.

House File 471 of the 46th General Assembly was signed by the Governor on May 4th and has now been published as provided in the act.

The facts, as I understand, are that one stockholder was assessed for the year 1933 on 16 shares of stock and the bank went into receivership in October, 1933, the tax being paid in 1934. It further appears that the stockholder paid 100% on the stock assessment and has filed an affidavit with the receiver showing such payment. You advise that the taxpayer has filed a claim for refund and you ask whether in our opinion, the refund should be allowed, and whether there would be any difference if this tax had not been paid. Chapter 91 of the Laws of the 45th General Assembly, Extra Session, went into effect on January 16, 1934, and our Supreme Court in the early case of First Congregational Church vs. Linn County, 70 Iowa, 396, said:

"The exemption from taxation under Code Section 797 was not intended to act retrospectively and exempt from prior taxes or prior liability for taxes. The provision was intended to act prospectively and to exempt from future liability."

There is no provision in Chapter 91 that would make it retrospective and it is the rule that the statute under which the exemption is claimed, should be strictly construed where the property is taxable under a previous general statute and the remission is provided for by later statute. The exemption must be clearly and unequivocally expressed.

The assessment is made at the first of the year on the supposed value and the tax levied the following September and paid the following year. In this particular case, a receiver is not appointed until October, so that the bank here was not only a going concern on January 1, 1933, which is the event which determines the taxpayer's liability, for taxes thereon, but was also a going concern in September when the levy was paid.

It is clear then, that as Chapter 1 of the Laws of the 45th General Assembly, Extra Session, was not retroactive, that the taxpayers here can obtain no relief thereunder irrespective of whether the taxes were paid and the refund was asked, or whether they were not paid and a remission is sought. However, House File 471 of the Acts of the 49th General Assembly, which has just become a law, provides:

"Whenever a bank operated within the State of Iowa has been heretofore, or shall hereafter be closed and placed in the hands of a receiver, the Board of Supervisors shall remit all unpaid taxes on the capital stock of said bank."

You will note that this act is both retrospective and prospective and therefore covers taxes that were levied before the passage of the bill as well as those that will be levied after the bill becomes a law so long as they were unpaid.

It is, therefore, the opinion of this department that the petition of the stockholders who have not paid their taxes, should be granted by the Board of Supervisors, but that the stockholders who have paid their taxes, are not entitled to a refund.

SCHOOLS: CERTIFICATE WHEN TRANSFERRING FROM ONE HIGH SCHOOL TO ANOTHER: A student transferring from one high school to another, after having successfully completed one semester or one period of work, would not be required to present an affidavit or certificate of the County Superintendent as provided for in Sec. 4276 of Code.

May 17, 1935. *Department of Public Instruction:* We have your request for opinion on the following proposition:

"Section 4276 of the Code provides that any person applying for admission to any high school in this State shall, among other things, present a certificate signed by the County Superintendent showing proficiency in the common school branches, but such certificate shall not be required for admission to the high school in any school corporation when the pupil has finished the common school branches in the same corporation. If a student enters high school in the same school corporation in which he has finished the common school branches and after attending that school a year or two years, he moves to a rural school district in another part of the State and enrolls as a non-resident in another high school, would it be necessary for him to have the certificate required in Section 4276 of the Code?"

Section 4276 of the Code merely requires the certificate or affidavit at the

time of applying for admission to high school, that is, the ninth grade, and if a pupil has completed the eighth grade in the same school corporation, he is not required to present a certificate upon admission to the high school, and if subsequently and before finishing that high school, he goes to another high school, he is not seeking admission as provided for in this section, but is a transfer student as he will resume his studies at the place where he left off in the former school, and therefore, such a certificate would not be required.

It is, therefore, the opinion of this department that a student transferring from one high school to another, after having successfully completed one semester or one period of work, would not be required to present an affidavit or certificate of the County Superintendent, as provided for in Section 4276 of the Code.

SECRETARY OF EXECUTIVE COUNCIL: SECTION 1797 OF 1931 CODE OF IOWA: HOUSE FILE NO. 507, ACTS OF FORTY-SIXTH GENERAL ASSEMBLY:

The duties of the secretary of the Executive Council include that of being secretary to the new State Conservation Commission.

May 20, 1935. *Executive Council:* This will acknowledge receipt of your letter of the 16th instant in which you request the opinion of this department on the following:

What is the status of the secretary of the Executive Council under the provisions of Section 1797 of the 1931 Code of Iowa when read in connection with House File No. 507, Acts of the 46th General Assembly?

House File No. 507, Acts of the 46th General Assembly, which creates the new Conservation Commission of the State of Iowa, repeals certain sections of the 1931 Code of Iowa, but does not repeal Section 1797 thereof. This section provides:

"*Secretary.* The secretary of the Executive Council shall, without additional compensation, act as secreary of the State Board of Conservation."

We wish to call your attention to Section 34 of the act creating the State Conservation Commission and particularly to that part of the same which provides:

"Wherever in the statutes, other than this Act, reference is made to the Fish and Game Commission, the Fish and Game department, or the Board of Conservation, it shall be deemed to mean 'State Conservation Commission'; * * * * * *,"

Therefore, it is the opinion of this department that Section 1797 of the 1931 Code of Iowa, which designates the secretary of the Executive Council as secretary of the Board of Conservation, without additional compensation, is still in full force and effect with one change, which is that where this section refers to the "State Board of Conservation," it shall now read, "State Conservation Commission." The duties of the secretary of the Executive Council include that of being secretary to the new State Conservation Commission.

SCHOOLS: TUITION: SECTIONS 4277 AND 4278 OF CODE OF IOWA, 1931: The debtor school district is not liable for the tuition and the County Treasurer is not authorized to transfer the amount of said tuition from the funds of the debtor corporation to the creditor corporation.

May 20, 1935. *County Attorney, Clarion, Iowa:* We have your request for opinion on the following proposition:

"A student completed the 8th grade in one district moved to another district which did not embrace a high school and thereafter, attended school in an adjoining district having a high school. Upon entering high school, he did not present the certificate of the County Superintendent and was admitted to high school without such certificate and continued his studies therein. The creditor district has applied to the debtor district for the payment of tuition as provided in Section 4277 of the Code, but the debtor district refuses payment on the theory that the creditor district, having accepted the student without requiring the certificate of the County Superintendent, that the debtor district is not liable for his tuition. Will you please give me your opinion as to liability and as to whether it is necessary that the amount be transferred by the County Treasurer as provided in Section 4278 of the Code?"

We are not quite clear from your question as to whether the student attended high school in the same district in which he completed eighth grade or not. If he did, of course, there can be no question but what under Section 4276, he would not be required to have a certificate, for the certificate is only required where the student attends high school in a different corporation than the corporation in which he finished the common school branches. We are, therefore, assuming in our opinion, that the student is attending a high school in a different corporation from which he completed the common school branches.

Section 4276, under such circumstances, is mandatory, and it is for the protection of the debtor district, as otherwise, the creditor district might allow anyone to attend its high school whether he was entitled to attend or not, knowing that the debtor district would be liable therefor, and if the creditor district has allowed a student to attend school without requiring a certificate, they, of course, cannot be compensated for tuition by the debtor district. His enrollment, of course, in the creditor district was entirely proper if he had completed the course as approved by the Department of Public Instruction, as provided for in Section 4275, so that his credits in the high school cannot be in any wise affected by the question of payment of the tuition. Section 4278 is a companion statute to Sections 4276 and 4277 and therefore, the mandatory provisions of Section 4278 only apply where there is a liability of the debtor district to pay the tuition.

It is, therefore, the opinion of this department that the debtor district is not liable for the tuition and the County Treasurer is not authorized to transfer the amount of said tuition from the funds of the debtor corporation to the creditor corporation.

SCHOOLS: DIRECTOR OF SCHOOL BOARD: BOARD MEETING: Section 4216-c28 Director was entitled to oath of office—if he presented himself during organization meeting before it had adjourned and oath was refused, he is entitled to make oath within reasonable time after being notified by secretary of board.

May 20, 1935. *County Attorney, Clarion, Iowa:* We have your request for opinion on the following proposition:

"In one of the school districts of this County, the old board met on the third Monday in March as required by law, for the purpose of closing up the business for the old board and organizing a new board. The meeting was called at 2 p. m. One of the newly elected directors who had not yet qualified, arrived at the meeting at 2:30 p. m. The board, acting under Section 4216-c28 of the Code disqualified him because of his failure to take the oath

before the organization of the new board. Will you please advise us whether this director should be disqualified?"

Section 4216-c28 must be read with Section 4220 of the Code, and you will note that Section 4220 provides that the Board shall meet and organize at two o'clock P. M. or 7:30 o'clock P. M. The exact hour of two o'clock is of course, a very short period and as that would only be the duration of about a second, the Legislature intended by this that the Board should meet at two o'clock and should organize any time during the day or before the meeting had adjourned. There is, then, no set time for organization, for as pointed out above, it would be impossible to meet and organize at exactly two o'clock.

You will notice that Section 4216-c28 states:

"Each director shall qualify on or before the time *set* for the organization of the board."

The only time set then is during the first meeting of the Board, which is the organization meeting.

It is, therefore, the opinion of this department that this director was entitled to the oath of office and that if he presented himself during the organization meeting and before it had adjourned, and the oath was refused, then he is entitled to take the oath within a reasonable time after being notified by the secretary of the Board, after you have advised the secretary of the law on this matter.

RAILROADS: TRANSPORTATION: TRAVELING EXPENSES:

Section 7873, Code 1931 intends only that railroads and other transportation companies *operating in the State* shall provide free transportation for the Railroad Commissioners, their secretaries, experts or other agents while in the performance of their official duties.

May 21, 1935. *Railroad Commission:* I have your letter of May 8th in which you request an opinion from this department on the following proposition:

"Section 7873 of the Code of 1931 provides that the Commissioners, their secretaries, experts or other agents, while in the performance of their official duties, shall be transported free of charge by all railroads or other transportation companies operating within the State.

This Commission desires an opinion as to whether the Board of Railroad Commissioners can be given free transportation according to Section 7873, to all points on the various transportation lines now operating in the State of Iowa while on official business. The Commission is called upon to attend hearings in many parts of the country and it would seem that transportation lines operating in Iowa would have authority, under Section 7873, to issue transportation to all points on their lines, both within and without the State.

Your opinion in the above matter will be greatly appreciated."

Section 2151 of the Code of 1897 provides as follows:

"The Commissioners and their secretaries shall be carried free while performing their duties, *on all railroads and trains in the State,* and may take with them experts and other agents who shall be carried free."

The above section of the Code was amended, revised and codified by Paragraph 4 of House File 188 of the Acts of the 40th Extra General Assembly, to read as follows:

"The Commissioners, their secretaries, experts or other agents, while in the performance of their official duties, shall be transported free of charge *by all railroads or other transportation companies operating within the State.*"

This last enactment of the Legislature is now known as Section 7873 of the 1931 Code of Iowa.

The language used in Section 2151 of the Code of 1897, was very plain and unambiguous. The following clause used in the former statutes—"on all railroads and trains in the State," left no room for doubt as to the intent of the Legislature. The free transportation permitted by this former statute was on all railroads and trains in the State. However, the language used in the later statute appears to lend itself to a dual construction. Does the last clause of Section 7873, "shall be transported free of charge by all railroads or other transportation companies operating within the State," limit the extent of the free transportation or does it place a limitation upon the railroads or other transportation companies that can grant this free transportation? I do not feel it is necessary for us to adopt either one of the two possible constructions as above pointed out, for the reason that the laws of no State can have any extra-territorial effect. See Rasteve vs. Chicago, St. Paul and O. R. Co., 203 Iowa 430, at 436.

Even the Constitution of the United States cannot have any force or effect in any other country than the United States of America. See 25 Corpus Juris 311, Ross vs. McIntyre, 140 U. S. 453, 564; 11 Sup. Ct. 897; 35 L. Ed. 581; Door vs. United States, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128.

From the above decisions, it is very apparent that the State of Iowa could not pass any law governing the free transportation of its officials in any other state of the Union.

It is therefore the opinion of this department that the Board of Railroad Commissioners, their secretaries, experts or other agents, while in the performance of their official duties, can only be transported free of charge by all railroads or other transportation companies operating within the State and that Section 7873 of the Code of 1931 would not authorize free transportation by such companies outside the State of Iowa.

CODE—SECTION 5223: AUTO LICENSE DEPARTMENT CLERK: BOARD OF SUPERVISORS: 1. Is full-time clerk of auto license department entitled to specific minimum wage? 2. Can Board of Supervisors decline to approve appointment of any deputy? 3. Interpretation of Section 5223 of Code, as amended.

May 21, 1935. *County Attorney, Cherokee, Iowa:* Your letter of May 10th, addressed to the Attorney General, has been referred to me for reply. You state that a question has arisen as to the proper interpretation of Section 5223 of the 1931 Code of Iowa, as amended by Section 33 of Chapter 89, Laws of the 45th General Assembly, and Section 1 of Chapter 60 of the Acts of the 45th General Assembly, Extraordinary Session.

The Supreme Court of Iowa in the recent case of Smith vs. Board of Supervisors, held Chapter 89, above referred to, unconstitutional. Chapter 60 of the Acts of the 45th General Assembly, Extraordinary Session, substituted the word "sixty-five" for the word "sixty" in Section 33 of said Chapter 89. In view of this Supreme Court decision there is no further occasion to consider the amendments to Section 5223, as they have been held to be null and

void. I assume you will have no difficulty in construing Section 5223 as it stands without the attempted amendments.

Your second question follows:

"Is a clerk who is employed full time, and in charge of the auto license department, entitled to any specific minimum wage?"

We have in mind no statute fixing a minimum wage for clerks employed in the office of the County Treasurer. The statutes fix the salaries of the county officers and their deputies but not the salaries of clerks in the office of the County Treasurer.

Your third question is:

"Can the Board of Supervisors decline to approve the appointment of any deputy and thereby automatically place all employees under the definition of clerk?"

We believe this question should be answered in the negative. Chapter 261 of the Code provides the rate of compensation for county officers, deputies and clerks. Section 5238 provides that the various county officers 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 the appointment, shall be by resolution made of record in the proceedings of the Board.

Section 5241 prescribes the qualifications for deputy county officers and Section 5242 provides that 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.

Clerks are not required to qualify as deputies unless specifically so required by the officer appointing them or by the Board of Supervisors, nor do they have the powers conferred by statute upon deputies. While it is true the statute provides that county officers may, with the approval of the Board of Supervisors, appoint one or more deputies or assistants respectively, we do not think the Board by arbitrarily withholding its approval of any and all appointments of deputy county officers may require the county officers to conduct the business of their respective offices without the aid of deputies. The appointment is made by the county officer with the approval of the Board of Supervisors. To fill the office of Deputy County Treasurer, appointment by the Treasurer and approval by the Board of Supervisors are both necessary, but the law contemplates there shall be certain deputy county officers and the Board cannot defeat the legislative intent by refusing to approve any and all appointments. The Board should not approve the appointment of a dishonest or poorly qualified person, but it should recognize and approve any reasonable and proper appointment made by the county officer.

You submit an additional question relating to the liability of a school district in which no school is maintained for transportation of a child to a

neighboring school. Your letter is being referred to Mr. Ryan in this department, who has school questions in his assignment.

LEGISLATURE—CLOCK STOPPED: BILLS—DATE OF SIGNING: 1. Is it proper for bills signed during this period to bear the date the clock was stopped? 2. Is it proper for bills signed after assembly adjourns to bear the date the clock was stopped?

May 22, 1935. *Secretary of the Senate:* We have your letter of this date in which you state that at the last session of the General Assembly the clock was stopped on the 23d day of April, 1935, and the Senate continued in session as of that day until the 3d day of May, 1935. You state further that it is necessary that the date of signing by the Governor of various bill be recorded in the journal of the Senate, and that communications received during the last legislative day and including the period from April 23d to May 3d inclusive, advising you that the Governor had during that period signed certain bills, carried the date April 23d. You then submit this question:

"Is it proper and legal for the Senate Journal to state that these bills have been signed on April 23rd, when such bills were signed by the Governor during the period while the Senate was yet in session?"

We believe this question should be answered in the affirmative. Your advice as to the date of the signing of such bills came from the Governor's secretary and was to the effect that the Governor had signed the bills as of April 23d. That notification with the further fact that the bills were returned duly signed to the Senate while it was still in session should be ample authority for you to show in the journal the signing of such bills on April 23d.

Your second question follows:

"Is it proper for the Senate Journal to show bills to have been signed on the 23rd day of April, when in fact they were signed after the Senate adjourned sine die on the 3rd calendar day of May, which was still the 23rd legislative day of April?"

This question must be answered in the negative. The group of bills covered by this question are those which were signed by the Governor subsequent to the 3d day of May. The Legislature was not then in session and the journal should not show that a bill was signed on one day which was actually signed on another. Presumably the Senate journal would not show any transaction which occurred after adjournment, and the signing of the bills in question was subsequent to adjournment.

BEER LAW (46th GENERAL ASSEMBLY): CLUBS:
Qualification as a club.
Permit fee discussed.

May 24, 1935. *City Solicitor, Cedar Rapids, Iowa:* This will acknowledge receipt of your letter of the 23d instant in which you request the opinion of this department on the following question:

"Under the new beer law passed by the 46th General Assembly of the State of Iowa, and referring to page 10, Section 1921-f109 and Section 1921-f110, we have in Cedar Rapids three Bohemian lodges, some of them having been organized as early as 1860 and all of them having been organized for more than twenty-five years. The question comes up as to whether they are to be construed as clubs so that they could take out a beer permit for $100.00."

If the organizations which you mention can qualify under Sections 1921-f109, 1921-f110 and 1921-f111 of the beer law, there is no question but what they could be issued beer permits. The question of incorporation under the laws of the State of Iowa might arise and in the event that they are not so incorporated, it may be that they could qualify under the provision with regard to being "regularly chartered branches of nationally incorporated organizations" under Subsection c of Section 1921-f110. If this were true and assuming that they could meet all other qualifications set forth in the sections of the beer law above cited, they can be granted a permit to sell beer as granted to clubs.

A question might arise as to the amount to charge for said permit. It is the opinion of this department that power is given to cities, towns and special charter cities to fix the fee, the minimum being one hundred dollars ($100.00) and the maximum, three hundred dollars ($300.00). We assume that this refers to retail establishments selling beer to the general public. Under club permits, clubs are prohibited from selling beer to the general public and are permitted to sell beer only to their members. This, of course, makes a limited amount of possible sales, the sales being limited to members only. Therefore, we feel that there is a distinction between these types of beer permits and, by way of illustration, if the city ordinance fixes the permit fee at three hundred dollars ($300.00) for retail class "B" permit holders, then the club permit fee could be fixed at one hundred dollars ($100.00).

OLD AGE ASSISTANCE LAW: FUNERAL EXPENSES AS LIENS:
Amounts advanced for funeral expenses for burial of aged persons receiving old age assistance would be a lien on any property of the person or persons so benefited.

May 24, 1935. *Old Age Assistance Commission:* This will acknowledge receipt of your request of recent date for the opinion of this department as to whether or not the amount advanced for funeral expenses for burial of aged persons receiving old age assistance under Section 25 of Chapter 19, Acts of the 45th General Assembly in Extraordinary Session, would be a lien on any property of the person or persons so benefited.

Section 25 of Chapter 19, Acts of the 45th General Assembly in Extraordinary Session, provides as follows:

"*Funeral expenses.* On the death of any person receiving old age assistance, such reasonable funeral expenses for burial shall be paid to such persons as the board directs; provided, such expenses do not exceed one hundred dollars and the estate of the deceased is insufficient to defray the same."

It is the opinion of this department that this would be, in its nature, assistance and under this act, all assistance is a lien on the property of the person or persons so benefited.

OLD AGE ASSISTANCE LAW (46th G. A.):
No penalty attaches to the non-payment of the head tax until after July 1, 1935.

May 24, 1935. *Old Age Assistance Commission:* This will acknowledge receipt of your letter of May 21st in which you request the opinion of this department relative to the 1935 payment of the head tax, under the old age assistance law, with reference to the right of your commission to pay pensions

during the month of June to any person or persons who had not paid the 1935 head tax.

Senate File No. 357, Acts of the 46th General Assembly, amends Chapter 19, Acts of the 45th General Assembly of the State of Iowa in Extraordinary Session. Under the law at this time, no penalty attaches to the non-payment of the head tax until after July 1, 1935.

In a recent conference with officials of the State Auditor's office, a memorandum of facts pertaining to the new old age assistance law was presented. We understand that a mimeographed copy of the interpretations of the State Auditor's office will be sent to all county officials in charge of the collection of this tax and the entering of penalties on the proper records of the county. It was pointed out in this conference that there is no default in the payment of the so-called head tax prior to July 1, 1935, and that no penalty would attach prior to that date.

Heretofore, we have concluded that the payment of this tax came under the rule with reference to all special taxes and that penalty would attach subsequent to April first of the year in which due. However, the amendments to Chapter 19, Acts of the 45th General Assembly in Extraordinary Session, change the same as above set out by Senate File No. 357, Acts of the 46th General Assembly of the State of Iowa.

BEER LAW (46th GENERAL ASSEMBLY): CLUB PERMITS:
Discussion of fee to be charged.
Granting power.

May 24, 1935. *Treasurer of State:* This will acknowledge receipt of your request for the opinion of this department with reference to the following questions:

What fee shall be charged for club permits under the new Iowa beer law?
Who is empowered to grant said permits?

It is the opinion of this department that club permits, under Sections 1921-f109, 1921-f110 and 1921-f111, are granted, when the premises of the club are situated within the corporate limits of a city, town or special charter city, by said city, town or special charter city. When the premises of the club are situated outside of the corporate limits of a city, town or special charter city, a permit is granted by the Board of Supervisors.

Section 1921-f117 provides in part as follows:

"* * * * * For a golf or country club * * * * the license may be granted for a period of six months, for which the license fee shall be fifty dollars. * * * * *."

We have advised several officials of cities and towns that it is our opinion that there is a distinction with reference to the permits as issued to clubs other than golf and country clubs and the class "B" permit which is issued to persons desiring to engage in the retail sale of beer and that the city council might fix a permit fee for retail class "B" permits at a certain amount and if they so desired, a club permit could be issued for some other amount, presumably less than the amount charged for retail class "B" permits. But there should be no discrimination as between the amount charged various clubs. We consider this possible as the club permit is a special class "B" permit as outlined in the beer law.

BEER LAW (46th GENERAL ASSEMBLY):

1. CLUBS: Cost of fee to be charged.
2. HOTELS: Discussion of fee to be charged.

May 24, 1935. *Mayor, Keokuk, Iowa:* This will acknowledge receipt of your letter of the 23d instant in which you request the opinion of this department on the following question:

"The question has arisen in Keokuk in regard to beer licenses for clubs such as the Elks, Moose, and Eagles. A committee has called upon me, asking us to issue them a $100.00 permit, stating that they cannot afford to pay $200.00, the amount the council agreed to charge for class 'B' permits.

"My understanding of the law is that we would be unable to issue clubs, such as the above, a $100.00 license and the balance $200.00 licenses. I do not believe that the State Permit Board would permit us to do that. I should like to have your opinion on the same.

"We have two small hotels in our city. According to the law, we can only charge them $100.00 for a permit, and it is causing us a lot of trouble among other beer permitholders."

Please be advised that it is the opinion of this department that there is a distinction between the class of permits issued to clubs and the class of permits issued to retail establishments for sale to the general public, in that clubs having club permits are permitted to sell beer to their members only.

Therefore, we feel that the city council would not be bound to charge the same fee for a club permit as it would for a retail beer permit for sale to the general public.

On this date, I have discussed the matter with the Honorable Leo J. Wegman, State Treasurer, who is chairman of the State Permit Board, and he feels that such a distinction exists and is in accord with this opinion.

In arriving at a fee to be paid by clubs for the right to sell beer, we construe the law as stated above in making a special class of this type of permit and in fixing a fee for such permits, of course, there could be no discretion between organizations of this nature or, in other words, all clubs would have to pay the same amount, but the amount fixed for clubs would not necessarily be the amount paid by retail class "B" permit holders who sell to the general public. This could be fixed in your ordinance as to what you desire to charge for the regular class "B" permit to enable those holding said permits for sale to the general public to sell beer. A definite fee could be fixed for club permits if the council so desired.

Regarding the second matter presented in your request for an opinion, you are advised that the State law is clear on the matter, and is not under the ordinance power of the city or town council. You will note in Section 1921-f117 of the beer law that the permit fee for hotels is fixed in accordance with the number of hotel rooms.

CONSERVATION COMMISSION: COMPETITIVE EXAMINATIONS:

This is an administrative matter for the commission to determine. The commission would be empowered to determine as to the nature of the examinations and those previously taken could be used by the commission in picking its personnel.

May 25, 1935. *Iowa State Conservation Commission:* We have your letter of May 24th requesting an opinion from this office on the following proposition:

"Under the provisions of House File No. 507, which is now a law, pertaining to the merging of the State Fish and Game Commission and the State Board of Conservation, there is a provision in Section 15, reading as follows:

'*Officers and Employees.* Said director shall, with the consent of the commission and at such salary as the commission shall fix, employ such assistants, including a professionally trained State forester of recognized standing, as may be necessary to carry out the duties imposed by this chapter on the commission; also and under the same conditions, said director shall appoint such officers as may be necessary to enforce the laws, rules and regulations, the enforcement of which are herein imposed on said commission. Said officers shall be known as State Conservation officers. * * * * *'

"Also under Section 16 we have the following:

'*Conservation officers.* No person shall be appointed as a conservation officer until he has satisfactorily passed a competitive examination held under such rules as the commission may adopt, and other qualifications being equal only those of highest rank in the examinations shall be adopted.'

"It is my information that the former Fish and Game Commission required all deputy game wardens to pass a written examination and I believe they were held at stated intervals or at least at such times as they might give public notice of or maybe private notice to the various applicants and that they were created according to the rules and regulations of the Fish and Game Commission.

"Also, the Board of Conservation has had a general policy of requiring all full time custodians of the various state parks under recent appointments to pass a written examination. However, these examinations have been taken from time to time as the applicants came into the office whenever he had time.

"I am writing to inquire if the examinations formerly held by the Fish and Game Commission for deputy game wardens and the Board of Conservation for state park custodians might be construed to apply to the present law; that is, whether those who have taken examinations under the former boards could be considered for appointment without additional examination and under the new rules and regulations of the present commission. There is a provision on this same House File, Section No. 24, that the existing rules, orders and regulations of the State Board of Conservation and the State Fish and Game Commission shall continue to be the rules, orders and regulations of the Conservation Commission created herein, until changed or modified by said latter commission.

"In view of the above facts and the other provisions of House File No. 507, we would ask for your opinion."

It would be the opinion of this department that the sections to which you refer relative to competitive examinations would be a part of the administrative duties of the new Conservation Commission, and that the commission could determine with reference to the nature of an examination which they desired to give applicants for these positions, and if, in the opinion of the commission, the examinations previously given made a situation as the commission desired to have it, those now employed who have previously taken examinations and are doing satisfactory work, could be continued if the commission so desired.

In other words, it is our opinion that this is an administrative matter for the commission to determine and under the law creating the commission, it would be empowered to determine as to the nature of the examinations and those previously taken could be used by the commission in picking its personnel.

ELECTION OF MAYOR: CITY COUNCIL OF NEW HAMPTON: CITIES AND TOWNS: City Council unable by majority vote of its members to agree on anyone to fill the vacancy caused by the death of the acting mayor.

May 25, 1935. Your letter of May 3d, addressed to the Attorney General, has been referred to me for reply. You state that at a special meeting of the city council of New Hampton an effort was made to fill the vacancy resulting from the death of Mayor F. J. Conley, but that all voting by the members of the council in an effort to elect a mayor to fill the vacancy resulted in a tie vote, which tie still exists, and you state the council is unable by a majority of its members to agree upon anyone to fill the vacancy.

Section 5663 of the Code, 1931, provides in part as follows:

"5663. *City and town councils.* City and town councils shall:

"8. Election for filling vacancies. Elect by ballot persons to fill vacancies in offices not filled by election by the council, and the person receiving a majority of the votes of the whole number of members shall be declared elected to fill the vacancy."

It has been held by our Supreme Court in the case of *State vs. Dickey,* that a majority of all the members of the council must vote for a candidate to fill a vacancy, and a different conclusion could not be arrived at in view of the plain language of Sub-section 8 above quoted.

In an opinion dated January 18, 1929, for the Auditor of State, this department held that the office of mayor is properly filled by election by the city council. Since this method is provided by statute and there is no provision for filling a vacancy in the office of mayor by special election by the voters, it would seem that the council should discharge its duty and elect by ballot a person to fill the vacancy in the office of mayor in your city.

Section 1157 of the Code provides that if a vacancy occurs in an elective office in a city, town, or township ten days, or a county office 15 days, or any other office 30 days prior to a general election, it shall be filled at such election unless previously filled at a special election. This section raises the implication that where a vacancy occurs in an elective city office it might be filled at a special election. We are of the opinion, however, that the implication so raised is not tantamount to statutory authority for a special election.

Section 5663 provides a specific and definite method for filling such vacancy and in the absence of a statutory provision for filling it in some other manner, we must take the view that Section 5663 provides the only statutory method for filling the vacancy.

You state that a tie vote of the council has prevented the election of a mayor. This situation is answered by the statement that a city council composed of men of good judgment and sound discretion charged with the duty of electing a mayor to fill a vacancy in the office within their power to fill, shall perform their duty by breaking the tie and electing a qualified person to fill the vacancy. In the city of New Hampton there are many men qualified to fill the office and the council should not arbitrarily refuse to discharge its legal duty.

SINKING FUND: ANTICIPATORY WARRANTS:

Refer to House File 85 of the 46th General Assembly.

May 25, 1935. *Governor of Iowa:* You have verbally stated to me that the Executive Council desires an official opinion from this department on the following proposition:

"Can the Executive Council, by resolution, require the Treasurer of State to issue refunding anticipatory warrants on the State sinking fund for the purpose of paying off the outstanding issue of anticipatory warrants heretofore issued and sold by the Treasurer of Iowa?"

You are hereby advised that House File No. 85 which was enacted by the 46th General Assembly of the State of Iowa very clearly and plainly states that the Executive Council does not have this power. The particular language of House File No. 85, which clearly answers this question, is contained in lines 14 to 17 inclusive of Section 1 of the above mentioned enactment, which is as follows, to-wit:

"* * * * provided, however, that the Treasurer of State by and with the approval of the Executive Council of the State of Iowa may issue such additional anticipatory warrants as may be necessary or required to refund existing warrants * * * *."

The above quoted part of this statute clearly places the discretion and responsibility for such an issue upon the Treasurer of State. The power of the Executive Council with reference to this matter is simply to approve or disapprove the application of the Treasurer of State for such an issue. It is similar to the power conferred upon the Governor to make certain appointments with the approval of the Senate. Under these latter statutes making provisions for the appointment of certain state officers by the Governor with the approval of the Senate, it is not contemplated in law that the Senate by resolution could require the Governor to make these appointments. The law contemplates and intends that the responsibility for the selection of these appointments shall rest upon the Governor subject to the approval of the Senate.

The same is true with regard to the issuance of refunding anticipatory warrants or original anticipatory warrants on the State sinking fund by the Treasurer of State. It is the Treasurer of State that is empowered to exercise the first discretion in this matter. If the Treasurer of State deems that it is advisable and in the public interest, he shall make application to the Executive Council for its approval to issue such warrants. When this application is made by the Treasurer of State, then it is the duty of the Executive Council, either to approve or disapprove the application of the Treasurer of State. No other construction can be placed upon the above plain wording of the statute as contained in House File No. 85.

Before House File 85 can have any application to this matter, the Treasurer of State must first make application to the Executive Council for their approval of his desire to issue such refunding anticipatory warrants. When such an application is made by the Treasurer of State, then the Executive Council may approve or disapprove the same.

STATE SINKING FUND: PUBLIC DEPOSITS: PUBLIC INSTITUTIONS: Chapter 352-d1, 352-a1, H. F. 506—46th G. A. Under the provisions of H. F. 506, 46th G. A., the rate of interest fixed by the Treasurer of State and approved by the Executive Council shall apply to all public deposits of the State of Iowa, and this shall include all deposits by boards or commissions and institutions under these boards and commissions.

May 27, 1935. *Treasurer of State:* We have your request for opinion on the following proposition:

"Heretofore, Chapters 352-d1 and 352-a1 of the Code of Iowa, 1931, com-

monly known as the State Sinking Fund for Public Deposits, have not been deemed to cover moneys deposited by the institutions under the Board of Control or under the Board of Education, nor has the provisions of these two chapters been thought to cover deposits of various boards, commissions and individuals, of public moneys before it reached the Treasurer of State. Will you please advise me whether House File 506 of the 46th General Assembly, has amended these chapters so as to now include all public funds and the funds of all these boards, commissions and individuals?"

House File 506 of the 46th General Assembly amends Section 7420-d6 of the Code by striking therefrom all after the word "deposited" in the eighth line and has added the words after the word "deposited," "for the months of April and October," so that during those two months, the interest rate is 1% per annum on 90% of the daily balance, and then the act further provides:

"provided further that in order that public bodies throughout the State may be able at all times to obtain sufficient acceptable depositories the Treasurer of State with the approval of the Executive Council may from time to time adjust the rate of interest that shall be payable by all depositories on public funds in their hands but in no event shall such rate of interest be adjusted below one (1) per cent per annum on ninety (90) per cent of the collected daily balances payable as hereinbefore required. Henceforth public deposits shall be deposited 'with reasonable promptness and shall be evidenced by pass book entry by the depository legally designated as depository for such funds. Provided, however, that the rate of interest set by the Treasurer of State shall apply to all public deposits of the State of Iowa'."

It is apparent that the Legislature intended to cover and apparently did cover all deposits of public funds of the State of Iowa, while prior to this, they only covered deposits of specific public funds as set forth in Chapter 352-d1, for you will note that the act provides the Treasurer of State, with the approval of the Executive Council, may from time to time, adjust the rate of interest that shall be payable by *all depositories on public funds in their hands* and this shall apply to all deposits of the State of Iowa.

There is no question but what all funds coming into the hands of the various boards and commissions under the State or to institutions under these boards and commissions are public funds of the State of Iowa, as the money is either raised through taxation or else is paid as fees, tuition, purchase price or otherwise, for the benefit of the State, acting through this particular instrumentality that receives the money. All funds must necessarily be private or public and there is no question but what these are not private, so necessarily, they must be public.

In enacting the last sentence of the act, the Legislature undoubtedly had a definite purpose. The deposits made by you as Treasurer of State were already covered by the Sinking Fund so it was not necessary to mention those and if the Legislature had intended to cover only those deposits, they would have used the terminology: "all public deposits by the State of Iowa," but here, you will note that they used the terminology of "all public deposits of the State of Iowa," so that not only the language appears to be clear, but also the intent of the Legislature.

It is my understanding that prior to this act of the Legislature, the Executive Council only designated the depositories for the money actually in the hands of the Treasurer of State, and allowed each of the individual boards, commissions and groups having public moneys, either before it went into your

hands or after it was received from you, to designate and choose their own depositories, and that these depositories generally entered into an escrow agreement, whereby the deposits were secured, but this was, of course, without expense or cost to the depository as they were entitled to all dividends on the securities, and control over them, the same as if they were not up in escrow except, of course, that wherever they withdrew any securities, they must replace other acceptable securities, so that this practice may continue the same as in the past.

In view, however, of this act of the Legislature, I would suggest that the Executive Council hereafter approve any and all depositories of any and all of these public deposits of the State of Iowa, so that there would be no question as to the approval of the depository under the law. The board or commission to designate the depository as in the past. The designation to be forwarded to the Executive Council for approval or disapproval. This, of course, will not in any wise affect these depositories securing the deposits exactly as they have heretofore done.

It is, therefore, the opinion of this department that under the provisions of House File 506 of the 46th General Assembly, the rate of interest fixed by the Treasurer of State and approved by the Executive Council shall apply to all public deposits of the State of Iowa, and this shall include all deposits by boards or commissions of the State of Iowa and institutions under these boards or commissions.

BEER BILL (46th G. A.):

Granting of permit to golf and country clubs: expiration date.

May 28, 1935. *County Attorney, Spencer, Iowa:* This will acknowledge receipt of Mr. Heald's letter of the 21st instant in which information is desired with reference to the granting of a beer permit to a golf or country club. You state that there are several inconsistent provisions in the beer law with reference to permits for golf and country clubs. You state further that Section 1921-f111 states that all permits shall expire at the end of one year from the date of issuance and that Section 1921-g2 provides that all class "B" permits issued to golf or country clubs shall expire on July first after the date of issuance. You state:

"Section 1921-f117 provides that a license to a golf club may be granted for a period of six months, for which the license fee shall be $50.00.

"In case the board should decide to grant a six months license to a golf club, would it have to be from January first to July first, or could it be six months from the date of issuance?"

The sections referred to are those named in the pamphlet compiled and distributed by Leo J. Wegman, Treasurer of State. Under the provisions of Section 1921-g2, permits issued to golf and country clubs shall expire on July first after the date of issuance. However, this must be read in connection with that part of Section 1921-f129, which is in italics, and which excepts the permits issued to golf and country clubs as to 1935. This provides that all class "B" permits, except permits issued to golf and country clubs, shall terminate as of July 1, 1935. Under the plain reading of the act, a permit now issued to a golf and country club would not expire on July 1, 1935, as other class "B" permits do. Section 1921-f117 authorizes the

issuance of a permit to a golf and country club for a period of six months. The only purpose of this was to allow such clubs to take a six-months' license instead of a 12-months' license, which they would have to take otherwise. But there is no change in the expiration date. In other words, a permit might be granted to a golf and country club for a six months' period at this time and it would run for six months for the reason that this type of permit is especially exempted from the expiration date of July 1, 1935, as the section in italics relates exclusively to permits expiring in 1935, while Section 1921-g2 relates to future permits to be granted which will expire on July first of each year. Therefore, in those country clubs desiring a permit for one year, such as are taken out by some of the larger country clubs in the State, the permit expires on July first from the date of issuance. But we are of the opinion that an exception is made as to those clubs desiring only a six-months permit and they are exempted with reference to the expiration date in the year 1935. So that a permit issued to a golf and country club after July 1, 1935, would expire on the July first thereafter.

SALARY REDUCTION ACT: CLAIM OF CLERK FOR ADDITIONAL SALARY: REFUND OF SALARY BY COUNTY ATTORNEY:

"If the compensation for the clerk was fixed by the Board of Supervisors prior to the enactment of the salary reduction act, the provisions of the salary reduction act would not automatically reduce such a salary. * * * * The County Attorney who served during the years 1933 and 1934 will not have to refund any part of the salary that he received as County Attorney during these years."

May 28, 1935. *County Attorney, Audubon, Iowa:* I have your letter of May 20th, in which you ask for an opinion from this department on the following propositions:

1. Can a clerk, not a deputy, have any claim for additional salary, because he was employed for the past two years, when the reduction of salaries was in effect?
2. Does the County Attorney have to refund, because he received more salary than the Code of 1931 sets out?
3. What salary does the County Attorney receive from January 1, 1935?

It is impossible for us to answer your first question without a further recital of the facts pertaining thereto. The salary reduction act, which was declared unconstitutional by the Supreme Court, did not apply to the compensation for clerks in county offices whose salaries are fixed by the action of the Board of Supervisors. The only salaries involved by this unconstitutional act were the salaries that were specifically fixed by statutes. Your letter does not show the action of the Board of Supervisors with reference to the fixing of the salary of a clerk in a county office. Please furnish us with the action of the Board of Supervisors with reference to the fixing of compensation for clerks in the county offices in Audubon County. If the compensation for the clerk was fixed by the Board of Supervisors prior to the enactment of the salary reduction act by the 45th General Assembly, the provisions of the salary reduction act would not automatically reduce such a salary. In order to have the salary reduced for the clerk, the Board of Supervisors would have to take some subsequent action reducing the same.

In answer to your second question, we wish to advise you that the 45th General Assembly increased the statutory salaries of county attorneys in

many of the counties by the salary reduction act and as a consideration therefor, the same Legislature eliminated certain statutory fees which previously were allowed to county attorneys. The acts of the Legislature eliminating the fees are still in force and effect. The salary reduction act which attempted to raise the salaries of certain county attorneys being unconstitutional, it naturally follows that the only statutory salary to which these county attorneys were entitled would be as fixed by the provisions of Section 5228 of the 1931 Code of Iowa. These county attorneys would have to refund the salary received in excess of the provisions of Section 5228 of the 1931 Code of Iowa, were it not for the passage of a legalizing act of the 46th General Assembly known as Senate File 201, which is as follows, to-wit:

"Section 1. That all salaries paid to County Attorneys and assistant County Attorneys in counties having a population less than sixty thousand are hereby ratified, confirmed and legalized, and the various counties in which the salary of the County Attorney and assistant County Attorney was increased shall have no right of recovery for any salary paid under and by virtue of Chapter 89 of the Acts of the 45th General Assembly."

Therefore, the County Attorney of your county who served during the years 1933 and 1934 will not have to refund any part of the salary that he received as County Attorney during these years.

In answer to your third question, I wish to state that the provisions of Section 5228 of the 1931 Code will apply. Assuming that your county has a population of less than fifteen thousand, the salary of the County Attorney would be eleven hundred dollars per year.

SALARY REDUCTION: DEPUTY COUNTY AUDITOR:
See Section 5221 of 1931 Code.

May 29, 1935. *County Attorney, Muscatine, Iowa:* Your letter of the 21st instant, inquiring as to right of Deputy Auditors to collect back salaries, at hand.

Answering your first question:

"Can the Deputy Auditor of Muscatine County collect back salary to 1931?"
it is the opinion of this department that the Deputy Auditor could collect any back salary due him or her, under and as fixed by Section 5221 of the 1931 Code, unless he or she had voluntarily contracted to take a less amount or surrendered the same by repayment.

Answering your second question:

"If possible to collect back pay, will her salary be $100.00 per month or one-half of the amount paid the County Auditor?"
would say that in your county, having a population of to exceed twenty-five thousand and less than thirty thousand, the salary of your Auditor would be $2,100.00 under Section 5220. One-half of that would be $1,050.00 per annum, the amount to which the Deputy Auditor would be entitled, unless the Board of Supervisors under Section 1 of Section 5221, increased or allowed an additional amount up to an aggregate not to exceed $1,500.00.

Answering your third question:

"Can the Board of Supervisors compel said Deputy Auditor to take less than $100.00 per month?"
we would say that governed by the foregoing, your Board of Supervisors could

not pay the Deputy Auditor to exceed one-half the amount that is authorized to pay the County Auditor under Section 5220 plus any amount that may be added thereto, under authorization of Section 5221 of the 1931 Code of Iowa.

SALARIES: DEPUTIES: COUNTY OFFICIALS:

Chapter 261 of 1931 Code provides that salaries for deputy county officials in cities of less than 50,000 be fixed at one-half the salary of his or her principal. If that amounts to less than $1,500.00 per annum, the Board of Supervisors could raise it to an amount not to exceed $1,500.00.

May 31, 1935. *County Auditor, Ottumwa, Iowa:* Answering the question you submit concerning deputy county officials' salary in cities less than 50,000 in population, I would say that Chapter 261 of the 1931 Code of Iowa provided that the Deputy Auditor, Deputy Clerk, Deputy Treasurer and Deputy Recorder should receive one-half the salary fixed for his or her principal, which might be increased, if such sum was less than $1,500.00 per annum, up to an amount not to exceed $1,500.00 per annum by the Board of Supervisors of the county. It is the opinion of this department that Senate File No. 95, which is Chapter 60 of the Acts of the 45th General Assembly in Extraordinary Session, has no bearing on the question for the reason that the same seeks to amend an act (Chapter 89, Acts of the 45th General Assembly), which our Supreme Court has declared to be unconstitutional.

Hence, the provisions of Chapter 261 apply as if no amendment thereto or change thereof had been attempted.

POOR RELIEF: SOLDIERS AND SAILORS: Are they entitled to relief based simply on residence? If soldiers and sailors relief funds are depleted, is it necessary to assist service men on the basis of being paupers?

June 1, 1935. *County Attorney, Marshalltown, Iowa:* Your letter of May 29th is received. Your first question is:

"Are soldiers and sailors entitled to relief based simply on residence or is it necessary that they obtain a legal settlement within the county as provided by Chapter 99, Acts of the 45th General Assembly as amended by Chapter 61 of the Acts of the 45th General Assembly in extraordinary session."

Your question relates to two groups of persons—those who come within the legal definition of "poor persons" but who are not soldiers, and those who may be described as "honorably discharged indigent United States soldiers, sailors, marines and nurses who served in the military or naval services of the United States in any war, and their indigent widows, wives and minor children" under certain ages.

Chapter 99 above referred to as amended, provides that:

"A legal settlement in this State may be acquired as follows:

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 affidavit stating that such person is no longer a pauper and intends to acquire a settlement in that county."

From the above, it will be seen that any person asking the relief under Chapter 267 of the 1931 Code relating to support of the poor, must acquire a settlement in the county from which he seeks aid by continuously residing in such county for a period of one year without being warned to depart, as provided by law.

Section 5385 of the 1931 Code provides for the creation of a fund for the relief of, and to pay the funeral expenses of honorably discharged indigent soldiers, etc., "having a legal residence in the county."

It is the opinion of this department that a legal residence in a county is a different thing from a legal settlement therein, as defined by Chapter 99 of the Acts of the 45th General Assembly. In other words, a soldier must establish a legal residence in the county from which he seeks relief under Chapter 273 of the Code of Iowa of 1931, but it is not necessary for him to establish a settlement in the county as provided in said Chapter 99, which requires one to reside continuously in one county for a year without being warned to depart.

Your second question is as follows:

"If soldiers' and sailors' relief funds are depleted and it is necessary to assist service men on the basis of being paupers, must they then maintain a settlement within the county or are they entitled to relief simply as residents."

It is our opinion that if a soldier is to receive relief from the funds provided for the relief of poor persons independently of the funds provided for in Chapter 273, relating to the relief for soldiers, sailors, and marines, they must then possess a legal settlement in the county the same as any other person who is not a soldier. "The removal of the soldier and his family to a county with the good faith intention of making that his home is all that is necessary to entitle the soldier to relief." See 1930 Attorney General's Opinions, 72.

If the soldier is being given relief out of Federal relief funds which are used in lieu of or as funds additional to those provided for by Chapter 273 relating to relief for soldiers, sailors, and marines, then it is not necessary for the soldier to establish his legal settlement, as above defined, in the county where he seeks relief. It is only necessary for him to establish his legal residence in such county, which means in substance that he has established his home in good faith in that county with the intention of making it his home and with no intention to return to his prior home.

DRAINAGE DISTRICT BONDS: When such bonds are presented for payment and there are no funds with which to pay the same, they should be stamped by the paying officer "not paid for lack of funds" and both principal and interest will thereafter draw 5% interest.

June 1, 1935. *County Attorney, Manson, Iowa:* Yours of the 25th of May addressed to Attorney General Edward L. O'Connor, relative to the above entitled matter, has been handed to the writer for consideration and answer.

You state:

"In a certain drainage district there are outstanding bonds which are in default, as also are the interest coupons thereto attached. When such bonds or coupons are presented for payment and there are no funds from which

they may be paid, is it incumbent upon the treasurer to stamp these bonds and coupons 'not paid for lack of funds' and thereafter to pay interest on them in the same way as warrants are stamped in case of insufficient funds?

"In this particular drainage district, the assessment was made for $2,000.00 in excess of the bonded indebtedness, but owing to the times and conditions, there are some of the owners in the district who have been unable to pay the special assessments levied."

Answering the foregoing, it is the opinion of this department, when such bonds or coupons are presented for payment and there are no funds with which to pay the same, that they should be stamped by the paying officer "not paid for lack of funds" and both principal and interest will thereafter draw five per cent (5%) interest, the same as county funds under like circumstances, unless otherwise provided for in the bond.

TAX SALE: BOARD OF SUPERVISORS:

Senate File 150 (46th G. A.) does not repeal Section 7193-a1 of the 1931 Code but does, by implication, limit the exercise of authority therein granted to the Board of Supervisors to the date of the sale to the county.

June 1, 1935. *County Attorney, Centerville, Iowa:*

In re: *Senate File No. 150 46th General Assembly, relating to purchase of property at tax sale by county.*

Your letter of May 27th at hand and contents noted. Your first question is:

"Does the enactment above referred to (Senate File No. 150 of the Laws of the 46th General Assembly) repeal Section 7193-a1 of the Code of Iowa, 1931, or can the Board of Supervisors still compromise taxes under the provisions of that section if it is done before the property is bought by them at a tax sale under the provisons of the new law?"

Answering the above, it is the opinion of this department that Senate File No. 150 of the 46th General Assembly does not repeal Section 7193-a1 of the 1931 Code, but does by implication limit the exercise of the authority therein granted to the Board of Supervisors to the date of sale to the county, the purchase of which Senate File No. 150 requires the county to make for general taxes due.

Your second question is:

"After the County has bid the property in at tax sale, may the County Board of Supervisors, together with the City Council in which certain property is located and the school board interested in the taxes, compromise the taxes with the owner for a definite named sum between the time of the sale and the date for the issuance of a tax deed under the new Act?"

This may be done at that time.

TAX COLLECTORS: COMMISSION: SALARY:

The legally appointed delinquent tax collector of a county is entitled to 10% of the taxes actually collected after the list is placed with him for collection.

June 1, 1935. *County Attorney, Rock Rapids, Iowa:*

In re: *Tax collectors.*

Your letter of May 28th addressed to Mr. Clair E. Hamilton has been handed to the writer for attention in the absence of Mr. Hamilton.

It is the opinion of this department that the legally appointed delinquent tax collector of a county is entitled to ten per cent (10%) of the delinquent personal taxes actually collected after the legally delinquent tax list is placed

with him for the collection of the personal taxes therein shown to be delinquent whether the same were paid to the tax collector or directly to the County Treasurer. It will be presumed that the tax collector, once the delinquent tax list for the collection of personal taxes shown to be delinquent has been turned over to him, gives service relative thereto and incurs expenses in connection therewith.

Based on the foregoing, it would be the duty of the Board of Supervisors to allow the collector of personal delinquent taxes ten per cent (10%) commission upon all money collected thereon whether paid to him or directly to the County Treasurer. The foregoing, however, is based upon the Board of Supervisors acting strictly in accord with Section 7225 of the 1931 Code of Iowa and no allowance should be made for services rendered or expenses incurred by said collector in addition to said ten per cent (10%). This should only be paid after full accounting with him has been made as in said section provided.

SALARIES: COUNTY SHERIFF'S: EXPENSES:

See Sections 5226, 5191 and 5192 of the 1931 Code.

June 1, 1935. *County Attorney, Hampton, Iowa:* Your letter of May 20th addressed to Attorney General Edward L. O'Connor has been referred to the writer for answer. You ask:

"What shall constitute and be included in the salary and expenses of a Sheriff of a County of 15,000 population in the absence of any specific agreement?"

Answering the foregoing, it is the opinion of this department that salaries of the sheriff are fixed by Section 5226 of the 1931 Code of Iowa. Where the population is 15,000 or less than 20,000, the salary is $1,800.00. He shall receive 7½ cents mileage per mile for distance traveled inside the county in his official capacity and 5 cents mileage per mile for distance traveled outside of his county on official business. Subsection 10 of Section 5191 of the 1931 Code of Iowa, as amended by the Acts of the 45th General Assembly in regular and extraordinary sessions.

Subsection 11 of said Section 5191 provides:

"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. * * * * *"

Subsection 12 of said Section 5191 of the 1931 Code allows the sum of five cents (5c) per prisoner per day for waiting on and washing for prisoners.

Subsection 14 provides in part as follows:

"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."

Section 5192 of the 1931 Code of Iowa provides:

"*Fees in addition to salary.* The amounts allowed by law for mileage and for actual, necessary expenses paid by him, and for board, washing, and care of prisoners, may be retained by him in addition to his salary."

It is the opinion of this department that the county is not obligated to furnish light, coal, water, gas and all expenses necessary in maintaining a

home for the sheriff, in addition to those expenses actually necessary for the care of prisoners confined in the county jail.

It is the opinion of this department that to a large degree the right of discretion on the part of the Board of Supervisors could be exercised as to the allowance of such claims.

CITY AND TOWN ASSESSOR'S COMPENSATION: SALARY:

"* * * * the deputies not more than $5 or less than $3.50 per calendar day, Sunday excepted, for the time actually employed, to be fixed by the Board of Supervisors. * * * *"

June 3, 1935. *County Attorney, Dubuque, Iowa:*

In re: *City Assessor's compensation.*

Yours, relative to the compensation of Deputy Assessors, at hand.

As you are well aware, Section 5669 of the 1931 Code of Iowa provides in part as follows:

"* * * * the deputies not more than five dollars or less than three dollars and fifty cents per calendar day, Sunday excepted, for the time actually employed, to be fixed by the Board of Supervisors. * * * *"

This amount must be fixed by the board before the commencement of the term for which the services are to be rendered and when once fixed, under the general law, may not be changed or altered, during the term or thereafter. In the instant case, if the Board of Supervisors of your county, in fixing compensation of Deputy Assessors, acted solely by reason of an unconstitutional statute limiting the maximum pay to $4.00 per day and was of the opinion at the time that the Deputy Assessor was actually earning and entitled to $5.00 per day and would have so fixed the same but for said unconstitutional statute, being Chapter 89, Acts of the 45th General Assembly, then and in that event, it is the opinion of this department that the Board of Supervisors would now have the right to allow bills for back pay for the additional $1.00 per diem to the Deputy Assessor or Assessors. The resolution allowing such claims, however, should specifically state, in its preamble, that the Supervisors were at the time of the reduction of the opinion that the Deputy Assessors were entitled and were earning the $5.00 per day as fixed by Section 5669 and would have allowed compensation at the rate of $5.00 per day as therein provided had it not been for the enactment of said Chapter 89 and its supposed legality. In other words, the preamble to the resolution of the Board of Supervisors allowing these claims should show that its discretion to allow the maximum of $5.00 as provided in Section 5669 was controlled by Chapter 89 of the Acts of the 45th General Assembly, subsequently declared unconstitutional.

BANKS AND BANKING: REMISSION OF TAXES ON CAPITAL STOCK: HOUSE FILE 471, 46th G. A.: House File 471 definitely provides that such remission can only be had where receiver is appointed, but that where manager is appointed, there is still some value in stock therefore there can be no remission in bank inquired about.

June 3, 1935. *County Attorney, Marshalltown, Iowa:* We have your request for opinion on the following proposition:

"A small bank in your County took advantage of the provisions of Chapter 156 of the Acts of the 45th General Assembly (S. F. 111). Thereafter,

the Superintendent of Banking appointed a manager for the said bank who liquidated its assets and distributed the proceeds thereof to the depositors, paying them in full. The remaining assets are in the hands of a trustee who will liquidate them and distribute the proceeds among the stockholders of the bank. The stockholders have petitioned for the remission of taxes pursuant to House File 471 of the Acts of the 46th G. A. Will you please advise us whether such a remission should be allowed?"

House File 471 of the Acts of the 46th General Assembly provides:

"Whenever a bank operated within the State of Iowa has heretofore or shall hereafter be closed and placed in the hands of a receiver, the Board of Supervisors shall remit all unpaid taxes on the capital stock of said bank."

You will note that this definitely provides that such remission can only be had where the receiver was appointed, the theory being that where a receiver is appointed, the stock is destroyed, but that where only a manager is appointed, he is for the purpose of attempting to conserve the assets and that so long as there is a manager, there is still some value in the stock and this is definitely shown in this particular instance by the fact that there will be assets placed in the hands of a trustee, the proceeds of which will be distributed among the stockholders.

It is, therefore, apparent that there cannot be a remission in the bank inquired about, and it is the opinion of this department that the Board of Supervisors should not remit the unpaid taxes on the capital stock of the bank.

POLL TAX: The city is compelled to give credit for the amount of the annual old age pension tax to one only who has paid the same upon the amount due from him on his poll tax.

June 3, 1935. *Deputy County Auditor, Clarion, Iowa:* Your letter of April 27th, relative to the imposition of poll tax by the city of Clarion, Iowa, at hand.

It is the opinion of this department that, while the two men you mention attained the age of 21 in February, 1935, and would therefore be exempt from the payment of the old age pension tax of $2.00 per annum, the city of Clarion would still have the right to raise its poll tax from $2.00 to $4.00.

Having exercised this right, the city is compelled under Chapter 19, Acts of the 45th General Assembly in Extraordinary Session, being the old age assistance law, to give credit for the amount of the annual old age pension tax to one only who has paid the same upon the amount due from him on his poll tax.

BOARD OF SUPERVISORS: AUTHORITY TO HIRE AND COMPENSATE SPECIAL TAX COLLECTOR:

"The Board of Supervisors in their discretion may authorize the appointment by the treasurer of one or more collectors to assist in the collection of delinquent taxes as the Board may designate and pay such collectors as full compensation for all services rendered a sum not to exceed ten per cent of the amount collected."

June 4, 1935. *County Treasurer, Jefferson, Iowa:*

In Re; Special Tax Collector.

Your letter of May 25th addressed to the Attorney General asking for a "written ruling" on the question of whether or not a County Board of Super-

visors have the legal right to hire a special tax collector and pay tax collector a percentage of same not to exceed a certain sum for the work, has been referred to the writer for reply.

I shall say that if your inquiry is intended to be limited to property not assessed for taxation, Section 7161 of the 1931 Code will apply. This section provides that the Board of Supervisors of any county may employ any person, firm or corporation for a reasonable salary or per diem to assist the proper officer for discovery of property not taxed, as required by law. You will note that this section provides that the Board must fix a reasonable salary or per diem for such services and could not therefore compensate the person, firm or corporation for said services upon a commission basis.

On the other hand, if your question has to do with the collection of delinquent taxes, then the Treasurer under Section 7222 of said Code, should "immediately after the taxes become delinquent proceed to collect the same by distress and sale of personal property of the delinquent tax payer and for this purpose he may appoint one or more persons to assist in collecting the same.

Section 7223 prescribed the compensation for services and expenses at five per cent of the amount of taxes collected, and paid over by him, etc.

Again, however, the Board of Supervisors may in their discretion authorize the appointment by the Treasurer of one or more collectors to assist in the collection of delinquent taxes as the Board may designate and pay such collectors as full compensation for all services rendered a sum not to exceed ten per cent of the amount collected.

In construing this section the department has held that the ten per cent should be paid upon delinquent taxes designated for collection by the collector when paid either to such collector or direct to the Treasurer. In other words such collector is entitled to the ten per cent compensation whether he collects the taxes designated or they are paid direct to the Treasurer. But on the other hand the Board of Supervisors have no authority nor does the Treasurer to pay any of the expenses incurred by such collector, as the ten per cent includes all such items.

CHIEF OF POLICE: PENSION FUNDS: A chief of police who was appointed and has not passed a regular mental and physical civil service examination should not have a percentage of his salary deducted for the pension fund.

June 6, 1935. *City Attorney, Fort Madison, Iowa:* Your letter of recent date, addressed to the Attorney General, has been referred to me for attention. You submit this question:

Should a percentage of the chief of police's salary be deducted for pension fund, he having been appointed and having never taken a civil service examination?

In Section 1 of Chapter 75, Acts of the 45th General Assembly, Extra Session, we find this provision:

"Policeman, or policemen, shall mean only the members of a police department who have passed a regular mental and physical civil service examination for policeman * * * * and who shall have been duly appointed to such positions."

Section 3 of the act provides that all persons who become "policemen" after

the date the retirement system provided for is established, shall become members thereof as a condition of their employment. Such members shall not be required to make contributions under any other pensions or retirement systems of city, county, or State.

In view of the provision above mentioned particularly and other provisions of the act generally, it is our opinion a chief of police who was appointed and has not passed a regular mental and physical civil service examination for policeman is not within the provisions of said Chapter 75 and would not be entitled to the benefits provided for by said chapter, and therefore a percentage of his salary should not be deducted for the pension fund under any provisions of said chapter.

FEDERAL EMERGENCY RELIEF FUNDS: AS TO INTEREST TO STATE SINKING FUND FOR PUBLIC DEPOSITS: Under an Act of Congress of the U. S., certain funds are granted by the Federal Emergency Relief Administrator to State of Iowa and under the law, are forwarded to Governor and deposited in banks in this State. Will you please advise me whether such depository banks of these funds must pay interest thereon into the State Sinking Fund for Public Deposits.

June 6, 1935. *Honorable Clyde L. Herring, Governor:* We have your request for opinion on the following proposition:

"Under an Act of Congress of the United States, certain funds are granted by the Federal Emergency Relief Administrator to the State of Iowa and under the law, are forwarded to me as Governor and deposited in banks in this State. Will you please advise me whether such depository banks of these funds must pay interest thereon into the State Sinking Fund for Public Deposits?"

The Federal Emergency Relief Act of 1933 which is codified as Sections 721 to 728, Title XV, U. S. C. A., creates the Federal Emergency Relief Administration and provides that funds for the administration be made available out of the funds of the Reconstruction Finance Corporation.

Section 724 of the Act provides that out of these funds made available, the administrator of the Federal Relief Administration is authorized to make grants to the several states to aid in meeting the costs in furnishing relief and work relief and in relieving the hardship, suffering and so on. It further provides that the grants shall be made quarterly upon the basis of expenditures certified by the states to have been made during the preceding quarter.

Section 725 provides that any state desiring to obtain such funds shall through its Governor, make application therefor from time to time to the administrator.

Section 726 provides that the administrator, upon approving a grant to any state, shall so certify to the R. F. C., which shall make such payments to the state and the Governor, upon receipt of such grants, must file monthly with the administrator, a report of the disbursements made under such grants. There is no specific requirement in the act as to how the Governor must handle the moneys, or in regard to depositories.

The Emergency Relief Act of 1935, which was approved April 8, 1935, provides that the Act of 1933 is continued in full force and effect until June 30, 1936, or such earlier date as the President, by proclamation, may fix. The Act of 1935 appropriates certain sums of money to be used under the

direction of the President, and provides for certain types of acts for which the same may be used, but does not set up any different type of procedure for obtaining the grants, or the care thereof by the state, after receipt. It, therefore, appears that under the act of 1935, the President may make direct expenditures or may continue to use the state as an instrumentality in expending these moneys.

You will notice from the above that the grants are made to the several states and the 46th General Assembly amended the State Sinking Fund by enacting House File 506, the last clause of that act being as follows:

"providing, however, that the rate of interest set by the Treasurer of State shall apply to all public deposits *of the State of Iowa.*"

The question then to be determined is whether these funds are public deposits of the State of Iowa after they are received by you and duly deposited. With this proposition in mind, I wrote to Mr. Harry L. Hopkins, Federal Relief Administrator at Washington, and asked for their opinion on the proposition and I am in receipt of a telegram which is as follows:

"Relet June first it has always been position this administration concurred in at least informally by Department Justice here that funds granted by FERA become State moneys losing their federal idenity. Stop. Bureau Internal Revenue has ruled that State eras are State agencies and therefore exempt from federal excise tax. Stop. Also Comptroller General United States has decided that funds belong to States after granted and that he has no jurisdiction. Stop. No direct judicial decisions known but see Brown University, Fifty-six Federal, Fifty-five Appeal dismissed. One Fifty-four United States Five Twenty-one, Wyoming Agricultural College, Two Hundred Six United States, Two Seventy-Eight and Yale College, Sixty-two Federal, One Seventy-seven."

Corington Gill, Assistant Administrator."

I have examined the cases cited by the Assistant Administrator in the telegram and they very well bear out his conclusion, they being cases involving the original land grant act of Congress of 1862, being commonly referred to as the Morrill Act, and the question in these cases was whether the state had the right to determine what it would do with the proceeds of the grant and the income thereof, and the court in each of the above cases, held that as the grant was to the state that it could determine the disposition thereof and held that after being granted to the state pursuant to that act, it was in effect state money.

I have also examined the late case of Langer vs. U. S., No. 10204, of our own Eighth Circuit, U. S. Circuit Court of Appeals, decided May 7, 1935, in which Governor Langer of North Dakota was granted a new trial and the lower court reversed. The court there went into the set-up of the FERA and the RFC and their relationship to the Federal government, but did not decide this proposition that we have under consideration.

From the telegram of the Assistant Administrator and my own study of the proposition, it is my opinion that such constitutes state funds and it is, therefore, the opinion of this department that the deposits mentioned by you constitute public deposits of the State of Iowa within the purview of House File 506 of the 46th General Assembly and that the depository bank must pay interest thereon into the State Sinking Fund for public deposits.

There is another question that will undoubtedly arise in these deposits and I presume that this should also be taken care of in this opinion.

It is my understanding that these deposits are secured by a pledge of assets of the depository bank and you should be advised in regard to this pledge.

Section 9222-c3 of the Code of Iowa provides that state banks, savings banks and trust companies, when authorized by the Superintendent of Banking, may pledge a portion of their assets to secure public funds and such other funds as may be authorized by the Superintendent of Banking, so that in regard to state banks acting as depositories, the depository may continue to secure these funds by a pledge of assets when so authorized by the Superintendent of Banking and this is not affected by the Act of the 46th General Assembly in regard to pledge of assets by banks, as this Act specifically authorizes such public depositories to require security at their option. The mechanics of securing deposits pursuant to this section is for the bank to pass the resolution and secure the authorization of the Superintendent of Banking and then enter into an escrow agreement with the depositor. We have heretofore held that public depositors may receive security for their deposits pursuant to Section 9222-c3 of the Code even though the deposit is covered by House File 506 of the 46th General Assembly. In event the depository bank of these funds is a national bank, a different question arises in regard to securing the deposit, for prior to 1930, national banks were not authorized to secure any deposits except those of the Secretary of the Treasury of the United States and certain specified Federal funds. The Congress, however, in 1930, amended Section 90 of Title XII, U. S. C. A., as follows:

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State. (As amended June 25, 1930, c. 604, 46 Stat. 809.)"

You will note that this act does not provide for the obtaining of approval of the national banks before giving such security. It appears to merely provide that security of the same kind may be given as provided by the State law which would be Section 9222-c3 of the Code, above referred to. The question of manner of this security was before the Circuit Court of Appeals in the case of Fidelity & Deposit Company of Maryland vs. Kokrda, 66 Fed. (2d) 641, and the court there held that this act only provided the kind of security and not the manner, and that if the state law evidenced public policy of securing such deposits by the enactment of a statute, then the deposits in a national bank could be secured if they could be in a state bank in the same state, but that the mechanics of the state statute in regard to securing the funds need not be followed out.

The United States Supreme Court in City of Marion vs. Smeeden, 54 Sup. Ct., 421, held that a national bank in Illinois had no right to secure its deposits for the reason that a state bank in that state had no such authority. The rule on this case, however, would not apply in Iowa for the reason that we do have a specific statute as hereinbefore pointed out.

It is, therefore, apparent that national banks in the State of Iowa may secure these deposits and while under the holding in Kokrda case above cited, it might not be necessary for the depository bank to secure the approval of anyone prior to entering into the escrow agreement securing the deposit,

yet, because of the substantial amount of money involved and to be safe, I would suggest that you have such depository bank, prior to the securing of this deposit, obtain the approval of the FERA Administrator, Comptroller of Currency of the United States, Secretary of the Treasury of the United States, and the State Superintendent of Banking, and should they then advise the depository bank that their approval was not necessary, or that there was no authority in the law for such approval, then I believe you would be much better protected than if you did not attempt to have the depository secure these approvals. Of course, if the depository should close and it was established that they had no right to secure this deposit, then the security could not be held and the purpose of this protection is to protect this deposit as fully as possible in event that any of the depository banks of these funds should close.

I should also call your attention to the fact that the Federal Deposit Insurance Corporation only insures deposits up to a certain amount which would not be very much protection in a deposit the size of this one, and also the fact that the F. D. I. C. is a separate corporation organized in the nature of a mutual insurance company and that these deposits are not guaranteed or insured by the Federal Government.

CITY OF CLINTON: BONDS: HOUSE FILE 79, 46th G. A.: Does the City of Clinton have the right to pay the premium for the bond of its City Treasurer for the fiscal year beginning April 1, 1935?

June 7, 1935. *City Attorney, Clinton, Iowa:* Your letter of June 4th, addressed to the Attorney General, has been referred to me for reply. You refer to House File No. 79, which amends Section 5655 of the Code of Iowa, 1931, which strikes from said section the words "one-half of," leaving said section so that it reads as follows:

"5655. *Expense of bond.* If the treasurer request it, the city or town shall pay the reasonable expense of procuring the bond for the city treasurer, at a premium not exceeding one per cent per annum of the amount thereof."

House File No. 79 also adds a new section to Chapter 287 as follows:

"5654-g1. The bond of the city treasurer shall be in the sum of ten thousand dollars ($10,000.00)."

Your question is whether or not in view of this amendment the city of Clinton has the right to pay the premium for the bond of its city treasurer for the fiscal year beginning April 1, 1935.

House File No. 79 carries no publication clause, and it therefore becomes effective on July 4, 1935. Prior to that date, the city may pay the reasonable expense of procuring the bond for the city treasurer at a premium not exceeding one-half of one per cent per annum of the amount thereof. Until July 4th, the city is bound by that provision, and a payment of a premium of one per cent per annum of the amount of the bond would be in violation of the law as it stands at present. For that part of the fiscal year from April 1st to July 4th, the city is limited to the payment of the premium to an amount not exceeding one-half of one per cent of the amount of the bond. After July 4th the city may pay the reasonable expense of procuring a bond at a premium not exceeding one per cent. It would seem logical that if the city can arrange to pay the premium in two installments covering said peri-

ods respectively, the city could take care of the entire amount of the premium after July 4th. It clearly can take care of only one-half thereof for the period from April 1st to July 4th, so long as the premium amounts to one per cent of the amount of the bond.

SCHOOLS: BOARD OF DIRECTORS: QUORUM FOR TRANSACTION OF BUSINESS: If quoroum is present at meeting all that would be required to carry proposition would be majority of those present and actually voting, so that if 4 constituted quorum and 5 were present and all voted, it would take affirmative vote of 3 to carry—if 3 out of 5 voted, it would only take affirmative vote of 2 out of 3.

June 8, 1935. *Superintendent of Public Instruction:* We have your request for opinion on the following proposition:

"Section 4223 of the Code provides:

'A majority of the board of directors of any school corporation shall constitute a quorum for the transaction of business, but a less number may adjourn from time to time.'

Suppose that the board was composed of seven members and that under the law, four constituted a quorum. Suppose further that these four had met but only two of them elected to vote on particular proposition, the other two refusing to vote. If the two who voted, voted in the affirmative, would the proposition or motion be deemed to have carried?"

The law having fixed the number constituting a quorum, this number has the same authority to act as the full board, and the actions of this number constitute the action of the board, so that therefore, if a quorum is present at the meeting, all that would be required to carry a proposition would be a majority of those present and actually voting, so that if four constituted a quorum and five were present and all voted, it would take the affirmative vote of three to carry the proposition, but if only three out of the five voted, it would only take the affirmative vote of two of the three to carry the proposition or motion.

BOARD OF NURSE EXAMINERS: STATE PAY ROLL: A member of the faculty of the School of Nursing at the University Iowa Hospital may not hold that position and at the same time serve as a member of the Board of Nurse Examiners for pay.

June 11, 1935. *Division of Nursing Education:* You submit to this department the following question:

"1. Could a member of the faculty of the School of Nursing at the University of Iowa Hospital, being already on the State pay roll, accept an appointment to the Board of Nurse Examiners?"

Section 2455 of the Code provides that no examiner shall be an officer or member of the instructional staff of any school in which any profession regulated by Title 8 of the Code is taught. This section was amended by Senate File 49 by adding at the end thereof the following:

"provided however that the foregoing shall not apply to nurse examiners."

In view of this amendment, there appears to be no statutory disqualification of members of the faculty of the school of nursing at the University of Iowa Hospital for service on the Board of Nurse Examiners. The enactment of said amendment would indicate a legislative intent to permit, if

not authorize, a member of the faculty of a school of nursing within the state to serve on the Board of Nurse Examiners.

If members of the faculty are required to give their full time, meaning their usual and full working hours to the state, then it would be improper for such person to devote a portion of that time to any other activity. If the faculty position is a full-time position, such faculty members should not seek other or outside employment. If the free discharge of the duties of examiners will in no way conflict with or detract from the duties of such faculty member, there would appear to be no good reason why the same person should not hold both positions. A situation is conceivable where it might serve public interest better for the same person to hold two positions in both of which the state is the paymaster. It might be stated, however, that as a general proposition that where a person holds two positions or offices, both of which are somewhat exacting, the discharge of the duties of one will interfere with the discharge of the duties of the other.

Public policy demands that all persons employed by the state shall render to the state the best service of which they are capable. This demand in many instances could not be met by a person who assumes to hold two offices or positions, both of which make large demands upon his time and energy.

Basing our opinion then upon grounds of public policy, we are constrained to hold that a member of the faculty of the School of Nursing at the University of Iowa Hospital may not hold that position and at the same time serve as member of the Board of Nurse Examiners for pay. There are, of course, other considerations such as the possibility that an examiner selected from a school within the state might voluntarily or involuntarily have a disposition to favor certain applicants for examination over others, but such considerations are not involved in your questions.

Your second question is as follows:

"2. If anyone receiving a State salary cannot legally receive other State compensation, could she accept the appointment if willing to serve without compensation?"

This question is partially answered above. There is no statutory prohibition against the acceptance of an appointment to membership on the Board of Nurse Examiners, by one receiving other state compensation. The consideration of public policy, however, should preclude such an appointment. If, as stated above, full-time services are required, a person drawing one state salary could not properly give less than his full time to the position he is being paid to fill. If the holder of each position is entitled to a salary under the state law, it would be improper to waive one salary in order to secure appointment to both positions.

In the case of certain elective offices, it has been held tantamount to a bribe of the electorate for a candidate to make a campaign pledge that he will discharge the duties of the office for less than the lawful and legal salary.

LIBRARIES, PUBLIC: BOOKS: FEES: A public library is prohibited from exacting a fee for the use of any of its books, including any books which may be bought on the credit of the library or municipality.

June 12, 1935. *Auditor of State:*

Re: Municipal Library Book. Rental Charges.

We have your letter of June 5th in which you submit the following question:

Do the powers conveyed to the Board of Trustees of a free public municipal library by Section 5858, subsection 7 of the Code of Iowa 1931, include the right to fix and charge rental fees to the citizens of the municipality for the use of books which are in particular demand?

The Code section referred to insofar as there is material to your question is as follows:

"5858. *Powers.* Said board of library trustees shall have and exercise the following powers: * * * *

"7. To make and adopt, amend, modify, or repeal by-laws, rules, and regulations, not inconsistent with law, for the care, use. government, and management of such library and the business of said board, fixing and enforcing penalties for the violation thereof."

Section 5849 of the Code is as follows:

"5849. *Formation—maintenance.* Cities and towns may provide for the formation and maintenance of free public libraries open to the use of all inhabitants under proper regulations, and may purchase, erect, or rent buildings or rooms suitable for this purpose and provide for the compensation of necessary employees."

This section provides for the formation and maintenance of free public libraries open to the use of all inhabitants under proper regulations, and under these sections we are disposed to say that it is not within the contemplation of the law that there shall be a charge or rental fee for the use of books by the citizens of the municipality which provides and maintains the library. We have made some independent inquiry and find that it is the practice in some states and communities for the library trustees to provide duplicates of certain books which are much in demand and to charge a fee for the use of such books by patrons of the library, such fees to apply on the purchase price of books until such time as the books are paid for and become then the property of the library, available without charge to the citizens of the municipality. By such practice, the patrons of the library would gain an advantage rather than suffer a disadvantage, providing the free volumes were always available to all proper persons in proper order of their application therefor.

It may naturally be urged that a library is not free so long as it exacts a charge for any of its books, and we take the view that such position is well grounded, for all books which are the property of the municipality. If, as stated above, duplicates of books in the library were bought to be paid for out of the earnings, which books were to be used without charge after they are paid for, it could hardly be said that the patrons were being denied all of the intended purposes of the free public library.

The Supreme Court of Rhode Island, under statutes providing that the State Board of Education shall prescribe rules regulating the management of libraries receiving aid so as to secure the free use of the same to the people, held that a regulation of said board permitting the Providence Public Library, while enjoying state aid under said statutes, to maintain a collection of duplicate books on recent fiction for the use of which, when taken from the library, a charge was made, was reasonable and within the power of the

board. Book Store Incorporated vs. Providence Public Library, 46 Rhode Island 283.

We think a free public library is prohibited by law from exacting a fee for the use of any of its books, including any books which may be bought on the credit of the library or municipality. Your question does not embrace the plan carried out by some libraries, as above referred to, of paying for a duplicate set of books in special demand out of rental fees collected therefore, so we shall express no further opinion upon that point.

BOARD OF HEALTH: DENTISTRY: HOUSE FILE 203, 46th G. A.: All advertising of any kind on a professional card or display window constitutes unprofessional conduct on the part of a dentist or dental hygienist.

June 12, 1935. We have your letter of recent date requesting a construction of that part of Paragraph 16 of Section 4 of House File 203, Acts of the 46th General Assembly, which reads as follows:

"(16). *Unprofessional conduct.* As to dentists and dental hygienists 'unprofessional conduct' shall consist of any of the acts denominated as such elsewhere in this title, and also any other of the following acts:

"A. All advertising of any kind or character other than the carrying or publishing of a professional card or the display of a window or street sign at the licensee's place of business; which professional card or window or street sign shall display only the name, address, profession, office hours and telephone connections of the licensee."

You state that what you are interested in particularly is a construction of the word "profession" and in connection therewith you submit the question whether members of the dental profession by the word "profession" are limited in their signs to the use of the word "dentist" or whether they may use a word, or words, which express a limited field in dentistry, that is, the words "Orthodontia" and "Exodontia."

All advertising of any kind or character other than the carrying or publishing of a professional card or display of a window or street sign at the licensee's place of business, constitutes unprofessional conduct on the part of a dentist or dental hygienist. The professional card or window or street sign shall display only the name, address, profession, etc. The use of the words "dentist" and "dentistry" are clearly within the law. The proper use on professional cards, window and street signs of the words "Orthodontia" and "Exodontia," representing limited fields within the profession of dentistry, embraces Orthodontia and Exodontia, and would not, we believe, constitute unprofessional conduct. Anyone using these words to indicate his profession holds himself out to be a dentist.

You call attention to a specific case in which the following words appear on a window of the dentist's office:

"Dr. Blank
Teeth — Plate Shop
Artificial Teeth"

and you ask whether the use of such sign is prohibited under the provisions of the above House File.

It is our opinion it was the intention of the Legislature to prohibit the use of such a sign. There are persons making and selling teeth and plates and operating shops where plates are made, who are not licensed to practice den-

tistry. The dentist may display his name, address, and profession. The use of the word "teeth" is hardly a proper designation of the dental profession. The words "plate shop" do not indicate necessarily any profession, and the words "artificial teeth" lack much of indicating that the person using such words in his sign is a dentist. This statute was enacted at the request of the dental profession, or a representative part of it, supposedly for the benefit of dentists generally, and we desire to give it a fair construction which will carry out the intent of the Legislature.

OFFICIAL PUBLICATION, LEGALITY OF: ORDINANCE: NEWSPAPER:

The town of New Market may use the Southwest Iowa Democrat as a means of publishing its new beer ordinance.

June 13, 1935. *County Attorney, Bedford, Iowa:* This will acknowledge receipt of your request for the opinion of this department on the following question:

The town of New Market, Iowa, has passed a new beer ordinance and has requested an opinion from this office as to whether or not they can post this ordinance and make it legal.

The facts of the case are:

"A man by the name of Harlan Mohler runs a paper called 'The Southwest Iowa Democrat.' Mr. Mohler is a resident of Bedford, Iowa. The paper is printed at Bedford, Iowa. Mr. Mohler has a permit from the proper authorities in Washington to publish such paper and send it through the United States mails. The paper is printed twice a month at Bedford but is entered in the New Market Post Office for circulation under the permit obtained from the Federal Government. However, I have been informed that this paper is not always entered on the same day of the month or the same day of the week. There is, at times, a variation of a day or two when the paper is printed and placed in the Post Office. However, there may be a confliction in this last matter."

You cite several legal authorities, among which the definition of "newspaper" as given in Corpus Juris is set out, as follows:

"A newspaper in the ordinary acceptation of the term is a publication in sheet form, intended for general circulation, published regularly at short intervals, and containing intelligence of current events of general interest. It follows from this definition that if a publication contains the general current news of the day, it is none of the less a newspaper because it is devoted primarily to special interests, such as legal, religious, political, mercantile, or sporting."

You state that Section 5720 of the 1931 Code of Iowa provides as follows:

"*Publication.* All ordinances of a general or permanent nature, and those imposing any fine, penalty, or forfeiture, shall be published in some newspaper published and of general circulation in the city or town; but if there is no such newspaper, such ordinances may be published in a newspaper designated by the council and having a general circulation in such city or town, or by posting copies thereof in three public places therein, two of which shall be at the post office and the mayor's office. When the ordinance is published in a newspaper it shall take effect from and after its publication; when published by posting, it shall take effect ten days thereafter. It shall be a sufficient defense to any suit or prosecution for such fine, penalty, or forfeiture, to show that no such publication was made."

Also:

Palmer vs. McCormick, 30 Federal 82.

Where printed. A local paper, the inside of which is printed in Chicago and forwarded to the place of residence of the owner or the owners of the paper and there finished and published and put into circulation, must be held to the 'printed' at the place of residence of the owners, within the meaning of Iowa Code 1897, Section 2619, providing that in foreclosure proceedings 'publication must be made by publishing the notice required in Section 2599 * * in some newspaper printed in the county where the petition is filed'."

In accordance with the above, it is the opinion of this department that the town of New Market, Iowa, may use the Southwest Iowa Democrat as a means of publishing its new ordinance. In order to safeguard in the matter so that there could be no question about the ordinance, the council of the city could designate this newspaper as the official publication for the publishing of this ordinance. If the council desired to safeguard further, they could also post this so there could be no question about the legality of the ordinance.

BEER LAW (46th GENERAL ASSEMBLY): Hotel defined under beer law.

June 13, 1935. *League of Iowa Municipalities, Marshalltown, Iowa:* This will acknowledge receipt of your letter of the tenth instant in which you request the opinion of this department on the following:

"Now that the council can fix the class 'B' permit higher than the permit for a hotel with less than one hundred rooms some of the hotel owners over the state and cafe owners with two or three lodging rooms in connection with their cafe are trying to come in under the hotel license of $100.00.

"My own idea is that under the definition of the state law, any place that will furnish lodging for transients would be considered a hotel and this would include almost all of the cafes or a cafe owner could easily arrange probably for a few rooms upstairs and come under the definition of a hotel.

"I have been inclined to tell the council to insist on these people taking a regular class 'B' permit and if they do not want to do this to refuse them a permit for a hotel. I can see that where there are perhaps two permits in a small town and one of the permit holders has a few rooms and would insist on coming under the $100.00 license, that it would be pretty hard to charge the other permit holder more than $100.00."

You are advised that Section 2808 of the 1931 Code of Iowa is entitled "Definitions" and provides in Subsection 1, as follows:

"1. 'Hotel' shall mean any building or structure equipped, used, advertised as, or held out to the public to be an inn, hotel, or public lodging house or place where sleeping accommodations are furnished transient guests for hire, whether with or without meals."

This definition apparently would be in accordance with your thoughts in this matter.

However, we wish to call your attention to Chapter 323, entitled "HOUSING LAW." Section 6329 of that chapter provides in Subsection 4 as follows:

"4. *Hotel.* A 'hotel' is a multiple dwelling of class B in which persons are lodged for hire and in which there are more than twenty-five sleeping rooms."

The class B referred to in the above quoted section is defined in Paragraph 3 of Subsection 3 of Section 6329 and provides as follows:

"Class B. Multiple dwellings of class B are dwellings which are occupied, as a rule transiently, as the more or less temporary abiding place of individuals who are lodged, with or without meals, and in which as a rule

the rooms are occupied singly. This class includes hotels, lodging houses, boarding houses, furnished room houses, club houses, asylums, boarding schools, similarly occupied whether specifically enumerated herein or not."

It would be our thought that the Legislature in enacting the beer law did not intend to include places with two or three sleeping rooms, but that a hotel should come within the provisions as set out in the housing law. Any other interpretation might permit persons desiring a beer permit to put two or three sleeping rooms in their establishment and contend that they came under the hotel classification of the beer law.

CHAIN STORE TAX:

It would be permissible for a company to have a Class A beer permit at each (coal office) establishment and if the receipts from the sale of beer at wholesale amounted to 50% of the gross receipts, it would not be considered, in determining whether or not the company would come within the taxing portion of the Chain Store Tax Act rather than the exemption.

June 14, 1935. *Treasurer of State:* We have your letter of May 7th with which you enclosed copy of a letter received from W. G. Block Company requesting an opinion on the following:

This company operates ten retail establishments in the State of Iowa, catering principally to coal and building material. However, at the Waterloo branch they have a Class A beer distributors permit and is contemplating applying for a Class A beer permit for their plant at Mason City. During the last year, the sales at the Waterloo branch, of beer alone, comprized about 10% of the total sales of all the branches.

The question is, whether or not the company could still take advantage of the exemptions granted under Section 3c of House File 311.

You are advised that under the Iowa beer statute, a Class A permit holder is strictly a manufacturer or wholesaler and is not permitted to make any kind of a sale of beer at retail by virtue of his Class A permit. You are further advised that under the provisions of Section 3c of House File 311, being what is generally known as the chain store tax act, persons engaged in selling at retail lumber, grain, seed, etc., are exempted from the payment of the tax provided the total retail sales of any such person of such products, do not exceed 95% of the total *retail* sales of all sources within the state, of any such person. Therefore, under the chain store tax act, the 95% applies to retail sales; while under the beer statute the Class A permit holder is selling strictly at wholesale. For that reason, the sales of beer under the class A permit, would not be taken into consideration in determining whether or not 95% of the company's business at retail is received from the merchandise named in Section 3c.

It would therefore be permissible for the company to have a Class A beer permit at each of its establishments and if the receipts from the sale of beer at wholesale amounted to 50% of its gross receipts, it still would not be considered, in determining whether or not the company would come within the taxing portion of the act rather than the exemption.

CHAIN STORE TAX: Two questions in reference to oil stations.

June 14, 1935. *State Board of Assessment and Review:* We acknowledge receipt of a letter written to you on May 22d by the Primary Oil Company in which three questions are asked:

1. I am an independent jobber with storage tanks of 60,000 gallon

capacity operating one service station and running one truck selling to farmers and stores outright. I also sell gasoline to one garage at the regular price, with no contract. Do I come under the chain store tax act?

If this man is a petroleum jobber, he is selling at wholesale rather than at retail. For that reason the bulk plant would not be considered as a retail store. If all of his sales at retail are confined to the service station, or are from the station from which his truck operates, and if none of them are made from the bulk plant, then he would not be in the class of a chain store as he would have one wholesale establishment and one retail establishment.

2. May I buy a major oil company's product and sell same under their trade name without coming under the chain store tax act?

The answer is yes.

3. May I lease my bulk and service station to a major oil company and handle their products under the name of Standard Service or Shell Service, and not come under the chain act?

If the gentleman leases his station to the Standard Oil Company it would tend to put the company in the chain store class, rather than Mr. DeWitt.

CHAIN STORE TAX. House File 311 of Acts of 46th General Assembly.

June 14, 1935. *Board of Assessment and Review:* We have your letter of recent date with which you enclosed many letters received from different persons, firms and corporations in the State of Iowa, relative to House File 311 of the Acts of the 46th General Assembly, generally known as the Chain Store Tax Act.

You understand, of course, that under the law it is the duty of the Department of Justice to defend the validity of all acts of the Legislature. For that reason there is no need for this department to make any statement concerning the constitutionality of the act. We must take it for granted that the act is constitutional until the courts determine otherwise and it is mandatory that we attempt to sustain its validity from all attacks.

Most of the questions presented in the letters which you have forwarded to us, deal with the question of what is, and what is not, a chain within the meaning of House File 311. It might be well at the outset to discuss briefly some of the provisions of the act.

The Legislature, in Section 2g of the act, has defined the phrase "conducting a business by a system of chain stores" to mean and include every person (as defined in the act) who is engaged in the business of owning, operating or maintaining, directly or indirectly, under the same general management, supervision, control or ownership, two or more stores where goods, wares, articles, commodities, or merchandise of any kind whatsoever, are sold or offered for sale at retail, and where the person operating such store or stores receive the retail profit from the commodities sold therein. The section then goes on to provide that two or more stores shall, for the purpose of the act, be treated as being under a single or common ownership, control, supervision or management, if directly or indirectly owned or controlled by a single person or any group of persons, or by a common interest in such stores, or if any part of the gross revenues, net revenues or profits from such store shall, directly or indirectly, be required to be immediately or ultimately made available for the beneficial uses, or shall directly or indirectly inure to the immediate

or ultimate benefit, of any single person or group of persons having a common interest therein.

In determining when a chain is a chain, it is necessary to consider, in connection with the provision just referred to, Section 2b of the act, which reads as follows:

"b. 'person' includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, or any other group or combination *acting as a unit,* and firms however organized and whatever be the plan of operation."

It will be noted that the Legislature deemed it advisable to define a person as including a firm, copartnership, joint adventure, association, corporation or combination *acting as a unit.* In other words, the operator of the chain must be a person as that term is defined by the Legislature. For that reason, two corporations owning two different stores, would not be acting as a unit merely because one of the stockholders of the first corporation owned some stock in the second corporation, any more than two individuals owning two separate stores. In other words, in order to make the chain taxable within the provision of the act, the stores must be owned by the same person, or by the same copartnership or by the same group of persons, acting as a unit.

If "A" owns a small block of stock in several corporations and each of those corporations operates a store, no one could be heard to say that "A" individually was conducting a business by a system of chain stores and be taxed according to the dividends which he received from the different corporations, because we would then be taxing him on his net profits rather than the gross receipts of the stores, as provided in the act, and there would be no way at all that we could reach him with the unit tax as provided in Section 4a of the act and we certainly could not say that all of the corporations were acting as a unit merely because "A" owned a small block of stock in each corporation.

If, however, A owned several stores and incorporated each one separately, retaining for himself the ownership or control of all the stores, he would come within the provisions of the act, and would be classed as one conducting a business by a system of chain stores.

We believe the test is whether or not the individual, firm, copartnership, association, corporation, or other group or combination, acting as a unit, operates or maintains directly or indirectly two or more stores under the same general management, supervision, control or ownership. But we still must qualify this statement by saying that if the two or more are ostensibly owned and operated by different persons but are under the same general management, control or ownership, it would not defeat the application of the act. In other words, the application of the act can not be defeated by subterfuge.

Having concluded this general statement, we will now proceed to set out numerous questions which have been submitted to you, along with our answers to the questions.

1. If the same person as defined in the act, owns a drygoods store in one city in Iowa, a grocery store in another and a clothing store in a third city, would that person be classed as one conducting a business by a system of chain stores, as defined by the act?

Although Section 2e of the act is broad enough to include drygoods, groceries and clothing stores within its definition of "business," still this office is of the opinion that to constitute a "chain" the different stores under unit control or management, must be engaged in substantially the same type of business. Thus, several drygoods stores or several clothing stores under unit management, ownership and control would constitute a chain under the meaning of the act. The tax is imposed upon every person in the State of Iowa engaged in conducting "a business" by a system of chain stores. It is the conducting of "a business" by a system of chain stores that is taxable. The words "a business" are clearly descriptive and characteristic. They limit the applicability of the "chain" to a single business, whatever that may be. Conducting a grocery store in one town, a dry goods store in another town and a clothing store in a third town would not be conducting "a business" as contemplated by the act in the three different towns. It would be conducting three different types of business in three different towns, none of which would have any relationship to the others.

2. Suppose the same person owns a Ford garage in the city of Des Moines and several blocks distant from the Ford garage, he owns and operates a service station where gasoline, oil and accessories are sold and motor vehicles are greased and serviced.

This person would be engaged in the operation of a chain store but he would not be taxed on the service, such as labor for repairing motor vehicles at his garage or for greasing, alemiting or washing cars at his service station, because those items do not constitute a sale at retail of tangible personal property. In making this statement, however, we take it that the person operating the garage and service station, either owns or rents the station and is not merely operating it for an oil company on a commission basis.

3. If one individual owns a garage and is a part owner in a service station, does this classify him as the operator of a chain store system?

No, unless he is the owner to such an extent that he has control of both stores or establishments.

4. If the service station is adjacent to the automobile dealership and the two are operated together, even though in separate, but adjoining buildings, and the buildings rented from separate owners but the entire business carried on under the ownership and control of one individual, would he be classified as a chain store operator?

He would not. It would be more in the nature of separate departments in the same business. This, however, would depend somewhat upon the fact that the entire business was carried on as one business establishment, meaning one office with central operation and control. The mere fact that the rent was paid to two or more landlords would make no difference.

5. If the automobile dealer has made arrangements for a service station operator to display the dealer's sign and display the merchandise of the automobile dealer at the service station but receiving only a commission on the dealer's merchandise sold, would this be considered a "chain"?

It is the opinion of this department that the automobile dealer does not have sufficient control or management of the service station to constitute it a part of the chain operated by him. He does not control the number of

employees, hours of labor, wages, purchases or sales, nor has he any interest in the gross or net earnings of the service station.

6. Can the dealer form a separate company to lease and operate the service station?

Yes, but it might still be considered as a chain store if the same person had the general management, supervision and control of both places of business.

7. Can the dealer sub-lease his service station to an employee and eliminate the chain store classification?

The dealer could lease all of his service stations, but to lease them to his employees, and continue to retain those individuals in his employment, certainly would smack of subterfuge. However, so far as leasing the stations is concerned—if the leases are executed in good faith and the automobile dealer does not retain ownership, control, management, or supervision of the stations —they would not come under the class of chain stores.

A. If so, can this sub-lease have a cancellation clause by either party, setting forth a specific time limit?

There is nothing wrong with having a cancellation clause in a lease. Even a 24-hour cancellation clause would not be evidence of an attempt to get around the act. Most companies, and especially petroleum companies, want to be sure that persons who lease their stations are desirable lessees and the companies usually, for their own protection, have a cancellation clause of which they can take advantage in case the tenant is a bootlegger.

B. What form of sub-lease agreement should be drawn up between the dealer and the person sub-leasing?

We believe it makes no difference whether the lease is upon a fixed rental basis or whether it is a gallonage or gross receipts lease, so long as the lease is made in good faith and the lessor does not attempt to retain ownership, control, management or supervision of the station.

C. May the sub-leasing agreement specify general policies under which the station may be operated?

We do not believe the lessor would have a right to specify the general policies under which the station should be operated to such an extent that he would be retaining the control, supervision or management of the station. This, however, depends upon the facts in each case.

D. Must the dealer sell the merchandise outright to the lessor or can it be put in on consignment?

Whether or not the leaving of goods on consignment with the service station operator would constitute that service station a part of the chain, insofar as those particular goods are concerned, thereby making the automobile dealer a chain store operator, would all depend upon the facts in each particular case, that is, whether or not he was retaining supervision, control or management of the place of business.

E. Can the agreement provide for daily or periodic reports to the dealer or oil company?

In further answering sub-divisions A to E inclusive, we will say that this department, as well as the Board of Assessment and Review, will scrutinize very carefully any such transactions, for the purpose of determining whether or not there is an attempt to evade the tax.

8. An automobile dealer has a garage on one side of the street and owns a gasoline service station directly across the street from the dealership. Some of the employees are interchanged and part of the merchandise sold at the station is kept at the garage because of proximity. Would this be a unit operation?

We would rule that this constitutes two stores and would therefore make the owner a chain store operator.

9. One dealer leases a station, furnishes the operating capital, etc., but lets his son run the station and receive whatever profits accrue. Will this operation be classified as a chain? Another has the same arrangement with a brother. What is its status?

This would all depend upon whether or not the automobile dealer, who leased the station, has the ownership, control, supervision or management. If he leased the station, furnished the capital and gave it to his son, he would not be a chain store operator. You understand, of course, that this would all depend on the proof in the particular case. However, we must conclude that such a transaction would bear close scrutiny.

10. In one case the dealership is a corporation and the active member of the firm managing the dealership operates a station as an individual enterprise. Does this constitute a chain?

In answering this question, we would say that it would depend a great deal upon the extent of the control, management or supervision. If the person who was a stockholder in the corporation and paid as a manager, owned an individual oil station, it would not necessarily place the two stores in the chain class, for the reason that the one is owned by an individual and the other by a corporation. However, if it should appear to your board that the corporation was organized for the sole purpose of evading the tax by way of subterfuge, the purpose sought to be accomplished should not be permitted.

11. Isn't it possible in view of the fact that these Ford dealers operated station set-ups are in a peculiar category in that they are merely an accessory to, or a department of the main business and the legislation was not intended for such operations, to have this type of unit exempted by the rules of the Board of Assessment and Review?

As we stated in our answer to question 1, two or more stores under unit control, in order to be considered as a chain, must necessarily be engaged in the same type of business. On the other hand, if the automobile dealer should sell automobiles, tires, and accessories at his service station, he might then be considered as conducting a business by a system of chain stores because he would have two or more stores, namely the garage and the service station, at which the same types of business was carried on.

12. The Ford Motor Sales Company—a separate corporation from the Ford Motor Company—owns and operates a retail establishment in the Ford Building in Des Moines; it being the only unit in the state selling at retail. Does it constitute a chain because similar units are operated in other states by the Ford Motor Sales Company.

Yes. The fact that the Ford Motor Company operates other sales divisions in other plants outside the state would constitute a chain and would come within the scope of the act.

13. If the Ford Motor Company itself sells used company-owned automobiles to employees individually or to other individuals, does this make the Ford Motor Company a chain and if so, would the tax be only on such sales as are classified as retail? Does the same thing apply to gasoline or parts sold to employees at retail, though only as accommodation services?

We would feel inclined to say that an occasional sale at retail does not constitute one a retailer, except for the wording of the act. It should be noted that Section 2d provides that a retail sale or a sale at retail means the sale to a consumer or for any purpose other than for re-sale. For this reason we must follow the definition provided by the Legislature. Hence we must say that the Ford Motor Company would be in danger of throwing itself in the chain store class if it sells automobiles to its employees. The tax would apply, however, only to the retail sales and not to the wholesale profits.

14. A. Does a dealership become a "chain" through the operation of a used car lot away from the main garage building without any office to complete used car sales which would be consummated at the dealership?

No. If the sale is consummated at the dealership, the used car lot is only for the purpose of storage of cars. We realize, of course, that at the present time in the city of Des Moines and in most of the other cities in the state, it is impossible for any of the larger automobile concerns to keep all of their used cars in the same building or even on the same lot. When the sale is consummated at the dealership, there is no question but that the used car lot located in close proximity could not be classed as a separate store as defined by the act.

14. B. Would the same thing apply if an office were on the used car lot?

If the used car business and the dealership were all one unit and were located so they could be so considered, then the mere fact that there was a department office on the used car lot would have no bearing and such would probably not be subject to the tax.

14. C. If the used car location is a building instead of a lot, does this alter the classification?

If the location is sufficiently close so that it may reasonably be considered as one unit or centrally controlled, such as a departmental store, then the fact that it was in a separate building would not alter the class. We realize that there is a great deal of difference between a dealer having a used car department on a vacant lot or building next to his own garage, and having a service station across the street or in some other part of town.

15. One individual—L. E. Harrison—owns and operates a dealership at Charles City, it being a corporation. He is majority stockholder in dealerships at Nashua, Waverly, Traer and Sumner. In each case, other than Charles City itself, the dealerships are separate corporations with the minority stockholder being in active charge of and managing the business. Do these constitute a "chain"? If so, how should the set-up be changed to alter the classification?

In answer to question 15, it is our opinion that in order to constitute one a chain store operator within the meaning of the act, the same person or group of persons, acting as a unit, must have control, ownership, supervision or management. In the case mentioned by you, L. E. Harrison is the sole owner of one corporation. He is a majority stockholder in the other four corporations, each corporation operating a Ford garage. By virtue of his being a majority stockholder, he has control and hence would be conducting a business by a system of chain stores.

16. In the case of Wood Auto Company, a corporation, the corporation owns and operates dealerships at Hampton, Eldora, Sheffield and Union, with one member of the firm in charge of each operation. Policies and management are entirely separate in each case, except in ownership. Is this classified as a chain?

There is no question but what the set-up above outlined constitutes a chain.

17. In another case, a partnership of two men own and operate a dealership at Northwood and Riceville. One partner actively runs and controls each place. Is this a "chain"?

This would constitute a chain.

18. In one case two brothers operate dealerships in adjoining towns and each has some interest or investment in the other, though not incorporated and merely operated by mutual agreement. What is the status of this set-up with reference to the "chain"?

It is rather difficult to answer this question without having more facts concerning the set-up. We would say, however, that if the brothers exercised joint ownership over the two establishments, they would be considered as chain store operators.

19. A finance company has furnished the capital investment for the operation of a dealership to be run by a salaried manager who participates in profits and has option to buy as conditions warrant. The finance company in another town sells repossessed automobiles to individuals. Does this make the operation a chain? If the same finance company made this arrangement with more than one dealership, would the operation be a chain?

The financing company, in financing sales of automobiles for a dealership, is not engaged in retailing of tangible personal property. It is strictly in the loan business so far as the financing is concerned. We are also inclined to say that a finance company in disposing of automobiles which it has been required to repossess for the purpose of protecting its security, would not be classed as a chain, unless it operates a store or business establishment where the automobiles are sold or kept for sale. However, if the finance company has furnished the capital investment, and owns the business as stated in your question, for the operation of a dealership, to be run by a salaried manager, the finance company itself is then engaged in the automobile business. If, then, the finance company should maintain an establishment in another town for the sale of repossessed cars, it would be classed as a chain store operator by virtue of the fact that it operated more than one store.

20. The Repass Automobile Company, a corporation, owns and operates dealerships in Waterloo and Ottumwa. The same corporation owns a portion

of the stock of the Chambers Motor Company in Des Moines, a separate corporation. Is the Chambers Motor Company a part of the chain? Are the Waterloo and Ottumwa places a separate group and chain?

Insofar as the two dealerships at Waterloo and Ottumwa are concerned, they would constitute a chain. Insofar as the Chambers Motor Company in Des Moines, a separate corporation, is concerned, the situation is different. A part of its stock is owned by the Repass Automobile Company. This, however, would not necessarily throw the Chambers Motor Company in the chain unless the control of the Chambers Motor Company was in the other corporation.

21. One dealer has an interest as a minority stockholder in two other dealerships operated by the majority stockholder. What is the status of this group?

A minority stockholder is not a chain store operator. These are two separate corporations, not operating as a unit.

22. A corporation, engaged in the retail automobile business, maintains its new car garage or sales room at one location. In addition to this it has a reconditioning plant for the purpose of reconditioning used cars, and a used car lot a short distance from the building. All of the business is transacted from the one central point, but it is necessary for the company to have the additional places for storage and reconditioning.

Under the conditions set out in the above question, it would not constitute a chain for the reason that the control is centrally located and the business is more in the nature of departmental rather than separate stores or establishments.

CHAIN STORE TAX: House File 311, Acts 46th General Assembly: Field seeds, such as clover and timothy are strictly seeds and not classed as grain, and for that reason those seeds could not be classed as grain as that word is used in House File 311 of the Acts of the 46th General Assembly.

June 14, 1935. *State Board of Assessment and Review:* You have forwarded to us a letter received by you from F. Mueller & Sons Company of Calamus, Iowa, in which the following question is asked:

"We have more than one place of business in Iowa and we are engaged in handling grain and seed which is exempted from the provisions of the chain store tax act if 95% of the total gross receipts from retail sales are received from those exempted commodities. It so happens that this company handles field seeds as well as grain, and the sales from the field seed amount to more than 5% of the total. Our question is whether or not this will throw us within the meaning of House File 311 of the Acts of the 46th General Assembly."

Grain has been defined in modern usage as a seed or seedlike fruit of any cereal grass whose seeds are used for food of man or beast; and generally used in the collective sense. See Corpus Juris, Volume 28, page 757. Undoubtedly, from the wording of the act, the Legislature intended to use the term "grain" in Section 3c in the collective sense, thereby referring to the fruit or seeds of the cereal plants en masse. It is the opinion of this department that field seeds, such as clover and timothy, are strictly seeds and not classed as grain, and for that reason those seeds could not be classed as grain as that word is used in House File 311 of the Acts of the 46th General Assembly.

CHAIN STORE TAX: Petroleum corporations.

June 15, 1935. *Board of Assessment and Review:* We have your letter of June 12th in which you ask for an opinion on the following question:

A certain petroleum corporation organized under the laws of the State of Iowa supplies, at wholesale, gasoline and oil to its dealers. Practically all of these dealers are under a contract with this corporation by the terms of which contract the dealers agree to purchase all of their petroleum products from this corporation for a certain term of years, and the corporation, wholesaler or individual wholesaler as the case might be, agrees to supply the dealers with products as needed, at their respective stations, during the life of the contract.

In certain cases the wholesaler has furnished the money to buy the service station and has sold it to the dealer on a contract by the terms of which the dealer agrees to pay the purchase price at the rate of 1c on each gallon of motor vehicle fuel purchased from the wholesaler.

We see no reason why an exclusive sale contract would constitute the wholesaler a retail dealer. He is not selling motor vehicle fuel at retail, but is selling it to the dealer. He does not own the stations and the one cent additional on each gallon of gasoline is merely an additional payment to apply on the purchase price of the station. The wholesaler has no control over the retail business nor would he have a right to take over the station and operate it in case the dealer violated the terms of the contract, insofar as the handling of the wholesaler's goods are concerned. The only right the wholesaler would have, would be to sue for damages for violation of the contract or to foreclose the mortgage given to secure the loan of money which was used by the dealer to purchase the real estate.

SCHOOLS: TUITION: FAILURE OF CREDITOR SCHOOL DISTRICT TO FILE STATEMENT WITH TREASURER OF DEBTOR SCHOOL DISTRICT: Section 4277, Code of Iowa, is merely directory and while creditor district should follow these dates as closely as possible for filing, the failure to follow them does not invalidate claim.

June 18, 1935. We have your request for opinion on the following proposition:

"A resident of a school district in this county went to high school in another town for the years 1930 and 1931, and the school district where he went to school did not file an itemized statement on or before February 15th or June 15th of each year as mentioned in Section 4277 of the Code. Will you please advise whether or not failure to file the itemized statement bars a remedy of the creditor district."

We should first call your attention to the amendments to Section 4277 of the Code. There was a minor amendment in the 45th General Assembly, Regular Session, this appearing as Chapter 62 of the Session Laws, which merely changed the amount from 12 to 9. It was amended by Chapter 41 of the Laws of the 45th General Assembly, Extra Session, and this is quite a substantial amendment and the matter that you inquire about is provided for in the amendment as follows:

"On or before February 15th and June 15th of each year, the secretary of the creditor district shall deliver to the secretary of the debtor district an itemized statement of such tuition fees."

It will be noticed that this is an act to be done subsequent to the liability incurred and therefore is much different than the certificate required under

Section 4276, for there, the pupil is required to present the certificate before entitled to admission and we have held that the presentation of this certificate is mandatory, but as to the dates in Section 4277, it is plain that this is merely directory and was not intended by the Legislature that if the itemized statement was not filed on or before these dates, that the claim should be barred and while, of course, the creditor districts should follow these dates as closely as possible, so that the debtor districts will know their liabilities, the failure to follow them does not invalidate the claim and such is the opinion of this department.

In the postcript to your letter, you ask in regard to securing copies of the opinions of this office. They are printed by the State Superintendent of Printing, State House, Des Moines, Iowa, and include the opinions for each biennium in separate books so that you can write to him in regard to the years for which you desire the opinions and if they are still available, he will be very glad to forward them to you.

STATUTE OF LIMITATIONS: Accounts receivable belonging to state institutions are not barred by the statute of limitations.

June 18, 1935. *Board of Education:* We have your request for opinion on the following proposition:

"Does the statute of limitations apply to accounts receivable belonging to any one of the state institutions?"

It is the general rule that a claim or an action is not barred unless definitely provided for by contract or by statute and it is also a general rule that the statute of limitations does not run against a state or any department or division thereof and from these general rules, it is our opinion that your question must be answered in the negative and that accounts receivable belonging to state institutions are not barred by the statute of limitations. You will note that this general rule is made a matter of statute in Section 3931 of the Code, which provides that no lapse of time shall be a bar to any action to recover on any loan made on behalf of any institution.

See *Des Moines County vs. Harker*, 34 Iowa, 84.
Minatt vs. Starr, 72 Iowa, 677.
Cedar Rapids Gas Light Co. vs. Cedar Rapids, 144 Iowa, 426.
Payett vs. Marshall County, 180 Iowa, 660.

BEER BILL: (46th General Assembly): Person not having good moral character cannot be granted a permit to sell beer. Good moral character defined.

June 18, 1935. *County Attorney, Keokuk, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department on the following:

"The city council of Keokuk have taken the position that they will not issue a single license to any person who has been convicted of any violation of the provisions of the beer law or the intoxicating liquor law or who has been convicted of a felony or an indictable misdemeanor.

"Under the provisions of the new beer law, I think that they are correct in what they are doing. What is your opinion in regard to the same"?

Under Subsection e of Section 1921-f97 of the new Iowa beer law, which defines the term "good moral character," it is the opinion of this department

that said section would be authority for the city council of Keokuk to take the position which they have taken, in that said subsection provides as follows:

"e. The term 'good moral character' shall not be construed to include the following. Any person, firm, or corporation who, preceding the making of an application for any permit under the provisions of this chapter, has been found guilty of violating the provisions of the beer act or any of the intoxicating liquor laws of the state or who has been convicted of a felony or an indictable misdemeanor."

Therefore, in considering the application of any person, if such applicant has been found guilty of violating any of the provisions of the beer law or any of the intoxicating liquor laws of the state or who has been convicted of a felony or an indictable misdemeanor, he shall not be construed as a person having a good moral character and, therefore, cannot be granted a permit to sell beer under the law.

BEER LAW (46th G. A.): HOTELS: FEES: Discussion of use of word "taproom."

June 18, 1935. *City Solicitor, Red Oak, Iowa:* This will acknowledge receipt of your letter of the fourth instant in which you request the opinion of this department on the following:

"Our city council is somewhat confused over the section of the new beer law relative to the fees to be paid by hotels. We have in this city a hotel that has been operated under a class 'B' permit. If the fee for class 'B' permits is raised in this city, the hotel would be entitled to a class 'B' permit, under Section 1921-f117 for the sum of $100.00, which would be discrimination in the hotels' favor, as it has under one hundred guest rooms.

"Some of the council members are of the opinion that the fee for hotels simply permitted serving in the dining rooms and guest rooms, and did not contemplate the permission to sell in a tap room or at a bar, as other class 'B' permits do.

"Can the hotel be issued a class 'B' permit which would entitle them to sell beer generally or does the class 'B' permit issued to hotels give authority to sell only in the dining rooms and guest rooms"?

Please be advised that it is the opinion of this department that hotels, under Section 1921-f113, "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," which is in accordance with the wording of that section.

Section 1921-f114 provides in part as follows:

"No holder of a permit under the provisions of this chapter 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."

Therefore, the hotel to which you refer could not use a sign in violation of the section above cited. The question would resolve itself into one of fact as to whether or not the place in which beer is sold is a dining room. There is a provision in Section 1921-f103, in Subsection 1, Division f, to the effect that wherever beer is sold, the place should be equipped with tables and seats sufficient to accommodate not less than 25 persons at one time. We presume that the Legislature intended, although this is not a section relating to hotel

permits, that dining rooms in hotels would have tables and seats sufficient to accommodate 25 persons at one time. The act itself refers to dining rooms —that a hotel could sell beer in any one of a number of dining rooms.

Regarding the use of the words "tap room," we have not found any case in which the court has construed the same. However, in Funk & Wagnalls Standard Dictionary, we find the following definition given under the word "tap":

"To withdraw the plug or turn the faucet of (a cask), to let the contents flow. To draw off, as liquor, by broaching a cask; especially, to begin to withdraw and use, as the contents of a full cask or barrel. To act as a tapster; draw off beer or other liquor. An arrangement for drawing out liquid, as liquor from a cask."

We find the following definition given under the word "taproom":

"A place where liquor is sold and drunk; barroom."

It would, therefore, appear that the dictionary definition of the word "tap" or "taproom" might be such as to come within the law as to the use of the words above mentioned. For this reason, the use of such a word as "taproom" might be objectionable.

As stated before, it is the opinion of this department that hotels holding class "B" permits may serve beer to their guests either in the dining room or rooms or to any guests duly registered at such hotel in the rooms of such guests.

OLD AGE ASSISTANCE LAW: (46th GENERAL ASSEMBLY): FUNERAL EXPENSES:

In re: Funeral expenses of Nellie Auringer of Waterloo.

June 18, 1935. *Comptroller:* This will acknowledge receipt of your letter of the fourth instant in which you request the opinion of this department on the following matter:

"We have claim filed by the Old Age Assistance Commission for $100.00 for the funeral expense of Nellie Auringer of Waterloo, who died November 13, 1934. The entire expense of the funeral in the total amount of $195.00 was paid by her sister, Mrs. Myrtle Torney. My understanding is that the Old Age Assistance Commission is allowed to pay on the funeral expense of any pensioner not to exceed $100.00, provided that there is no relative able to pay the same. It would appear that this sister was able to procure the money and pay the entire amount at once and, therefore, there is some question about the legality of the claim.

"Will you please give me your official opinion?"

These payments are made under Section 25 of Chapter 19, Acts of the 45th General Assembly in Extraordinary Session, which section provides as follows:

"*Funeral expenses.* On the death of any person receiving old age assistance, such reasonable funeral expenses for burial shall be paid to such persons as the board directs; provided, such expenses do not exceed one hundred dollars and the estate of the deceased is insufficient to defray the same."

You will note that the same has been amended by Senate File No. 357, Acts of the 46th General Assembly, to read as follows:

"*Funeral expenses.* On the death of any person receiving old age assistance, such reasonable funeral expenses for burial shall be paid to such persons as the board directs; provided, such expenses do not exceed one hundred dollars and the estate of the deceased or any life insurance or death or

funeral benefit association or society payment, made by reason of the death of such person, payable to his estate or the spouse or any relative, responsible under Sections 5298, 5301 and 10501-b6 of the Code, 1931, is insufficient to defray the same.

"The person to whom such funeral expense is paid as above provided is hereby prohibited from soliciting, accepting or contracting to receive any further compensation for services rendered in connection with such burial except on written approval of the board and subject to such rules and regulations as the commission shall direct."

However, it is our understanding that this situation arose prior to the time that Senate File No. 357, Acts of the 46th General Assembly, became effective. But the change in the law does not affect this particular situation. We presume that the Legislature intended by the use of the words "shall be paid to such persons as the board directs," that this would mean persons engaged in lines of business from which necessary articles would have to be procured and personal service furnished to insure a decent burial.

However, it would be our opinion that the payment of the $100.00 by the state in cases where Section 25 of the act was met would naturally depend upon the use of sound discretion on the part of the Old Age Assistance Board of the county in which the person receiving assistance resided. Many of these cases may differ with respect to the ability of relatives to pay funeral expenses. A sister, as we understand the law, would not be liable in such a manner as to defeat that person from receiving old age pension. In other words, while a sister or brother might be living and able to care for the person desiring assistance, yet the fact that such persons existed, having the relationship of brother or sister to such a person, would not prevent the giving or receiving of such assistance. This, however, is not true in the case of a child. Therefore, it would be our thought that some investigation should be made by the local board and that their discretion should be followed with respect to the paying of the $100.00 in this case.

The payment of the $100.00 to the sister can only be made upon the recommendation by the county board that there may be cases where the use of the words "to such persons," as used in the statute, might refer to others than those who supplied articles or service in connection with the burial.

However, we would suggest that the county board make a thorough investigation in each case.

OLD AGE ASSISTANCE LAW:

"Old Age Assistance Commission required to collect 6% interest on assistance liens for period from November 1, 1934, to and including May 9, 1935.

"It would not be proper to interpret the legislative amendment as retroactive, and discontinue the collection of interest in the enforcement of all liens even though such liens were in effect prior to May 10, 1935"?

June 18, 1935. *Old Age Assistance Commission:* This will acknowledge receipt of your request for the opinion of this department on the following questions:

"1. Is our department required to collect six per cent interest on assistance liens for the period from November 1, 1934, to and including May 9, 1935?

"2. Would it be proper for us to interpret the legislative amendment as retroactive, and discontinue the collection of interest in the enforcement of all liens even though such liens were in effect prior to May 10, 1935"?

In answer to your first question, it is the opinion of this department that the Old Age Assistance Commission is required to collect six per cent interest on assistance liens for the period from November 1, 1934, to and including May 9, 1935, as this provision was part of the law during said period of time. Therefore, the interest would have to be included on liens accruing between those dates, but the interest on the amount paid would cease as of the date on which Senate File No. 357, Acts of the 46th General Assembly, became effective, which we understand was at midnight on May 9, 1935.

In answer to your second question, it is the opinion of this department that the same should be answered in the negative. We believe the reasoning set forth in answer to your first question is sufficient answer to this question.

CONSERVATION COMMISSION: REAL ESTATE: EXECUTIVE COUNCIL: The safe practice in every occasion would be to have the approval of the Executive Council before expending any of the funds of the conservation commission.

June 18, 1935. *Conservation Commission:* This will acknowledge receipt of your letter of June 3, 1935, in which you request the opinion of this department on the following:

"Need real estate purchases made by the conservation commission be confirmed or approved by the State Executive Council"?

Section 1703-d12 of the 1931 Code of Iowa provides in part as follows:

"*Specific powers.* The commission is hereby authorized and empowered to:
1. Expend any and all moneys accruing to the Fish and Game Commission fund from any and all sources in carrying out the purpose of this chapter; any act, or acts, not consistent with this provision are hereby repealed so far as they may apply to the Fish and Game Commission fund;
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;
3. 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;
* * * * * * * * *"

This section of the Code is amended by Section 1, Chapter 30, Acts of the 45th General Assembly, but not with reference to the part of said section above quoted.

Section 1800 of the 1931 Code of Iowa provides 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."

Therefore, in the consolidation of the Fish and Game Commission with the Board of Conservation, while the Fish and Game commission has the right, for certain specified purposes, as above set out, to purchase property for the uses enumerated, the Board of Conservation, however, does not have this right, and in matters in which joint funds would be used, the Executive

Council would have to approve the transaction in accordance with Section 1800 of the Code.

It is the opinion of this department that the better practices in all such purchases would be to have the Executive Council approve the same. However, there may be purchases made exclusively with the funds of the Fish and Game Commission, as the funds are divided in the Conservation Commission, whereby some purchases might be made without the approval of the Executive Council. But in the Conservation Commission set-up, we assume that the practice will be that the money will be paid out of the administrative department, there now being three departments which are as follows:

1. Public parks,
2. Fish and game,
3. Administrative.

Therefore, the safe practice in every occasion would be to have the approval of the Executive Council before expending any of the funds of the Conservation Commission.

HOUSE FILE 173, 46th G. A.: DRY CLEANING: SHOE REPAIRING: People engaged in shoe repairing trade and in dry cleaning are not included in the terms of House File No. 173, 46th G. A.

June 19, 1935. *County Attorney, Des Moines, Iowa:* Your letter of May 8th, addressed to Mr. Clair E. Hamilton, Assistant Attorney General, has been referred to me for reply. You request an interpretation of Section 2 of House File No. 173, which reads as follows:

"Section 2. This act applies only to those trades—where personal services are rendered upon a person or persons without the sale of merchandise as such, which are herein referred to as service trades. The fact that title to personal property may pass as an incident to rendering such service or services, does not prevent the trade in which this happens from being a service trade provided however that no provisions in this act shall apply to any trade school."

You request an opinion as to whether or not this section applies to people who are engaged in the shoe repairing trade and people who are engaged in dry cleaning.

Your question calls for a construction particularly of the following language:

"This act applies only to those trades where personal services are rendered upon a person or persons."

Conversely it does not apply to those trades where personal services are not rendered upon a person or persons. The act clearly is not broad enough to include the trades of the printer, bricklayer, automobile mechanic, and numerous other trades, for the reason that they do not render personal services upon the person or persons of their employers.

Person, as used in this act, means the body of a human being. The carpenter may render a service to a person or persons by building for him, or them, a house in which to live, but he does not render a personal service upon the person of anyone; and the same is true of mechanics who build or repair automobiles in order that others may ride in them for purposes of business and pleasure and perhaps sometimes for the purpose of making an ostenta-

tious appearance. A person engaged in the shoe repairing trade or who is engaged in the work of dry cleaning clothes and other articles may contribute very largely to the convenience, comfort, and appearance of those whom they serve, but surely it cannot be said that they perform personal services upon a person or persons. They clearly do not perform a personal service upon the body of a human being, and therefore we do not believe they come within the terms of House File No. 173, as passed by the 46th General Assembly of Iowa.

SCHOOLS: TRANSPORTATION OF CHILDREN: AS TO DESIGNATED SCHOOL: Board shall arrange for transportation and shall pay cost of such transportation. Both of these elements are lacking here—the board did not arrange for transportation as no transportation was furnished and there could be no cost of transportation as child walked.

June 19, 1935. *County Attorney, Cherokee, Iowa:* We have your request for opinion on the following proposition:

"Section 4, Chapter 60, Acts of the 45th General Assembly, as amended by Chapter 61, provides for the payment of transportation when the school of a child has been closed and the child has been placed more than two miles from another school designated by the board. Will you please advise whether the parent of such child would be entitled to the reasonable cost of transportation of the child where the child had walked to school."

We should first suggest that this provision applies only to the contract or designated school and that transportation is only provided for the school designated by the board, but that where a child goes to school of his choice, he is entitled to tuition, not to transportation. You did not point out whether this was a designated school or not, so that is why I call your attention to this at the very outset.

As to the question of transportation, you will note that the board shall arrange for the transportation and shall pay the cost of such transportation. In your inquiry, both of these elements are lacking as, apparently, the board did not arrange for transportation as no transportation was furnished and there could have been no cost of transportation, as the child walked and was not transported. Therefore, there is no basis upon which the board may pay for transportation, and such is the opinion of this department.

SCHOOLS: STATE AID: Attendance between 9½ and 10 cannot be considered 10 for the purpose of state aid—the minimum requirement is an average daily attendance of at least 10 pupils and this is not complied with by any number less than 10.

June 19, 1935. *Superintendent of Public Instruction:* We have your request for opinion on the following proposition:

"According to Section 4333, state aid is distributed to standard rural schools provided they have maintained an average daily attendance of at least ten pupils during the previous school year.

"It is customary in recording average daily attendance to drop fractions that are less than one-half, and to consider those that are one-half or more as a unit. Could this custom be applied to a school whose average daily attendance is below ten but not below 9.5?

"In other words, could a number between nine and one-half and ten be considered as ten for the purpose of state aid, or as being equivalent to ten?"

Your inquiry must be answered in the negative for the reason that under

the statute, the minimum requirement is an average daily attendance of at least ten pupils and this is not complied with by any number less than ten.

SCHOOLS: ELECTION: CONSTRUCTION OF GYMNASIUM: CHAPTER 225, CODE OF IOWA: When petition is presented for construction of improvement, president of board on receipt of petition, shall call meeting and fix time and place of election. If Section 4354 of Code is complied with, election must be had.

June 19, 1935. *County Attorney, Estherville, Iowa:* We have your letter of recent date requesting our opinion on the following proposition:

"The electors of a school district, or some of them desire to have constructed a gymnasium and other improvements to the school. The board of directors have refused to consider the proposed improvements and have so voted. It will not be necessary to issue bonds and the proposed expenditure will not be in excess of 1¼% of the actual value of the taxable property of the district. Will you please advise whether under the provisions of Chapter 225 of the Code it is necessary that the board submit such matter to the electors upon petition being presented to them with the proper number of signatures as provided in Section 4354 of the Code?"

Section 4355 of the Code provides as follows:

"Election called. The president of the board of directors on receipt of such petition shall, within ten days, call a meeting of the board which shall call such election, fixing the time and place thereof, which may be at the time and place of holding the regular school election."

You will note that this is mandatory and that the president of the board on receipt of said petition, shall call a meeting and fix the time and place of the election. It is, therefore, apparent, that if Section 4354 of the Code is complied with, that the election must be had.

I also call your attention to the case of *Mershon vs. Consolidated School District,* 204 Iowa, 221, which may assist you in regard to the procedure.

SCHOOLS: FREE USE OF GYMNASIUM OR AUDITORIUM OF PUBLIC SCHOOL BY BOARD OR GOVERNING BODY OF PRIVATE OR PAROCHIAL SCHOOL: No one has right to demand free use of gymnasium or auditorium of public school, but that board may authorize its use at any time that such use does not interfere with regular school activities.

June 19, 1935. *Supt. of Public Instruction:* We have your request for opinion on the following proposition:

"Does the board or governing body of a private or parochial school have the right to demand from the board of a public school that it be permitted free use of the gymnasium or auditorium of the public school?"

This is covered by Sections 4371, 4372 and 4373 as amended by Chapter 66 of the Acts of the 45th General Assembly. These statutes provide that the Board of Directors of any school corporation may authorize the use of any school house and its grounds for certain purposes and the amendment provides that such use shall in no way interfere with school activities.

It is, therefore, clear that no one has the right to demand the free use of the gymnasium or auditorium of a public school, but that the board may authorize its use at any time that such use does not interfere with the regular school activities and such is the opinion of this department.

SCHOOLS: TUITION: FAMILY ON RELIEF: It appears that if family is on relief and instead of being placed in the county home, are placed in a house in Audubon, that the county should likewise be liable for their tuition—but not if family moved to Audubon on their own volition and thereafter went on relief.

June 19, 1935. *County Attorney, Audubon, Iowa:* We have your request for opinion on the following proposition:

"We have a family who have moved into Audubon from another town in the county because they could not find a house elsewhere and are on relief. The school board demands tuition because they are here for reasons just stated. Will you please advise whether the county is liable for the tuition of the children or whether they are only liable for those who live in the county home or in homes owned by the county?"

Every child is, of course, entitled to attend school and is even so required and a residence, even for temporary purposes in a school district is sufficient to entitle a child to attend school there. The question, however, that you have presented is one of tuition.

Section 5346 of the Code provides as follows:

"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, it is apparent that if these children were at the county home, the cost of their schooling would be paid for by the county pursuant to the above statute, and it also appears to be clear that if this family is on relief and instead of being placed in the county home, are placed in a house in Audubon, that the county should likewise be liable for their tuition, and such is the opinion of this department.

It is further our opinion that if this family moved to Audubon on their own volition and thereafter went on relief, that this would not make the county liable as the children would be entitled to attend school like any other child living within the district, for the county is only liable when the family is moved into a district by the county or any relief agency in order to avoid placing the family in the county home.

BEER LAW (46th GENERAL ASSEMBLY). SALE OF BEER IN ORIGINAL CONTAINER:

Class "B" permit holder who sells beer for consumption off the premises would have to sell in the original container.

June 19, 1935. *County Attorney, Rock Rapids, Iowa:* This will acknowledge receipt of your request for the opinion of this department on the following question:

"Is the holder of a class 'B' permit prohibited from selling beer for consumption off the premises, said beer being put up by him in containers such as jugs, pails and other containers, the containers belonging to the consumer, or must he only sell beer which is in the original container?"

Your attention is called to Section 1921-g6 of the new Iowa beer law, which provides as follows:

"Bottling Beer. No person, firm or corporation shall bottle beer within

the State of Iowa, except class 'A' permittees who have complete equipment for bottling beer and who have received the approval of the local Board of Health as to sanitation, and it shall be the duty of local Boards of Health to inspect the premises and equipment of class 'A' permittees who desire to bottle beer."

Therefore, it would be the opinion of this department that the only class of permit holders in Iowa, under the present beer law, who can bottle beer is class "A" permit holders. The section provides that a class "B" permit holder could not put beer into various containers or bottle the same, as this right is given exclusively to class "A" permit holders. Therefore, the class "B" permit holder who sells for consumption off the premises, in our opinion, would have to sell in the original container and could not sell beer in containers of different kinds, such as you have outlined in your request for an opinion.

Under the old beer law, we rendered an opinion to the Department of Agriculture with reference to sanitation measures which would have to be taken by persons selling beer in containers brought in by customers. We advised that department that all laws with reference to sanitation would have to be obeyed by all permit holders selling beer.

Under the present law, it would be our thought that sales of this kind could not be permitted.

BEER LAW (46th GENERAL ASSEMBLY): Form of bond.

June 20, 1935. *Treasurer of State:* This will acknowledge receipt of your request of the 18th instant, together with enclosures which we are herewith returning to you, with reference to the form of bond, under the new beer law, which is prescribed and furnished by the Treasurer of State. You desire our opinion in the matter.

You will note from the reading of the beer law that, in the case of applications made by persons desiring class "A," "B" or "C" permits, it is necessary that a bond be furnished in the form prescribed and which has been furnished by the Treasurer of State, with good and sufficient sureties to be approved by the authorities to which such application is submitted, conditioned upon the faithful observance of the chapter in the sum of.....dollars.

You advise that heretofore this bond has run to the state of Iowa and that, under the present law, cities and towns have been given additional powers to enact ordinances for the enforcement of the act. By reason of the additional powers given to cities and towns in which these municipalities can enact ordinances and may by this regulate largely the conduct of a permit holder within the limits of a city or town and by which Boards of Supervisors, by rules and regulations, can control the method by which beer can be sold by permit holders, it is the opinion of this department that the bond could be made jointly to the State of Iowa and to the city or town issuing the permit or jointly with the State of Iowa and the county in which a permit might be issued by the Board of Supervisors, in cases where that body issues permits. The bond might be in the following form:

To the STATE OF IOWA and.....COUNTY (..... CITY or.....TOWN), for the faithful observance of the act, (In the case of a city or town, to also include—the faithful observance of any ordinances which had been or might be adopted by such muncipality with respect to the sale of beer and the conduct of places where beer is sold.) and for the faithful observance of any rules and regulations which might

be adopted by said.....county to enforce the provisions of the beer law.

CONSERVATION COMMISSION: TAXES: From what fund should the taxes on such land be paid?

1. School taxes are paid in accordance with Chapter 125, acts of the 45th General Assembly.
2. Other taxes are paid from the conservation commission's fund.

June 24, 1935. *Executive Council:* This will acknowledge receipt of your request of the 24th instant for the opinion of this department on the following question:

"Senate File 360, Acts of the 46th General Assembly authorized the State Conservation Commission to acquire or lease property for development as State forests and conservation areas subject to regular tax levies for each and every year in the respective taxing districts. We would appreciate an opinion as to the fund from which the taxes on such land should be paid."

Please be advised that it is the opinion of this department that as far as school taxes are concerned, under Chapter 125, Acts of the 45th General Assembly, Subdivision 4, second paragraph, it is provided:

"When the computed amount is based upon land belonging to the State of Iowa or to the government of the United States as provided herein, it shall then become the duty of the Secretary of the Executive Council of the State to certify the amount to the Auditor of State who shall draw his warrant to the secretary of the said school district and the Treasurer of State shall pay the same from any funds of the State not otherwise appropriated."

In accordance with this, school taxes are paid in the manner provided. Other taxes would be paid from the Conservation Commission's funds.

Now, you are doubtless aware of the procedure which has been followed in the acquisition of property under the Board of Conservation in the past, which has been to go before the Board of Supervisors of the county in which the property is located and ask that the taxes be compromised in cases where the state has taken over areas.

SCHOOLS: SCHOOL DISTRICTS: RESIGNATION OF SCHOOL BOARD SECRETARY—WHETHER EFFECTIVE: Under our statute, the appointive power is in the board and the resignation to be effective, must be accepted by board and any time before such acceptance, may be withdrawn.

June 26, 1935. *Department of Public Instruction:* We have your request for an opinion on the following proposition:

"A school director tenders his resignation to the secretary of the school board. The secretary reads this resignation at the next meeting of the board. No action is taken. At the next meeting of the school board this director withdraws his resignation with no objection from the board, all of whom were present. Since the withdrawal of said resignation this director has met with the board and taken part in its proceedings. Now the question is raised as to whether this resignation under such conditions creates a vacancy on the school board."

In 56 Corpus Juris, page 318, the rule is stated as follows:

"The mere tender of a resignation by a member of a school board, which he states shall take effect at once, does not immediately create a vacancy in the office, and such a resignation may be withdrawn at any time before

it is accepted or acted upon by the appointive power, even without the consent of the latter. When accepted, according to its term, resignation becomes binding immediately, and cannot be withdrawn even though it is not to become effective to create a vacancy until a specified date in the future."

Section 4223-a2 of the Code provides:

"Vacancies occurring among the officers or members shall be filled by the board by ballot, and the person receiving the highest number of votes shall be declared elected, and shall qualify as if originally elected or appointed, and hold office until the organization of the board the third Monday in March immediately following the next regular election."

So it will be noted that under our statute, the appointive power is in the board and that the resignation to be effective must be accepted by the board and any time before such acceptance may be withdrawn. From the statement of facts here, the resignation was not accepted by the board. Our Supreme Court in the late case of Cowles vs. Independent School District of Rome, 204 Iowa 689, had before it a similar proposition, and the court in that case followed the general rule and held that for a resignation to be effective it must be accepted.

It is therefore the opinion of this department that the school director in question had the right to withdraw his resignation before it was accepted by the board and that such attempted resignation did not create a vacancy.

CHAIN STORE TAX: TOLERTON & WARFIELD CO.: Temporary injunction.

June 27, 1935. *Board of Assessment and Review:* I have your letter of June 26th in which you ask for an opinion on the following:

"In view of the fact that suit has been commenced in the Polk County District Court attacking the constitutionality of the chain store tax act of 1935, known as House File 311, the rumor seems to be current that other companies who have not commenced actions will not have to pay the tax due July 1, 1935, but merely sit back and await the determination of the case which has been instituted by Tolerton & Warfield Company. What attitude should we take relative to the collection of this tax?"

You are advised that the act provides for a penalty in case the tax imposed by Section 4-a is not paid on or before July 1, 1935. The fact that one company has commenced an action to enjoin the collection of this tax will not prevent the collecting of the tax from other companies. We might also call attention to the fact that there will be no temporary injunction issued in the Tolerton & Warfield case for the reason that the plaintiff has stipulated with the State of Iowa that it will pay the tax and that the Treasurer of State will hold the said money in a segregated fund in trust, pending the final determination of the case and that in the event the act is finally held unconstitutional the money will be returned to the Tolerton & Warfield Company.

You are further advised that you should not permit any person, firm or corporation to withhold the payment of the tax due on July 1, 1935, and in case said tax is not paid by July 1, 1935, the statutory penalty as provided in the act should be added.

The only way that any company can prevent the collection of the tax is to commence a suit against the State of Iowa or to stipulate with the state

that the tax will be paid and held by the Treasurer of State in trust until the final determination of the pending litigation.

SALES TAX: Hotel telephone calls: Hotel employees' meals—are these subject to tax? Yes.

June 27, 1935. *State Board of Assessment and Review:* We have your letter of June 26th in which you ask for an opinion on two questions:

1. Under the provisions of the sales tax act permitting the Board of Assessment and Review to adopt rules and regulations, this department has ruled that restaurants and hotels furnishing meals to their help and employees are liable for the sales tax on the consumption of said food.

The reason for this rule is that we consider the furnishing of this food as an element fixed by each restaurant or hotel in placing the salary of the employees. We have fixed the rate at $3 per week as that is the rate established by the NRA. This has been paid by most all of the hotels and restaurants, but the Blackhawk Hotels Corporation claims that it is not possible to collect the same under the law, stating that it is not a sale of any tangible personal property, and that the food is given to the employees, and that it has nothing to do with their compensation.

Your second question is as follows:

On all telephone calls out of the hotel there is a charge made by the hotel company against its guests in the sum of ten cents which amount is divided as follows—three cents retained by the telephone company—two cents retained by the hotel and other five cents is held by the hotel company, claiming that it is a service charge for getting the connection and other service in connection with the call. Our board has ruled that the sales tax should apply to the gross receipts to the telephone calls, for the reason that is communication service.

We will answer your questions in the order in which they are asked.

Under Division 4, Section 37, Subdivision "b" of the tax revision act, a sale is defined as follows:

"'Sale' means any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration."

In view of the above definition of a sale, we believe the rule adopted by your board is reasonable, fair and just. Surely the hotel company is not giving away meals. These meals constitute something that is given in exchange for labor. The hotel company is in the business of furnishing meals at retail. It pays its waiters and other employees so much for labor, and takes into consideration the meals given, and thereby reducing the weekly compensation. If I worked in a grocery store, surely the grocer could not be heard to say, for the purpose of evading the tax, that because my grocery account was deducted from my wages, that it was not selling them to me within the definition above quoted. It is undoubtedly true that when the hotel company employed each waitress or other employee, the management advised those persons that they would be paid a certain weekly compensation and would receive their meals. If this is true, the meals were taken into consideration as a part of the weekly compensation or exchange. The personal service was then furnished in consideration of the payment of money and meals. The meals were therefore sold to the employee. We can only say that it is a just, fair and reasonable rule and that you should insist upon the payment of the tax.

In answer to your second question, we quote for you Division 4, Section 37, Subdivision "c" of the act, which reads as follows:

"'Retail sale' or 'sale at retail' means the sale to a consumer or to any person for any purpose, other than for processing or for resale, of tangible personal property, and the sale of gas, electricity, water, and communication service to retail consumers or users."

Surely no one could be heard to say that a telephone call made from a hotel room is not communication service. There might be a question as to just how the tax should be paid—whether the telephone company should pay on the three cents and the hotel company on the seven cents, or whether the hotel company should pay on the entire ten cents and deduct it from that portion which it pays to the telephone company. However, that is merely a matter of mechanics insofar as the payment is concerned. But it is true, that regardless of the mechanics of the collection of the tax, the ten-cent telephone call is communication service, just as much as a long distance call from Davenport to Des Moines would be communication service and the tax should be collected.

INSURANCE COMPANIES: REAL ESTATE TAXES: Real estate taxes attach as a lien against property in this state on the 31st day of December subsequent to the assessment and levy.

June 27, 1935. *Commissioner of Insurance:* We have your request for opinion on the following proposition:.

"Insurance companies often acquire real estate in this state either by voluntary deed or sheriff's deed. Such instruments are silent as to taxes. Will you please advise us as to the date real estate taxes attach as a lien against property in this state?"

We have examined opinion of counsel of the Bureau of Internal Revenue, No. 9793, enclosed with your letter, and also authorities cited by him therein.

Under the provisions of Section 7171 of the Code of Iowa, 1931, taxes are levied upon the assessable value of taxable property in September. The Treasurer then proceeds to collect the taxes at the beginning of the following year. A tax is regarded as accruing, within the meaning of the rules of the common law respecting the liability therefor, on the date when it becomes a lien on the land, and the day of such lien is the subject of your inquiry.

Section 7202 of the Code provides as follows:

"Taxes upon real estate shall be a lien thereon against all persons except the State."

You will note that there is no provision in this as to the date when the taxes become a lien. Section 7204 of the Code provides:

"As against a purchaser, such liens shall attach to real estate on and after the 31st day of December in each year."

This latter provision, as you will note, applies only to the date that the lien shall attach as against the purchaser. Our Supreme Court has construed this statute in the case of *Moore vs. Central National Bank & Trust Company*, 210 Iowa, 1020, and there is also an extended note in 12 A. L. R., beginning on page 411, but this, of course, does not answer the question directly as to when the lien attaches as to the owner.

From decisions of our Supreme Court and from one decision of the United

States District Court of the Southern District of Iowa it may be gathered that taxes do not become due until after the levy is made, and perhaps not until after the books are placed in the hands of the Treasurer, and taxes are not a lien on real estate except when made so by statute or constitutional provision. Our constitution is silent and as pointed out above our statute is silent as to date. It is clear that such taxes could not become a lien until after they are due; and they could not be said to be due before they are fixed and determined, that is from the time the assessment is complete, which is the date the books come into the hands of the Treasurer, for up until that date there has been no evidence of the tax upon the books as to any particular sum or charge, and therefore they could not become a charge against a particular parcel of land.

In the early case of *Larson vs. Hamilton County*, 123 Iowa, 485, decided in 1904, there is some dictum on this proposition, for on page 486 the Court said:

"The particular time taxes attach as a lien against a stock of goods is not designated, but inferentially this is when they become due, in analogy to the time when they attach as a lien on the real estate of the owner."

and again on page 487, the Court said:

"It may not attach until the levy, and this is doubtless true with respect to real estate."

In this state, under our statute the assessment is made the first of the year, but the taxes are not levied until the following Sepember, and as far as I am able to find we have no statutory provision when the tax books are certified to the Treasurer for collection, but I know as a common practice here in Polk County that these books are certified by the County Auditor to the County Treasurer on the 31st day of December, and on that date anyone interested could go to the Treasurer's office and ascertain the exact amount of taxes due and which would be a charge against a particular parcel of land. Now, there is nothing in the statute by which it could be said that this then relates back to the preceding January, and clearly if our Legislature had intended that the lien of such taxes when levied should relate back to the preceding January they would have specifically so provided, and in absence of such provision we must, of course, find that the law is that taxes become a lien upon the date that they are made a charge in a definite sum against a particular parcel of land. And the only question that must be raised is as to this—there is no statutory time between September and January 1st when this act must take place and this is undoubtedly why the Legislature definitely provided that as to purchasers the lien should attach as of December 31st, for this obviates the necessity of a purchaser inquiring whether the levy has been made and certified to the County Treasurer for collection, and as this date may vary in different counties in the state, it would appear to us that your department, in order to advise insurance companies, should have a definite date and therefore it is our thought that this date of December 31st should likewise be the determining date as to owners, for as pointed out above this is the date that is in use in Polk County, and may be the date that all counties use.

You will note in our conclusions above that our opinion differs from the

opinion of the General Counsel for the Bureau of Internal Revenue, for it appears that from an analysis as above set forth that he has not correctly interpreted the law of this state.

We should call your attention to the fact that there are two or three special chartered cities in Iowa, and that these special chartered cities, pursuant to their charters, make their own levy, and these charters provide the date that the taxes so levied shall become a lien, so wherever the real estate is located in a special chartered city the date that the taxes become a lien should be ascertained from the charter and as to such real estate this date would govern.

It is, therefore, the opinion of this department that real estate taxes attach as a lien against property in this state on the 31st day of December subsequent to the assessment and levy.

INSURANCE: ANNUITIES: Premiums or considerations received by insurance companies in sale or grant of annuities are taxable pursuant to Chapter 335 of Code of Iowa, 1931.

June 27, 1935. *Commissioner of Insurance:* We have your request for opinion on the following proposition:

"Many insurance companies doing business in this state grant and sell annuities. Will you please advise this department whether the consideration or premium received by such insurance companies in the sale or grant of such annuities is taxable pursuant to Chapter 335, Code of Iowa, 1931?"

We forwarded to you some time ago a memorandum on this proposition and have withheld official opinion in order to give counsel an opportunity to submit authorities on this proposition.

The power to tax is purely statutory. It is a burden imposed by legislative authority upon persons or property to raise money for public purposes. Necessarily then, terminology of the statute and any administrative, legislative or judicial construction must control.

Section 7022 of the Code provides for a tax and gross premiums as to foreign companies, the pertinent parts of this section being as follows:

"Every insurance company incorporated under the laws of any state of the United States, other than the State of Iowa * * * shall * * * pay into the State Treasury as tax 2½% of the gross amount of premiums received by it. * * *"

The tax then under this statute is on the gross amount of premiums received and the question is whether this also includes premiums or considerations paid for annuities, for you will note there is no exception in favor of annuities. The terms "insurance" and "annuities" have been many times defined by the courts and in the last analysis both are ordinarily contingent upon death —one starting at death and the other stopping at death. They are then both based on mortality tables, and the premium or consideration for them figured on such tables.

Our Legislature first gave to corporations in this state the power to grant or sell annuities in Chapter 147 of the Laws of the 45th General Assembly, and you will note there that they gave this right only to life insurance companies, so that Legislature considered the granting and selling of annuities as a part of the life insurance business and your own department, as I under-

stand, has heretofore treated the premiums or considerations paid for annuities on the same basis as those paid for any type of insurance.

And our own Supreme Court in the case of *Hult vs. Home Life Insurance Company*, 240 N. W., 218, treated annuities as a form of life insurance, for on page 228 the Court said:

"The contracts under consideration contain no element of wager. True enough the length of the life of the annuitant is uncertain. So it is in any form of life insurance contract clearly within the law."

So that the three branches of our government have treated annuities as a form of insurance and it will be well to note that the Legislature when they enacted Chapter 147 of the Laws of the 45th General Assembly did not provide any particular method of taxation as to annuities, so they must have intended the provisions of Chapter 335 of the Code to govern.

The original source of income of life insurance companies is, of course, its premiums from all types of policies. Its incidental income is from its earnings such as rents, interests, dividends, and so on. There is nothing in the laws of this state relieving any part of the original source of income of these companies from taxation, and if we should arbitrarily hold that the granting of annuities was separate and distinct from the rest of the business of a life insurance company, the company would be under no statutory provisions or restrictions as to the annuity business. It could abandon the insurance end and from such arbitrary finding of ours would contend that they could operate a purely annuity business without restriction, or could organize as an annuity company without statutory provision or restriction as to their organization or operation and without supervision of any kind or character. Such clearly was not the intent of the Legislature. The intent, we believe, to be exactly opposite.

In our study on this proposition, we have gone into the cases of

State of New York vs. Knapp, 193 App. Div., 413, which was affirmed in 231 N. Y., 630;
Commonwealth vs. Metropolitan Life Ins. Company, 98 Atl., 1072;
People vs. Security Life Insurance Co., 78 NY, 114;
Curtis vs. New York Life Ins. Co., 104 NE., 553;
Hall vs. Metropolitan Life Ins. Co., 28 Pac. (2d), 875;
Carroll vs. Equitable Life Ins. Co., 9 Fed. Sup., 223;
Cuthbert vs. North Amer. Life Ins. Co., 24 Ont., 511;
Couch on Insurance, Vol. 1, Section 2;
Mutual Life Ins. Co. vs. Smith, 184 Fed., 1.

The New York and Pennsylvania cases involve taxation, but we do not believe that our Supreme Court would follow the majority of opinions in these cases with the particular facts in mind as we have outlined above.

It is, therefore, the opinion of this department that premiums or considerations received by insurance companies in the sale or grant of annuities are taxable pursuant to Chapter 335 of the Code of Iowa, 1931.

CORPORATIONS: CHARTERS: EXTENSION PERIOD: Corporations organized under Chapter 384, Code 1931, may not change over and operate thereafter as cooperatives. If cooperative associations are organized after July 4 they must be organized under Senate File 113.

June 27, 1935. *Secretary of State:* On May 31st you submitted the following questions to this department for an opinion:

"1. In view of Sections 1, 43 and 61 of Senate File 113, will it be possible after July 4th for corporations organized under Chapter 384 to change over under the provisions of Section 8481 or Section 8509 and operate thereafter as cooperatives under authority of Chapter 389 or 390?"

"2. Will a pecuniary corporation organized under Chapter 384, the charter of which has been extended for two years under the provisions of Senate File 227, be permitted during this two-year extension period to change over and operate under Chapter 389, 390 or Senate File 113 which goes into effect July 4th"

It is our opinion in view of Sections 1, 43 and 61 of Senate File 113, Acts of the 46th General Assembly, that it will not be permissible after July 4th for corporations organized under Chapter 384 to change over under the provisions of Sections 8481 and 8509 of the Code, 1931, and operate thereafter as cooperatives under authority of Chapter 389 or Chapter 390.

Section 8481 appears in Chapter 389, which relates to cooperative associations and is in part as follows:

"8481. *Chapter extended to former companies.* All cooperative corporations, companies, or associations heretofore organized and doing business under prior statutes, or which have attempted to so organize and do business, shall have the benefit of all the provisions of this chapter and be bound thereby, on filing with the Secretary of State and the County Recorder of the county in which the principal place of business is located, amended and substituted articles," etc.

Section 8509 insofar as it is material to this opinion appears in Chapter 380, relating to non-profiting sharing cooperative associations, and is in part as follows:

"8509. *Chapter extended to former associations.* All corporations, or associations heretofore organized and doing business under prior statutes, or which have attempted so to organize and do business cooperatively, shall have the benefit of all the provisions of this chapter and be bound thereby, on filing with the Secretary of State amended and substituted articles of incorporation," etc.

Both of these sections contain the provision that corporations or associations "heretofore organized and doing business under prior statutes, or which have attempted to so organize and do business" shall have the benefit of the provisions of the chapter in each case in which the section appears.

Section 1 of Senate File 113 is in the following language:

"Section 1. Scope. This act applies only to cooperative associations as defined in Section two (2) hereof. All such associations hereafter formed or renewed must be organized under this act."

The sections about which you inquire relate to corporations or associations "heretofore organized and doing business under prior statutes." Senate File 113 provides that all such associations hereafter formed must be organized under this act. In other words, if they are not such cooperative corporations at the time this act takes effect on July 4, 1935, and if they are formed as such associations after that date, it is mandatory that they be organized under Senate File 113.

In answer to your second question, it is our opinion corporations for pecuniary profit organized under Chapter 384, the charters of which have been extended for two years under the provisions of Senate File 227, may not, after July 4, 1935, and during this two-year extension period, change and

operate under Chapter 389 or 390 in view of Senate File 113, which provides that all such cooperative associations organized after said act takes effect shall be organized thereunder. In other words, if any cooperative association, as defined in Section 2 of Senate File 113, is formed after July 4th, it must be organized under Senate File 113. Chapters 389 and 390, Code, 1931, are by Senate File 113 declared non-operative as to corporations chartered from and after July 4, 1935, but said chapter shall continue in force and effect as to corporations organized and operating thereunder prior to July 4, 1935, so long as such corporations elect to operate under or renew their charters under said chapter.

DENTISTRY: HOUSE FILE 203: ADVERTISING: Professional cards or window signs shall display only the name, address, profession, office hours, and telephone connections of dentist, and it is lawful for specialists to call attention to such specialty.

June 28, 1935. *State Department of Health:* You have requested of this department an opinion construing House File 203, Acts of the 46th General Assembly, insofar as the same relates to advertising of any kind or character by dentists practicing in this state.

Subsection 16 of Section 4 of said House File is as follows:

"(16) Unprofessional conduct. As to dentists and dental hygienists 'unprofessional conduct' shall consist of any of the acts denominated as such elsewhere in this title, and also any other of the following acts:

"A. All advertising of any kind or character other than the carrying or publishing of a professional card or the display of a window or street sign at the licensee's place of business; which professional card or window or street sign shall display only the name, address, profession, office hours and telephone connections of the licensee.

"B. Exploiting or advertising through the press, on the radio, or by the use of handbills, circulars or periodicals, other than professional cards stating only the name, address, profession, office hours and telephone connections of the licensee."

From the above, it will be seen that a dentist who uses any advertising of any kind or character other than a professional card or a window or street sign at his place of business will be guilty of unprofessional conduct. It will be noted also that any such professional card or window or street sign shall display only the name, address, profession, office hours, and telephone connections of such dentist. The carrying and publishing of a professional card are permitted, but very strict limitations are placed upon the printed matter which professional cards or window or street signs may display. That a dentist may not advertise by the use of signs at locations other than his office or place of business is quite obvious.

The language of this new statute which appears very simple but is, in fact, somewhat difficult to construe, is as follows:

"which professional card or window or street sign shall display only the name, address, profession, office hours and telephone connections of the licensee."

When the statute refers to the name, does it mean the name of the dentist written out in full or does it mean his initials and surname, or does it mean simply that he may use his surname standing alone? It would doubtless be conceded on every hand that the full name or the initials and surname

may be used. If the word "name" as used in this statute means the full and complete name of the licensee, then the use of initials would not be proper and it would seem logically to follow that if the practitioner may, at his option, use his entire name or one or more initials with his surname, he might properly use only his surname. We are not going to lend our approval to this practice, but at this time we are not prepared to say that a dentist who uses on his professional card only his surname is violating the terms of the statute.

The word "profession" as used in Subsection 16 of said Section 4, is the source of much difference of opinion. It is claimed by certain ethical dentists that such professional card or advertising may contain no word other than "dentist" to designate the profession. Section 2510-d1, insofar as it is material to this discussion, is as follows:

"2510-d1. *False representation—title abbreviations required.* 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 the following designations shall be guilty of a misdemeanor and shall be fined not less than twenty-five dollars, nor more than one hundred dollars, or be sentenced to thirty days in jail."

"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'."

It being conceded on every hand that it is proper for a dentist to advertise himself as "Dr. Richard Roe, Dentist," using, of course, his correct name, is it proper for him to add thereafter such statement as "Practice limited to Orthodontia"? It has been proposed by dentists in good standing and who desire to comply strictly with the law, that it should be considered within the law to permit a statement that the pracice of a dentist is limited to any one of the following five specialties within the field of dentistry, namely, Orthodontia, Exodontia, Prosthodontia, Radiodontia, or Peridontia, and that no other terms be permitted.

Orthodontia is defined by Funk & Wagnalls new standard dictionary as "mechanical treatment for correcting irregularities and faulty positions of the teeth." Exodontia is defined by the same dictionary as "The branch of dentistry dealing with the extraction of teeth." If Exodontia means, or deals with the extraction of teeth, and the dictionary says that is what it means, would it not be proper then to use other words meaning the same thing as Exodontia?

We believe there are two alternatives, one or the other of which must be accepted in determining the construction of the word "profession." The first is to hold that it permits merely the use of the word "dentist" or the words "dental surgeon" and none other, or to permit the use of those words with additional qualifying terms such for instance as "Practice limited to Exodontia" or "Practice limited to extraction of teeth." The word "Exodontia" no doubt carries with it much more than the mere extraction of teeth, or at any rate, we assume it means all of the treatment that properly and professionally goes with the extraction of teeth, but the use of the words, "Practice limited to the extraction of teeth," would carry the implication that the extraction was to be done in an efficient and professional way.

The question has been presented whether the proper and legal professional card or street sign may use qualifying language, such "Practice limited to plate work." It is our opinion that if it is proper to use the qualifying words, "Practice limited to Orthodontia or Exodontia," it must be equally proper to use the words, "Practice limited to plate work." In the legal and medical professions, it is regarded as ethical and proper to call attention in professional cards to the specialties to which the practitioners devote their special attention. This is more or less an age of specialists. No one will deny that there are specialists within the fields of dentistry, and if there are, we believe the interests of the profession and the interests of the public generally should permit a dentist in calling attention to his profession to call attention to the branch of that profession in which he is a specialist, if any. It is our opinion that if a dentist is a specialist in Exodontia or in plate work he may lawfully call attention to such specialty as a part of the designation of his profession on his professional card or office sign.

MOTOR VEHICLE: CODE SECTION 4924: LICENSE FEE REFUNDS: If motor vehicle, registered and required fee paid therefor, is used first half of year continuously out of the state, the Iowa owner is entitled to a refund of one-half of the motor vehicle license fee paid.

June 28, 1935. *Motor Vehicle Department:* You have submitted to this department for an opinion the following question:

"Is an Iowa owner of a duly licensed motor vehicle who, during the first six months of the year, sells such motor vehicle to an out of state purchaser for continuous use beyond the boundaries of this state, entitled to a refund of one-half of the license fee under Section 4924, Code of Iowa, 1931?"

Section 4924 of the Code is as follows:

"4924. *Refund.* If during the first half of the year for which a motor vehicle was registered and the required registration fee paid therefor, such car is destroyed by fire or accident, or junked and identity as a motor vehicle entirely eliminated, or stolen and not recovered by the owner before the expiration of the registration period for which such fee was paid, or sold and continuously used beyond the boundaries of the state, said owner shall upon the first day of January following such theft or destruction by accident, or the junking and entire elimination of identity as a motor vehicle or sale be paid a refund to the amount of one-half the motor vehicle license fee paid for such year."

This section provides that the owner of a motor vehicle may secure a refund of one-half the license fee paid therefor for the previous year, where such vehicle has not been used upon the highways of the state during the last half of the year upon the happening of any one of five certain contingencies, as follows:

1. Destruction by fire.
2. Destruction by accident.
3. Junking and entire elimination of identity.
4. Theft where not recovered.
5. Sale and continuous use beyond the boundaries of this state.

It was clearly the intention of the Legislature that there should be a refund to the owner upon the happening of any one of these events.

Your question would not be at all difficult if Section 4924 were to be construed alone and without regard to Sections 4961 to 4967, inclusive. Section

4961 provides that upon the transfer of any registered motor vehicle the owner shall immediately give notice to the County Treasurer upon the form on the reverse side of the certificate of registration, stating the date of such transfer, the name and post office address with street number, if in a city, of the person to whom transferred, the license number and such other information as the department may require. Section 4962 provides that the purchaser of a motor vehicle shall join in the notice of transfer to the County Treasurer and shall at the same time make application for the transfer of the motor vehicle and for a new certificate of registration.

Section 4963 provides:

"*Registration and fee.* Upon filing the application for transfer, the applicant shall pay a fee of fifty cents for the transfer, 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 as provided in this chapter."

Section 4964, relating to the passing of title, is as follows:

"4964. *When title passes.* Until said transferee has received said certificate of registration and has written his name upon the face thereof for the purpose of this chapter, delivery and title to said motor vehicle shall be deemed not to have been made and passed."

Section 4887 of the Code is as follows:

"4887. *Surrender of plates.* When a motor vehicle is permanently dismantled and can no longer be used on the public highway or when same is sold outside the state, the owner thereof shall detach the license plates and certificate of registration and surrender them to the county treasurer who shall cancel the registration of record and report such cancellation forthwith to the department upon blanks provided for that purpose. Such license plates shall be destroyed by the county treasurer who shall so advise the department."

It is somewhat difficult to harmonize all of the sections referred to herein. When ownership is transferred in this state, it is contemplated a fee of fifty cents shall be paid for the transfer and that the records in the office of the County Treasurer and the Motor Vehicle Department shall be completed. If the transfer of ownership is made, as provided in these sections, the new purchaser becomes the owner in Iowa. On November 13, 1933, we wrote the Secretary of State as follows:

"In any case where a car is sold outside the state during the first one-half of the year, the title must pass to the new owner. The title may pass either in Iowa or in some other state depending on the facts and circumstances of each case. If the title passes from the owner in whose name the car is registered by sale and transfer of title in the month of June, for instance, the sale and transfer being made to a resident of Nebraska who immediately removes the car to Nebraska, it would be the Nebraska owner who would then be entitled to the refund provided he has complied with Sections 4961 and 4967, inclusive. If the sale is made in Iowa, the title is not deemed to have passed to the purchaser until he has received the certificate of registration and has written his name upon the face thereof for the purposes of Chapter 251 of the Code.

"If the car is taken to Nebraska by the Iowa owner and sold and transferred there and remains in that state where it is thereafter registered by the owner who is a resident of that state, the title would be deemed to have passed at the time the parties intended it should pass and if such Nebraska sale is consummated during the first one-half of the year for which the car

is registered, the Iowa owner should then be entitled to the refund to be made under Section 4924 as he is the actual owner at the time the car leaves the state. As to the degree and character of proof that is to be required by the department before a refund is made that is a matter for the department to determine and all we can say in that regard is that the requirements should be reasonable and such as to prevent fraud upon the department, and yet not such a quantum of proof as to prevent refunds in meritorious cases. It is our view that the legislature intended by the enactment of Section 4924 to allow the owner of the motor vehicle sold outside the state during the first half of the year a refund to the amount of one-half of the license fee paid, and that this statute should operate for the benefit of the owner who sells the car in another state and he should not be deprived of this benefit by a too strict construction of Section 4964.

"In brief, the 'owner' who is entitled to a refund is the person in whose name said car is registered at the time it is taken from this state."

As a legal proposition, it certainly is true that where "A" sells an automobile to "B" who causes the transfer of the title to be made to him, as provided by Sections 4961 to 4967, inclusive, and where nothing else appears in the record, "B" is the actual and record owner of the motor vehicle in this state, and our letter of November 13, 1933, from which we quote above, contemplated a compliance with all of the sections of the Code herein referred to.

Construing the statutes referred to strictly and giving to the language, and particularly the word "owner" its ordinary and literal meaning, it would seem that our November 13, 1933, letter above referred to, set out the only construction which could be given said statutes. We are disposed, however, at this time to suggest to the Secretary of State that a construction slightly more liberal than that contained in our former letter would seem justifiable.

Section 4925 of the Code is set out as follows:

"4925. *Payment authorized.* The department is hereby authorized to make such payments according to the above provisons, 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."

It is our opinion that if during the first half year for which a motor vehicle was registered and the required registration fee paid therefor, such car is continuously used beyond the boundaries of the state. The Iowa owner who makes such sale, shall, upon the first day of January following such sale, be entitled to a refund to the amount of one-half the motor vehicle license fee paid for such year. The department is authorized to make such refund, payment to be made when sufficient proof of such 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 department must be satisfied that the sale is for continuous use beyond the boundaries of the state and that the vehicle will not be used for even a limited period of time in this state. Operating the car for any substantial period in this state, after its sale by the Iowa owner would entitle the new owner and not the Iowa owner to the refund. The burden is upon the person seeking the refund to prove the sale is for continuous use beyond the boundaries of the state. Upon such proof and upon a showing that such vehicle was im-

mediately removed from the state in good faith, the Iowa owner would be entitled to the refund.

Our rather strict construction heretofore made was inspired by the desire to require an honest compliance with the law and to prevent evasions on the part of some dealers who sought refunds to which they were not entitled. On the other hand, we desire to avoid placing such a strict construction upon the law as to penalize honest dealers and individuals who, in good faith, sell automobiles for continuous use beyond the boundaries of the state.

HIGHWAY COMMISSION: DESTRUCTION OF BRIDGES AND CULVERTS BY FLOODS: COUNTY ISSUE WARRANTS FOR REPAIR OF SAME:

"If such a course is pursued, it is the opinion of this department that such warrants so issued would be legal and that your Board of Supervisors would then have full authority to issue the same."

July 2, 1935. *County Attorney, Corydon, Iowa:* I beg to acknowledge receipt of yours of the 27th ult., wherein you state that "owing to cloudbursts and heavy rains resulting in serious floods, several bridges and culverts on county roads of Adams County were washed completely out, thereby crippling traffic and hampering mail deliveries." You also state that "the county is practically without money in the road fund, either construction or maintenance and will be compelled to issue stamped warrants in the amount of approximately thirty to forty thousand dollars in payment for material and labor in repairing this damage, if the damage is repaired." You ask "whether or not it would be entirely legitimate for your county to issue stamped warrants in this emergency, for repair or replacement of said bridges and culverts."

Based upon the above facts, in answer to the above question, it is the opinion of this department as follows:

1. That as to such bridges and culverts as are new, or amount to construction projects, you county could legally issue warrants, charging the cost of the respective projects to the local improvement fund created by Section 4644-c9 of the 1931 Code, or to the trunk line construction fund created or provided for in Section 4644-c10 of the 1931 Code, as the project was one located on a local road, or one located on a county trunk road.

2. As to such projects as would practically come under the head of repairs or maintenance, your county could legally issue warrants against the county road maintenance fund created under Section 4644-c13 of the 1931 Code. There is thereby created only one maintenance fund and projects whether on local or trunk line roads, as to the cost of such repair and mantenance, should be charged wholly to the maintenance fund above referred to.

3. Before proceeding with any construction work, or maintenance and repair work, necessitated by reason of the above and foregoing facts, your Board of Supervisors should at a regular or special meeting called for that purpose, adopt a resolution setting out such facts, and the projects required to be reconstructed, or repaired and maintained, with an estimated approximate cost thereof, and that it proposes to construct said projects and to make such maintenance or repair projects and issue warrants for the payment of the cost thereof against the proper funds, as above designated.

If such a course is pursued, it is the opinion of this department that such

warrants so issued would be legal and that your Board of Supervisors would then have full authority to issue the same, as hereinbefore stated. Upon presentation for payment they of course would be stamped "not paid for want of funds," and draw the legal rate of interest.

You will note that Section 4644-c14 is a general pledge of the secondary road maintenance fund to secondary roads, which includes both local and trunk lines, according to their needs, and there is no division of this fund as between local and trunk line county roads.

BANKS AND BANKING: LIABILITY OF BANK IN RECEIVERSHIP TO PAY TAXES. If taxes are for a year prior to passage of Chapter 30, 43d G. A., then taxes are against individual stockholders and not against bank, for undivided profits and surplus are part of capital, but if taxes are for year subsequent, then it is a moneys and credits tax on surplus and undivided profits and is liability of bank and if liability of bank, must be paid by receiver.

July 3, 1935. *County Attorney, Tipton, Iowa:* We have your letter of a few days ago in which you advise that

"the Helmer & Gartner State Bank of Mechanicsville is now in receivership, and that there appears of record in the Treasurer's office unpaid taxes of about $100 based upon surplus and undivided profits for the year prior to its closing.

"You ask whether this is a liability of the bank and therefore should be paid by the receiver or whether it is a liability of the individual stockholders."

You cite Chapter 333 of the Code of 1931, and a case of *Wilcoxen vs Munn*, 206 Iowa, 1194.

The section in controversy is Section 7003 of the Code of 1931. You will note that the same section in the 1927 Code was amended by the 43d General Assembly and the 44th General Assembly, and has also been amended by the 45th General Assembly, Extra Session.

Prior to the 43d General Assembly, the real estate of a bank was taxed to the bank and the capital stock, surplus and undivided profits were taxed to the individual stockholders but paid by the bank as a matter of convenience.

The 43d General Assembly amended this in 1929 and provided at Section 23, Chapter 30, of the Laws of that General Assembly that a surplus and undivided profits should be taxed as moneys and credits, so that thereafter there was the real estate tax to be paid by the bank, the moneys and credits tax to be paid by the bank on surplus and undivided profits, and the personal property tax to be paid by the stockholders on their stock.

This was amended by the 45th General Assembly, Extra Session, so that now instead of the personal property tax as against the individual stockholders, there is a moneys and credits tax as against both the capital stock and the surplus and undivided profits, and then of course the real estate tax.

So that if these taxes are for a year prior to the passage of Chapter 30 by the 43d General Assembly, then they are taxes against the individual stockholders and not against the bank, for undivided profits and surplus are naturally a part of the capital, but if the taxes are for a year subsequent to the effective date of Chapter 30 of the Laws of the 43d General Assembly, then it is a moneys and credits tax on the surplus and undivided profits, and

is a liability of the bank and not of the individual stockholders, and of course if there is a liability of the bank it must be paid by the receiver.

You will note that the Wilcoxen case, which you cited, was decided by the Supreme Court in November, 1928, which was before the 43d General Assembly, and which case followed the former case of *Andrew vs. Munn.*

SCHOOLS: BUS DRIVER: AS TO HAULING NON-RESIDENT PUPILS: If bus is owned by district, the district must be reimbursed if bus goes out of district for pupil—maximum liability of district for tuition and transportation is $9.00—any overplus on transportation must be paid by pupil. Transportation must be available to all pupils—illegal to offer inducements to certain pupils to attend particular school. If bus is owned by driver, he can make any arrangements, except if district pays him certain sum and allows him to transport others by private contract, it must be in good faith and not to give advantage to those pupils.

July 3, 1935. *County Attorney, Iowa Falls, Iowa:* We have your request for opinion on the following proposition:

"Does a bus driver for a consolidated high school have the right to transport, free of charge, non-resident high school pupils?

"Is it legal for a consolidated high school to hire a bus driver to go outside its district and get non-resident high school students?

"Is it legal for a bus driver to haul high school pupils from outside the district to a consolidated school if he makes his own contract with the students or the parents, and works independent of the school district?"

Under the law, if the bus is owned by the district, the district must be reimbursed in event the bus goes out of the district for a non-resident pupil, and as the maximum liability of the district for tuition and transportation is $9.00 any overplus on the transportation must be paid by the pupil. But, if there are arrangements for transportation on this basis or any other basis, it must be available to all pupils, for the last Legislature has made it illegal to offer inducements by way of transportation or otherwise to certain pupils to attend a particular school.

If, however, the bus is owned by the bus driver, he can make any arrangements he wants in regard to whom he shall transport, except that if the district pays him a certain sum and allows him to transport others in addition by private contract between himself and the pupil, it must be in good faith and not for the purpose of attempting to give to those pupils an advantage which other pupils are not also accorded.

HIGHWAY COMMISSION: CONDEMNATION OF GRAVEL PIT BY COUNTY:

"The authority to purchase gravel beds is conferred upon the Board of Supervisors by Sec. 4657 of the 1931 Code, and the question of whether or not the county will purchase is entirely a matter to be initiated by the Board of Supervisors, and when once it has determined to acquire land for a gravel pit, if it is unable to purchase the same, it may proceed to condemn such land with a road thereto, if there be none."

July 3, 1935. *County Attorney, Muscatine, Iowa:* Your letter of June 10th, addressed to Edward L. O'Connor, and also one of June 22d, addressed to this office, relative to the above entitled matter, at hand.

I beg your pardon for not answering sooner, but I have been very busy and out of the city a part of the time. I think, however, over the 'phone,

some time ago, I practically answered your questions in answer to a message from Clair E. Hamilton, Assistant Attorney General at Des Moines.

Answering your four questions, I would say:

In answer to your question No. 1—"Please advise us whether it is necessary for a *petition* to be filed by *private* individuals under Section 4562?"—I would answer the same, "No." The purchase of a gravel pit is initiated entirely by the Board of Supervisors on its own motion.

Answering your question No. 2—"Must a bond be filed under Section 4563?" —I would say, "No."

Answering your question No. 3—"After the report of the commissioner must notice be served under Sections 4575-4576 or Sections 4611-4612?"—I would say, "No"; no commissioner is needed.

Answering your question No. 4—"The unnecessary end of this triangular tract is within 20 rods of a farm building. Will this part within this distance but cut off by the interurban right of way prohibit the proceedings against the tract under Section 4658-a1? A project hole was dug over 20 rods from the buildings. This was done before action was started. The attorney for the quarry contends that since prospecting is prohibited within 20 rods from farm buildings, the section would imply that no quarrying could be done. We find no cases in point and would appreciate your opinion."—the answer is, "No."

Section 4658-a1 applies only to prospecting, but does not limit the tract of land to be actually taken, which may include land within the 20-rod limit.

The authority to purchase gravel beds is conferred upon the Board of Supervisors by Section 4657 of the 1931 Code, and the question of whether or not the county will purchase is entirely a matter to be initiated by the Board of Supervisors, and when once it has determined to acquire land for a gravel pit, if it is unable to purchase the same, it may proceed to condemn such land with a road thereto, if there be none. The procedure in condemnation proceedings is fixed by Section 4658 of the 1931 Code. The only procedure for condemnation fixed in Chapter 237, is that provided for in Section 4610. The other proceedings therein prescribed are for the establishment of highways upon petition or by consent and are not condemnation proceedings whatever. Section 4610 provides for the appointment of the commissioners, and by whom they shall be appointed, etc., as you are well aware. Subsequent sections, 4611, 4612, etc., outline the procedure, fixing the notice, etc., with which you are undoubtedly familiar and which I think it is unnecessary for me to discuss.

The procedure outlined herein is the procedure that has been followed generally throughout the state in such matters and it is the opinion of this department that it is undoubtedly the correct and proper procedure relative to condemnation of land for gravel beds by a county.

INSURANCE: REAL ESTATE TAXES: AS TO DATE THEY ATTACH AS LIEN AGAINST PROPERTY IN THIS STATE:

(To supplement opinion to E. W. Clark, as of June 27, 1935).

July 5, 1935. *Commissioner of Insurance:* I wrote an opinion to Mr. E. W. Clark, Commissioner of Insurance, as to the date real estate taxes attach as a lien against property in this state, and in briefing up another proposition,

I ran across the case of *Wilcoxen vs. Munn*, 206 Iowa, 1194, and will supplement our opinion by also citing that case.

The corporation there was placed in the hands of a receiver and a suit was instituted by a receiver to restrain collection of taxes, and the question was as to when the taxes become a lien, for if they were not a lien until after the appointment of a receiver then they were not a liability of the receivership, and the Court said on page 1197:

"Here the tax was levied for the year 1925. It was not payable until December 31st. Before that time arrived, the corporation had become insolvent. The shares had become of no value. The corporation had become unable to pay, unless at the expense of its creditors, who, in the meantime by the receivership had acquired a definite and immediate interest in, and, figuratively speaking, had become the owners of the corporate property. When the receiver took possession of the property, the rights of the creditors therein became fixed. See 14a C. J., 977; 34 Cyc., 187. The duty of the corporation to pay was inchoat,—was entirely in future."

HIGHWAY COMMISSION: Primary Road Fund.

July 8, 1935. *Executive Council:* Pursuant to the verbal request of your secretary, Mr. Ross Ewing, for a written opinion confirming a verbal opinion given by the writer in the month of July, 1933, relative to the necessity for an application by the Attorney General to the Executive Council for authority to employ counsel to assist in the trial of primary road litigation, I would say: That some time in the month of July or August, 1933, I appeared before the Executive Council of the State of Iowa at a meeting held in the office of Mrs. Alex Miller, Secretary of State, and there rendered an opinion that the law did not require the Attorney General to apply to the Executive Council for authority to employ legal help in the conduct of litigation affecting or growing out of primary road matters for the reason that Chapter 188, Section 66, of the Acts of the 45th General Assembly, provided as follows:

"For the office of the Attorney General there is hereby set aside from the primary road fund the sum of fifteen thousand dollars ($15,000) annually, for the purpose of covering all costs of litigation arising from or pertaining to primary roads."—and it was my opinion, as your adviser, that the change of the appropriation act, to read as above set out, relieved you of the responsibility of passing upon the employment of such legal assistants, and placed the authority and responsibility for the employment of such legal assistants wholly in and upon the Attorney General.

ADVERTISING FOR BIDS FOR CONSTRUCTION OF BRIDGES: HIGHWAY COMMISSION:

"It is the opinion of this department that your Board of Supervisors would have no authority to waive the requirements of Section 4644-c42, where the estimated cost exceeds $1,500.00. These contracts must also be let at a public letting as well as advertised."

July 8, 1935. *County Attorney, Primghar, Iowa:* Your letter of July 5th, at hand, relative to the above entitled matter wherein you asked for an opinion in answer to the following question:

"Has the County Board of Supervisors the right, in the case of an emergency created by a flood, in this instance, to construct bridges without advertising and having a letting as required by Section 4644-c42?"

The writer would say that it is the opinion of this department that your

Board of Supervisors would have no authority to waive the requirements of said Section 4644-c42, where the estimated cost exceeds $1,500.00. These contracts must also be let at a public letting as well as advertised. Emergencies may appear to warrant the violation of law, but they do not suspend the law.

The Legislature has outlined the course to be pursued and that course is the only course that will be legal. The Board may reject all bids and readvertise or let the work privately, at a cost not exceeding the lowest bid received, or build the project by day labor, but must first advertise a letting and all bids at that letting must be rejected.

POLICE BROADCASTING UNIT: BOARD OF SUPERVISORS: - Boards of Supervisors do have power and authority to enter into a contract with the Attorney General in regard to placing a unit of the state police broadcasting system in county courthouse, extending beyond present term of office of members of boards, as such contracts are entered into in good faith by both Attorney General and board.

July 16, 1935. *County Attorney, Mount Pleasant, Iowa:* I have your telephone request for opinion on the following proposition:

"Does the Board of Supervisors of Henry county have the power under the law to enter into a contract with the Attorney General of the State of Iowa for installation of a unit of the police broadcasting system in the county courthouse of Henry county and to enter into a contract or lease with the Attorney General in regard to space in the courthouse and make this contract or lease for a term of years?"

The statutory provisions in regard to police broadcasting system is found in Chapter 616-d1 of the Code of Iowa, 1931. This was amended by Chapter 142 of the Acts of the 45th General Assembly, Extra Session, which amendment gives to the Attorney General the authority to enter into contracts for two broadcasting units in the northwestern and northeastern part of the state. This was further amended by an act of the 46th General Assembly which gave to the Attorney General the authority to enter into contracts for the installation, maintenance and so on of additional police broadcasting units in southeastern and southwestern parts of the state, so that when these units are fully installed they comprise a police radio broadcasting system and will be used in the apprehension of criminals and by peace officers of the state in the general performance of their duties.

It is the general rule of law as pointed out by our Supreme Court in the case of *Hilgers vs. Woodbury County,* 200 Iowa, 1318, that Boards of Supervisors have only such powers as are expressly conferred by statute or necessarily implied from the power so conferred. The powers of Boards of Supervisors are set forth in Chapter 254 of the Code and there is no such specific power given to the board. The question then is whether the power to enter into such a contract with the Attorney General is implied.

In the *Hilgers* case above noted, our Supreme Court held that the Board of Supervisors had no authority to rent a portion of a public building for private use, but that rule would not prevail here for the reason that this contract would not be for private use, but would be for the benefit of the state as a whole which would include Henry County as this county is a subdivision of the state.

There is no question but what the Legislature could provide that Henry

County furnish suitable rooms in its courthouse for the installation of this police broadcasting unit and the mere fact that the benefit would be to the entire state would be no objection to such a statutory provision, for as pointed out by the Nebraska Supreme Court in the case of State vs. Board of Commissioners, 189 N. W., 639, a county is governmental only and in that capacity acts purely as an agent of the state and that the property of the county acquired by funds raised through taxation is property on which the state can direct the management and disposition so long as it acts for the benefit of the public. In that case, the Legislature provided that counties should furnish a location in their public buildings for municipal courts and it was contended by the defendant county that the statute takes the property of the county and appropriates it to the use of the city of Omaha without due process of law and is therefore violative of the state and federal constitutions. The Supreme Court held, however, that the statute was constitutional for the reason that the function of the municipal courts of Omaha is governmental and the service that they render is a public service.

This is exactly the function of the police broadcasting system and as the Legislature clearly would have authority to require the Board of Supervisors to furnish suitable quarters for this unit, they have the implied power to so provide these quarters and to enter into a contract with the Attorney General for that purpose.

Your next proposition is whether such a contract could extend beyond the term of office of the members of the present board.

We have pointed out above that assisting in the operation of the state police broadcasting system is a proper county function and our Supreme Court in the case of *Palo Alto County vs. Ulrich,* 199 Iowa, 1, held that the Board of Supervisors is a continuous body and while in that case, the court only went so far as to say that a designation of a depository was binding upon future boards until revoked, but did not state to what extent the future board would be bound in a contract such as you have inquired about, yet the Supreme Court of Indiana in *Jessup vs. Hinchman,* 133 N. E., 853, states that as a general rule, contracts entered into by the Board of Supervisors and extending beyond their term of office is legal if entered into in good faith. This rule, we believe, is also the law of this state and it is, therefore, the opinion of this department that Boards of Supervisors do have the power and authority to enter into a contract with the Attorney General in regard to placing a unit of the state police broadcasting system in the county courthouse, extending beyond the present term of office of members of the board, as such contracts are entered into in good faith by both the Attorney General and the board.

LIQUOR CONTROL ACT: APPLICABILITY OF SECTION 1966-a3 OF 1931 CODE:

"It is quite clear to us, therefore, that intoxicating liquor still maintains its original status as an outlaw, except where sold, possessed, etc., strictly under the terms, conditions, limitations and restrictions of the act. We do not find any provisions in the act or by construing the act as a whole which would afford a basis for concluding that Section 1966-a3 has been superseded by Chapter 24."

July 18, 1935. *County Attorney, Sioux City, Iowa:* This will acknowledge receipt of your favor of the 17th instant, asking for an official opinion on

the applicability of Code Section 1966-a3 of the 1931 Code, in view of the provisions of Chapter 24, Acts of the 45th General Assembly, Extraordinary Session, being the Iowa Liquor Control Act. You desire to know whether or not the above section has been superseded by the provisions of the new Iowa Liquor Control Act.

Section 1966-a3 is as follows:

"Attempt to destroy—presumption. The destruction of or attempt to destroy any liquid by any person while in the presence of peace officers or while a property is being searched by a peace officer, shall be prima facie evidence that such liquid is intoxicating liquor and intended for unlawful purposes."

This section must be construed with its antecedent, Section 1966-a2, as follows:

"Defense. The possessor of liquor may show in defense, that the liquor found in his possession was manufactured, transported, and sold to him legally, as the possessor of a permit issued according to the laws of the United States and the State of Iowa, or wine received from a minister * * *."

It is quite evident from these two sections that prior to the enactment of the Iowa Liquor Control Act, intoxicating liquors were outlawed in Iowa and possession of the same might only be had under the exceptions created by the statute. In other words, the burden was upon the possessor of intoxicating liquors to show rightful possession. If, being in possession, he attempted to destroy the liquid in the presence of peace officers or while a property was being searched by peace officers, the destruction or attempt to destroy the liquid constituted prima facie evidence that the liquid was intoxicating liquor and intended for unlawful purposes.

Section 1 of the Iowa Liquor Control Act provides in part, as follows:

"It is declared to be the public policy that the traffic in alcoholic liquors is so affected with a public interest that it should be regulated to the extent of prohibiting all traffic in them, except as hereinafter provided for in this act * * *."

Section 2 of the act provides that when any provisions of existing laws are in conflict with the provisions of the act, then the provisions of the act shall control and supersede all such existing laws.

Section 3 of the act provides that it shall be unlawful to manufacture for sale, sell, offer or keep for sale, possess and/or transport vinous, fermented, spirituous, or alcoholic liquor, * * * * except upon the terms, conditions, limitations and restrictions as set forth in the act.

Section 20 of the act provides for the classes of permits to be issued, so that the privileges set forth in Section 3 may be enjoyed.

It is quite clear to us, therefore, that intoxicating liquor still maintains its original status as an outlaw, except where sold, possessed, etc., strictly under the terms, conditions, limitations and restrictions of the act. Rightful possession of intoxicating liquors does not rest upon presumption but upon proof of compliance with the provisions of the Iowa Liquor Control Act. We do not find any provision in the act or by construing the act as a whole which would afford a basis for concluding that Section 1966-a3 has been superseded by Chapter 24. To hold otherwise would be to place an effective and wholly unnecessary obstacle in the path of proper enforcement of the act.

CONSERVATION COMMISSION: EXECUTIVE COUNCIL: The State Conservation Commission is entitled, by the express intent of the Legislature, to receive those things enumerated herein.

July 19, 1935. *Executive Council:* This will acknowledge receipt of your letter of the 16th instant in which you request the opinion of this department on the following:

Is it the duty of the Executive Council, under the provisions of House File No. 507, Acts of 46th General Assembly, to provide furniture for the Conservation Commission irrespective of how the funds for the operation of said commission are acquired?

House File No. 507, Acts of the 46th General Assembly, will appear in the Session Laws as Chapter 13, entitled *"Conservation Commission."* Section 10 thereof provides:

"Office. The commission shall keep its office at the seat of government. The Executive Council shall supply and properly furnish said rooms."

Section 29 provides as follows:

"Section three hundred two (302), Code, 1931, is amended by inserting therein the following:

" '39. State Conservation Commission'."

Section 302 of the 1931 Code of Iowa provides in part as follows:

"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:

"* * * * * * * * *."

At a recent conference with the head of the administrative department of the Conservation Commission, we are advised that it is the thought of the commission that furniture, fixtures, office equipment, rent and necessary supplies should be furnished by the Executive Council and also telephone service, but the expressed thought was that the commission would pay long distance calls out of its own funds.

In accordance with the two sections of the Iowa State Conservation Commission law quoted above, it is the opinion of this department that said commission is entitled, by the express intent of the Legislature, to receive those things enumerated.

PUBLIC FUNDS: STATE SINKING FUND: STATE BOARD OF EDUCATION: (This opinion supplements opinion of May 27, 1935 to Leo J. Wegman). Confirms opinion of May 27, 1935 and further states that this opinion does not apply to deposits of gifts, endowments and such other funds.

July 23, 1935. *Treasurer of State:* Some questions have arisen in regard to our opinion to you of May 27, 1935, and in order that our position may be made more clear, we are supplementing that opinion as to funds deposited by institutions under the State Board of Education. The three primary questions are:

1. Rate of interest.
2. Whether the interest shall be turned to the State Sinking Fund.
3. Whether this shall cover interest on gifts or other trust funds.

As to the first proposition, I think there is very little question when the history of House File 506 of the 46th General Assembly is taken into consideration. The history is that for some months prior to the convening of the 46th General Assembly, public bodies were having considerable difficulty in finding depositories as banks claimed that under present earnings, they could not afford to pay 2% on these public deposits. You remember also that this office held that depository banks were not authorized under the law to charge a service fee on these accounts.

A representative of the bankers of this state, after the convening of the 46th General Assembly, suggested that if the interest rate was lowered or if banks were authorized to charge a service fee, then the banks felt quite confident that they could take care of all the public deposits in the state, which situation was becoming quite acute, and at a meeting, it was thought that instead of authorizing a service fee that it would be much better if the Legislature provided an interest rate on a sliding scale.

It was understood then that Section 7420-d6 would only be amended so as to change the interest rate from a mandatory rate of 2% to a sliding scale rate, but at this same meeting, it was called to the attention of the group that under the provisions of Section 7420-d6 of the Code, that the Legislature had not provided for a 1% rate on 90% of the daily collected balance for the months of April and October, as to deposits of the Treasurer of State. No one knew the reason for leaving out the Treasurer of State and it was thought that perhaps this was an oversight of the Legislature. The representatives of the bankers of the state suggested that this also should be clarified in the amendment so as to give deposits of the Treasurer of State the same interest for these two months as the other public bodies named. In the preparation of the bill, this thought was in mind together with a reduction of interest.

It was also brought out at the meeting that it had been understood that some public depositors instead of depositing their money in depository banks as required by law, had purchased cashier's checks or drafts, so a provision was placed in the bill requiring the deposits to be made with reasonable promptness and to be evidenced by a pass book entry.

The bill as originally prepared then with the various "whereases" provided for these particular matters. When the bill reached the floor of the House, it was amended by adding thereto the last clause: "provided, however, that the rate of interest set by the Treasurer of State shall apply to all public deposits of the State of Iowa." The bill as originally drawn, withdrew from Section 7420-d6 all references as to particular public deposits and I, of course, do not know the inner workings of the minds of the various legislators, but from the amendment as above set out, it is plain that they had in mind that the Sinking Fund was very much in the red; that there were outstanding warrants against the Fund in a substantial amount; that the interest rate here would be cut in half and that the only way this could be made up and the fund pay out would be to bring in other funds which heretofore had not been under the provisions of the act, so they then made the interest rate apply as to all public deposits.

To state that the clause above set out refers only to the specific public deposits as mentioned in Section 7420-d1 of the Code would make the clause

useless, for in the original bill was a provision that 1% for the two months should apply to all public bodies covered in the act and so the amendment as placed thereon by the Legislature had nothing at all to do with that particular provision. It is plain that it was for the sole and only purpose of covering all public deposits in the State of Iowa.

It has been suggested that Paragraph 8 of Section 3921 of the Code has been in effect for a number of years and that the Legislature, not having made a direct repeal of this provision, that it was not intended that this provision should be in any wise affected by House File 506 under consideration.

Our Supreme Court had nearly an identical question before it in the early case of *Scott County vs. Johnson*, 209 Iowa, 213. In this case, Scott County attempted to question the constitutionality of this State Sinking Fund for public deposits, as it was claimed that Scott Couny had a certain vested interest in the interest that accrued from this Sinking Fund, which interest was diverted to the general fund of the county, and that this act of the Legislature attempted to interfere with Scott County's rights. The court there pointed out that prior to the year 1909 there was no statutory provision requiring the payment of interest by depositories of public funds and that thereafter, the various statutes in regard to such payment were enacted and that the Legislature thus created a large source of revenue which was non-existent before and directed that it be placed in the general fund of the various subdivisions.

The court then goes on to point out that all of the property of Scott County is acquired by the exercise of governmental functions and that its revenues were derived through the power of taxation and were subject to legislative control at all times, and that the Legislature could have originally provided that the interest be turned to a special fund, and having had that power originally, they could assume and exercise that power at any time.

In that case, it was argued by Scott County that Section 7404 of the Code of 1924, which provided that the County Treasurer shall with the approval of the Board of Supervisors, deposit state, county, or other funds in any bank in the state to the amount to be fixed by resolution at a rate of a least 2½% per annum on 90% of the daily collected balance at the end of each month which should accrue to the general county fund, and that this statute, not having been repealed, was still in full force and effect and governed. As to this, the court said on page 228:

"The sum of our conclusion is that Chapter 173, Acts of the 41st General Assembly, is so related to Section 7404 as to be amendatory thereof. The amendment operated as a repeal of a part of the original section. The appellant has necessarily built its case upon the original Section 7404, as the necessary source of its title to the funds. This original section is its standing ground for the purpose of its attack upon the later amending legislation. The power to repeal was exactly equal to the power of original enactment."

It will be noted that amending Section 7404 of the Code was not mentioned in the title of the Sinking Fund Act nor in the body of the law itself, yet, our Supreme Court said that it was so related as to constitute an amendment thereto, and as such amendment operated as a repeal of a part of it, that is exactly the situation that we have here, as the Paragraph 8 of Section 3921 of the Code.

As to the second proposition, that is, whether the interest shall be turned

to the State Sinking Fund or into the general fund of the institution, we have nearly an identical proposition. You will note that Section 3921 does not provide where the interest is to be turned. It merely gave the Board of Education the power to collect the highest rate of interest obtainable, but did not say what was to be done with it after it was collected. I do not know the mechanics, but I presume that it was then turned into the general fund of the institution.

House File 506 of the 46th General Assembly is an amendment to Section 7420-d6 of the Code, which is part of Chapter 352-d1 pertaining to deposit of public funds. You will note that Chapter 352-a1 of the Code in which the State Sinking Fund is created, is not in any wise amended, but the two chapters relate to the one proposition, that is, that the Sinking Fund is made up of the interest collected from the deposit of public funds and that the deposit of public funds instead of being diverted to the general fund of the subdivisions as was formerly the law, is diverted at the present time to the State Sinking Fund for Public Deposits.

You will notice further that Section 7420-d7 which now immediately follows House File 506 of the 46th General Assembly when it is codified, states:

"Said interest, except when legally diverted to the State Sinking Fund for Public Deposits, shall be credited to the general fund of the governmental body making the deposit * * * ."

There is no question but what interest on public funds is still being diverted to the State Sinking Fund and as long as such diversion continues and until the claims are paid in full, I cannot see how it can be contended that the interest from all these funds covered by Chapter 352-d1 is not going to the State Sinking Fund.

The third proposition is something that was not specifically covered in the original opinion, that is, that there are certain trust funds given to the Board of Education or to an institution to administer such as scholarship funds and so on, and our Supreme Court in the case of *Boyd vs. Johnson*, 212 Iowa, 1201, specifically ruled on such funds and on page 1213, said:

"Manifestly, the Kilborne money constitutes a trust fund in the possession of the Board of Directors of the Independent School District of the city of Keokuk. Said school district does not own the fund. It does not own the interest on the fund. It merely accepted the trust and it is undertaking to administer it. The legislature has no power to take control of the interest accruing on this fund and it follows that the statute under consideration does not apply to the interest derived from said fund."

You will note that this is much different than fees and tuitions which are received by the institutions as a part of the compensation for the education of the students and are expended by the institutions generally for that purpose and are taken into consideration by the Legislature in making their appropriations to the institutions and have even been covered specifically by the Legislature in the Appropriation Act wherein they provide that all such unexpended balances must be used before the institution is entitled to its appropriation from money derived through taxation.

One thing further that we should have suggested hereinbefore and that is that under the law, the appropriations to the institutions under the Board of Education, instead of being retained by the Comptroller and disbursed

by him as is done with other funds, are turned in regular periods to the treasurer of the various institutions and disbursed in that manner so that such funds are still funds of the State of Iowa but the law has set up a particular agency to expend these funds instead of making all warrants issuable out of the office of the State Comptroller. For example, if the law provided that at the first of every year, the amount appropriated to your department by the Legislature was to be turned to you and expended by you on warrants issued by you, you could not very well contend that that was not money of the State of Iowa.

It is, therefore, the opinion of this department that our opinion to you on May 27, 1935, on these matters be confirmed, and it is further our opinion that this does not apply to deposits of gifts, endowments and such other funds as are administered by the Board of Education or a particular institution, or interest thereon as such deposits should be handled exactly like they were handled prior to the enactment of House File 506 of the 46th General Assembly.

BOARD OF EDUCATION: INSURANCE: Nine questions asked and answered in regard to whether insurance may be purchased covering buildings at state institutions, burglary insurance, insurance on art collections, etc., etc.

July 24, 1935. *Board of Education:* We have your letter of June 25th in which you ask nine questions pertaining to insurance. We are answering them in the same order set forth in your inquiry and you will note that our opinion is at the end of each question.

1. Under Section 3945-a1, and following, the State Board of Education has authority to borrow money upon dormitory properties for the purpose of financing the erection of same. The power to borrow specifically includes the power to mortgage. Mortgagees are inclined to demand that mortgagors keep the security property insured at the expense of the mortgagor. Certain dormitory properties under the jurisdiction of the board are now so mortgaged and insured.

Yes, insurance may be purchased as to this.

2. The Iowa State Board of Education has received numerous gifts under Sections 3921 (6), 10185, 10186 and 10187. You will note that, under the provisions of the sections mentioned, the board is bound to "accept and administer trusts deemed by it beneficial to and perform obligations of the institutions" under its jurisdiction, and it is bound to exercise "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." In connection with these properties, the Iowa State Board of Education has felt that suitable "preservation" of such properties and a due respect for the "obligations of the institutions" have required that properties so received be kept insured so as to make certain the discharge of the purposes of the donors, and the assurance that such objectives will not be defeated by reason of fire or other hazards. Assurance that such protection will be maintained is sometimes demanded by donors; and it would seem to be expected in all cases where the property is such that, in case of its destruction, it would not be likely to be replaced by action of the legislature.

Yes, insurance may be purchased as to this.

3. Under Article IX of the Constitution of the State of Iowa, particularly part two of that Article, certain educational funds are established as to permanent funds and, due to obligations entered into between the State of

Iowa and the United States when certain of the property thereby effected was received, the state became obligated and, as provided in Section 5 thereof, is now bound to "take measures for the protection, improvement or other disposition of such lands as have been, or may hereafter be reserved, or granted by the United States, or any person or persons, to this state, for the use of the university, * * * * *. And it shall be the duty of the General Assembly as soon as may be, to provide effectual means for the improvement and permanent security of the funds of said university." Under these sections, considerable acreages of lands are now controlled by the Iowa State Board of Education and, because of the fact that upon the farms involved numerous frame buildings exist remote from fire protection apparatus, insurance has been carried. It has been thought that the prompt relief offered through this common commercial device, in case of loss, constituted the best "measure for the protection" of the regular income from the property and of the objectives sought by the United States in conating the properties involved.

Yes, insurance may be purchased as to this.

4. Certain properties at the institutions under the jurisdiction of the State Board of Education have been erected in part as a result of the expenditure of donated funds and, in part, as a result of the expenditure of general state funds. It is thought that adequate protection of the donated funds invested in these buildings would seem to require the insurance of the buildings for their entire value, at least in some cases.

No, unless required by terms of gift.

5. At several of the institutions under the Board of Education there are urban properties owned and used as income or tenant properties. These have been acquired in part by the expenditure of donated funds, in part by the investment of earnings from other tenant properties, and from profits acquired by operating dining rooms, etc. They now have considerable value as income producing properties, but are not of such character that they would be likely to be replaced by legislative appropriations or other provision in case they should be lost by fire.

Yes, insurance may be purchased as to this.

6. At each of the institutions under the jurisdiction of the Iowa State Board of Education there are various old buildings which now have value for certain uses, but which would not likely be replaced by appropriation or other public action in case of their destruction by fire.

No, insurance may not be purchased as to this.

7. There are also at each institution numerous buildings erected by the expenditure of public funds and now used for public educational purposes.
No, insurance may not be purchased as to this.

8. At the various institutions under the jurisdiction of the State Board of Education there are art collections, books, machinery, etc., which have been donated to the institutions and received under Section 10187, as described in paragraph one, supra. It is thought that these properties should be insured.
No, insurance may not be purchased as to this, unless required by terms of gift.

9. Insurance has been carried at various institutions under the jurisdiction of the State Board of Education upon safes and buildings against burglary, and upon packages of money while in transit, and upon groups of employees to protect against the possibility of their embezzling or committing larceny of funds subject to the management and control of the Board of Education. At some of the larger institutions, the cash on hand, particularly at times when students are registering, is extremely large in amount and the danger of loss in case of a hold-up or other feloniously tak-

ing is great. It has heretofore been deemed wise to obtain insurance protection against such a possibility.

Yes, insurance may be purchased as to this if deemed best by the Board of Education.

SCHOOLS: FUNDS DERIVED FROM ASSUMING MANAGEMENT OF FARMS OF ELLSWORTH COLLEGE AT IOWA FALLS: This fund would constitute trust fund in possession of Board of Directors of School District of Iowa Falls—district does not own fund—therefore, income should be kept in separate account—only surplus after payment of necessary expenses and upkeep is property of district under terms of the contract.

July 24, 1935. *Superintendent of Public Instruction:* We have your request for opinion together with enclosures from the secretary of the school board at Iowa Falls, in regard to the following proposition:

"The Independent School District of Iowa Falls entered into a contract with Ellsworth College at Iowa Falls in regard to the use of certain buildings and grounds of the college. The college also had an endowment of 2,200 acres of land and some invested funds. The school district assumed the management of the farms and under the arrangement is to collect the rents and pay therefrom taxes, repairs, insurance, upkeep, etc., and the surplus, if any, over and above such expense is to be used for the maintenance of a junior college in the college buildings pursuant to the contract. Will you please advise whether the income from these farms can be kept by the district in a separate bank account and separate books maintained thereon and the surplus over the expense, if any, turned to the fund of the school districts, or whether the district is required to keep this income with their other funds in the hands of the school treasurer and draw on this by warrant in the usual manner?"

It appears to us from the above statement of facts that this fund constitutes a trust fund in the possession of the Board of Directors of the Independent School District of the city of Keokuk and that the district does not own the fund, but merely accepted it as a trust and is undertaking to administer it. This being true, under the authority of *Boyd vs. Johnson,* 212 Iowa, 1201, the income from these farms not only may be kept in a separate account, but should be kept in a separate account as such trust fund is not the property of the district. Only the surplus after the payment of the necessary expenses and upkeep is the property of the district under the terms of the contract, and such is the opinion of this department.

BOARD OF EMBALMING EXAMINERS: COOPERATIVE BURIAL ASSOCIATIONS: 1. A corporation may not legally practice a profession. 2. Chapters 389 and 390, Code 1931, do not provide for organized cooperative burial associations.

July 25, 1935. *Board of Embalmers Examiners:* You have submitted to this office a request for an opinion as to whether or not cooperative burial associations may legally carry on their activities in the State of Iowa and you submit three specific questions as to whether or not such associations are violating the law relative to—

1—The practice of a profession by a corporation.

It is settled beyond question in this state, that a corporation may not legally practice a profession. *State vs. Bailey Dental Company,* 211 Iowa, 781; *State vs. Baker,* 212 Iowa 571, and *State vs. Kindy Optical Company,* 216 Iowa, 1157. In the latter case the court says:

"The said Kindy Optical Company, appellee, is not licensed to practice optometry within the State of Iowa and is not such a person or entity as can engage in the practice of the profession of optometry in the State of Iowa."

In the same case, appears the following quotation from a holding of the Colorado Supreme Court:

"The practice of dentistry under the name of a corporation not licensed and not entitled to a license for such purpose in unlawful. Dentistry is a profession having to do with public health and so is subject to regulation by the state. The purpose of regulation is to protect the public from ignorance, unskillfulness, unscrupulousness, deception and fraud. To that end the state requires that the relation of the dental practitioner to his patients and patrons must be personal."

In the same case appears a quotation from the Supreme Court of Minnesota in re: Otterness, 232 N. W. 318, which held that an attorney practicing law under agreement with a bank to pay him an annual salary, the fees earned by him to become a part of the income of the bank, was guilty of unprofessional conduct, and that the bank was in fact practicing law.

In the State vs. Bailey Dental Company case, supra, our court held that a corporation, being incapable of receiving a license to practice dentistry, cannot legally practice such profession, and is therefore subject to injunction if it attempts to do so, and that a corporation is practicing dentistry when it publicly opens an office and equips it for such practice, employs dentists to carry on such practice and advertises its business in its corporate name accordingly.

In the Baker case, supra, our court held that where several persons engaged jointly and in cooperation in the unlawful furnishing, prescribing, and administering of medicine without a license, they may be properly joined in one action for injunction.

Your second question is as follows:

2—Whether Chapters 389 or 390, Code of 1931, provide for organized cooperative burial associations.

This question must be answered in the negative. Section 8459, which is the first section in Chapter 389, is set out in full as follows:

"8459. Plan authorized. Any number of persons, not less than five, may associate themselves as a cooperative association, society, company or exchange, for the purpose of conducting any agricultural, dairy, mercantile, mining, manufacturing or mechanical business on the cooperative plan. For the purposes of this chapter, the words 'association,' 'company,' 'corporation,' 'exchange,' 'society,' or 'union,' shall be construed to mean the same."

Section 8486, the second section in Chapter 390, is as follows:

"8486. *Organization.* Any number of persons, not less than five, may associate themselves as a cooperative association, without capital stock, for the purpose of conducting any agricultural, live stock, horticultural, dairy, mercantile, mining, manufacturing, or mechanical business, or the constructing and operating of telephone and high tension electric transmission lines on the cooperative plan and of acting as a cooperative selling agency. Cooperative live stock shipping associations organized under this chapter shall do business with members only."

You will note that Section 8459 provides that any number of persons—not

less than five—may shape themselves as a cooperative association for the purpose of conducting any agricultural, dairy, mercantile, mining, manufacturing or mechanical business on the cooperative plan; and that Section 8486 provides that such parties may associate themselves together for the purpose of conducting *any agricultural, live stock, horticultural, dairy, mercantile, mining, manufacturing or mechanical business, or the constructing and operating of telephone and high tension electric transmission lines on the cooperative plan.*

Since these chapters expressly provide for the organization of corporations for certain purposes, we are compelled to take the position that other purposes not expressly included within the language of these statutes may not be read into them by implication. Only such corporations may be organized under these chapters as the language of the chapters permit; since nothing is said therein about burial associations we must take the view that cooperative burial associations may not be organized under either one of these chapters.

Section 8482 of the 1931 Code provides as follows:

"No corporation or association organized after July 4, 1915, shall be entitled to use the term 'cooperative' as part of its corporate or other business name or title, unless it has complied with the provisions of this chapter, and any corporation or association violating the provisions of this chapter may be enjoined from doing business under such name at the instance of any stockholder of any association legally organized under the provisions of this chapter."

And Chapter 390, Section 8510, is as follows:

"No corporation or association hereafter organized shall be entitled to use the term 'cooperative' as part of its corporate or other business name or title, unless it has complied with the provisions of this chapter or of Chapter 389, and any corporation or association violating the provisions of this chapter may be enjoined from doing business under such name at the instance of any stockholder of such organization under the provisions of this chapter."

Prior to July 4, 1935, Section 2585-c1, which defined the practice of embalming, was in part as follows:

"2585-c1. *Embalming defined.* For the purpose of this chapter, the following classes shall be deemed to be engaged in the practice of embalming:
1. Any person, firm, corporation or association of persons who prepares dead human bodies for burial, cremation or other final disposition; or who, in connection with the disposition or sale of any casket, vault or other burial receptacle, shall furnish any embalming or funeral service, directly or indirectly, by himself or in conjunction with another; or who publicly professes to be an embalmer, funeral director, mortician, or any other title indicating that such person, firm, corporation or association of persons assumes the duties or any part of the duties, incidental to the preparation of dead human bodies for burial, cremation or other final disposition, furnishes funeral services.
2. Any person, firm, corporation or association of persons who shall disinfect, preserve and make final disposition of dead human bodies * * * * *."

The 46th General Assembly, by the enactment of House File 167 amended this section of the Code by striking therefrom in three different places where such words appear in the statute, the following words—"firm, corporation or association of persons." The Legislature evidently had it in mind that firms, corporations and associations of persons, are not qualified to secure

licenses to practice embalming and that therefore they should not be included within the terms of Section 2585-c1.

3—Your third question is whether or not the sale of memberships or certificates in such organization, constitutes a violation of House File 475, Acts of the 45th General Assembly, where such organization has not complied with all the provisions of such act.

We are unable from your letter to determine just what the activities and practices of a cooperative burial association are.

Chapter 47, Acts of the 45th General Assembly, which you refer to as House File 475, provides that the term "association" when used in the act shall mean any person, firm, company, association, etc., which sells, offers for sale or issues to the public generally memberships or certificates of membership entitling the holder to purchase merchandise, materials or services on a discount or cost plus basis.

Section 3 of the chapter provides "no association contemplated by this act shall issue any membership until it shall have procured from the Secretary of State a certificate of authority authorizing it to engage in such business."

If the constitution, by-laws or contract provide for selling or issuing to the public certificates of membership entitling the holder to purchase materials or services on a discount or cost plus basis, then such association must comply with the terms of said chapter and a failure to do so will be a violation of the provisions thereof.

UNIVERSITY OF IOWA: PSYCOPATHIC HOSPITAL: PRINTING OF BLANKS: Appropriation of printing board is not to be used for the expense of printing for psychopathic hospital—that appropriation act governs and that such expense must be paid for by psychopathic hospitals. (Sec. 3986, Code, 1931.)

July 25, 1935. *University of Iowa:* We have your request for opinion on the following proposition:

"Section 3986 of the Code provides that the medical faculty of the hospital of the College of Medicine of the University shall prepare blanks containing certain questions and requiring certain information, and further provides that such blanks shall be printed by the state and a supply thereof be sent to each district and superior court of the state. The act further provides that the State Board of Audit shall audit, allow and pay the cost of the blanks as other bills for public printing are allowed and paid. Section 34, Chapter 188, Laws of the 45th General Assembly, being the appropriation for state printing board, provides that the appropriation shall not be used to include the expense of certain departments, among them being the psychopathic hospital. Would you please advise whether these blanks should be paid for out of the appropriation to the State Printing Board or by the psychopathic hospital."

It appears to us that the preparation and distribution of these blanks is one of the duties of the psychopathic hospital as Section 3986 of the Code is a part of the chapter pertaining to that hospital and as the appropriation of the printing board is not to be used for the expense of printing for the psychopathic hospital, that the appropriation act governs and that such expense must be paid for by the psychopathic hospital, and such is the opinion of this department.

HIGHWAY COMMISSION: COUNTY ROAD EMERGENCY IMPROVEMENT AND MAINTENANCE: ISSUE WARRANTS:

"Construing these sections together, your county can issue its warrants for the construction of bridges, including approaches, where the same was made necessary by reason of flood or other extraordinary casualty. These warrants should be drawn against the local or trunk line construction fund, as the case may be, and may exceed the anticipated income because of the emergency."

July 25, 1935. *County Engineer, Mount Ayr, Iowa:* Your letter of the 15th inst., of which the following is a copy, at hand.

"I called you over the phone in regard to the condition of the maintenance fund of this county. You stated that you would like to have the necessary information in writing.

"Present condition of maintenance fund:

"Anticipated income for the year 1935, Appr. $48,000.00

"Expenditures plus stamped warrants to date.....$40,000.00

"We will need approximately $20,000 to replace and repair about sixty bridges and culverts destroyed by recent floods.

"The question is this: Can the board issue warrants for more than the anticipated income for the year 1935?

"If warrants can be issued, can they be funded by issuance of bonds?

"Levies this year:

"Construction levy—None.

"Maintenance levy—three mills.

"Emergency levy—None.

"Ringgold county is bonded for 18% of constitutional limit.

"The Board of Supervisors shall raise levies to the limit for 1936, if necessary.

"Please give us all the information possible on this situation and the best manner in which to proceed."

Based upon these facts, answering your question, "Can the board issue warrants for more than the anticipated income for the year 1935?"—this department is of the opinion that your county may not issue warrants against such Maintenance Fund in excess of the balance of the anticipated County Road Maintenance Fund income for the year 1935, which you have estimated at approximately $8,000.00.

In addition to the approximate $8,000.00 balance in your anticipated County Road Maintenance Fund, you must have some anticipated income in the Second Road Construction Fund created by Section 4644-c8 of the 1931 Code, arising from the receipts of gas tax, if from no other source.

You have given above no estimate as to the anticipated County Road Construction Fund, but whatever that may be, your county could construct local and trunk line roads and draw warrants against the local road portion of 35% therof, and against the trunk line portion of 65% thereof, until the anticipated income in the Secondary Road Construction Fund for the year 1935 has been exhausted.

Section 5258 makes it "unlawful for any county * * * * to allow any claim, or to issue any warrant, or enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said years," etc.

Section 5259 provides:

"The preceding section (5258) shall not apply to:

"1. Expenditures for bridges or buildings destroyed by fire or flood or other extraordinary casualty."

Construing these sections together, your county can issue its warrants for the construction of bridges, including approaches, where the same was made necessary by reason of flood or other extraordinary casualty. These warrants should be drawn against the local or trunk line construction fund, as the case may be, and may exceed the anticipated income because of the emergency.

It is further the opinion of this department that in case such warrants have been issued in excess of the anticipated income by reason of such emergency, they could be stamped "not paid for want of funds" and paid when funds were available.

These warrants, when issued, may be taken up and paid from the proceeds of funding bonds issued as provided by law, provided, of course, that the debt evidenced by the warrants does not create an additional indebtedness of your county beyond the constitutional limitation. From your letter, it is the opinion of this department that such increased indebtedness would not place the indebtedness of your county beyond its constitutional limitation.

This department thinks it well to call your attention to the further fact that in making your next budget for the Comptroller your county should report, of course, the issuance of these warrants and bonds, if any issued in payment thereof, to the Comptroller, together with an estimated amount of taxes that it will be necessary to levy in order to pay the interest and maturities thereof. In other words, any levy for the payment of any debt created by the construction of these bridges necessitated by virtue of floods and extraordinary casualties, and the tax to be levied for the payment of interest thereon and principal thereof should be reported in your next budget to the Budget Director for his approval.

TAXATION: BUDGET LAW: REFUNDS. Taxpayer objecting to paying amount of tax levied and paid part in protest, claiming that such protested amount is excessive, erroneous and illegal (based on Chapter 24, Code of Iowa, 1931), also contending that local boards in making up budgets did not comply with Sec. 374 of Budget Law—this taxpayer has no right under the law to refund.

July 27, 1935. *State Comptroller:* We have your request for opinion on the following proposition:

"One of the railway companies having considerable property in various counties in the state, is objecting to paying the amount of tax levied against them and have filed notice of protest and have paid a certain portion of their taxes under protest, it being the claim that such protested amount is excessive, erroneous and illegal. The protest is based on the local budget law being Chapter 24 of the Code of Iowa, 1931, and they contend that local boards in making up the budgets, did not comply with Section 374 of the local budget law in that the balance on hand was not taken into consideration in estimating the expenditures for the ensuing year and the net amount of taxes to be levied. Will you please advise us whether refunds should be made pursuant to this protest?"

We should first call your attention to the fact that under the local budget law it is within the discretion of the local board to determine within the limits of the law, the necessities of the municipality and the amount necessary to be raised or the amount necessary to be expended for governmental purposes and that your office has merely the power of supervision but cannot exercise rights affecting the powers and duties of the local board, and further,

that there is no provision for appeal from the findings and considerations of the local board.

As I understand, there is no suggestion here that the legal limits have been exceeded so such question is not in issue. The only question is whether the balance on hand was deducted and taken into consideration by the board, and whether the failure to take such into consideration can be raised by a taxpayer by way of protest as to the amount of taxes due.

You will note that Section 370 provides that the local body consider the amount of income for the several funds from other sources than taxation. There is no provision in the statute making it mandatory that the balance on hand be deducted.

As it is only mandatory that the income be considered, you will further note that Section 374 merely provides that the amount of the difference between the receipts estimated from all sources other than taxation, and the estimated expenditures for all purposes be the estimated amount to be raised by taxation. Now, the mere fact that the local body had a balance on hand would not be a basis at all for claiming the tax levy was excessive, erroneous or illegal, or that the income was not considered, as we all know of our own personal knowledge that every public body in this state has funds that are not available because of closing of their depository banks, which funds, we hope, will be eventually available by payments from the State Sinking Fund for public deposits, which is now many million dollars in the "red." Also, it is ordinarily true that a great portion of the balance on hand is necessary to pay outstanding indebtedness accruing before the end of the fiscal year.

There are probably a number of other reasons why the unexpended balance might not be available for general purposes and that is why the law merely requires that the amount of income from sources other than taxation only be *considered.* The law, of course, presumes that such public officers will do their duty and will so consider the items mentioned in the statute. There is also another very conclusive reason why the refund cannot be granted in such cases and that is, that every taxpayer is entitled to be present and object to the tax levy and that is the only right under the law that a taxpayer has in regard to such matters; and the mere fact that the board did not agree with a taxpayer in his protest would not give him the right to claim a refund.

Your inquiry does not state whether the taxpayer actually attended this meeting or not, but it had the opportunity to attend and if it did not, it is no one's fault but its own and if it did attend and make objections and the body differed with its thoughts, the matter is at an end, as there cannot be an appeal to or review by any other body under the law.

It is, therefore, the opinion of this department that the taxpayer inquired about has no right under the law to a refund.

FUND, General contingent: CONTINGENT FUND: as provided by Section 46, (H. F. 214) Acts of the 46th G. A.

Executive Council does not control. Section specifically states that said fund shall be administered by Committee on Retrenchment and Reform.

July 30, 1935. *Executive Council:* I have your letter of July 23, 1935, in which you ask for an opinion by this department on the question of whether

or not the fund mentioned in Section 46, House File 214, Acts of the 46th General Assembly, is under the control of the Executive Council.

Section 46 of House File 214, Acts of the 46th General Assembly, is as follows:

"*General contingent fund.* Section 46. For the purpose of establishing a general contingent fund for the state, there is hereby appropriated for each year of the biennium, begining July 1, 1935 and ending June 30, 1937, the sum of eighty thousand dollars ($80,000) 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."

Prior to the session of the 45th General Assembly this general contingent fund was to be administered by the Committee on Retrenchment and Reform. The 45th General Assembly, by Section 47 of Chapter 188, provided that this general contingent fund was to be administered by the Executive Council. Now Section 46 of House File 214 of the Acts of the 46th General Assembly provides that this fund shall be administered by the Committee on Retrenchment and Reform as was done prior to the Acts of the 45th General Assembly. It therefore follows that this general contingent fund, as provided for by Section 46 of House File 214 of the Acts of the 46th General Assembly is not to be administered by the Executive Council but is to be administered by the Committee on Retrenchment and Reform as specifically stated therein.

It is therefore the opinion of this department that the Executive Council of the State of Iowa does not have control of the general contingent fund as provided for by Section 46 of House File 214, Acts of the 46th General Assembly, for the reason that Section 46, above, specifically states that this fund shall now be administered by the Committee on Retrenchment and Reform.

MUNICIPALITIES: GOLF COURSES: FUNDS: A public park may be equipped with a golf course and the park board is justified in using a reasonable portion of the money in the park fund for the maintenance and upkeep of such golf course.

July 30, 1935. *Auditor of State:* We have your letter of July 6th in which you say it appears that funds raised by and expended for the operation of the municipal golf course of the city of Council Bluffs are being handled in conjunction with monies raised by taxation for the benefit of the General Park Fund, and that the salary of a professional golf instructor, as well as expense incurred in printing score cards, tickets, etc., appears to be paid from said fund, while the proceeds from fees charged for the use of the course are credited to the fund. You state further that the particular property used for such golf course appears to have been given to the city of Council Bluffs for park purposes many years ago. You submit to this office for an opinion the question whether such golf course may be operated or supported by the General Park Fund or whether it must be operated entirely apart from the General Park Fund or any other fund which contains money raised by taxation.

We are unable to find any specific mention in the statutes of this state of municipal or public golf courses prior to the enactment of Chapter 71, Acts of the 45th General Assembly, Extraordinary Session. This chapter amends Chapter 111 of the Acts of the 45th General Assembly so that as amended it

includes docks, piers, swimming pools, and golf courses. Section 5 of said chapter contains the following provision:

"Nothing in this act contained shall be so construed as to authorize or permit any city or town to make any contract or to incur any obligation of any kind or nature referred to in this act except such as shall be payable solely from the funds provided under this act."

This act provides for the raising of funds from two sources. It provides in Section 1 that cities and towns are empowered "as an emergency measure, to issue revenue bonds to pay the costs of such improvement to be financed only through the Reconstruction Finance Corporation, as hereinafter provided." In Section 7 it is provided that the council may charge and collect proper rates and charges for swimming pools, golf courses, etc.

Chapter 111 therefore fails to provide authority for the spending of money raised by general taxation for the maintenance and upkeep of a municipal golf course, and nowhere else in the statutory law of this state is there express authority for the expenditure of money from the General Park Fund, or from any other fund raised by taxation, for the purchase, maintenance, or operation of a municipal golf course. If there is then authority for using a portion of the Park Fund for the maintenance of such a golf course, it must be based upon the fact that a municipally owned and operated golf course is in reality and in fact a park.

The word "park" has been variously defined as follows:

"A 'park' is a pleasure ground set apart for recreation of the public, to promote its health and enjoyment; it need not be a mere field or open space, but objects, having no connection with the park purposes, should not be permitted to encroach upon it without legislative authority." Williams vs. Gallatin, 128 N. E. 121 (N. Y.)

"A 'park' is variously defined to be a pleasure ground in or near a city set apart for the recreation of the public; a piece of ground inclosed for purposes of pleasure, exercise, amusement or ornament; a place for the resort of the public for recreation, air, and light; a place open for every one." Kennedy vs. City of Nevada (Mo.) 281 S. ". 56, 58.

"A 'park' is a pleasure ground for the recreation of the public to promote its health and enjoyment." Booth vs. City of Minneapolis, 203 N. W. 625.

There is direct judicial authority for the statement that a golf course may be included in a park.

"The public parks in all the metropolitan cities contain golf courses. The public courses in parks are within financial reach of all. The golf course being a place of recreation must be included in the terms 'parks and parkways' as used in the city charter and 'public function' as used in the statute.

"A park is a pleasure ground for the recreation of the public to promote its health and enjoyment. A public golf course is for the same purpose. Parks are used for public recreation by indulgence in tennis, pitching horse shoes, croquet, baseball, kitten ball, golf, walking, horseback riding, picnicking, skating, bathing, and general outdoor exercise, band concerts, maintenance of botanical and zoological gardens and other recreations. If ground be acquired for these purposes, it may be acquired for a part of them. It follows that the city has authority, under its charter, and also under the statute, to acquire and maintain a public golf course." Booth vs. City of Minneapolis, 203 N. W. 625 at 626.

The uses to which a public park may be put are well discussed in the case of Wichita vs. Clapp, et al., 263 Pac. 12 (Kan.), 63 A. L. R. 478. In

that case the court says, "the specific question for consideration is whether park purposes may include an air port or landing field for airplanes," and the court holds the question should be answered in the affirmative. We take the following quotation from the same case:

"The devotion of a reasonable portion of a public park to tennis courts, croquet grounds, and children's playgrounds, with suitable appliances for these forms of public amusement and recreation, comes strictly within the proper and legitimate uses for which public parks are created."

There is a considerable portion of the public in each city and town which is not interested in playing tennis or in using public parks for any form of amusement other than the playing of golf, with a view to obtaining amusement, recreation, and exercise, and in view of the authorities cited, we are constrained to hold that a public park may very properly be equipped with a golf course as a part of its facilities for serving the public as a public park and that where a park is so equipped the park board is properly justified in using a reasonable and proper portion of the money in the Park Fund for the maintenance and upkeep of such golf course.

You refer to the payment out of the General Park Fund of the salary of a professional golf instructor and the payment of expense incurred in printing score cards, tickets, etc. We are not prepared to say that the payment of these items is justified. If the services of the golf instructor were furnished free to all who desired to avail themselves of such services and if there was great demand for such free services by the golf-playing public, payment of such item might possibly be justified but that situation is not presented. The expense, however, of maintaining a municipal golf course, including such expenses as are necessarily incidental to the maintenance of such course, are properly payable out of the General Park Fund in the absence of ordinances providing to the contrary.

HIGHWAY COMMISSION: RELOCATION OF COUNTY ROADS:

"In such a case it is the opinion of this department that Barnett Brothers would find themselves in the position of having to file a petition with the Board of Supervisors for an outlet road and file a bond and proceed as provided in Sec. 4562, 4563 over to and including Sec. 4592 * * * * *."

July 31, 1935. *County Attorney, Guttenberg, Iowa:* Answering your letter of July 13th, it is the opinion of this department that the Board of Supervisors "may on its own judgment change the course of any part of your secondary road or stream, watercourse, or dry run within your county in order to avoid construction and maintenance of bridges, grades, railroad crossings or straighten any secondary road or cut off dangerous corners, turns or intersections on the highway, or to widen any secondary road above statutory width, or for the purpose of preventing the encroachment of a stream, watercourse or dry run upon such highway." See Section 4607.

The costs of such change shall be paid from the secondary road fund. Section 4608.

It is our opinion that the Supervisors if inclined to exercise this authority, the next Section 4609 and succeeding sections provide for the procedure in such cases.

Section 4621, the last section of Chapter 237, as amended by Chapter 46

of the Acts of the Extra Session of the 45th General Assembly provides for abandonment if found by the Supervisors to be advisable.

I take it, however, that the above and foregoing does not solve your problem. Your Board of Supervisors in the exercise of its judgment may not desire to provide the changed location. In such a case it is the opinion of this department that Barnett Brothers would find themselves in the position of having to file a petition with the Board of Supervisors for an outlet road and file a bond and proceed as provided in Section 4562, 4563 over to and including Section 4592, applying as the case may be under the facts and the circumstances of the surrounding demands. This certainly could be done if your Board of Supervisors saw fit to vacate the old highway and this department is of the opinion, from the facts stated in your letter, that the same has been abandoned.

On the other hand your Board of Supervisors could vacate a portion of the old road and leave that portion that is practical alone. That of itself might give Barnett Brothers the right to invoke Chapter 237 relative to the establishing highways to places that have none.

ANDERSON FURNITURE COMPANY: CORPORATIONS: STOCK—CAPITAL: Said company may not issue non-assessable stock in corporation in payment of stock dividends without first being appraised by the Executive Council.

August 3, 1935. *Executive Council:* You have submitted to this office a petition of the Anderson Furniture Company to the Executive Council of the State of Iowa for authority to issue capital stock in payment of a stock dividend, the Anderson Furniture Company being engaged in the furniture business in Des Moines, Iowa. At the present time the authorized capital of this company is $15,000.00, of which amount $10,000.00 has been issued. The company now desires to increase its authorized capital stock to $75,000.00, divided into 750 shares of $100.00 each. The company has declared a 400% stock dividend on the $10,000.00 of capital stock outstanding payable out of the surplus of the corporation, each stockholder to receive four additional shares of stock of the par value of $100 for each share now owned by such stockholder. All of the now outstanding stock of the corporation is owned by three persons and they, of course, will own the additional stock which the company proposes to issue. Said capital stock is not to be paid for in cash but in property which now constitutes the surplus owned and accounted for by the corporation. The Anderson Furniture Company now asks permission of the Executive Council to issue fully paid, non-assessable stock in said corporation in the payment of said 400% stock dividend and asks that such authority be granted without acquiring appraisements of the assets of said corporation.

The duties of the Executive Council in such a situation are prescribed by Sections 8413 and 8414 of the 1931 Code, which are as follows:

"8413. *Payment in property other than cash.* If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the Executive Council of the state for leave so to do. Such application shall state the amount of capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock."

"8414. *Executive Council to fix amount.* The Executive Council shall make investigation, 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 the stock. It shall enter its finding, fixing the value at which the corporation may receive the same in payment for capital stock; and no corporation shall issue capital stock for the said property or thing in a greater amount than the value so fixed."

The question presented for our consideration is whether or not the Council may waive an appraisement of the assets of said corporation. Section 8414 provides that "The Executive Council shall make investigation, 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 the stock." The quoted part of the statute requires of the Executive Council two things: first, that it shall make an investigation and second, that it shall ascertain the real value of the property or things which the corporation is to receive for the stock. There is no statutory requirement that there shall be an appraisement in the sense of sending an appraiser outside the membership of the Council to appraise the stock. If, in a particular case, the Council desired to make its own investigation and was able therefrom to ascertain the real value of the property, there would be no occasion for an appraisement by anyone outside the membership of the Council. One thing the Council must undertake to do in all cases to the very best of its ability, and that is to ascertain the real value of the property or other thing to be exchanged for stock. The Council must prescribe the rules and methods for ascertaining the real value. Anyone who ascertains the real value and announces the result has, in reality, made an appraisement of the property.

We are not disposed, therefore, to say that appraisement of the property may be waived. The property must be appraised, its real value must be ascertained, and an order must be entered by the Council fixing the value at which the corporation may receive the same in payment for capital stock. It is our opinion the Council may make its own investigation and appraisement, or it may delegate the duty of making such investigation to an agent whom it may require to make an appraisement and report. The Council will always have in mind its duty to ascertain the real value of the property. Unnecessary expense in so doing, of course, should be avoided, but the Council in each case should determine the extent and character of the investigation necessary to be made, appraisers being used in any case where their services are required in order that the board may ascertain the real value of the property.

SCHOOLS: CONTRACTS: Section 4468 of the Code prohibits any officer of the school district from acting as agent or dealer in school textbooks or school supplies. Secretary and treasurer of board would come within this prohibition.

August 5, 1935. *Superintendent of Public Instruction:* We have your request for an opinion on the following proposition:

"May the secretary or treasurer of a school board be legally interested in the contracts of the district?"

Section 4468 of the Code prohibits any officer of the school district from acting as agent or dealer in school text books or school supplies. The secretary and treasurer of the board come within this prohibition and under the law they cannot be interested in the contracts of the district.

DEPARTMENT OF AGRICULTURE: WAREHOUSES—UNBONDED: The terms "grain" and "grain in storage" as used in Chapter 427, Code 1931, include timothy seed.

August 5, 1935. *Secretary of Agriculture:* You have submitted to this department the question whether or not Chapter 427 of the Code, 1931, as amended, which chapter relates to unbonded agricultural warehouses and the storage therein of grain, is broad enough in its terms and provisions to include timothy seed, of which there appears to be this year rather an abundant crop. Stated differently, your question is whether timothy seed may be construed to be grain within the purview of this chapter.

Section 9752, the first section in Chapter 427, contains the following definition applicable to this chapter:

"The words 'grain in storage' shall refer to any grain stored under the provisions of this chapter."

Chapter 427 was amended in many respects by Chapter 105, Acts of the 46th General Assembly. Numerous amendments to this chapter were likewise made by the 45th General Assembly in Extraordinary Session. Section 8 of Chapter 105 aforesaid provides that it shall be the duty of the seller under the direction of the Secretary of Agriculture to:

"1. Supervise storage of grain.

"2. Ascertain the amount stored by each owner who shall desire to avail himself of the provisions of this chapter" etc.

Section 9 of said chapter, relating to the form and contents of certificates, provides that every such certificate must embody within its written or printed terms:

"5. A description of the grain."

Section 11 is in part as follows:

"A certificate in which it is stated that the grain stored will be delivered to the bearer, or to the order of any person named in such certificate, is a negotiable certificate."

Section 2 provides for a local supervisory board "for the purpose of supervising grain in storage and the issuing of certificates against such grain." There are other references in this chapter and amendments thereto to grain, but no definition of the word "grain" is contained in the chapter. Chapter 104, Acts of the 46th General Assembly, relating to bonded warehouses for agricultural products, contains the following definition:

"Section 2. Terms defined as used in this act:

"5. Grain means wheat, corn, oats, barley, rye, flaxseed, field peas, soy beans, grain sorghums, spelts, and such other products as are usually stored in grain elevators, subject to determination by the commissioners."

Chapter 105 was approved April 15, 1935, and Chapter 104, containing the above definition of grain, was approved May 3, 1935. Both chapters became effective July 4, 1935.

Grain has thus been defined by the Legislature of this state to include flaxseed, field peas, soy beans, grain sorghums, spelts, and such other products as are usually stored in grain elevators. With this definition of the word "grain" in the law of this state, relating to bonded warehouses and with no other or different definition of the word in the chapter on unbonded warehouses, or elsewhere in the statutory law of the state, we must assume that grain

means grain as the Legislature has defined it and that it was not the intention of the Legislature that this simple and common word should have different meanings and different definitions in the several chapters and sections of the statutory law.

Grain is defined in Corpus Juris as follows:

"*Grain.* A generic term; a kernel, especially of those plants, like wheat, whose seeds are used for food; specifically, a seed of one of the cereal plants collectively; a single seed or hard seed of a plant, particularly of those kinds whose seeds are used for food of man or beast; a single small seed; a small hard seed; the gathered seed of cereal plants in mass; the fruit of certain plants which constitute the chief food of man and beast; also the plants themselves, whether standing or gathered. Sometimes the term is used to designate a crop in a field, or cereals in the straw. In accordance with the context or the connection in which it is employed the term may include barley; bran; broom corn; corn, in general; corn and millet hay; flax; hay or stalk; maize, millet, millet hay; oats; rye, sugar cane seed; wheat." 28 C. J. 757.

In the case of Hewitt vs. Fire Insurance Company, 55 Iowa 323, which was a suit on a policy of insurance, which included grain in stack and granary, it was held to insure a stack of flax which was raised for seed and not for fiber. Our Supreme Court spoke as follows:

"The sole question to be determined is whether the word 'grain' as used by the parties includes flaxseed. Mr. Webster says: 'Grain signifies corn in general, or the fruit of certain plants which constitute the chief food of man and beast, as wheat, rye, barley, oats and maize.' It does not necessarily follow from the fact that certain kinds of grain are named that there may not be others that as clearly come within the definition as those named. It is so because it is clearly an article of food when prepared as usually used, but we believe it is seldom if ever used as food in its natural state.

"Measurably, at least, this can be said as to flaxseed. After it has been ground and the oil largely extracted, the residuum is the 'oil cake' known to commerce, which is largely if not exclusively used as food for cattle and other beasts, and it is highly nutritious. This being so, flaxseed comes within, to an extent at least, the definition of grain given by Mr. Webster; that is, it is an article used as food for man and beast."

In Holland vs. the State, 34 Georgia 455, the statute provided:

"It shall not be lawful for any person, in this state, to make any spirituous liquors 'out of any corn, wheat, rye, or other grain, except for medicinal purposes' etc., and under a license."

"In this case the parties, we think, must have intended the policy to cover whatever was usually and ordinarily stacked on the farm or put into a granary."

and it was held that millet was grain within the meaning of the words "or other grain," being grain as such word was used by the Legislature.

By the same token it would seem logical and necessary to assume that the Legislature in using the words "grain" and "grain in storage" in the statutes relating to unbonded agricultural warehouses did not intend to include corn, wheat, rye and oats and at the same time exclude timothy seed, flaxseed, soy beans, and spelts, simply because they were not specifically named in connection with the provisions of the chapter, when as a matter of fact every reason for the application of the warehousing legislation to corn applies with equal force to timothy seed.

Funk and Wagnalls' new standard dictionary gives the following definition of grain:

"Collectively any of the common cereals, either as growing plants or cut and gathered or as seeds in bulk."

In the case of Norris vs. Insurance Company, 65 Mo. Appeals, 632, the Supreme Court of Missouri held that millet hay was included in the terms of an insurance policy where grain is described as the subject of the risk in the application. We quote from this case as follows:

"It appears from the evidence that at the time of the issue of the policy, and the loss, the barn contained corn and millet hay. If corn and millet hay are comprehended within the term grain, then the instruction complained of was not improper. This term in the Century Dictionary, at page 2492, is defined thus: 'A small, hard seed; specifically, a seed of one of the cereal plants, wheat, rye, oats, barley, maize, or millet, collectively; corn in general; the gathered seeds of cereal plants in mass, also the plants themselves, whether standing or gathered; as to grind or thresh grain; a field or stack of grain'."

"It would, therefore, seem that millet is a cereal plant and whether the seeds are gathered in mass, or whether the plants are standing in the field, or in the stack, that in any or either of these conditions, it is grain."

In the case of Cohen vs. Insurance Company, 155 Illinois Appeal 332, it is held that whether what is known as "red-top seed" is grain within the meaning of a fire insurance policy is a question of fact to be determined by the jury. Quoting from this case further:

"Barley, rye, oats, broom corn, millet hay, field peas, flaxseed and sugar cane before the seeds were separated from the straw, hay, or stock, have all been held by the courts of this country to be included in the term 'grain.' Citing Reavis vs. Insurance Company, 78 Mo. Appeals 14; Norris vs. Id, 64 Mo. Appeals 632; 4 Words and Phrases, 3145, and other cases.

In view of the authorities herein set out, and in view of the purposes sought to be accomplished by the Legislature in the passage of the legislation under discussion, we are of the opinion that the terms "grain" and "grain in storage" as used in Chapter 427 as amended, are broad enough to include, were intended by the Legislature to embrace, and do, therefore, embrace and include timothy seed.

BANKS AND BANKING: PUBLIC DEPOSITS IN DEPOSITORY BANKS BY PUBLIC OFFICIALS: INTERPRETATION OF HOUSE FILE 506, 46th GENERAL ASSEMBLY: STATE SINKING FUND: INTEREST RATE ON COLLECTED DAILY BALANCES:

"House File 506, otherwise known as Chapter 85 of the Laws of the 46th G. A., applies only to public deposits in properly authorized depository banks made by the public officials, as clearly defined by Sec. 7420-d1 of the 1931 Code of Iowa, and that it cannot have and does not have any application to deposits made by other officials."

August 5, 1935. *Treasurer of State:* On May 27, 1935, our department issued an opinion to you prepared by Assistant Attorney General Lehan T. Ryan with reference to the interpretation and construction that should be placed upon House File 506 as enacted by the last legislative session, which is now also known as Chapter 85 of the Laws of the 46th General Assembly. In that former opinion we held that the above law required that the interest rate on public deposits as fixed by the Treasurer of State, with the approval of

the Executive Council, should apply to all public deposits of the State of Iowa, the effect of which was to bring all such public deposits made by any fiscal officer of the State of Iowa or its subdivisions within the provisions of the Brookhart-Lovrien state sinking fund law. In accordance with this former opinion, the public deposits made by all elective and appointive state officers, boards, commissions and departments would come under the provisions of the Brookhart-Lovrien state sinking fund law and the banks in which said deposits were made would be required to pay the interest rate as fixed by the Treasurer of State to the Treasurer of State for the purpose of replenishing the state sinking fund for public deposits.

Since the issuance of this former opinion, this department has received objections from the State Board of Education and also from the Iowa Liquor Commission, in which it was claimed it was certain that this former opinion was in error. Briefs and arguments were furnished this department by Attorneys Carlson, Keenan and Shull, who are members of the State Board of Education, and also a brief and argument was submitted to us by C. E. Updegraff, Special Assistant Attorney General, who was specially appointed to handle the legal matters of internal business routine in connection with the State Board of Education. These attorneys claim that House File 506 was an act specifically limited to amending Section 7420-d6 of the 1931 Code of Iowa, and that it did not enlarge the scope of the provisions of the Brookhart-Lovrien state sinking fund law; that it simply applied to the rate of interest and made provision that the Treasurer of State, with the approval of the Executive Council, had the power and authority to lower the 2% rate of interest on 90% of the daily balances on these public funds in depository banks to a lower rate of interest than 2%, but not below 1% per annum on 90% of the collected daily balances as hereinbefore required. It was their specific claim that this amendment could not apply to the funds deposited by the treasurers of the different institutions under the control of the Board of Education, because these funds were never included under the provisions of the Brookhart-Lovrien law, and also because Paragraph 8 of Section 3921 of the 1931 Code of Iowa specifically authorized and directed the Board of Education to secure the highest rate of interest consistent with safety obtainable on daily balances in the hands of the treasurer of each institution.

In view of the filing of these objections and briefs and arguments on the part of the above lawyers, who are members of the Board of Education, and by Attorney C. E. Updegraff, who was appointed as a Special Assistant Attorney General to handle and supervise legal matters of internal business routine in connection with the Board of Education, our department decided to reconsider the opinion furnished you under date of May 27, 1935. After full and complete consideration of these objections, this department has decided to withdraw its opinion of May 27, 1935, and to issue the following opinion in lieu thereof.

In approaching this question, your attention is called to the provisions of Section 143 of the 1931 Code of Iowa, which is as follows:

"143. Deposits by State Officers. All elective and appointive State Officers, Boards, Commissions and Departments, except the State Fair Board, the State Board of Education, and the Board of Control of State Institutions, shall within ten days succeeding the collection thereof, deposit, with the Treasurer of State, or to the credit of said treasurer in any de-

pository by him designated, ninety per cent of all fees, commissions, and moneys collected or received, the balance actually collected in cash, remaining in the hands of any officer, board, or department shall not exceed the sum of five thousand dollars and no money collected shall be held more than thirty days."

The above statute clearly directs all elective and appointive state officers, boards, commissions and departments, except the State Fair Board, the State Board of Education and the Board of Control of State Institutions to transfer 90% of all collections made by them to the Treasurer of State within ten days or to deposit the same to the credit of the Treasurer of State in any depository bank designated by him within ten days, and that no moneys collected by said officers should be held by them more than thirty days before being transferred to the Treasurer of State or deposited to the credit of the Treasurer of State in the depository banks as directed by the Treasurer of State. With the exception of the State Fair Board, the State Board of Education and the Board of Control of State Institutions, it was the apparent intent of the Legislature that all collections made by all other elective and appointive state officers, boards, commissions and departments should be transferred and deposited with the Treasurer of State as soon as clearances could be made, and that then the Treasurer of State should have full possession and control of all said collections for deposit in authorized depository banks or for legal expenditures of the State of Iowa.

Section 7420-d1 of the 1931 Code of Iowa provides as follows:

"7420-d1. Deposits in general. The Treasurer of State, and of each county, city, town, and school corporation, and each Township Clerk and each County Recorder, Auditor, Sheriff, and each Clerk and Bailiff of the Municipal Court and Clerk of the District Court, and each Secretary of the School Board shall deposit all public funds in their hands in such banks as are first approved by the Executive Council, Board of Supervisors, City or Town Council, Board of School Directors or Township Trustees, respectively. The term 'bank' shall embrace any corporation, firm, or individual engaged in a general banking business."

By the terms of the above statute, the Legislature specifically describes the 13 different officials of the state and subdivisions of the state that are required to deposit public funds in their hands in said depositories.

Section 7420-d6 of the 1931 Code of Iowa, prior to the Acts of the 46th General Assembly, read as follows:

"7420-d6. Interest on deposits. Said deposits shall draw interest at the rate of not less than two per cent per annum on ninety per cent 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 or secretary of a school district, by treasurer of a city or town corporation, by county treasurer or by township clerk for the months of April and October."

The object of the above statute was to fix the rate of interest that must be paid by the depository banks after the deposits were made therein by the 13 different officials specifically mentioned in Section 7420-d1 of the 1931 Code of Iowa.

Section 7420-d7 of the 1931 Code of Iowa provides as follows, to-wit:

"7420-d7. Interest credited. Said interest, except when legally diverted

to the State Sinking Fund for public deposits, shall be credited to the general fund of the governmental body making the deposit, except that interest on township funds shall be credited to such township fund or funds as the township trustees may determine."

The object of this section was to provide that the interest as fixed by said Section 7420-d6 on the public deposits made by the 13 different officials specifically mentioned in Section 7420-d1 when collected should be credited with the general fund of the governmental body making the deposit, except when legally diverted to the state sinking fund for public deposits. When the state sinking fund for public deposits became depleted and claims against the same were filed and unpaid, then this interest should be diverted to the state sinking fund for public deposits for the purpose of paying all such legal claims as were on file against said fund.

Therefore, prior to the Acts of the 46th General Assembly, the only interest on public deposits that could legally be diverted to the state sinking fund for public deposits was the interest collected on the public deposits made in the proper depository banks by the 13 different officials mentioned in Section 7420-d1 of the 1931 Code of Iowa.

Now let us inquire as to whether or not House File 506 as passed and enacted into law by the 46th General Assembly enlarged the scope of the Brookhart-Lovrien state sinking fund for public deposits so as to include deposits made in banks by officials other than the 13 officials that are specifically mentioned in Section 7420-d1 of the 1931 Code of Iowa.

House File 506 of the Acts of the 46th General Assembly is as follows, to-wit:

"AN ACT to amend Section seventy-four hundred twenty-d six (7420-d6), Code, 1931, as amended, relating to public deposits.

"WHEREAS, Many of our public bodies in many of the counties do not have ample depository facilities for their funds it being estimated that such a condition prevails with seriousness in approximately one-half of the counties and to a certain degree in nearly all counties, because banks as below explained cannot today afford to pay as high a rate of interest on public funds that they could in normal earning times; and Whereas, the Public Fund Law strictly requires that public funds must be deposited and that the rate of interest payable by depositories cannot be less than 2% per annum on 90% of the collected daily balances payable each month; and Whereas, it is believed as forceably brought out by prevailing conditions that some central authority such as the Treasurer of State with the approval of the Executive Council ought to have discretionary authority to adjust the rate above a certain minimum interest rate so that all public bodies may be able to find sufficient acceptable depositories for their public funds as the Public Fund Law requires, and

"WHEREAS, Hundreds of banking institutions in existence today cannot afford during these present economic times when good bank loans were never so few and bank earnings consequently were never so scarce to accept all of the public funds now offered to them and pay interest upon them at the end of each month at the statutory required rate of 2% per annum. Whereas, innumerable banks today are serving as depositories for their local public bodies and handling public funds at a loss for the reason that they cannot loan out public funds as they could in normal earning years and break even with the combined cost of overhead expense and the payment of 2% interest that the present law requires them to pay if they accept public funds; and Whereas, Night Burglary and Daylight Holdup Insurance rates represent an important item of overhead expense for such

portion of public funds that are kept under insurance, the Daylight Holdup Insurance rate alone for cash and securities kept on hand by a bank being $20.00 per thousand dollars per year or 2%; and Whereas, Iowa Banks cannot any longer deposit public funds with their city correspondents and earn 1% or 2% interest thereon as they formerly could, the Federal 'Banking Act of 1933' now prohibiting any bank a member of the Federal Reserve System or the Federal Deposit Insurance Corporation from paying interest on funds deposited with said bank by any other bank; and Whereas, while Iowa banking institutions are willing to extend adequate depository facilities to all public bodies they do feel that there is a very definite limit to the amount of loss in handling public funds which they can absorb and beyond that they cannot prudently go, because Bank Supervising Departments particularly Federal Bank Supervising Departments will not permit them to continue to absorb known avoidable losses to the detriment of other depositories and

"WHEREAS, It is believed that the following bill will solve the present dilemma in which public bodies throughout the State now find themselves in obtaining adequate acceptable depository facilities for their public funds and will enable a central authority such as the Treasurer of State, with the approval of the Executive Council, all upon behalf of the State, interested in the depository problems of all public bodies as well as directly interested in the financial welfare of the State Sinking Fund, to adjust the rate of interest payable upon Public Funds, but not below the minimum fixed in the following bill, consistent with the prevailing economic conditions, and Whereas, it is believed that the aggregate amount of interest for the State Sinking Fund will immediately materially increase rather than be diminished if the following bill is enacted because it will permit more public funds to find interest paying depositories even though the rate of interest may be slightly lower than the present statutory rate; and Whereas, it is the intent of the following bill to authorize the central rate making authority suggested therein to prescribe a slightly lower minimum interest rate whenever conditions like those now prevailing make it seem advisable to so do, yet it at the same time will insure that the higher interest rate now payable will again be payable in the future to the State Sinking Fund when public funds like other funds may again be employed by the depositories handling them, Therefore,

"Be it enacted by the General Assembly of the State of Iowa:

"Section 1. Section seventy-four hundred twenty-d six (7420-d6) of the Code, 1931, as amended, be and the same is hereby amended by striking all of said section after the word 'deposited' in line eight (8) thereof and inserting in lieu thereof the following: 'for the months of April and October, provided further that in order that public bodies throughout the State may be able to all times to obtain sufficient acceptable depositories the Treasurer of State with the approval of the Executive Council may from time to time adjust the rate of interest that shall be payable by all depositories on public funds in their hands but in no event shall such rate of interest be adjusted below one per cent (1%) per annum on ninety per cent (90%) of the collected daily balances payable as hereinbefore required. Henceforth public deposits shall be deposited with reasonable promptness and shall be evidenced by pass book entry by the depository legally designated as depository for such funds. Provided, however, that the rate of interest set by the Treasurer of State shall apply to all public deposits of the State of Iowa.'

"Sec. 2. This Act being deemed of immediate importance shall be in full force and effect from and after its publication in the Fort Dodge Messenger, a newspaper published at Fort Dodge, Iowa, and the Gowrie News, a newspaper published at Gowrie, Iowa.

"Approved May 3, 1935.

"CLYDE L. HERRING, Governor.

"I hereby certify that the foregoing Act was published in the Fort Dodge Messenger, May 7, 1935, and the Gowrie News, May 9, 1935.

MRS. ALEX MILLER, Secretary of State."

It will be observed that the title to the above act states that it is "an act to amend section seventy-four hundred twenty-d six (7420-d6), Code, 1931, as amended, relating to public deposits." It also will be observed that the enacting clause of House File 506 specifically states that "section seventy-four hundred twenty-d six (7420-d6) of the Code, 1931, as amended, be and the same is hereby amended * * * *." The title of this act and the enacting clause of the act specifically state that it is an act simply and specifically to amend Section 7420-d6 of the 1931 Code of Iowa, which is the section in the Brookhart-Lovrien state sinking fund law fixing the rate of interest that must be paid by the depository banks on the public deposits made by the officials that are specifically mentioned in Section 7420-d1 of the 1931 Code of Iowa. House File 506, by its title, by its preamble and by its enacting clause, is restricted to a mere amendment of Section 7420-d6 of the 1931 Code of Iowa. Its title, preamble and enacting clause nowhere state that it is an act to enlarge the scope of Section 7420-d1 of the 1931 Code of Iowa or to include public deposits made by any other public officials except those specifically mentioned in Section 7420-d1, unless we are able to place such a construction on the last sentence of said House File 506, which is as follows: "Provided, however, that the rate of interest set by the Treasurer of State shall apply to all public deposits of the State of Iowa." The last sentence of House File 506 is what is known in law as a proviso clause.

A proviso clause ordinarily signifies a condition. It is a condition, limitation or qualification; it either imposes a condition or is itself a limitation. The true office of a proviso is to restrict the sense or make clear the meaning of that which has gone before; to qualify, restrain or otherwise modify the general language of a principal clause; its object is to except something out of the general terms of the claimed statute or other instrument to which it may be attached; it implies a condition and defeats the operation of the antecedent clause conditionally; it voids such antecedent clause by way of defeasance. A proviso can have no existence separate and apart from the provision which it is designed to limit or qualify. It should be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter. It is a general rule of construction that a proviso which is a limitation of a preceding general provision will be held to affect or limit the immediate clause or general statement, unless it clearly appears from the whole sentence preceding such proviso that it was the intention of the proviso to refer to the whole general provision. The meaning of a proviso, however, is to be determined from the language. In some cases it may extend or enlarge what precedes it.

Citing 50 Corpus Juris, Page 835, and cases therein cited.

The nature and office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it, unless it fairly appears to have intended to apply to some other matter. It should be construed to relate to the immediately preceding parts of the clause to which it is attached and will be so restricted in the absence of anything in its terms or the subject it deals with evincing an intention to give it a broader effect.

Words and Phrases, Volume 6, Page 5756.
In re Bouvier's Estate, 52 Utah, 280, Page 285; 172 Pac., 683, 684.

Section 7420-d6 of the 1931 Code of Iowa as now amended by House File 506 of the Acts of the 46th General Assembly reads in its entirety as follows:

"7420-d6. Interest on deposits. *Said deposits* shall draw interest at the rate of not less than two per cent per annum on ninety per cent of the collected daily balances payable at a 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 for the months of April and October, provided further that in order that public bodies throughout the State may be able at all times to obtain sufficient acceptable depositories the Treasurer of State with the approval of the Executive Council may from time to time adjust the rate of interest that shall be payable by all depositories on public funds in their hands, but in no event shall such rate of interest be adjusted below one per cent per annum on ninety per cent of the collected daily balances payable as hereinbefore required. Henceforth public deposits shall be deposited with reasonable promptness and shall be evidenced by pass book entry by the depository legally designated as depository for such funds. Provided, however, that the rate of interest set by the Treasurer of State shall apply to all public deposits of the State of Iowa."

Applying the above quoted rules of statutory construction to the last sentence of the above act, which is the proviso clause, it is apparent that it was not the intent of the Legislature to enlarge the scope of House File 506 so as to apply to public deposits made by officials of the state or its subdivisions by any other officers except those specifically mentioned in Section 7420-d1 of the 1931 Code of Iowa. The first two words, "said deposits," of Section 7420-d6 as it now appears in the above law clearly refers back to the public deposits in the hands of the officers specifically mentioned in Section 7420-d1 of the 1931 Code. The preamble to the enacting clause of House File 506 and the following provision in the enacting clause thereof "provided further that in order that public bodies throughout the state may be able at all times to obtain sufficient acceptable depositories" clearly shows that the object of the Legislature in passing this amendment was for the main purpose to alleviate the difficulty the public bodies throughout the state were experiencing in getting depository banks to accept their public deposits. If the last sentence of the enacting clause of House File 506 were not included in this act, then House File 506 might be construed as to apply only to the public bodies throughout the state and would not apply to deposits made by the Treasurer of State as directed by Section 7420-d1 of the 1931 Code of Iowa. Such a construction, however, is eliminated by the inclusion of the last sentence of the enacting clause of House File 506. By reading the above two proviso clauses in the enacting clause of House File 506, it is apparent that it was the legislative intent that when the rate of interest was fixed by the Treasurer of State, with the approval of the Executive Council, this rate of interest should apply not only to the public deposits made by public bodies throughout the state but also by the public deposits made by the Treasurer of State. It appears to us that the correct interpretation and statutory construction that should be placed upon the last sentence or clause of House File 506 is that the rate of interest set by the Treasurer of State shall apply to all public deposits of the State of Iowa made in acccordance with all of the provisions of the Brookhart-Lovrien state sinking fund for public deposits as amended, and that it cannot apply to public deposits made in the banks of this state by any public official except those as specifically mentioned in Section 7420-d1 of the 1931 Code of Iowa.

It has been ably argued that the Iowa Supreme Court case of Scott County vs. Johnson, reported in 209 Iowa, 213, is controlling. In that case, Scott County attempted to question the constitutionality of the state sinking fund for public deposits by claiming that Scott County had a certain vested interest in the interest that they were collecting from the public deposits made by the Treasurer of Scott County under the provisions of Section 7404 of the 1931 Code of Iowa, and that the Brookhart-Lovrien state sinking fund for public deposits law did not specifically provide in the title to the act or in the enacting clause that it was repealing or amending Section 7404 of the 1924 Code of Iowa. The Supreme Court in that case pointed out that prior to the year 1909, there was no statutory provision requiring the payment of interest by depositories of public funds, and that thereafter the various statutes in regard to such payment were enacted, and that the Legislature thus created a large source of revenue which was non-existent before and directed that it be placed in the general fund of the various subdivisions. The court further went on to point out that all the property of Scott County was acquired by the exercise of governmental functions and that its revenues were derived through the power of taxation and were subject to legislative control at all times, and that the Legislature could have originally provided that the interest be turned to a special fund and having had that power originally, they could assume and exercise that power at any time. As to whether or not the provisions of the Brookhart-Lovrien state sinking fund for public deposits law superseded the provisions of Section 7404 of the 1924 Code of Iowa, the court has this to say on page 228:

"The sum of our conclusion is that Chapter 173, Acts of the 41st General Assembly, is so related to Section 7404 as to be amendatory thereof. The amendment operated as a repeal of a part of the original section. The appellant has necessarily built its case upon the original Section 7404, as the necessary source of its title to the funds. This original section is its standing ground for the purpose of its attack upon the later amending legislation. The power to repeal was exactly equal to the power of original enactment."

However, in our Supreme Court case of Scott County vs. Johnson above, the court was dealing with two statutes or two laws pertaining to the same subject matter. Section 7404 of the 1924 Code of Iowa provided that the County Treasurer shall, with the approval of the Board of Supervisors as to place of deposit, by resolution entered of record, deposit state, county, or other funds in any bank or banks in the state to an amount fixed by such resolution at interest at the rate of at least two and one-half per cent per annum on ninety per cent of the daily balances payable at the end of each month, and that all of this interest should accrue to the benefit of the general county fund. The Brookhart-Lovrien state sinking fund law was dealing with the same subject matter, that is, public deposits made by the treasurer of each county in the State of Iowa. The latter law also dealt with the rate of interest that should be paid by the depository banks on such public deposits. Section 7404 of the 1924 Code of Iowa was in direct conflict with the Brookhart-Lovrien state sinking fund law in dealing with this same subject matter. When that situation obtains, naturally the latest law passed by the Legislature would govern. Where two statutes are in apparent conflict, they should be so construed, if reasonably possible, as to allow both to stand

and to give force and effect to each, and, if it is not possible to reconcile them, effect will be given to the later enactment.

See Fitzgerald vs. State, 260 N. W., 681.

However, in the present case we are dealing with public deposits made under the provisions of the Brookhart-Lovrien state sinking fund law and also deposits made by other public officials which do not come within the provisions of the Brookhart-Lovrien state sinking fund law for such deposits. Under the Brookhart-Lovrien state sinking fund law for public deposits, there is no requirement for the treasurers of the different institutions under the Board of Education to deposit public funds in their hands in depositories approved by their respective boards or by the Executive Council of the state of Iowa. These deposits of public funds are outside the purview and scope of the Brookhart-Lovrien state sinking fund for public deposits. Special provision is made for the deposits of public funds in the custody of and under the control of the State Board of Education by Paragraph 8 of Section 3921 of the 1931 Code of Iowa. Other sections of the Code provide for the collection of public funds by the institutions under the Board of Control and for the transmittal to the Treasurer of State of all funds received during the preceding month.

See Section 3330 of the 1931 Code of Iowa.

Such collections and deposits in banks by such officials should not be construed as regular public deposits for the reason that in many instances they only remain in the bank for a sufficient length of time for clearance and the banks could not possibly have any commercial use of such deposits to justify or permit them to pay interest on the same. It appears to be the intent of the Legislature that such collections and deposits should be transmitted to the State Treasurer every month, and that the State Treasurer then should make the public deposit in his own name, and when the Treasurer so does, the public deposit then comes within the provisions of the Brookhart-Lovrien state sinking fund for public deposits.

The case of Fitzgerald vs. State, reported in 260 N. W., on page 681, has been cited and argued ably in support of the previous opinion rendered by this department, but in that case the Supreme Court again had before it two statutes relating to the same subject matter, namely, costs and attorney's fees in connection with condemnation proceedings in the exercise of the rights of eminent domain. These two statutes were Sections 7852 and 7853 of th 1931 Code of Iowa. Section 7852 was amended by Chapter 213 of the Acts of the 43d General Assembly of the State of Iowa, which specifically stated that in "all cases in which the State of Iowa is the applicant, no attorney fee shall be taxed." Claim for attorney's fees was made under Section 7853 and stated that in case the applicant declined on the final determination of the appeal to take the property and pay the damages awarded, that he shall pay in addition to the costs and damages actually suffered by the land owner a reasonable attorney's fee to be taxed by the court. In that case, the State of Iowa was the applicant and declined to take the property after the final determination of the appeal was made, and as a result claim was filed for the attorney's fees. In deciding this question in the Fitzgerald case above, the court used the following language:

"So on the whole case we conclude that from the plain language of the Act of the 43d General Assembly, also from the fact that in the title it was dealing with the subject of assessed costs and attorney's fees in condemnation proceedings without any limit, from the fact that this statute as it stands is a part of the Code devoted to the one subject, the rule in pari materia is to be applied, that is to say, forming a part of the entire Code on the subject of condemnation proceedings wherein the State is interested as the applicant or condemnor, the sections must all be construed together and all be given effect, and therefore the court below erred in taxing attorney's fees in this case."

It will be noted that the court laid stress in the Fitzgerald case above on the title to the amendment as passed by the 43d General Assembly, in that the title was broad enough to include the subject of assessment, costs and attorney's fees in condemnation proceedings. However, this is not the situation in the present case, because the title to House File 506 specifically stated that it was an act to amend Section 7420-d6 of the Code of 1931 as amended relating to public deposits. The section of the Brookhart-Lovrien state sinking fund for public deposits that was intended to be amended was simply a section which fixed the rate of interest that the depository banks should pay on public deposits made with them in accordance with all of the provisions of the Brookhart-Lovrien state sinking fund for public deposits. The enacting clause of House File 506 consistently follows the title to the act and goes no further.

It is, therefore, the final conclusion and opinion of this department that House File 506, otherwise known as Chapter 85 of the Laws of the 46th General Assembly, applies only to public deposits in properly authorized depository banks made by the public officials, as clearly defined by Section 7420-d1 of the 1931 Code of Iowa, and that it cannot have and does not have any application to deposits made by other officials.

LIQUOR CONTROL COMMISSION: LICENSE: It is mandatory that the Liquor Commission grant a wholesale license in accord with Section 30 of the Act, to a person or firm that makes a proper showing in his application and who furnishes the proper bond and tenders the proper license fee.

August 6, 1935. *Iowa Liquor Control Commission:* You request an opinion from this department as to whether or not it is mandatory that the Iowa Liquor Control Commission grant a wholesale license in accord with Section 30 of the Iowa Liquor Control Act to a person or firm that makes a proper showing in his application and who furnishes the proper bond and tenders the proper license fee.

You are advised that the phrase "shall grant a license," in Section 30 of the Iowa Liquor Control Act makes it mandatory on the Iowa Liquor Control Commission to grant a wholesale license to an applicant who fulfills the requirements of that section. In many cases the word "shall" is construed as "may." However, this is never the case where the statute containing the word "shall" confers a right or a benefit upon an individual or upon the public in general. Section 30 of the Liquor Control Act does confer a benefit upon those who apply for a license and, therefore, the word "shall" must be given its literal meaning. There are many cases directly in point. An Iowa case sets forth the principle very clearly:

"The word 'shall' appearing in statutes is generally construed to be mandatory. Where no right or benefit depends on its imperative use, it may and often is treated as synonymous with 'may.' The rule of construction is quite clearly expressed in Wheeler vs. City of Chicago, 24 Ill. 105, 76 Am. Dec. 736, quoted with approval in First National Bank of Helena vs. Neill, 13 Mont. 377, 34 Pac. 180:

'The word 'may' is construed to mean 'shall' whenever the rights of the public or third persons depend upon the exercise of the power or performance of the duty to which it refers. And so, on the other hand, the word 'shall' may be held to be merely directory when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or the individual, by giving it that construction. But, if any right to any one depends upon giving the word an imperative construction, the presumption is that the word was used in reference to such right or benefit. But, where no right or benefit to anyone depends upon the imperative use of the word, it may be held to be directory merely'."

Vale vs. Messenger (Iowa) 168 N. W. 281-283, 184 Ia. 553.

SCHOOLS: TRANSPORTATION: Children whose school is more than two miles away from their home, are entitled to transportation.

August 6, 1935. *Superintendent of Public Instruction:* We have your request for an opinion on the following proposition:

"A child lives in a school township divided into subdistricts, its home being two and one-half miles from the schoolhouse in his own subdistrict. The township board has designated another school in the same township for this child to attend. The school designated is more than two and one-half miles from the child's home. The home is within one-half mile of a regularly established bus route to a consolidated school. The two boards have not agreed as to the child attending school in the outside subdistrict, nor has the county superintendent so consented. Will you please advise us as to the right of this child to transportation?"

In the provisions of Section 4274 of the Code, a child residing in one corporation may attend school in another if the two boards so agree. Or in case no such agreement is made, the county superintendent and the board of the adjoining corporation may consent to such attendance, if the child resides nearer a schoolhouse in the adjoining corporation or nearer to a regularly established transportation route to a consolidated school and two miles or more from the public school in the child's own corporation.

However, as I understand from your request for opinion, the two boards will not agree and neither will the County Superintendent consent, so it is purely, then, a question of whether the child is entitled to transportation to the school in its own subdistrict which is two and one-half miles from the child's home and also whether the child is entitled to transportation to the school in the adjoining subdistrict which is two miles from the child's home.

Chapters 60 and 61 of the 45th General Assembly provide in part as follows:

"When children enrolled in an elementary school other than in a consolidated district, live two and one-half miles or more from a school in their district or subdistrict, or when the school in their subdistrict or district 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 of 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."

As this child lives two and one-half miles from his own school, he is clearly

entitled to transportation, and if he is required to go to a school in an adjoining subdistrict then for all intents and purposes his own school is closed as to him and if the designated school is more than two miles, he is entitled to transportation to that school.

OLD AGE ASSISTANCE COMMISSION: MEMBER, COUNTY BOARD: INVESTIGATOR: Member of county board may qualify as an investigator, but he could not receive compensation as an investigator.

August 7, 1935. *Old Age Assistance Commission:* This will acknowledge receipt of your request for the opinion of this department on the following question:

"The commission has had several inquiries with reference to a member of a county old age assistance board acting as an investigator and in so doing, receiving compensation as an investigator.

"The county old age assistance act, as amended, provides that members of the old age county board shall receive no compensation.

"If a member of the county board could act as an investigator, could such member receive compensation as an investigator?"

If you will refer to your records, you will find our opinion to you under date of July 10, 1934, in which we stated that it was our opinion 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 owing to the fact that there might be a conflict in administrative duties. Our thought, as expressed at that time, was that the holding of the two positions would create incompatibility, as the investigator reports to the board and if he were a member of the board, he would be acting in a dual capacity, which would cause incompatibility by reason of the fact that he would be passing upon his own report. However, the 46th General Assembly amended Chapter 19, Acts of the 45th General Assembly in several respects. Section 5 of Chapter 55, Laws of the 46th General Assembly, provides:

"Sec. 5. Amend Section seven (7), Chapter nineteen (19), Acts of the 45th General Assembly in extraordinary session, by striking the first sentence found in lines 1 and 2 and inserting in lieu thereof the following: 'Any member of the board may qualify himself as a local investigator, as hereinafter provided, or the board may appoint one or more local investigators, at a salary for each to be set by the board and approved by the commission'."

Therefore, the Legislature has set up a method by which a member of the board may qualify himself as a local investigator. But this amendment should be considered in conjunction with Section 6 of Chapter 19, Acts of the 45th General Assembly in Extraordinary Session, which section provides as follows:

"Sec. 6. *Compensation.* The members of the board as herein provided shall receive no compensation for their services as members of such board, but they shall be entitled to the actual and necessary traveling expenses incurred by them in properly discharging their official duties."

The 46th General Assembly amended this section in Section 4 of Chapter 55 by striking the word "traveling," appearing in the last line of the above quotation. Therefore, it is clear that a member of the County Old Age Board can receive no compensation, except necessary expenses incurred in the proper discharge of official duties.

In arriving at a proper and legal interpretation of the question presented,

there can be no question, under the express wording of the amendment referred to above with reference to members of the board qualifying as investigators. In this connection, we wish to call your attention to the wording of the amendment in that a member of the board may qualify. Then the sentence is qualified by the word "or" in setting up another and definite method of selecting one or more local investigators, appointed by the board, and that a salary might be fixed by the board and approved by the commission. Therefore, it seems to be the intent of the Legislature that there are two methods of selecting investigators, either a board member may serve or the board may appoint other persons. In the latter case, the investigators may receive a salary.

The situation as we view it is analogous to that of a member of the school board who desires to do some act or assist in the doing of some act, which involves duties other than those of a member of the board or, in other words, desires to save expense for the school district by doing physical labor around the school grounds or building or undertake some other work in behalf of the school district for which the school board, if some other person were selected, would have to compensate. In this situation, it is the policy throughout the state, as far as we are informed, that the board member who performed such tasks to save the school district money, is not compensated for performing such services.

Therefore, it is the opinion of this department that, while a member of the County Old Age Board may qualify as an investigator, yet he is not to be compensated as an investigator, as the Legislature, undoubtedly, intended that he would serve without compensation. If such member desires to save expense, he could act as an investigator without compensation, or if he was not in a position to give his time to such duties, the board then would select other persons and compensate them for this work.

SCHOOLS: SALARIES: OFFICERS: SALARY REDUCTION ACT: County Superintendent of Schools of Polk County whose salary had been reduced on January 1, 1932 and then again on May 1, 1933 which was immediately after effective date of Chapter 89, 45th General Assembly, is entitled to his two claims for salary.

August 7, 1935. *County Attorney, Des Moines, Iowa:* We have your request for an opinion on the following proposition:

"The salary of the county superintendent of schools of Polk County was fixed by the Board of Supervisors at $3,000.00 per year beginning September 1, 1930, for the term of office of three years. On January 1, 1932, the board reduced his salary to $2,600.00 per year. This reduction continued until May 1, 1933, which was immediately after the effective date of Chapter 89, Acts of the 45th General Assembly, being the salary reduction act. On that date, the salary was reduced to $2,400.00 per year.

"The county superintendent has filed a claim with the board in two parts, the first part asking for the amount equal to the reduction from January 1, 1932, to May 1, 1933, a total of sixteen months, at $30.00 per month, or $480.00; the second part asking for an amount equal to the reduction from May 1, 1933, to July 1, 1935, a total of twenty-six months, at $50.00 per month, or $1,300.00.

"Will you please advise me whether the board has the legal right to pay both or either of these claims?"

In regard to the claim of $480.00, you have cited to us the late case of

Kellogg vs. Story County, et al., 257 N. W., 778, in which our Supreme Court held that where the Board of Supervisors had fixed the salary of the County Superintendent for the term, the power of the board was at an end and they had no authority to reduce the salary during the term. It is clear then that the attempted reduction on January 1, 1932, was a nullity, and the claimant is entitled to the amount owing from January 1, 1932, to May 1, 1933, or $480.00.

This then brings us to the second part of the claim and the claimant's right to recover for the amount equal to the reduction between May 1, 1933, and July 1, 1935. There is no question about his right to recover for the period from May 1, 1933, to September 1, 1933, the end of his first term. This is a period of four months at $50.00 a month, or a total of $200.00. Our thought on this is that because of the fact that our Supreme Court in the case of Smith vs. Thompson, 258 N. W., 190, held the salary reduction act invalid, this would not in any wise interfere with the fixed compensation for the term, and this compensation would carry through the term exactly as if the salary reduction act had not been passed. The serious question is the amount of the claim based on the reduction from September 1, 1933, the beginning of the second term to July 1, 1935. It appears from the facts that no action was taken by the board in regard to salary at the beginning of the second term. The action of May 1, 1933, would not control, as that action was taken during the first term and before he was elected for the second term, and such action was then not only a nullity as to the first term but likewise would not affect the second term, for the compensation could not be fixed for a term for which he was not yet elected. There being then no new action taken as to compensation for the second term, does the compensation of $3,000.00 per year as fixed for the first term carry over into the second?

It would appear that this would be a very ordinary proposition and that there should be abundant authority on it, but we have not been able to find a case exactly in point, the statements of law that we have been able to find being those of text writers. For example, the author of "Throop on Public Officers" says at page 463 in regard to fixing the salary of appointive officers, "Where it (salary) has been once properly fixed, that is sufficient for each successive appointment until changed." This rule appears to be good law and should apply to elective officers the same as appointive officers, and you will note that there is no mandatory provision in either Section 5130 or Section 5232 of the Code requiring that the salary be set for each term. It is the law that every public officer is entitled to his salary, and where no new action is taken, it is the opinion of this department that the salary fixed for a term carries over into subsequent terms, unless the board takes proper action to fix a new or different salary for the ensuing term, and therefore the claimant, in our opinion, would also be entitled to the amount equal to the amount that he did not receive from September 1, 1933, to July 1, 1935, namely, $50.00 per month.

BANKS AND BANKING: INTEREST ON NOTES: Chapter 103, Laws of the 46th General Assembly, amending Sections 9404-5 of the Code, 1931, does not affect instruments entered into prior to its effective date—the statutory rate of interest applies.

August 14, 1935. *Superintendent of Banking:* We have your request for opinion on the following proposition:

Chapter 103 of the Laws of the 46th General Assembly amended Sections 9404 and 9405 of the Code of Iowa, 1931, by reducing the rate of interest from 8 per cent to 7 per cent, and from 6 per cent to 5 per cent. Will you please advise whether this Act applies to notes executed prior to the effective date of the Act, and extended subsequent to its effective date?

You will note that this act of the Legislature does not act retrospectively, and therefore does not affect instruments entered into prior to its effective date, which was July 4, 1935. This being true, if the original instrument is extended by the parties subsequent to the effective date of Chapter 103 of the Laws of the 46th General Assembly, the interest provided for in the original instrument would not be affected by this Chapter 103, as it is the law that such extension does not extinguish the original debt or in any way change it, except by postponing the time of payment.

It is also the law that where accrued interest is included in the extension agreement, this does not alter the situation, as such included interest does not constitute a new and independent consideration.

See 8 Corpus Juris, 443.

Commercial Savings Bank vs. Schaffer, 190 Iowa, 1088.
Anthony State Bank vs. Bernard, 194 Iowa, 1090.

BANKS AND BANKING: SMALL LOAN ACT: In Chapter 125, 45th General Assembly, Extra Session, there is no authority therein for a corporation segregating a portion of its capital to be used solely for small loan business and the provisions of this Act seem to require that the licensee shall have certain liquid assets which shall be used in this type of business.

August 16, 1935. *Superintendent of Banking:* You ask for our opinion on the following proposition:

The S. & M. Finance Company is a corporation, organized under the laws of this State. It is engaged in the business of handling installment contracts given for the purchase of automobiles. They have approximately $350,000 employed in that business. This corporation made application for a license to operate a small loan company. The application was executed by the S. & M. Finance Company doing business as the Webster County Loan Company. The license was granted, and it appears that the records of the small loan department of this corporation are segregated from the other business of the corporation. Would you please advise us whether it is possible for a corporation to engage in several businesses by segregating a portion of their capital, and receive a license, as has been done here, to apply only to a portion of the entire business of the company?

Our Supreme Court, in the case of *Butler Manufacturing Company vs. Elliott & Cox,* 233 N. W. 669, said:

"A corporation, like an individual, may do business, and contract in a name other than its legal name."

There is, then, no question about this corporation doing business in a name other than its corporate name, and they undoubtedly would not have to file their trade name with the County Recorder, as provided for in Chapter 429-a1 of the Code of Iowa, as this chapter only mentions persons and co-partnerships, and it appears to be the law that where corporations are not included in such provisions, or if they are expressly excepted, that they need not file. (See *National Iron Works vs. Korn,* 114 So. 659.)

As we view it, however, this question of trade name, and whether a cor-

poration must file or not, is not material here, for the reason that corporations are creatures of the statute and have only the authority and powers given to them under the law, and the serious question here then is, whether this corporation may segregate a portion of its capital and use it for a specific purpose, and in viewing this proposition we will assume that the corporation, by its original articles or amendments thereto, has assumed the power to carry on a small loan business.

Our statutes in regard to corporations for pecuniary profit begin with Chapter 384 of the Code, and while a corporation may have as many businesses as it chooses, so long as they are not prohibited by law, I do not know of any statute whereby a corporation would be authorized to set apart a portion of its capital and use for one particular purpose, as all of the powers of a corporation are conjunctive and the entire capital must be used for all purposes; and I find no statutory provision for a corporation organizing for two or more objects and setting aside a certain portion of its capital, to be used in the furtherance of any particular object for which it is formed.

I have carefully studied the provisions of Chapter 125 of the Laws of the 45th General Assembly, Extra Session, being the Small Loan Act, and find no authority therein for a corporation segregating a portion of its capital to be used solely for the small loan business, and the provisions of this act seem to require that the licensee shall have certain liquid assets which shall be used in this type of business.

TAXES: BOARD OF SUPERVISORS COMPROMISING DELINQUENT TAXES: Must be scavenger sale before Board of Supervisors is authorized to compromise taxes, and compromise can include only delinquent taxes.

August 16, 1935. *Auditor of State:* We have your letter of August 15th in which you ask for an opinion on the following question:

"Is the Board of Supervisors of a county authorized under the provisions of Section 7193-A1 to compromise delinquent taxes where the real estate has been offered for sale for taxes for two consecutive years and not sold?"

"In other words, does Section 7193-A1 limit the authority of the Board of Supervisors to compromising only the delinquent taxes against the property antedating a tax sale certificate or being a part of the taxes due for the year for which the property was sold for taxes?"

Section 7193-A1 reads as follows:

"Compromising tax. When any property in this State has been offered by the County Treasurer for sale for taxes for two consecutive years and not sold, or sold for only a portion of the delinquent taxes, then and in that event the Board of Supervisors of the county is hereby authorized to *compromise the delinquent taxes against said property antedating any tax sale certificate; or being a part of the taxes due for the year for which such property was sold for taxes,* and may enter into a written agreement with the owner of the legal title or with any lienholder for the payment of a stipulated sum in full liquidation of all delinquent taxes included in such agreement."

Upon a first reading of said Section 7193-A1, one would naturally draw the conclusion from the wording of the first three or four lines of the section, that the Board of Supervisors is to be authorized to compromise the taxes after the property has been offered for sale for two consecutive years and not sold.

The first few lines provide when any property is offered by the County

Treasurer for sale for taxes for two consecutive years and not sold, or sold for only a portion thereof, that then the Board of Supervisors is authorized to compromise. However, that portion of the section immediately following the word "compromise" limits the board in its authority to compromise by providing that it may compromise

"the delinquent taxes against said property antedating any tax sale certificate; *or being a part of the taxes due for the year for which such property was sold for taxes,* * * * *"

It, therefore, conclusively appears, in view of the wording of the underscored portion of the last quotation, that there must have been a scavenger sale before the Board of Supervisors is authorized to compromise the taxes, and the compromise can include only the delinquent taxes antedating the tax sale certificate or being a part of the taxes due for the year for which the property was sold.

DRAINAGE DISTRICTS—Redemption from Tax Sale, Compromise of Special Assessments.

August 19, 1935. *County Attorney, Wapello, Iowa:* We have your letter of recent date in which you ask for an opinion on the following two questions:

1. "When, under the provisions of Section 7590-c1 of the Code of 1931, the Board of Supervisors of a county acting for a drainage district, or the trustees of such district, have purchased and taken an assignment of a tax sale certificate, has that particular governing body authority to sell the certificate to a third person; and if so, can the governing body again demand a re-assignment of said certificate from the third person to whom it was sold?"

2. "When the Board of Supervisors acting as trustees for a levy and drainage district, have purchased a tax sale certificate under the provisions of Section 7590-c1 and 7590-c2 of the Code of 1931, does that body have authority to compromise said levy and drainage special assessments?"

We will answer your questions in the order asked.

1. We do not believe that under the provisions of Section 7590-c1 of the Code of 1931, the Board of Supervisors acting on behalf of the drainage district, had authority to sell or dispose of the certificate after having once taken an assignment of it. This being true, there is no question but that the board would have a right to demand a return of the certificate upon payment of the face of the certificate, plus statutory interest and penalties, and in addition to that, the amount which the holder has paid for taxes. In other words, the Board of Supervisors acting on behalf of the district, should deposit with the County Auditor the amount of money to which the holder of the certificate would be entitled, if redemption would be made at that time. The amount to which the holder of the certificate would be entitled, would naturally be the face of the certificate, the amount of subsequent taxes paid by him, and the statutory interest and penalties allowed.

2. There has been some reference made in correspondence in connection with this question, to an opinion of the Attorney General in the year of 1927, as holding that Boards of Supervisors of drainage districts or trustees acting on behalf of the districts, had no authority to compromise drainage district special assessments. That opinion was good law at the time it was written. However, since the date of that opinion, the Legislature of this state has enacted what is now Chapter 212 of the Acts of the 43d General Assembly, also found in Sections 7590-c1 to c6 inclusive, of the Code of 1931. Under

the provisions of said Chapter 212, the Legislature expressly provided that the Supervisors or trustees, as the case might be, should have authority to purchase the tax sale certificates. While Section 7590-c2 expressly provides that redemption may be made by the land owner on such "terms" as may be agreed upon between such Board of Supervisors or such trustees and said land owner, and further provides that if they cannot agree, still the land owner shall be permitted to redeem by paying fifty per cent (50%) of the actual value of the land at the time of redemption. We will say frankly, that the amount which was to be paid has not caused us as much worry as the construction to be placed on Section 7590-c2. We think the real question is whether or not that section provides for compromise or for an easy method of redemption. We are inclined, however, in view of that portion of the first sentence after the semi-colon quoted, "but in any case in which the owner of said land will pay as much as fifty per cent of the value of the land at the time of redemption, he shall be permitted to redeem," to say that the intention of the Legislature was to provide for a compromise rather than a mere redemption on easy payments. If it had been the intention of the Legislature to enact merely a law permitting redemption on easy terms, it would have included more in that portion just quoted than a payment of fifty per cent. The Legislature would have gone further and provided for the payment of the balance, because if the Board of Supervisors and the land owner could not agree under the first part of the sentence, surely they would be unable to agree as to how the remaining fifty per cent should be paid. It is, therefore, the opinion of this office that the Legislature in enacting Section 7590-c2, provided for a method for compromising the taxes, or rather special assessments.

It has been argued that in order for the land owner to redeem from the sale, he must pay all of the general taxes, and unless he can agree with the Board of Supervisors for a settlement of the special assessments, under Section 7590-c2, must pay the special assessments up to at least fifty per cent of the value of the land. We believe the argument is true as to the special assessments, provided he cannot agree with the Board of Supervisors. However, as to the general taxes, the Board of Supervisors under the provisions of Section 7293-a1, has authority to compromise delinquent taxes against any property antedating a tax sale certificate or paying a part of the taxes due for the year for which such property was sold for taxes, provided said property has been offered by the County Treasurer for sale for taxes for two consecutive years and not sold, or sold for only a portion thereof.

It is, therefore, the opinion of this department that if the Board of Supervisors, acting on behalf of such district, and the land owner, can agree on the amount to be paid by way of redemption and the terms of such payment, he will have a right to redeem, conceding, of course, that in order for the board to obtain the certificate from the present holder, it would have to pay the amount to which the holder would be entitled, if redemption were made at the present time.

BOARD OF ASSESSMENT AND REVIEW: FUNDS OF COUNTIES IN BANKS: STATE SINKING FUND. Moneys apportioned back to the counties by the State Board of Assessment and Review and deposited in banks, draw interest payable to the State Sinking Fund.

August 19, 1935. *Iowa State Board of Assessment and Review:* We have your request for an opinion on the following proposition:

Under the provisions of Division VI, Chapter 82, Laws of the 45th General Assembly, extraordinary session, revenues arising under the operation of the property relief act are allocated back to the counties after deduction of a certain amount for the State Emergency Relief Fund and also for expenses of collection.

Under the provisions of this act, the Board of Assessment and Review on August 1, 1935 certify to county treasurers of the State the total amount of money which has been apportioned to that county. This amount is distributed by the county treasurer to the several taxing districts of the county by either a credit against the second installment of the tax bill of each taxpayer in the county or by remittance to the taxpayer if both installments have been paid in full prior to the apportionment. It is some little time before this distribution can be made by the county treasurers, and necessarily these funds must be deposited by them awaiting the distribution.

Will you please advise whether the depository banks of these funds should pay interest thereon into the State Sinking Fund for public deposits as provided by Chapters 352-D1 and 352-A1 of the Code of Iowa, 1931?

Section 7420-D1 of the Code provides that the County Treasurer shall deposit all public funds in his hands in such banks as are approved by the Board of Supervisors. The subsequent provisions of Chapter 352-D1 provide for the payment of interest on these deposits; Chapter 352-A1 of the Code creates a state sinking fund and provides for the diversion of such interest into the state sinking fund.

Section 62 of Chapter 82, Laws of the 45th General Assembly, Extraordinary Session, in providing the manner and method of the distribution of this money allocated back to the counties, provides:

"The amount of money so credited shall forthwith be distributed by the County Treasurer to the several taxing districts of the said county, the same as though the amount thereof had been paid to the treasurer of said county by the taxpayers of said taxing district."

You will note, therefore, that this money in the hands of the County Treasurer is to be treated as any other public moneys received by him, and it is, therefore, the opinion of this department that your question must be answered in the affirmative, and that the depository banks must pay interest on said amounts into the state sinking fund for public deposits the same as on the deposit of any other public funds.

HIGHWAY COMMISSION: UNEXPENDED BALANCE OF $1,432.45: PRIMARY ROAD FUND: GENERAL FUND:

The $1,432.45 on hand July 1, 1934 and transferred to the general fund should be returned to the primary road fund.

August 19, 1935. *State Comptroller:* Your letter of August 1, 1935, of which the following is a copy:

"Under Chapter 188, Section 65 of the 45th General Assembly there was appropriated from the primary road fund the sum of $15,000.00 to pay for workmen's compensation for employees under the State Highway Commission. The Comptroller Act went into effect July 4, 1935, and provided that all unexpended balances should be charged off annually. In accordance with this statute, on July 1, 1934, the unexpended balance of this appropriation, amounting to $1,432.45 was charged off and credited to the general fund of the State. To get the money from the primary road fund credited to the Industrial Commissioner, it is necessary to write a warrant. This is a trust fund

warrant on the primary road fund to be credited to Chapter 188, Section 65 of the 45th General Assembly, which made it a general revenue account.

"You will note in reading Section 65 that it does not provide $15,000.00 or so much thereof as may be necessary, but does provide $15,000.00 annually for use in paying all claims of employees of the State Highway Commission who are injured or killed while on duty, as provided in Chapter 70 of the Code.

"Since charging the unexpended balance off and crediting it to the general fund of the State, the question comes to my mind as to whether or not it should be charged back to the primary road fund.

"Your interpretation of this situation at an early date will be appreciated."

at hand, the same having been handed to the writer for attention and opinion.

It is the opinion of this department that the primary road fund created by Section 4755-b3, 1931 Code, is a trust fund, that is, a fund to be used for certain specific purposes. Section 4755-b4 specifically enumerates these purposes and appropriates the primary road fund to the payment thereof, to-wit: the establishment, construction, and maintenance of the primary road system and the payment of interest on, and the principal of primary road bonds lawfully issued by the counties in anticipation of income of said primary road fund.

Sec. 4755-b32 requires—"the State Highway Commission to each year set aside from the primary road fund an amount equal to the interest and principal of such bonds maturing in such year. * * * * . 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. * * * *."—thus confirming the trust character of the primary road fund.

Chapter 48 of the Acts of the Extra Session of the 45th General Assembly fixes the amount to be set aside as required in Section 4755-b32 not less than $8,000 per annum.

It might well be said that the Workmen's Compensation payable to employees of the Highway Commission as provided in Chapter 70 of the 1931 Code was a part of the cost of construction or improvement of the primary road system and payable from the primary road fund.

The 45th General Assembly, when it enacted Chapter 188, must have had this thought in mind, for it did not appropriate, but set aside, from the primary road fund, $15,000 annually for the use of the Industrial Commissioner, and previous Assemblies and succeeding General Assemblies must have had the same thought in mind, for they all merely expressly authorized the payment of Workmen's Compensation claims of employees of the Highway Commission from the primary road fund in an amount not to exceed $15,000 in any fiscal year.

The General Assembly merely intended to clarify an apparent conflict in the law and authorize expressly the payment of Workmen's Compensation for Highway Commission employees from the primary road fund, which was a legitimate part of the cost of construction and maintenance of primary roads. It in nowise intended that the $15,000, or any portion thereof, should be taken out of the primary road fund. It having been impressed with a trust, remained so impressed, but for a particular purpose connected with, and a part of the cost of construction and maintenance of highways. It follows therefore, that said $15,000, so set aside annually for the use of the Industrial Commissioner, cannot be diverted from the primary road fund, and

any portion thereof that may have been transferred to the general fund should be returned to the primary road fund.

We are of the opinion, that as to the $1,432.45, reported in your letter as having been on hand July 1, 1934, and transferred to the general fund, that it should be returned to the primary road fund.

TAXES: SCAVENGER SALE: The county should bid sum equal to the general taxes, and no more.

August 23, 1935. *County Attorney, Williamsburg, Iowa:* We have your letter of August 8, 1935, in which you ask for an opinion on two questions as follows:

1. "When real estate is offered at tax sale under Sec. 7255-b1, Code 1931, since the effective date of Chapter 83 Acts of the 46th General Assembly, and delinquent special assessments for paving, etc., are included with delinquent general taxes, interest and costs in the amount of all taxes for which the property is offered for sale, should the county bid a sum equal to the full amount of all taxes including delinquent special assessments?"
2. "When real estate is offered at tax sale under Sec. 7255-b1 of Code of 1931, since effective date of Chapter 83, Acts of the 46th General Assembly and there are no general taxes involved (general taxes being paid in full) the property being offered for delinquent special assessments, is the county, through its Board of Supervisors, required to bid a sum equal to the full amount of such special assessments, interest and costs?"

We will answer your questions in the order in which they are asked.

1. Under the provisions of Chapter 83 of the Acts of the 46th General Assembly, the county should bid a sum equal to the general taxes, and no more.

2. If the general taxes have been paid prior to the scavenger sale and the property is offered only for the special assessments, the county through its Board of Supervisors, is neither required nor authorized to bid at the sale.

We note from your letter of August 8th that the Board of Supervisors at the time of the scavenger sale, advised the County Treasurer that they were making the bid required by law for each tract of real estate. Of course, it would not be necessary for the Board of Supervisors to be present in the County Treasurer's office during all of the time of the tax sale. There is no reason why, at the time of the commencement of the sale or even before the sale was held, they should not tell the County Treasurer to enter a bid for the county on each piece of property for the full amount of the general taxes.

You state in your letter that these instructions were given to the County Treasurer. If he then entered on the records of the sale, a bid by the county on each piece of property, the full amount of all taxes and special assessments, he did not enter the authorized bid and he should correct his records. As to all items which sold not only for general taxes but for special assessments, and for which there were no other bidders, the records should be corrected to show the sale to the county for the amount of the general taxes, which was the actual bidding made by the supervisors. However, if on any of these items, some other person bid more than the general taxes, that person should be advised of the fact and the certificate delivered to him as he desires it. As to those items of property on which the general taxes had been paid prior

to the sale, and which items sold only for specials, the sale to the county was not valid because the county did not bid.

We probably should advise you that on July 30th, the County Treasurer of your county wrote this department for an opinion concerning scavenger sales held under the provisions of Chapter 83 of the 46th General Assembly. The facts, however, were not clearly stated and we were compelled to guess somewhat at the questions. However, so that there would be no misunderstanding, the writer of this opinion in answering the letter of your County Treasurer on August 5th, stated clearly the two questions as he understood them. Neither of those questions pertained to the authority of the county to bid more than the amount of the general taxes. They were as follows:

1. "Is any part of the amount bid at a scavenger sale applied to the special assessments?"
2. "Should the property have been offered at scavenger sale for all taxes, whether general or special?"

We answered the first question that no part of the purchase price is applied to the special assessments until after the general taxes are satisfied in full; and we answered the second question by saying that when the property is offered for sale, it is offered for the total amount of all taxes, whether general or special. We further said that any individual has a right to bid at a sale and can bid the full amount of all the taxes, if he so desires, and we then went on to say that when the property was redeemed, it was necessary to redeem from the full amount of all taxes, penalties and interest regardless of the amount for which the property sold.

We still say that the answers to those two questions are correct, but the questions evidently were misunderstood by the writer. However, we did not intend to, nor did we at any place in that letter of August 5th, say that the county, through its Board of Supervisors, should bid to protect special assessments, and such is not the law of this state.

EXTRADITION: PATERNITY ACTION:

"We are constrained to hold as a matter of law that an extraditable offense has not been committed by the defendant under the facts stated in your inquiry."

August 23, 1935. *County Attorney, Independence, Iowa:* You have requested our opinion on the following statement of facts:

"A woman has filed a paternity action in Buchanan County, Iowa, against a defendant now residing in Illinois. After the action was started in your county a warrant of arrest was issued by the Judge, but before service the defendant fled to Illinois. Can this defendant now be extradited to Iowa so that he may be tried under the proceedings in Buchanan County of bastardy now instituted by you?"

It is our opinion that the defendant cannot be legally extradited under this statement of facts.

Chapter 624 dealing with the extradition of fugitives from justice provides that they may be extradited when there is sworn evidence that the party charged is a fugitive from justice and by a duly attested copy of an indictment, preliminary information or complaint. The indictment, preliminary information or complaint referred to in Section 13501 refers to an indictment,

preliminary information or complaint charging the defendant with a criminal offense.

Proceedings in bastardy as provided in Chapter 544-A1 are not criminal per se but only quasi criminal in nature.

Our Supreme Court in construing Chapter 624 made this announcement in the case of *Seely vs. Beardsley*, 194 Iowa, 863 at 865:

"The executive of the asylum state performs his full duty when he determines (1) that an extraditable offense has been regularly charged and (2) that the accused was within the jurisdiction of the demanding state when the offense charged was committed."

We are constrained to hold as a matter of law that an extraditable offense has not been committed by the defendant under the facts stated in your inquiry.

MOTOR VEHICLES: LIGHTS: REFLECTORS: Two lights required on front, and two on the rear. Section 5044-d1.

August 23, 1935. *Iowa Highway Safety Patrol:* Your letter of August 19th addressed to the Attorney General has been referred to me for reply.

You request a construction of Section 5044-d1, which provides for corner lights or reflectors on vehicles more than six (6) feet in width. You ask whether this section requires four (4) lights on the front and four (4) on the rear of such vehicles, or whether it requires only two (2) lights on the front and two (2) on the rear, and you express the view that only two (2) are required on the front and two (2) on the rear of such vehicle.

We set out Section 5044-d1 as follows:

5044-d1. Corner lights or reflectors. Every vehicle more than six feet in width, measured at the widest point of the vehicle or load, shall carry on each of the four corners of the body an electric clearance lamp of not to exceed four candle power or a reflex reflector so placed as to clearly outline the limits of the body; the same lamps or reflectors so placed on the front of the same to cast or reflect a green ray of light and said lamps or reflectors carried on the rear of the body to cast or reflect a red ray of light."

This section provides that every vehicle more than six feet in width measured at the widest point of the vehicle or load shall carry on each of the four corners of the body an electric clearance lamp or a reflex reflector so placed as to clearly outline the limits of the body. From the language of this statute and particularly from the words "shall carry on each of the four corners of the body an electric clearance lamp * * * * or a reflex reflector" compels us to conclude that only two lights are required on the front and two on the rear.

LEGAL SETTLEMENT: Chapter 99, Acts 45th General Assembly. Where husband and wife acquired legal settlement in Wisconsin, she could not gain legal settlement in this state following death of husband until she had resided here for one year.

August 23, 1935. *County Attorney, Waterloo, Iowa:* Your letter of August 21st addressed to the Attorney General has been referred to me for attention.

Your reference is made to Section 5311 of the 1931 Code of Iowa, which section was repealed by Chapter 99, Acts of the 45th General Assembly, which chapter enacted a substitute for said section, and in particular you refer to the matter now contained in Subsection 4 of Section 1 of said Chapter 99, which subsection we set out 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."

In connection with Subsection 4 you submit this question:

"Does this mean that a woman who lived with her husband as legal residents of Wisconsin for over ten years, the husband then dying and the widow returning to Iowa, may claim Black Hawk County, which was her former residence, as her residence and legal settlement, thus entitling her to relief?"

Your question calls for a construction of the following language of the statute:

"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 bandoned by him if both settlements were in this State."

Your question assumes that Black Hawk County was the settlement of the wife at the time of her marriage, and that she ceased to be a resident and citizen of the State of Iowa upon her removal with her husband to Wisconsin. Any settlement which the wife had at the time of her marriage may at her election be resumed upon the happening of any one of three contingents, namely:

(1) The death of her husband.
(2) If she is divorced by him, or
(3) If she is abandoned by him

and providing "both settlements were in this state."

In the use of the provision "if both settlements were in this state" the Legislature must have meant the settlement of the wife prior to her marriage and the settlement of the husband which was also the settlement of the wife at the time of his death. The provision in the statute that any settlement which the wife had at the time of her marriage may at her election be resumed upon the death of her husband is limited by the provision: "if both settlements were in this state."

The first part of Subsection 4 provides:

"That 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 require a settlement as if she were unmarried."

In other words, if her husband does not have a settlement in this state, she may still under certain circumstances acquire a settlement in this state as if she were unmarried. This can only mean that if her husband has a legal settlement in another state she can acquire a settlement in this state only on the same terms and conditions as are prescribed for acquiring such a settlement by any adult and unmarried person.

It is our opinion therefore that the woman in this case, who lived with her husband in Wisconsin until his death, and who had lost her legal settlement in Iowa may acquire a legal settlement in this state by residing in Black Hawk or other county in this state for one year without being warned to depart.

BUDGET: TAXES: LEVIES: Proceeds should go for use for which levies were made where the one corporation absorbs the other.

August 27, 1935. *County Attorney, Waterloo, Iowa:* Your letter of August 17th addressed to the Attorney General has been referred to me for reply.

You state that the Cedar Heights School District, and the Town of Cedar Heights have each certified a budget for the next year in accordance with Section 383. You state further it is your understanding that after September 1st both of these taxing districts will cease to exist inasmuch as they are to become a part of Cedar Falls, and that both Cedar Falls and the Cedar Falls School District are counting on this tax money as a part of their revenue for next year.

In connection with the above facts, you submit this question:

"May a tax be levied by Cedar Heights and Cedar Heights School District after they cease to exist?"

We have discussed this question with Mr. Fred Porter in the office of the State Comptroller and he agrees with us that there should be no practical difficulty because of the situation you described. The tax which will be levied will be for certain purposes and those purposes should be carried out by Cedar Falls and the Cedar Falls School District which should have the money as a part of their revenue. The reconstructed taxing districts will assume all of the rights, duties and responsibilities of the old ones which they succeed, and while the tax may be levied for Cedar Heights and Cedar Heights School District which soon will cease to exist, the proceeds should go to Cedar Falls and the Cedar Falls School District for the use for which the levies were made.

OSTEOPATHY: PRESCRIPTIONS: Chapter 23, Acts 46th General Assembly grants osteopathic physicians authority to prescribe and write prescriptions for drugs which they are permitted to use.

August 27, 1935. Your letter of August 22d addressed to the Attorney General has been referred to me for reply.

You ask this question:

"Would it be against the Osteopathic Practice Act to write prescriptions for the various drugs the new act allows us to use?"

The 46th General Assembly repealed Chapter 118 of the Code of Iowa, 1931, and enacted in lieu thereof Chapter 23, Acts of the 46th General Assembly which became effective July 4, 1935. Section 1 of the act defines "Osteopathy" and "Osteopathic Practice" as follows:

"Section 1. For the purpose of this Code, the following definitions are enacted:

a. Osteopathy is that school of healing art which teaches and practices scientific methods and modalities used in the prevention and treatment of human diseases, but whose basic concept, in contrast with all other schools, places paramount emphasis upon the normality of blood circulation and all other body functions as a necessary pre-requisite to health and holds that such normality is more certain of achievement by and through manual stimulation or inhibition of the nerve mechanism controlling such functions, or by the correction of anatomical maladjustments.

b. Osteopathic practice is that method of rehabiliating, restoring and main-

taining body functions by and through manual stimulation or inhibition of nerve mechanism controlling such body functions, or by the correction of anatomical maladjustment, and/or by other therapeutic agents, methods and modalities used supplementary thereof; but such supplementary agents, methods or modalities shall be used only preliminary to, preparatory to and/or in conjunction with such manual treatment. Such osteopathic practice is hereby declared not to be the practice of medicine within the meaning of Chapter 116, and is not subject to the provisions of said chapter."

Osteopathic practice is here defined as that method of rehabilitating, restoring and maintaining body functions by and through manual manipulation, etc., "and/or by other therapeutic agents, methods and modalities used supplementary thereto."

Therapeutic is defined by Funk and Wagnalls new standard dictionary as "a medicine efficacious in curing or alleviating disease. Having healing qualities; curative; alleviative."

The Legislature, it will be observed, has defined osteopathic practice then to include treatment through manual manipulation and by other therapeutic agents. Such supplementary agents, methods and modalities should be used preliminary to, preparatory to and/or in conjunction with such manual treatment. A therapeutic agent would be one having healing, curative or alleviative qualities.

Section 1 above quoted is very broad in its scope, but it is limited somewhat by Section 8 which is as follows:

"Sec. 8. A license to practice osteopathy or osteopathy and surgery shall not authorize the licensee to prescribe or give internal curative medicines and a license to practice osteopathy shall not authorize the licensee to engage in major operative surgery. The words "internal curative medicine," as used herein, shall be so construed as not to include antidotes, biologics, drugs necessary to the practice of minor surgery and obstetrics, or to the simpler remedies commonly given for temporary relief."

This section expressly provides that a license to practice osteopathy or osteopathic surgery shall not authorize the licensee to give or prescribe internal curative medicines. This section expressly provides however that the words "internal curative medicines" as used in the section shall be so construed as not to include antidotes, biologics, drugs necessary to the practice of minor surgery and obstetrics, or to the simpler remedies commonly given for temporary relief. Section 8 is a negative section. It grants no authority. It provides merely that a license to practice osteopathy shall not authorize the licensee to prescribe internal curative medicines and that a license to practice osteopathy shall not authorize the licensee to engage in major osteopathic surgery.

The section proceeds then to provide that the words "internal curative medicine" shall be construed so as not to include certain drugs.

A reading of Section 8 brings the conclusion that the Legislature clearly intended to grant authority to osteopathic physicians to prescribe and give those drugs which the section provides shall be construed not to be internal curative medicines. Such authority is not granted by this section however unless by implication. Reading Section 1 and Section 8 together, however, we are of the opinion Chapter 23 grants to osteopathic physicians authority to prescribe and give and to write prescriptions for the various drugs which Section 8 permits osteopathic physicians to use.

GENERAL ASSEMBLY: SALARY: COMPENSATION: Member who qualified at beginning of session but who was not in attendance a considerable portion of session entitled to his compensation for full session unless he waives it and there being no vacancy.

August 27, 1935. *State Comptroller:* You call our attention to the fact that during the 45th General Assembly, Extra Session, a member of the Legislature was ill a greater part of the session and did not appear at the State House until the last part of the session. You state that you paid his mileage in accordance with the law and paid him for the time he was actually in Des Moines and attending the session. You also state you have in your possession certain warrants covering a period of time from the beginning of the session until the time the legislator appeared for service, and you ask this question:

"Whether you should cancel these warrants and if so, on what authority?"

We assume the legislator was sworn in and qualified in the beginning of the session. The statutes of this state do not appear to provide for partial payment or part-time payment to members of the General Assembly who are duly sworn in and qualified. Section 14 of the Code provides:

"That the compensation of the members of the General Assembly except the Speaker, shall be: to every member for each full regular session, $1,000.00."

Section 15 provides compensation for part-time members, said section being in part as follows:

"When a vacancy occurs during a session of the General Assembly and by reason thereof the term of office of any member does not cover the entire session, such member shall be paid as follows:"

In this case there was no vacancy during the session, by reason of which the term of office of the legislator did not cover the entire session. It is our understanding his term of office covered the entire session.

Section 17 provides:

"That at any extra or adjourned session the compensation of the Lieutenant Governor, Speaker of the House of Representatives, and member shall be paid semi-monthly during such session upon certificate of the presiding officer of each house showing the number of days of allowance and compensation as provided by law."

If the certificate of the presiding officer of the House, showing the number of days and allowance and compensation as provided by law, was properly filed certifying that he was a member and entitled to compensation your office would have authority and the duty to issue the proper warrants. Under the law, members of the General Assembly are paid on the basis of the term served by them on the basis of the terms for which they were elected rather than on the basis of the time actually spent in the chamber of the House or Senate.

It is conceivable that the member of the Assembly though confined to his home, many miles distant from the seat of government and therefore incapable of voting during the session, could still render very valuable service to his constituents through his influence with other members present at the session.

Unless the legislator is willing to waive his claim to the portion of his salary represented by the warrants which you still hold and to consent to

their cancellation it is our opinion there is no authority for the cancellation of the warrants.

UNPROFESSIONAL CONDUCT: RADIO ADVERTISING BY DENTISTS: Dentists may use radio advertising but is limited strictly by Section 16 of Chapter 24, Acts 45th General Assembly to such items as may appear on professional card.

August 29, 1935. *Commissioner of Health:* Your letter of August 29th addressed to the Attorney General has been referred to me for reply. You present the question:

"Whether radio advertising may be used by dentists, and if so, to what extent?"

Section 16 of Chapter 24, Acts of the 46th General Assembly, defines "unprofessional conduct." We set out said Section in full as follows:

"As to dentists and dental hygienists 'unprofessional conduct' shall consist of any of the acts denominated as such elsewhere in this title, and also any other of the following acts:

a. All advertising of any kind or character other than the carrying or publishing of a professional card or the display of a window or street sign at the licensee's place of business; which professional card or window or street sign shall display only the name, address, profession, office hours and telephoning connection of the licensee.

b. Exploiting or advertising through the press, on the radio, or by the use of handbills, circulars or periodicals, other than professional cards stating only the name, address, profession, office hours and telephone connections of the licensee.

c. Employing or making use of advertising solicitors or publicity agents or soliciting employment personally or by representative."

Particular attention is called to Subsection B which provides that the following acts constitute unprofessional conduct, to-wit:

"Exploiting or advertising through the press on the radio or by the use of handbills, circulars or periodicals, other than by professional cards stating only the name, address, profession, office hours, and telephone connections of the licensee."

It will be observed exploiting or advertising through the press or on the radio is defined to be unprofessional conduct except that professional cards stating only the name, address, profession, office hours and telephone connections of the licensee may be used. The use of professional cards setting forth certain matter may be used. The question naturally arises whether it is permissible to use the radio also for the material which appears on a proper and legal professional card. In other words:

"Would the reading of a professional card over the radio amount to exploiting or advertising on the radio by the use of a professional card which complies with the law?"

It is generally recognized of course that a dentist may advertise through the press or by the use of handbills, circulars or periodicals by publishing therein or thereon merely the prescribed professional card. Section 16 above quoted permits advertising by carrying or publishing of a professional card containing certain matter. Subsection A permits the publication of a professional card and publishing in its broad sense may properly be construed to include publishing or announcing by radio. Subsection B provides that unprofessional conduct shall include exploiting or advertising through the

press or on the radio other than by professional cards. From the use of the language, "exploiting or advertising through the press, on the radio, or by the use of handbills, circulars or periodicals," followed and qualified by the words "other than professional cards," etc., forces us to conclude that the Legislature intended by said subsection to accept advertising on the radio along with advertising through the press or by the use of handbills, circulars and periodicals so long as the advertising consisted wholly and only of the matter properly contained on a professional card. All of the provisions of Section 16 must be read and construed together with a view to giving the sections such force and effect as the Legislature intended it should have. In the absence of a statutory provision to that effect the law would not recognize limited and truthful radio advertising as unprofessional conduct. In other words such radio advertising would be lawful. In order to make a lawful practice unlawful the Legislature should use language which would be free from doubt. There is no doubt in our minds as to the correctness of the opinion held against that advertising on the radio by the use of a professional card is not unprofessional conduct, but if there were a doubt in our minds as to what the Legislature intended we would be compelled to resolve that doubt in favor of the dentist who always before the enactment of this statute has had the legal right to advertise on the radio.

NURSES EXAMINING BOARD: CONFLICTING STATUTES: Chapter 18 Acts 46th General Assembly held to prevail over provisions of Appropriation Act. Appropriation for said board being held surplusage.

August 29, 1935. *State Comptroller:* Some time ago you wrote us for a construction of Chapter 18, Acts of the 46th General Assembly relating to the Nurses' Examining Board, and related matters. In some manner we had the idea that the questions submitted in your letter had become moot on account of your having disposed of the subject matter thereof, and for that reason I am undertaking to reply to your original letter.

Section 7 of Chapter 18, 46th General Assembly, provides that all examination, license and renewal fees shall be paid to and collected by the Secretary of the Board of Nurses Examiners who shall remit to the Treasurer of State quarterly all fees collected, which shall be placed in a special fund by the Treasurer of State and the State Comptroller to be known as the "Nurses' Fund," which fund shall be used by the board to enforce the law relating to the practice of nursing, to elevate the standards of schools of nursing and to promote the additional and professional standards of nurses, and no part of such expense shall be paid out of the State Treasury. This act became effective by publication on April 21, 1935. Chapter 126, Acts of the 46th General Assembly, which chapter establishes the general fund of the state and makes appropriations for the biennium beginning July 1, 1936, appears in some respects to conflict with Chapter 18 and the question naturally arises whether Chapter 126 which became effective on July 4, 1935, repeals certain portions of Chapter 18. Section 19 of Chapter 126, the Appropriation Act, contains the appropriations made to the Department of Health for each year of the biennium and included therein Subsection 7 which appropriates for each year $5,400.00. Said subsection contains this provision:

"Grand total of all appropriations for all purposes for each year of the biennium for the Board of Nurses' Examiners, $5,400.00."

Section 62 provides as follows:

"Where any provisions of the laws of this state are in conflict with this act, the provisions of this act shall govern for the biennium."

No express reference is made in the Appropriation Act to Chapter 18, but both chapters undertake to deal with the manner of paying the salaries and expenses, incidental to the maintenance of the Board of Nurse Examiners. The question presented is:

"Whether the later enactment in the Appropriation Act shall prevail over the prior enactment of Chapter 18, both provisions being enacted at the same session?"

Both provisions cannot be given effect, one must be rejected.

It is a general rule that as between repugnant statutes, the latter enactment must prevail.

Clear Lake Co-operative vs. Weir, 200 Iowa 1293.
Fitzgerald vs. State, 260 N. W. 681.

We quote from Smith vs. Thompson, 258 N. W. 190, as follows:

"In Elks vs. Conn., 186 Iowa, 48, the rule of intent and interpretation of a statute is said to be: "This intent is to be determined by means of the rules of interpretation, and not alone from the abstract and permissible definition of the terms used. The statute should be construed with reference to its general purpose, and aim, and this involves the consideration of its subject-matter, the change in, or adddition to, the law. It is proper to take into consideration the law as it was before the mischief sought to be remedied, and the nature and the reason of the remedy. The several sections of an act are to be construed as parts of a connected whole, and harmonized, if possible. Appellant cites authority to these propositions that if the intention of the Legislature cannot be discovered, it is the duty of the court to give the statute a reasonable construction, consistent with the general principles of law; that the reason of the law will prevail over its letter, especially where the literal meaning would work an injustice; words may be accordingly rejected and others substituted; that every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object, it is proper to consider the occasion and necessity for its enactment, the difficulties or evils in the former law, the remedy provided by the new one, and the statute ought to be given that construction which is best calculated to advance its object and suppress the mischief and secure the benefits intended.' It is obvious from the above that the intent of the Legislature is the controlling element."

Where two statutes are in apparent conflict they should be so construed if reasonably possible as to allow both to stand and give force and effect to each, and if it is not possible to reconcile them, effect will be given to the latter enactment.

Fitzgerald vs. State, 260 N. W. 681.

We take this further quotation from the Fitzgerald case:

"If the proper occasion for construction arises, statutes on the same subject should be considered with reference to each other."

The Appropriation Act appropriates out of the general fund $5,400.00 for each year of the biennium. Chapter 18 creates a special trust fund and provides for requisition upon the Comptroller by the Chairman of the Board attested by the Secretary for the payment of all salaries and other expenses necessary to carry out the provisions of the act. In no event, however, shall the total expenses therefore exceed the total fees collected and deposited to the credit of said fund.

Sections 2462 to 2465 inclusive of the 1931 Code provide for appropriations, supplies, quarters, etc., for the various examining boards which come under the Practice Arts. That part of Chapter 18 which provides, "and no part of such expenses shall be paid out of the State Treasury," in effect repeals certain sections insofar as they relate to the Board of Nurse Examiners.

No longer does the Department of Health furnish the Board of Nurse Examiners with articles and supplies required for public use, etc., since the Board of Nurse Examiners is no longer in or connected with the State Department of Health. Section 19 of the Appropriation Act makes appropriations for the various boards coming under the State Department of Health and improperly and inadvertently it would seem included in said section the Board of Nurse Examiners which is clearly no longer in the Department of Health. The Legislature undertook to do specific things in connection with the Board of Nurse Examiners and provided a definite method for financing its activities. It was clearly intended to change the law with reference to the control and activities of that board. After providing for the payment of the expenses of the board in one manner the same General Assembly without expressly repealing the original enactment proceeded to provide another way for raising and limiting the funds available for the Board of Nurse Examiners. The repeal of statutes by implication is not favored by the courts.

We find the following rule of statutory construction set out in 59 C. J. 1055:

"Where statutes passed at the same session are necessarily inconsistent a statute which deals with the common subject matter in a minute and particular way will prevail over a more general nature and a legislative intent clearly expressed in a special act will prevail over any implication which can be gathered of a general statute where both were approved contemporaneously."

Here Chapter 18 is a special chapter dealing with a special subject. The Appropriation Act is a general provision of the law undertaking to provide money for the various branches of the state government. As we view it, the only ways the rules of construction herein referred to can be harmonized and given full force and effect is to hold that Chapter 18 is a special statute in which the Legislature undertook to do a particular thing in a certain and definite way and that the inclusion of an appropriation for said department in the Appropriation Act and particularly in that section of the Appropriation Act which provides appropriations for boards under the Department of Health, in which category the Nurses' Examining Board is not included, was a general provision and that the special statute must prevail over the general one, especially in view of the fact that the inclusion in Section 19 of an appropriation for the Board of Nurse Examiners was included inadvertently. If we are to give full force and effect to the intention of the Legislature in the enactment of the two chapters in question, we must hold that there is not such inconsistency in the provisions under discussion. As requires the acceptance of the latter enactment to the exclusion of the special legislation contained in Chapter 18 it is our opinion, considering both chapters together, considering the purposes of the special legislation and the ends sought to be accomplished, that Subsection 7 of Section 19 of the Appropriation Act must be held to give way to the express provisions of Chapter 18, which seems to make definite changes and reforms and provides the machinery therefore, including the method of paying all expenses thereof.

You submit the further question:

"Does the Executive Council have any authority to fix the salaries after July 1st and are the employees subject to the Nurses' Board's direction or to that of the Commissioner of Public Health?"

Section 8 of Chapter 18 provides that:

"Subject to the approval of the Commissioner of Health, the Board may appoint such assistants and inspectors as may be necessary to properly administer and enforce the provisions of this act. They shall perform such duties as the board shall assign to them. The amount of salary or compensation of the secretary and such appointees shall be fixed by the Executive Council."

PEDDLERS: Sales through country by grocery stores from wagon or truck. Section 7176-7177.

August 29, 1935. *County Attorney, Primghar, Iowa:* Your letter of August 26th addressed to the Attorney General has been referred to me for reply. You present this question:

"Does a merchant owning and operating his own grocery store from which store he sends into the country a wagon loaded with groceries and other merchandise for sale among his patrons, require a license under 7176 of the Code?"

We call your attention to an opinion issued on July 31, 1931, which appears to answer your question. The merchant or persons representing him and operating a grocery wagon which he sends through the country and from which he sells merchandise comes clearly within the provisions of Section 7176 and is a peddler.

Section 7177 provides certain exceptions to the statutes requiring a license for peddlers. This section provides that the statutes relating to peddlers shall not apply to persons selling at wholesale to merchants, nor to transient vendors of drugs nor to persons running a huckster wagon, nor selling or distributing fresh meats, fish, fruit or vegetables, nor to persons selling their own work or production either by themselves or employees.

The merchant you describe does not appear to come within the exceptions.

PRIMARY ROAD FUND: INTEREST CHARGES: "NOT PAID FOR WANT OF FUNDS" WARRANTS: The interest charges made against Primary Road Fund covering interest on warrants are chargeable against said fund.

August 29, 1935. *State Auditor:* I beg to acknowledge receipt of yours of August 23d, wherein you quote from the twentieth annual report of the Iowa State Highway Commission:

"In April, 1933, due to the closing of many banks in the State of Iowa, in which were deposited Primary Road Funds, there was not sufficient money available to be drawn by the Treasurer of the State of Iowa, to meet Primary Road Bond payments represented by maturities in the sum of $2,062,500.00 and interest in the sum of $4,111,420.65. The Treasurer of State was obliged to stamp Primary Road warrants in the amount of $4,058,670.65. Later in the year in order to meet the obligation thrown onto the Primary Road fund by the National Recovery highway program, additional primary road warrants in the amount of $1,062,667.19 were stamped. The stamping of all these primary road fund warrants resulted in payments throughout the year 1933 of interest on these stamped warrants in the sum of $80,464.30.

"Throughout the balance of the year, from current collections of Primary

Road Funds and liquidations in part of the amount tied up in closed banks, the entire amount of these warrants was paid off with the exception of $70,496.81, which remained unpresented on November 30, 1933."
and state:

"In the fiscal year 1934 there was paid in interest the sum of $998.37, and principal payment of $70,496.81.

You ask,

"I should like to have your opinion as to whether it was proper to charge the Highway Commission with these interest charges."

It is the opinion of this department that the interest charges made against Primary Road Fund covering the interest on these warrants was properly chargeable to that fund. In 1933 the State Treasurer had available funds on hand to more than cover the $4,085,670.65 primary road warrants stamped "not paid for want of funds." While his books showed that he had that much available cash on hand the Treasurer was unable to collect and the banks refused to remit and pay deposits and the result was that the $4,085,-670.65 of primary road warrants were stamped "not paid for want of funds."

This matter is all covered by an opinion rendered on April 6, 1933, to the Treasurer of State, Des Moines, Iowa, and will be found in the 1934 Report of the Attorney General, page 151.

The law requires that warrants outstanding be paid in the order of serial number and as money comes in warrants are paid in serial numbers and subsequent warrants are stamped "not paid for want of funds" until such time as the usable funds are sufficient to pay the warrants.

This accounts for stamping $1,062,667.19 of warrants "not paid for want of funds." So as a result during the year of 1933 the interest charge of $80,464.30 was a proper charge against the Primary Road Fund.

It follows therefore that the payment of interest in the sum of $998.37 in the year of 1934 and the payment of the principal in the sum of $70,496.81 was a legal charge to the primary road fund. In all of these instances the warrants were authorized by the Iowa State Highway Commission because of the fact that the law says that the cash was available. It was but it was not usable because it could not be obtained from the bank in which it was deposited. Hence the warrants were stamped, "not paid for want of funds."

BRIDGE: BOARD OF CONSERVATION: LEDGES STATE PARK: Said bridge should be maintained, repaired and improved under the direction of the Board of Conservation.

August 30, 1935. *County Attorney, Boone, Iowa:* Your letter of August 7th addressed to the Attorney General, in the following language:

"We have in this county a bridge, the south end located within the Ledges State Park which is under the control of the Board of Conservation and is on State land. The north end of said bridge is within 80 feet of the State land, making it adjacent thereto.

"The question has come up if the maintenance and repair of said bridge is an obligation of the state or county. Section 4622, Code of 1931 has been amended and now reads: The roads, bridges and culverts within or adjacent to any such district shall be maintained and repaired and improved under the direction of the Board of Control of said land, etc. Under this section there is no question in my mind that this bridge must be maintained and improved and repaired by the state; and I have so given my opinion to the Board of Supervisors.

"I would appreciate hearing from you upon this matter."
at hand.

In answer thereto this department wishes to say that it is the opinion of this department that the bridges referred to, the south end of which is located within the Ledges State Park, and which extend south of said park to a point within about eighty feet beyond the state line, is a bridge which Section 4633, as amended, should be under the jurisdiction of the Board in control of the state land, to-wit: the Board of Conservation, in this instance.

It is our opinion therefore that said bridge should be maintained, repaired and improved under the direction of the Board of Conservation, and the cost therefor be paid, after certification of detailed amount due is filed by said Board of Conservation, with the Comptroller, duly audited, as provided by law.

TAX SALES: CANCELLATION: There shall be no cancellation of tax sale under Code Section 7271 where some action has been taken by certificate holder to obtain deed within eight years from time of sale.

September 4, 1935. *County Attorney, Waterloo, Iowa:* We have your letter of August 30th in which you present this question with reference to the cancellation of tax sales under Section 7217, Code of Iowa, 1931:

"If cancellation shall be for only those on which no action has ever been taken, or if it includes those on which proper notice has been served and the date of redemption past, and eight (8) years elapses with no further action toward taking deed."

I call your attention to an opinion issued by this department on September 17, 1929, which holds under a state of facts peculiar to that case and citing Ockendon vs. Barnes et al., 43 Iowa 615, that the tax sale should be cancelled. It appears from the opinion of this department above referred to that the tax sale was held in 1917, publication of notice and expiration of right of redemption was made in 1920, but no further action was taken by the holder of the sales tax certificate until 1929, or 12 years after the tax sale. In the Ockendon case the deed could have been issued 11 years before the case was tried and the court held that the long delay raised a presumption of abandonment of the claim. We have no disposition to disagree with the interpretation placed by the Supreme Court upon the statute in question, but many cases might arise where there would be no unreasonable delay such as that in the Ockendon case. The statute provides that after eight years from the time of any tax sale, and no action has been taken by the holder of the certificate to obtain the deed, it shall be the duty of the County Auditor and County Treasurer to cancel such sales from their tax sale index and tax sale register.

In other words, the cancellation must take place after eight years have elapsed from the time of the tax sale, and no action has been taken by the holder of the certificate to obtain a deed. If the holder has taken some action, then this statute cannot apply for the reason that it applies only where "no action has been taken by the holder of a certificate to obtain a deed."

It is our opinion that if the eight years have elapsed from the time of a tax sale and some action has been taken by the holder of the certificate to obtain the deed, and such holder shall still be entitled to the issuance of a deed after the expiration of eight years from the date of the sale, providing an unreasonable time after the expiration of eight years has not elapsed.

SCHOOLS: WORKMEN'S COMPENSATION INSURANCE:

Section 1362 does not require the school district to purchase workmen's compensation insurance, but provides in event of injury to employee, district shall be liable as provided under the Compensation Law and statute is compulsory only as to amount of compensation to be paid in event of injury.

September 6, 1935. *County Attorney, Leon, Iowa:* We have your request for an opinion on the following proposition:

Section 1362 of the Code provides that where a school district is the employer, the provisions of the chapter pertaining to workmen's compensation and the payment of compensation and amount thereof for injuries sustained by an employee of such employer shall be exclusive, compulsory, and obligatory upon both the employer and the employee, except as otherwise provided in Section 1362 of the Code.

Will you please advise whether under the provisions of this statute, the school district is required to purchase compensation insurance or whether this section merely provides for their liability?

You are advised that it is the opinion of this department that Section 1362 does not require the school district to purchase workmen's compensation insurance, but merely provides that in event of an injury sustained by an employee, the district shall be liable as provided under the workmen's compensation law, and that the statute is compulsory only as to amount of compensation to be paid in event of injury.

PUBLIC LIBRARIES: TRUSTEES: Non-resident property owners in same class with other non-resident persons. No greater right to free use of library within city.

September 10, 1935. *State Library Commission:* You have referred to this department the following question:

"May persons owning property in a city, but not residing therein, have the free use of a public library within the city the same as residents of the city?"

In Chapter 299 of the Code of Iowa, 1931, relating to public libraries, we find Section 5849, which is as follows:

"Formation—Maintenance. Cities and towns may provide for the formation and maintenance of free public libraries open to the use of all inhabitants under proper regulations, and may purchase, erect, or rent buildings or rooms suitable for this purpose and provide for the compensation of necessary employees."

This section provides for the formation and maintenance of free public libraries open to the use of all inhabitants under proper regulations. This section clearly relates to inhabitants of a city or town in which the library is established. It does not provide for the establishment and maintenance of library facilities for nonresidents of such city or town.

Section 5858 of the Code provides that the Board of Library Trustees shall have and exercise certain powers, including the power "to authorize the use of such libraries by nonresidents of such cities and towns and to fix charges therefore." The right to the use of the library without charge appears to be dependent upon residence within the city or town rather than upon the ownership of the property for the payment of taxes therein. The authority on the part of the trustees to authorize the use of such libraries by nonresidents of such cities and towns and to fix the charges therefore makes it pos-

sible for the trustees to fix a very nominal charge if they see fit so to do. The language of Section 5858 implies that a charge will be made for the use of such public libraries by nonresidents of cities and towns. It is clear that the Legislature intended to make a distinction between residents and nonresidents and no preference is given nonresident property owners over nonresidents without property.

It is our opinion therefore that the ownership of property within a city by a nonresident thereof does not carry with it the right to the free use of the free public library within the city. Such nonresident property owner is in the same class with other nonresident persons.

PEACE OFFICER: CONSERVATION COMMISSION: No person can serve as a peace officer in a capacity such as is designated under the conservation act for the enforcement of laws, rules and regulations pertaining to fish and game, public parks and forests, unless such person comes within the express grant of authority given in Sections 15, 16 and 17 of the Conservation Act.

September 11, 1935. *Iowa State Conservation Commission:* This will acknowledge receipt of your request for the opinion of this department on the following:

"The Conservation Commission is desirous of extending the authority of the conservation officers to other employees, such as the director, divisional heads, the perhaps other regular employees who are bonded to the state as public officials. The question involved here and which we would appreciate receiving your written opinion on is:

"Can we lawfully extend the authority to employees other than conservation officers, the authority of the conservation officer, with full power of arrest, when they are designated on the payroll as employees in another capacity?

"In the way of an explanation may we state that we do not wish to have all of the employees who have been designated the authority of conservation officers classified as such, in that their salaries may be over and above that allowed by law for the regulation conservation officers."

Chapter 13 of the Acts of the 46th General Assembly, which created the State Conservation Commission, provides in Section 15 as follows:

"Officers and employees. Said director shall, with the consent of the commission and at such salary as the commission shall fix, employ such assistants, including a professionally trained state forester of recognized standing, as may be necessary to carry out the duties imposed by this chapter on the commission; also and under the same conditions, said director shall appoint such officers as may be necessary to enforce the laws, rules, and regulations, the enforcement of which are herein imposed on said commission. Said officers shall be known as state conservation officers. The salaries of state conservation officers shall not exceed one thousand five hundred (1,500) dollars per year."

This should be read in connection with Sections 16 and 17 which are as follows:

"Conservation officers. No person shall be appointed as a conservation officer until he has satisfactorily passed a competitive examination, held under such rules as the commission may adopt, and other qualifications being equal only those of highest rank in examinations shall be appointed."

"Peace officers. Conservation officers shall have the power of, and be deemed peace officers within the scope of the duties herein imposed on them."

Apparently, from a reading of these three sections, it was the intention of the Legislature to designate certain persons to enforce the laws, rules and

regulations, which duties are imposed on the commission. These persons are designated as state conservation officers and a limitation is placed upon the salary to be paid to such officers, and provides for competitive examinations. Such officers are given the authority of peace officers within the scope of the duties imposed on them by the Legislature with respect to the subject matter under the jurisdiction of your department, which of course would be the enforcement of the fish and game laws of the state and the protection of public parks and forests.

General duties of peace officers are defined in Section 13405-b1 of the 1931 Code of Iowa which provides 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."

The provisions of this section would apply within the limitations as set out in Section 17 of Chapter 13, Acts of the 46th General Assembly as above set out.

In accordance with the above, it is the opinion of this department that no person can serve as a peace officer in a capacity such as is designated under the conservation act for the enforcement of laws, rules and regulations pertaining to fish and game, public parks and forests, unless such person comes within the express grant of authority given and this, in the instant matter, pertains solely to conservation officers whose position is created in Sections 15, 16 and 17 of the conservation act.

Therefore, in our opinion, it is limited to such officers and to no others.

HIGHWAY COMMISSION: TRANSFER SECONDARY ROAD CONSTRUCTION AND MAINTENANCE FUNDS:

"It is the opinion of this Department that Chapter 3 of the Acts of the 46th General Assembly does not apply to, nor does it prohibit or in any manner effect the right to make the transfers contemplated in Section 4644-c17."

September 12, 1935. *State Auditor:* I beg to advise you that your letter addressed to Edward L. O'Connor, Attorney General, of date August 12th, relative to the above entitled matter has come to this office for attention and reply.

Your question is, "Does the latter enactment, namely Chapter 3, Acts of the 46th General Assembly, prohibit the transfers as contemplated in Section 4644-c17 as amended?"

It is the opinion of this department that Chapter 3 of the Acts of the 46th General Assembly does not apply to, nor does it prohibit or in any manner affect the right to make the transfers contemplated in Section 4644-c17.

BANKS AND BANKING: TAX, CAPITAL STOCK: House File 471 does not apply to the taxes remaining unpaid on the surplus and undivided profits. It applies solely to the unpaid taxes on the capital stock of such banks.

September 12, 1935. *Board of Assessment and Review:* You have submitted a request for an official opinion from this department based upon the following matters:

"House File No. 471 passed by the 46th General Assembly provides as follows:

> 'Whenever a bank operated within the State of Iowa has been heretofore or shall hereafter be closed and placed in the hands of a receiver, the Board of Supervisors shall remit all unpaid taxes on the capital stock of said bank."

"In 1930, Section 7003 provided that the shares of capital stock shall be taxed as other property of such taxing district and the surplus and undivided profits of such bank or trust company shall be taxed as moneys and credits.

"The 45th General Assembly amended Section 7003 by providing in Chapter 86 that the capital stock after deducting the real estate and using the same ratio of assessed value as real estate was valued at in the particular taxing district, should be assessed as moneys and credits. The part pertaining to surplus and undivided profits remained unchanged.

"This amendment affected assessments to be made in 1934. Now the question arises, does House File No. 471 apply to the taxes remaining unpaid on the surplus and undivided profits or only to the tax on the capital stock?"

Section 7003 of the 1931 Code of Iowa as amended by Chapter 86 of the Acts of the 45th General Assembly in Extraordinary Session, now reads 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 the assessed value, and shall be taxed as moneys and credits. The provisions hereof shall become effective beginning with the assesments on the capital stock of all of said banks as of January 1, 1934."

Prior to the passage of Chapter 86 of the 45th Extra General Assembly, the taxable value of such shares of stock was one-fourth of the assessed value and were to be taxed as other property of such taxing district. This amendment made the taxable value the same as the assessed value and provided that such stock shall be taxed as moneys and credits.

House File 471 passed by the 46th General Assembly specifically provides that

"Whenever a bank operated within the State of Iowa has been heretofore or shall hereafter be closed and placed in the hands of a receiver, the Board of supervisors shall remit all unpaid taxes on the *capital stock* of said bank." By the plain wording of this act of the 46th General Assembly, it can only apply to unpaid taxes on the capital stock of said bank.

If the Legislature intended that House File 471 should apply to the taxes remaining unpaid on the surplus and undivided profits of such banks, it would have so stated in the act.

We cannot enlarge the scope of the application of this act by any such interpretation as to make it apply to the taxes remaining unpaid on the surplus and undivided profits. It applies solely to the unpaid taxes on the capital stock of such banks.

BRIDGES: CULVERTS: CONSTRUCTION OF: SECONDARY BRIDGE SYSTEM: The word "bridges," as used in paragraph 1 of Sec. 5259 applies to the secondary bridge system of the county as defined in Sec. 4644-c3. Legislative intent to permit the repair or reconstruction of both a bridge and a culvert where same has been destroyed by floods or other extraordinary casualties.

September 13, 1935. *County Attorney, Corydon, Iowa:* At the oral request of your County Auditor and Attorney D. L. Murrow, I hereby desire to supplement the opinion furnished you under date of July 2, 1935, by the Honorable C. E. Walters, Special Assistant Attorney General and counsel to the Iowa State Highway Commission, with regard to the construction of bridges and culverts destroyed by floods in your county during this ensuing year.

On July 25, 1935, the Honorable C. E. Walters, above mentioned, furnished an opinion to Mr. S. B. Stuck, County Engineer for Ringgold County, Iowa, upon the same proposition which more specifically set out than in the former opinion and I am therefore enclosing herewith a copy of the opinion of July 25, 1935, to Mr. Stuck, as above stated.

In order that there may be no misunderstading concerning whether or not culverts are included in this emergency repair or construction as well as bridges, I wish to call your attention to Section 4644-c3 of the 1931 Code of Iowa which specifically 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 * * * *."

Paragraph 1 of Section 5259 of the 1931 Code of Iowa is as follows:

"*Exceptions.* The preceding section shall not apply to:

"1. Expenditures for bridges or buildings destroyed by fire or flood or other extraordinary casualty."

It is our opinion that the word "bridges," as used in the above exception, applies to the secondary bridge system of the county as defined in Section 4644-c3 of the 1931 Code of Iowa. Since the secondary bridge system of the county includes both bridges and culverts, it is therefore our opinion that culverts come within the first exception under Section 5259 of the 1931 Code of Iowa as well as bridges. Where both bridges and culverts are washed out by floods, it would be unthinkable to assume that the Legislature meant that the counties could repair and rebuild a bridge and not a culvert. The destruction of culverts by floods and other extraordinary casualties could and would render the road just as impassable as the destruction of bridges from such causes. There can be no question but what it was the Legislative intent to permit the repair or reconstruction of both a bridge and a culvert where the same has been destroyed by floods or other extraordinary casualties when they based this exception, as contained in Section 5259 of the 1931 Code of Iowa.

OSTEOPATHY: BOARD OF SUPERVISORS: FERA: FERA not bound by State law. Osteopathy recognized by State law substantially on parity with medicine for treatment of indigents where desired.

September 13, 1935. Your letter of August 19th addressed to the State's Attorney has been referred to me for attention.

You state that Miss West and Miss Eva Hagan of the Des Moines County Organization state they have no right to recommend or grant osteopathic treatments to indigent persons unless Dr. Denny of the FERA so directs. You state that Dr. Denny has thus far failed to authorize the use of osteopathy in the treatment of patients who come under the FERA in your county.

The last Legislature passed Chapter 23 of the Acts of the 46th General Assembly, which became effective July 4, 1935, which chapter greatly broadens the scope of osteopathy as compared with former legal definitions.

Sections 9 and 10 of that chapter are as follows:

"Section 9. The Board of Supervisors of any county may enter into contract with one licensed hereunder for the care and treatment of an indigent sick."

"Section 10. One licensed hereunder shall have the right to examine applicants, recommend admissions and make reports in connection with the admission of patients to all state institutions."

The Legislature of this state cannot enact legislation to control the Federal agencies. Where, however, the Federal agencies operating in this state, recognize and are to be controlled by the state laws, such laws are applicable through Federal agencies. If the Federal Emergency Relief and Iowa Emergency Relief are to employ physicians to serve indigent patients and are limited to employ practitioners of schools accepted by the state law no discrimination should be made between regular practicing physicians and surgeons on the one hand and osteopaths on the other. So far as the law of this state is concerned, osteopathy is a recognized school of healing art, and members of that profession may be employed by the Board of Supervisors of any county to enter into contract for the care and treatment of indigent sick of the county and shall have the right to examine applicants, recommend admissions, and make reports in connection with the admission of patients to all state owned institutions.

So far as the state law is concerned, it appears that there should be no arbitrary ruling against the practitioners of osteopathy.

ROAD HOUSES: LICENSES: PARKS: Licenses should be procured from Township Trustees if operated for profit.

September 13, 1935. *County Attorney, Newton, Iowa:* Your letter of August 30th addressed to the Attorney General has been referred to me for reply. You state as follows:

"That Mr. F. L. Maytag of your city recently purchased the old Jasper County Fair Grounds in Beuna Vista Township, which is outside the corporate limits of the City of Newton. That a corporation was formed to operate said grounds as a public park for the benefit of the residents of the county. That a swimming pool was installed with a bath-house adjoining, on the second floor of which a restaurant will be conducted, where hot and cold sandwiches, soft drinks and confectioneries will be dispensed. You state that the public generally will be admitted to the park without charge and that the profit from the restaurant, if any, will be donated to charity and you inquire whether the restaurant under such circumstances comes within the purview of Sections 5582 and 5582-C1 of the 1931 Code of Iowa, and whether, in view of said sections, it will be necessary for the persons operating such restaurant to procure a license as required in certain instances by Section 5582."

Section 5582 provides:

"That no person shall for himself or for any other person, firm or corporation, keep or operate for hire or for profit any club house, road house or amusement park outside the limits of cities and towns without first procuring a license therefore from the township trustees."

It is our opinion that the Legislature intended by this section to require that club houses and road houses outside of cities and towns, if operated for a profit or if operated by any person for hire, shall first procure a license from the Township Trustees.

A road house for the purposes of Section 5582 is defined by Section 5582-c1 as follows:

"Any building or establishment open to the public and located on or accessible to a road or public highway outside of 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."

If the restaurant in question were privately owned, it would clearly come within the terms of this definition of "road house," and there is no exception in the statute which would exempt the operator from procuring such license if the operator happened to be a municipal corporation. If the restaurant in question would be a road house if privately owned, it could hardly be said that it would not be a road house if owned or operated by the city or a corporation organized expressly for that purpose.

It appears from your letter that said restaurant may make a profit, which profit will be devoted to some use to be determined by the corporation formed to handle the property, probably to charity. It is contemplated that some person shall for hire or profit operate the restaurant in question.

It therefore comes within the language of the statute and a license should be procured from the Township Trustees.

SCHOOLS: SCHOOL BOOKS: Independent School District, in buying school books and reselling them, must charge and collect sales tax.

September 14, 1935. *County Attorney, Boone, Iowa:* We have your request for an official opinion on the following proposition:

The Independent School District in this county is buying school books and reselling them to the pupils at cost. Is it necessary that they charge and collect sales tax?

Section 4446 of the Code provides that the Board of Directors of a school corporation is authorized to buy school books and sell the same to the pupils at cost. Said money so received to be returned to the general fund.

Section 4447 provides that the books so purchased shall be under the charge of the Board who may select one or more persons within the county to keep the books for sale.

Section 4448 provides that such books purchased by the Board shall be paid for out of the general fund, and that the Board of Directors shall annually certify to the Board of Supervisors the amount necessary to levy for the general fund of said district to pay for such books.

Section 4123 of the Code provides that each school district shall continue a body politic as a school corporation, and as such may sue and be sued, hold property and exercise all the powers granted by law.

Our Supreme Court in the early case of *Clark vs. Thompson*, 37 Iowa, 536, has held that a school district is a municipal corporation.

Section 37 of Chapter 82 of the Laws of the 45th General Assembly, Extra Session, being the sales tax division of the act, defines a "person," among other things, to include a municipal corporation, and there is no exemption from the tax of such municipal corporations, but they are made liable therefor as retailers. This act also defines a "retailer" as every person engaged in the business of sale of tangible goods, wares or merchandise at retail.

The question then is whether the school district is:

1. A retailer within the provisions of the Act, or
2. An occasional seller, not engaged in the business and therefore not within the provisions of the Act, or
3. The ultimate consumer.

The school district is not the ultimate consumer for it does not use the books, it merely acts as an agency through which the pupils receive the books, and in such capacity acts as any other retailer, except from the profit standpoint.

The district cannot be said to be an occasional seller for they buy and sell such books generally in the district where they so desire.

It seems, therefore, they in the buying and selling of books are in direct competition with ordinary retailers and are exercising not an ordinary power or an incidental power of the Board.

Our Supreme Court in the case of *Reis vs. Hemmer*, 127 Iowa, 408, in which status of a contract entered into by the Board in regard to such books was under discussion, said at page 410:

"It is plainly not an incidental power of a school board; aside from express statutory authority, to use the money raised by taxation for school purposes in purchasing books for scholars, or paying a portion of the price which they would otherwise be required to pay for such books. The maintenance of public schools does not necessarily involve the furnishing of school books to scholars; nor can it be implied from the authority to maintain schools that a school board may compel taxpayers in general, regardless of whether they have children attending the schools, to pay taxes for the purpose not only of supporting schools, but of enabling the children who attend them to have books without cost, or at a lower cost than that at which the books can be procured without the expenditure of public money. Therefore the right of the defendant board to contract for the payment of money from the contingent fund to secure the sale of books to scholars at a reduced price must depend on the exercise by the school board of the authority conferred by the statute, for, if the power is not expressly conferred, or necessarily implied from the powers that are conferred, it does not exist, and any fair doubt as to the existence of the power is to be resolved against its existence."

The Board then are not engaged in a purely governmental function but are performing a statutory function and in so doing they are acting as statutory retailers, and as there is no exemption under the provisions of law pertaining to the collection of a sales tax, they must collect the tax like any other retailer and remit the same to the State Board of Assessment and Review, and such is the opinion of this department.

TAXATION: EXEMPTION: WORLD WAR VETERAN:

If qualifications of subsection 4 of Section 6946 are met, the widowed mother of a deceased soldier of the world war would be entitled to exemption.

A woman who divorced a Spanish American war veteran, who later died in 1924, and married another man who died in 1930, would not be entitled to exemption.

September 17, 1935. *County Attorney, Creston, Iowa:* This will acknowledge receipt of your letter of the ninth instant in which you request the opinion of this department on the following:

1. Can the widowed mother of a deceased soldier of the World War claim exemption from taxation under paragraph 4 of Section 6946, 1931 Code of of Iowa?
2. Can a woman who divorced a Spanish American War veteran, who later died in 1924, and married another man who died in 1930, claim a soldier's exemption under the law as the widow of the Spanish American War veteran?

Subsection 4 of Section 6946 of the 1931 Code of Iowa provides as follows:

"The following exemptions from taxation shall be allowed:

"4. The property, to the same extent, of the wife of any such soldier, sailor, or marine, where they are living together, and he has not otherwise received the benefits above provided; and the property, to the same extent, of the widowed mother, remaining unmarried, of any such soldier, sailor, or marine, where the said widowed mother is dependent upon any such soldier, sailor, or marine for support, and he has not otherwise received the benefits above provided."

By a careful reading of the above, you will note that a widowed mother of any such soldier, sailor, or marine, who remains unmarried and who possesses the additional qualification of having been dependent upon such soldier, sailor, or marine, for support and the other limitation that the said soldier, sailor, or marine, has not received benefits above provided.

Therefore, it is the opinion of this department that the first question you present is a fact question as to whether or not she would meet the qualifications as set out.

In answer to your second question, it is the opinion of this department that a woman whose case is such as you have outlined, would not be entitled to this exemption.

From the facts submitted, we take it that at the death of the veteran, this woman was no longer married to him and hence would not come under the provisions of this act.

Your attention is directed to Subsection 5 of said section of the Code:

"5. The property, to the same extent, of the widow remaining unmarried and of the minor child or children of any such deceased soldier, sailor, or marine."

MINES: FILLING OR SEALING AFTER FINISHING OR SEALING: Senate File No. 294, 46th General Assembly, would not apply to mines finished or abandoned prior to the time it went into effect, July 4, 1935.

September 26, 1935. *State Mine Inspector:* This will acknowledge receipt of your letter of the 20th instant in which you request the opinion of this department on the following:

A certain coal company ceased to operate their mine and withdraw from the underground all their mine equipment from the same prior to July 1, 1935. All or practically all of their mine machinery and equipment are at this date, September 20, 1935, on their mine premises and to which they claim ownership. Their two shafts have not been filled or sealed as required by the mining laws of our state. The mine owners claim the right to remove

their machinery and equipment from their mine premises without having to fill their shafts either now or hereafter on the grounds that their mine had ceased to operate before the act pertaining to the closing of abandoned mines became effective.

Can the mine owner lawfully move away any machinery or mine equipment from the mine premises without first filling up their abandoned mines or shafts as required by law?

It seems a sound policy not to permit mine owners to go free from the requirements of the mining laws pertaining to the closing of abandoned mines unless they had in fact vacated their mine premises and had relinquished their ownership to said premises and had moved away all their machinery and equipment thereon before Senate File No. 294 became effective.

The 46th General Assembly of the State of Iowa amended Chapter 68 of the Code of Iowa, 1931, by adding to Section 1241 of the Code, in part as follows:

"It shall be the duty of the owner, lessee, operator of the mine or owner of land on which mine is located, to permanently fill, or seal all openings to the same immediately after it is finished or abandoned, so as to prevent any person or animal from entering or falling into the said finished or abandoned mine; * * * * *"

While it would undoubtedly be the proper practice to have mines that are abandoned sealed, and would without a doubt be for the mine owners' benefit or inure to the benefit of the operator of the mine or lessee, as the case may be, as damage suits might result from leaving these mines open, so that persons or animals might be injured, yet the general rule of law is that all laws are retrospective unless they are specifically made retroactive. The wording of that part of Senate File No. 294 above quoted that the owner, etc., shall permanently fill or seal all openings to the mine immediately after it is finished or abandoned, in the opinion of this department would be the same as if the General Assembly had used the following language: Hereafter when a mine is abandoned, these things should be done.

While, as stated above, the better practice would be, because of the danger of injury and the question of liability for such injuries on the part of those responsible, to close the mine in accordance with this act, yet, in our opinion, a careful reading of the same does not make it retroactive and, therefore, we do not believe that it would apply to mines abandoned prior to the time this act went into effect, which was July 4, 1935.

In answer to the direct question asked with reference to machinery and equipment still being on the premises, we believe that Section 3 of Senate File 294, an amendment to Section 1241 of the Code, is directly in point. Section 3 provides as follows:

"It shall be unlawful for any owner, lessee, or operator of any coal mine, or any person, firm, or corporation, to take or move away from the premises of a finished or an abandoned mine any machinery, equipment or material without the consent of the mine inspector until first all the requirements of this act have been complied with, and have been approved in writing by the mine inspector."

Therefore, it is the opinion of this department while in some instances a fact question is presented with reference as to whether or not the machinery or equipment has been removed, yet where the facts are clear and the machinery or equipment is still there, even though the mine has been finished or abandoned, the section above quoted of the amendment would apply, and the mine would have to be sealed in accordance with the provisions of the amend-

ment when the machinery or equipment were taken away. Or in other words, the provisions of Section 3 would have to be strictly complied with.

MOTOR VEHICLE TESTING STATIONS: Chapter 47, Acts 46th General Assembly. City may employ private agency to operate testing stations but should maintain complete control over such operation.

September 27, 1935. *Motor Vehicle Department:* You enclose a copy of a letter received by you from the mayor of Boone in which he states that his city is contemplating the passage of an ordinance providing for the operation and maintenance in the city of a motor vehicle testing station or stations as authorized by Chapter 47, Acts of the 46th General Assembly. He submits this question:

"May a city pass an ordinance authorizing certain stations to test motor vehicles with the understanding that the owners thereof may get their work done thereon wherever they see fit?"

This question calls for a construction of Subsection 3 of Section 1, Chapter 47, Acts of the 46th General Assembly, which is as follows:

"In addition to all the powers heretofore granted to local authorities, all cities and towns, including cities operating under special charter, shall have the power to acquire, establish, erect, equip, operate and maintain motor vehicle testing stations therein and to pay for the same out of the proceeds of the collection of fees charged for testing motor vehicles, including trucks."

Does the requirement of this subsection which provides that cities and towns "shall have the power to acquire, establish, erect, equip, operate and maintain Motor Vehicle testing stations" require that cities and towns must own the real estate and all equipment used in connection therewith when such testing stations are established? We believe the language used in the statute does not require this construction. The word "acquire" is defined by Corpus Juris as follows:

"Acquire: To obtain; to procure; to get as one's own; to earn; to get or gain by some lawful title; to make one's own according to some rule of law * * * * In its broader sense to obtain in any manner; to gain by any means. In the past tense, the word is used in the sense of obtain."

1 C. J. 908.

A lease has been held to be a species of acquisition of railroad property within the purview of a statute authorizing the railroad to construct, purchase, lease or otherwise acquire property under eminent domain proceedings.

Mull vs. Indianapolis, etc. Tract Co., 81 N. E. 657 (Indiana)

We quote from the above case as follows:

"The solution of the question turns upon the construction of the word acquire as used in this act. The word in its primary use doubtless means to get as owner, but in its broader sense means to obtain in any manner * * * * It thus appears that leasing was regarded by the Legislature as a species of acquisition of railway property within the purview of this statute."

Ibid.

We are of the opinion the Legislature did not intend to place upon the word "acquire" such a strict construction as to require cities and towns if they operate under this chapter to acquire a fee simple title to any real estate used in connection with such testing stations. It would be utterly impracticable for small towns to avail themselves of the provisions of this chapter if the chapter requires the acquisition of a fee simple title to real

estate and the establishment, erection and equipment of vehicle testing stations thereon.

We believe the Legislature intended to enact a reasonable statute capable of accomplishing a useful purpose for cities and towns, and one which is free from requirements so unreasonable as to make the statute unavailable for many communities. The mayor of Boone states in his letter that "the town isn't large enough to warrant the city in constructing a testing station." The statute does not use the word "construct" but it does use the words "acquire, establish, erect, equip, operate and maintain motor vehicle testing station."

We think it was the intention of the Legislature in the enactment of this statute to provide that cities and towns have the power alternatively to acquire, establish, erect, or equip motor vehicle testing stations. A city may by purchase acquire a testing station or it may erect one and it may operate and maintain such station without acquiring legal title to the premises and without erecting or constructing a building or plant in which to operate said station. The Motor Vehicle Department shall have supervision and control over the type of tests and facilities therefore in any motor vehicle testing station, and such city or town desiring to establish such station shall have first to procure the approval thereof by the State Motor Vehicle Department. The City Council must use its own judgment as to the terms of the ordinance to be passed, having in mind always that the ordinance must be in harmony with the law of the state. The operation of such testing stations should be free from the taint and improper influences of private interests. If the testing stations were operated by persons who might have a personal and private gain from the operation thereof over and above the reasonable compensation for the services rendered in connection with testing motor vehicles, the testing service rendered might not be always of the character contemplated by the law. It would be more in harmony with the spirit of the law if testing stations were operated independently of any private business or enterprise. Municipalities no doubt have authority to arrange for the use of privately owned equipment for the use of such tests but they should maintain the control of such station as the operator thereof.

DELIVERING BALLOTS: COUNTY AUDITOR'S EXPENSE: Sections 782 to 785, Code, 1931. County Auditor may collect his actual expenses in delivering ballots. Mileage at the regular rate allowable. Board of Supervisors should order and allow claim if reasonable.

September 27, 1935. *County Attorney, Rock Rapids, Iowa:* Your letter of September 25th addressed to the Attorney General has been referred to me for reply. You submit several questions as follows:

"1. May the County Auditor charge mileage for the use of his car in delivering ballots to the judges of election as provided by Sections 782 to 785 inclusive of the 1931 Code of Iowa?"

Assuming that the use of an automobile is necessary for the purpose of delivering such ballots and election supplies, we are of the opinion reasonable and proper mileage may be collected by the Auditor for the use of his automobile. Your second question is:

"2. Can the County Auditor charge expense other than his time for delivering ballots?"

It is our opinion he may charge his actual and necessary expense in connection with delivering such ballots. Your third question is as follows:

"3. If the County Auditor can make such charge, is it up to the Board of Supervisors to determine what is reasonable?"

This question should be answered in the affirmative. The claim should be presented, audited and allowed on the basis of what is right and reasonable in the premises.

UNPROFESSIONAL CONDUCT: USE OF PROFESSIONAL CARD: PERSONAL LETTERS:

Chapter 24, Acts 46th General Assembly. No statutory limitation on size of professional card. Must be reasonable. Personal letters suggesting dental service allowable in certain cases.

September 27, 1935. *Commissioner of Health:* Your letter of September 24th addressed to the Attorney General has been referred to me for reply.

You submit three questions calling for a construction of Chapter 24 of the Acts of the 46th General Assembly. Your first question is as follows:

"Is there any restriction as to the size of the professional card which a dentist may use or publish for advertising purposes?"

Section 4 of said chapter defines unprofessional conduct as it relates to dentists and dental hygienists in the practice of their professions and provides that unprofessional conduct shall include all advertising of any kind or character other than the carrying or publishing of a professional card or a display of a window or street sign at the licensee's place of business. Carrying or publishing a professional card is permissible advertising. Such cards may state only the name, address, profession, office hours and telephone connections of the dentists or dental hygienists. There is no statutory limitation upon the size of the card. If there were such limitation, it of course would control. The Legislature in defining unprofessional conduct saw fit to permit the use of professional cards but failed to prescribe the size thereof. If this department were to undertake to impose definite limitations on the size of such cards, it would usurp a legislative function. In seeking to determine what may properly be regarded as a professional card, the dentist must look to the practice and custom within his profession and within other professions to determine what in those professions and particularly in his own, is regarded as a professional card as distinguished from other forms of advertising. We believe inquiry of the manufacturers or printers of professional cards would disclose that business and professional cards in most common use today are approximately three and one-half (3½) inches long and two (2) inches wide. The use of a card somewhat larger or somewhat smaller would still be within the limits of professional conduct. This office has no authority arbitrarily to fix or prescribe the size of professional cards, which dentists may publish and use.

Your second question is as follows:

"May a dentist write personal letters to persons for whom he has performed services, suggesting to them that they come to his office for a dental examination?"

It is our opinion that if no relationship of doctor (dentist) and patient

exists, the writing and sending of such letters would constitute unprofessional conduct. If the relationship of doctor and patient exists or if such personal letters are written to patients pursuant to arrangements previously made while the addressee is a patient, there cannot be and is no charge of unprofessional conduct. A dentist and his patient clearly have the right to make arrangements whereby the dentist is to call or write the patient at intervals with reference to the possible dental needs of the patient.

Your third question follows:

"Does the law permit a dentist to send his professional card through the mail?"

We believe this question should be answered in the affirmative. Exploiting or advertising through the press, on the radio, or by the use of handbills, circulars or periodicals, other than professional cards is prohibited. Advertising then by the use of professional cards is the exception to the rule prohibiting, with certain exceptions, exploiting or advertising one's profession.

INVESTMENT CERTIFICATES: STATE FINANCE COMPANY: SECURITIES ACT: REGISTRATION:

Said instrument, as so amended and changed, would constitute an exemption as contemplated by paragraph "h" of Section 8581-c4 of the Code and would not have to be registered in the securities department of the office of Secretary of State.

September 27, 1935. *Securities Department:* This will acknowledge receipt of your favor of the 23d ultimo asking the opinion of this department on the following proposition:

Whether or not it is necessary for a so-called investment certificate, copy of which was enclosed and hereinafter referred to, to be registered pursuant to the provisions of the Iowa Securities Act. Contending that the certificates are not subject to registration, you state that Section 8581-c4 of the 1931 Code of Iowa has been invoked.

Section 8581-c4 of the 1931 Code of Iowa provides as follows:

"Except as hereinafter otherwise provided, the provisions of this chapter shall not apply to any of the following classes of securities: * * * * *

"h. Negotiable promissory notes or commercial paper issued in good faith in the usual course of carrying on and conducting the usual business of the issuer: Provided, that such issue of notes or commercial paper mature in not more than twelve months from date of issue and shall be issued within three months from date of sale."

The question is, are the instruments concerned within the foregoing paragraph "h" of Section 8581-c4, 1931 Code of Iowa, exempting them from registration? With this in mind, the following questions arise:

1. Are the instruments issued *negotiable promissory notes* or *commercial paper* within the meaning of Paragraph "h" above quoted?

2. Do the instruments meet the other requirements of Paragraph "h," to-wit: *Issued in good faith in the usual course of carrying on and conducting the usual business of the issuer * * * * mature in not more than twelve months from date of issue * * * * *."*

3. Was it the intent of the Legislature to require such instruments as those under consideration herein to be registered under the securities law?

CHARACTER OF INSTRUMENT

The instrument concerned, so far as pertinent, consists of six separate paragraphs, to-wit:

4%

INVESTMENT CERTIFICATE

This is to certify that State Finance Company, of Des Moines, Iowa, is indebted to.....of....., who is a resident of the State of Iowa, herein referred to as holder, or order in the sum of..... .....Dollars ($.....), which amount State Finance Company agrees to pay to the holder hereof twelve months after this date with interest at the rate of four per cent (4%) per annum, from this date, payable quarterly on the first day of January, April, July and October.

Thus far, the instrument contains all of the elements of a negotiable instrument as defined in Section 9461 (1) and Section 9464 (4) of the 1931 Code, and it is likewise a negotiable promissory note unless subsequent paragraphs of the instrument take it without. So far as the first paragraph of the instrument is concerned, it comes clearly within the exception of Paragraph "h" of Section 8581-c4 of the 1931 Code of Iowa.

Section 9461 (1) of the 1931 Code of Iowa is as follows, to-wit:

Form of negotiable instrument. An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer.
2. Must contain an unconditional promise or order to pay a sum certain in money.
3. Must be payable on demand or at a fixed or determinable future time.
4. Must be payable to the order of a specified person or to bearer.
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

The second paragraph of the instrument is as follows:

This certificate is payable at the office of State Finance Company in the city of Des Moines, Iowa. Interest and principal when due shall be payable only on presentation of this certificate unless this certificate is registered in the name of the holder.

The sixth paragraph of the instrument provides as follows:

At the request of holder, State Finance Company agrees to register this certificate in holder's name, after which no transfer shall be effective as to the State Finance Company unless such transfer is made in writing by the registered holder and so noted on the back of this certificate. The registry, thus made, may be discharged by transferring as aforesaid "to order" or "to bearer," but it may again be registered as before at holder's request.

The above two paragraphs of the instrument do not destroy its negotiability. It may or may not be registered at holder's option; just as any other negotiable promissory note may, by restrictive endorsement, be limited as to payment to a particular person or for a particular use. And, if so registered in holder's name at holder's option, he may discharge the registry and again have the instrument made payable "to order" or "to bearer." In time all this may be legally done without having the right to do it recited in the instrument.

So far as the above mentioned three paragraphs are concerned, the instrument remains a negotiable promissory note. Registration is an act subsequent to issuance and the doing or not doing of it is entirely subject to the will of

the holder. The registration is printed and endorsed on back of instrument itself, so that at all times the negotiability of the instrument can be determined from examination of the instrument itself, the same as if a restrictive endorsement appeared thereon.

The third paragraph of the instrument provides as follows:

This certificate shall automatically be extended for an additional period of twelve months unless presented for payment at an annual anniversary date or within ten days thereafter; and shall in like manner be extended for successive periods of twelve months each.

The most serious question as to the negotiability of this instrument arises from and out of the above quoted third paragraph of the instrument. Is this instrument payable at a fixed or determinable future time? A determinable future time has been defined by our Legislature and the negotiable instruments act as follows:

An instrument is payable at a determinable future time, within the meaning of this chapter, which is expressed to be payable:
1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

See Section 9464 (4) of the 1931 Code of Iowa.

In *State Bank of Halstad vs. Bilstad,* 162 Iowa 433, the question there raised was whether notes, which contain the following provision, were negotiable instruments:

"It is agreed that if the crop on Sections 25 and 26 Twp. 145-48 is below 8 bushels per acre (for 1905 as to one and 1907 as to the other) this note shall be extended one year."

It was held by our Supreme Court that these notes were negotiable. In handing down this opinion, Judge Sherwin, on pages 439 and 440, has the following to say:

"Section 3060-a4 expressly says that a note that is payable at a determinable future time, or that is payable on or before a fixed period after the occurrence of a specified event, which is certain to happen, is negotiable. These provisions clearly provide for flexibility in fixing the time of payment, provided only that there shall certainly come a time when the note is, by its terms, due. In other words, they recognize the right of the parties to any instrument to contract for their mutual benefit, and say, in effect, that, if the contract made is certainly to be performed at some definite time in the future, its negotiability is not destroyed. A determinable future time, as used in the second clause of the section, can mean nothing else than a time that can be certainly determined after the execution of the note. The contingency which will render a note non-negotiable under the last clause of the section clearly means an event which may or may not happen. A contingency is, in law, an uncertain future event, and, as a contingency may never happen, a note payable only upon the happening thereof may never become due. We think that the meaning of the language used, construed with the other provisions of the section and in the light of former rules. We reach the conclusion that the two notes in question were negotiable, and that the judgment must be reversed because the trial court did not so hold."

Does the provision contained in the third paragraph of the certificate for the automatic extension of the same constitute an event which may or may

not happen? If it does, then the instrument would be nonnegotiable under the ruling of our Supreme Court in the case of *State Bank of Halstad vs. Bilstad,* 162 Iowa 433, above quoted.

However, there is a later Iowa case, *Townsend vs. Adams,* 207 Iowa 326, which appears to throw a little more light on this particular question. In this later case the note contained the following clause:

"and we consent and agree that *after this obligation shall become due* the time of payment thereof may be extended from time to time by any one or more of us * * * * * * *"

Our Supreme Court in this case held that the note was negotiable. Judge Kindig, who delivered the opinion in the above case, after reviewing the decisions, in construing the above clause, said on page 333:

"The net result, therefore, is that the extension must be after maturity. Thus, on the day the note, by its terms, was payable, the makers were permitted to put it out of existence by making full and complete liquidation thereof, so that there could not have been any extension of the same.

"Wherefore the instrument is negotiable, and the trial court was in error because it directed a verdict for appellees. Such should have been done in favor of appellant, instead."

On page 329 of the above reported case, Judge Kindig states as follows:

"Hence, if on that date payment can be made by the maker or obligor, on the one hand, and, on the other, required by the holder, without an intervening extension, then certainty exists concerning the 'fixed or determinable future time'."

Navajo County Bank vs. Dolson, 163 Cal. 485, 126 Pac. 153.
Stitzel vs. Miller, 250 Ill. 72, 95 N. E. 53.

See also:

First Nat. Bank vs. Stover, 21 N. M. 453, 155 Pac. 905.
Longmont Nat. Bank vs. Loukonen, 53 Colo. 489, 127 947.
First Nat. Bank vs. Buttery, 17 N. D. 326, 116 N. W. 341.

Judge Kindig states further:

"At this juncture, some light is thrown upon the subject by the rule in this state to so interpret as to bring about negotiability, if possible.

Apt language in *Williamson vs. Craig,* 204 Iowa 555, is:

" 'Since the adoption of the Uniform Negotiable Instrument Law, and since negotiable instruments have taken such a prominent part in the business of the commercial world, the tendency of the courts is to hold instruments negotiable where they can reasonably be so held. It is apparent from the citation of authorities (in the *Williamson* case) above that this is the drift of the modern holdings.'

"Within the bounds of reason, then, liberality of construction must be exercised in favor of negotiability."

Again on page 330 of the case of *Townsend vs. Adams,* reported in 207 Iowa, Judge Kindig has this to say:

"Nowhere has there been called to our attention any decision to the effect that an instrument becomes non-negotiable when it can be paid at maturity, even though thereafter the time may be extended."

There is no question but what the instrument under consideration here can be paid at maturity which is 12 months after the date of the execution of the same, or it can be paid within ten days after the expiration of the 12-

month period. This additional ten days, apparently, are days of grace. In other words, at the expiration of the 12 months from date, the holder of this instrument could demand payment and the maker of this instrument would have the right to pay it 12 months after date. Insofar as this third paragraph of the certificate is concerned, we feel that there is nothing therein contained that would destroy its negotiability in view of the holding of our Supreme Court and the reasoning of Justice Kindig in the case of *Townsend vs. Adams*, 207 Iowa 326.

The fifth paragraph of the instrument provides:

State Finance Company reserves the right to pay this certificate together with all unpaid and accrued interest to the holder hereof as of any interest payment date upon thirty days' written notice sent by mail to the above stated address of the holder.

It is thus seen, the maturity of the instrument is 12 months; but the issuer may call it at any intermediate quarterly period. This does not in anywise affect negotiability of the instrument.

Section 9484 (4), 1931 Code of Iowa.

State Bank vs. Bilstad (1913), 162 Iowa; 422, 136 N. W. 204; 49 L. R. A., (NS), 132; on rehearing (1913), 144 N. W. 363.

Des Moines Savings Bank vs. Arthur (1913), 163 Iowa 205; 143 N. W. 556.

Fisher vs. O'Hanlon (1913), 93 Neb. 529; 141 N. W. 157; L. R. A., 1918C, 727.

Northbridge vs. Grenier (1932), 278 Mass. 438; 180 N. E. 226; 81 A. L. R., 394.

The title of this instrument, "4% INVESTMENT CERTIFICATE," cannot be approved in that it purports to be a negotiable promissory note or commercial paper in accordance with the provisions of Paragraph "h" of Section 8581-c4 of the 1931 Code of Iowa. This instrument is clearly not an investment certificate and, therefore, it would not be held out to the public as an investment certificate. The word "certificate" wherever it appears in this instrument is equally as bad as the title of the same.

There is another clause in this instrument that might render the same nonegotiable, this clause being as follows:

"who is a resident of the State of Iowa."

This clause appears in the second line of the body of the instrument. A negotiable note or commercial paper should circulate freely in the ordinary course of business and should not be restricted in its terms if it is a negotiable note, to citizens or residents of any particular place or locality. However, this clause might be construed simply as descriptive of the person to whom it was issued. This objection to the instrument can easily be remedied by striking this clause therefrom.

It is therefore the opinion of this department, if the title to this instrument, "investment certificate," and the word "certificate" wherever it appears therein, are stricken therefrom and a title and description of said instrument is inserted in lieu thereof, in conformity with Paragraph "h" of Section 8581-c4 of the 1931 Code of Iowa, which provides that "negotiable promissory notes or commercial paper * * * *" issued in accordance with the rest of the provisions of said exemption, that said instrument as so amended and changed

would constitute an exemption as contemplated by Paragraph "h" of Section 8581-c4 of the 1931 Code of Iowa and would not have to be registered in the securities department of the Secretary of State of the State of Iowa.

STATE OFFICERS AND EMPLOYEES: NATIONAL GUARD: VACATION AND ENCAMPMENT PAY:

Chapter 10, Acts 45th General Assembly, Extra Session. Officers and employees of state and subdivisions thereof and municipalities who are members of National Guard entitled to leave of absence and vacation on full pay.

September 30, 1935. *Executive Council:* We have your letter in which you state that several employees of the Executive Council and of the Custodian's Department have been called for the Iowa National Guard duty for the regular national camp of the National Guard. You state further that such duty is in addition to the annual two weeks' vacation for state employees, and you raise the question whether or not these employees should be paid by the state for the time they are attending this camp.

We call your attention to Section 25 of Chapter 10, Acts of the 45th General Assembly, Extra Session, which is as follows:

"All officers and employees of the State, or a subdivision thereof, or a municipality therein, who are members of the National Guard, shall, when ordered by proper authority to active service, be entitled to a leave of absence from such civil employment for the period of such active service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence."

This section, you will note, provides that employees of the state, who are members of the National Guard shall when ordered by proper authority to active service be entitled to leave of absence from such civil employment without loss of pay during the first thirty days of such leave of absence. The term "active service" is defined in Section 2 of said chapter as follows:

"The term 'active service' shall be understood and construed to be service on behalf of the State in case of public disaster, riot, tumult, breach of the peace, resistance of persons or whenever the same is threatened, whenever called upon in aid of civil authorities or national law or *at encampments whether ordered by the state or federal authority or upon any other duty requiring the entire time of the organization or person*, except when called or drafted into the Federal Service by the President of the United States."

We assume your question contemplates active service as here defined. It clearly was contemplated by the Legislature when it enacted Chapter 10 that state employees should while in active service as members of the National Guard, receive their pay as such state employees the same as if they were on duty in their civil employment. Chapter 126 being the Appropriation Act for the biennium beginning July 1, 1935, contains Section 56 which is in part as follows:

"Employees of the State are granted one week's vacation after one year's steady employment, and two weeks' vacation after two or more years' employment with pay."

A similar provision was contained in the Appropriation Act for the preceding biennium. In view of the statutes quoted, we are of the opinion that if the employees referred to in your letter are in "active service" while at-

tending the camp they shall attend "without loss of pay during the first thirty days of such leave of absence."

Stating it differently, the answer to your question is that employees of the state who are in active duty as members of the Iowa National Guard for the period of the regular annual camp of such guard, shall suffer no loss of pay during the period of such active service not exceeding thirty days.

BOARD OF EDUCATION: UNIVERSITY OF IOWA: FIELD WORK: DEPARTMENT OF BOTANY: DICKINSON COUNTY TRACT OF LAND: LAKESIDE LABORATORY: Acceptance of conveyance of land and buildings of Lakeside Laboratory in Dickinson County, Iowa, by board of education for use of university of Iowa would not violate constitutional provisions against university having branches at other places than Iowa City.

September 30, 1935. *The State University of Iowa:* The question under consideration is:

Can the Iowa State Board of Education accept for the State of Iowa for the use and benefit of the State University of Iowa the title of a tract of land in Dickinson County, Iowa, for use as a place for field work in connection with the Department of Botany of the University of Iowa which is in Johnson County, without violation of Article XI, Section eight and/or Article IX, Section eleven of the Constitution of Iowa?

The sections of the Constitution referred to read as follows:

Article XI. "Seat of government established— State University. Sec. 8. The seat of government is hereby permanently established, as now fixed by law, at the City of Des Moines, in the County of Polk; and the State University, at Iowa City, in the County of Johnson."

Article IX. "State University. Sec. 11. The State University shall be established at one place without branches at any other place, and the University fund shall be applied to that Institution and no other."

The Lakeside Laboratory Association, a non-profit corporation, expresses a willingness to transfer the Lakeside Laboratory located in Dickinson County, Iowa, upon the shores of Lake Okoboji, to the State of Iowa for the use and benefit of the State University of Iowa so that there may be located at that place for the improvement of the same and for other work in the vicinity a CCC camp. It is understood that such camps, under the federal laws and regulations, cannot be located upon and make improvements upon any but publicly owned property.

The Lakeside Laboratory is now and has heretofore been owned by the Association for the purpose of maintaining it as an area for botanical field work. The land, the location thereof, and the flora thereon are uniquely adapted and valuable for such purpose.

The botanical field work which has heretofore been carried on in connection with the work of the University of Iowa and which will be continued should the proposed transfer be made, is done by students registered at the University of Iowa, all of whose registration and records are retained in Iowa City, and, so far as the work is carried on by the staff of the University, it is by persons regularly upon the faculty of the University and residents of Iowa City. Field work at Lake Okoboji is carried on only during the summer session and is entirely subordinate to the general courses and departmental organization existing at, housed at and operated at Iowa City.

There are several sections of the Code of Iowa which have important bear-

ing upon the propriety legally of the transfer of the Okoboji Laboratory property from the corporation which now holds the same to the State Board of Education. These sections follow:

"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."

"3921. *Powers and duties.* The board shall * * * * 4. Manage and control the property, both real and personal, belonging to said institution.

5. With the approval of the Executive Council, acquire real estate for the proper uses of said institutions, and dispose of real estate belonging to said institutions when not necessary for their purposes.

6. Accept and administer trusts deemed by it beneficial to and perform obligations of the institutions. * * * *

10. Perform all other acts necessary and proper for the execution of the powers and duties conferred by law upon it and the finance committee."

There can be little doubt that under Section 10187 the Board of Education can accept such a gift of real property unless the acceptance of the gift is contrary to the provisions of Article 9, Section 11, and Article 11, Section 8 of the Constitution of the State of Iowa.

The question thus appears to be—would the Lakeside Laboratory, if owned by the State Board of Education and administered as intended by its donors, be a "branch" of the University?

Definitions of the term "branch" in the sense that the same is used in that portion of the Constitution of Iowa quoted above or in a closely related sense are almost entirely lacking. In *Fort Smith Lumber Co. vs. Shackleford,* 115 Ark. 272 (1914), the court says:

"(3) The word 'branch' qualifying the word 'office' in the statute under consideration, indicates that the office maintained was to be tributary to the principal office. See Webster's Dictionary, Branch. So, in the sense of the statute, the term 'branch office' is used to designate a place maintained in the county where business is transacted similar to that where the principal office is situated.

"(4.5) The term 'other place of business' refers to a place where the corporation is conducting a settled or established business. The term 'branch office' refers to a place where the company may conduct its general business in the same way that it carries on its business at its principal office."

It has been held by the New York Supreme Court in *Berman, Inc., vs. American Fruit Distributing Co.,* 186 NYS. 376 (1921), that a mail box or a mailing chute is not a "branch post office" in the sense that a copy of summons is properly served when mailed at such a place.

Somewhat illuminating inferences may be drawn from Iowa Code Section 9258-b1 which prohibits branch banking. The section contains the following sentence:

"However, as may be authorized by and subject to the jurisdiction of the Banking Department, any banking institution may establish an office for the sole and only purpose of receiving deposits and paying checks and performing such other clerical and routine duties not inconsistent with this section * * * *. No office shall be continued at any place after a banking institution has actually commenced business at that place."

This provision seems to be in harmony with the statement above quoted from the Arkansas case. That is, that a branch office is one in which "the company may conduct its general business in the same way that it carries on its business at its principal office."

Under these conceptions of the term "branch," the field work now being carried on under the direction of the Department of Botany of the University of Iowa at the Lakeside Laboratory could not be confused with or designated as maintaining a branch of the institution.

"Branch" schools and colleges are comparatively well known institutions in American education organizations. Outstanding examples of such branches are the branch of the University of California at Los Angeles and the branch of the University of Idaho at Pocatello. At these institutions, students may register, become enrolled for courses, complete all work required for credits in various courses and obtain degrees. These branch institutions have resident faculties and administrative officers and carry on educational activities according to the orthodox practices concerning the same, throughout the year.

The statutes under which the southern branch of the University of Idaho was set up are to be found in Volume 2 of the Idaho Code, Annotated (1932, Official Edition), Chapter 28, Section 32-2801 and following. In the General Laws of the California Legislature (1931 Deering), reference is made to Act 8911 on page 4934. In this statute and in the one previously cited in the Idaho Code, reference is made to training courses, extensive properties, faculty, etc., indicating clearly that a complete set of business facilities for registration, education and all of the matters connected with the same are to be provided, maintained and used at the so-called "branch" institution.

It seems to be evident that these are of the type of "branch" intended to be prohibited by the Iowa Constitutional provision. See 2 Constitutional Debates, Iowa (1857) 838.

It is clear that very considerable activities may be carried on in rather close relation to the principal activities of a university without the establishment of a so-called "branch."

This may be illustrated by a type of decision handed down by the Supreme Court of Nebraska. Article VII, Section 10 of the Constitution of the State of Nebraska makes reference to "The University of Nebraska." From these words and from the contents of Section 13 it may be fairly inferred that the Constitution recognizes only one institution to be so designated. In *State vs. Whitmore*, 85 Neb. 566 (1909) a writ of mandamus was issued to compel the Board of Regents of the University to locate, equip and maintain two experimental stations according to a certain act of the Legislature. The respondents contended that the funds under their control consisted of the income from trust funds pledged to the support of a college teaching branches of study relating to agriculture and the mechanic arts and that the appropriations made from a temporary university fund could not lawfully be expended for the purpose of establishing experimental stations. The court, however, found no difficulty in holding that the experimental stations considered were necessary to the welfare of the people of the State of Nebraska and should, under an act of the Nebraska Legislature, become a component part of the College of Agriculture in the University of Nebraska. Upon

rehearing, the same issues came before the Nebraska court in 86 Neb. 399 and with slight modifications the basic position first stated was affirmed.

These matters, when taken together, seem to recognize that a university, though located in one place, may have experimental stations and other activities upon it and managed by its officials, located elsewhere, which are not "branches" of the institution in such a sense as to be entitled to share in the general support funds.

In *Indiana State Board of Finance vs. State*, 166 Ind. 36 (1918), the power of Purdue University to operate an agricultural experiment station was not disputed though it was concluded that such a station was not sufficiently a part of the university to justify the expenditure of university funds thereon, since it was not specifically named as a department or station entitled to participate in the fund in question in the case.

To the same effect is *State ex rel. Jones vs. Erickson*, 75 Mont. 429 (1926). There, among other things it was held that the agricultural experiment station and the agricultural extension service are not parts of the agricultural college or component parts of the University of Montana; hence appropriations made for them could not be charged to receipts from a mill and one-half levy made for state purposes authorized by Section 2148, Revised Codes of 1921, for the maintenance of the University.

In a very early case in the State of New York, *People vs. Trustees of Geneva College*, 5 Wend. 211 (1850), the court holds that no college, simply because of its existence as such, has authority to found another college or incorporate a department thereof. This conclusion being generally accepted, it could not be said that an experimental station, observatory, or out-of-door field or laboratory should properly be considered a "branch" in view of the frequency with which such institutions have been established and in view of the formal extensive type of arrangement, statutory and otherwise, to be found where a true "branch" university is intended to be set up.

It is therefore concluded that the acceptance of a conveyance of the land and buildings of the Lakeside Laboratory on Lake Okoboji in Dickinson County, Iowa, from the Iowa Lakeside Laboratory Association (a corporation not for pecuniary profit) by the Iowa State Board of Education for the State of Iowa for the use and benefit of the University of Iowa for the purposes above mentioned, would not violate the constitutional provisions against the University having branches at any other place than at Iowa City in Johnson County, Iowa.

BASIC SCIENCE LAW: Chapter 17, Acts 46th General Assembly. Law applicable after July 4, 1935 to physicians and surgeons, osteopaths and surgeons, and chiropractors unless on July 4, 1935 they hold licenses from the State of Iowa, Reciprocal relations may be maintained only with states having substantially the same requirements as this state.

October 1, 1935. *Commissioner of Health:* You have asked for a construction of Sections 4 and 5 of Chapter 17, Acts of the 46th General Assembly, which sections are set out in full as follows:

"Sec. 4. No person shall hereafter be eligible for examination or be permitted to take an examination for a license to practice medicine and surgery, osteopathy, osteopathy and surgery, chiropractic or any other system or method of healing that may be hereafter legalized in this state or be granted any such license until he has presented to the licensing board empowered to

issue a license, a certificate of proficiency in the basic sciences as provided in this act. This requirement shall be in addition to all other requirements now or hereafter in effect with respect to the issuance of such license or licenses."

"Sec. 5. Nothing in this act shall be construed to apply to persons holding licenses as physicians and surgeons, osteopaths, osteopaths and surgeons or chiropractors, at the time this act takes effect; nor shall this act, at any time, be construed to apply to dentists, dental hygienists, nurses, pharmacists, optometrists, embalmers, podiatrists, barbers or cosmetologists practicing within the limits of their respective licenses or christian scientists. This act shall not apply to students regularly registered, enrolled and in attendance as of July 1, 1936, in accredited schools of medicine, osteopathy or chiropractic in the State of Iowa."

You call attention particularly to the first three lines of Section 5 which provides that nothing in the act shall apply to persons holding licenses as physicians and surgeons, osteopaths, osteopaths and surgeons, or chiropractors at the time the act takes effect and submit the question in connection therewith whether the exemption contained in this act with reference to the persons holding licenses, such as physicians and surgeons, osteopaths, osteopaths and surgeons, or chiropractors, applies only to those owning such licenses in Iowa or whether it applies to all persons holding such licenses regardless of their residence, domicile, and the jurisdiction within which they are licensed.

It is the opinion of this department that the exemption contained in the first three lines of Section 5 applies only to persons holding licenses as physicians and surgeons, osteopaths, osteopaths and surgeons and chiropractors in the State of Iowa at the time the act became effective as of July 4, 1935. Said Section 5 provides that "nothing in this act shall be construed to apply to persons holding a license * * * * at the time this act takes effect."

Section 2 defines "license" as follows:

"c. A license shall mean a certificate issued to a person licensed to practice certain professions affecting the public health as provided in title eight (8) of the Code of Iowa, 1931 and acts amendatory thereto."

Section 5 must be read in connection with all other sections of the act, including Section 1, and if as provided in Section 1, a license means a certificate issued as provided in Title eight (8) of the Code of Iowa, 1931, and acts amendatory thereto, then it would seem obvious that the exemption in Section 5 in favor of persons holding licenses at the time this act takes effect, must be limited by the other provisions above quoted, that a license shall mean a certificate issued as provided in Title eight (8) of the Code of Iowa, 1931. It will be insisted in some quarters that the language in Section 5, "Nothing in this act shall be construed to apply to persons holding licenses * * * * * at the time this act takes effect," applies to all persons in the United States holding licenses on July 4, 1935. We think this cannot be true because as above stated, Section 1 provides, "A license shall mean a certificate to practice certain professions affecting public health as provided in Title eight (8) of the Code, etc." Those who disagree with us in the construction of this act are going to point to the last four lines of Section 5 and argue therefrom that because a specific mention was made of certain schools in the State of Iowa, and that no mention is made of the State of Iowa elsewhere in said section, it must follow that the Legislature did not intend to limit the exemption in Section 5 to persons holding licenses in Iowa

at the time this act takes effect. We think no force can be given to this contention. The entire act takes effect as of July 4, 1935, except that part contained in the last four lines of Section 5, which provides the act shall not apply to students regularly registered and in attendance as of July 1, 1936, in accredited schools of medicine, osteopathy or chiropractic in the State of Iowa. This provision clearly was intended to give the Iowa schools and their students an advantage which the Legislature deemed they should have, which as to such students postpones the application of the act for some four or five years. The simplest and most satisfactory way that such schools could be designated is to describe them as accredited schools of medicine, osteopathy or chiropractic in the State of Iowa. It is clear that the Legislature intended wherever the word license was used in this act to mean a license issued by the State of Iowa. It would seem the Legislature could not have intended to make the unreasonable rule that the act would not apply to any persons in foreign states no matter how poor their qualifications but who happen to possess a license on July 4, 1935, and on the other hand make it apply to citizens of Iowa who are taking their training in schools outside of Iowa.

From the reading of the entire act, it is our opinion that the provision in Section 5, "that nothing in the act shall be construed to refer to persons holding licenses at the time the act takes effect," applies only to persons holding licenses issued under and as provided by Title eight (8) of the 1931 Code of Iowa. The laws of Iowa have no extra territorial force or effect, that is, they are effective and bearing only within this state. Any person desiring to be licensed to practice a profession in this state must meet the requirements of the law with reference to taking examinations or must be admitted pursuant to reciprocity agreements as authorized by the Department of Health, which enter into reciprocal agreements with every state which is certified to it by the proper examining board under the provisions of Section 2482 and with which this state does not have an existing agreement at the time of such certification. Section 2482 provides that the department shall at least once each year lay before the proper examining board the requirements of the several states for a license to practice the profession for which such examining board conducts examinations for licenses in this state. Said examining board shall immediately examine such requirements and after making such other inquiries as it deems necessary shall certify to the department the states having substantially equivalent requirements to those existing in this state for that particular profession and with which said examining board desires this state to enter into reciprocal relations. The Basic Science Law became effective July 4, 1935, thus changing the requirements, which must be met by anyone seeking a license to practice certain professions in this state. Section 2485 is as follows:

"2485. *Termination of reciprocal agreements.* When the requirements for a license in any state with which this state has a reciprocal agreement are changed by any law or rule of the authorities therein so that such requirements are no longer substantially as high as those existing in this state, then such agreement shall be deemed terminated and the licenses issued in such state shall not be recognized as a basis of granting a license in this state until a new agreement has been negotiated. The fact of such change shall be determined by the proper examining board and certified to the department for its guidance in enforcing the provisions of this section."

In view of the sections relating to reciprocal relations, it clearly was the intention of the lawmakers to provide for reciprocal relations only with states whose requirements with reference to licenses are substantially equal to the requirements which must be met by those who seek a license to practice said profession in this state.

For all the reasons herein stated, it is our opinion that the act in question is applicable to persons holding licenses as physicians and surgeons, osteopaths, osteopaths and surgeons, and chiropractors who did not on July 4, 1935, hold a license under Title eight (8) of the Code to practice their respective professions.

CONSTITUTIONAL LIMIT OF INDEBTEDNESS: POOR FUND WARRANTS: REFUNDING: If warrants are legal and within the constitutional limit when issued they may be refunded by bond issue although constitutional limit of indebtedness has been reached.

October 4, 1935. *County Auditor, Albia, Iowa:* I wish to acknowledge receipt of your letter of September 28th in which you again refer to outstanding poor fund warrants issued in 1934 in the aggregate sum of ten thousand dollars ($10,000.00). You state that in 1934 you issued warrants on the poor fund amounting to all the anticipated and collectible revenue for that year and that at that time there were outstanding poor fund warrants for the year 1933. You state further that your County Treasurer called in certain 1933 warrants and paid them out of 1934 revenue with the result that at the end of 1934, there were approximately fourteen thousand dollars ($14,000.00) of outstanding 1934 poor warrants, and that in some manner the amount of 1934 warrants outstanding has been reduced to $10,000.00. You advise that your county is in debt over its constitutional limit of indebtedness and present the following question:

"Whether it would be possible in view of the constitutional limit on indebtedness to issue bonds in order to take up the outstanding 1934 poor fund warrants?"

It is the duty of counties and municipal corporations to preserve their current income intact for the purpose of paying current expenses. The Supreme Court gave expression to this rule in the following language:

"We have heretofore recognized and adjudicated the right and duty of a city to retain and apply its current revenues to the payment of its proper and ordinary current expenses; and this, too, as against a judgment creditor, who demanded and insisted upon the application of such revenues to the payment of his judgment debt, then long over due:"

Grant vs. The City of Davenport, 36 Iowa, 396 at 401.
Coy vs. The City of Lyons, 17 Iowa, 1.
Coffin vs. The City of Davenport, 36 Iowa, 315.

The court in the case first above cited, states the reason for the above rule in the following language:

"This right to thus apply the current revenues to the defraying of ordinary expenses is grounded upon the fact that such a course is absolutely necessary to the life of the municipality and to the successful accomplishment of the purposes of its creation."

We quote the Iowa Supreme Court further as follows:

"It matters not how, or for what purpose the indebtedness is incurred, it is prohibited, unless it can be shown to be reasonably certain such indebted-

ness can be liquidated and paid from the ordinary current revenues of the city.

"And he who contracts with a city, whereby an indebtedness is created, must at his peril take notice of the financial standing and condition of the city, and whether the proposed indebtedness is in excess of the constitutional limitation. Any other rule leaves the taxpayer at the mercy of the officers of the city and contractor, and would render the constitutional provision nugatory. Such a result cannot be contemplated or allowed to prevail. We have heretofore held that a city may retain and apply its current receipts or revenues in payment of its proper, ordinary and current expenses, even against a judgment creditor. * * * If the ordinary revenues are not sufficient for the payment of the current expenses, the improvement of the streets must be postponed for a time."

County Boards and Supervisors, Auditors and Treasurers should at all times keep it in mind that it is the duty of the counties to retain and apply current revenue to the payment of proper and ordinary current expenses. Indebtedness is prohibited unless it can be shown to be reasonably certain that such indebtedness can be liquidated and paid from the ordinary current revenues of the city. I cannot tell from your letter whether the 1934 warrants referred to were legally issues representing valid indebtedness or whether such warrants were issued in excess of the constitutional limit upon the indebtedness of your city at the time they were issued. If the warrants were valid and legal warrants at the time they were issued and within the limits of indebtedness fixed by the constitution, it is our opinion they may be properly refunded by the issuance of bonds. The holders of the warrants could exchange them for bonds which would simply be a different form of evidence of the legal indebtedness of the county. Any firm or person who saw fit to do so could take up such warrants by purchase and assignment and hold them, and there would appear to be no good reason why such valid indebtedness could not be refunded by the issuance of bonds to take up such warrants. A different question however is presented if warrants were issued in 1934 in excess of the collectible revenue for the current year and in excess of the constitutional limitation. In arriving at the constitutional limit of indebtedness, the collectible revenue for the current year may be added to the actual outstanding indebtedness or in other words, although the constitutional limit has been reached, further indebtedness may be incurred up to the amount of collectible current revenue available for the payment of such further indebtedness.

In the recent case of Banta vs. Clarke County, 260 N. W. 329 at 333, our Supreme Court spoke as follows:

"It is the settled rule of law in this state that certain available anticipated revenue from taxes or otherwise, during a certain fiscal year, may be deducted as an offset in computing the total aggregate indebtedness of the corporation within the same period, in determing whether or not the total aggregate indebtedness comes within the debt limit meaning of the constitution."

Citing many cases.

In Rowley vs. Clarke, 162 Iowa 732, our court held:

"Warrants issued in anticipation of taxes are held not to constitute a debt on the theory that moneys, the receipt of which is certain from the collection of taxes, are regarded as for all practical purposes already in the treasury and the contracts made upon the strength thereof are treated as cash transactions."

In the Banta vs. Clarke County case above quoted, our court said:

"It is our conclusion that in computing the aggregate indebtedness of the county within the meaning of the debt limit provision of the Constitution, the county is authorized to deduct from its aggregate indebtedness the amount of cash it is certain to receive from the sale of the new bonds, and segregated in a trust fund and to be used only for the purpose of paying an equal amount of certain designated old bonds. * * * It is our conclusion that the issue and sale of refunding bonds to pay off an equal amount of primary county road bonds out of the proceeds of the sale of the new bonds does not create a new indebtedness, but simply changes the form of the old debt. It is in effect a renewal of the old indebtedness, payable to a new debtor at a lower rate of interest, but remains the same old debt."

Our court held in this case that the bonds of Clarke County were valid and within the constitutional limitation when issued and that notwithstanding the fact that the indebtedness of Clarke County later came to exceed the constitutional limit, new refunding bonds could be sold under the terms and provisions of legislation by the 46th General Assembly and the proceeds segregated in a special trust fund and used to take up valid outstanding road bonds of the county. The court appears in this case to adopt the majority rule in the United States, which is that after new bonds are sold, the total cash on hand will be increased by the amount so received. Therefore, the actual aggregate indebtedness of the county within the meaning of the debt limit constitutional provision will be more after the new bonds are sold than it was before the cash is received, being in the nature of an offset against outstanding indebtedness. In view of the court decisions above quoted, it is our opinion that if the warrants referred to represents indebtedness which was incurred within the constitutional and statutory limitations at the time it was incurred, such warrants may be negotiated, and refunded as above set out. If, on the other hand, the indebtedness represented by said warrants exceeded the lawful limit of indebtedness at the time the indebtedness was incurred, a different situation presents itself and we can make no suggestion as to how such illegal warrants may be made lawful evidence of legal indebtedness.

OLD AGE ASSISTANCE COMMISSION: POLL TAX: CREDIT: Where tax is paid prior to July 1, 1935, a credit can be given on the poll tax at any time whether the road poll tax is paid subsequent to July 1st or not.

Administrative detail with reference to employers liability for tax—payment before July 1, 1935.

October 8, 1935. *County Attorney, Iowa City, Iowa:* This will acknowledge receipt of your request of recent date for the opinion of this department on the following:

The law creating old age assistance provided that when this tax was paid, the amount should be deducted from the regular poll tax. The 46th General Assembly by amendment struck out this provision, taking effect July 1, 1935.

"I have advised the treasury that no deduction be made from the poll tax after that date. The treasurer's office have been told that Muscatine County have an opinion from your office to the effect that they should allow this deduction after July 1, and to satisfy them, I would like to have an opinion or a copy of an opinion given to some other county."

A search of our files fails to reveal an opinion on this point. In a conference with officials of the Old Age Assistance Commission, Auditor of State's

office and this department, on this date, the ruling which was placed into effect prior to this time by both the Auditor and the Commission is reaffirmed. In a conference held in the month of June by officials of the above mentioned three departments of state, the result of which was given to the press, it was determined that the correct procedure in this matter is as follows:

Where the old age assistance tax is paid prior to July 1, 1935, a credit can be given on the poll tax at any time whether the road poll tax is paid subsequent to July 1st or not. But where the head tax, under the old age assistance law, is paid subsequent to that date, then no credit can be allowed by reason of the change in the law, to which you call our attention, and which went into effect on July 1st of this year.

A question has also arisen with reference to the head tax being paid by employers from receipts of employees, which did not come to the attention of the County Treasurer until subsequent to July 1, 1935, but which were in fact paid prior to that date, the delay having been caused in most instances by the money being sent to the State Treasurer's office and notification to this effect did not reach the County Treasurer's office until subsequent to that date. In such cases, credit is allowed. This, we view, as an administrative detail and the money was in fact paid prior to the time the amendment went into effect.

BEER BILL: MATTER OF REFUND: EXPIRATION OF PERMIT: (Marion Thompson, Rhodes, Marshall County)

He should have received a refund from July 1st to August 9th. If a permit was granted on this date, it would expire a year from this date.

October 8, 1935. *County Attorney, Marshalltown, Iowa:* This will acknowledge receipt of your letter of recent date in which you request the opinion of this department on the following:

Mr. Marion Thompson of Rhodes, Marshall County, had a class "B" permit which expired August 9, 1935, but on July 1, 1935, was automatically cancelled with all other permits. Apparently the town council refused to make a refund to him covering the unexpired period of time. At what time do beer permits issued after July first expire? Are permits cancelled as of July 30, 1936?

The following situation also exists with reference to Mr. Thompson's business:

"He leased the place on July 8, 1935, to a Mary Blink, who is now operating the same, and this fact seems to have some bearing on the Rhodes town council. Inasmuch as the beer permit was cancelled July 1st, it would seem that this would have no connection with Mr. Thompson receiving a refund. I merely mention this so that you may have all the facts."

In accordance with the beer law, as amended by the 46th General Assembly, all class "B" permits * * * * shall terminate as of July 1, 1935. Further:

"The authorities empowered by this act to issue permits *shall* refund the permit holder an amount proportionate to the unexpired term of the permit, except in cases where the county has received one-half (½) of the permit fee and in such cases the county *shall* refund one-half (½) of the said proportionate amounts and the granting authority the other one-half (½)."

This apparently is clear. Two points are stressed in the *amended* act. They follow:

1. A refund shall be made in an amount proportionate to the unexpired term of the permit.

2. All permits shall be cancelled.

Therefore, the fact that Thompson leased his place of business to someone else on July 8th would not control, as his permit should have been cancelled as of July 1, 1935. He should have received a refund from July 1st to August 9th.

You are further advised that the present beer law, in Section 1921-f100, provides as follows:

"All permits provided for in this chapter shall expire at the end of one year from the date of issuance, and may be renewed for a like period upon application being made therefor to the proper authorities as in this chapter provided. * * * *"

Therefore, permits will not expire or be cancelled on June 30, 1936, unless they are granted as of July 1, 1935. This section seems to be clear that all permits shall expire at the end of one year from date of issuance. Therefore, if a permit was granted on this date, it would expire a year from this date. The provisions, with reference to the cancellation and refund as of July 1, 1935, was, in the opinion of this department, to give uniformity to the amount to be charged for class "B" permits, as the amended beer law gives cities and towns the right to limit the number of permits and also to fix the fee to be charged between $100.00 and $300.00.

SPECIAL CHARTER CITIES: DAVENPORT: Power to suspend, cancel or remit taxes.

October 8, 1935. *City Attorney, Davenport, Iowa:* Your letter of September 6, 1935, addressed to the Attorney General, has been referred to me for reply. You submit several questions with reference to the power of the City of Davenport, as a special charter city, to suspend, cancel, or remit taxes. Your first question is as follows:

"Does the City of Davenport as a special charter city levying and collecting its own taxes, have the power to suspend taxes for the current year?"

Municipal corporations are creatures of the statute and have only such powers as are expressly conferred upon them by statute and such other powers as are implied and necessarily incidental to the powers expressly conferred. Cities and towns generally have no statutory or implied power to suspend, cancel or remit taxes. Section 6227 of the Code of Iowa, 1931, relating to cities and towns, provides:

"That all assessments and taxes of every kind and nature, levied by the council except as otherwise provided by law, shall be certified by the Clerk on or before the first day of September by the County Auditor, and by him placed upon the tax list for the current year, and the County Treasurer shall collect all assessments and taxes so levied in the same manner as other taxes, and when delinquent they shall draw the same interest and penalties."

Section 6229 provides how taxes so collected shall be paid over to the City Treasurer. Section 6871 relating to special charter cities provides:

"That the council may provide by ordinance for certifying all taxes and assessments to the County Auditor as provided by Sections 6227 to 6229 inclusive, which shall be applicable to the city adopting the provisions thereof and the taxes so certified shall be collected and paid over in the same way with the same penalties, rights and liabilities as in and for other cities to which such sections are applicable."

The city of Davenport as a special charter city, has elected to levy and collect its own taxes and has elected not to collect such taxes throughout the county. So far, then, as the city of Davenport is concerned, the County Board of Supervisors has nothing to do with the collection of taxes for the use of the city and since the county and its officers have nothing whatever to do with the collection of taxes within the city of Davenport for the use and benefit of the city, and since the county Board of Supervisors, Auditor and Treasurer have no record of the taxes collected for city purposes, it would seem obvious that the Board of Supervisors of Scott County would be very slow to assume authority under Section 6950 of the Code to suspend, cancel, or remit taxes due and payable to the city of Davenport. For convenience we set out Sections 6950 and 6951 of the Code as follows:

"Petition for exemption. Whenever a person, by reason of age or infirmity, is unable to contribute to the public revenue, such person may file a petition, duly sworn to, with the Board of Supervisors, stating such fact and giving a statement of property, real and personal, owned or possessed by such applicant, and such other information as the board may require. The Board of Supervisors may thereupon order the County Treasurer to suspend the collection of the taxes assessed against such petitioner, his polls or estate, or both, for the current year, or such board may cancel and remit said taxes, provided, however that such petition shall first have been approved by the council of the city or town in which the property of the petitioner is located, or by the township trustees of the township in which said property is located."

"Section 6951. Additional order. The Board of Supervisors may, if in their judgment it is for the best interests of the public and the petitioner, cancel and remit the taxes against the petitioner assessed, his polls or estate or both, even though said taxes have previously been suspended as provided in the preceding section."

Section 7007 makes both of said sections applicable to cities acting under special charter. Section 6732 provides:

"Whenever the words "Boards of Supervisors," "County Auditor or Recorder of Deeds," and "County Treasurer" are used in any section made applicable to special charter cities, the words "City Council" "City Clerk" or "City Recorder" and "City Collector or Treasurer" shall be respectively substituted."

Since Sections 6950 and 6951 are expressly made applicable to special charter cities, it clearly is the intent of the law that taxes may in proper cases be suspended, cancelled or remitted in the city of Davenport, the same as in all other cities in the State of Iowa, and the only difficulty in connection with this question is that of determining whether the city council of the city or the Board of Supervisors is vested with the authority to order the suspension, cancellation or release provided by law. In view of the fact that the city of Davenport exercises complete authority and jurisdiction over its city revenue derived from taxation without any assistance or intervention from the county and in view of the fact that Section 6732 provides:

"That wherever the words "Board of Supervisors" are used in any section made applicable to special charter cities, the words "City Council" shall be substituted."

We are of the opinion that the council of the city of Davenport has, under Section 6950, the authority upon proper application to suspend the collection of taxes for the current year. In other words, it is our opinion that Section

6950 may be read as though the words "board of supervisors" were erased from said section and the words "city council" substituted therefor.

Your second question is:

"Does said city have the power to suspend taxes that are not for the current year, but are delinquent and unpaid?"

In answer to your first question we hold that so far as the collection of taxes by the city of Davenport is concerned, the City Council may do under Sections 6950 and 6951 all of those things with reference to taxes collectible by the city which the Board of Supervisors may do as to the taxes collectible by the County Treasurer. The Board of Supervisors may order the County Treasurer to suspend the collection of taxes assessed against the petitioner, his polls or estate or both for the current year or such Board may cancel and remit said taxes with the approval of the Council of the city or town. Since Section 6950 provides that the Board may order the Treasurer to suspend the collection of taxes assessed against the petitioner for the current year, and no reference is made to other years, it appears your second question should be answered in the negative.

Your third question is as follows:

"Does the city of Davenport as a special charter city levying and collecting its own taxes, have the power to cancel and remit taxes for the current year?" We answer your third question in the affirmative.

Your fourth question is as follows:

"Does it have power to cancel and remit taxes not for the current year but which are delinquent and unpaid?"

This question, we believe, should be answered in the negative.

We quote your fifth question as follows:

"If it has power to cancel and remit taxes, does it have power to cancel and remit taxes for previous years which have not been suspended?"

The answer to this question, in our opinion, is no.

Your sixth question follows:

"If it has power to suspend or to cancel and remit taxes or both, does this apply to both personal and real estate taxes?"

Section 6950 provides:

"That wherever a person by reason of age or infirmity is unable to contribute to the public revenue, the Board of Supervisors on proper petition may suspend the collection of taxes against such petitioner, his polls or estate or both."

We believe this language is intended to cover both personal and real estate taxes.

BOARD OF CONTROL: TRAINING SCHOOL FOR GIRLS AT MITCHELLVILLE: MARRIED WOMEN. Married women should not be committed to Training School for Girls at Mitchellville and one so erroneously committed should be transferred to Women's Reformatory at Rockwell City.

October 8, 1935. *Board of Control:* We have your request for opinion on the following proposition:

"Will you please advise whether a married woman should be committed to

the Iowa Training School for Girls at Mitchellville, or to the Women's Reformatory at Rockwell City?"

In McPherson vs. Day, 162 Iowa, 251, our Supreme Court had before it the question of whether the Board of Control could legally detain a girl at the Industrial School for Girls at Mitchellville after she had attained the age of 18 years and had married. The court there held that such a commitment was until the girl attained the age of 21 years of age, and therefore, her marriage would be immaterial. But the court after so holding, said at page 252:

"The situation here presented is quite anomalous, as it may result in confining a married woman in the Industrial School."

The court then, to get around the proposition of holding that the mere fact of marriage did not entitle the girl to release from the school and the counter-proposition that a married woman should not be confined in the School, stated that they would not require the married woman to be returned until after a proper showing was made.

Paragraph 3, Section 3646 of the Code of Iowa, 1931, provides in part:

"But married women, prostitutes and girls who are pregnant shall not be committed to the Training School."

Section 3726 provides that all females over 18 years of age and married females under 18 years of age, who are convicted in the district and shall, if imprisonment be imposed, be committed to the Women's Reformatory."

Sections 3617 and 3620 of the Code or merely general provisions and it is not intended by those provisions that married women be committed to the School at Mitchellville, and in fact, it appears that if detention in the school is for the betterment of the girls, they should not be placed in a home and made to associate with married women who might be committed there, as necessarily most of the girls are of a tender age and if such were allowed, the whole purpose of the institution would be defeated.

It is, therefore, the opinion of this department that married women should not be committed to the Training School for Girls at Mitchellville and that one so erroneously committed should be transferred by proper order of the Board to the Women's Reformatory at Rockwell City and that the court committing the girl should be so notified so that their records may reflect the place of detention of the girl.

BUILDING AND LOAN ASSOCIATIONS: SHARE ACCUMULATION LOANS AND DIRECT REDUCTION LOANS: ARTICLES PROVIDE ANY BORROWER BE MEMBER:

"If the articles of incorporation so provide, said associations may make the two types of loans mentioned, to-wit, share accumulation loans and direct reduction loans. * * * * we believe it is advantageous and desirable and possibly required that a member should be the holder of at least one share of stock on which he has made a payment of at least one dollar."

October 10, 1935. *Auditor of State:* In reply to your letter of September 10th, in which you put forth the following questions:

(1) May Iowa Building and Loan Associations provide by articles of incorporation for making loans on both the share accumulation plan and direct reduction plan, in the former by requiring the borrower to subscribe for, and pledge and pay for shares with which to retire the loan (this being the plan

now generally in use), the latter by merely subscribing for one qualifying share of stock and the borrower making payments directly in reduction of the principal amount, it being assumed that the interest on both types of mortgages will be the same?

(2) Can an Iowa building and loan association provide in its articles of incorporation that any borrower shall be a member and entitled to one vote and thereby eliminate the necessity of subscribing for one qualifying share of stock in connection with direct reduction loans?

We find nothing in the statutes to prohibit building and loan associations in Iowa providing in their articles of incorporation for the two types of loans set out in your first question. Section 9313 of the Code provides:

"The articles of incorporation shall show:

(4) The plan of becoming and continuing a member.
(5) The plan of making loans."

If the articles of incorporation so provide, said associations may make the two types of loans mentioned, to-wit, share accumulation loans and direct reduction loans.

In answer to your second question, the articles could not provide that any borrower shall be a member and be entitled to one vote because Code 9342 states that the member can vote only if he owns stock. We have made a thorough search of the statutes and find nothing in our laws which distinctly and directly requires a member to be a stockholder—we find nothing on either side of the question, so we have looked into the law of other jurisdictions. We find the prevailing rule is to the effect that membership in a building and loan association is acquired in the same manner as in all other corporations for profit, by becoming holders of capital stock, there being no substantial difference between members and stockholders. This rule is announced in Sundheim's Buildings & Loans, Third Edition, Section 22. In the absence of any authority of any kind in Iowa, it is probable that the prevailing rule would be followed.

In our opinion, this rule should be followed. In the case of Acklin vs. People's Savings Association, 293 Federal, 392, the Supreme Court of the United States held "a stockholding loan of one dollar qualified a person as a member within the meaning of the Federal Reserve Act of 1921, and entitled him to a loan of any amount."

In view of the general rule in Sundheim and the U. S. Supreme Court holding, we believe it is advantageous and desirable and possibly required that a member should be the holder of at least one share of stock on which he has made a payment of at least one dollar.

WELLS: WATER SUPPLY: CONTAMINATION: Mayor and council may by action in equity abate unhealthful conditions and as Board of Health may order owner to remove at own expense source of contamination.

October 10, 1935. *Commissioner of Health:* Your letter of October 4th addressed to the Attorney General has been referred to me for reply.

You state as follows:

"That an analysis of the samples of water from the well serving as the source of public supply in the town of Havelock, Iowa indicated contamination of the water. That upon inspection by an engineer from your department, no defects were found in the well which might be responsible for the

pollution, but that a privately owned well, the property of one, Mrs. Ella Lane, directly across the street and in close proximity to the city well, appears to be the source of the contamination of the city well."

You state further as follows:

"That a sample of the water taken from Mrs. Lane's well discloses heavy contamination and that an inspection of the well construction reveals defects which could easily be responsible for such contamination. That the construction of Mrs. Lane's well is such that it would endanger the entire underground water-bearing stratum from which the city derives its supply and that it seems most logical that the contamination of the water entering Mrs. Lane's well would result in contamination of the city well."

In connection with the above situation you submit three questions, the first of which is as follows:

"Would the mayor and council of Havelock, either acting as mayor and council or as local Board of Health, have the power to compel Mrs. Lane to either reconstruct the well, correcting the defects which are responsible for permitting contamination to enter an underground water-bearing formation which is the source of municipal water supply, or require her to abandon the well and plug it up to prevent further contamination?"

Section 5739 of the Code, 1931, relating to general powers of cities and towns is as follows:

"5739. Nuisances-action to abate. They shall have power to prevent injury or annoyance from anything dangerous, offensive, or unhealthful: to cause any nuisance to be abated, and to provide for the assessment of the cost thereof to the property. They may prohibit any public or private nuisance, and may maintain actions in equity to restrain and abate any nuisance."

Under this section the City Council would have the authority in case an adjustment could not be made by agreement between the parties, to maintain an action in equity to restrain and abate any nuisance. This section controls action by the Council.

Section 6141 gives cities and towns jurisdiction over territory occupied by public waterworks and all reservoirs, mains, filters, streams, pipes, drains and apparatus of said works so used in or necessary for the construction, maintenance and operation of the same and over the stream or source from which the water is taken for five miles above the point from which it is taken. If contamination of the water in the city well comes by underground streams from the well of Mrs. Lane, the city without question has jurisdiction under the sections referred to, to abate the nuisance by proper action in equity.

Section 2240 of the Code is as follows:

"2240. Abatement of nuisance. The local board may order the owner, occupant or person in charge of any property, building, or other place, to remove at his own expense any nuisance, source of filth, or cause of sickness found thereon, by serving on said person a written notice, stating some reasonable time which such removal shall be made within, and if such person fails to comply with said order, the local board may cause the same to be executed at the expense of the owner or occupant."

Under this section the local board may order the owner, occupant or person in charge of any property, building or other place, to remove at his own expense any nuisance, source of filth, or cause of sickness found on the premises. If such person fails to comply with the order of the local board, it may cause

the order to be executed at the expense of the owner or occupant. The simpler procedure probably would be for the local Board of Health to proceed under Section 2240 of the Code. If the owner of the premises on which the nuisance is located, will not correct the defects responsible for the contamination of the city well, then the Board shall proceed to correct the situation. The well has certain property value to its owner and if it could be so repaired as to make it no longer a nuisance, such repair should be made by the owner or at her expense. If repairing the well does not correct the situation, the Board could require her to abandon the well and plug it, if such step is the logical one to take in the course of preventing further contamination of the city well.

Your second question is:

"If the municipality has this power under one of the sections previously quoted or under some other section of the Code, what would be the proper legal procedure for the municipality to follow?"

In answering the first question, we appear to have answered your second question.

Your third question is:

"Would the State Department of Health have any jurisdiction in the matter other than to recommend the proper procedure to the municipality (See Section 2191, subsection 7, Code of 1931)?"

Section 2191 referred to by you in your question prescribes the powers and duties of the Department of Health and Subsection 7 of said section provides that said department shall "make inspection of the public water supplies, sewer systems, sewage treatment plants, and garbage and refuse disposal plants throughout the state and direct the method of installation and operation of the same." You have caused inspection of the public water supply in question to be made and your department has the further power to direct the method of installation and operation of said water supply system. Subsection 1 of said section gives your department the power "to exercise general supervision over the public health, public hygiene and sanitation and unless otherwise provided, enforce the laws relating to the same." While we are not prepared to say that the jurisdiction of your department is limited to merely recommending the proper procedure to be followed by the municipality.

It is our opinion that the situation under consideration should be handled by the municipality with the aid and advantage of such recommendation as your department is able to give.

SUBPOENA: MILEAGE: WITNESS: WOODBURY COUNTY. State under no obligation to pay mileage of witnesses subpoenaed to appear before a Grand Jury. County should pay such mileage.

October 11, 1935. *Executive Council:* You have referred to us for an opinion a letter dated August 19th, received by you from the Clerk of the District Court of Woodbury County, in which the Clerk advises that you are not entitled to receive mileage from Des Moines to Sioux City and return, from Woodbury County. The second paragraph of the Clerk's letter is as follows:

"Mr. Havner has informed us that you as state officer would have to obtain this mileage through the state and not through the county."

You were subpoenaed by the Clerk of the District Court of Woodbury County, the subpoena requiring you to take with you from your office in Des Moines certain records and files. The subpoena commands you to appear before the Grand Jury of Woodbury County on the sixth day of August, 1935. If you did appear as a witness pursuant to subpoena and if the subpoena was served upon you in Des Moines, you are entitled to the mileage as a witness before the Woodbury County Grand Jury, the same as any other witness appearing before said Grand Jury in response to a subpoena, and Woodbury County has no more right to refuse payment of your actual mileage than it has to refuse the payment of the mileage of any or all other Grand Jury witnesses.

The officers of Woodbury County compelled your attendance before the Grand Jury and that county clearly should pay your mileage. The state is under no obligation to pay the mileage of witnesses subpoenaed to appear before the Woodbury County Grand Jury or any other Grand Jury.

BASIC SCIENCE ACT: RECIPROCITY: Chapter 17, Acts 46th General Assembly. New standards for admission to practice applicable after July 4, 1935 to all not then licensed in Iowa. Students enrolled and in attendance on July 1, 1936 and prior thereto are exempt from the provisions of the Act if they later finish course in Iowa schools.

October 14, 1935. *Board of Osteopathic Examiners:* Your letter of October 7th addressed to the Attorney General has been referred to me for reply.

You request an interpretation of Section 5 of the Basic Science Act of July 4, 1935, and present two questions:

"First. Would this basic science act effect applicants for reciprocity from states with whom this board have enjoyed reciprocal relations in the past, provided such applicants were regularly licensed in such states at or prior to the time this basic science act became effective or July 4, 1935? Our board has held that those who were licensed in any state at the time this act became effective were eligible to reciprocity without writing a basic science examination, while those licensed in another state after July 4th would be required to present a certificate of proficiency in the basic sciences."

In an opinion dated September 30th we rendered an opinion to Dr. Walter L. Bierring, State Commissioner of Health, in which we held that Chapter 17, Acts of the 46th General Assembly, which became effective on July 4th, 1935, applies to physicians and surgeons, osteopaths, osteopaths and surgeons, and chiropractors holding licenses at the time the act took effect, unless at such time they were licensed in the State of Iowa. The Basic Science law sets up new standards for admission to the practice of said profession in the State of Iowa effective since July 4, 1935, and in our opinion that part of Section 5 of said act which provides that "nothing in this act shall be construed to apply to persons holding licenses, as physicians, surgeons, osteopaths, osteopaths and surgeons, or chiropractors, at the time this act takes effect," applies only to persons holding such licenses within and from the State of Iowa. Our reasons for this holding are set out in detail in the opinion above referred to, rendered to Dr. Bierring. We enclose a copy of that opinion.

Your next question is as follows:

"Second. Does the last sentence in Section "5" "that students regularly registered enrolled and in attendance as of July 1, 1936, etc." imply July 1, 1936 and prior thereto?"

This question calls for a construction of the following language in Section 5 of the Basic Science Act:

"This act shall not apply to students regularly registered, enrolled and in attendance as of July 1, 1936 in accredited schools of medicine, osteopathy or chiropractic in the State of Iowa."

This language seems to be plain and susceptible of only one construction, namely, that the act shall not apply to students regularly registered, enrolled and in attendance on July 1, 1936, in accredited schools of medicine, osteopathy and chiropractic in this state. The act became effective on July 4, 1935, but made an express exemption from its provisions in favor of students regularly enrolled and registered and in attendance in certain schools as of July 1, 1936. This provision of the statute should have a liberal construction so that it will accomplish what the Legislature intended. It would hardly be claimed that this exemption would apply to a student registered, enrolled and in attendance as of July 1, 1936, and would not apply to a student regularly registered, enrolled and in attendance as of June 1, 1936, and who perhaps graduated or received his degree from such school between July 4, 1935, and July 1, 1936. In that situation, we would construe the exception or exemption contained in that statute so as to cover the period between said dates. It is conceivable that licensees from other states will register in Iowa schools and be enrolled and in attendance between July 4, 1935, and July 1, 1936, merely for the purpose of circumventing the Basic Science statutes. It is our opinion that such attendance must be in good faith and if it does not lead up to the conclusion of the course offered and a graduation certificate, merely being registered, enrolled and in attendance in some school during part of said period would not bring such student within the exception contained in the statute.

SOLDIERS' RELIEF: RESIDENCE FOR SOLDIERS' RELIEF PURPOSES: Actual and bona fide residence in good faith all that is required. Legal settlement statutes not applicable.

October 15, 1935. *County Attorney, Indianola, Iowa:* It is the opinion of this office that for soldiers' relief purposes, residence for one year is not necessary. In order to be entitled to relief so far as residence or legal settlement is concerned, all that is necessary is an actual and honest residence in good faith within the county from which soldiers' relief is sought. Much depends upon the intention of the parties as to whether they change their residence. An ex-service man who lived in Polk County might stay temporarily in Warren County for much more than three months without establishing a residence there. The good faith establishment of a residence in your county is the determining factor in handling soldiers' relief cases.

CITIES AND TOWNS: SALARY OF MAYOR: City Council may fix salary of Mayor so as to include ten per cent of license fees collected.

October 15, 1935. *County Attorney, Hampton, Iowa:* Your letter of Oc-

tober 9th addressed to the Attorney General has been referred to me for reply.

You set out Section 1 of the Town Ordinances of the the Town of Latimer relating to the salary of Mayor, such section providing that he shall receive a salary of $50.00 per year, and for holding a Mayor's court or discharging the duties of the Justice of the Peace, a compensation allowed by law for such officer, to be paid in the same manner, and for issuing a license or permit pursuant to the ordinances of the town, he shall receive ten per cent of the license fee collected for such license.

You present the question as follows:

"Whether or not the fees for licenses and permits issued under the town ordinances are within the contemplation of Section 5671, and whether the ordinance providing that the Mayor shall receive ten per cent of license fees collected relates to fees which the Mayor may legally collect as a part of his salary?"

Section 5665 of the Code of Iowa, 1931, provides:

"5665. Fees of mayor. Mayors of cities and towns, where no salary is provided by ordinance in lieu of fees, shall receive, for holding a mayor's or police court, or discharging the duties of a justice of the peace, the compensation allowed by law for similar services for such officers, to be paid in the same manner."

It might be claimed with some force that the Mayor may receive no fees other than those provided for by this section. As a matter of course he should not collect fees or compensation not expressly authorized by law. This section does not limit the Council, however, in fixing the salary of the Mayor. It provides for fees in certain cases "where no salary is provided by ordinance in lieu of fees."

Section 5670 of the Code is as follows:

"5670. 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."

This section makes it the duty of the Mayor where the salary is fixed by ordinance in lieu of all other compensation, to "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."

Section 5639 prescribes certain powers and duty of the Mayor including the following:

"3. Signature: He shall sign all commissions, licenses, and permits granted by the authority of the council, and do such other acts as by law or ordinance may require his signature or certificate."

Section 5745 relating to the general powers and duties of cities and towns provides that they shall have the power to limit the number, regulate licenses and prohibit certain activities and practices within their respective jurisdiction. It may be said then that licenses are issued not by the Mayor, although he ordinarily attaches his signature thereto, but by the city or town by authority

of the Council. In view of this situation, it is our opinion that fees received for licenses and permits issued under town ordinances are not within the contemplation of Section 5671, which is as follows:

"5671. Compensation of other officers. All officers in any city or town, whose compensation is not fixed by law, shall receive as compensation the fees of the office, or a salary, or both the fees and a salary as the council shall prescribe."

The fees in question are not fees of the office of Mayor and insofar as fees which may be retained or paid to the Mayor as a part of his salary are concerned, such fees must be fees of the office of Mayor.

JUSTICE OF THE PEACE: POLICE JUDGE: One person cannot legally hold both the office of Justice of the Peace and office of Police Judge at the same time.

October 15, 1935. *County Attorney, Muscatine, Iowa:* I have your letter of October 7, 1935, requesting an opinion from this department on the following proposition:

You state that on August 21, 1935, the Deputy Sheriff of Muscatine County, served a notice on you as County Attorney, which notice was signed by H. S. Olson, demanding that you take immediate steps legally necessary to prevent J. C. Coster from occupying the office of Justice of the Peace in and for Muscatine Township, Muscatine County, Iowa, and also Police Judge of the City of Muscatine, Iowa.

You further state that the City of Muscatine is a special charter city and that the said J. C. Coster qualified for the office of Justice of the Peace in and for Muscatine Township, Muscatine County, Iowa, after he had qualified for the office of Police Judge of the City of Muscatine, Muscatine County, Iowa, and has been holding both offices and attempting to perform the duties of both from the time he qualified for both offices, up to the present time.

It is my understanding that J. C. Coster was elected to the position of Police Judge in the March, 1934, city election and that he duly qualified for this office. It is my further understanding that at the time he was elected and qualified for the office of Police Judge of Muscatine, that he was serving as Justice of the Peace in and for Muscatine Township, and that he served as Justice of the Peace throughout the balance of the year 1934, finishing his term as Justice of the Peace for which he was elected in 1932 and qualified as of January 1, 1933. It is my further understanding that the said J. C. Coster was a candidate for re-election as Justice of the Peace in the fall election of 1934 and that he was elected to this office and qualified for it as of January 1, 1935, for a two-year term, and that he is still serving as Justice of the Peace in and for Muscatine Township, Muscatine County, Iowa, for the term for which he was re-elected in the fall of 1934.

The question that you raise, is whether or not he has the legal right to hold both offices at the present time.

In *Bryan vs. Cattell,* 15 Iowa 538, the Supreme Court of Iowa held that, in determining whether a vacancy exists in an office, the court is not confined to statutory causes, but may declare it vacant if it is incompatible with the office held. 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."

Magie vs. Stoddard, 25 Conn. 565, 68 Am. Dec. 375.
People vs. Hanifan, 96 Ill. 420.
Pichon vs. State, 149 Ind. 223, 48 N. E. 1038, 39 L. R. A. 278, 63 A. S. R. 270.
Stubbs vs. Lee, 64 Me. 195, 18 Am. Rep. 251.
Attorney General vs. Common Counsel of Detroit, 112 Mich 145, 17 N. W. 450, 37 L. R. A. 211.
State ex rel Knox vs. Hadley, 7 Wisc. 700, — N. W. —.
Bryan vs. Cattell, 15 Iowa 538.
State vs. Anderson, 155 Iowa 271, 136 N. W. 128.
State ex rel Banker vs. Bobst, 205 Iowa 608.

In the last case above cited, Justice Kindig of the Supreme Court of Iowa, states the rule for determining incompatibility as follows, on page 610 of Volume 205 of the Iowa Reports:

"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 vocates 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 italics are ours.)

In the case of *State vs. Bobst*, supra, the question presented to the Iowa Supreme Court was whether or not the office of constable of Washington Township in Franklin County, was ipso facto vacated when the incumbent qualified as marshal of the city of Hampton, which was located in Washington Township, Franklin County, Iowa. The court there held that these offices were incompatible, and that when the incumbent qualified and accepted the office of marshal, that he thereby ipso facto vacated the office of constable, for the reason that the Legislature provided that this township should be entitled to two constables and a city marshal. The Legislature contemplated that there should be three conservators of the peace, within the boundaries of this township, and that when one incumbent held both offices, that thereby the number of conservators of the peace was reduced from three to two, which was held to be a violation of the statutes and contrary to public policy. The language used by Justice Kindig in handing down this decision relative to the number of conservators of the peace that were required by law, is as follows:

"Gathering its ideas from the early forms of government in America, this state adopted the township and city systems as separate and distinct jurisdictions for the administration of justice and the preservation of peace. Whether right or wrong, needing change or maintenance, it is still part of our governmental form, as enacted into written law; and therefore the legislature, and not the courts, must bring about a new scheme of dispensing justice and protecting the people against wrong-doers, if any is to be adopted.

Within the purview of the legislative purpose under the enactments referred to is a city marshal, in addition to two constables. This makes possible three conservators of the peace within the boundaries of their respective jurisdictions. Less than three was not contemplated. * * * * Permission for him to do this means minimization of the public service, abrogation of the statutory requirements, and departure from our original governmental forms. Public policy, and not physical absence, causes the 'incompatibility,' and the judgment of the district court should be, and hereby is, affirmed."

In the case of *State ex rel Knox vs. Hadley*, 7 Wisc. 700, which case was cited with approval of our Supreme Court in *State vs. Anderson*, supra, the Supreme Court of Wisconsin held that the office of Police Justice of the City of Watertown, Wisconsin, was incompatible with the office of Justice of the Peace of said city. According to the provisions of the city charter of Watertown, Wisconsin, the city was entitled to four Justices of the Peace, one of which was to be denominated as a Police Justice. In other words, the city was entitled to one Police Justice and three Justices of the Peace. In deciding this question, the Supreme Court of Wisconsin said:

"We consider that the two offices are clearly incompatible with each other and that one person cannot and should not hold both of them at the same time. In the plainest terms, the charter gives the city four judicial officers of the grade of justice of the peace; while if the relator could make good his right to the office of police justice, it would in fact have but three."

Let us now inquire as to how many judicial officers of the grade of Justice of the Peace the city of Muscatine and the township of Muscatine are entitled to under the laws of this state and the city ordinances of Muscatine, Iowa.

Section 523 of the 1931 Code of Iowa provides that "in all townships, except such as are included in the territorial limits of municipal courts, there shall be elected biennially two justices of the peace * * * * who shall hold office two years and be county officers." It is, therefore, clear that Muscatine Township, Muscatine County, Iowa, is entitled under the law to two Justices of the Peace. Under our form of state government, the township and city systems are separate and distinct jurisdictions for the administration of justice and the preservation of peace. See *State vs. Bobst*, 205 Iowa, on page 611. Under the laws of the State of Iowa, and the city ordinances of Muscatine, Iowa, the city of Muscatine is entitled to the office of a Police Judge. Page 81, Chapter 11 of the Revised Ordinances, 1918, of the city of Muscatine, Iowa, provides for the election of a Police Judge during the month of March in each even numbered year. Special charter cities are authorized by state law to have Police Judges. See Chapter 329 and especially Section 6706 of the 1931 Code of Iowa.

Judges of the Police Court are magistrates the same as Justices of the Peace, as defined by the laws of the State of Iowa. See Section 13403 of the 1931 Code of Iowa. Therefore, the Police Judge, as a magistrate under the laws of Iowa, has power to hear complaints or preliminary informations, issue warrants, order arrests, require security to keep the peace, make commitments and take bail as provided by law. See Section 13404 of the 1931 Code of Iowa. It is, therefore, clear that the Police Judge on hearing a preliminary information, may bind over the accused to await the action of the next grand jury of the county, the same as if said preliminary hearing was held before a Justice of the Peace. Hence, if a preliminary information

was filed against accused in the Police Court of the said J. C. Coster, and an affidavit for a change of venue was filed in accordance with Section 13569, it would be the duty of said Police Judge to grant the change of venue and order the cause to be sent to the next nearest Justice in the township. The next nearest Justice in the township might be Justice of the Peace J. C. Coster. Such a situation was not contemplated by the Legislators of the State of Iowa when they enacted into law the provisions now contained in Sections 13569 and 13570 of the 1931 Code of Iowa.

The city of Muscatine is a city of the first class, and as such is entitled to a police court where there is no municipal or superior court, and said police court in all criminal actions shall have the jurisdiction of a Justice of the Peace Court. See Section 5728 of the 1931 Code of Iowa.

It is our understanding that the city of Muscatine has no municipal or superior court. It is our further understanding that the boundaries of the city of Muscatine, Iowa, are coextensive with the boundaries of the township of Muscatine, Iowa. It, therefore, clearly appears that the township of Muscatine is entitled to two Justices of the Peace and the city of Muscatine is entitled to a Police Judge. The legislative enactments and the city ordinance above referred to, plainly and clearly show that it was contemplated that the township of Muscatine and the city of Muscatine were entitled to three judicial officers of the grade of Justice of the Peace, at least in criminal cases. Less than three such officers were not contemplated or intended.

Under the facts presented, it appears that when J. C. Coster qualified for the office of Police Judge of the city of Muscatine in March, 1934, that he thereby ipso facto vacated the office of Justice of the Peace for the remainder of his term for which he was elected in the fall election of the year 1932. In other words, he could not legally act as Justice of the Peace of Muscatine Township from the time that he qualified as Police Judge of the city of Muscatine until January 1, 1935. However, in the fall election of 1934, he again presented himself as a candidate for Justice of the Peace in and for Muscatine Township, and was elected by the voters at such election. In January, 1935, he qualified for the office of Justice of the Peace for the term of two years, which would be for the years 1935 and 1936. At the time that he qualified for and accepted the office of Justice of the Peace for the two-year term beginning January 1, 1935, he was also holding the office of Police Judge of the city of Muscatine. The act of J. C. Coster in qualifying for the office of Justice of the Peace in and for Muscatine Township, in January, 1935, ipso facto vacated his office as Police Judge of the city of Muscatine.

It is, therefore, the opinion of this department that the said J. C. Coster cannot legally hold the offices of Justice of the Peace in and for Muscatine Township, Muscatine County, Iowa, and the office of Police Judge of the city of Muscatine, Iowa, and that the office of Police Judge of Muscatine, Iowa, has been legally vacated since the time that the said J. C. Coster qualified for the office of Justice of the Peace in and for Muscatine Township, Muscatine County, Iowa, in January, 1935. It is further the opinion of this department that the said J. C. Coster should no longer attempt to perform or assume the duties of Police Judge of Muscatine, Muscatine County, Iowa, and that the office, being vacant, should be filled by another qualified person in accordance with law.

It is further the opinion of this department that if you neglect or refuse to bring quo warranto proceedings for the purpose of tesing the right of J. C. Coster to hold the office of Police Judge in Muscatine, when formal demand has been made upon you as stated in your letter, then any citizen of the state, having an interest in the question, may apply to the court at which the action is to be commenced or to the Judge thereof, for leave to do so, and upon obtaining such leave may bring and prosecute the action to final judgment. The bringing of such an action is discretionary with the County Attorney unless directed by the Governor, the General Assembly or a court of record. However, it appears to us that the bringing of such an action by yourself as County Attorney, would clearly be an exercise of a sound discretion and would be for the public interest, as hereinabove pointed out in this opinion.

FEDERAL HOUSING ACT, MAKE LOANS UNDER: BUILDING AND LOAN ASSOCIATIONS: INSURANCE FEATURE OF FHA. (SECTION 9314) If building and loan associations desire to take advantage of insurance feature of FHA, they must amend their charter to fix a lower rate of interest in accordance with provisions of FHA, and it shall apply uniformly to all members of said association.

October 16, 1935. *Auditor of State:* We acknowledge your letter of recent date requesting our opinion on the effect of House File 438 of the 46th General Assembly, on Section 9314 of the Code, pertaining to building and loan interest rates.

The pertinent parts of House File 438 are as follows:

"An act to promote the objects of the National Housing Act by authorizing insurance companies and building and loan assoications, to make loans pursuant to Titles I and II of the National Housing Act, ..."

Section 1 of said act authorizes building and loan associations to make such loans as the Federal Housing Administrator insures or makes commitment to insure under Title II of the NHA.

Section 2 of said act authorizes building and loan associations, and others, to invest in bonds and notes secured by mortgage or trust deed insured by the Federal Housing Administrator, etc.

Section 3 of said act provides in part as follows:

"No law of this state * * * prescribing or limiting interest rates upon loans * * * shall be deemed to apply to loans or investments pursuant to the foregoing paragraphs."

The intention and purpose of the Legislature in enacting the foregoing statute is clearly apparent in the enacting clause. That said act was passed with the express purpose of permitting and enabling insurance companies and building and loan associations in this state to avail themselves of the advantages of Titles I and II of the National Housing Act is too apparent to suggest the slightest question or doubt. In order to determine what advantages are to be gained, we must look into the National Housing Act.

Title I of said act pertains to housing renovation and modernization and is of no particular interest to the subject at hand. Title II of said act, under the caption "Mutual Mortgage Insurance," sets out the following provisions:

"Sec. 203. (a)—The administrator is authorized, upon application by the mortgagee, to insure as hereinafter provided, any mortgage offered to him within one year from the date of its execution which is eligible for insurance as hereinafter provided, and upon such terms as the administrator may prescribe.....

(b)—To be eligible for insurance under this section a mortgage shall—

(5) Bear interest (exclusive of premium charges for insurance) at not to exceed 5 per centum per annum on the amount of the principal obligation outstanding at any time, or not to exceed 6 per centum per annumn if the administrator finds that in certain areas or under special circumstances the mortgage market demands it."

Section 9314 of the Code provides in short that if the Articles of Incorporation of a building and loan association are amended so as to reduce or lower the interest rate, said reduced rate shall apply to all loans made in the past, as well as those in the future. The maximum rate of interest is seven per cent under the statutes of this state. It should be noted that the maximum rate prescribed by the federal statute is five per cent, unless fixed by the Administrator at six per cent under certain circumstances. Considering the provisions of the Code Section 9314, the question naturally arises—if an association makes loans acceptable to the Federal Administrator at five per cent, will the provisions of Section 9314 of the 1931 Code of Iowa, compel the association to reduce all prior loans to five per cent?

We are inclined to the view that such was the intent of the Legislature in the enactment of House File 438. When we consider the declared purpose of this act, "to promote the objects of the National Housing Act by authorizing insurance companies and building and loan associations to make loans" pursuant to the Federal Act, we are bound to the conclusion that House File 438 was intended to be beneficial to state building and loan associations as such, and also to all of its members, and also to all of those who might become members of such associations in the future. It is to be presumed that the Federal Housing Act held out some attraction and benefit to the state associations and its members in order to interest the latter in taking advantage of the provisions of the Federal Housing Act. The benefit held out to state associations and its members by the FHA is the insurance feature of the Federal Housing Act, which feature practically guarantees the state associations against loss arising from their mortgage loans in case they comply with the federal regulations and secure the insurance as provided for by the FHA. The Federal Act thus held out to the state loan associations this guaranty of security against loss to the associations, and also permitted and made it possible for home owners to be more secure in the enjoyment of their own homes, by liberalizing the terms and conditions and interest rates that the home owners might be required to pay on their mortgage loans. The local state associations would be benefited more by having their mortgage loan risks insured by the Federal Administrator, even though the interest rate on the mortgage loans was reduced, than to carry on their loans with a higher rate of interest without this federal insurance. Any investor is willing to accept a lower rate of interest where the security given is safe and sound, than to invest in a doubtful security with a much higher rate of interest.

It seems to us that it was the intent of the National Congress in the passage of the FHA to not only assist the local state associations as associations in insuring them against loss on their mortgage loans, but also to help the home

owner retain his mortgaged premises. In order to secure these benefits to the state associations and to its members within the State of Iowa, the Legislature enacted House File 438 of the 46th General Assembly. Section 3 of this new state law simply means that Iowa has adopted the requirements of the FHA and that no state law shall apply to loans or investments which are made pursuant to the provisions of said House File 438. In other words, the State of Iowa has adopted the requirements of the FHA and the provisions of the FHA which control where loans are made in accordance with this new state law.

It appears to us that it was the legislative intent in the passage of House File 438 to permit state associations to take advantage of the insurance features of FHA and that this could be done without changing or modifying the provisions of Section 9314 of the 1931 Code of Iowa. House File 438 does not amend, revise or repeal Section 9314, but does provide a means whereby loan associations can take advantage of the benefits to be derived from the federal insurance feature of FHA within the provisions of Section 9314, by lowering their rates of interest to all members in order to meet the requirements of FHA. If the rate of interest is lowered for new members, then this rate of interest must apply to all members under the provisions of Section 9314 of the 1931 Code of Iowa. In this connection it is well to call your attention to Section 203 (a) of Title II of the Federal Housing Act which provides that no mortgage is eligible for this insurance unless presented to the Administrator within one year from the date of its execution. Old members of state associations whose mortgages have been in existence for more than a year can be permitted to renew or rewrite their mortgages on the new basis, in order to qualify them for the insurance feature of FHA and thereby have the new rate of interest apply uniformly to all members. When this is done, then the loan association can secure the FHA insurance on all of their mortgage loans, which would result in benefits to all parties concerned.

In our opinion the provisions of House File 438 of the 46th General Assembly do not permit state associations to accept new loans in order to meet the requirements of the FHA and to keep these new loans as a separate and distinct class or type of business from the business already transacted by said associations. The only way that this could be done would be to have the Legislature amend Section 9314 accordingly. House File 438 of the 46th General Assembly does not amend or change Section 9314 of the Code in order to justify such a separation of the business of a state building and loan association. House File 438 of the 46th General Assembly does not in any manner, amend or change Section 9314 of the Code.

It is, therefore, the opinion of this department that if building and loan associations within the State of Iowa desire to take advantage of the insurance feature of FHA, they must amend their charter to fix a lower rate of interest in accordance with the provisions of FHA, and that when this rate of interest has been thus lowered, it shall apply uniformly to all members of said association.

TAXES: BOARD OF SUPERVISORS COMPROMISING DELINQUENT TAXES: Must be scavenger sale before Board of Supervisors is authorized to compromise taxes, and compromise can be made only of delinquent taxes on land sold at scavenger sale, the bid thereat paid, and a sale certificate issued thereunder.

October 16, 1935. *County Attorney, Fort Dodge, Iowa:* We have seriously considered your objections recently filed with us concerning the above mentioned opinion, which was issued from this office and was prepared by Assistant Attorney General Clair E. Hamilton.

The position taken by you is that the Board of Supervisors is authorized by Section 7193-a1 of the 1931 Code of Iowa to compromise the delinquent taxes after they have been offered by the County Treasurer for sale for two consecutive years and not sold, and that this compromise may be effected at any time after the date of being offered for sale for the second time and before they are offered for sale for the third time. In other words, your position is that where real property has been offered for sale for taxes for the second time in December, 1934, and not sold, then the Board of Supervisors might enter into a compromise with the owner of the property, or any lien holder, at any time subsequent to this offering in December, 1934, and prior to the next time said property would be offered for sale, which would be in December, 1935.

We feel that your position is untenable in view of the mandatory provision of Section 7255 of the 1931 Code of Iowa, and also in view of the specific limitations contained in Section 7193-a1. The sale for unpaid taxes contemplated by Section 7255 of the Code is the one that is commonly known as the scavenger sale. Section 7255 makes it mandatory upon the Treasurer to offer and sell at public sale to the highest bidder on the day of the regular tax sale each year or at any adjournment thereof all real estate which remains liable to sale for delinquent taxes, and which has previously been advertised and offered for sale for two years or more and remaining unsold for want of bidders. This section clearly makes it the mandatory duty of the Treasurer to offer such property at public sale to the highest bidder after it has been previously offered at public sale for two years or more and still remains unsold. If during the interim between the date of the second public offering of such property and the date of the third public offering of such property the taxes were compromised by the Board of Supervisors, then Section 7255 of the Code would be rendered inoperative and a mere nullity.

If the Board of Supervisors of every county in the state were authorized to compromise such taxes after the property has been offered for two consecutive years and not sold, and all the Board would so exercise this pretended authority, then there would be no property in the state that could be offered for sale at a scavenger sale under the provisions of Section 7255 of the Code. If this were the law no tax payer would pay his taxes until his property had been thus offered for sale for the unpaid taxes for the second time because he then could come before the Board of Supervisors and represent that he had insufficient money to pay his unpaid taxes and penalties in full and that he would give the Board of Supervisors more money to compromise the same than the Board would likely receive at the scavenger sale. Such a situation was not contemplated by the Legislature of the State of Iowa when it passed Chapter 148 of the Laws of the 41st General Assembly, which chapter is now known as Section 7193-a1 of the 1931 Code of Iowa.

The first legislative authority compromising such taxes was contained in Chapter 148 of the Laws of the 41st General Assembly. The title to this chapter and the enacting clauses specifically state that this new act was an

act to amend Section 7193 of the Code of 1924 and was in no way calculated or intended to repeal, revise or amend Section 7255 of the 1924 Code, which is the same as Section 7255 of the 1931 Code. The 46th General Assembly of the State of Iowa has further shown the legislative intent by treating Section 7255 of the Code as still being in full force and effect by its reference thereto in Chapter 83 of the Laws of the 46th General Assembly of the State of Iowa. This latest act is known as the Public Bidder Act, and the specific provision to which we refer is as follows: "When property is offered at a tax sale under the provision of Section 7255 of the Code of Iowa and no bid is received * * * *."

Therefore, in approaching the proper interpretation of Section 7193-a1 of the Code of 1931, we must read it and construe it together with Section 7255 of the Code, and we must treat Section 7255 as being in full force and effect.

Now, let us analyze Section 7193-a1 of the 1931 Code of Iowa and determine if possible just what this act does contain. The statute reads:

(a) When any property in this state has been offered by the County Treasurer for sale for two consecutive years and not sold,
(b) *or* sold only for a portion of the delinquent taxes,
(c) then and in that event the Board of Supervisors of the county is hereby authorized to compromise the delinquent taxes against said property *antedating any* sale certificate;
(d) or being a part of the taxes due for the year for which such property was sold for taxes,
(e) and may enter into a written agreement with the owner of the legal title or with any lien holder for the payment of a stipulated sum in full liquidation of all delinquent taxes included in such agreement.

We are here considering only real estate and assume the preliminaries of notice, etc., have been complied with. So far as here relevant as to tax sales we note: *Annual tax sale: for total amount owing.*

1. Annually on the first Monday of December sale shall be made of real estate "on which taxes of any description for the preceding year or years are delinquent, which sale shall be made *for the total amount of taxes, interest and costs due and unpaid thereon*" (Section 7244). It is thus seen that at the regular annual tax sale the land cannot be sold for less than the total amount due. *The whole amount of taxes must be bid and paid.*

2. The "purchaser shall designate the portion of any tract of land or town lot for which he will pay *the whole amount of taxes* for which it may be sold, the portion thus designated shall be an undivided portion" (Section 7253). That is to say, the purchaser may bid for an undivided fractional interest in the parcel offered, but his bid must be for "the whole amount of taxes."

Where for two successive years there is no sale.

3. The Treasurer shall "offer and sell at public sale, to the *highest bidder,* all real estate which remains liable for sale for delinquent taxes, and shall have previously been advertised and offered for two years or more and remain unsold for want of bidders, general notice of such sale being given at the same time and in the same manner as that given of the regular sale." (Section 7255.)

It is thus seen that at a regular annual sale the land may be sold as an

entirety, or for a fractional undivided interest therein, but for never less than "the total amount of taxes, interest and costs due and unpaid thereon" (Sections 7244, 7253); but—

If the land for two years or more has been offered for sale "for the total amount of taxes, interest, and costs due and unpaid thereon." and shall have "remained unsold for want of bidders," then and in such event at the ensuing annual sale it may be offered for sale and sold to the highest bidder" regardless of the amount bid, which may be less than "the total amount of taxes, interest and costs due and unpaid thereon."

It would hence appear that the Board of Supervisors have jurisdiction under Section 7193-a1, to compromise subject to these conditions:

First: There must first have been a "sale," for the authority to compromise is only of the "delinquent taxes against said property *antedating* any sale certificate, "which latter can issue only after sale and payment of the delinquent tax." (Section 7263.)

Second: Since there cannot be a "sale certificate" except after a sale had and bid paid (Section 7263); and since there can be no sale "only for a portion of the delinquent taxes" (Section 7193-a1, Clause (b), except as to "real estate which remains liable for sale for delinquent taxes, and shall have previously been advertised and offered for two years or more and remain unsold for want of bidders" (Section 7255), it must follow that the Board of Supervisors has not jurisdiction to compromise delinquent taxes until the land is sold at scavenger sale under Section 7255, the bid thereat paid, and a sale certificate issued thereunder.

Third: In order to give Section 7193-a1 congruity and sense, the word "or" at the beginning of clause (b) should be construed "and." "That courts have interpreted the word 'and' as a disjunctive, and the word 'or' as a conjunctive when the sense absolutely required, and this in extreme cases in criminal statutes, against the accused, is laid down as elemental." (Miller, C. J., in *State vs. Brandt* (1875), 41 Iowa, 593, loc. cit. 615; 59 *Corpus Juris*, p. 986, Section 584, title "Statutes," and cases subsumed in note 92).

Fourth: Clause (d), which reads:

"; or being a part of the taxes due for the year for which such property was sold for taxes, may enter into," etc.,

is as it appears in 41st General Assembly, Chapter 148, Section 1. Section 7391-a1, of which it is a part, must be construed in connection with Chapter 347 relating to tax sale. It is noted that this clause is preceded by a semicolon, the reason whereof is not apparent. The problem is to connect this clause with the other parts of the section so as to give it sense.

Various situations may arise:

As, that the first half of 1934 taxes payable in 1935 are paid, the second half remain unpaid, then the land is offered at tax sale on December, 1935, and sold. Does this clause mean that the Board of Supervisors may then compromise for part of the second installment of the 1934 tax? Such could not have been the legislative intent for, aside from being ridiculous as upsetting the whole tax collecting program, it would be in utter conflict with the provisions in Chapter 347. Further such construction would be in utter conflict with the preceding clauses of Section 7193-a1.

As, that the taxes for 1932 and 1933 are unpaid, the land offered for sale and not sold for want of bidders; the first half of 1934 taxes was paid, the second half unpaid, and on December 2, 1935, the land is sold at scavenger sale. For, we have seen, there may not be a compromise until and unless there has first been a scavenger sale to the "highest bidder," and the highest bidder may have the land struck off to him for less than the total amount owing and due. Here, a compromise may be made which would certainly include all "delinquent taxes against said property antedating any tax sale certificate," which would issue to him who bid and received a "sale certificate" at the scavenger sale.

The foregoing analysis might also require the substitution of the conjunctive "and" for the disjunctive "or."

There is another possible interpretation that can be placed upon Section 7193-a1 which leads us to the same ultimate conclusion.

Upon a first reading of this section, it appears that there may be two alternative conditions existing in which the Board may compromise delinquent taxes. These alternative conditions or situations are as follows: First, when any property in the state has been offered by the County Treasurer for sale for taxes for two consecutive years and not sold, and second, or sold for only a portion of the delinquent taxes.

There is no question but what the second alternative refers to the scavenger sale because such property could not be sold for a portion of the delinquent taxes at the first two offerings. The first alternative situation appears to be sort of a general authorization for the Board to compromise in that case and should be given full force and effect unless the same were qualified and limited by later provisions contained in the act.

There is such a qualification and limitation contained in Section 7193-a1, which is as follows:

"* * * * then and in that event the board of supervisors of the county is hereby authorized to *compromise* the *delinquent taxes* against said property *antedating any tax sale certificate;* or being a part of taxes due for the year for which said property was sold for taxes * * * *."

What does the above qualification or limitation mean? Does the clause, "antedating any tax sale certificate," refer solely to the time when the compromise may be made, or does it refer to the amount of delinquent taxes that may be compromised?

It is our opinion that this clause plainly and specifically refers to the amount of delinquent taxes that may be compromised, and that it also contemplates that the compromise shall be made subsequent to the issuance of any tax sale certificate.

There are words and phrases contained in this act which indicate and contemplate that the action of the Board in compromising such taxes shall and must be made after the issuance of any tax sale certificate. In arriving at this conclusion, let us see what the words "antedate" and "any" mean.

"Antedate" means "to put a date to an instrument of the time before the time it was written." Bouvier's Law Dictionary. "To antedate an instrument is to insert in it, as the date of its execution, a date prior to its actual execution." Ballentine's Law Dictionary. "To date a document before the day of its execution." 3 Corpus Juris, 229; Wharton Law Lexicon.

The word "any" means "some; one out of many; indefinite number." Bouvier's Law Dictionary. The word "any" is given the full force of "every" or "all." Logan vs. Small, 43 Mo., 254; McMurray vs. Brown, 91 U. S., 265; 23 L. Ed., 321; City of Covington vs. Cincinnati C. R. Ry. Co., 144 Ky., 646; 139 S. W., 854-855. Webster's New International Dictionary defines the word "any" to mean that it "indicates a positive but undetermined number or amount; one or more; *not none.*" Our Supreme Court has defined the word "any" as follows: "* * * * in the single, one, a or an, some * * * *." State vs. Pierson, 204 Iowa, 839. The word "any" before "extension," in relation to an extension of the time of payment of a note, is equivalent to "every," and the provision is a waiver of defense in case of more than one extension. Winnebago State Bank vs. Hustel, 119 Iowa, 115.

It, therefore, appears from the legal definitions of the word "any" that the proper construction to be placed upon its use as it appears in Section 7193-a1 of the Code of 1931 is that it means a positive but undetermined number of tax sale certificates; that it means one or more tax sale certificates and that it means "not none" tax sale certificates. Therefore, the phrase "any tax sale certificate" as used in this section contemplates that there must be at least one outstanding tax sale certificate. However, there might be one or more outstanding tax sale certificates. The reference to any tax sale certificate as used in this statute is important for the purpose of determining just what delinquent taxes may be compromised. If there were no tax sale certificates outstanding, then the Board of Supervisors would not have any criterion before them upon which they could determine just what delinquent taxes could be compromised in accordance with this section. The delinquent taxes that can be compromised under this section are only those that antedate any tax sale certificate. The legislative use of the phrase, "antedating any tax sale certificate," clearly means and contemplates that the compromise shall be effected subsequent to the issuance of any tax sale certificate and that when such a compromise is entered into it shall cover only the delinquent taxes antedating the issuance of one or more tax sale certificates.

The limitation clause above referred to in this act contemplates that the tax sale certificate must be the one issued at the scavenger sale.

Prior to the enactment of Chapter 148 of the Laws of the 41st General Assembly, the owner of the property could not redeem without paying in full all of the delinquent taxes, penalties and interest accruing thereon. It must have appeared to the Legislature that the prior legislation of tax laws favored the scavenger purchaser too much and worked a hardship against the owner of the property that might be financially embarrassed to the extent of being unable to pay his taxes in full. It appears that it was the intent of the Legislature to give the owner a remedy by compromise after his property had been sold at public sale to the highest bidder under the provisions of Section 7255 of the Code. But until the scavenger sale was held, the Board would not be in a position to properly determine the exact amount of what the taxes should be compromised for. The Board would not have any proper basis for entering into a compromise with the owner prior to the scavenger sale for the reason that the scavenger might offer more for the property than

what the owner offered to the Board in a private compromise arrangement or settlement.

Where the law provides for three public offerings for the sale of such property for delinquent taxes, it appears that it was the legislative intent that it was the duty of the County Treasurer to exhaust these remedies for the sale of such property before the Board of Supervisors could be authorized to compromise such delinquent taxes. In compromising such delinquent taxes, the main and proper function of the Board of Supervisors should be to represent and protect the public interest. After the scavenger had purchased the property at the third public sale, then the Board would know that the purchase price of the scavenger was the highest and best bid possible to secure at a public sale. Then the Board would be in a position and would be justified in accepting a compromise from the owner of an amount in excess of what the scavenger paid, or the Board might be justified in compromising with the owner for an amount equal to what the scavenger paid. It then would be a question as to whether or not the Board were willing to permit the scavenger to secure title to this property or whether they would permit the owner to keep his property on the same terms and conditions as offered by the scavenger.

There is, however, another legal consideration to be borne in mind with reference to the taxes that have already been compromised by Boards of Supervisors prior to the scavenger sale.

The record shows that the Attorney General of Iowa placed an interpretation upon Section 7193-a1 in 1926 to the effect that Boards of Supervisors were authorized to compromise the delinquent taxes where the property had been offered for sale for two consecutive years and not sold or sold for only a portion of the delinquent taxes. See 1926 A. G., 441. Similar opinions were rendered by the Attorney General in 1928 and also in 1932. See 1928 A. G., 226; 1928 A. G., 275; 1928 A. G., 290; 1928 A. G., 308; and 1932 A. G., 183.

It, therefore, appears that the Attorney General and the Auditor of State have interpreted this section differently from the interpretation that we are now placing upon this statute. Hence, for the past ten years this act has been construed by the above state departments to mean that the Boards of Supervisors could compromise such taxes if the property had been offered for sale for two consecutive years and not sold, and that the Boards could thus make such compromise without waiting for the scavenger sale or the issuance of a tax sale certificate.

There is no question but what many Boards of Supervisors throughout the state have compromised taxes on the basis of the former opinions issued by the Attorney General. Therefore, prior to the issuance of Mr. Hamilton's opinion and the instructions sent out by the State Auditor to the different county officers the Boards of Supervisors were acting under and in accordance with the former Attorney Generals' opinions and the construction placed upon this statute by the Auditor of State under the advice of the Attorney General, and these local county officials should not be held personally liable for any of their acts done in accordance with the previous opinions of the Attorney General's office. There is little doubt but that these local Boards

of Supervisors were acting in good faith in entering into these compromises under what they had every reasen to believe was the law.

Since the passage of Chapter 148 of the Laws of the 41st General Assembly, seven subsequent legislative Assemblies have been held in the State of Iowa. These subsequent General Assemblies are presumed to have known the interpretation that was placed upon this act by the office of the Attorney General and also by the office of the Auditor of State. With this departmental construction before them, no Legislature since 1926 has seen fit to amend or change the provisions of Chapter 148 of the Laws of the 41st General Assembly. It is to be, therefore, presumed that the subsequent legislative assemblies by their failure to change this law consented to the interpretation placed upon it by the Attorney General and the Auditor of State. Because of such departmental construction and interpretation of this statute for the last past ten years with the approval of seven sessions of the state Legislature, the situation results in a construction of this statute by the Legislature and the departments of government and as such is entitled to great weight.

Our Supreme Court in the case of Gallarno vs. Long, 243 N. W., page 726, announces the rule applicable hereto as follows:

"* * * 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."

While the Boards of Supervisors throughout the state were thus compromising such taxes, they were acting officially in accordance with the legal interpretation that was placed upon this statute by the proper state officials. As a result of their official action in the premises, property rights have been secured thereunder to different parties which should not now be disturbed by the present interpretation that we feel should be placed upon this statute. In other words, the present interpretation that the Attorney General's office is now placing upon this statute should not have any retrospective effect. Its effect should be purely prospective.

No future compromises should be made by the Boards of Supervisors in the State of Iowa unless there has been a scavenger sale and issuance of a tax sale certificate thereunder.

We are hereby holding that the record already made in the compromising of such taxes shall stand and shall not be disturbed in any manner whatsoever, and that there shall be no personal liability against any member of any Board of Supervisors or other county official where they have acted in accordance with the previous opinions of the Attorney General's office or the instructions received from the Auditor of State, where such records have been made and action taken prior to the receipt of instructions from the Auditor of State relative to the new opinion which was written by Assistant Attorney General Clair E. Hamilton and issued to the Auditor of State.

We, therefore, affirm the opinion previously written by Assistant Attorney General Clair E. Hamilton and issued by this department to the Auditor of State for all the reasons contained in said opinion and for all the additional reasons as hereinabove set forth together with the exceptions specifically referred to as not having any retrospective effect.

SCHOOLS: TAX: WARRANTS: NEW SCHOOL HOUSE BUILDING: If board passed resolution to effect that electors at special election authorized board to levy school house tax not exceeding 2½ mills for period not longer than 1940, and board pledges said levy and collection of special tax for sole and only purpose of retirement of these outstanding warrants and if board follows provisions of Section 6263 of Code, the district would have authority to issue warrants in an amount not exceeding cost of building or the anticipated school house tax for a period not longer than 1940 and such warrants will be legal and valid and claims only against special fund and not indebtedness of district.

October 17, 1935. *State Comptroller:* We have your request for opinion on the following proposition:

The Creston Independent School District is up to its legal limit of indebtedness. One of its school buildings has been condemned and it is necessary to erect a new building in lieu of the one condemned. Some time ago, there was submitted to the voters of the district, the following proposition:

"Shall a school house tax, not exceeding two and one-half (2½) mills on the dollar in any one year and continuing for a period not longer than the year 1940, be levied on the property in the Independent School District of Creston, Union County, Iowa, for the purpose of constructing a new school house to be erected on Lots number Ten (10), eleven (11), twelve (12), twenty-seven (27), twenty-eight (28) and twenty-nine (29) in Section "A" McDonald's North Addition to Creston, Union County, Iowa?"

The proposition was carried and the school house tax of 2½ mills has been certified to the County Auditor and Board of Supervisors of Union County, pursuant to law. This special tax will produce about $11,000 per year. The district desires to anticipate this special revenue and issue warrants for approximately $50,000 which will be sufficient to erect the said building. Will you please advise us if the district has this authority and whether such warrants would be legal?

As to ordinary revenue, I believe it is quite clear that there can only be anticipation for the next year, but we are here dealing with the special fund and our Supreme Court in the case of *Swanson vs. City of Ottumwa,* 118 Iowa, 161, has quite well answered this proposition. The court said on page 182:

"This authority, reduced to briefest terms, distinctly holds that the city may levy a special tax for a public purpose whenever expressly authorized by the legislature to do so; that such special tax may be pledged or appropriated for a series of years in advance in furtherance of the purpose for which it is provided; that the city may by contract limit its liability to the mere duty of levying and collecting the special tax, and that under such contract no municipal indebtedness is incurred within the meaning of the constitution."

It is our opinion, then, that if the Board passed a resolution to the effect that the electors of the district at a special election held as provided by law, authorized the Board to levy a special school house tax of not exceeding 2½ mills for a period not longer than 1940, for the purpose of erecting a new school house on Lots 10, 11, 12, 27, 28, and 29 in Section A, McDonald's North Addition to Creston, Union County, Iowa; and to the further effect that the full 2½ mills has been levied on all taxable property of the district, to be collected for the year 1936, and that the same levy will be made and certified for collection in the years 1937, 1938, 1939 and 1940, or in as many of those years as necessary, and the Board irrevocably pledges the said levy and collection of the special tax for the sole and only purpose of the retirement of these outstanding warrants which are to be issued pursuant to the special election on September 8, 1935; and if the Board will generally

follow the provisions of Section 6263 of the Code which pertains to cities and towns, but which procedure coud be followed here so far as practicable, then and in such event, the district would have the authority to issue warrants in an amount not exceeding the cost of the building or the anticipated special school house tax for a period not longer than the year 1940, whichever shall be the lesser, and such warrants will be legal and valid and claims only against the special fund, and not indebtedness of the district.

HOSPITALS: REBUILD:

Chapter 67, 46th General Assembly, amending Section 6211 of the 1931 Code, authorizing levy for rebuilding, remodelling or enlarging "such hospital" precludes building an entirely new hospital in new location and out of new materials.

October 19, 1935. *County Attorney, Iowa Falls, Iowa:* We wish to acknowledge receipt of your letter of October 17th in which you ask for a construction of Chapter 17, Acts of the 46th General Assembly. Section 1 of said chapter is as follows:

"Section 1. Section six thousand two hundred eleven (6211), Code, 1931, is amended by adding to subsection twenty-six (26) the following: "Cities having a population of not less than four thousand (4,000) and not more than five thousand (5,000), in which a municipal hospital has been established, may levy, under the provisions of this section, not to exceed two and one-half mills, for rebuilding, remodeling or enlarging such hospital."

The question which you present and upon which you desire an answer by this department is as follows:

"Whether a tax which may be levied thereunder may be used to build or rebuild a hospital on a different site or whether a hospital built wholly or in part with funds raised pursuant to said section must be rebuilt on the same grounds as the old hospital?"

Ballentine's Law Dictionary, 1930 edition, defines "rebuild" as follows:

"*Rebuild:* To rebuild is to build up again; to build or construct after having been demolished. (Century Dictionary) The term is not in meaning restricted to the erection of a new structure on the site of an old one. Hence, if a building is blown down by a storm, it is possible to rebuild it on a new site. See Board of Education vs. Townsend, 63 Ohio St. 514, 52 L. R. A. 868, 870, 59 N. E. Rep. 223."

In the case of *Board of Education vs. Townsend,* 52 L. R. A. 868, in which action plaintiff sought the enforcement of a contract with the defendant that the latter should remove a school building from its original location and reconstruct and rebuild it on a new site, the court said:

"To reconstruct is to rebuild, and to rebuild is to "build up again"; to build or construct after having been demolished." Century Dict. Nor is the meaning of the term restricted to the erection of the new building on the site of the old one."

That case, as stated, involved the construction of a contract by the terms of which the defendant agreed in effect to reconstruct and rebuild the school house on a new site. We think that case is not controlling in arriving at a correct construction of the statute under consideration. In that case, it was clearly the intention of all that the school house when removed, rebuilt or reconstructed would be on a new location. It seems quite logical that

parties might enter into a contract to tear down a building and rebuild it on a new location.

Rebuild is defined in C. J. as follows:

"Rebuild: To build up again; to build or construct after having been demolished; to build again or renew; to make extensive repairs or alterations."

52 C. J. 1189.

Under the above citation we find this note:

"54. Seabolt vs. Northumberland County, 187 Pa. 318, 324. (Rebuild) (Used in reference to a bridge, was said not to be strictly accurate; for a new bridge in another place could not strictly be said to be the old one rebuilt; but the meaning was clear, and "replaced by" or any equivalent phrase, would express it correctly).

Section 6211 of the 1931 Code of Iowa, of which Chapter 67, Acts 46th General Assembly, amends, is in part as follows:

"6211. Taxes for particular purposes. Any city or town shall have power to levy annually the following special taxes:

26. Hospital fund. When a municipal hospital has been established, not exceeding three mills in cities having a population of more than twenty-two thousand, and in other cities not exceeding five mills. Such levies shall not extend for a longer period than twenty years and shall be used only for the purpose of constructing hospitals or purchasing sites therefore and for the retirement of bonds issued in payment thereof."

Chapter 67 above referred to adds to the above subsection a provision that cities having a population of not less than four thousand and not more than five thousand in which a municipal hospital has been established may levy under the provisions of said section not to exceed two and one-half mills for repairing, remodeling or enlarging such hospital.

It is the opinion of this department that the Legislature clearly contemplated in the use of the above language the rebuilding, remodeling or enlarging of such hospital on the location in which the municipal hospital to be rebuilt, remodeled or enlarged was originally built. The information furnished us is that it is the plan of Iowa Falls, proceeding under the statutes quoted, to use very largely or altogether new material in the construction of a hospital, and that it is not contemplated that the old hospital shall be torn down and a new hospital built with the material therefrom. If, then, a hospital were to be built on an entirely new location out of new material, it surely cannot be said that it could be in any sense a rebuilt hospital, it would be simply a new hospital in a new location, bearing no relationship to any hospital heretofore built under Section 6211 of the Code. Rebuild, according to C. J., means "to build up again or to build or reconstruct after having been demolished." This definition does not contemplate necessarily the use of the old material in the rebuilt building, but it does at least suggest a rebuilding in the same location. Chapter 67 contains the language, "for rebuilding, remodeling or enlarging such hospital." We think this language clearly contemplates the construction or rebuilding of the hospital on the premises where "such hospital" now stands. Surely, a rebuilding of such hospital means a rebuilding of the hospital now standing on the same or substantially the same tract of ground. As heretofore stated the building of an entirely new hospital in a remote part of the city out of entirely new

material is the building of a new and different hospital and not the rebuilding of "such hospital" as comes within the purview of the statutes.

ITINERANT COSMETOLOGISTS: LICENSE: Cosmetologists may maintain two offices or places of business in same city without procuring itinerant license—but must publicly display his license wherever he practices.

October 25, 1935. *Executive Secretary:* I wish to acknowledge receipt of your letter of October 8th in which you request a construction of Section 2511 of the Code of Iowa, 1931, relating to itinerants and in connection with which statute you inquire as to whether a person holding a license to practice cosmetology may maintain more than one office or place of business in the city of his residence and practice said profession in all of said places.

Section 2511 of the Code insofar as material to your inquiry is as follows:

"2511. Itinerant defined. * * * Itinerant cosmetologists as used in the following sections of this title, shall mean any persons engaged in the practice of * * * cosmetology as defined in the chapter relative to the practice of said profession who by himself, agent or employee *goes from place to place or from house to house* or by circulars, letters or advertisements solicits persons to meet him for professional treatment at places other than his office maintained at the place of his residence."

Section 2512 as amended requires every itinerant cosmetologist in addition to his regular license to practice his profession to procure from the State Department of Health a license to practice as an itinerant.

Section 2444 of the Code is as follows:

"2444. Display of license. Every person licensed under this title to practice a profession shall keep his license publicly displayed in the place in which he practices."

The provisions of this section are very clear and definite. Every licensee shall keep his license publicly displayed in the place in which he practices. Presumably the purpose of this statute is to guarantee that anyone availing himself of the services of one licensed to practice a profession may have an opportunity to know whether the person whose services are sought possesses the proper license and authority to practice said profession. While this section refers to the "place" in which the licensee practices, we are not disposed to say that the statute should be so strictly construed as to require a holding under this section that a licensee may practice in only one place. Physicians practice their professions in their offices and hospitals and at any other place where they may be called upon to render professional services.

Section 2511 defines an itinerant as one who goes from place to place or from house to house or who, by circulars, letters or advertisements solicits persons to meet him for professional treatment at places other than his office maintained at the place of his residence. Clearly one who goes from house to house or place to place in the practice of cosmetology is an itinerant if the places in which he practices are places other than his office or offices located at the place of his residence. Under this section one is an itinerant who solicits persons to meet him for professional treatment at places other than his office maintained at his place of residence. One who establishes offices in several different cities thereby becomes an itinerant. This is true because of the express language of the statute. There is no express prohibi-

tion against maintaining two offices or places of business within the same city. One may not be said to be an itinerant in a legal sense unless the statute expressly makes him such. One who possesses a license to practice cosmetology cannot be made an itinerant by implication. It was the intention of the Legislature to require an itinerant's license of those who go out from their regularly established place of business to practice their professions except as provided in Section 2514. In view of the fact that there is no express statutory prohibition against the maintenance of two offices or places of business in the city of his residence by members of the various professions, it is our opinion that a practitioner of cosmetology may establish and maintain two offices or places of business within the city of his residence and may practice therein under Section 2444 and he must display his license in the place in which he practices. If he practices in both places he must display his license at each place while he is practicing there. The maintenance of the two offices or places of business must be in good faith and such places must be equipped as required by law. It would be a mere subterfuge if such licensees were to establish temporary places of business or offices throughout the city merely for the purpose of avoiding the penalties of the law.

CONTRACT TO ERECT: HOSPITALS: City Council is charged with responsibility of contracting for erection of new hospital.

October 26, 1935. *County Attorney, Charles City, Iowa:* Some little time ago you submitted to this office an inquiry as to whether the city council or hospital trustees of the city of Charles City are charged with the responsibility of contracting for the erection of a new hospital which the city plans to erect pursuant to a favorable vote at a special election recently held on the question of whether the city should erect such new hospital. You state the voters at said election approved the issuance of $66,000.00 worth of bonds to defray the erection of said hospital which will cost approximately $120,000.00, the additional amount to be paid by a grant from the Federal government.

Section 6239 of the Code authorizes cities and towns to incur indebtedness for the construction of hospitals in certain cases. Section 6195 provides that cities and towns shall have the power to purchase or provide for the condemnation of and to pay for out of the general fund or a specific fund as may be provided and to enter upon and take lands within or without their territorial limits for hospital purposes. Section 6211 provides that any city or town shall have the power to levy annually a certain amount for a hospital fund and an additional amount for a hospital maintenance fund. Hospital trustees gain whatever power they may have from Chapter 300 of the 1931 Code of Iowa as amended. Section 5871 of this chapter provides that such boards shall be vested with authority to provide for the management, control and government of any city hospital for which they are trustees, but nowhere in such chapter do we find such trustees clothed with authority to contract for the erection of a city hospital. Such trustees have no authority other than that given by statute. The city or town council is clothed with authority to transact the business of the city or town in all cases where such authority is not expressly delegated to some other board, officer or agency.

It is our opinion therefore that the city council and not the board of hospital trustees is charged with the responsibility of contracting for the erection of such hospital.

LEGAL SETTLEMENT: POOR RELIEF: NOTICE TO DEPART: If Mrs. X has resided in Hardin County and lived there for more than one year and has never been served with a notice to depart, Hardin County is now liable for her support.

October 28, 1935. *County Attorney, Iowa Falls, Iowa:* Receipt of your request, under date of October 23, 1935, for the opinion of this department, is acknowledged.

This department, under date of July 20, 1934, rendered an opinion to the special transient investigator of Des Moines, covering nine questions similar in nature to the question submitted by you. If you have a copy of the report of the Attorney General for 1934, this opinion appears in full on page 631. I would suggest that you read same as it will throw some light on the situation presented.

In answer to the specific question asked of this department, whether or not Hardin County is liable for the support of Mrs. X, or whether Y County is liable for her support, we will say that it is our opinion, in keeping with the opinion previously rendered, that Y County is no longer liable for the support of Mrs. X as she has lived in Hardin County more than one year. As to the liability of Hardin County for her support, apparently Section 5315 of the Code of Iowa, 1931, which is as follows, governs the situation:

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

Section 5311, entitled "*Settlement—how acquired,*" has been amended by Chapter 61, Acts of the 45th General Assembly in Extraordinary Session, and by Chapter 99, Laws of the 45th General Assembly. In this last citation, Subsections 1 and 2 provide in brief as follows:

"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, acquired settlement in that county * * * * *."

Subsection 2, which provides that any person having acquired settlement in any county in this state, shall not acquire a settlement in any other county until such person shall have continuously resided in any county more than one year without being warned to depart as provided in this chapter.

Therefore, the answer to the question submitted is that, if Mrs. X has resided in Hardin County and lived there for more than one year and has never been served with a notice to depart, Hardin County is now liable for her support.

BEER LAW: EXPIRATION DATE: All permits issued subsequent to July 1, 1935, would expire one year from date of issuance.

October 28, 1935. *County Attorney, Belle Plaine, Iowa:* Your letter of October 22d received with reference to the expiration date of beer permits issued at this time and will say that we agree with you in your analysis of

the situation which is, as we understand the question, to the following effect: That class B beer permits issued under the beer law on July 1, 1935, or at any date subsequent to that time, expire one year from the date of issuance and therefore, the date mentioned, July 1, 1936, is of no significance.

It is our thought that the Legislature intended to have all Class B permits expire on July 1, 1935, so that the section of the beer law passed by the 46th General Assembly to the effect that cities and towns were given ordinance power to limit the number of permits and to fix the amount to be paid for such permits, would be uniform in its operation and would take effect as of that date. All subsequent to that date would expire as stated above, one year from date of issuance.

OLD AGE ASSISTANCE LAW: Section 21 thereof. In the case of Martha Weiss Seydell, the commission would be justified in reviewing the application, either approving or disapproving the same.

October 29, 1935. *Old Age Assistance Commission:* Under date of October 16, 1935, you have asked for an interpretation of Section 21 of the old age assistance law and submit the following case:

Martha Weiss Seydell applies for assistance. The case is approved by the county board in May, 1935. Application is in complete form in our office, but has not been approved for payment by the commission.

On October 5, 1935, a request from her daughter in Rock Falls, Illinois, was forwarded to this office asking that the mother be permitted to make her home with the daughter for the winter, due to her mother's health.

A study of Section 21 leads this department to the following conclusion with reference to the law to be applied to the case submitted:

Applications requesting permission to leave the state could be made on July 4, 1935, or subsequent to that date as this provision in the law went into effect on the date above mentioned through an amendment to the old age assistance law passed by the 46th General Assembly, which qualified the eligibility as to residence and specified continuous residence for one year preceding application, with absence not to exceed thirty days. This being true, the commission could give permission to an applicant to leave the state temporarily, whose application for a pension has been approved.

Therefore, in the case above cited by you, where an application for assistance was approved by the county board in May, but has not been approved for payment by the commission, we would feel that the commission in such a case would be justified in reviewing the application and either approving or disapproving the same at this time. If the application was approved and not paid for some reason, such as lack of the necessary funds with which to pay the same, yet when funds were available, the applicant would be paid the assistance, and the matter of the applicant's assistance completed. The commission could as of October 5, 1935, or any date subsequent to the time the amendment took effect, grant permission to leave the state in accordance with the amendment.

FLOOD LIGHTS: SCHOOLS: ATHLETIC FIELD: GENERAL OR ATHLETIC FUND: If field is used solely for inter-scholastic games to which an admission is charged, cost cannot be paid out of general fund; but if field is used primarily for general physical education of students and only incidentally by inter-scholastic contests when not used by general student body, then such expense should not be paid out of general fund.

October 30, 1935. *Auditor of State:* We have your request for opinion on the following proposition:

"May the Board of Directors of a school district install flood lights in connection with an athletic field for the purpose of providing light for inter-scholastic athletic events to be held at night and to pay for the expense of the same out of the general fund of the district. Would the electric current used by the flood lights also be payable out of the general fund in event the lights could be so paid for?"

The answer to this proposition depends somewhat upon the facts, that is, if the athletic field was used for physical education and was used at night for that purpose, then, of course, the lights for the field and the electricity for the same would be paid for out of the general fund the same as the lights in the gymnasium, but if the field was used exclusively for inter-scholastic athletics to which an admission was charged, then, neither the original cost of the lights nor the electric current would be payable out of the general fund, but would be payable out of the athletic funds of the school derived from the admissions to games and voluntary sources. In event the athletic field is used at night or when lights are necessary, for both physical education and inter-scholastic games, the use of the field for such inter-scholastic games would probably be merely incidental and in such event and if there were going to be a regular use of the field for physical education during the time when lights were necessary, then the cost of construction of the lights and the lights themselves and the current for the same would be payable out of the general fund.

The controlling element in determining whether this expense should be paid out of the general fund or the athletic fund of the school must be determined by the nature of the use of the athletic field, for, if the field is used solely and exclusively for inter-scholastic games to which an admission is charged, it is apparent that the cost cannot be paid out of the general fund, but if the field is used by all the students who desire the use of the same and primarily, for the general physical education of the students, and only incidentally by inter-scholastic contests when the field is not in use by the general student body, then such expense should be paid out of the general fund.

COMPTROLLER: APPROPRIATIONS: SEC. 45, SUBSECTION 10, CHAPTER 126, ACTS OF 46th GENERAL ASSEMBLY: The Legislature intended that the $2,500 should be appropriated for each year of the biennium or a total of $5,000 for two years.

October 31, 1935. *Comptroller:* We have your request in which you call our attention to Section 45, Subsection 10, of Chapter 126, of the Acts of the 46th General Assembly, and you ask whether in view of the language, whether the $2,500 appropriated is for the biennium or for each year of the biennium.

It is the opinion of this department that the Legislature intended that the $2,500 should be appropriated for each year of the biennium, or a total of $5,000 for the two years.

SCHOOLS: OPENING ROAD TO SAVE TRANSPORTATION EXPENSE: According to Sec. 4217, subsection 6, Code, board authorized to purchase this land to open road, but there is no authority for maintenance of road,

so while school corporation has authority to open road, it would not seem advisable to do so unless county board would agree to maintain it.

October 31, 1935. *County Attorney, Oskaloosa, Iowa:* You ask for our opinion on the following propositions:

"The school board desires to have a road opened for about a half mile in order that the children who live beyond the mileage limit may be brought within and thus save transportation expense. The county board refused to open the road.

1. Does the school corporation have the power to purchase and open the road?
2. What kind of a road and what amount of money could they expend?
3. Whose duty would it be to maintain the road?"

We will answer the questions in the same order in which they are asked.

1. Pursuant to the provisions of Section 4217, Subsection 6 of the Code, the board can be authorized to purchase this land and open the road.

2. Under the provisions of Subsection 7 of Section 4217 of the Code, the amount will be limited to 2½ mills on the dollar in any one year, for this provides in part as follows: "Vote a school house tax not exceeding 2½ mills on the dollars in any one year for the * * * * opening roads to schoolhouses."

3. There is no authority at all for the maintenance of such a road and the money levied for opening of the road could not be used for the maintenance of it so while the school corporation has the authority to open the road, it would not seem advisable to do so unless the county board would agree to maintain it, for otherwise, the road would be nearly worthless.

SCHOOLS: REOPENING OF SCHOOL: TRANSPORTATION: Parents cannot be forced to send their children to any school irrespective of fact whether such pupils would allow a school to open. Where school is closed in district, the district is required to furnish transportation and this must be furnished irrespective of fact that this school could be re-opened if all parents would send their children to it.

October 31, 1935. *County Attorney, Sibley, Iowa:* We have your request for opinion on the following propositions:

"One of our country schools was forced to close a few years ago because of lack of pupils. Last year, however, there were seven pupils of school age in that district and there are the same number in that district this year. If the parents of all seven children would agree to send them, then the school would be re-opened. The parents of three have refused to send the children, and therefore, the school cannot be re-opened. Will you please advise,

(1) Can these parents be forced to send their children so that the school can be opened,

(2) Do the directors have to furnish transportation the same as in other cases when schools are closed, when in this particular case, the school could be re-opened if all the parties would send their children.

In regard to the first question, our opinion is no, for the reason that parents cannot be forced or required to send their children to any school irrespective of the fact whether such pupils would allow a school to open or not.

Our opinion in regard to the second question is yes, for the reason that where a school is closed, the district is required to furnish transportation

and this must be furnished irrespective of the fact that a school could be reopened if all the parents would send their children to it.

SCHOOLS: COUNTIES: Students from both Fayette and Bremer counties have attended school located in Bremer County, but near county line. Bremer County has decided to operate school, but there is no possible way under the law for taxes on this land to be paid to Fayette County and by it turned over to Bremer County (several sections of Fayette County land in this district). Boundary lines may be changed so as to include sections in Fayette County. If this is done, Sec. 208 of Code should be followed.

October 31, 1935. *County Attorney, Waverly, Iowa:* We have your request for opinion on the following proposition:

"Bremer County and Fayette County are adjoining counties. Heretofore and pursuant to arrangements between the two counties, students from both counties have attended school located in Bremer County, but near the county line. Bremer County has decided to operate the school and the question arises as to the procedure in taking in several sections of Fayette county into this school district in Bremer County. The school districts in both counties are composed of sub-districts. The boards have met and the Fayette County Board of Directors have agreed to turn over a certain number of sections to this school house in Bremer County. Will you please advise us as to the procedure?"

There is no possible way under the law for the taxes on this land to be paid to Fayette County and by it turned over to Bremer County which, as I understand, is one of the problems that you have in mind. The only way it appears to us is that pursuant to Section 4133 of the Code, the boundary lines may be changed so as to include these sections in Fayette County. If this is done, the statutory provisions set forth in Chapter 208 of the Code of Iowa, 1931, should be followed.

LAWS: CONSTITUTIONALITY: Duty of Attorney General's office to seek to sustain all laws passed by Legislature. Sec. 2, Chapter 93, Acts 46th General Assembly therefore held constitutional.

November 2, 1935. *County Attorney, Iowa City:* Your letter of September 24th addressed to the Attorney General has been referred to me for reply. You request the opinion of this department as to whether Section 2 of Chapter 93, Acts of the 46th General Assembly, is constitutional in view of the fact that there is no reference whatever in the title to Senate File 227 to the subject matter of Section 2 of said chapter. Said Senate File is now Chapter 93 above referred to.

The Supreme Court has expressed very definitely its opinion that it is the duty of this department to seek to sustain all laws passed by the Legislature of this state when such laws are attacked on the ground that they violate some provision of the constitution. Regardless of the opinion of this department, as to the soundness and wisdom of laws passed by the Legislature, we must adhere to our policy of defending such legislation against attack on constitutional grounds. We must therefore take the position that Section 2 of said Chapter 93 is constitutional and should be recognized as such by the law enforcement officers of this state.

INQUISITION: CORONER: FEES: Section 5218 provides that fee may be allowed to a physician who is summoned, or to coroner himself if he be a physician, for making scientific examination in the inquest. Legislature

has limited calling of a physician or performing of scientific examination to cases *in which an inquisition is held.*

November 4, 1935. *County Attorney, Sioux City, Iowa:* We have your letter of October 24th in which you ask for an opinion on the following:

"Our local coroner William M. Krigsten received payment for 19 autopsies performed during the year ending December 31, 1934, the charge being in the amount of $15.00 each, which amount on claim made was approved by the Board of Supervisors, although no jury was called by the coroner. In those cases he thinks that he had the right under Section 5218 of the Code to make such an examination in order to discover whether there might have been foul play causing the death in question.

"The State Auditor in his report has objected to the payment of these items and claims that the coroner should pay $285 to the county general fund."

Your question is whether or not the coroner was entitled to receive the $15.00 for each autopsy:

You call our attention to an opinion of the Attorney General dated January 31, 1928, addressed to the County Attorney at Clinton, Iowa. We believe that that opinion is squarely in line and is good authority for the question submitted by you. The trouble with your coroner was that he did not hold an inquisition as provided by Section 5218. Of course, if he held an inquisition he would be entitled to receive the same pay which the Board would allow another physician called by the coroner or the jury. It should be noted, however, that Section 5218 provides that the fee may be allowed to a physician who is summoned, or to the coroner himself, if he be a physician, for making the scientific examination "in the inquisition." Section 5200 provides for an inquest or an inquisition. Consequently, the Legislature has provided that the inquest be held by the coroner with the assistance of a jury.

Section 5218 then provides that "in the inquisition by a coroner or by an acting coroner, when he or the jury deem it requisite, he may summon one or more physicians or surgeons to make a scientific examination, who, instead of witness fees shall receive a reasonable compensation to be allowed by the Board of Supervisors. If the coroner is also a physician, he may make such scientific examination, and shall receive therefor, the same compensation as that paid other physicians, but in no case shall he receive any witness fee."

Certainly, under the provisions of the above quoted section, the coroner could not call a physician to make the scientific examination unless an inquisition was held. That being true, he would not be entitled to the same compensation for performing the same duty, unless an inquisition was held. We believe that the Legislature did not intend that Section 5218 should be so construed as to permit a coroner who happened to be a physician to make a scientific investigation or perform an autopsy on every body that was called to his attention under the provisions of Chapter 260 of the Code of 1931.

On the contrary, we must say that the Legislature by the use of the first three words in the section, has limited the calling of a physician or the performing of a scientific examination to cases in which an inquisition was held.

OLD AGE ASSISTANCE LAW: GRANT OF ASSISTANCE. Interpretation of paragraph 5, Section 16, Chapter 19, 45th General Assembly in Extra. Session, as amended and revised by Senate File 357, Acts of the 46th General Assembly.

November 4, 1935. *Old Age Assistance Commission:* This will acknowledge receipt of your request of this date for the interpretation of this department of Paragraph 5, Section 16, Chapter 19, Acts of the 45th General Assembly in Extraordinary Session as amended and revised by Senate File No. 357, Acts of the 46th General Assembly. The paragraph in question reads as follows:

"If the commission deems it necessary to protect the interest of the state, it may require, as a condition to the grant of assistance, the absolute conveyance of all, or any part, of the property of an applicant for assistance to the State of Iowa. Such property shall be managed by the board which shall pay the net income to the person or persons entitled thereto. The commission shall have 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."

You desire to know under what circumstances the commission may require, as a condition to a grant of assistance, the conveyance of all, or any part thereof, to the State of Iowa.

In connection with the interpretation of the paragraph of the section referred to above, Sections 9, 10, 11, Paragraphs 1 and 2 of Section 13, and Section 14 should be taken into consideration before the commission should proceed under Paragraph 5 of Section 16. The sections referred to in brief are as follows:

Section 9 provides that the assistance can only be granted to persons not having an income of $300.00 per year.

Section 10 refers to the amount of assistance, which shall not exceed a total of $25.00 a month.

Section 11, among other things, provides with reference to occasional or uncertain earnings and/or gifts, which shall not exceed $100.00 for a 12-month period.

Paragraph 1 of Section 13 provides for property exclusions and states:

"No person shall receive old age assistance if the assessed value of his real property, less recorded liens, exceeds two thousand dollars, or if married and not separated from the spouse, if the net assessed value of his real property together with that of such spouse, less recorded liens, exceeds three thousand dollars."

Paragraph 2 of Section 13 provides:

"No person shall receive old age assistance if he has more than three hundred dollars in cash, on deposit in a bank, in postal savings, or if the immediate cash value, as determined by the board and subject to review by the commission, of his holdings of bonds, stocks, mortgages, other securities or investments, except real estate, exceeds three hundred dollars. At the discretion of the commisison, however, where such immediate sale, for cash, of such securities or investments necessitates an undue financial sacrifice, the applicant, when in immediate need of assistance, shall assign such securities and investments to the state to be held in trust by the commission to reimburse the old age assistance revolving fund for the amount paid from the old age pension fund and the old age assistance revolving fund in assistance or other benefits in behalf of said applicant."

Section 14 provides with reference to the annual income of any real estate and states how it shall be computed on an interest basis after deducting the

amount of all recorded encumbrances and/or liens thereon. Said section provides further:

"The annual income of any personal property, including moneys and credits, which does not produce a reasonable income, shall be computed at five per centum of the value of such property as determined by the board and reported to the commission; provided, however, that the value of household goods and/or heirlooms shall be exempted to the amount of five hundred dollars in such computation.

"The property owned at the date of application for assistance shall be taken as property of the applicant for the purpose of this act."

Within the limitations of the sections just referred to, or, in wording it in another manner, taking into consideration the limitations of the sections referred to, the facts in any given case should meet the requirements of those sections and if this is done and the property in question, either real or personal, in the hands of an applicant, comes within the classification as laid down in these sections, the fifth paragraph of Section 16 can be invoked by the commission. This paragraph of Section 16 provides, as a condition to the grant of assistance, that the commission may take an absolute conveyance of all, or any part, of the property of an applicant for assistance to the State of Iowa, such property to be managed by the board which shall pay the net income to the person or persons entitled thereto, and the commission, within the limitations set out, shall have 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.

Therefore, it is the opinion of this department, that before the provisions of Paragraph 5 of Section 16 be invoked by the commission, all tests as laid down in other sections of the act be complied with and if such is the case and the condition of the applicant is such with respect to his property interests that he can meet all the requirements as laid down in these sections, then and in that case, Paragraph 5 of Section 16 may be used by the Old Age Assistance Commission, where assistance is granted so that the rights of the state may be protected.

FAIR BOAD: PEACE OFFICERS: BOND: LIABILITY OF FAIR ASSOCIATION FOR DAMAGES:

Advisable to have officers bonded. Fair association would be liable for damages. Violators would be turned over to county authorities.

November 18, 1935. *State Fair Board:* This will acknowledge receipt of your letter of the 14th instant requesting the opinion of this department on the enclosure, letter from L. C. Dailey, secretary, Clay County fair, in which the following question is submitted:

At the time of the Clay County fair in September of this year, a police officer on the fair ground apprehended a man in the act of stealing. In taking him into custody, the police officer hit the man taken with a cane. The prisoner was then turned over to the county authorities and received a sentence of thirty days in the county jail for petty larceny.

Later the Clay County Attorney called the fair secretary and reported that a doctor, who attended the prisoner, demanded that he be removed from the jail to a hospital and that he had been moved on the 13th day of September and remained in the hospital until the 19th day of that month. The hospital sent a statement to the fair secretary for the expense incurred. From the enclosure I take it that the fair association paid a policeman on duty with the prisoner in the hospital during the time he was confined.

The secretary states that, at a recent fair board meeting, he presented the bill from the local doctor for services rendered, and that the fair association has taken the matter up with your department to ascertain the status of the police force on the grounds. Secretary Dailey of the Clay County Fair Association submitted the following questions:

1. Who would be liable should one of the policemen in the course of his duty find it necessary to cause serious injury to a criminal or perhaps an innocent bystander?
2. Would it be preferable to have our police all covered by a blanket bond?
3. Would the fair association be liable for damages or would the county be held liable?

With reference to conducting county and district fairs, your attention is directed to Chapter 136, 1931 Code of Iowa. Section 2896 of that chapter gives to the fair association the sole and exclusive control over and management of the fair. Section 2898 provides as follows:

"*Appointment of police.* The president of any society may appoint such number of special police as he may deem necessary. Such officers are hereby vested with the powers and charged with the duties of peace officers."

Section 13405-b1 of the 1931 Code of Iowa provides 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."

In the matter submitted, peace officers of course should be instructed with reference to their duties and men who are competent to perform the duties imposed should be appointed. The liability, with reference to any certain police officer, in the performance of his duties, would be a fact question on each situation which may arise.

With reference to Mr. Dailey's question in regard to the bond, it might be advisable to have these officials bonded, which of course would have to be done in accordance with the powers granted to the society under Chapter 136 of the 1931 Code of Iowa, and in cases where the fair association or society is incorporated, in keeping with the articles of incorporation.

In answer to the other two questions submitted, which seem to be synonymous as far as the answer is concerned, the fair association would be liable for damages and not the county. We take it that this fair, as well as all other county and district fairs in the State of Iowa, are organized under the powers given under Chapter 136 of the Code. In the specific illustration given by Mr. Dailey, it would seem that, as the policeman appointed by the president of the fair association would serve in this capacity during a limited time and for a specific purpose, in accordance with Sections 2896 and 2898, which would be during the time the fair is being held, as a practical matter, those apprehended violating the law would be turned over to the county authorities and the question of what was done with the prisoner after the county authorities took charge would be a matter for those officials to determine.

We take it that the dates mentioned as the 13th day until the 19th day of that month are dates subsequent to the fair. This, however, would not be controlling, as the prisoner in question had been turned over to the county authorities, had been sentenced to a term in jail and then was under the jurisdiction of the county authorities. As to what was done to him with reference to hospitalization would be a matter for those officials to determine.

TAX SALE CERTIFICATE: ASSIGNMENT OF: SECTION 6041. County Auditor is entitled to receive for assignment of tax sale certificate, the total amount plus interest as provided by statute.

November 22, 1935. *County Attorney, Des Moines, Iowa:* We have your request for an opinion on the following question:

The Inter-Ocean Reinsurance Company of Cedar Rapids holds special assessment certificates against certain properties in the City of Des Moines, which properties were sold at the 1935 so-called scavenger tax sale and purchased by Polk County under the provisions of Chapter 83 of the 46th General Assembly, which makes it mandatory for the county to bid the total amount of general taxes, interest, penalties and costs. The Inter-Ocean Reinsurance Company now desires to secure an assignment of the tax sale certificates on the properties on which it holds special assessment certificates. The question is as to the amount the company would be required to tender and pay to the holder of the tax sale certificate and particularly to the County Auditor for the purpose of securing such an assignment.

Section 6041 of the Code of 1931, provides as follows:

"*Assignment of certificate.* Any holder of any special assessment certificate against a lot or parcel of ground, or any holder of a bond payable in whole or in part out of a special assessment against any lot or parcel of ground, or any city or town within which such lot or parcel of ground is situated, which lot or parcel of ground has been sold for taxes, either general or special, shall be entitled to an assignment of any certificate of tax sale of said property for any general taxes or special taxes thereon, upon tender to the holder or to the County Auditor of the amount to which the holder of the tax sale certificate would be entitled in case of redemption."

Under the provisions of the foregoing section, the holder of the special assessment certificate would have the right to an assignment of the tax sale certificate upon payment to the holder of the tax sale certificate, the amount to which the holder would be entitled in case of redemption. Ordinarily, the holder of a tax sale certificate evidencing the purchase of property at a scavenger sale, would be entitled to receive, in case of redemption, the amount which he bid for the property, together with the statutory interest, and in addition to that, any subsequent taxes paid by him together with the statutory interest or penalties on those amounts.

Under the provisions of Chapter 83 of the Acts of the 46th General Assembly, the county bid the total amount of the general taxes, interest, penalties and costs. Therefore, the County Auditor would be entitled to receive for the assignment that amount plus the interest as provided by statute on the amount of his bid. The authority for this statement is found in Section 7275 of the Code of 1931.

HIGHWAY COMMISSION: INTERPRETATION TO BE PLACED UPON CHAPTER 44 OF THE ACTS OF THE 46th GENERAL ASSEMBLY. General Assembly intended to close all accounts and to pay over any funds therein to the Highway Commission, said funds to be credited to the

Primary Road Fund. Highway Commission to pay from Primary Road Fund any legitimate debts or claims against said accounts.

November 30, 1935. *Iowa State Highway Commission:* I beg to acknowledge receipt of yours of the 26th inst., requesting of this department an opinion as to the meaning and construction to be given to Chapter 44 of the Acts of the 46th General Assembly relating to the refunding of Primary Road assessments, etc.

It is the opinion of this department that the General Assembly intended to close all accounts into which have been paid special assessments levied against property in the various counties to pay for the paving of primary roads, under whatever name or title said accounts have been kept by the county, or its officers having charge and control thereof in the respective counties, and to pay any funds therein, or to which said account was entitled, to the Highway Commission, which shall cause the same to be credited to the primary road fund.

The said General Assembly also intended in the closing of said accounts that any indebtedness or claims against the same, in the hands of the county or its officers, should be paid by the Iowa State Highway Commisison from the primary road fund, and provided for an audit of these accounts and the closing of the same. It was evidently the intent that any and all funds, whether principal, interest or penalties, paid as special assessment levies for the pavement of primary roads, no matter under what title the account may have been kept by the county, or its officers having charge thereof, was to be paid to the Highway Commission and become a part of the primary road fund, and in consideration thereof the Highway Commission was to pay from the primary road fund any legitimate debts or claims existing against said account in the form of outstanding special assessment certificates, with interest.

UNIVERSITY HOSPITAL: TRANSPORTATION OF BODIES: MEDIUM OF COST:

"It is therefore concluded that the University Hospital officials are authorized to pay out of the hospital fund the 'necessary expenses of transporting' the corpse of a former patient by the medium of lowest cost from the hospital to the former home town of the deceased 'whether by ambulance, train or automobile'."

December 5, 1935. *University of Iowa:* In your favor of November 11th addressed to President Gilmore and by him referred to me, you raise the following question:

To what extent are the University Hospital officials authorized to pay for the transportation of bodies of deceased persons from the hospital to any other place or places within the state?

A study of Chapter 199 of the 1931 Code of Iowa as amended by the 45th General Assembly, Extra Session, discloses no specific provision for the transportation of dead bodies from the University Hospital. Section 4016 of the Code provides for transportation of an attendant when "the University Hospital attendant and ambulance service is not available." This transportation is provided for the "most feasible route to said Hospital whether

by ambulance, train or automobile." The same section provides in its closing sentence that "the actual necessary expenses of transporting and caring for the patients shall be paid as hereinafter provided."

While strictly speaking, the term "patient" as used in the sentence last above quoted would not include the dead body of a former patient, it must be assumed that the term in this connection was used in the light of the obvious and common knowledge that of many who go to a hospital some will die and that the bodies of the dead should be properly disposed of. It is quite evident that proper disposition of a dead body would not be made by simply delivering it to a relative or friend of the deceased at the door of the institution of the relative or friend were without funds to transport the body to a suitable place of burial. Likewise the body would hardly be properly disposed of, if utilized for scientific purposes against the wishes of relatives or friends too poor even to transport themselves to the institution and there make demands for the body.

The duty to make proper disposition of dead bodies coupled with ordinary conceptions of public hospital functions would lead then to the conclusion that the officers entrusted with managerial responsibility at the University Hospital should enjoy authority, within their sound discretion, to arrange for transporting bodies to former homes of deceased persons.

Since the expenditures for transportation of the patient are limited to "actual, necessary expenses" whether by "ambulance, train or automobile," it appears to be inferrable that the same economy must characterize the transportation of the dead body.

It is therefore concluded that the University Hospital officials are authorized to pay out of the Hospital Fund the "necessary expenses of transporting" the corpse of a former patient by the medium of lowest cost from the Hospital to the former home town of the deceased "whether by ambulance, train or automobile."

UNIVERSITY HOSPITAL: FURTHER TREATMENT OF PATIENTS DISCHARGED: OSTEOPATHS:

"In case the latter (reporting physician) is an osteopathic physician, the staff member would not be 'consulting' with him by simply making a report as to recommended further treatment to the Social Service Department at the hospital. The Social Service Department could and perhaps should forward such information to the reporting physician of the patient's home town."

December 5, 1935. *College of Medicine:* Your letter of November 11th raises the following question:

Does the law pertaining to the practice of osteopathy passed by the last General Assembly require staff members of the University Hospital to give reports and advice concerning further treatment of patients discharged from the hospital to the "home physician" when the latter is an osteopath?

In the opinion of September 30, 1935, addressed to Mr. Robert E. Neff, Administrator of University Hospital, concerning the statute above mentioned, Section 10 was quoted and discussed. That section is likewise relevant to the above inquiry. It is as follows:

"Sec. 10. One licensed hereunder shall have the right to examine applicants, recommend admissions and make reports in connection with the admission of patients to all state-owned institutions."

While this section has to do only with recommending admissions and making reports in connection with their admission, it appears to have been the purpose of the General Assembly to put the osteopathic physician on a parity with "regular" physicians and surgeons in respect to the matter of admission and treatment of patients in state-owned institutions.

It must not be forgotten that the welfare of the patient after his discharge from the hospital frequently depends upon his continuing to receive treatments in strict compliance with instructions given upon his discharge. In some instances this would be true whether the instructions for treatment are carried out by a "regular" physician or by another.

The terms of the statute would not seem to require that members of the University staff should be embarrassed or possibly forced by their convictions to resign from the staff by reason of the rule of the Medical Association providing for expulsion of members who consult with osteopaths and chiropractors. Such information as may seem to be necessary, proper or relevant to the care of the patient after he leaves the hospital can be sent, at the doctor's option, directly to the referring or reporting physician or to the Social Service Department of the hospital, which can in turn send the same on to the referring or reporting physician. In case the latter is an osteopathic physician, the staff member would not be "consulting" with him by simply making a report as to recommended further treatment to the Social Service Department at the hospital. The Social Service Department could and perhaps should forward such information both to the reporting or referring physician and to the Social Service office of the patient's home town, if one exists.

UNIVERSITY HOSPITAL: BOARD OF SUPERVISORS: MEDICAL CARE FOR INDIGENT PATIENTS:

"If a court * * * should find the hospital could not accommodate such person within thirty days and should decree that care be at once given * * * in a local hospital * * *, the County Supervisors would be bound to respect the same * * *.

"No specific provision exists under which a court can order the continuation of treatment * * * at the expense of a county after a patient has been returned * * * to his home."

December 5, 1935. *University of Iowa:* The letter of November 6th written to you by Mr. Neff and your letter of November 12th addressed to President Gilmore raise the two following questions:

1. Are County Supervisors bound to provide medical care, hospitalization, etc. for indigent patients reported to the District Court under the procedure in Chapter 199 of the Code of Iowa as amended, if the said patients cannot be admitted to the hospital within the period of thirty days?

2. Is a county bound to furnish through its own channels and its proper officers or employees necessary care, treatment, medicine, maintenance, etc. to one who, having been committed to the University Hospital by court order under the provisions of Chapter 199 of the Code, 1931 as amended, has been treated at the hospital and discharged therefrom in convalescent condition or in a condition requiring a continued supply of medicine such as insulin?

In the absence of any court order, county officials acting under the provisions of Chapter 267 of the Code, particularly with reference to Sections 5322, 5323 and 5328 (see 45th G. A., Ch. 100), may properly provide care

"as they find cause" though they are not bound to do so in the absence of a specific court order.

Under the provisions of Section 4012 of the Code as amended by the 45th General Assembly, Extra Session, a district judge clearly has authority to enter an order directing the Board of Supervisors of a county to provide adequate treatment at county expense for the patient at the patient's home or in a hospital. If no such court order is made, however, the matter is left within the discretion of the Board of Supervisors to give or deny relief "as they find cause." (Section 5328; 45th G. A., Ch. 100).

The hospital commitment form 11 does not provide any order directed to the Board of Supervisors for the care of the patient at home if he cannot be received at the hospital within thirty days. If a court after presentation of application for the commitment of an indigent sick person should find the hospital could not accommodate such person within thirty days and should decree that care be at once given at local expense in a local hospital or in the patient's home, the County Supervisors would be bound to respect the same unless they were successful in getting it set aside on appeal.

No specific provision exists under which a court can order the continuation of treatment or a continued supply of medicine at the expense of a county after a patient has been returned from the University Hospital to his home.

While, as indicated above, no specific authority for such an order exists it may well be inferred from the nature of the juvenile court (Code, 1931, Ch. 179) and from the fact that jurisdiction of all commitments to the University Hospital, etc., is entrusted to the juvenile court (Code, 1931, Sec. 4005 as amended by the 45th General Assembly, Extra Session) that the purpose of the Legislature in entrusting jurisdiction over the indigent sick to the juvenile court was to provide a constantly available jurisdiction over such members of society. This would suggest that a patient having once come within the jurisdiction of the court should be regarded as under the supervision of the court until completely well.

If these premises be accepted, the court could then make an order requiring that treatment, necessary care, medicine, supplies, etc., be furnished to the patient at the expense of the county after his return to his home from the University Hospital as a convalescent or an improved patient requiring permanent care.

To take the matter of such care out of the discretionary hands of the Board of Supervisors and to make their duty mandatory by court order would require, of course, that the court in fact enter such an order. Such an order could be requested by any social welfare agent in the county. Presumably such request should go to the court through the County Attorney.

Since, as indicated above, the jurisdiction of the court with respect to matters within your second question would not be based upon specific provision but rather upon inference or implication, a court might be reluctant or unwilling to make such an order. If such order were actually made by the court, however, the County Supervisors would be bound by it and they would be in contempt of court should they ignore the same, unless they should appeal and have the order set aside or unless they could persuade the court which entered the order to modify or eliminate the same at a subsequent hearing.

It might be desirable in some instances that a recommendation for prompt commitment to a local hospital or an order for home treatment be sent to the local officials where the University Hospital cannot receive the patient within the thirty-day period. This would seem to be particularly sound where such delay would substantially endanger or discommode the patient or increase the ultimate total cost of his care at public expense.

PRINTING BOARD: CODE: Section 177 of the 1931 Code of Iowa held to make appropriation for payment of cost of printing and publishing of 1935 Code of Iowa.

December 6, 1935. *Superintendent, State Printing Board:* You advise us that the 1935 Code has now been printed, and is ready for distribution and that the bill for printing the same has been presented to your department in a sum approaching $28,000.00. You advise us that the appropriation made to the Printing Board is not adequate to permit payment of this bill from such appropriation and request an opinion from this department as to whether Section 177 of the Code is authority for payment of this bill out of the general fund of this state. Section 177, Code, 1935, is as follows:

Appropriation. There is hereby appropriated out of any money in the treasury not otherwise appropriated an amount sufficient to defray all expenses incurred in the carrying out of the provisions of this act.

Said section is followed by the note:

"The word "act" refers to 40 Ex. G. A., Ch. 3."

Appropriations for each year of the biennium beginning March 1, 1935, were made in Sections 32 and 33 of Chapter 126, Acts of the 46th General Assembly. For general office purposes an appropriation of $14,620.00 was made for each year of the biennium. For state purposes an appropriation was made for each year of the biennium in the following words:

"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. . . . $129,150.00."

The state appropriation for each year of the biennium beginning March 1, 1933, for the department of the State Printing Board for general offices was $14,178.00 and for state purpose was $120,000.00. It would seem apparent from an examination of the appropriation acts for the several years that it was not within the contemplation of the Legislature that the printing of the Code should be paid for out of the appropriation to the State Printing Board. Section 177 above set out was enacted as a part of Chapter 3, Acts of the 40th General Assembly, Extra Session, which chapter contained Section 5 relating to future Codes as follows:

"Future Codes. The editor of the Code shall, immediately following the final adjournment of the regular session of the 42d General Assembly and immediately following the final adjournment of each even numbered regular session thereafter, prepare a new edition of the Code, and the Printing Board shall forthwith cause the same to be printed:"

Section 5 appeared as Section 170 in the 1924 Code. Editorial changes were made in said section in the 1927 and 1931 Codes relating to future Codes, but the substance of Section 170 as it stands at present is substantially the same as in Chapter 3, Acts of the 40th General Assembly, Extra Session.

It is our opinion therefore, that Section 177 of the 1931 Code of Iowa is in

effect an appropriation for the payment of the cost of printing and publishing of the 1935 Code of Iowa. Any money received by the state from the sale of copies of the Code goes into the general fund and in view of Section 177 of the Code, and in view of the absence of any other express appropriation for payment of the costs of printing the Code, it seems that but one conclusion can be drawn and that is that the bill in question is to be paid out of the general fund pursuant to an appropriation made by Section 177.

NOTICE TO DEPART: LEGAL SETTLEMENT: Paragraph 3, Section 1 of Chapter 99, Acts 45th General Assembly, 1935 Code, Sec. 5311. Any person being wholly supported by public funds shall not acquire settlement in another county.

December 10, 1935. *County Attorney, Guttenburg, Iowa:* We have your letter of November 5th in which you state a question has arisen in relation to the duty of your county to support a widow who left Clayton County December 15, 1933, moving into Delaware County, where she received aid from Clayton County until November 20, 1934, by way of a widow's pension. You state that Delaware County served a notice on her after she had resided for one year in Delaware County, said notice being a notice to depart as provided by Chapter 99, Acts of the 45th General Assembly. Your question is:

"Whether by one year of residence in Delaware County without being served with notice to depart, gave her a legal settlement in that county."

It is difficult to answer the question without information additional to that contained in your letter and the accompanying letter of P. T. Ockett, Director of Relief. The intention of the person involved may be an important consideration, as is also the extent of support which is being given from public funds. The party in question by residing in Delaware County for one year without being served with notice to depart, acquired a legal settlement in that county if at all times she possessed the intention so to do, unless she was prevented from gaining such legal settlement by Paragraph 3 of Section I of Chapter 99, Acts of the 45th General Assembly, which paragraph insofar as material reads as follows:

"3. * * * Any person who is being supported by public funds shall not acquire a settlement in said county unless such person before * * * being supported thereby has a settlement in said county."

The lady in question was receiving a widow's pension at the time she came into Delaware County and continued receiving such pension for a considerable period of time thereafter. If it was her purpose and intent to abandon her residence in the original county and acquire settlement in the county of her new location, she could do so but would thereby forfeit her right to a widow's pension from the first county. If her sojourn in the second county was temporary and without intention to establish a settlement and residence there and the county continued the widow's pension, assuming that her status warranted it in view of the quoted portion of Paragraph 3 above, it is our opinion that any such person who is being supported by public funds may not acquire a settlement in another county while she continues to be supported by such public funds. The same rule applies to persons who are inmates of or supported by institutions whether organized for pecuniary profit or not and in-

stitutions supported by charitable and public funds. If this lady was being wholly supported by the widow's pension, then Paragraph 3 above quoted would appear to preclude her from gaining a legal settlement in a county other than that from which she received a pension. If, on the other hand, such widow's pension was only a part of such support, and if she was not being supported almost wholly by public funds, then it is our opinion she could acquire the new legal settlement. We take Paragraph 3 to mean that any person who is being wholly supported by public funds shall not acquire a settlement in another county. We do not believe this exception applies to persons who are in a fairly creditable way of making their own living with limited aid from public funds.

PARKS: PARK BOARDS: Park Board would not have power to lease entire city park to a group for the special purposes of that group. Board would have power to lease for temporary period a portion of city park, leaving a substantial part thereof for public use free from lease.

December 10, 1935. *County Attorney, Red Oak, Iowa:* Your recent letter with reference to leasing a portion of a park in your city to the American Legion for the purpose of holding a fourth of July celebration therein under the auspices of the Legion, at which celebration the Legion expects to charge an admission fee of fifty cents per person for entrance to the park, was referred to Mr. Rader and has been by him referred to me.

Your first question is as follows:

"Whether or not the park board has the authority to lease the entire park to the American Legion and the American Legion to charge admission into the park for their celebration."

In answering your questions, we assume there is no ordinance bearing directly thereon. The Park Board will of course be limited by your city ordinances having any bearing on parks and the Park Board.

Section 5798 of the Code relating to the general powers of Park Boards provides that such board may sell subject to the approval of the City Council, exchange, or lease any real estate acquired by it, which shall be found unfit or not desirable for park purposes, and shall have exclusive control of all parks and pleasure grounds acquired by it or of any other grounds owned by the city and set apart for like purposes. Section 5805 relates to the jurisdiction of such board over all lands used for park purposes within or without the corporate limits. If any such park became the property of the city under the terms of a will or other legal instrument, the terms of such instrument and the city ordinances would control. Public parks are the property of the city for the benefit of all the people of the city alike and not for the special benefit of any particular group. I am therefore of the opinion that the Park Board would exceed its powers if it were to lease the entire city park to the American Legion for the special purposes of that group.

Your second question is as follows:

"Whether or not the park board has the right to lease half of the park to the American Legion and the American Legion charge 50c per person for entrance into the half of the park which they have leased."

Assuming that if half the park were rented for a brief period to the American Legion the other half would be available to the people of the city for park purposes and adequate to meet all of their requirements for such tem-

porary period. It is my opinion that the Board would have authority to lease for a brief and temporary period a portion of such park not exceeding a half thereof to the American Legion for its special purposes, in view of the further fact that the American Legion is a patriotic organization and not a private enterprise.

LIQUOR CONTROL COMMISSION: CHARGE RENTAL FOR SPACE IN MULBERRY BUILDING OCCUPIED BY CONSERVATION COMMISSION.

"Therefore, the Liquor Commission is legally bound to collect rent for the space occupied in the Mulberry building by the Conservation Commission. The Conservation Commission should be made to pay their proportionate share of the total floor space used for offices in the Mulberry Building."

The Iowa Liquor Control Commission: Your question divides itself into two parts:

(1) Has the Iowa Liquor Control Commission the right to charge the Conservation Commission rent for the space they occupy in the building (Mulberry Building) rented by the Iowa Liquor Control Commission for use by it for Store No. 1, Warehouse and Central Office?

(2) If the Iowa Liquor Control Commission has such right, who is to determine what constitutes the rental that the Liquor Commission may charge the Board of Conservation?

Facts:

Chapter 24, Laws of the 45th General Assembly, Extraordinary Session, provides for the creation of the Iowa Liquor Control Commission. Section 6 of this chapter (1921-F15, Code of 1935) provides as follows:

"The principal place of business of the Liquor Control Commission shall be in the city of Des Moines, and the Executive Council shall provide suitable quarters or offices for the Liquor Control Commission in Des Moines."

Section 7 (1921-F16, Code of 1935) provides as follows:

"The commission shall have the following functions, duties and powers:

"4. To rent, lease, and/or equip any building or any land necessary to carry out the purposes of this chapter."

In accord with the above two sections quoted from Chapter 24, Laws of the 45th General Assembly, the Iowa Liquor Control Commission rented the Mulberry Building for use as Retail Store No. 1, Central Office and Warehouse. The Liquor Commission remodeled this building in such a way that the entire second floor was fit for use as a Central Office. After one year's operation it was discovered that this office space was somewhat larger than was absolutely necessary for the proper conduct of the business of the Liquor Commission. The Executive Council was apprised of this fact and after a great deal of negotiation with the Executive Council, through their Secretary, Mr. Ross Ewing, approximately 4,000 square feet of floor space was rented to the Conservation Commission to be used by them for their Central Office. It was agreed with Mr. Ewing, Secretary of the Executive Council, that a fair and equitable rental for the amount of space used would be $1.25 per square foot per year.

The State Conservation Commission is a body created by the 46th General Assembly through a merger of the previous Fish and Game Commission, Office

of State Forestry Commissioner, and the State Board of Conservation. The only provision of the Act creating this commission relative to office space is as follows:

"The commission shall keep its office at the seat of government. The Executive Council shall supply and properly furnish said rooms." (1703-G9, Code of 1935.)

Opinion:

I

This is not a question where the Liquor Commission has a right to do something or not to do it. The Commission has no choice in the matter of charging or not charging the Conservation Commission rent for the space they occupy in the Mulberry Building.

The Iowa Liquor Control Act provides that the Liquor Commission shall conduct a retail business in intoxicating liquors (other than beer). It further provides that any profit derived from such business shall be used for a specific purpose. That purpose is "to reduce the general state tax levy against real estate." (1921-F50, Code of 1935.) Any other use of the profits derived from the liquor business by the Commission would be a violation of the law and as such would be illegal.

The Liquor Commission rents the Mulberry Building for use as its Central Office, Store Nō. 1, and the Warehouse. If the Liquor Commission should grant any other body the privilege of occupying space in this building, rent free, and in addition give them light, heat and janitor service, the Liquor Commission would thereby be reducing their profit and, at least indirectly, using their profit for a purpose contrary to that allowed by law.

The fact that the Conservation Commission is also an arm and agency of the state just as the Liquor Commission is does not make any difference. This is particularly true since the Conservation Commission does not derive all of its money from taxes on real estate. The Conservation Commission derives its funds from the following sources:

1. Hunting and fishing license fees.
2. By appropriation by the Legislature. (1703-G13, Code of 1935, Section 7, Chapter 126, Laws of the 46th General Assembly.)

For the Liquor Commission to grant the Conservation Commission office space, light, heat and janitor service free of charge would be to grant relief not only to property owners but also to hunters and fishers who now help support the Conservation Commission by their license fees. Granting the Conservation Commission the right to occupy space in the Mulberry Building on which the Liquor Commission pays rent, rent free, would constitute a distribution of profits by the Liquor Commission in violation of Section 1921-F50, Code of 1935.

The Liquor Commission has no legal right to grant anybody anything which would either directly or indirectly constitute a division of profits of the Liquor Commission. All profits must be distributed in accord with the method laid down by the Legislature. Therefore, the Liquor Commission is legally bound to collect rent for the space occupied in the Mulberry Building by the Conservation Commission.

II

The amount that must be charged the Conservation Commission should not be hard to determine. The Conservation Commission should be made to pay their proportionate share of the total floor space used for offices in the Mulberry Building. Some account, however, should be given to the desirability of the space used by the Conservation Commission.

BOARD OF SUPERVISORS: ROADS: Board of Supervisors may not be legally mandamused to build and construct road improvements, including bridges.

December 13, 1935. *County Engineer, Muscatine, Iowa:* I beg to acknowledge receipt of letter from Le Roy A. Roder, Assistant Attorney General, relative to the above entitled matter, in which he says you dictated certain paragraphs as to the facts therein stated, relative to the above matter.

At the outset let me say that neither the county nor the Board of Supervisors may legally be mandamused to compel them to build or construct any road improvement, including bridges. As to whether or not the county or its Board of Supervisors will make such improvements is a matter of discretion, and the action of the Board of Supervisors may not be controlled in a mandamus proceeding in court. That was the law ten years ago, and it is the law now.

It would, therefore, be the opinion of this department that the Board of Supervisors of Muscatine County in this matter should exercise its discretion and if in the exercise of such discretion it should find that it would be unwise or impossible, for financial or other reasons, to build this bridge, it is the further opinion of this department that its action could not be successfully attacked in court.

By way of suggestion, the Supervisors would have the right, uncontrolled by court, to vacate a portion of the unused highway which has been heretofore abandoned, if in the exercise of its discretion it sees fit so to do, and its action again could not be successfully attacked in court.

ASSESSORS: BONDS: Bonds of city and town assessors shall be approved by Board of Supervisors.

December 16, 1935. *State Board of Assessment and Review:* We have your letter of recent date in which you present the question as to what officer or board shall approve the bonds of city and town assessors and the further question as to the office in which such bonds shall be filed.

Section 5632 provides that in all cities and towns, the Mayor, Trustee, and Assessor shall be elected by the entire electorate. An Assessor elected by the entire electorate of a city or town is then a city or town officer. Section 1073 of the 1935 Code provides in part as follows:

"1073. Approval of bonds, bonds shall be approved: * * *

2. By the Board of Supervisors in case of county officers, township clerks and assessors. * * *

5. By the mayor, or as may be provided by ordinance, in case of city and town officers."

It will be observed that there is an apparent conflict in the provisions of Section 1073 above quoted. Paragraph 2 quoted above provides, however, that the Board of Supervisors shall approve the bonds of county officers,

Township Clerks and Assessors, whereas Paragraph 5 provides generally that bonds of city and town officers shall be approved by the Mayor or as otherwise provided by ordinance. Paragraph 2 refers to Assessors without making any distinction between Township Assessors on the one hand and City and Town Assessors on the other. It would seem impossible to conclude that the Legislature by the use of the word "assessors" in said Paragraph 2 meant only Township Assessors. The provision is clearly that the Board of Supervisors shall approve the Board of Assessors, and surely that means all Assessors. The provisions that the Mayor shall approve the bonds of city and town officers appears in the same section and it is our opinion that the specific provision in Paragraph 2 should prevail over the general and more indefinite provision of Paragraph 5. Section 1065 provides that the bonds of city, town and township Assessors shall each be in a penal sum to be fixed by the Board of Supervisors. Section 1077 provides that the bond and oath of officers of cities and towns shall after approval and proper record be filed in the office of the officer or clerk or body approving the bonds. Section 1078 provides that in the record kept by the County Auditor, the official bonds of all county officers, elective or appointive, Justices of the Peace, Township Clerks, Constables, *and all Assessors,* shall be recorded therein in full.

In view of the fact then that the bonds of city and town Assessors shall be in a penal sum to be fixed by the Board of Supervisors, and in view of the specific provision that bonds of Assessors shall be approved by the Board of Supervisors, and in view of the provisions of Section 1077 and Section 1078 that bonds and official oaths of officers of cities and towns shall be filed in the office of the officer or clerk or body approving the bond, and that the bonds of all Assessors shall be recorded in full in the record kept by the County Auditor, who is the clerk of the Board of Supervisors, it is our opinion that the bond of city and town Assessors must be approved by the Board of Supervisors, notwithstanding the express provision of Section 1073 that bonds shall be approved "by the mayor, or as may be provided by ordinance, in case of city and town officers."

SUSPENSION OF LICENSE: JUDGMENT: Section 5079-c4 provides Motor Vehicle Department shall suspend registration of any motor vehicle registered in name of judgment debtor and suspension shall not be removed until proof is filed that judgment is satisfied.

December 18, 1935. *County Attorney, Osage, Iowa:* Your letter of December 14th addressed to Clair E. Hamilton has been referred to me for reply.

You refer to a case of suspension of license for nonpayment of a judgment under Section 5079-c4 of the 1935 Code of Iowa, and your question is:

"Whether a finance company which holds a conditional sales contract covering the motor vehicle in question which instrument was properly on file in the county in which the car was registered may repossess the car and demand and procure a license therefore?"

As suggested in your letter it is the attitude of the Motor Vehicle Department that the suspension of a motor vehicle license under Section 5079-c4 is effective as against said motor vehicle and all parties interested therein,

but the rule may be subject to exception in some cases. The material part of the section under consideration is as follows:

"5079-c4. Whenever a final judgment is recovered in any court of record in this state in an action for damages for injury to or death of a person or for an injury to property caused by the operation or ownership of any motor vehicle on the highways of the state, and such judgment shall remain unsatisfied and unstayed for a period of sixty days after the entry thereof, a transcript of such judgment duly authenticated may be filed with the County Treasurer and thereupon the County Treasurer shall forthwith suspend the license, if any, of the judgment debtor or debtors, as the case may be * * * and shall forthwith suspend the registration of any and every motor vehicle registered in the name of such judgment debtor or debtors * * * and such suspension shall not be removed nor such license plates returned by the County Treasurer nor shall a license to operate a motor vehicle thereafter be issued to such judgment debtor or debtors * * * until proof that such judgment has been stayed, satisfied, or otherwise discharged of record shall be filed with the County Treasurer."

It will be noted this section expressly provides that the motor vehicle department shall forthwith suspend registration of any motor vehicle registered in the name of such judgment debtor and that such suspension shall not be removed until proof is filed that the judgment is satisfied. The statute makes no exception in the case of a lienholder who may repossess the car nor in case of a purchaser of such motor vehicle. The Legislature clearly intended that such judgment debtor should not have a license for any motor vehicle owned by him or a license to operate motor vehicles until the judgment was satisfied in whole or in part as provided by the section.

Your question involves a situation where a finance company sold the car or financed the sale of the car, presumably at the time it came into possession of the party against whom a judgment was later obtained. The finance company had a good faith first lien on the car with a contractual right between the parties to repossess it under certain circumstances. The finance company is in no way at fault and has now repossessed the car, we assume, pursuant to its rights under the conditional sales contract. This section was not intended by the Legislature to hamper the motor vehicle industry nor to do anything more than enable the judgment creditor to collect his claim if possible from the judgment debtor. His rights against the judgment debtor should not be limited by any narrow construction placed upon the statute. On the other hand the rights of third parties should not be interfered with by a too broad construction of the statute.

It is our opinion therefore, that if the finance company repossesses the car under the terms of the contract and in absolute good faith and if there is no taint of fraud in the transaction then it should be entitled to procure a license for such vehicle. The Motor Vehicle Department should issue licenses in such cases, however, only after it is fully convinced that there is no fraud or connivance involved in the repossession by the finance company of such motor vehicle.

STATE INSTITUTIONS: WOMEN'S REFORMATORY: RELEASE OF WOMEN CONVICTED OF ADULTERY:

"Section 13960 is controlling, and in as much as the court designated the Women's Reformatory as the place for the punishment, he had no legal right to impose less than the maximum period, thus making the inmate immediately available for either parole or pardon."

December 26, 1935. *Women's Reformatory, Rockwell City, Iowa:* Your communication, addressed to Mr. Hamilton of our department a few days ago, has been handed to me for answer.

It appears from your correspondence that one Anna Dirkson Eygebroad entered a plea of guilty in the District Court of Franklin County to the charge of adultery and that the judgment entry contained the following provision:

"It is therefore adjudged and ordered that the defendant be committed to the Women's Reformatory at Rockwell City, Iowa, for a period of three months from this date."

For the purpose of this opinion, we understand that the three-month period of commitment has already been served, and you desire to know whether or not the defendant above named is entitled to be discharged at this time.

The punishment provided by statute for the crime of adultery is contained in Section 12974, as follows:

"Every person who commits adultery shall be imprisoned in the penitentiary not more than three years, or be fined not exceeding three hundred dollars and imprisoned in the county jail not exceeding one year; * * *."

In reaching a construction of the judgment entry in this case, consideration must be had of Chapter 654 of the Code of 1935 and especially Sections 13960 and 13962 thereof. Section 13960 deals with indeterminate sentences and is as follows:

"When any person over sixteen years of age is convicted of a felony, except treason or murder, the court imposing a sentence of confinement in the penitentiary, men's or women's reformatory shall not fix the limit or duration of the same, but the term of such imprisonment shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted."

Section 13962 makes provision for the discretion of the court as to the sentence. It is as follows:

"Where one is convicted of a felony that is punishable by imprisonment in the penitentiary, or by fine, or by imprisonment in the county jail, or both, the court may impose the lighter sentence if it shall so elect."

As applied to the judgment in the instant case, the court could have imposed the lighter sentence, to-wit, a fine of three hundred dollars and imprisonment in the county jail not exceeding one year. Had the judgment provided that this defendant was to serve three months in a county jail, it is probable that she would be entitled to be released at the end of three-month period, but the judgment in this case committed the prisoner to the Women's Reformatory at Rockwell City, and therefore under the rule laid down by our Supreme Court in a number of cases the woman is in fact committed to your institution for a three-year period. It was said by our Supreme Court in *State vs. Korth,* 204 Iowa, 667:

"Under this statute (Section 13960) a sentence that the defendant 'be imprisoned in the penitentiary according to law' is all that is required. No reference whatever need be or should be made to a minimum or maximum period."

In *State vs. Bird,* 207 Iowa, 212, it was held:

"The sentence was for ten years and the defendant complains that this is excessive. The sentence, however, was under the indeterminate sentence law and did not exceed the maximum. The length of the imprisonment and the granting of a parole or pardon are under the control of the Board of Parole

and the Governor, and the sentence for the maximum is not now open to the objection here made to it."

In *State vs. Sego,* 161 Iowa, 71, it was held that the fact that the circumstances of the crime indicated that it was minor in character was not a ground for complaint that the sentence for the maximum punishment provided by statute was unwarranted.

In *McKinnon vs. Sanders,* 161 Iowa, 555, it was held that a person convicted of carnally knowing an idiot or imbecile punishable by imprisonment for life or for a term of years has no constitutional right to a definite sentence for life or for a term of years.

There is no doubt in our minds that the court felt that a commitment of three months in this case would be a sufficient punishment. Unfortunately, however, Section 13960 is controlling, and in as much as the court designated the Women's Reformatory as the place for the punishment, he had no legal right to impose less than the maximum period, thus making the inmate immediately available for either parole or pardon.

Believing that the Board of Parole will give careful consideration to her application for a parole because of the disadvantages suffered by her under the form of judgment entry and commitment, I am today forwarding a copy of this opinion to the Board of Parole.

SOLDIERS' RELIEF: IOWA EMERGENCY RELIEF ADMINISTRATION: Soldiers' Relief Commissions of various counties should cooperate with Iowa Emergency Relief Administration reproposed program of relief for 1936.

Commissions are without legal authority to delegate powers or duties to Director of Relief.

December 30, 1935. *State Bonus Board:* You have submitted to this department a proposed program of soldiers' relief for 1936, prepared by the Iowa Emergency Relief Administration, and have asked our opinion as to whether or not the Soldiers' Relief Commissions of the various counties in the state have authority, under the statute, to accept and approve the plan. The plan as proposed by the Iowa Emergency Relief Administration is as follows:

A. If the county Soldiers' Relief Commission does not have sufficient funds to give adequate relief to both the employable and unemployable veterans of the county for the entire year of 1936, and desires the Iowa Emergency Relief Administration to supplement their funds during the year, the following plan must be followed.

B. If counties where the Soldiers' Relief fund is sufficient to care for both the employable and unemployable veterans of the county throughout the year, also desire to operate under this plan, they may make application as provided below and all sections will apply except Section 9.

1. The entire case load (both employable and unemployable) and all new applications will be investigated by an approved Director of Relief, acting under the supervision of this administration. After the investigation, the amount of relief authorized for each case will be recommended by the Director of Relief and will be submitted to the Soldiers' Relief Commission for their approval.

2. The findings of this investigation and all future records of each case will be kept as other records of the relief office, however these records are to be accessible to the Soldiers' Relief Commission at any time, and copies will be furnished them upon request.

3. Relief may be extended from Soldiers' Relief Funds either in cash or in kind as agreed upon by the Soldiers' Relief Commission and the Director of Relief; however when expenditures are made for the care of veterans from funds provided through the Iowa Emergency Relief Administration, only the current approved relief order procedure may be used.

4. No obligation against the Soldiers' Relief Fund may be made by the Director of Relief for any case until the Soldiers' Relief Commission has certified the case as being eligible to receive Soldiers' Relief.

5. When a disabled veteran is entitled to receive a portion of his relief from the Iowa Bonus Board this amount will be certified by the County Soldiers' Relief Commission to the Bonus Board and relief granted from Soldiers' Relief funds will be reduced accordingly.

6. All obligations incurred against the Soldiers' Relief fund, except administrative expense, shall be made by agreement between the Director of Relief and the Soldiers' Relief Commission. Administrative expenses must be reported to the Director of Relief at the end of each month.

7. No obligation will be made against the Soldiers' Relief Fund for wages, mileage or other expense of the Director of Relief. This expense will be cared for in the same manner as non-veteran relief expenses of the county.

8. The same procedure used to determine eligibility for relief and the amount of relief needed for other relief cases will be used for veterans.

9. The January 1, 1936 available balance in the Soldiers' Relief Fund, plus .25 mills levy on the taxable property of the county, will be considered as the available revenue for 1936. One-twelfth of this, plus any unexpended balance or minus any over-expended amount of available revenue for previous months will be considered the available revenue for the following month. When so much of the available revenue for the month has been expended that it appears only sufficient funds are still available to care for the disabled for the remainder of the month, the Director of Relief will cease to make recommendations for expenditures from the Soldiers' Relief Fund for employable veterans and will care for them in the same manner as is being done with employable non-veterans.

10. If the County Soldiers' Relief Commission desires to operate under this plan it will make application through its chairman on forms provided by the Iowa Emergency Relief Administration. Approval of this plan must be obtained from the Board of Supervisors and the County Emergency Relief Administration. Upon receipt of the application in the office of this administration, it will promptly be acted upon and the County Soldiers' Relief Commission will be notified of its acceptance or rejection.

The laws of this state which provide for the establishment of Soldiers' Relief Commissions in the various counties and under which laws the said Commissions obtain their authority, are found in Chapter 273 of the Code of 1931. The chapter provides for a tax not exceeding one-fourth mill on all taxable property within the county, to create a fund for the relief of, and to pay the funeral expenses of honorably discharged, indigent United States soldiers, sailors, marines and nurses who served in the military and naval forces of the United States in any war, and their indigent wives, widows and minor children, not over fourteen years of age if boys, nor sixteen years if girls, *having a legal residence in the county.* Under the provisions of the chapter, the fund is to be expended for the purposes therein provided by the joint action and control of the Board of Supervisors and the Relief Commission. The fund is to be dispersed by the Soldiers' Relief Commission, which consists of three persons, all of whom shall be honorably discharged soldiers, sailors, marines or nurses who served in the military or naval forces of the United States in any war. The members of the Commission are to

be appointed by the Board of Supervisors at its regular meeting in June, and each member holds his office for a period of three years.

We have said and we believe correctly, that although the Soldiers' Relief Fund is not, strictly speaking, a poor fund, yet it is a public fund within the meaning of the exceptions to the Tuck Law as provided in Section 5259 of the Code of 1931, and also within the meaning of the exceptions to the local Budget Law as contained in Section 380 of the Code of 1931 as amended.

Chapter 273 of the Code of 1931 further provides in Section 5390 that the Commission shall meet annually on the first Monday in June of each year and at such other times as may be necessary. At the annual meeting, it shall determine who is entitled to relief and the probable amount required to be expended therefor, which sum it shall certify to the Board, together with a list of those found to be entitled to relief, and the sum to be paid in each case. As soon as this provision of the statute is complied with, the Board at its regular meeting in June shall levy a sufficient tax to raise the amount required to furnish the necessary relief as determined by the Commission. The next section provides that the amount awarded to any person may be increased, decreased or discontinued by the Commission at any regular meeting, and that new names may be added and certified at any regular meeting.

The question then is whether or not the Soldiers' Relief Commissions of the various counties can lawfully delegate their powers and duties to determine the persons entitled to relief and the amount to which each is entitled, to the Iowa Emergency Relief Administration or to a Director of Relief acting under the supervision of the Administration. The Soldiers' Relief Commissions certainly cannot delegate this authority.

We do not intend by this opinion to say that the Relief Commissions cannot accept and approve the plan, provided some slight changes are made.

Paragraph B-1 of the proposed plan provides that all new applications shall be investigated by an approved Director of Relief acting under the supervision of the Iowa Emergency Relief Administration, and that after the investigation, the amount of relief authorized for each case will be recommended by the Director of Relief and submitted to the Soldiers' Relief Commission for their approval. Suppose under the paragraph just referred to, there should be a disagreement between the Director of Relief and the Soldiers' Relief Commission as to whether or not some particular ex-soldier was entitled to relief, or a disagreement as to the amount to which he was entitled. According to the wording of that paragraph, it would seem that the decision of the Director of Relief, acting under the supervision of the Iowa Emergency Relief Commission, would be final and binding on the Soldiers' Relief Commission. Under the provisions of Chapter 273 of the Code of 1931, the Soldiers' Relief Commission cannot barter away its authority nor its duties. If Paragraph B-1 was changed to provide that the decision of the Soldiers' Relief Commission should be final as to the list of persons entitled to relief and the amount to which each is entitled, we would find no fault with that provision.

We do not mean to say that the Soldiers' Relief Commissions should not cooperate with the Directors of Relief. On the contrary, we emphasize the fact that they should cooperate in every way possible. But in case of a disa-

greement as to the names of persons to be placed on the certified list or the amount to which any particular person is entitled to receive, then the decision of the Commission should control.

Someone might assert that Paragraph 4 of the proposed plan clarifies Paragraph B-1. However, upon a careful reading of Paragraph 4, it will be seen that such is not the case. That paragraph provides that no obligation against the Soldiers' Relief Fund may be made by the Director of Relief until the Soldiers' Relief Commission has certified the case as being eligible to receive soldiers' relief. It does not provide, however, that if the Soldiers' Relief Commission should certify the name of a veteran, the Director will grant such relief.

We also call your attention particularly to Paragraph 8 which provides as follows:

"The same procedure used to determine eligibility for relief and the amount of relief needed for other relief cases will be used for veterans."

You understand, of course, that the rule of eligibility for relief granted by the Soldiers' Relief Commission under the provisions of Chapter 273 is not the same as the rule of eligibility prescribed by the poor laws of the state. Under the poor laws it is necessary that the applicant for relief have a "legal settlement of one year in the county." This rule as to general poor relief has no application to veterans. The statutes under which the veteran receives his relief, provide that he shall "have a legal residence in the county." There is a vast difference between "legal residence" on the one hand and "legal settlement for a year" on the other. The former implies that the applicant must be a bona fide resident of the county, meaning that his home is in the county; while the latter means that he must have resided in the county for more than a year without having been served with notice to depart.

You recall, of course, the difficulty faced by the Soldiers' Relief Commissions last year in attempting to procure work relief for their veterans. After the Commissions cooperated in every way possible with the Iowa State Emergency Relief Administration by allocating certain portions of the Soldiers' Relief Funds to work relief, with the understanding that said funds would be supplemented by state and federal funds, numerous veterans were served with notice to depart and were refused work relief after the Soldiers' Relief Funds had been depleted. We call your attention to the fact that under Paragraph 8 of the plan proposed by the Iowa Emergency Relief Administration, if the rule used to determine the eligibility for relief under the poor laws is applied to the veteran, then it would be necessary for him to have a "legal settlement in the county for a year," before he would be entitled to relief. Such is not the law of this state in so far as veterans are concerned.

We might add further, that under the provisions of Chapter 76 of the Acts of the 46th General Assembly, a certain amount was set aside by the Legislature to be known as the Iowa Emergency Relief Administration Fund. Under the provisions of the chapter, the sums are appropriated for either direct relief or work relief. The fund was not established by the Legislature solely for the relief of those who apply under the provisions of Chapter 267 of the Code of 1931, providing for the support of the poor. It was created "for the purpose of caring for unemployed and needy persons within this state." It was therefore, created as much for the benefit of veterans as it

was for any other class or group of persons, and although it is to be administered through the Iowa Emergency Relief Administration, it is, under the provisions of the statute, to be allocated throughout the various counties of the state in accordance with the need therefor. There is nothing in that act which provides that persons must be able to qualify under the poor laws in so far as residence or legal settlement in a particular county is concerned, before they are entitled to relief. The fund is for the relief of the unemployed and needy. If the needy person should be a veteran, a different rule applies to him than that which applies to other persons asking for relief. Consequently, we say that in so far as the Soldiers' Relief Fund is concerned, the various Commissions have no legal right to approve and accept the proposed plan as long as it contains Paragraph 8.

So far as the general provisions in the proposed plan are concerned, we believe they are proper, and we believe that the Commissions of the various counties should cooperate with the Iowa Emergency Relief Administration in every way possible. We do not believe, however, that we should advise the various Commissions to delegate their powers or duties to the Director of Relief when, under the laws of the state, they are without legal authority so to do.

BEER LAW: The City Council could reinstate a permit cancelled through inadvertance and mistake, as could the State Permit Board.

December 30, 1935. *Treasurer of State:* This will acknowledge receipt of your request of recent date for the opinion of this department on the following set of facts:

The City Council of the town of New Sharon, through inadvertance and mistake, cancelled out a class 'B" permit. When the error was discovered, the permit was reinstated. In the interim, the State Permit Board was notified and the state permit was cancelled. As long as the City Council has acted or are ready to act in reinstating the permit, what is the status of the state permit?

It is the opinion of this department, where a permit is canceled by inadvertance and mistake and is later reinstated by the city or town council, that it could also be reinstated by the State Permit Board, as apparently, from the facts submitted, the entire matter was a mistake in the first instance. The council could reinstate, as could the State Permit Board, where the facts are as they exist in this matter.

SALARY: COUNTY ATTORNEY: Chapter 54 of Acts of 46th General Assembly should apply to salaries for *remainder* of the year of 1935.

January 7, 1936. *County Attorney, Spirit Lake, Iowa:* We have your letter of December 30th in which you ask for an opinion on the following:

Prior to the enactment of the so-called salary reduction act by the 46th General Assembly, the salary of the County Attorney of Dickinson County was $1,100 a year. That act increased the salary of County Attorneys in the class of Dickinson County from $1,100 to $1,200 a year. That act was held unconstitutional.

Another act by the same Legislature took numerous fees and commissions from the County Attorney of Dickinson County, which act has never been held unconstitutional. The 46th General Assembly, by Chapter 54 of its session laws, otherwise designated as Senate File 391, amended Section 5228 of the Code of 1931, by striking out the words "eleven hundred" and inserting

in lieu thereof, "twelve hundred." That act took effect on May 4, 1935. The County Attorney of Dickinson County during the months from January to May inclusive, of 1935, drew his salary at the rate of $1,100 a year. Commencing with the month of June, he was paid $99.00 a month, or on a basis of $1,200 a year.

The question is whether or not that County Attorney is entitled to be paid at the rate of $1,200 a year for the months from January to May of 1935 inclusive.

What is the effect of amending a section by increasing an annual salary in the middle of the year? Prior to the enactment of Chapter 54 of the Acts of the 46th General Assembly, Section 5228 of the Code of 1931, provided in part as follows:

"Each County Attorney shall receive as his annual salary in counties having a population of:—(1) less than 15,000, $1,100.00."

Chapter 54 of the Acts of the 46th General Assembly then amended the section by striking out the word "eleven" and inserting the word "twelve." Section 1218 of the Code of 1931, provides that the salaries of all officers authorized in the 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 provided.

The question really is whether or not Chapter 54 of the Acts of the 46th General Assembly should be given a retroactive construction. This would be necessary if we were to say that the amendatory act increased the salary for the entire year. It is said in 59 Corpus Juris, 1159, Section 692, that retrospective or retroactive legislation is not favored and that it is the well settled and fundamental rule of statutory construction that all statutes are to be construed as having only a prospective operation and not as operating retrospectively, unless the purpose and intention of the Legislature to give them a retrospective effect, clearly, expressly, plainly, obviously, unequivocably and unmistakably appears. This statement in Corpus Juris is supported by some three pages of citations from practically every state in the union, including numerous cases. For us to say then that the Legislature intended when it enacted the amendatory law in June, to have it apply to the salary for the entire year would be to disregard a rule of statutory construction which has been supported by text writers and judicial decisions for many years.

It is, therefore, the opinion of this office that when Chapter 54 of the Acts of the 46th General Assembly became effective, the County Attorney's salary was then raised and that during the remainder of that year, he should be paid at the rate of $1,200.00 a year instead of $1,100.00, but that that provision should not apply to the months prior to the taking effect of the law.

SCAVENGER SALES: REDEMPTION: Senate File 150 re cutting down period of redemption on scavenger sales, has no application to sales held prior to the taking effect of the act.

January 7, 1936. *County Attorney, Spirit Lake, Iowa:* We herewith furnish opinion requested by you on the following:

Prior to the enactment of Senate File 150 of the Acts of the 46th General Assembly, the owner of real estate sold at either a general or scavenger tax sale, was entitled to three years in which to redeem.

Senate File 150 of the Acts of the 46th General Assembly amended Section

7279 cutting down the year of redemption on scavenger sales from three years to one year.

The question is whether or not the owner of real estate sold at scavenger sale prior to the taking effect of Senate File 150 of the Acts of the 46th General Assembly, is entitled to one year or three years in which to redeem the property.

You are advised that Senate File 150 in so far as it cuts down the period of redemption on scavenger sales, has no application to sales held prior to the taking effect of the act. Section 63, Subdivision 1, of the Code of 1931, provides as follows:

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

It should be noted that the above quoted section provides that the repeal of a statute does not affect any right which has accrued under that statute. Under the former statute, the owner of the real estate had three years in which to redeem. (We say three years—you understand, of course, that the statute provides that he has two years and nine months before the ninety-day notice can be given, which means that has at least three years.) Surely, to now cut that statute of limitations to one year would be affecting a right which the owner of that real estate had at the time the act took effect.

That this opinion follows definite holdings of the Supreme Court of this state can readily be seen by the reading of the following cases:

Adams vs. Beale, 19 Iowa 61.
Myers vs. Copeland, 20 Iowa 22.

Both of these cases just cited deal with the question of changing the period of redemption from tax sale, and in both cases, the Supreme Court said that it applied only to sales held after the taking effect of the act.

REAL ESTATE BROKER'S LAW-EXTRADITION STATUTE. Violation of the Real Estate Broker's Law would be a misdemeanor. Therefore the extradition statute first cited would not apply.

January 6, 1936. *Real Estate Commissioner:* Under date of January 3, 1936, you requested the opinion of this department on the following question:

"Referring to the matter of the indictment against T. R. Jordan, will say there seems to be a difference of opinion among attorneys as to whether or not a person who has been guilty of a disdemeanor is extraditable, and this department would appreciate your written opinion and some citations as to your understanding of this matter."

From a previous conference with you regarding the Jordan case, will say that it is my understanding that this man was indicted for a violation of the real estate brokers' law, Chapter 91-c2 of the 1935 Code of Iowa, by reason of negotiating a sale of land as a real estate broker in Kossuth County, Iowa, and that he is a resident of the State of Minnesota. By reason of the alleged violation, he was indicted by the Kossuth County Grand Jury.

Chapter 624, 1935 Code of Iowa, is entitled "FUGITIVES FROM JUSTICE" and Section 13497 of that chapter is to the general effect that the Governor, in any case authorized by the constitution and laws of the United States, may appoint agents to demand of the executive authority of another state or

territory, or from the executive authority of a foreign government, any fugitive from justice charged with treason or felony.

Under Section 12889 of the 1935 Code of Iowa, public offenses are divided into two classes, felonies and misdemeanors. Section 12890 defines a felony as 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. Section 12891 defines a misdemeanor as "another other public offense." Section 12894 provides 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."

The real estate brokers' license law, in Section 1905-c59, provides that any person or corporation violating a provision of this chapter shall upon conviction thereof, if a person be punished by a fine of not more than five hundred dollars, or by imprisonment for a term not to exceed six months or by both such fine and imprisonment, in the discretion of the court, and if a corporation, be punished by a fine of not more than one thousand dollars.

It is the opinion of this department that a violation of the real estate brokers' law would be a misdemeanor. Therefore, the extradition statute first cited would not apply.

INCOME TAX: MUNICIPAL AND COUNTY BONDS: Interest received from bonds or certificates should be included as a part of the gross income of either an individual for individual income tax purposes, or of a corporation in determining the amount of business tax due from it.

January 9, 1936. *Iowa State Board of Assessment and Review:* We have your request for an opinion on the following questions:

1. Should the interest from county and municipal bonds be included in an individual taxpayer's income return as a part of his gross income, for the purpose of determining the amount of tax which he owes the State of Iowa?

2. Should the interest from county and municipal bonds be included in the return of a corporation for the purpose of determining the amount of business tax due from a corporation under Division 3 of Chapter 82 of the Acts of the 45th General Assembly, extra session?

The bonds and certificates which we will cover by this opinion are the bonds and certificates issued by a municipality, county, school district, drainage or levy district, as well as bonds and certificates issued in anticipation of special assessments or allotments of primary road funds.

State bonds will not be covered by this opinion, but will be dealt with separately.

We believe that the following questions should be determined in arriving at our conclusions:

1. Does a state have power, in the absence of a constitutional prohibition, to tax its own bonds and those of its subdivisions and municipalities?

2. Did the Legislature in its enactment of Chapter 82 of the Acts of the 45th General Assembly, Extra Session, intend that interest received by a taxpayer from the bonds hereinbefore referred to, should be included as a part of his gross income for income tax purposes?

The question whether or not the state has power to tax its own bonds and those of its subdivisions or municipalities in the absence of a constitutional prohibition has been before the courts on numerous occasions.

In 26 Ruling Case Law, 334, Section 292, it is said:

"In a majority of the jurisdictions in which the question has arisen, it has been held that in the absence of an express exemption, state and municipal bonds are subject to taxation in the same manner as other personal property."

Some of the cases in which it has been held that a state may tax such bonds as personal property, are: *Stoddard vs. Corbin,* 94 Conn. 543, 109 Atl. 813; *Easton vs. Board of Review,* 183 Ill. 255, 55 N. E. 716; *Hall vs. Middlesex County Commissioners,* 10 Allen (Mass.) 100, *State vs. Woodrull,* 37 N. J. Law 139; *British Commerce Life Ins. Co. vs. Commissioners of Taxes and Assessments,* 31 N. Y. 32; *People ex rel Niagara Fire Ins. Co. vs. Board of Commissioners of Taxes and Assessments,* 76 N. Y. 64; *Drainage Commissioners vs. C. A. Webb & Co.,* 160 No. Car. 594, 76 S. E. 552; *Com. vs. City of Philadelphia,* 27 Pa. 497; *Wilkes-Barre Deposit & Savings Bank vs. City of Wilkes-Barre,* 148 Pa. 601, 24 Atl. 111; *State vs. Page,* 100 W. Va. 166, 130 S. E. 426; *State National Bank vs. Memphis,* 116 Tenn. 641, 94 S. W. 606; and many other cases.

There is a line of cases which is authority for the proposition that a state may not tax such bonds as personal property. However, in most of those cases, a constitutional provision was involved prohibiting such taxation. There is no constitutional prohibition against such taxation in Iowa. It might also be well to note that all of the cases hereinbefore cited, as well as the line of cases holding against such taxation, deal with the question of the right to tax such bonds and certificates as personal property and not with the question of including the interest in the income return of an individual for income tax purposes.

As we said, there is no constitutional prohibition in Iowa against such taxation. There is, however, an exemption granted by statute to the several classes of bonds and certificates herein discussed. Section 6944 (5) of the Code of 1931 is as follows:

"6944. *Exemptions.* The following classes of property shall not be taxed: * * * (5) Public securities, bonds or certificates issued by any municipality, school district, drainage or levy district, or county within the State of Iowa. No deduction from the assessment of the shares of stock of any bank or trust company shall be permitted because such bank or trust company holds such bonds as exempted above."

By Chapter 84 of the Acts of the 45th General Assembly, Extra Session, bonds or certificates issued by a Riverfront Improvement Commission were also exempted. That amendment became effective on March 8, 1934.

It might be well to call attention to the fact that Section 6944 of the Code of 1931 is made up of 21 subdivisions or paragraphs. Some of those subsections have been a part of the law of this state since the Code of 1851. That portion of the section exempting municipal, school, drainage or levy districts and county bonds or certificates from taxation was enacted by House File 448 of the 33d General Assembly, otherwise known as Chapter 81 of the Session Laws of 1909, and was approved on April 16, 1909, and became a part of the law of this state on July 4th of that year.

Prior to that amendment, the Supreme Court of this state had on two separate occasions held that Section 1304 of the Code of 1897, which section has been carried forward as Section 6944 of the Code of 1931, had reference only to general property taxes. See *Sioux City vs. Ind. School District,* 55 Iowa 150; *Iowa Mutual Tornado Ins. Assn. vs. Gilbertson,* 129 Iowa 658, 106 N. W. 153. In the first of these two cases, the Supreme Court said that the exemptions granted under Section 1304 of the Code of 1897, now Section 6944 of the Code of 1931, applied only to general property taxes and not to special assessments levied by cities and towns. In the second case, the plaintiff contended that it was not subject to a license tax imposed on insurance companies for the reason that it was a charitable institution within the meaning of the statute last mentioned. Although the Supreme Court held that the plaintiff was not a charitable institution, it decided definitely and positively that the statute under which it claimed exemption, applied to a property tax and not to a license tax.

After the decisions in those two cases, the Legislature later amended the statute by granting an exemption to the bonds or certificates issued by municipalities, drainage districts, school districts and counties. The Legislature then, at the time it amended the statute, knew that the statute had reference only to exemptions from property taxes and did not include an exemption from excise taxes. For that reason, it would show conclusively that all the Legislature intended by the amendment now included in Section 6944 (5), was to exempt such bonds from property taxes. Otherwise, it would have provided differently in the amendatory act.

We believe this disposes of the question of whether or not an exemption from the provisions of the income tax statute is provided by Section 6944 of the Code of 1931.

We now pass to the question of the taxability of the interest from county primary road bonds referred to in what is now Section 4753-A13 of the Code of 1931. The last four lines of that section are as follows:

"Bonds and road certificates, whether issued in anticipation of special assessments or in anticipation of annual allotments of primary road funds, shall not be taxed."

The provision just quoted became effective on April 19, 1919, and is contained in the Session Laws of the 38th General Assembly, Chapter 237, Section 28. It appeared in Section 4723 of the Code of 1924 and carried on into the Codes of 1931 and 1935, as Section 4753-A13, without change. No income tax law was in force in this state in 1919. In fact the statutes of this state have never contained a provision for an income tax, prior to March 8, 1934, practically fifteen years after the Legislature exempted primary road bonds from taxation. That the Legislature was intending only an exemption from property tax must be presumed. It is impossible for us to believe that the Legislature had any intention, in view of the wording of the statute, to grant an exemption to such bonds for all time and from all manner of taxation, especially from taxes which are far from being a direct tax on the bonds themselves. It is, therefore, the opinion of this department that the exemption granted in Section 4753-A13 does not include an exemption to the interest, in so far as the income tax and corporation tax laws are concerned.

Although some cases held that an exemption to bonds carries with it the exemption to the interest, those were cases in which the court was dealing with one of three questions, namely: (1) The right of the federal government to tax the securities of the several states, their agencies, subdivisions and municipalities; (2) The right of the state to tax the securities issued by the federal government; and (3) The exemption of interest on state or municipal bonds from a state property tax when the bonds themselves were exempted. We will readily agree that the federal government has no power to tax the bonds of a state, its agencies, subdivisions or municipalities, and we also concede that the state is without authority to tax securities issued by the federal government and its agencies. We also say that an exemption to municipal and state bonds from property tax, carries with it an exemption to the interest so long as the interest on the bond is unpaid. What we mean by this statement is that if on the first day of January, a resident of this state is the holder of a municipal bond in the sum of $1,000, on which there is an earned but unpaid interest of $25.00, the interest would not be taxable under the Monies and Credits statute any more than the bond itself. However, if that interest is paid and placed in the bank, it certainly is taxable even under a property tax, on the first day of the next January, if it is still owned by the taxpayer.

Having concluded that the provisions of the Iowa statute hereinbefore mentioned, granting exemptions to particular classes of securities applies only to a property tax, we now proceed to determine whether or not the Legislature in the enactment of Chapter 82, Acts of the 45th General Assembly, Extra Session, intended that the interest from the bonds herein referred to should be returned for individual income and corporation tax purposes.

Section 8 of the act which provides that the term "gross income" includes gains, profits and incomes derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, or reoccurring profits and income growing out of the ownership or use of, or interest in property, real or personal; *also from interest, rent, dividends, securities or the transaction of any business* carried on for gain or profit; or gains or profits and income derived from any source whatever, and in whatever form paid. The section then goes on to provide that the term "gross income" does not include certain items, among which is interest from the obligations of the United States or its possessions, agencies or instrumentalities which are or shall be exempt from state taxation by federal law. There is no specific exemption to state taxation by federal law. There is no specific exemption to state, county, municipal, school, drainage district or primary road bonds contained in Division 2 of the act. Therefore, in view of the fact that the Legislature defined "gross income" by including income derived from any source whatever, and in any form whatever, except from the items specifically exempted, we must conclude that it was that body's intention that the interest from the bonds herein discussed, should not be exempted.

The same situation is true with reference to the business tax on corporations imposed by Division 3 of the act. Section 28 thereof, imposes the tax on the net income or that portion thereof earned in the State of Iowa. Section 30 of the act then provides that all of the provisions of Section 8 (being the sec-

tion which defines "gross income" for individual income tax purposes) shall apply in computing the amount of net income of the corporation.

We find only one case where a Supreme Court of any state has dealt squarely with the question here involved. That case is so squarely in point, not only as to the facts, but as to the conclusion reached, that we desire to call it to your attention and to say that it has influenced us materially in arriving at our conclusion. See *Van Dyke vs. Wisconsin Tax Commissioners*, — *Wisc.* —, 259 N. W. 700. In that case, the bonds under consideration were partly municipal and partly county highway improvement bonds. The provisions of the income tax statute were similar to the provisions of the Iowa statute in defining gross income and exempting federal bonds. There were provisions contained in other statutes of Wisconsin, exempting such bonds from taxation, but no specific exemption was granted in the income tax statute. The Supreme Court of Wisconsin, without a dissent, held that the interest from such bonds was not exempt and that the same should be included in the individual income tax returns.

We call attention to one other case which we believe throws some light on the question. In the case of *People of the State of N. Y. vs. John F. Gilchrist, et al., as Members of the State Tax Commission*, 262 U. S. 84, 43 S. Ct. 501, 67 Law Ed. 883, the U. S. Supreme Court was called upon to determine whether or not the interest from certain bonds secured by mortgages and upon which mortgages the recording tax under Article 11 of the Tax Law had been paid, which recording tax statute contained a provision that the debts and obligations secured by such mortgages shall be exempt from other taxes by the state and local subdivisions, was exempt from the state income tax statute. The United States Supreme Court without much hesitancy and without a dissent, held that the interest was returnable for income tax purposes under the laws of the State of New York, and that the mortgage recording statute granting the exemption, pertained only to a tax on the bonds and not to an income tax, saying that "a tax upon the individual, measured by net income, might be regarded as one step removed from a tax on the capital from which the income was derived."

It is, therefore, the opinion of this department that both of the questions which we have propounded should be answered in the affirmative, which naturally necessitates that the two questions submitted by you should also be answered in the affirmative, and that the interest received from such bonds or certificates should be included as a part of the gross income of either an individual for individual income tax purposes, or of a corporation in determining the amount of business tax due from it.

SALES TAX: RULE NO. 54: "Under Rule No. 54 of Board of Assessment and Review, tax should be collected on price paid by consumer to retailer without permitting deduction of four cents a gallon on lubricating oil, for Federal tax which was paid to Federal government by manufacturer, producer or importer."

January 10, 1936. *State Board of Assessment and Review:* Some time ago you requested an opinion from this office on the following question:

"Under Rule No. 54 as promulgated by the Board, Federal taxes are not deductible from the selling prices. One of the larger oil companies has now filed a brief in support of its contention that in determining the amount of sales tax due, under the Iowa Sales Tax Act on lubricating oil sold, the

Federal tax of four cents a gallon should be first deducted and the Iowa Sales Tax figured on the sale price to the consumer, less the four cents Federal tax.

"Will you please furnish us with an opinion as to the validity of our Rule No. 54?"

Rule No. 54 of the State Board of Assessment and Review is as follows:

"Federal taxes imposed on the sale of tangible personal property are not deductible from selling prices in computing gross receipts from a sale at retail, by which the sales tax is measured. It is immaterial whether the retailer is obliged to pay the Federal tax, or whether the sale at retail is made by a person who has purchased goods upon the sale of which the Federal tax has been paid by another, even though the amount of the Federal tax may in the latter case be set up as a separate item in fixing the selling price of such property."

We have read carefully the brief submitted to your department and by you forwarded to us, and we have studied carefully those of the cases with which we were not already familiar. Conceding that Section 601 (c), Revenue Act of 1932, in imposing a tax on lubricating oils sold in the United States by the manufacturer or producer or imported into the United States, in fact imposes a sales tax, does not alter our view in so far as the application of the Iowa Sales Tax Act is concerned. The federal statute provides for a tax on the importation if the goods are imported, and upon the first sale if the goods are manufactured or produced in the United States.

Although it may be called a sales tax, yet it is in the nature of what we generally refer to as the manufacturers' or producers' tax and is passed on to the ultimate consumer as a part of the purchase price of the article, just the same as a tax on cosmetics, toilet articles, tobaccos, etc. Our tax is a tax on the gross receipts from sales at retail to the ultimate consumer or user. If we were to rule that the federal tax imposed upon the first sale and which is paid by the manufacturer or producer in the first instance and by him passed on as a part of the purchase price, is not in fact a part of the purchase price, merely because it is a tax on the sale of the article, in so far as lubricating oil is concerned, would we not also be compelled to say that all of the retail druggists and retail cigar and tobacco merchants would be entitled to deduct the proportionate share of the federal tax on cosmetics and tobaccos in collecting the Iowa Sales Tax, and remitting it to the State of Iowa? Would we not also have to say the same in connection with any article upon which there is a federal tax? We cannot adopt such a view.

It is, therefore, the opinion of this department that you have no need to waive Rule No. 54 or to withdraw it, and that under that rule you should require that the tax be collected on the price paid by the consumer to the retailer without permitting a deduction of four cents a gallon for the federal tax which was paid to the federal government by the manufacturer, producer or importer. When we say this, we realize that in some instances the manufacturer, producer or importer is the same person who sells at retail to the consumer. However, in our opinion this does not change the effect of the sale.

COMPTROLLER: CONSERVATION COMMISSION: Prospective claims against the state cannot be allowed.

January 21, 1936. *State Comptroller:* I have your letter of January 9,

1936, requesting an official opinion from this department upon the following proposition:

You state that you are having difficulty with the Conservation Commission and other departments who are insisting upon paying for leases upon land and rent for buildings, press service, telephone, water and electric services in advance. You further state that your department has always held that there is no provision in the statute for the payment of any commodity or service in advance. Your contention is that under Section 396 of the Code of 1931, it is very plain that no warrant should be issued except upon an itemized claim which shall show in detail the item of service, expense, thing furnished, or contract upon which the payment is sought.

While the above chapter was repealed by the Comptroller Act, yet this act transferred all the powers and duties of the Board of Audit to the Comptroller's office. See paragraph 5, Section 4, Chapter 4, Acts of the 45th General Assembly. It is also the duty of the Comptroller to 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. See Paragraph 6, Section 4, Chapter 4, Acts of the 45th General Assembly.

It is the duty of the Comptroller to pre-audit all accounts submitted for the issuance of warrants. See Subsection (b) of Paragraph 1, Section 6, Chapter 4, Acts of the 45th General Assembly. It was the very purpose of the Legislature in passing Paragraph 6, Section 6, Chapter 4, of the Acts of the 45th General Assembly, to establish a pre-audit system of settling all claims against the State of Iowa. The Comptroller Act also authorized the Comptroller 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. See Paragraph 16 of Section 6, Chapter 4, of the laws of the 45th General Assembly.

From the above specific provisions of the Comptroller Act as passed by the 45th General Assembly, it is very apparent that the Legislature intended to transfer all the duties previously performed by the Board of Audit, to the Comptroller. One of these duties of the Board of Audit was not to allow any claim against the state, unless the claimant filed an itemized claim showing in detail the items of service, expense, thing furnished, or contract upon which the payment is sought. This duty is now to be performed by the Comptroller. It is also apparent that the Legislature never intended to change the law with reference to this matter. Nowhere does the law contemplate that an alleged claimant can secure money from the State Treasury for services to be performed in the future or for things to be furnished the State of Iowa in the future. Prospective claims against the state cannot be allowed.

It is, therefore, the opinion of this department that the position and policy followed by your office, with reference to the allowance of claims, is legally correct and proper.

CODES OF IOWA: DISTRIBUTION: Subject to approval of Executive Council, these codes may be distributed to Law School of State University of Iowa without charge, also to members of Legislature upon request; also Legislature intended that code should be distributed to members of boards, commissions and heads of departments of such boards and commissions.

January 21, 1936. *Superintendent of Printing:* You advise that the 1935 Code of Iowa is now being distributed and these displace the 1931 Code of Iowa. You advise that there are a large number of 1931 Codes now on hand, and because of being displaced by the 1935 Code, the 1931 Code is, of course, of little value, except for reference and historical purposes. You ask:

1. Whether 150 of the 1931 Codes may be given to the Law School of the State University of Iowa, to be used by the students there.

Section 237 of the Code provides for distribution gratuitously to interested persons or associations, of the early Codes, providing that a sufficient number be retained in reserve as may be fixed by the Executive Council and the reserve be not distributed except on order of the Executive Council. This section does not specifically cover the 1931 Code, but it has been amended from time to time to include prior Codes, and therefore, it undoubtedly was a mere oversight of the Legislature and was, no doubt, intended by them to cover the future Codes which would become obsolete.

It is, therefore, the opinion of this department that subject to the approval of the Executive Council as to setting the reserve number of Codes and authorizing you to distribute these in this manner, that you do have the authority to turn these to the law school of the State University of Iowa and the same to be without charge.

2. Whether these 1931 Codes can be distributed to any one.

Under the foregoing section, they must be distributed gratuitously to persons or associations interested. Therefore, pursuant to authority of the Executive Council, you would have the authority to distribute these gratuitously, but the persons to whom they are given must show to your satisfaction that they are interested.

3. Whether the 1935 Codes may now be distributed to the members of the General Assembly.

Section 235, Paragraph 12 of the Code provides:

"The Superintendent of Printing shall make free distribution of the Code and all the Acts of each General Assembly * * * to each member of the present and subsequent General Assemblies."

Article III, Section 3 of the Constitution provides that the members of the House shall be chosen every second year and that their term of office shall commence on the first day of January after the election and continue two years and until their successors are elected and qualified. Section 5 of Article III provides that Senators be chosen for four years in the same manner. Therefore, all members elected are members of the General Assembly until the expiration of their term and under the statutory provision set out would be entitled to free distribution of the 1935 Codes at this time.

We appreciate the fact that these Codes should be very necessary and helpful to the members of the General Assembly in preparing legislation for the next session and, therefore, should be distributed to them upon request.

4. In regard to free distribution of codes to boards and commissions and heads of departments of these boards and commissions which are not specifically mentioned in the statute in regard to free distribution, these having been created since that statute was enacted.

The Legislature intended that the Code should also be distributed free to members of boards and commissions and to heads of departments of such boards and commissions, and such is the opinion of this department.

CORPORATION: STOCK: When stock in foreign corporation is owned by resident of this state, it is taxable in hands of that person even though the corporation is taxed in another state.

January 22, 1936. *State Board of Assessment and Review:* Pursuant to your request of January 17, 1936, we herewith furnish an opinion on the following:

"There is a foreign corporation engaged in the mercantile business in Iowa, which for assessment purposes would come under Section 6971 of the Code of 1935. Some of the stock of this corporation is held by individuals who are residents of Iowa, and some of the stock is held by corporations taxable under Sections 7008 to 7013 inclusive, of the Code of 1935. The questions are:

(1) Is this stock in the foreign corporation assessable when held by an Iowa corporation taxed under the provisions of Sections 7008 to 7013 inclusive?

(2) Is the stock in the foreign corporation assessed when held by individuals who are residents of the State of Iowa?

We will answer your questions in the order in which they are asked.

(1) Section 6985 of the Code of 1935, provides for a tax on monies, credits and corporation shares of stock of six mills on the dollar, except where otherwise provided, as to the corporation stock. Section 7008 of the Code of 1935, then, provides that the shares of stock of a corporation organized under the laws of this state, except corporations otherwise provided for in Chapters 330 to 341 inclusive, and except as provided in Section 7102, shall be assessed to the owners thereof, as monies and credits, at the place where its principal business is transacted. The section further provides that in arriving at the assessable value of the shares of stock of such corporations, the amount of their capital actually invested in property other than *monies and credits*, shall be deducted from the actual value of such shares, and the property thus deducted, other than monies and credits, shall be assessed like other property, meaning real and personal property.

Therefore, if the Iowa corporation holds stock in a foreign corporation, the value of the stock in the foreign corporation is not deducted from the capital of the Iowa corporation. If it was, the Iowa corporation would then have to pay six mills on the dollar on that foreign corporation stock under Section 6985. However, in view of the fact that it is not deducted from the capital of the Iowa corporation, it is used in arriving at the value of the stock in the Iowa corporation. Therefore, the Iowa corporation in paying the tax on its own capital stock, actually pays a tax on the stock of the foreign corporation.

It is, therefore, the opinion of this department that where the Iowa corporation has a part of its capital invested in the stock of a foreign corporation, the stock in the foreign corporation should not be assessed separately to the Iowa corporation, but should be considered as a part of its capital investment, for which no deduction is allowed in making the assessment on the capital stock of the Iowa corporation.

(2) The stock in the foreign corporation is assessable in the hands of an

individual who is a resident of the State of Iowa under the provisions of Section 6985 of the Code of 1935, wherein it provides that monies, credits and corporation shares of stock, except as otherwise provided, shall be assessed at the rate of six mills on the dollar.

We might explain further that the fact that the corporation is a foreign corporation, would not prohibit the taxation of its shares of stock in this state, for the reason that under the general rule, intangible personal property is assessed at the domicile of the owner of the property.

Therefore, when the stock in the foreign corporation is owned by a resident of this state, it is taxable in the hands of that person even though the corporation is taxed in another state.

ABSENTEES BALLOTS: SPECIAL FRANCHISE ELECTION: The manner in which the absentee votes were received by the voters in the special franchise election held in Gladbrook, Iowa, on November 7, 1935, is legal.

January 22, 1936. *County Attorney, Tama, Iowa:* Yours of December 8, 1935, relative to the legality of absentee ballots cast at the special franchise election held in Gladbrook, Iowa, on November 7, 1935, at hand. You state:

"The proposition submitted to the voters was whether or not the Central Iowa Telephone Company should be given a new franchise for a term of years and it carried by a majority of only six votes. The company is now operating under the franchise so granted, and has expended considerable money one new projects in the town since the election.

"Recently some complaint has been made to my office alleging irregularities in the election. According to information received from the complaining parties, there were some 26 absent voter's ballots voted at the election. There is, I believe, no complaint regarding the applications for these ballots, but there is considerable complaint regarding the manner in which the absentee votes were received by the voters.

"The complaining parties claim that they can produce evidence that ballots were delivered to the absentee voters by persons other than the town clerk, or by a delivery other than through the United States mails. I believe all voted ballots were returned to the clerk through the United States mail.

"The judges of election received and accepted these ballots with no question being raised at that time as to the legality of the ballots, and the same were counted and tabulated in the election returns. After the election, the town council met and canvassed the election returns, certified and approved the results of the election and found that the submitted proposition had carried.

"No demand has been made for a recount of the votes cast, and I believe, that since the election persons other than the city clerk have had access to the ballots cast in the election, including the absentee ballots and the envelopes containing them."

Based upon the foregoing facts, and the additional facts furnished by the clerk of the town of Gladbrook, Iowa, that he asked Mrs. Wahl and J. H. Dye, both notaries public, to help him in the matter, and they acting as his agents or deputies, took out to the applicants some of the ballots, for which application had been made, and administered the oath to the voters, but that the ballots were deposited in the mails and received by him through the United States mail at the post office in Gladbrook, Iowa—it is the opinion of this department:

1. That these ballots should have been counted as legal ballots by the judges of the election, and were entitled to full faith and credit and to be counted as other ballots were counted.

2. There is no provision in law for the contesting of a franchise election except by quo warranto proceedings in court.

3. The action of the judges in allowing these votes to go in as valid votes and the subsequent action of the town council as a board of canvassers would not bar such action to contest the election or declare the election illegal, if there be an irregularity or illegality, but in the case at bar, it is the opinion of this department, as stated before, that no such irregularity existed by reason of the appointment or agents by the clerk to deliver for him the ballots, or take, as notaries public, the acknowledgment thereon, if the applications therefor, as you state, were received from the applicant personally, or through the United States mail and the ballots themselves received by the clerk through the United States mail at the post office in Gladbrook, Iowa.

"In other words, these persons acting as agents or deputies of the clerk would not be such an irregularity or illegality as would render this election null and void.

SCHOOL BOOKS: RENTAL AND LOANING OF BOOKS WITHOUT VOTE OF ELECTORS under Sec. 4238, school board may only furnish books to indigent children without a vote of district and such vote is required for board to purchase and loan books when any part of purchase price is paid out of general fund.

January 23, 1936. *Auditor of State:* We have your request for an opinion on the following proposition:

May a board of directors of a school district, without a vote of electors, purchase books to be loaned to pupils upon payment of small rental charges, the receipts from the said charges to be placed in a revolving fund, which is to be used to pay for books already purchased and for the repairs, maintenance and replacement of such books as well as the purchase of additional books?

Under the provisions of Section 4238, the 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 this further provides that when directed by a vote of the district, the board may purchase and loan books to scholars and may provide therefor by levy of general fund.

It is apparent then that the board may only furnish books to indigent children without a vote of the district and that such a vote is required for the board to generally purchase and loan the books when any part of the purchase price is paid out of the general fund, so that your question must be answered in the negative.

SHERIFF: Sheriff is entitled to certain compensation (as set out in opinion) in the performance of his duties, re delivery of prisoners, etc.

January 24, 1936. *County Attorney, LeMars, Iowa:* We have your request of January 7th for an opinion on the following question:

"When the Sheriff of this county delivers prisoners to Fort Madison and files claim with the Board of Supervisors for mileage, hotel expenses and meals for transporting the prisoners to the pentitentiary, the board has been inclined to want to disallow the charge for both mileage and expenses on account of the wording of the statute, and because of an opinion issued by your department in February, 1933."

You refer to an opinion issued from this department under date of February 20, 1933. The law was somewhat different at that time than at the present time, because Chapter 90 of the Acts of the 45th General Assembly did not take effect until February 24, 1933, and this department, of course, issues its opinion on what the law is at the time the opinion is issued, rather than

what the law may be at some future time. Consequently, we say that that opinion would, of necessity, have to be changed in view of Chapter 90 of the Acts of the 45th General Assembly.

Prior to the taking effect of said Chapter 90, Section 5191 (10) of the Code of 1931, provided that the subsection providing for mileage, should not apply where provision is made for expenses. Section 5191 (14) then provided for expenses for conveying prisoners to the penitentiary. We, therefore, of necessity rule that in our opinion of February 20, 1933, Paragraph 14 was the provision under which the sheriff should be paid for conveying such prisoners.

However, by the enactment of Chapter 90 and especially Section 6 thereof, the Legislature amended Section 10, which had theretofore provided that that section should not apply where the provisions of Paragraph 14 could apply, by inserting a provision for mileage. The effect of Section 6 of Chapter 90 then was to nullify that portion of Paragraph 10 of Section 5191 of the Code of 1931, which prohibited mileage where Paragraph 14 provided for expenses. Section 6 of Chapter 90 cannot be reconciled with the words contained in Section 5191 (10) as follows:

"Provided that this subsection shall not apply where provision is made for expenses."

We must, therefore, say that that portion of Paragraph 10 just quoted was repealed by implication.

The last clause in Paragraph 10 of Section 5191 is as follows:

"And in no case shall the law be construed to allow both mileage and expenses for the same services and for the same trip."

We believe the provision just quoted in the use of the term "expenses" has reference not to meals and lodging but to gasoline and oil and expenses incident to the operating of an automobile, as well as to railroad fare. The provision does not mean that the sheriff in taking three prisoners from LeMars to Fort Madison would be required to pay for the lodging and meals of himself, the prisoners and his helper out of his mileage. The mileage is for the use of his car.

We must, therefore, say that when the sheriff in the performance of his duties is required to make a trip from LeMars to Fort Madison or to Anamosa, he is entitled to receive the following:

(1) For that portion of the mileage outside of his own county, five cents per mile.

(2) For that portion of the mileage within the limits of his own county, seven and one-half cents per mile.

(3) His own reasonable hotel expense and meals.

(4) Expense of meals and lodging for his prisoners.

(5) The amount which he pays his helper, including the amount which he spends for meals and lodging for his helper, provided the helper has not already been paid by the county.

SCHOOLS: EMPLOYMENT OF ATTORNEYS: If board believes that a matter should be defended by district, the board has the right and authority to employ or ratify the employment of, attorneys, whose fees shall be paid out of funds of district.

January 24, 1936. *County Attorney, Creston, Iowa:* We have your request for an opinion on the following proposition:

Some trouble developed in one of the Pleasant Township districts last year relative to whether the school should be opened or closed.

The School Board ordered it closed, and certain residents of the district, who wanted the school opened, employed a teacher and paid her personally. Thereafter, the president of the School Board locked the school house, so it could not be used for school purposes. However, some of the men, who had been paying the teacher and keeping the school open, broke the lock with a hammer.

The president and secretary of the board filed information, charging them with malicious destruction of property, and thereafter these gentlemen, who were arrested, sued the president and secretary for false arrest. One of the suits was tried and on trial, the court sustained a motion for a directed verdict by the defendants.

I understand that the School Board, at its last meeting voted to pay the attorneys, who defended the president the sum of $800. The suit was not against him as president of the School Board, but as an individual, and one of the gentlemen involved questions the right of the School Board to pay this attorneys' fee.

There is no question involved as to the reasonableness of the fee. The only question being "whether the School Board had the right to pay the attorneys?"

Will you please give me your opinion?

Section 4224 of the Code of 1931 gives to the school board the care and management of the schoolhouse, grounds and property of the school corporation, so there is no question but what it was the duty of the president of the board, and the other members of the board, to protect the school property.

Our Supreme Court in the case of *Cowles vs. Independent School District,* 204 Iowa, 689, held that a school board had the legal authority to employ an attorney at the expense of the district to defend the action of the board, even though the action was against the members of the board as individuals, and the court there pointed out that the board had the right of determination of certain questions, and had the right and duty to defend their actions against anyone who sought to assail them in court, whether the action be against personal members of the board or against the board as a body.

In the case of *Beers vs. Lasher,* 209 Iowa, 1158, our Supreme Court held that even the informal employment of attorneys by the directors of the school district was sufficient where it was ratified by formal action of the board thereafter with full knowledge of the facts in allowing the claim of the attorneys.

Our Supreme Court has held in the two cases just cited that if the board feels that this is a matter that should be defended by the district, that the board has the right and authority to employ, or ratify the employment of, attorneys, whose fees shall be paid out of funds of the district, and such is the opinion of this department.

SCHOOLS: TUITION: INSURANCE ON MONEYS IN SAFE OF INDEPENDENT SCHOOL DISTRICT: Under Sec. 4269, Independent School District of Davenport collected $1 per month in addition to regular tuition for September and October. Property owner of Davenport claims refund of excess of tuition paid. There could only be an offset of tuition that was due for the same year, so that here the offset can only be for the present school year. (2) Policy of insurance covering safe burglarly, etc. would cover proceeds from activities of school if activities were approved by School Board.

January 24, 1936. *County Attorney, Davenport, Iowa:* We have your request for an opinion on the following two propositions:

1. Under Section 4269 of the Code of Iowa, 1931, the Independent School District of Davenport has been collecting, in addition to the regular tuition paid by the districts, $1 per month for the school years of 1933-34, 1934-35 and 1935-36 for the months of September and October.

The parents of one of the children own property in the City of Davenport and pay taxes thereon, and are now requesting a refund of the excess amount of the tuition that they have paid.

Will you please advise for what years the refund can be made?

You will note that Section 4269 is not a refunding statute, but is a deducting or offsetting statute, and clearly applies to only the year that the taxes and tuition were both paid. In other words, on a claim for offset, the taxpayer is not allowed to go back past the present tax year, that is, taxes paid in any given year are for the purpose of operating the school for that year, and there could only be an offset of tuition that was due for the same year, so that here the offset can only be for the present school year.

In your second question, you state:

2. That the Independent School District of Davenport has been carrying a policy of insurance covering safe burglary, messenger and interior robbery. Included in the moneys in the safe, at times, are the proceeds of certain activities of the school, which moneys do not belong to the district.

Will you please advise whether the district has the right to purchase this insurance covering all moneys in the safe, even though some of it belongs to these activities of the school and not to the district?

Section 4238 of the Code provides in part:

It may provide and pay out of the general fund to insure school property such sum as may be necessary * * *.

The proposition then is whether this money in the safe which is the proceeds of school activities, is school property. The school board under the provisions of Sections 4250 and 4267 of the Code, has wide powers in regard to prescribing courses of study and determining the branches and if the board authorizes these activities of the school, then the proceeds therefrom would be school property even though it might not be property of the district until after it had actually been turned over to the treasurer of the school district. Your question must, therefore, be answered in the affirmative if these activities have been approved by the school board.

IN RE: EXPENSES OF INTERSCHOLASTIC CONTESTS SUCH AS ATHLETICS MUSIC, SPELLING, FORENSIC, ETC. As to which may be paid from public funds and which should not be paid from public funds.

January 24, 1936. *Auditor of State:* You advise that in making the school audits required by law, your examiners have often been confronted with the problem of determining legal and illegal expenditures. You have set forth in your request for opinion, certain definite classifications which, as I understand, are not intended to be conclusive as to all the problems that arise under each, but merely furnishes to us the various examples of expenditures. These generally pertain to the expenses of interscholastic contests which include athletics, music, spelling, forensic and so on.

We presume that the main question ordinarily arises in regard to inter-

scholastic athletic contests, and therefore, will treat the expenses pertaining to these contests more in detail than the others.

It should be first pointed out that courts now generally consider physical education in all its phases, a part of the modern system of education, and therefore, the provision of such physical education is an essential governmental function. The Supreme Court of Arizona in the case of *Alexander vs. Phillips*, 254 Pac., 1056, had the question before it as to whether the school district had the authority to issue bonds to build a stadium and in regard to this problem of physical education in the public schools, stated at page 1059:

"That athletic games under proper supervision tend to the proper development of the body is a self-evident fact. It is not always realized, however, that they have a most powerful and beneficial effect upon the development of character and morals. To use the one game of football as an illustration, the boy who makes a successful football player must necessarily learn self-control under the most trying circumstances, courage, both physical and moral, in the face of strong opposition, sacrifice of individual ease for a community purpose, teamwork to the exclusion of individual glorification, and above all that 'die in the last ditch' spirit which leads a man to do for a cause everything that is reasonably possible, and, when that is done, to achieve the impossible by sheer will power. The same is true to a greater or lesser degree of practically every athletic sport which is exhibited in a stadium.

"It seems to us that, to hold things of this kind are less fitted for the ultimate purpose of our public schools, to wit, the making of good citizens, physically, mentally and morally, than the study of algebra and latin, is an absurdity. Competitive athletic games, therefore, from every standpoint, may properly be included in a public school curriculum."

Section 4250 of the Code of Iowa requires school boards to prescribe the course of study and Section 4267 empowers them to determine what branches shall be taught. Our Code also provides certain mandatory subjects that must be taught and Section 4263 of the Code provides that the teaching of physical education, exclusive of interscholastic athletics, shall be required, so that under this provision, it is discretionary with the board as to whether it will provide instruction for interscholastic athletics and whether such athletics will be included among the school activities, and when the board has determined that interscholastic athletics be taught and be included among the activities of the school, then, of course, the instructional equipment necessary for the teaching of interscholastic athletics must be furnished and may be purchased from public funds.

Prior to making the expenditures, however, the board should pass a resolution to the effect that interscholastic athletics and any other such activities are to be a part of the activities for the ensuing year and the board should also exercise a control over the receipts from these activities and should require that an accurate accounting be made of all such receipts, and the board would have the authority to determine that a certain percentage of the receipts be turned into the general fund to reimburse it for the expense that it undertook in providing a stadium or gymnasium, lights, seating facilities and so on.

There are certain expenditures as will be hereinafter pointed out, which cannot be made from public funds. These should, therefore, be paid from the receipts from these contests or exhibitions and as I understand, a number of schools have a general activity fund in which all the funds from their activities are placed and in that way, some activities which are not self sustaining

or which do not have great spectator interest, are taken care of by those activities which afford a greater spectator interest and therefore, greater revenue.

Turning now to the particular questions asked by you, we beg to advise:

1. Travel expenses for participants in interscholastic contests such as athletic contests, music contests, spelling contests, and forensic contents.

This cannot be paid from public funds.

2. Travel expenses for their supervisors.
This cannot be paid from public funds.

3. Expenses incurred in providing uniforms and similar equipment for such participants.

This cannot be paid from public funds as public funds can only be used for instructional equipment, but not for personal equipment or clothing.

4. Expenses incurred in paying claims for hospital services and for injuries sustained by students participating in interscholastic and intramural contests and exhibitions.

Such expenditure of public funds is illegal except for emergency first aid treatment.

5. Expenses for referees' fees and judges' fees in connection with the above noted contests and exhibitions.

Such expense cannot be paid with public funds.

6. Expenses incurred in providing basketballs, footballs and similar equipment items, such items to be used solely in interscholastic contests.

Such expenditures may be made from public funds as this constitutes instructional equipment.

7. Expenses incurred in promoting or sponsoring interscholastic and intramural contests and exhibitions. (Supplies, royalties for class plays, tickets, etc.)

This expense cannot be paid from public funds and must be paid out of the activity fund or some other fund that is raised for that purpose.

8. Expenses incurred in building and lighting athletic fields to be used solely for interscholastic athletics.

This may be paid from public funds.

9. Expenses necessary to membership of small student groups or, in some cases, the whole student body or the high school itself, in national, state, and local associations, the purposes of such associations being to benefit, directly or indirectly, the students or groups who may be members. Among such associations will be found:

A. Forensic associations.
B. The North Central Association of Schools.
C. Interscholastic athletic conference associations.
D. Band associations.

Such should not be paid from public funds but should be paid out of the activity fund.

PATENTS: IOWA STATE COLLEGE, AMES: If attempted corporation of committee of five members as Iowa State Alumni Association Inc. to determine whether inventions of members of faculty at college should be patented, has been formed, action should be taken at once to dissolve and abandon it. There is no provision for state to go into private business of exploiting patents. All attorneys employed must be employed by Executive Council and be under the direction of Attorney General's office.

January 29, 1936. *Board of Education:* I understand that you have asked for an opinion on the following proposition:

The President of the Iowa State College of Agriculture and Mechanic Arts has appointed a committee of five members to determine whether inventions or discoveries of members of the faculty at the college should be patented. Such committee is known as the Iowa State Alumni Association, Inc., and is to have the authority to promote the exploiting and licensing of patents and to have the responsibility of securing the patents; to collect royalties and income from the use of patents; to institute legal action in case of infringement of a patent assigned to the association and to defend suits for infringement that may be brought in regard to such patents; and the expenses from the receipts from the licensing of patents and in event these are not sufficient, to employ other funds that may be available; to employ the net earnings from the patents exclusively for the promotion of research at the Iowa State College.

It is my understanding that this group has incorporated or attempted to incorporate or will incorporate itself. You ask in regard to its authority and specifically, as to whether it has the authority to expend sums of money for expenses already incurred, including attorney fees.

Prior to the 45th General Assembly, Extraordinary Session, this question of patents was handled pursuant to arrangements as set forth in your letter of January 5, 1933, to the Attorney General, in which letter you set out the procedure that had been agreed upon. This office questioned the right to expend state funds for these purposes, and thereafter, we assisted in the preparation of a bill to amend Section 3921 of the Code, which now appears as Paragraph 10 of Section 3921, Code of Iowa, 1935. This provides as follows:

"With consent of the inventor and in the discretion of the board, secure letters patent or copyright on inventions of students, instructors and officials, or take assignment of such letters patent or copyright and may make all necessary expenditures in regard thereto. That the letters patent or copyright on inventions when so secured shall be the property of the state, and the royalties and earnings thereon shall be credited to the funds of the institution in which such patent or copyright originated."

The only purpose of this provision is to authorize the expenditure of state money for the securing of the patent and to authorize the taking of assignment of letters patent or copyrights. It further provides that subsequent to assignment, they shall be the property of the state and that the royalty and earnings thereon shall be credited to the funds of the institution.

There is no authority under this act and such was not our intention in preparing it, nor the intention of the Legislature in enacting it, for the Board of Education to go into the private business of exploiting patents. The Board of Education is a creature of statute and as an instrumentality of the state, has only such power as given to it by statute. It can give to no group under it any broader powers than it possesses itself. There is no power given to it by law to go into the business of exploiting and dealing in patents.

The Board of Education or any group under it, have no authority in law to employ counsel or to expend money for anything except as expressly authorized by law. It has no power or right under the law to incorporate itself or any group under it. We went thoroughly into this proposition in the admission tax case in the Federal Court. Any such attempted corporation is a nullity.

It is, therefore, the opinion of this department that such an association, as you have named, has no authority to exploit patents or to incur any expense for such purpose and that all attorneys employed must be employed by the Executive Council and be under the direction of this office and that the only expense which the board is authorized to pay besides those of such attorney so designated by the Executive Council, is the necessary expense in securing the patent, such as making the search to determine whether the invention or discovery is patentable and the preparation of the necessary papers for this purpose. All other opinions heretofore given, if any, on this proposition are hereby withdrawn.

We would suggest that if such attempted corporation has already been formed, that action be taken at once to dissolve and abandon it.

UNIVERSITY OF IOWA: DUN & BRADSTREET CONTRACT: SETTLEMENT OF DEBT: "The balancing possibilities of being held liable or non-liable are such that it would appear to be a matter of administrative judgment whether this settlement should be made or not. I am personally inclined to recommend it."

January 30, 1936. *President E. A. Gilmore, Iowa City, Iowa:* Under date of October 16, 1935, you referred to me the question of

the liability of the University upon a Dun & Bradstreet contract signed by Mr. Bates on July 24, 1934 which involves on its face a debt of $150.00. Since then I have had several conferences with Mr. Olson, who represents the Dun & Bradstreet Company and with Mr. Cobb. In my early conversations with him, Mr. Olson expressed a willingness to try to make a settlement for the sum of $75. After further discussion, he offered in his letter dated January 25th to settle the claim for the sum of $37.50.

It is well established that the State University of Iowa is non-suable. See Weary vs. State University, 42 Iowa, 335 (1876); Hern vs. Iowa State Agricultural Society, 91 Iowa, 97 (1894); State vs. Cameron, 177 Iowa, 262 (1916); Hollingshead vs. Board of Control, 196 Iowa, 841 (1923); Cross vs. Donahue, 202 Iowa, 484 (1926); Long vs. Highway Commission, 204 Iowa, 376 (1927); De Votee vs. Iowa State Fair Board, 216 Iowa, 281 (1933). See also Swartzwelter vs. Utilities Corporation, 216 Iowa, 1060 (1933).

Since the state is non-suable, it may be questionable whether it is profitable to study the question whether the secretary of the University, without specific authority expressly granted to him by the Finance Committee or the Board of Education, can bind the University of Iowa upon the type of contract here involved.

It is the understanding of the undersigned that contracts such as the one involved have not been in the past entered into without specific authorization by the Finance Committee, so that no agency by estoppel would tend to expand the normal power of the secretary. Neither is any provision found in Chapter 195 of the Code which might be construed as making the secretary of the University a duly authorized contracting party upon a non-routine type of obligation. It therefore appears to be questionable whether the action of the secretary in signing the contract involved would bind the State University of Iowa if it were a private institution and subject to being sued.

On the other hand the frequently exercised authority of the secretary to enter into routine contracts of the ordinary commercial type such as insurance, leases, purchase contracts, etc., might conceivably lead a legislative

claims committee to the conclusion that his authority was such that a claim based on the contract should be allowed.

If this question is determined against the Dun & Bradstreet Company, it is not likely that the secretary would be held liable in a suit against him personally on an implied warranty of authority. See Mechem, Agency (2d Ed. 1914) Sections 763, 1371; McCurdy vs. Rogers, 21 Wis., 197 (1866); A. Lorenzo Co. vs. Wilbert, 165 La., 247 (1928); see also Jester vs. Gray, 188 Iowa, 1249 (1920).

A settlement of the claim for the amount of $37.50 is offered as stated above, and that settlement might well be defended on the ground of possible liability. On the other hand, a complete refusal to settle or pay anything upon the contract would appear to be equally likely to be sustained should a legislative claim be filed. The balancing possibilities of being held liable or non-liable are such that it would appear to be a matter of administrative judgment whether this settlement should be made or not.

BOARD OF EDUCATION: STATE INSTITUTIONS: BITUMINOUS COAL: EXEMPTION FROM TAXATION:

"There can be no doubt as to the propriety of a claim of exemption for each one of the institutions under the jurisdiction of the Board of Education, since each one is engaged in education, which is an essential governmental function."

January 31, 1936. *Iowa State Board of Education:* Some time ago you wrote to me requesting some information concerning the possibility of exemption of state institutions from taxation on bituminous coal under the Guffey Act.

I have just received a copy of the regulations relating to this tax and the part relevant to our situation is Article 41, which reads as follows:

"Art. 41. Sales to states or political subdivisions thereof. The tax will not attach to a sale of bituminous coal by the producer thereof to a state or political subdivision thereof for use in the exercise of an essential governmental function, but a sale of bituminous coal by the producer thereof to a state or a political subdivision thereof for any other purpose is subject to the tax. All sales to the United States, the District of Columbia, or a territory or possession of the United States are taxable regardless of whether the bituminous coal was purchased for use in the conduct of a governmental or proprietary function. The sale of coal to a state or political subdivision thereof under such conditions as to be tax-free will not relieve the producer from compliance with the provisions of Section 4, Part II (e), of the Act relative to minimum and maximum prices. To establish the exempt character of the sale under the provisions of the article, the producer must obtain from his vendee prior to or at the time of sale, and retain in his possession, an exemption certificate in substantially the following form:

EXEMPTION CERTIFICATE

.....(Date)....., 193....

The undersigned hereby certifies that he is the .....(Title of officer)..... of .....(State, city, etc.)..... and that the bituminous coal specified in the accompanying order or contract is purchased for use by the..... (Department)..... in the exercise of essential governmental functions, namely: .....

.....

It is understood that the exemption from tax in the case of sales of bituminous coal to states or political subdivisions thereof is limited to such coal purchased for use in the exercise of essential governmental functions, and it is agreed that when such coal purchased tax-free under this exemption cer-

tificate is used for purposes other than in the exercise of essential governmental functions, or is sold to employees or others, the vendee will report such fact to the vendor. It is also understood that the fraudulent use of this certificate to secure exemption will subject the undersigned and all guilty parties to a fine of not more than $10,000 or to imprisonment for not more than five years, or both, together with costs of prosecution.

.....

.....

(Title of Officer)

"The exemption certificates and proper records of invoices, orders, etc. relative to tax-free sales must be retained by the producer so as to be readily accessible for inspection by internal revenue officers. If upon inspection, it is found that a producer's records with respect to any sale claimed to be tax-free do not contain a proper exemption certificate, as above outlined, with supporting invoices and such other evidence as may be necessary to establish the exempt character of the sale, the producer shall be liable for the tax upon such sale."

There can be no doubt as to the propriety of a claim of exemption for each one of the institutions under the jurisdiction of the Board of Education, since each one is engaged in education, which is an essential governmental function.

SCHOOLS: EXPENSES OF SCHOOL OFFICERS TO ATTEND MEETINGS: It is within the discretion of board, if regularly called meetings and attendance necessary, then board would have authority to pay actual expense of their representative from funds of the district.

February 5, 1936. *Superintendent of Public Instruction:* We have your request for opinion on the following proposition:

Section 3832 of the Code of Iowa, 1935 prescribes the duties of the Superintendent of Public Instruction. To properly perform these duties, it has been the custom of this office to call the school officers of the state into a one day conference at least once a year for the purpose of discussing with them problems of school administration, finance and control. Is it within the legal powers of the boards of the various school corporations of the state who desire to defray the actual expenses of their representatives, members or officers at these regularly called meetings?

You are advised that it is the opinion of this department that this is within the discretion of the board, that is, if these are regularly called meetings by your office and the board feels that the attendance at these meetings is necessary and proper in the conduct of the affairs of the school corporation, then the board would have the authority to pay the actual expense of their representative from funds of the district.

BOARD OF CONTROL: REMOVAL OR DISCHARGE FROM OFFICE OF SUPERINTENDENT OF CHILD WELFARE: Removal from office can only be by filing petition in District Court (grounds stated in Section 1091 of the Code of Iowa) or Executive Council taking action pursuant to Section 1114, based on causes provided for therein.

February 7, 1936. *Board of Control:* We have your request for opinion on the following proposition:

What procedure is necessary for the Board of Control to discharge or remove the Superintendent of Child Welfare?

Section 3661-a4 of the Code gives the Board of Control the power to appoint a Superintendent of Child Welfare and fixed the term of office. The term of office, as I understand here, is for a definite number of years as fixed by the Board of Control. There is no definite provision in regard to the discharge

or removal of the Superintendent of Child Welfare, so therefore, this would be covered by the general provisions of removal from office as provided for in Chapter 56 of the Code.

Section 1091 of the Code provides that any appointive or elective officer, except those subject only to impeachment, may be removed for the following reasons:

1. For wilful or habitual neglect or refusal to perform the duties in of his office.
2. For corruption.
3. For wilful misconduct or maladministration in office.
4. For extortion.
5. Upon conviction of a felony.
6. For intoxication, or upon conviction of being intoxicated.

The method of removal under this section is by filing petition with the District Court.

Section 1114 of the Code provides that appointive state officers may also be removed by a majority vote of the Executive Council for the following causes:

1. Habitual or wilful neglect of duty.
2. Any disability preventing a proper discharge of the duties of his office.
3. Gross partiality.
4. Oppression.
5. Extortion.
6. Corruption.
7. Wilful misconduct or maladministration in office.
8. Conviction of felony.
9. A failure to produce and fully account for all public funds and property in his hands at any inspection or settlement.
10. Becoming ineligible to hold the office.

A state office is one that is created by an act of the Legislature or by the constitution and the holder of such an office is a state officer. See *State vs. Titus*, 95 So., 106. This office of Superintendent of Child Welfare, being created by statute, is then a state office and the holder thereof, a state officer, and either of the above provisions must be followed in order to remove the superintendent, that is, by an action being filed in court, or by submitting the matter to the Executive Council. I call your attention to Section 3292 of the Code, which provides for appointment and removal of superintendents, wardens and other chief executive officers, but this only applies to institutions and does not apply to the Child Welfare Department. The general law on this proposition is covered by our Supreme Court in the case of *Cliff vs. Parsons*, 90 Iowa, 665, 59 Corpus Juris, 137, 46 Corpus Juris, 983.

It is apparent from above, that it is the opinion of this department that if the term of office of the Superintendent of Child Welfare has not expired, then removal from office can only be by filing petition in the district court on the grounds stated in Section 1091 of the Code, or by the Executive Council taking action pursuant to Section 1114, based on causes provided for therein.

BOARD OF EDUCATION: RATE OF INTEREST ON NEW NOTE WHEN MORTGAGE EXTENDED: Your board could enter into a new note at rate of 4% per annum interest, or could enter into an extension agreement as to existing note and mortgage, for in either event, it would be a new contract, and the 4% rate could govern.

February 8, 1936. *Board of Education:* I have your request for opinion on the following proposition:

Prior to the 46th General Assembly, the Board of Education, under the provisions of Section 3926 of the Code, determined the rate of interest on loans and pursuant to this authority, the rate was fixed by the board at 5% or more. The 46th General Assembly amended Section 3926 of the Code and provided that the rate of interest to be fixed by the board should not be less than 4% per annum. Some of the 5% loans have matured or will mature shortly and the borrowers desire to renew or extend the loan and have the rate of interest reduced. Will you please advise whether the finance committee of the Iowa State Board of Education, upon the maturing of the present loan, may enter into a new note for 4% to be secured by the same mortgage which will be extended.

Such new note would be a new contract and agreement between yourself and the borrower and the mortgage only stands as security therefor, and it is the opinion of this department that in such event, your board could enter into a new note at the rate of 4% per annum interest, or could enter into an extension agreement as to the existing note and mortgage, for in either event, it would be a new contract and the 4% rate could govern.

LEGAL COUNSEL: AUTHORITY OF BOARD OF SUPERVISORS: The right of the Board of Supervisors to employ counsel on behalf of the county does not depend upon the consent of the County Attorney nor upon his willingness or ability to appear for the county. (See opinion).

February 11, 1936. *County Attorney, Muscatine, Iowa:* I have your letter of February 3, 1936, in which you request an opinion from this department with reference to the power of the Board of Supervisors to employ additional legal counsel to assist the County Attorney. In your letter above referred to you present the questions contained therein in the following language:

"The local Board of Supervisors recently employed John Horning as a tax ferret, to succeed Kringle & Bleaksley.

"Mr. Horning was before the board this morning, contending that possibly several suits should be brought to collect taxes in cases where insane people were delinquent and owed the county. I informed the Board of Supervisors that I was not asking legal assistance or recommending it. A member of the board said that I had nothing to do with the matter; that under Section 3595 of the 1935 Code the, 'County Auditor, subject to the direction of the Board of Supervisors, shall enforce the obligation herein created as to all sums advanced by the county.'

"Is it one of the duties of the County Attorney to represent the County Auditor in 'enforcing the obligations' under Section 3595 of the Code?

"Does the County Auditor, with the sanction of the board, have the legal right to employ an attorney, other than the County Attorney, at the request of the tax ferret and pay said attorney from county funds?

"Can the County Auditor or the Board of Supervisors employ a 'tax ferret' under Section 3595 or any other section of the Code, to 'enforce' such 'obligations herein created as to all sums advanced by the county?'

"The Board of Supervisors are inclined to believe, I take it, that Section 5243 of the Code 'Temporary Assistance for County Attorney,' will allow them to hire an attorney of the tax ferret's choice. My contention is that when I neither need or ask for 'an attorney to assist the County Attorney in any cause—,' then any attorney the tax ferret, Horning, might select, would not be an 'assistant' within the meaning of the Code but an independent attorney having nothing to do with the County Attorney's office.

"Do you think, under Section 5243 of the Code, the Board of Supervisors have the legal right to hire an attorney for the tax ferret and pay said attorney from county funds?"

You are advised that the Board of Supervisors may, whenever they deem it expedient, employ counsel in addition to prosecute or defend actions against the county, or to perform other services, and no form of vote by the board or entry of the fact of such employment of record is necessary to the validity of the contract. It may be proved by parol.

Hopkins vs. Clayton County, 32 Iowa 15.
Tatlock vs. Louisa County, 46 Iowa 138.
Jordan vs. Osceola County, 59 Iowa 388, 13 NW 344.
Chickasaw County vs. Bailey, 13 Iowa 435.

Even though the law is as set forth in the above decisions I would advise that the Board of Supervisors pass a form of resolution employing the attorney that they desire to perform such services for them and also to execute a written contract with said attorney wherein the terms, conditions and compensation is specifically set forth.

A county may employ agents other than the county attorney to prosecute claims for the county.

Galusha vs. Wendt, 114 Iowa 597, 87 NW 512.
Disbrow vs. Board, 119 Iowa 538, 93 NW 585.
Shinn vs. Cunningham, 120 Iowa 383, 94 NW 941.

The right of the Board of Supervisors to employ counsel on behalf of the county does not depend upon the consent of the County Attorney nor upon his willingness or ability to appear for the county.

Taylor County vs. Standley, 79 Iowa 666, 44 NW 911.

Even though the law is as stated above still it would appear as a matter of proper policy for the Board of Supervisors not to employ additional counsel unless the same was necessary to properly handle the county's affairs. This is not generally done throughout the state unless the County Attorney is too busy to properly handle certain matters, but nevertheless the Board of Supervisors does possess the authority to employ legal counsel as set out hereinabove.

RESIDENCE, LEGAL: WOMAN DIVORCED OR ABANDONED BY HUSBAND: SECTION 5311, PAR. 4:

"We therefore conclude that if the woman in question had a legal settlement in Calhoun County at the time of her marriage and has been divorced or abandoned by her husband in Hamilton County, she has the legal right to resume her legal settlement formerly acquired in Calhoun County under the statute in question."

February 11, 1936. *County Attorney, Rockwell City, Iowa:* This will acknowledge receipt of your favor of the 30th ultimo, asking for an opinion upon the following question:

"A woman who has been divorced from her husband, who has previously acquired settlement in Hamilton County, has returned to Calhoun County to reside. The authorities of Hamilton County claim that under Paragraph 4 of Section 5311 she may at her option and at this time claim settlement in Calhoun County and that she should be furnished with relief here."

We understand you to challenge this construction and to invite the opinion of this department on the same.

Chapter 267 of the Code of 1935 deals generally with support of the poor. Section 5311 of the chapter deals with the manner of acquiring settlement

for the purpose of relief. Subdivision 4 of the same section provides 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."

Investigation fails to disclose that the subsection in question has ever been interpreted or decided with reference to the particular facts in the question submitted. On more than one occasion the subsection was invoked to determine the settlement of one spouse or the other where either spouse had become afflicted with insanity. Thus it was said in effect in *Washington County vs. Polk County*, 137 Iowa, 333, that the wife's legal settlement is that of her husband only where the family relation in fact exists and her dependence upon him is acknowledged and acquiesced in by him, and that after a wife has been abandoned by her husband, this change of residence does not affect the place of her settlement. In the Washington County case, the husband abandoned his wife in Washington County just before she was adjudged insane and acquired a legal settlement in Polk County. Washington County continued to administer aid and medical expense to the insane wife and some years thereafter submitted a bill to Polk County for the services and expense thus furnished. The court said:

"The wife's legal settlement is that of her husband only when the family relation in fact exists and her dependence upon him is acknowledged and acquiesced in by him; and if this relation does not exist by reason of the abandonment of the wife, then her settlement does not follow the husband. This, it seems to us, is the clear meaning and intent of the section."

Washington County was therefore denied recovery against Polk County.

To the same effect, see *Polk County vs. Clarke County*, 171 Iowa, 558.

It would therefore follow that the legal settlement of a wife not abandoned or divorced by her husband follows that of her husband, the reason being that the husband has the right and authority to control the settlement of his wife. By the same yardstick it may be said that the law ends where reason ends, and under the particular subsection in question it seems to us the clear legislative intent that where the wife has been either divorced or abandoned by her husband, she has the legal right at her election to resume settlement in the county where she had a settlement at the time of her marriage.

Reading the statute in question and the subsection in question and considering the same with reference to the chapter as a whole, it is clear that an exception was created in behalf of a wife abandoned or divorced by her husband. Any other construction would render the wording of the statute and the subsection in question meaningless. We therefore conclude that if the woman in question had a legal settlement in Calhoun County at the time of her marriage and has been divorced or abandoned by her husband in Hamilton County, she has the legal right to resume her legal settlement formerly acquired in Calhoun County under the statute in question.

PROCESSING TAX: State Comptroller should not issue state warrants in full for goods purchased containing processing tax, regardless of date of shipment, whether before January 6, 1936, or thereafter.

Claims should be filed against processor who has collected tax from state and not turned it over to national government.

Processing tax plainly and specifically applied to "pork."

February 12, 1936. *State Comptroller:* I have your letter of February 3, 1936, in which you request an official opinion from this department on the following questions:

"This department desires your official opinion regarding payment of processing tax as a part of the AAA. Will you please direct your opinion to the following?

State Comptroller
Board of Control
Treasurer of State
Auditor of State
State Executive Council

"This department has refused payment on all purchases by the State of Iowa containing processing tax since the United States Supreme Court declared the AAA unconstitutional.

"The contracts entered into prior to the United States Supreme Court's decision surely contained the processing tax as specified by the Federal government as no exemptions were granted. Those claiming exemptions were required to file claim with the proper party, asking for refund of the processing tax.

"Claims reaching this department January 6, 1936 and up to the present time that contained processing tax, have been paid less the processing tax, or not paid at all, being held pending your official opinion.

"The state warrants issued in payment of claims where processing tax had been deducted, have been returned by the various parties, saying they could not allow the deduction of processing tax and requesting that a corrected warrant be issued in full amount as billed the state. This we refused to do. We are holding these state warrants as issued, awaiting your instructions.

"The meat packers having contracts to supply meat and other products claim they have attached and made a part of their contracts a clause which exempts them from any reduction in price on account of the AAA being declared unconstitutional. In vouchers for frankfurters, bologna, minced ham and other products, we have statements from the packer that the product contains no pork or other properties which carry a processing tax. Shall the State Comptroller issue state warrants in full when such statement is a part of the voucher?

"Shall the State Comptroller issue state warrant in full for goods purchased containing processing tax, regardless of date of shipment, whether before January 6, 1936 or after?

"At the time the United States Supreme Court declared the AAA unconstitutional, stocks of goods were on hand at the State Penitentiary, Men's Reformatory, Women's Reformatory, Boys' Correction School and Girls' Correctional School. No refunds were allowed the above institutions for the reason they were not considered charitable institutions. Should refund claims be filed for all goods on hand at the time the act was declared unconstitutional? The goods on hand consisted of yarn warp and other cotton goods made up for the use of the institutions and may not be all used for a year or so.

"The penal institution must either file for refund, charge institution using the article more, or absorb the tax as part of cost of manufacture. At Fort Madison processing tax paid on goods in stock (Textile Industry) on December 31, 1935 was over $5,000.00. In addition to cotton products held for manufacture or sale to other institutions, there were flour and sugar and possibly other goods containing processing tax."

In view of your statement that the contracts entered into prior to the United States Supreme Court's decision, surely contained the processing tax

as specified by the federal government, because no exemptions were granted, there can be no question but what your procedure has been correct in issuing warrants less the amount of the processing tax. I assume that no claims for exemptions were filed as required by law, with respect to the warrants mentioned by you in your letter of February 3d.

You also state that warrants issued in payment of claims where the processing tax had been deducted, had been returned by the various parties saying that they could not allow the deduction of the processing tax and requesting that a corrected warrant be issued in the full amount as billed the state, and that you refused to comply with their request. It is our opinion that you have acted properly in this matter, for the reason that the processing tax was included in their claim as filed with your department.

You further state that in vouchers for frankfurters, bologna, minced ham and other products, you have statements from the packers that the product contains no pork or other properties which carry a processing tax. Under the laws of the State of Iowa as contained in Chapter 147 of the 1935 Code of Iowa and also under the specific provisions of Section 3067 of the 1935 Code of Iowa, all food offered or exposed for sale or sold in a package or wrapped form, shall be labeled on the package or container as prescribed in Sections 3037 to 3040 inclusive. In order to properly answer your question with reference to these meat products, it would be necessary for us to know just what was ordered by the state. In case the state had purchased "frankfurters," "bologna" and "minced ham," then the packer or wholesaler or seller should comply with the order and furnish the State of Iowa the food that was ordered. A "frankfurter" is a "highly seasoned beef *and* pork sausage stuffed in sheep casings, linked and smoked." (Merriam Webster's New International Dictionary, page 1002.)

"Bologna" is "bologna sausage." (Merriam Webster's New International Dictionary, page 304.)

"Bologna sausage" is "a large sausage made of beef, veal *and* pork, chopped fine, seasoned and enclosed in a skin, smoked and cooked." (8 C. J. 1142; Merriam Webster's New International Dictionary, page 304; Armour & Co. vs. Bird, 123 N. W. 580, 159 Mich. 1, 25 L. R. A. (N. S.) 616.

"Ham" is the "thigh of a hog, cured by salting and smoking, or meat from it." (Merriam Webster's New International Dictionary, page 1130.)

"Mince" is "to cut or chop into very small pieces; to hash; to subdivide minutely." (Merriam Webster's New International Dictionary, page 1562.)

Paragraph two of Section 3030 of the 1935 Code of Iowa, provides that the Department of Agriculture shall make and publish all necessary rules, not inconsistent with law, for enforcing the provisions of Title 10 of the 1935 Code of Iowa. The department has adopted the rule wherein they define "sausage" as fresh or prepared meat, or a mixture of fresh or prepared meat, and is sometimes comminuted. The term "sausage meat" is sometimes applied to bulk sausage containing no meat by-products.

Section 3039 of the 1935 Code of Iowa, requires all mixtures, food mixtures, compounds, combinations, blends or imitations, to be plainly marked and labeled with the names of all the indigents contained therein, beginning with the one present in the largest proportion.

Section 3042 of the 1935 Code of Iowa prohibits dealing in mislabeled articles.

The Department of Agriculture of the State of Iowa has also issued a rule consistent with the Iowa law, wherein "sausage" has been defined as follows:

"Sausage is finely chopped or ground meat with or without the addition of salt and other seasoning, and not in excess of two (2) per cent of cereal; and if it bears a name descriptive of its kind, composition, or origin, it corresponds thereto. Water or ice shall not be added to sausage except for the purpose of facilitating grinding, chopping, and mixing, in which case the added water or ice shall not exceed three (3) per cent, except that sausages of the class which are smoked or cooked, such as Frankfort style, Vienna style, and Bologna style, may contain added water in excess of three (3) per cent, but not in excess of an amount necessary to make the product palatable.

"Sausage composed of more than one kind of meat shall be labeled with the names of the kinds of meat entering its composition beginning with the name of the kind of meat which is present in the greatest quantity."

Regulation No. 81 relating to the processing tax and compensating tax under the Agricultural Adjustment Act as passed by the National Congress, placed a processing tax "upon wheat, cotton, field corn, hogs, rice, tobacco and milk and its products, and any regional or market classification, type, or grade thereof, with respect to which commodity a processing tax is in effect; or any commodity which the Secretary of Agriculture has found and specified in a proclamation, to be a commodity competing to the disadvantage of a basic agricultural commodity, and with respect to which a processing tax is in effect."

From the above quoted sections of our law and the rules and regulations made by the Department of Agriculture which are not inconsistent with our state law, and from the legal definitions, it is apparent that "pork" must be present in frankfurters, bologna and minced ham, unless the article so purchased contains a different label showing all the ingredients that have been used to produce or to process the substituted product. In plain words the State of Iowa and the public as a whole, have a legal right to know just what they are buying. Unless the State of Iowa purchased a substituted bologna sausage, or substituted frankfurters, or a substituted minced ham, with full knowledge that no pork was to be used therein, then the processing tax certainly was included in the purchase and sale to the state of frankfurters, bologna and minced ham. The processing tax plainly and specifically applied to pork. If any packer or wholesaler filled an order for bologna sausage, frankfurters or minced ham, without any pork contained therein, then he has plainly violated the laws of the State of Iowa, unless the state was informed by the labels contained thereon, that they were buying such meats, knowing that they did not contain any pork.

The State Comptroller should not issue state warrants in full for goods purchased containing the processing tax, regardless of date of shipment, whether before January 6, 1936, or thereafter. If the State Comptroller should issue warrants in full for goods purchased containing the processing tax, then the state in reality, would be making a gift of the amount of the processing tax to the claimant or processor.

You are further advised that refund claims should be filed for all goods on hand at the time the United States Supreme Court declared the AAA

unconstitutional, at the state institutions mentioned in your letter, for the full amount of the processing tax paid by the state.

The decision of the United States Supreme Court above referred to, plainly means that the processing tax law was unconstitutional, null and void, and that the federal government could not legally enforce or collect the payment of this tax from the processors. Prior to the Supreme Court's decision, a large amount of the so-called processing tax was collected by the processors and turned over to the national government. Where such a situation has existed then, of course, it would be eminently unfair to require a processor to repay the state the amounts that the processors had collected from the state and turned over to the national government. Claims of this nature could not be made against anyone except the national government. However, we wish to be understood that we are not advising the filing of such claims against the national government, but we do wish to be understood as advising and urging that claims should be filed against the processor who has collected this alleged tax from the state and who has not turned it over to the national government. The processor has acted as a tax collector or tax gatherer for the national government. In reality, the processor has not paid this tax, but has adroitly collected it from the producer of the raw product and the consumer or purchaser of the processed product.

BOARD OF EDUCATION: PATENTS: IOWA STATE COLLEGE ALUMNI ASSOCIATION: "The Iowa State Board of Education does not have power to delegate to the Iowa State College Alumni Association or a committee of the same the management of its patents, patent applications, or patent interests, but that same may be entrusted to employees of Iowa State College at that institution either as individuals or as a committee of individuals, but only in the limited sense set forth in the foregoing opinion."

February 14, 1936. *Iowa State Board of Education:* The secretary of the Iowa State Board of Education informs me that the Board requests an opinion upon the following question:

May the Iowa State Board of Education, acting under its legal powers, delegate to an organization such as the Iowa State College Alumni Association or committee of the same, the management of patents, patent applications and patent interests now owned, or in the future to be owned, by the State of Iowa on behalf of the Iowa State College?

This inquiry seems to be relevant to a resolution passed on November 8, 1935, by the Iowa State Board of Education, as follows:

"NOW, THEREFORE, be it resolved that the Iowa State Board of Education does hereby transfer, without relinquishing title thereto, the patents and patent applications shown on the attached list, and all future patents which may be applied for by staff members and assigned to the Iowa State College until further notice, together with all revenue derived or to be derived therefrom, to the Board of Patent Trustees of the Iowa State College Alumni Association to be administered in accordance with the terms of the policy statement of November 1, 1934."

Response to the above question would seem to require also some consideration of the general question:

How broad are the powers of the Iowa State Board of Education in respect to administration and management of the interests of the State of Iowa in patents owned by the Iowa State College, an educational institution which in turn is owned by the State of Iowa and subject to the jurisdiction of the Iowa State Board of Education?

A response to these questions requires first a brief statement as to the ownership of patents and patent rights.

All patents or patent rights which have been assigned without qualification by the original patentees to the State of Iowa may be, without doubt, treated as the property of the state. Inventions leading to patents which are the work of persons specifically employed and specifically assigned to invention projects by the Iowa State College will result in the fruits of the work belonging to the State of Iowa. See Solomon vs. U. S., 137 U. S. 342 (1890); Standard Parts Co. vs. Peck, 264 U. S. 52 (1924); Bryan & Co. vs. Sturlock, 184 Iowa 376, 168 N. W. 144 (1918).

On the other hand the law does not regard the ordinary contract of employment as including a right on the part of the employer to the product of the inventive genius of the employee. Dalzell vs. Dueber Co., 149 U. S. 351 (1893); Pressed Steel Car Co. vs. Hansen, 137 Fed. 403 (C. C. A. 1905).

Where a skilled mechanic has been employed to secure efficient service from machines under his direction, and where he makes an invention increasing such efficiency, the employer obtains "shop rights" and not the ownership of the patent. See McAleer vs. United States, 150 U. S. 424 (1893); Hapgood vs. Hewitt, 119 U. S. 226 (1886); United States vs. Dublier Condenser Corp., 289 U. S. 178 (1933).

The General Assembly of Iowa in Section 3921, Code of Iowa, 1935, has recognized that where property rights growing out of inventions or patents belong to a Board of Education institution, or are to be assigned to a Board of Education institution by an employee thereof who has perfected the novelty device, state funds may be expended in securing letters patent or copyright. See Section 3921, Code, 1935, Paragraph 10, which reads as follows:

"The board shall:

10. With consent of the inventor and in the discretion of the board, secure letters patent or copyright on inventions of students, instructors and officials, or take assignment of such letters patent or copyright and may make all necessary expenditures in regard thereto. That the letters patent or copyright on inventions when so secured shall be the property of the state, and the royalties and earnings thereon shall be credited to the funds of the institution in which such patent or copyright originated."

It will be noted that inventions and the patent rights thereto which thus become the property of the State of Iowa are subject under the same section, Paragraph 4, to the management and control of the Board of Education.

In the management and control of such property the Board of Education through its administrative officers at any State Board institution may delegate clerical and simple administrative duties to its employees either as individuals or as committees composed of individual employees. Thus negotiations concerning licenses and the compensation to be paid therefor, the rights to be granted under the license contract and any qualifications thereof may be worked out in the first instance through the negotiations of employees of the institution or the committee of such employees, but final action thereon would have to be by the Iowa State Board of Education itself. It would not be objectionable to obtain without expense to the institution the skilled advice of an experienced alumnus provided he is willing to serve upon such committee without expense to the institution and provided that he has merely an ad-

visory capacity in relation to the work of such committee. It will be noted again that such committee would have no power to take final action in divesting the state of any interest in any property or binding the state upon any contract in respect to such an interest.

Inventions, patents and patent rights perfected and obtained by employees of State Board institutions which do not under the law, as briefly summarized above, in any way become the property of the State of Iowa are the private property of such inventors and may be used by them to their own private profit or donated by them to an alumni association or other body for the benefit of the institution by which they are employed or to any other person or institution, as the owner may see fit.

In Section 3921, Paragraph 4, of the Code, 1935, the Iowa State Board of Education is given power to:

"Manage and control the property, both real and personal, belonging to said institutions."

Attention is called again to the last sentence of Section 3921, Paragraph 10, of the Code, 1935, which reads as follows:

"That the letters patent or copyrights on inventions when so secured shall be the property of the state, and the royalties and earnings thereon shall be credited to the funds of the institution in which such patent or copyright originated."

While it is not contemplated that any branch or arm of the state government shall without specific legislative authority engage in private business or commercial activities in competition with private business, it is recognized that ordinary governmental activities, such as education, and the research attendant thereon, demonstration at educational institutions, and the products of labor at penal institutions, etc., will result from time to time in the ownership of property by the state which should be, to avoid waste to the taxpayers, utilized and managed as seems to be to their best advantage.

In this connection some patents will be administered for the benefit of the state at large simply by the wide granting of free licenses to manufacture under the same. Others perhaps may be advantageously sold outright to persons who wish to manufacture and carry on trade under advantages of the same. Still others may be widely licensed or exclusively licensed with resulting income to the Iowa State College, which in turn should tend to reduce the burden of carrying that institution at the expense of the taxpayers.

Which course should be taken with any particular patent is in the present state of the law a question, the solution of which is entrusted to the sound discretion of the Iowa State Board of Education under provisions of Section 3921 above quoted. It should be emphasized again that the ownership of these properties is incidental to direct governmental activities and in no case would appear to justify the Iowa State Board of Education in embarking upon any manufacturing program or broad plan of exploitation.

In conclusion the question set forth at the beginning of this opinion must be answered in the negative and the Iowa State Board of Education respectfully informed that it does not have power to delegate to the Iowa State College Alumni Association or a committee of the same the management of its patents, patent applications, or patent interests, but that the same may be entrusted to employees of the Iowa State College at that institution either

as individuals or as a committee of individuals, but only in the limited sense set forth in the foregoing opinion.

SCHOOLS: TEACHERS' CONTRACTS: SCHOOLS CLOSED ON ACCOUNT OF WEATHER CONDITIONS: EPIDEMIC: SALARIES OF TEACHERS ARE REQUIRED TO BE PAID WHERE THE CONTRACT IS SILENT AS TO PAYMENT OF SALARY WHEN SCHOOL IS CLOSED BY ACTION OF THE BOARD. AND

February 25, 1936. *Department of Public Instruction:* We have your request for opinion on the following proposition:

"Will you please render this office an official opinion on whether the salaries of teachers are required to be paid during the time school is closed because of a threatened epidemic of disease, impassable roads, weather conditions, fuel shortage, the fuel supply commandeered by the mayor because of public need, or some other overruling necessity for which the teacher is not responsible?"

Under the provisions of Section 4228 of the Code of Iowa, 1935, the Board of Directors of a school district are authorized to enter into contracts with the teachers and under the provisions of Section 4229, the contracts must be in writing stating the length of time that school is to be taught, the compensation per week of five days each month of four weeks and that the contract shall be invalid if the teacher is under contract with another Board of Directors in the State of Iowa for the same period.

You will note that there is no provision in the statute in regard to incorporating in the teachers' contracts the question of compensation during the period inquired about by you.

We are, therefore, assuming that the contracts are silent as to this proposition and it will be necessary, therefore, to determine what the courts of last resort have said on this proposition.

In *Hughes vs. Grant Parrish School Board,* 145 So., 794. The plaintiff was a school teacher and entered into a regular teacher's contract. There was no provision therein as to non-liability in event the school was closed. The school was burned and there are no available or suitable buildings wherein the remainder of the session could be held and in regard to the question of liability for the remainder of the term, the court said:

"In other states, it has been held that a school board cannot avoid paying the salary of a teacher because of the destruction of the school building by fire * * * or because the schools are closed on account of the prevalence of contagious diseases. (See cases cited)."

In *Board of Education vs. Couch,* 6 A. L. R., 740, there was a suit by a teacher on a contract which school was temporarily closed by order of the board and remained closed for a period of one month, during which time, the teacher held himself in readiness to resume his duties, which he did, and completed the term. The Supreme Court of Oklahoma in that case quoted from a Texas case, as follows:

"Plaintiff was not consulted as to the closing of the school aforesaid, but was informed and required by the Executive School Board that she should hold herself in readiness to resume her duties under said contract as soon as the health authorities would permit the schools to be opened, and the Executive Council should so direct * * * but the schools were never discontinued, only suspended temporarily and were likely to open at any time. Plaintiff was notified that she was to be ready to work when the schools resumed

and this might have occurred any day. There was no dereliction or fault on her part in any respect. Had the schools been closed permanently, she would have been able to seek other employment, but as it was, she was held as a teacher under her contract and the city cannot, in justice, claim that her time so spent was not in the actual service of the schools."

In that case, the court held a teacher was entitled to compensation during the period that the school was closed.

In *Phelps vs. School District,* 21 A. L. R., 737, the school was closed for two months by order of the board and it was stipulated that the teacher was ready and willing to teach during that period, and the Supreme Court of Illinois was quoted from an Ohio case as follows:

"And that the contingency might have been provided against by the contract, but that the law would not insert by construction an exception for the benefit of one of the parties which they had omitted from the contract."

And again the court said:

"It was no fault of the appellee (teacher) that the school was closed a portion of the time she was employed to teach. Neither was it the fault of the appellant (school board). Some one was required to suffer loss resulting from an unforeseen contingency which caused the school to be closed and the rule is that the loss will rest on the party who has contracted to bear it; for if he did not intend to bear it, he should have stipulated against it."

And again the court said:

"When made, the contract was lawful and valid. Its performance was rendered impossible by the subsequent happening of a contingency, which could not be foreseen or known when the contract was made, and the rule is that, if one of the parties desires not to be bound in the event of the happening of such a contingency, he must so provide in the contract."

In the case of *Randolph vs. Sanders,* 54 S. W. (Texas) 621, the Supreme Court of Texas said that had the schools been closed permanently, a teacher would have been able to seek other employment, but as it was, she was not free to do so and that, therefore, the district was liable for the period during which the school was temporarily closed and the teacher ready and willing to perform her part of the contract. Such is the holding also in the case of *Gear vs. Gray,* 37 N. E. 1078, and *Dewey vs. Union School District,* 5 N. W. 646, and a great number of other cases cited in the cases hereinbefore mentioned.

It must be kept in mind that under the conditions mentioned in your question, it is the school board or someone in authority that actually closes the school and while an overruling necessity or some act of God may seem to necessitate such action on the part of those in authority, yet, under this rule, the district is not excused from complying with the plain provisions of the contract, that is, payment of the salaries due the teachers.

It is, therefore, the opinion of this department that your question must be answered in the affirmative where the contract is silent as to payment of salary when school is closed by action of the board, and that salaries of teachers must be paid during the time the school is temporarily closed.

IOWA STATE COLLEGE: PATENT: IOWA STATE COLLEGE ALUMNI ASSOCIATION: REIMBURSEMENT:

It is an expenditure for which the college might directly have paid out its own funds.

The proper practice in the future will be to consult the office of the Attorney General before incurring any obligation for legal services in connection with patents, or otherwise.

February 26, 1936. *Iowa State Board of Education:* You have asked to be informed concerning the legal propriety in the following situation:

The Iowa State College Alumni Association has expended the sum of $500.00 in obtaining information concerning the true ownership, possible infringement, and the right to assign or license a patent owned by the State of Iowa. Some of the work of collecting and analyzing the information was done by a patent attorney. Is it legally permissible for the officers of the Iowa State College to disburse the necessary sum of money for the purpose of reimbursing the Iowa State College Alumni Association on account of this expenditure?

Section 152 of the Code of Iowa reads as follows:

"152. *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,* but the Executive Council may employ legal assistance, at a reasonable compensation, in any pending action or proceeding to protect the interests of the state, but only upon a sufficient showing, in writing, made by the Attorney General, that his department cannot for reasons stated by him perform said service, which reasons and action of the council shall be entered upon its records."

The 45th General Assembly in Extra Session passed a statute which became effective upon publication on the 22d day of February, 1934, which may now be cited as Code of Iowa, 1935, Section 3921, Paragraph 10, and which reads as follows:

"3921. *Powers and Duties.* The board shall: * * * *

"10. With consent of the inventor and in the discretion of the board, secure letters patent or copyright on inventions of students, instructors and officials, or take assignment of such letters patent or copyright *and may make all necessary expenditures in regard thereto.* That the letters patent or copyright on inventions when so secured shall be the property of the state, and *the royalties and earnings thereon shall be credited to the funds of the institution in which such patent or copyright originated."*

Perhaps the most obvious matter of common knowledge concerning patents is that conflicts with respect to the ownership of the same arising out of overlapping claims and infringements are extremely common and that the ascertainment whether any of the same exists or not would be numbered among the matters for which "necessary expenditures in regard thereto" would have to be made. This expenditure by the Alumni Association was made on behalf of the Iowa State College in accordance with action of the Board of Education and, therefore, is within the terms of the statute. It is, therefore, an expenditure for which the college might directly have paid out its own funds under the terms of the act last above quoted.

Since the debt is one for services which could properly have been paid for upon approval of this office, it seems to follow that when the same has been paid for by a third person, not as a volunteer but upon request and expectation of reimbursement or compensation from the Board of Education, the said reimbursement can be now approved. Such bill is therefore now approved and payment authorized.

The proper practice in the future will be to consult the office of the Attorney General before incurring any obligation for legal services in connection with patents, or otherwise, so that there may be advance clearance of any question of the legality of making compensation for the same.

WORKMEN'S COMPENSATION: No statute of limitations applicable to claims arising under Workmen's Compensation Law prior to enactment of Sec. 1368 40th General Assembly (Ex. Session). Proceeding before Industrial Commissioner not an action, but special proceeding. An action is a proceeding where there are adverse parties. Civil action a proceeding in court of justice where one party seeks against another party protection of a private right or prevention or redress of a private wrong.

February 26, 1936. *Iowa Industrial Commissioner:*

In Re: *Joel D. Miller vs. Independent School District of East Waterloo.*

In your letter of January 23, 1936, you state that it becomes necessary for you to determine whether or not Section 11007 of the Code of Iowa is applicable to the facts in the above entitled case.

You state that the workman involved was injured prior to the enactment of Section 1386 of the Code and direct our attention to the case of Hinrichs vs. Davenport Locomotive Company, 203 Iowa 1395, decided in 1927, in which case in the opinion written by Mr. Justice Stevens the following language is used: "prior to the enactment of Section 1386 of the 46th General Assembly, there was no statute of limitations applicable to claims arising under the Workmen's Compensation Law." Attorneys for the defendants contend the language just quoted is dictum, since under the facts in the Hinrichs case, Paragraph 5 of Section 11007 was not applicable, less than five years having elapsed between the time of the injury and the decision of the case by the Supreme Court.

While the language above referred to is purely dictum, it is a very clear, definite and positive expression by the distinguished author of the opinion that there was no statute of limitations applicable to claims arising under the Workmen's Compensation Law prior to the enactment of Section 1368 by the 40th General Assembly (Extra Session). Section 1368 clearly does not apply to the case which you now have under consideration, in view of the decision in the Hinrichs case that this section requiring proceedings under the Workmen's Compensation Law to be commenced within two years after the injury is inapplicable where the injury occurred before the statute went into effect. The defendants rely upon Section 11007 of the Code of 1931 as being a statute of limitations applicable to this case. This section, insofar as material, is as follows:

"11007. Period of. Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared: * * * *

5. Unwritten contracts—injuries to property—fraud—other actions. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, *and all other actions not otherwise provided for in this respect, within five years.*"

It will be noted that Section 11007 provides that *actions* may be brought within times therein limited and that "all other actions not otherwise provided for" shall be barred if not brought within five years. If the proceedings

before the Industrial Commissioner and his deputy are "actions" in the legal sense, then Section 11007 is applicable to the case under consideration, notwithstanding the definite statement of Mr. Justice Stevens expressing a contrary view. We quote Section 10938 of the Code of 1935:

"10938. 'Proceedings' classified. Every proceeding in court is an action, and is civil, special or criminal."

We quote also Section 10939:

"10939. Civil and special actions. A civil action is a proceeding in a court of justice in which one party, known as the plaintiff, demands against another party, known as the defendant, the enforcement or protection of a private right, or the prevention or redress of a private wrong. It may also be brought for the recovery of a penalty or forfeiture."

"Every other proceeding in a civil case is a special action."

If every proceeding in court is an action, then the word "action" must mean a proceeding in court wherever the word "action" is used with reference to a proceeding where there are adverse parties. A civil action is a "proceeding in a court of justice in which one party" seeks against another party the *influence* or protection of a private right or the prevention or redress of a private wrong. Every other proceeding in a civil case is a special action.

The word "action" has been defined as follows:

"A demand of a right in a court of justice; the lawful demand of one's rights in a court of justice; the legal and formal demand of one's rights from another person or party made and insisted on in a court of justice."

1 Corpus Juris 925.

"The term 'action' is, however, restricted to proceedings in a court of justice and does not include non-judicial proceedings."

1 Corpus Juris 927.

The following proceedings have been held not to be actions:

"1. A proceeding before County Commissioners for the location of a highway."

"2. A proceeding before County Commissioners for the maintenance of gates at railroad crossings."

"3. A proceeding to assess damages for the laying out of a highway."

"4. The entry of a judgment by confession."

(83 Iowa 471) 1 Corpus Juris 929. Note.

It is our opinion that a proceeding before the Industrial Commissioner is not, within the contemplation of the statutes above quoted, an action, but is a special proceeding and not subject to the limitations contained in Section 11007. In support of this view, we cite several cases as follows:

In the case of Hartley vs. K. & N. W. Railway Company, 85 Iowa 455, which was originally a proceeding before a Sheriff's jury to ascertain the compensation to which the plaintiffs were entitled for right-of-way occupied by the defendant, the Court used the following language:

"The proceeding is therefore special and not an action within the meaning of the provisions of the Code quoted, and the statute of limitations applies only to actions. It is true the provisions of the Code concerning the prosecution of civil actions are to be followed in special proceeding not otherwise regulated insofar as applicable. * * * But the provisions contemplated are those which relate to the settling of the issues, the place and manner of trial and other matters of that character. * * * whether the section referred to

was also intended to include the statute of limitations is a question which does not appear to have been fully determined by this court."

"In Daniels vs. C. I. & N. Railway Company, 41 Iowa, 52, a proceeding to ascertain the compensation to be paid the land owner was instituted more than ten years after the right-of-way was taken but no question as to the statute of limitations was made, and the proceeding was commenced by the Railroad Company."

"In Cuthbertson vs. Locke, 70 Iowa, 49, it was said that no definition under the statute of limitation can be interposed in the proceeding to establish the boundaries and corners of land. We are of the opinion that the same rule must be applied to proceedings to ascertain the compensation due to a land owner for a right-of-way taken by a Railway Company. The section of the statute specified does not refer to provisions of the law designed to prevent the prosecution of actions because of delay in commencing them."

In an appeal to the district from an order of the fence viewers portioning the division fence between two land owners, it was held that "the appeal in the District Court was a special action." In Re: Fence Dispute, 204 Iowa, 1072.

The case of Gates vs. Railway Company, 177 Iowa, 690, was one in which an application was made to the sheriff of Jasper County for the appointment of commissioners to assess damages resulting to a plaintiff from the appropriation by defendant of right-of-way through plaintiff's land. Said commissioners assessed the damage at $3,000.00, and the action was brought to enjoin the use by the defendant of the said right-of-way until the damages so assessed were paid. Appellant relied in part upon certain statutes of limitations, the court, in its opinion referring to Henry vs. D. & P. Ry. Co., 10 Iowa, 540, and Hartley vs. K. & N. W. Ry. Co., 85 Iowa, 455, said:

"We think the instant case is ruled by these cases."

Section 1 of Article 5 of the Constitution of Iowa provides that:

"The judicial power shall be vested in a Supreme Court, District Courts and such other courts inferior to the Supreme Court as the General Assembly may from time to time establish."

The Legislature, no doubt, could have made the Industrial Commissioner a Judge and could have constituted his tribunal a court, but we do not find that the Legislature has at any time or place denominated the Industrial Commissioner as a Judge or his tribunal as a court.

In view of the statutes and authorities above set out or referred to, and the holding of our Supreme Court in the cases cited, we are of the opinion that the statement of Judge Stevens in the Hinrichs case that "prior to enactment of Section 1386 by the 40th General Assembly (Extra Session) there was no statute of limitations applicable to claims arising under the Workmen's Compensation Law," although it may be dictum, is a correct statement of the law.

You have presented but one question, and we have confined this opinion thereto. We are advised that the finding of the Deputy Commissioner was based on other questions as well as the one here under consideration. If with the consideration of the question discussed in this opinion, the facts warrant the conclusion and findings arrived at by the Deputy Commissioner, then you will be justified in approving and ascertaining his findings, notwithstanding the opinion we have rendered herein.

IOWA STATE COLLEGE: PATENT: IOWA STATE COLLEGE ALUMNI ASSOCIATION: REIMBURSEMENT:

It is an expenditure for which the college might directly have paid out its own funds.

The proper practice in the future will be to consult the office of the Attorney General before incurring any obligation for legal services in connection with patents, or otherwise.

February 26, 1936. *Iowa State Board of Education:* You have asked to be informed concerning the legal propriety in the following situation:

The Iowa State College Alumni Association has expended the sum of $500.00 in obtaining information concerning the true ownership, possible infringement, and the right to assign or license a patent owned by the State of Iowa. Some of the work of collecting and analyzing the information was done by a patent attorney. Is it legally permissible for the officers of the Iowa State College to disburse the necessary sum of money for the purpose of reimbursing the Iowa State College Alumni Association on account of this expenditure?

Section 152 of the Code of Iowa reads as follows:

152. *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,* but the Executive Council may employ legal assistance, at a reasonable compensation, in any pending action or proceeding to protect the interests of the state, but only upon a sufficient showing, in writing, made by the Attorney General, that his department cannot for reasons stated by him perform said service, which reasons and action of the council shall be entered upon its records."

The 45th General Assembly in Extra Session passed a statute which became effective upon publication on the 22d day of February, 1934, which may now be cited as Code of Iowa, 1935, Section 3921, Paragraph 10, and which reads as follows:

"3921. *Powers and Duties.* The board shall: * * * *

"10. With consent of the inventor and in the discretion of the board, secure letters patent or copyright on inventions of students, instructors and officials, or take assignment of such letters patent or copyright *and may make all necessary expenditures in regard thereto.* That the letters patent or copyright on inventions when so secured shall be the property of the state, and *the royalties and earnings thereon shall be credited to the funds of the institution in which such patent or copyright originated.*"

Perhaps the most obvious matter of common knowledge concerning patents is that conflicts with respect to the ownership of the same arising out of overlapping claims and infringements are extremely common and that the ascertainment whether any of the same exists or not would be numbered among the matters for which "necessary expenditures in regard thereto" would have to be made. This expenditure by the Alumni Association was made on behalf of the Iowa State College in accordance with action of the Board of Education and, therefore, is within the terms of the statute. It is, therefore, an penditure for which the college might directly have paid out its own funds under the terms of the act last above quoted.

Since the debt is one for services which could properly have been paid for upon approval of this office, it seems to follow that when the same has been paid for by a third person, not as a volunteer but upon request and expectation of reimbursement or compensation from the Board of Education,

the said reimbursement can be now approved. Such bill is therefore now approved and payment authorized.

The proper practice in the future will be to consult the office of the Attorney General before incurring any obligation for legal services in connection with patents, or otherwise, so that there may be advance clearance of any question of the legality of making compensation for the same.

CAPITOL EXTENSION ACT: Legislature may authorize Executive Council to make conveyances proposed to be made to city of Des Moines and accept conveyances of other real estate in consideration therefor, but has not done so.

March 2, 1936. *Secretary to the Executive Council:* On January 27th, you wrote the Attorney General advising that the city of Des Moines is considering a project which will open East 14th Street from Court Avenue south to Indianola Road, and that in connection with this project the city has asked the state to deed to it for highway purposes a strip of land on the east edge of the Capitol Extension Grounds in consideration for which conveyance the city proposes to deed to the state that part of Southeast 13th Street south of Vine Street, the state owning the property on both sides of Vine Street. This exchange of real estate would result in considerable advantage to the state and city and to a great many citizens of the state outside of the city of Des Moines. As we understand it, the construction of a much needed viaduct across the railway tracks extending south on East 14th Street, and to connect with Indianola Road, is somewhat dependent upon the conveyance to the city of the land in question, and the question is presented whether the Executive Council has authority to make such exchange and conveyance.

The Executive Council was created by statute and has such powers and authority only as are given it by statute. The Legislature has given it express authority to sell and convey land in certain cases, as, for instance, islands in meandered streams and lakes of the state, or in water bordering upon the state as provided in Section 18235 of the Code of 1935, and in cases where title to real estate becomes vested in the state by purchase at execution sale or by a conveyance under statutes relating to taxation as provided in Section 10260-E1. In these instances the Legislature has vested the Executive Council with authority to convey the real estate involved.

The Capitol Extension Act is contained in Chapter 14, Acts of the 35th General Assembly, but the real estate under consideration was not included in the land covered by said act. Evidently it was acquired at a subsequent date, for it is included in the plat of the Capitol Extension Grounds.

Section 7 of said act authorized, empowered and directed the Executive Council to sell or cause to be sold the real estate then owned by the state and known as Governor's Square, located near the State Capitol Grounds. That the Legislature could authorize the Executive Council to make the conveyance proposed to be made to the city of Des Moines, and to accept a conveyance of other real estate in consideration therefor, there is no question, but as to whether such authority has been given to the Executive Council, there is grave doubt.

There are on file in the office of the Secretary of State numerous maps and plats covering the Capitol Grounds Extension, showing extensive improvements thereon in the way of walks, highways, monuments, etc., and including

a tunnel constructed for the purpose of connecting the buildings on said grounds with a proposed heating plant to be located at the extreme southeast of the Capitol Grounds Extension a short distance from the railway tracks, a few feet from the land under consideration, and covering a considerable portion of the street, which it is proposed the city of Des Moines shall vacate and convey to the state. If said power plant should at any time be built as proposed, it would be necessary or advisable to procure from the city a vacation and conveyance of Southeast 13th Street south of Vine Street.

As we view it, the property of the state embraced in said Capitol Grounds Extension and particularly that part abutting the present Southeast 13th Street, would be greatly enhanced in value by making the conveyances under consideration. If the proposed heating plant is to be built at some future date, the construction of a highly improved highway within 200 or 300 feet thereof would be of great advantage to the state. If such plant is not built, the state property abutting 13th Street is of little or no value to the state, but with the construction of a highly improved thoroughfare adjacent thereto, such property would quickly take on value that it probably never will possess without such improvement. As we view it, great advantage and no disadvantage will inure to the state by the making of this proposed improvement.

Section 296 provides that the Executive Council may contract for the repairing of all buildings and grounds of the state at the Seat of Government. No one could successfully challenge the right of the state to construct a reasonable or necessary road to its heating plant or elsewhere on said premises where such road seemed necessary or advisable. Although there is well grounded doubt as to the right of the Council to convey the real estate in question, it would seem clearly to have authority to enter into a contract which would authorize the permanent improvement of the premises by the construction of permanent pavement and other improvements thereon where such improvement is needed and does not conflict with the Capitol Grounds Extension plans. It is our opinion that the Council has the legal right and authority to enter into a contract with the city of Des Moines for the construction without cost to the state, of the improvement in question upon the land of the state, said improvement being for the use and benefit of the public and state, the public getting the benefit thereof. The Legislature could later, if it saw fit, authorize the relinquishment of all rights of the state in the property which the city with Federal aid desires to improve.

BASIC SCIENCE LAW:

Board of Examiners in Basic Sciences has right to issue certificates to practitioners engaged in practice of healing arts in Iowa prior to July 4, 1935.

March 2, 1936. *Board of Examiners in the Basic Sciences:* On January 14, 1936, Assistant Attorney General Harry Garrett passed an opinion for your Board with respect to the right of the Board to issue certificates of proficiency in the Basic Sciences to practitioners engaged in the practice of healing arts in Iowa prior to July 4, 1935, wherein Mr. Garrett held that your Board could issue such certificates, and that the sum of two dollars ($2.00) would be a reasonable and proper charge.

You are hereby notified that the above opinion prepared and written by

Assistant Attorney General Harry Garrett is hereby recalled and overruled by this department and the following opinion is issued in lieu thereof:

Your first question is as follows:

"Has the Board of Examiners in the Basic Sciences the right to issue certificates of proficiency in the Basic Sciences to those practitioners engaged in the practice of the healing arts in the State of Iowa on and prior to July 4, 1935?"

Your Board cannot issue certificates of proficiency in the Basic Sciences except as provided for by Section 2437-g18 of the 1935 Code of Iowa, which is as follows, to-wit:

"2437-g18. *Certificates.* The Board shall issue a certificate of proficiency in the Basic Sciences to each of the successful *applicants after examination,* as provided in this chapter."

The practitioners who are authorized to engaged in the practice of healing arts in the State of Iowa prior to July 4, 1935, are specifically exempted from the provisions of the Basic Science law. See Section 2437-g5 of the 1935 Code of Iowa.

However, these practitioners would not be applicants as contemplated by Section 2437-g18 to whom certificates of proficiency can be issued. Since the law itself exempts these practitioners from the application of the Basic Science law as contained in Chapter 114-G1 of the 1935 Code of Iowa it naturally follows that your Board could not issue certificates of proficiency to them for the simple reason that the law does not provide, or require, it to be done.

Your second question is as follows:

"Has the Board of Examiners in the Basic Sciences the right to make a reasonable charge for the issuance of certificates to practitioners coming within that provision of Section 2437-g5 which entitles persons holding licenses to practice certain professions as of July 4, 1935, to exemption from the provisions of said chapter?"

There is no provision in Chapter 114-G1 of the 1935 Code of Iowa which contains the Basic Science law authorizing your Board to make a reasonable charge for this service. Your Board is not required to issue any such certificate. However, Chapter 114-G1 of the 1935 Code does make provision for the fees that your Board can charge in the administration of the Basic Science law. These specific provisions are as follows:

"2437-g9. *Supplies.* The state department of health shall furnish the board with all articles and supplies required for the public use and necessary to enable said board to perform the duties imposed upon it by law. Such articles and supplies shall be obtained by the departments in the same manner in which the regular supplies are obtained and the same shall be considered and accounted for as if obtained for the use of the department.

"2437-g10. *Offices.* The Executive Council shall furnish the board with a suitable office and quarters in which to conduct the examinations held by said board at the seat of government.

"2437-g11. *Compensation and expenses.* Each member of the board shall, in addition to necessary traveling and hotel expenses, receive ten dollars per day for each day actually engaged in the discharge of his duties, including compensation for the time spent in traveling to and from the place of conducting the examination, and for a reasonable number of days for the preparation of examination questions and the reading of papers, in addition to the time actually spent in conducting examinations. *The compensation and ex-*

penses of the members and other expense of the board shall be paid out of the fees received from applicants.

"2437-g12. *Fees.* The fee for examination or any re-examination by the board shall be ten dollars. The fee for the issuing of a certificate by authority of reciprocity, as provided herein, shall be ten dollars. All fees shall be paid to the secretary of the board by the applicant at the time of filing application. The secretary shall pay all money received as fees into the State Treasury to be placed in a special fund to the credit of the board. The State Treasurer shall pay out of such fund the compensation and expense of the members and other expenses incurred by the board on vouchers signed by the president and secretary of the board."

From the above specific provisions of the Code it is clearly apparent that all of the articles and supplies required for the public use and necessary to enable your Board to perform its duties are to be furnished by the State Department of Health and that your compensation and expenses shall be paid out of fees received from applicants. The fee from the applicants has been fixed by the Legislature at ten dollars ($10.00) per applicant. There is no other provision in the Basic Science law for the collection of any fees except as provided in the above sections of the Code herein specifically set forth.

Your third question is as follows:

"Would a charge of two dollars ($2.00) for such certificates be a reasonable and proper charge?"

In view of our answers to your first two questions it is unnecessary for us to pass upon your third question.

The general rule of law is that public officials cannot collect fees for services performed, or even compensation, unless the statute so provides.

Gallarno vs. Long, 243 N. W. 719.
Palo Alto vs. Burlingame, 71 Iowa 201.
People vs. Elliott, 240 Ill. A. 351.
46 C. J. 1014-15.

Public policy forbids that a public official shall receive for services in the discharge of official duty any remuneration other than that prescribed by law.

Noble vs. Palo Alto (Calif. A.) 264 Pac. 529.
Kerr vs. Regester, 42 Ind. A. 375; 85 N. E. 790.

However, it is possible that many of the exempt practitioners in the healing arts might desire a statement, or certificate, from the Basic Science Board to the effect that they were exempted from the provisions of the Basic Science law by legislative enactment as contained in Section 2437-g5 of the 1935 Code of Iowa. In case your Board should receive such requests we feel that it would be entirely proper for you to issue them such a statement, or certificate, and that the fee for such a service would be controlled by Section 1220 of the 1935 Code of Iowa, which is as follows, to-wit:

"1220. *General fees.* Any officer legally called upon to perform any of the following services in cases where no fees have been fixed therefor, shall be entitled to receive:

1. For drawing and certifying an affidavit, or giving a certificate not attached to any other writing, twenty-five cents.
2. For affixing his official seal to any paper whether the certificate be under seal or not, thirty-five cents. * * *

It is to be understood from this opinion that your Board cannot require, or compel, any of such practitioners to procure such a certificate exempting

them from the provisions of the Basic Science law. If any of such practitioners desire such a statement, or certificate, from your Board it would be entirely proper for your Board to issue the same, charging therefor the fees as provided for by the general statute which is known as Section 1220 of the 1935 Code of Iowa.

In case your Board has already collected the two dollar ($2.00) fee as previously approved by the opinion furnished by Assistant Attorney General Harry Garrett under date of January 14, 1936, you are hereby directed to return one and 75/100 dollars ($1.75) in each instance to the exempt practitioners who have paid this sum for such a certificate. You are also directed to notify all of the exempted practitioners to whom your Board sent letters in accordance with the previous opinion issued by Assistant Attorney General Harry Garrett informing them of the fact that such opinion has been recalled, withdrawn and overruled by this present official opinion of this department.

CONSERVATION COMMISSION: DAMAGE CLAIMS, PAYMENT OF: The Conservation Commission is not liable and required under the law to pay damage claims for the destruction of property in the consumption of grain left in the fields when such consumption or damage was done by one or more species of wild game birds or animals.

March 21, 1936. *State Conservation Commission:* You request the opinion of this department, under date of March 17, 1936, on the following question:

Is the Conservation Commission liable and required under the law to pay damage claims for the destruction of property in the consumption of grain left in the fields when such consumption or damage was done by one or more species of wild game birds or animals?

Although the State of Iowa is designated as the owner and is given title to fish and wild game under Section 1704 of the 1935 Code of Iowa, yet the only way in which a claim can be made for damages would be to file the same with the Legislature. A Claims Committee will be appointed from the membership of the 47th General Assembly, which convenes in January, 1937. All persons having claims against the State of Iowa may submit them to this committee.

As we view it, there is no authority under the Iowa law, with relation to the powers and duties of the Conservation Commission to pay out damage claims such as this.

OLD AGE ASSISTANCE LAW: COORDINATING OF FEDERAL SECURITY ACT AND OLD AGE ASSISTANCE LAW: PAYMENT OF FEDERAL FUNDS SHOULD BE MADE TO THE TREASURER OF THE STATE OF IOWA.

March 23, 1936. *Old Age Assistance Commission:* In accordance with our conference of March 21, 1936, in which you requested information from our department relating to the coordinating of the federal security act recently passed by Congress, and the old age assistance act, Chapter 266-F1 of the 1935 Code of Iowa, particularly as to what department of this state should receive the payment of federal funds, will say that the said payment of federal funds should be made to the Treasurer of the State of Iowa.

Under Section 5296-f34 of the 1935 Code of Iowa, the pension fund in the State of Iowa is created and it provides in brief:

It "shall be kept separate from the general fund of the state" and "on receipt of written order from the commission, the State Comptroller shall draw warrants, and/or warrant checks against the Old Age Pension fund * * * *"

Under the law of Iowa in matters of this kind, the treasury of the state is the depository of funds received by taxation, licenses and kindred funds of the state, and the Treasurer of State is the custodian of the same. The State Comptroller draws warrants against such funds for the use of various departments of state.

Federal funds in coordination with state statutes are sent to the Treasurer of State. Two instances of this procedure are:

1. Under the Federal enactment known as the Wagner-Peyser Act, a certain sum is sent by the Federal government to the Treasurer of State to match funds appropriated by the General Assembly of the State of Iowa to set up a coordinating Iowa State Employment Service with the United States Employment service, and
2. The fund for vocational education is handled in the same manner.

Therefore, the amount sent to Iowa for the payment of old age pensions would be sent to the Treasurer of State of Iowa.

STATE LANDS: Senate File 360, Acts of the 46th General Assembly unworkable.

March 24, 1936. *Iowa Emergency Conservation Work:* We have your letter of February 29, 1936, for an official opinion from this department interpreting the provisions of Senate File 360 of the Acts of the 46th General Assembly, which is also known as Chapter 14 of the Laws of the 46th General Assembly, and which appear in the 1935 Code of Iowa as Chapter 85-G1 and also the Act of the National Congress H. R. 6914, known as the Federal Fulmer Act.

In order to fully understand the operation of the above two laws, which are of a cooperative nature, it is necessary that each of these acts be specifically analyzed. In the first instance, we shall consider and analyze Senate File 360 of the Acts of the 46th General Assembly. The salient features of this act of the Iowa Legislature are as follows:

1. It authorizes the Conservation Commission to receive *gifts, donations,* or *contributions* of lands suitable for *forestry* or *conservation purposes.*
2. It authorizes Iowa to enter into agreements with the Federal government or other federal agencies for *acquiring* such lands by lease, purchase or otherwise.
3. All such lands, whether acquired by the State Conservation Commission or the Federal government, shall be subject to the regular tax levies as other real estate, and this provision shall be written into every conveyance of such real estate.
4. It authorizes the Conservation Commission to use any of its funds not otherwise obligated for the management, development and utilization of such areas.
5. It specifically provides that all revenues from such lands shall be segregated by the State Treasurer for the use of the Conservation Commission in the acquisition, management, use and development of such lands until all obligations are paid in full. Thereafter fifty per cent of all net profits are to be expended as directed by the Legislature. The other fifty per cent of all net profits are to be paid into the temporary school funds of the county wherein the lands are located.
6. It directs and provides that such lands are to be paid for by the state solely and exclusively from the revenues derived from such lands, and that

no liability for their purchase shall be imposed upon the general credit and taxing power of the state.

7. It empowers the Conservation Commission to sell, exchange or lease such lands after they acquire the title from the Federal government or from gifts, donations or contributions of such lands direct to the state for the use and benefit of the Conservation Commission.

8. It fails to authorize the Conservation Commission to purchase such lands independently of the Federal government or its agencies; agreements with the Federal government or its agencies must be first entered into before the State Conservation Commission would be authorized to make any expenditures to appy upon the purchase price of any such lands.

An analysis of H. R. 6914, known as the Federal Fulmer Act, shows that this Federal legislation contains the following important features:

1. The Secretary of Agriculture is authorized to make cooperative agreements with the proper state officials for *acquiring* forest lands in the name of the United States, with the title to such lands to be in the United States of America.

2. It provides that such lands shall not be *turned over* to the state for administration, development or management unless the state complies to the satisfaction of the Secretary of Agriculture of the United States of America with the following specific requirements:

(a) No lands are to be acquired in any state by the United States after June 30, 1942, unless the state has (1) prior thereto provided by law for the reversion of title to the state or a political unit thereof of tax-delinquent lands: (2) blocked into state or other public forests the areas which are more suitable for public than private ownership, and which in the public interests should be devoted primarily to the production of timber crops and/or the maintenance of forests for watershed protection; (3) made provision for the enforcement of such law.

(b) Prior to June 30, 1942, preference will be given to states which provide by law for such reversion of title under tax-delinquency laws.

(c) State must employ a State Forester.

(d) Secretary of Agriculture and state agencies shall work out a plan defining forest areas which can be the most efficiently and economically administered by the state; plan to constitute a part of the cooperative agreement; plan may be modified later by agreement between the Secretary of Agriculture and the proper state agencies.

(e) No Federal funds shall be paid for such lands until approved by the National Forest Reservation Commission.

(f) With the approval of the National Forest Reservation Commission, the Secretary of Agriculture can pay state and local taxes, exclusive of penalties due and accrued on any forest lands *acquired* by the United States *under donations* from the owners thereof and which are to be included in a state or public forest pursuant to this act.

(g) The state must prepare and apply standards of forest administration, etc., for timber production and watershed protection. Such standards must be acceptable to the Secretary of Agriculture of the United States of America.

(h) The state must pay alone entire cost of future administration of such lands over which it has been given jurisdiction under this act.

(i) While such cooperative agreement is in force, and while the United States has the title to such lands, one-half of the gross proceeds from such lands shall be paid to the United States and credited on the purchase price that state is to pay to the United States. The purchase price to be paid by the state to the United States of America is to be the sum expended by the United States in acquiring such lands. When the state has fully paid the United States all of such expenditures then the title to such lands is to be transferred from the United States back to the state, and the Secretary of Agriculture of the United States of America can pay the expenses incidental to such transfer of title.

(j) Upon request of the state, any cooperative agreement may be terminated by the Secretary of Agriculture. The Secretary of Agriculture, with

the consent of the National Forest Reservation Commission, on due notice to the state, may terminate the same for violation of its terms or the provisions of this act, if terminated the United States shall reimburse the state for all funds expended by the state in the administration, development and management of such lands as the Secretary of Agriculture may decide to be fair and equitable.

(k) The state must furnish such annual, periodical or special reports as the Secretary of Agriculture may require respecting the state's operations under its agreement with him.

(l) Where a state has acquired under tax-delinquency laws title to forest lands without cost to the United States and which are included within a state or other public forest, then the Secretary of Agriculture *may* contribute annually a sum not to exceed one-half the cost of administration, development and management of said lands.

3. The total Federal Appropriation certified for this purpose is not to exceed $5,000,000.

In attempting to reconcile these two acts, it is apparent that the benefits to be derived from the Federal Government in the way of financial grants or advancements are as follows:

1. The Federal government pays the purchase price for said lands where the same cannot be acquired by gift, donation or contributions.

2. Where the state acquires said lands by gift, donation or contribution, then the Secretary of Agriculture *may* contribute annually a sum not to exceed one-half the cost of administration, development and management of said lands.

Under the Iowa act and the Federal act, it is clearly apparent that the State of Iowa, through its Conservation Commission, cannot pay any moneys for the initial purchase price of such lands. The Conservation Commission can accept donations, gifts or contributions of such lands and have the same included in a cooperative agreement with the Secretary of Agriculture if approved by the Secretary of Agriculture.

Section 2 of Senate File 360, now known as Section 1703-g25 of the 1935 Code, is a very interesting and perplexing problem to be considered in the interpretation of these two measures. You will note that this section of the Iowa laws requires that all lands *acquired* under this chapter by the State Conservation Commission or any agency of the Federal Government, shall be subject to the regular tax levies as other real estate in said taxing district in each and every year, and this provision of the Iowa law shall be written into every conveyance of real estate executed in accordance with the provisions of Chapter 85-G1 of the 1935 Code of Iowa. In other words, this section of the Iowa law means that such lands are to be taxed the same as other lands in said taxing district, no matter whether they are acquired by the Conservation Commission under gifts, donations or contributions, or whether they be acquired for such purposes by the Federal Government. In this connection, it is advisable to call your attention to Section 6944, Paragraph 1, of the 1935 Code of Iowa, which provides as follows:

"6944. *Exemptions.* 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."

Your attention is further called to Sections 4 and 4-a2 of the 1935 Code of Iowa, which are as follows:

"4. *Acquisition of lands by United States.* The United States of America may acquire by condemnation or otherwise for any of its uses for purposes

any real estate in this state, and may exercise exclusive jurisdiction over its holding.

"This state reserves, when not in conflict with the constitution of the United States or any law enacted in pursuance thereof, the right of service on real estate held by the United States of any notice or process authorized by its laws; and reserves jurisdiction, except when used for naval or military purposes, over all offenses committed thereon against its laws and regulations and ordinances adopted in pursuance thereof.

"Such real estate shall be exempt from all taxation, including special assessments, while held by the United States."

"4-a2. *Conditions.* Any acquisition by the government of the United States of land and water, or of land or water, under Section 4-a1 shall be first approved by the State Conservation Commission, by the State Conservation Director of this state, and the Executive Council."

Your attention is further called to Chapter 3 of the Acts of the 45th General Assembly, Extraordinary Session, also known as Sections 4-f1 and 4-f2 of the 1935 Code of Iowa.

The National Congress is vested by the constitution of the United States of America with power to control and make all needful rules and regulations with respect to the public domain, and the exercise of such power cannot be restricted by state legislation; (50 C. J. 888 and 889, Utah Power, etc., Company vs. United States, 243 U. S. 389; 37 Supreme Court 387; 61 Law Edition, 791; Shannon vs. U. S. 160 Federal, 870; 88 C. C. A. 52; David vs. Rickabaugh, 32 Iowa, 540) but the state may also provide reasonable police regulations applicable to public land areas (50 C. J. 889, McKelvey vs. U. S., 260 U. S. 353, 43 Supreme Court 132, 67 Law Edition, 301).

All property belonging to the United States devoted to public uses is immune from state taxation (61 C. J. 360 and 361), (Hart vs. Delphey, 157 Iowa, 316; 136 N. W. 702), but when Federal property is placed in a private enterprise for gain, the immunity has no application. (61 C. J. 361; Port Angeles Western Railway Company vs. Clallan County, Washington; 36 Federal (2) 956. Affirmed 44 Federal (2) 28 and Certiorari denied, 51 Supreme Court 495, 283 U. S. 848; 75 Law Edition 1457. Any state assessment on land where the United States holds the legal and beneficial title is null and void and can in no way affect the interests of the Federal government. (61 C. J. 361.)

A plant erected by the Federal government during the war and sold to a private corporation under a contract reserving title until payment of all installments due, is not subject to the state taxation. (People ex Rel Donner and Union Coke Corporation vs. Burke, 198 N. Y. S. 601; 204 Appellate Division 557. Affirmed 142 Northeastern 320, 236 N. Y. 650.)

The State of Iowa has already provided for the employment of a professionally trained State Forester of recognized standing. See Chapter 13, Paragraph 15, Acts 46th G. A. and also Section 1703-g13 of the 1935 Code of Iowa.

The 46th General Assembly in Chapter 83, made provision for what is known as the Public Bidder Act. This act requires the county to bid in property offered for sale for delinquent taxes for the third time, which sale is known as the scavenger sale, for the full amount of the delinquent general taxes, interests, penalties and costs. If the Secretary of Agriculture of the United States of America is satisfied that the Iowa Public Bidder Act complies with the provision of H. R. 6914 for the reversion of title to the state or a political unit of tax delinquent lands, then the State of Iowa would

already have complied with this specific provision of the Federal act in order to place it in a position to receive the benefits in connection with the Fulmer measure. However, the stumbling block appears to be in Section 2 of Senate File 360, as passed by the 46th General Assembly of the State of Iowa. This section of our law contains a mandatory requirement that such lands shall be taxed the same as other real estate in said taxing district, whether the lands acquired for such purposes be given by gift, donation or contribution direct to the Conservation Commission, or whether they be acquired direct by the Federal Government under the provisions of the Fulmer Act. It appears that it is the duty of the Conservation Commission to see to it that this provision of the Iowa law is contained in all deeds of such lands, either to the state or to the National Government. In our opinion, the Federal Government would not accept a deed with such a taxing provision contained in it because the same would be in direct violation of Article 4, Section 3, Clause 2, of the Constitution of the United States of America. (See Utah Power Co. vs. U. S., 243 U. S. 389.) In passing upon this point of law, Justice Van Devanter, in delivering the opinion of the Supreme Court of the United States in Utah Power and Light Company vs. United States, states the law as follows:

"Not only does the Constitution (Article 4, Section 3, Clause 2) commit to Congress the power 'to dispose of and make all needful rules and regulations respecting' the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a state has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them. Thus while the state may punish public offenses, such as murder or larceny, committed on such lands, and may tax private property, such as live stock, located thereon, it may not tax the lands themselves or invest others with any right whatever in them. *United States vs. McBratney,* 104 U. S. 101, 624; *Van Brocklin vs. Tennessee,* 117 U. S. 151, 168; *Wisconsin Central R. R. Co. vs. Price Co.,* 133 U. S. 496, 504."

It therefore appears clear that the Federal Government will not and cannot accept a deed to such lands containing the mandatory provisions of Section 2 of Chapter 14 of the Laws of the 46th General Assembly. It is also clear that the State Conservation Commission cannot accept any deed to such lands unless this provision is contained in the deed and also it is mandatory upon the private owners of such lands to include the provisions of Section 2 in their deeds to either the Conservation Commission or the Federal Government. This section makes the Iowa act clearly unworkable because it is in direct conflict with the Constitution of the United States of America. Senate File 360 of the Laws of the 46th General Assembly, Iowa, did not contain any saving clause.

It is therefore the opinion of this department that Senate File 360, Acts of the 46th General Assembly of the State of Iowa, are unworkable for the reason herein above pointed out.

HIGHWAY COMMISSION: PRIMARY ROAD REFUNDING BONDS: DEPOSIT OF FUNDS: BANKS AND BANKING:

"It is the duty of the Board of Supervisors, under appropriate resolution or order, to designate and approve the bank, or banks, as a depository, or depositories, and to specify the maximum amount which may be kept on deposit in each respective bank."

March 24, 1936. *Iowa State Highway Commission:* Reference your inquiry relative to the deposit of funds received from the sale of Primary Road Refunding Bonds, together with all other funds from time to time coming into the possession and control of the County Treasurer for the purpose of paying interest on, or principal of, Primary Road Bonded indebtedness.

Section 7412 of the Code of 1935, provides:

"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."

Section 7420-d1 of the Code of 1935, among other things, provides:

That the treasurer of each county shall deposit all funds in their hands in such banks as are first approved by the Board of Supervisors.

Section 7420-d2 of the Code of 1935, provides in substance:

That the approval of a bank as a depository shall be by written resolution or order, which shall be entered of record in the minutes of the approving boards, and which shall distinctly name each bank approved, and specify the maximum amount which may be kept on deposit in each bank.

Section 7420-d3, of the 1935 Code, provides:

"The maximum amount so permitted to be deposited in a named bank shall not be increased except with the approval of the Treasurer of State."

The Supreme Court of Iowa, in passing upon a similar section to 7412, of the Code of 1935, which was contained in the Code of 1927, in the case of State, to Use of Emmet County vs. National Surety Company of New York, 230 NW 308, said:

"It will be observed from the foregoing provisions of the statutory law, that it is mandatory for the County Treasurer to keep the funds in a vault, or in some bank legally designated as a depository, that it is left to the Board of Supervisors to determine the banks in which the deposits are to be made and the amount thereof, and that, if the deposit is made by the treasurer in accordance with the provisions of the law, the treasurer is not liable for the loss of any funds so deposited by reason of the insolvency of the depository bank."

It is the opinion of this department, that under the foregoing sections, that it is the duty of the Board of Supervisors, under appropriate resolution or order, to designate and approve the bank, or banks, as a depository, or depositories, and to specify the maximum amount which may be kept on deposit in each respective bank. That the County Treasurer would have the right and authority to deposit the funds received from the sale of Primary Road Refunding Bonds, together with all other funds from time to time coming into the possession and control of the County Treasurer for the purpose of paying interest on, or principal of, Primary Road bonded indebtedness, in any bank, or banks, which had been designated and approved by the Board

of Supervisors, so long as the amount, or amounts deposited do not exceed the maximum amount authorized to be deposited in the respective bank or banks so designated. In the event that the amount or amounts received from the sale of Primary Road Refunding Bonds, together with all other funds from time to time coming into the possession and control of the County Treasurer for the purpose of paying interest on, or principal of, Primary Road bonded indebtedness, which is to be deposited in the bank or banks, exceeds the limit or amount authorized to be deposited in each respective bank, the limit of the amount heretofore authorized to be deposited would have to be increased by appropriate resolution of the Board of Supervisors and the approval of the Treasurer of State for such increased deposit would have to be secured.

EMERGENCY CONSERVATION WORK: LAND, ACQUISITION OF: FUNDS:

The procedure of purchasing the undivided interest of the sympathetic heirs and later force a division of sale of the remaining interests is not recommended.

It is impossible to obligate funds which should be forthcoming but have not been actually set aside by the Board of Assessment and Review.

March 26, 1936. *Land Acquirement Division:* We have your request for an opinion regarding the purchase of land by the state as authorized and enacted by the 46th General Assembly in Chapter 14 and Chapter 76, Section 1, Paragraph 2b, wherein you ask the following question:

"A certain desirable tract of land is held by six heirs. Two of the heirs are anxious to sell their interests at an agreeable price, while the remaining heirs object to selling at any price. Would it be possible to purchase the undivided interest of the sympathetic heirs and later force a division of sale of the remaining interests?"

It is always legally possible for the owner of the undivided share in real estate to have the same divided and set apart to said owner in a partition action. Such a procedure is not recommended for the reason that your board would not and could not know what compensation they would have to pay in case they purchased the interests of the remaining heirs in partition proceedings, and in addition thereto your board would simply be purchasing a lawsuit.

Your second question is as follows:

"It may be desirable to acquire title to a greater amount of land than for which we have funds available during the current six months period. Would it be possible to purchase on such a plan by contract using deferred payments during some later six months periods? In other words, is it possible to obligate funds which should be forthcoming but have not been actually set aside by the Board of Assessment and Review?"

You will note that Paragraph 2b of Section 1 of Chapter 76 of the Laws of the 46th General Assembly provides that the Board of Assessment and Review shall, beginning on July 1, 1935, and semi-annually thereafter, up to and including January 1, 1937, from the revenue collected under the act, set aside and cause to be paid into a fund to be known as the Iowa emergency conservation work fund, the sum of $125,000.00 semi-annually. These sums are to be used only for *emergency conservation work in Iowa,* which shall consist of the following:

1. For acquisition of lands,
2. Purchase of supplies, materials and equipment,
3. Rentals, and
4. The employment of necessary personnel in connection with the CCC program, for which expenditures the civilian conservation corps does not provide.

The sums "shall be withdrawn only as needed from time to time, by requisition of the Governor and upon warrants drawn by the State Comptroller payable to emergency conservation work in Iowa." These funds should be administered in a similar manner as other state funds in line with the spirit and intent of the State Comptroller act. The gist of this latter act was to require the state to live within its income at all times. It is not intended by this act that all of this money so appropriated *must* be used for such purposes. The amounts expended should be limited to the actual needs of the proper administration of the same in order to carry out the spirit and intent of this act. In the first place, this fund is to be considered as an emergency fund. In the second place, it would be considered that the funds are to be withdrawn only as needed from time to time. It was not the intent of the Legislature that this fund should be expended for the purchase of property or lands on a large scale, but only as needed. If the Civilian Conservation Corps did provide sufficient funds for these purposes, then there would be no necessity for the expenditure of any funds out of this act.

In no event could the Governor or Comptroller approve the expenditure of funds in excess of $125,000.00 during any six months period while this act is in effect. In our opinion the law does not contemplate the purchase of lands on a contract basis wherein payments for the same are extended over a period of time. When the state purchases real estate, it should have the money to buy the same and pay for it in full. Otherwise the very purpose of the State Comptroller act would be defeated.

Your third request is for the preparation of the wording of a regular form to be written into every conveyance of real estate that will satisfy Section 2 of Chapter 14 of the Acts of the 46th General Assembly. The following form would meet the requirements of this statute in case such law is valid and constitutional:

"The above described real estate hereby sold and transferred by this instrument shall be subject to the tax levies as other real estate in the taxing district in which this said real estate is located."

The answer to your third request is made conditional upon the official opinion issued by this department to Professor G. B. MacDonald, director of Iowa emergency conservation work, under date of March 24, 1936.

INDIGENTS—PAROLED PRISONER—MEDICAL AND HOSPITAL EXPENSES. Duty of the county where offense was committed to pay the expenses incurred by way of medical aid, hospital, etc. and it is immaterial that the patient was under the jurisdiction of the Board of Parole.

March 28, 1936. *Iowa Board of Parole:* We regret that the press of outside business has forced us to delay answering your inquiry of the 9th inst., which you submitted with a copy of a letter dated December 7, 1935.

The situation submitted is substantially as follows: One Stewart whose residence or legal settlement is not disclosed by the record committed an offense in Dubuque County, and at the request of Dubuque authorities was

apprehended in Waterloo and returned to Dubuque, where he was placed in the county jail. While waiting for trial or hearing he became so violently ill that it was necessary to remove him to a Dubuque hospital, where a considerable hospital and medical expense was incurred which the prisoner was unable to pay. It later developed that Stewart was a paroled prisoner and for this reason the Dubuque County officials feel that the Board of Parole should take care of the expense of the hospital and medical care. It further appears that a state examiner has advised that the Board of Parole is liable for such expense, basing his opinion on a prior opinion of this department found at page 247 of the 1930 Report of the Attorney General, which is as follows:

"Where an inmate of the Reformatory at Anamosa was paroled and placed at employment, and who later absconded and was not found until he was injured while stealing an automobile, and which injuries necessitated expense for treatment and guarding him while in the hospital, would the board be liable for payment of these expenses? In reply we would say that, while there is no specific statute covering this particular question, we are of the opinion that inasmuch as the parolee is under the care and direction of the Board of Parole during this time and he was returned to the reformatory as soon as he was able to be removed from the hospital, we believe that the board would be authorized to pay the necessary expense."

This opinion is not emphatic or decisive—the most that can be said is that the opinion permits the Board of Parole to pay the expenses in question, and from all that appears, the Board was willing to pay. Nothing in the opinion states that the Board is liable or under duty to pay such expenses. So far as we know, there may have been no one else to look to for payment. At any rate, we are satisfied that said opinion is not the authority that the State Examiner contends, and we are not disposed to be bound by it in your case.

One outstanding argument against the Board of Parole's paying such charges is the fact that you have no fund out of which to make such payment. While we are aware that the Board has a wide discretion and latitude in the expenditure of the funds under its control, we believe that to inaugurate the practice contemplated herein would be opening the door to considerable expenditures of this nature in the future. As a practical matter we heartily endorse the attitude of the Board in denying such a claim.

We find the following statutes to help us in this matter: Code Section 5497 states:

"The jails in the several counties in the state shall be in charge of the respective Sheriffs and used as prisons;

1. For the detention of persons charged with an offense and committed for trial or examination.

3. For the confinement of persons under sentence * * * and of all other persons committed for any cause authorized by law."

Code Section 5501 provides:

"The keeper of each jail shall

2. Furnish each prisoner with necessary bedding, clothing, towels, fuel, *and medical aid.*"

And Code Section 5511 provides:

"All charges and expenses for the safekeeping and maintenance of prisoners shall be allowed by the Board of Supervisors except those committed or detained by the authority of the courts of the United States* * * *."

Our Supreme Court has had occasion to construe the foregoing sections in the case of Miller vs. Dickinson County, 68 Iowa 102, wherein a town marshal was making an attempt to arrest a man named Miller, who resisted such arrest and was shot and dangerously wounded. Information was filed charging that Miller had resisted an officer and he was arrested by the sheriff, but he was in such condition that he could not be committed to jail or have his preliminary examination. Thereupon, the sheriff employed the plaintiff in the case to take care of Miller, and the action was brought against Dickinson County to recover for such services. In holding that the county was liable the Supreme Court said that from the time of the arrest the prisoner must be regarded as being in the custody of the sheriff. The sheriff did what any humane man was bound to do, and that is have him taken care of and furnished with such reasonable care and attention as his condition required. The prisoner being in the custody of the sheriff, it was the duty of the latter to supply him with the necessaries of life suitable to his condition until the preliminary examination. The sheriff had the power to contract for necessaries for the prisoner during the time he was in custody at the expense of the county. In this case the Supreme Court cites a former Iowa case reported in 56 Iowa 379, where supplies were furnished to a prisoner in jail and the county was held liable for reasonable necessities furnished.

Our Supreme Court has further held that the county of settlement is bound to take care of indigents who have no settlement in the state. If a stranger meets with mishap in this state, it is the duty of the county where he is found to take care of him. See 61 Iowa 215, 145 Iowa 397, at page 407, and 152 Iowa 692.

In view of the above statutes and the cited cases, we are of the opinion that it is the duty of the Dubuque County Board to pay the expenses incurred in the matter at hand, and it is immaterial that the patient was under the jurisdiction of the Board of Parole. To hold otherwise would be to place a burden upon the Board of Parole which is not contemplated or provided for by statute. The Legislature and the Supreme Court have insured immediate medical and hospital care to every person found in this state in urgent need of such attention and care, even though said person is a total stranger and unable to pay for such attention and care, and the financial responsibility in such cases is placed upon the county in which the emergency arises.

In conclusion, may we state that we have assumed that Mr. Stewart had no legal settlement in Iowa. If Dubuque County can establish that there was such a settlement in another county of the state, it may be that Dubuque County could get reimbursement from such other county. This is but an afterthought, and we do not attempt to decide this matter at this time.

BUS DRIVERS: SCHOOLS: SALARIES WHEN SCHOOL IS TEMPORARILY CLOSED: Where contract is silent as to question of salary, when school is closed by action of board and driver is ready to comply with his part of contract, the salaries of drivers must be paid during time school is so temporarily closed, in amount provided by contract.

March 30, 1936. *Department of Public Instruction:* We have your request for an opinion on the following proposition:

"Are salaries of the drivers of school busses required to be paid during the time the schools were closed because of impassable roads, weather con-

ditions, fuel shortage, the fuel being commandeered by the mayor because of public need, a threatened epidemic of disease or some other overruling necessity for which the driver was not responsible?"

You have accompanied your request with the form of contract in general use.

On February 25, 1936, we rendered an opinion on the companion proposition in regard to the salaries of teachers.

Section 4182 of the Code, 1935, provides that the School Board shall contract with as many suitable persons as it deems necessary for the transportation of children of school age, to and from the school, and this section further provides that the contract shall be in writing, and state the route, the length of time contracted for, the compensation to be allowed per week of five school days, or per month of four school weeks, and also providing two weeks' salary may be retained by the board to guarantee full compliance, and that the driver shall be subject to the rules of the board.

The ordinary form of contract entered into for this purpose provides that the driver shall transport the children each day that school is in session during the school year, and that the district agrees to pay to the driver a certain stipulated sum per month, and that the Board of Directors reserves the right to make changes in regulations, or to terminate the contract at any time.

The first of these provisions has nothing to do with the question of compensation, but only provides what the bus driver is to do, so this is not material to the question here. The last provision gives the board the right to terminate the contract and there is no question of termination involved in your question, so that provision is not material here. The second provision provides for the compensation to be paid per month and this covers the question in controversy, that is, whether the driver is entitled to compensation during the time that the school was temporarily closed by action of the board and at a time when he was ready and willing to perform his part of the contract, the contract itself being silent as to the liability of the board in event the school is temporarily closed during the contract period.

In the case of *Montgomery vs. Board of Education,* 15 A. L. R. 715, the Supreme Court of Ohio had before it the same proposition and the court there pointed out that the contingency which occurred might well have been provided against in the contract, but was not, and that the law will not insert by construction for the benefit of one of the parties, an exception or condition which the parties, either by design or neglect, have omitted from their contract.

In the case of *Crane vs. School District,* 199 Pac. 712, the Supreme Court of Oregon took a similar view in regard to the bus drivers' contracts.

In *Sandry vs. Brooklyn School District,* 15 A. L. R., 719, the Supreme Court of North Dakota took a somewhat different view of the question, but in that case, it was a three to two decision and the opinion of the minority appears to us to be the much better reasoned, as the majority opinion seems to assume that the contract has been suspended during that period, although there is no actual agreement for suspension. This is hardly the exact situation, the true situation being that the contract is in force and that the driver of the bus is ready and willing to perform.

There is not much authority in the United States on this proposition, but

in our opinion, the Supreme Courts of Ohio and Oregon have set forth the true rule.

It is, therefore, the opinion of this department that your question must be answered in the affirmative where the contract is silent as to the question of salary when the school is closed by action of the board, and the driver is ready to comply with his part of the contract and perform the services; and that the salaries of the drivers must be paid during the time the school is so temporarily closed, in the amount provided for in the contract.

EXAMINATION OF CITIES: Auditor of State shall examine financial condition of cities of 2,000 or more at least once a year, and shall be reimbursed by said city for same.

April 2, 1936. *Auditor of State:* You call our attention to Section 6177-c1 of the Code of 1935, which is as follows:

"6177-c1. *Audit of Accounts.* The books and accounts of such waterworks shall be audited at least once a year by a public accountant selected by the city council, and a copy of said audit shall be filed with the Auditor of State."

You ask for the opinion of this department as to whether in view of this section your office has authority to proceed under Section 113 of the Code to cause the books and accounts of waterworks systems in cities of more than two thousand population to be examined once each year, the cost of such examination to be collected by your office from the city through its warrant issuing officer.

Section 6177-c1 provides that the books and accounts of such waterworks shall be audited at least once a year by a public accountant selected by the city council, and a copy of said audit filed with the Auditor of State. This examination is controlled entirely by the city council insofar as the selection of the public accountant is concerned. We set out Section 113 as follows:

"113. *Examinations.* The Auditor of State shall cause the financial condition and transactions of all county and school offices to be examined at least once each year by the State Examiners of Accounts, and shall cause a like examination to be made at least once each year of cities and towns having a population of two thousand or more, including offices of cities acting under special charter."

This section provides that the Auditor of State shall cause the financial condition and transactions of cities and towns having a population of two thousand or more to be examined at least once each year by the state examiners of accounts.

Section 6177-c1 provides for an audit of the accounts of city waterworks systems at least once a year by a public accountant selected by the city, and Section 113 provided that the Auditor of State shall cause the financial condition and transactions of all county and school offices to be examined, and provides that "he shall cause a like examination to be held each year in cities and towns having a population of two thousand or more." An examination of the books and records of cities and towns would include an examination of the records of city and town waterworks systems.

Section 6177 with reference to the records and accounts of city and town waterworks, provides "said accounts shall be kept distinct and separate from other city accounts, and in such manner as to show the true and complete financial results of the operation of said waterworks." While it may be some-

what burdensome for the city to be required to pay for two separate and distinct audits of the books and accounts of its waterworks system, this department has no authority to repeal any part of Section 113 with reference to certain duties of the Auditor of State. Section 113, in its present form, was enacted by the 45th General Assembly. If the Auditor of State then is required by Section 113 to examine at least once each year the financial condition and transactions of cities and towns having a population of two thousand or more, the city thus examined would be liable under Section 126 to reimburse the state for the cost of such examination.

PERMANENT ENDOWMENT FUND: Limited sums of money bearing a reasonable proportion to the amount of principal previously invested in the property which has been obtained by the foreclosure of mortgages can be invested from the principal of the Permanent Endowment Fund in the same to secure their proper stewardship and efficient use and tenancy while owned by the State of Iowa for the use and benefit of the State University of Iowa and under the jurisdiction and management of the Iowa State Board of Education.

April 8, 1936. *Iowa State Board of Education:* I have your request for a response to the following question:

Should the cost of a permanent improvement, such as a barn, located on a farm that constitutes a part of the Permanent Endowment Fund, be paid out of the said Permanent Endowment Fund?

It will be noted at once that the lands which were allotted by the Federal Government to the Territory of Iowa and the sale of which created the Permanent Endowment Fund were not embraced within the Federal legislation concerning "Land Grant Colleges." The restrictions in Section 5 of the Act of 1862 (First Morrill Act; 12 Statutes at Large 503) are therefore not applicable.

A brief history of the Permanent Endowment Fund of the University of Iowa is found in a small handbook entitled "Historical Sketch of the State University of Iowa," by J. L. Pickard (former president of the university), pages 6 to 23, which is a reprint from the Annals of Iowa for April, 1899. Neither this history nor any of the numerous statutory authorities, both state and Federal, cited in the footnotes, indicate any restriction upon the Fund which would specifically prohibit the use of a small part of the principal to improve property otherwise legally obtained by the use of the principal of such Fund. While no such specific restriction apepars, the Constitution of 1846, Article 10, Section 5, contains the following words:

". . . and the funds accruing from the rents or sale of such lands, or from any other source, for the purpose aforesaid, shall be and remain a permanent fund, the interest of which shall be applied to the support of said University, ... as the public convenience may hereafter demand, for the promotion of literature, the arts and sciences, as may be authorized by the terms of such grant. And it shall be the duty of the General Assembly, as soon as may be, to provide effectual means for the improvement and permanent security of the funds of said University."

The present Iowa Constitution (of 1857), Article 9, Part 2, Section 2, contains the following:

"Permanent Fund, Section 2. The University lands, and the proceeds thereof, and all moneys belonging to said funds shall be a permanent fund for the

sole use of the State University. The interest arising from the same shall be annually appropriated for the support and benefit of the said University."

The above provisions clearly negative the existence of any authority to expend the principal of such funds for current expenses or for buildings for the housing of University activities and suggest clearly that the funds are intended to be income producing. While "rents" are mentioned in the Constitution of 1846, it is probable that this is due to the fact that the funds were originally donated by the Federal Government to the state for educational purposes in the form of land.

Clear authority exists to make careful loans of the funds in question upon real estate security. The existence of such authority clearly implies the power and duty to assume ownership and possession of the security in case of default of payment. Management of the property so acquired, including sound additional investments for its protection, would seem to be a matter entirely within the discretion of the Iowa State Board of Education. Within such discretion, it would have power to make reasonable investments of additional capital for the protection of the security so coming into its ownership and protection.

Sections 3926 and 10187 of the Code of Iowa, 1935, have some bearing upon the matter in question. In those sections, again, loans are contemplated and in the former farm loans are specifically authorized. As indicated above, a necessarily implied or included power connected with the making of farm loans on first mortgages would be that of realizing upon the security and having obtained the same, the Board would be, in duty, bound to give such property economical and efficient stewardship, at least until the same can be advantageously sold. Such property would have to be maintained, managed and accounted for, however, as income property and as a part of the property represented by the Permanent Endowment Fund owned by the Board of Education for the institution.

You are therefore advised that limited sums of money bearing a reasonable proportion to the amount of principal previously invested in the property which has been obtained by the foreclosure of mortgages can be invested from the principal of the Permanent Endowment Fund in the same to secure their proper stewardship and efficient use and tenancy while owned by the State of Iowa for the use and benefit of the State University of Iowa and under the jurisdiction and management of the Iowa State Board of Education.

ELECTIONS: RIGHT OF EX-CONVICT TO HOLD OFFICE:

"After a person has been convicted of an infamous crime and automatically restored to all the rights of citizenship, this includes the right of an elector and the right to hold office in the State of Iowa, and that conversely he may not enjoy these rights after conviction of an infamous crime until and unless such an order of restoration to citizenship has been granted."

April 13, 1936. *County Attorney, Mt. Pleasant, Iowa:* This will acknowledge receipt of your favor of the 8th instant, asking the opinion of this department upon the following question:

"A man in your county seeks the nomination for Sheriff. He has served a sentence in the penitentiary from your county, and also served time on a penal farm in Indiana.

"Section 5 of Article II of the constitution provides:

"'No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector.'

"Section 3823 of the Code of 1935 authorizes the governor to restore the convicts to the rights of citizenship. Does this in any way give him the right of an elector or the right to hold office in the State of Iowa? If he has an order of restoration to citizenship, does that qualify him an an elector, and if he does not have one, then is he barred under the statute?"

To be eligible to an elective office created by law, a person must be a qualified elector.

State vs. Van Beek, 87 Iowa, 569.

Section 5 of Article II of the constitution of Iowa provides:

"No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector."

Any crime punishable by imprisonment in the penitentiary is an "infamous crime."

Flannagan vs. Jepson, 177 Iowa, 393.

The crime was, therefore, an infamous one, regardless of its nature. A person, then, convicted of an infamous crime, by such conviction is under the constitution prevented from exercising the elective franchise or holding an elective office.

At this point, Section 3823 of the Code of 1935 comes into play. It provides in part:

"The governor shall have the right to grant any convict, whom he shall think worthy thereof, a certificate of restoration to all his rights of citizenship. * * * *"

Assuming, without deciding, that the right to be an elector and the right to hold an elective office are among the rights of citizenship, rather than mere political rights, we entertain some doubt whether or not without other constitutional aid the Legislature was empowered to confer upon the Governor authority to override the constitutional provision above quoted by giving certificates to those convicted of infamous crime, which would entitle said persons to vote. Certainly, the Legislature could not by law authorize idiots or insane persons to vote in contravention of the constitutional injunction. However, the right of so-called restoration to citizenship is generally considered as an incident to the pardoning power and, therefore, must be construed in the light of not only Section 5 of Article II above quoted, but also with reference to Section 16 of Article IV of the constitution, which, among other things, provides that "the Governor shall have power to grant reprieves, commutations and pardons after convictions for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law." Substantial authority holds that by such executive act the Governor releases the person pardoned from the disabilities imposed by the conviction and to the full enjoyment of his civil rights. It is one of the charities woven into the constitution of Iowa in behalf of those who prove themselves worthy. (See 20 Corpus Juris, page 80, Section 46, and cases cited.)

Construing Statute 3823 in conjunction with the above two constitutional provisions, we are of opinion that one convicted of an infamous crime, to whom certificate of restoration has been granted by the Governor, enjoys in effect a pardon, although it may not be so named. It, therefore, necessarily

follows from what we have said that after a person has been convicted of an infamous crime and automatically restored to all the rights of citizenship, this includes the right of an elector and the right to hold office in the State of Iowa, and that conversely he may not enjoy these rights after conviction of an infamous crime until and unless such an order of restoration to citizenship has been granted.

CONSERVATION COMMISSION: WITNESS FEES: DEPUTIES:

If deputies are asking for fees as witnesses for testifying in regard to any matter coming within their knowledge in the discharge of their official duties, no fees can be charged up in favor of such officers.

April 14, 1936. *Iowa State Conservation Commission:* This will acknowledge receipt of your recent request for the opinion of this department with reference to a hearing had in the justice of peace court at Valley Junction on January 12, 1936, in which your state conservation officers, Rooker and Adamson, apprehended six men in the act of spearing fish at a time and place where same was prohibited; that the justice proceeded in the case in the usual manner and fined the men, but that he refused to assess or enter on the docket any costs for deputy fees, warrant fees, attending trial fees, or witnesses.

You state that the following question arises:

Can the judge lawfully waive the deputy fees which amount to seventy-five cents in each case and to which the deputy is entitled?

We do not know exactly what you mean by deputy fees, but assume that the conservation officers referred to are those appointed under Chapter 85-D1 of the Code of Iowa, 1935, specifically under Section 1703-g13, and by that authority are paid a salary. In this connection, we wish to call your attention to Section 11328, which is as follows:

"*Peace officer.* No peace officer who received a regular salary, or any other public official shall, in any case, receive fees as a witness for testifying in regard to any matter coming to his knowledge in the discharge of his official duties in such case in a court in the county of his residence, except police officers who are called as witnesses when not on duty."

Therefore if these men are asking for fees as witnesses for testifying in regard to any matter coming within their knowledge in the discharge of their official duties, no fees can be charged up in favor of such officers. I believe that we have heretofore ruled that conservation officers are peace officers within the limitation of enforcing the law with reference to parks, fish and game and matters kindred thereto. You will note that the Code section above referred to refers to the fact that a public officer in any case shall not receive witness fees.

In case we have misinterpreted your request with reference to the nature of these fees, kindly advise us and we will be glad to go into the matter.

UNIVERSITY OF IOWA HOSPITAL: INDIGENT CASES: COUNTIES:

University Hospital authorities empowered to indicate to counties through proper officials kind of cases which will be accepted without charge to the counties, when judicially committed, over and above the strict county quotas, on a population basis plus 10%. In the absence of such notice to the counties, if number of patients committed to hospital exceeds 10%

of quota of service allotted to any county, excess cases must be charged to county on an actual cost basis as provided in Sec. 4018-f1.

April 17, 1936. I have your request for an opinion upon the following question:

May the University of Iowa Hospital authorities, with the approval of the Iowa State Board of Education, specify types of cases which will be cared for at the University Hospital over and above the basic quota of the county plus ten per centum as established in Section 4018-f1 of the Code and not charged to the counties on an "actual cost" basis in the interests of providing necessary suitable teaching material for the College of Medicine if the expenses of care and treatment at the said hospital are refrayed from earnings of the hospital from private cases?

Section 4018-f1 of the Code, 1935, reads as follows:

"4018-f1. *County quotas.* Subject to subsequent qualifications in this section, there shall be treated at the University Hospital during each fiscal year a number of committed indigent patients from each county which shall bear the same relation to the total number of committed indigent patients admitted during the year as the population of such county shall bear to the total population of the state according to the last preceding official census. This standard shall apply to indigent patients, the expenses of whose commitment, transportation, care and treatment shall be borne by appropriated funds and shall not govern the admission of either obstetrical or orthopedic patients. If the number of patients admitted from any county shall exceed by more than ten per cent the county quota as fixed and ascertained under the first sentence of this section, the charges and expenses of the care and treatment of such patients in excess of ten per cent of the quota shall be paid from the funds of such county at actual cost; but if the number of excess patients from any county shall not exceed ten per cent, all costs, expenses, and charges incurred in their behalf shall be paid from the appropriation for the support of the hospital."

It will be noted that this section entitles each county to receive at the University of Iowa Hospital services for its indigents in proportion to the population of the county so far as such services are maintained by "appropriated funds," plus ten per cent. Any funds in the hands of the Iowa State Board of Education for the State University, not expressly appropriated for the care of the indigent sick is subject to the obligation of the State Board of Education to manage physical property and other assets under it jurisdiction for the advancement of education. (See 46 G. A., Ch. 126, Sec 45 (1); Iowa Code, 1935, Secs. 3946, 3949, 3919, 3921 and 84-e25.) It must be inferred therefore that the expenditure of funds for the care of patients over and above the strict county quota may be at least in part dictated by the needs of the College of Medicine for teaching purposes.

Section 4021 contains the following sentence: "Earnings of the Hospital, whether from private patients, cost patients or indigent, shall be administered so as to increase as much as possible, the service available for indigents."

Here it will be noted that the Legislature expressly avoided strict subjection of earned funds of the hospital to the quota system, but makes the earnings available for indigents only "as much as possible." In view of the character of the University Hospital, which serves two purposes: one, teaching objectives of the College of Medicine, and, two, treatment of indigent persons from over the entire state, it would seem that the Legislature meant to require that non-appropriated funds available to the College of Medicine be used for indigents only "as much as possible" in view of the teaching needs

of the College of Medicine both in regard to clinical treatment of patients and other legitimate expenses related to medical education. Since Section 4021 requires that earnings of the hospital be administered to increase "the service available for indigents," any patients treated whose expenses are charged to such funds must be committed in the same manner as are county quota patients so that their indigency will be judicially ascertained in advance of treatment. In no case may the acceptance and treatment of such patients at the University Hospital, however, be permitted to prevent or postpone the care and treatment of other indigent patients properly committed by judicial order and sent to such institutions under the provisions of Chapter 199 of the Code of Iowa, 1935.

You are therefore respectfully advised that the University Hospital authorities are empowered to indicate to the several counties of the state through their proper officials the kind of cases which will be accepted, without charge to the counties, when judicially committed, over and above the strict county quotas, on a population basis plus ten per cent. In the absence of such notice to the counties, if the number of patients committed to the University Hospital exceeds ten per cent of the quota of service allotted to any given county under Section 4018-f1, the excess cases must be charged to the county on an "actual cost" basis as provided in that section.

ENGINEER'S SEAL: Not necessary for engineer to purchase seal at the time he receives his certificate. May postpone this purchase until he has need for it.

April 17, 1936. *Board of Engineering Examiners:* Your letter of April 16th, addressed to the Attorney General, has been referred to me for reply.

You ask whether under Section 1868 of the 1935 Code a successful applicant for registration as a professional engineer is required to obtain a seal at the time he receives his certificate, or whether he may postpone the purchase of his seal until he has need for it. Section 1868 is as follows:

"1868. *Seal—certificate as evidence.* Each registrant shall provide himself with a suitable seal with a uniform inscription thereon formulated by the board, with which he shall stamp all plans, specifications, surveys, and reports made or issued by him. A certificate of registration provided for in this chapter shall be presumptive evidence that the person named therein is legally registered."

It is our opinion that the acquiring of such seal is not a condition precedent to his receiving a certificate of registration as a professional engineer, and that he may properly postpone the purchase of a seal until he has need for it. Section 1868 requires that each registrant shall provide himself with a suitable seal with which he shall stamp all plans, specifications, surveys and reports made or issued by him. Nothing more is required by this section.

SCHOOLS: ELECTION: SCHOOL SUPERINTENDENTS: If County Superintendent is qualified at the time of his induction into office, it is immaterial what his qualifications were on date that he was elected by the convention. Present incumbent holds over till successor qualifies and if he does not qualify, then present incumbent holds over.

April 22, 1936. *Superintendent of Public Instruction:* We have your request for opinion on the following proposition:

"Section 4097 of the Code provides in part that the County Superintendent

shall be the holder of a superintendent's certificate and shall have had at least five years' experience in administrative or supervisory work or in teaching. Would you please advise whether this provision in the law requires that the candidate for County Superintendent must be eligible at the time of his election, or is it sufficient for him to be qualified at the time of induction into office, even though he was not so qualified at the time of his election, and will you further advise as to the rights of a present incumbent of the office of county superintendent if he is not reelected, but the convention elects one who is not qualified and cannot qualify?"

Our Supreme Court has held that where a statute is silent as to the qualifications to be possessed on the date of election, but merely provides that the holder of an office shall possess certain qualifications, then the determining date is the date on which the party presents himself to take over the duties of the office, and so if a County Superintendent is qualified at the time of his induction into office, it is immaterial what his qualifications were on the date that he was elected by the convention. See *State vs. Van Beek*, 87 Ia., 569; *State vs. Boyles*, 199 Ia., 398.

The case of State vs. Huegle, 135 Iowa, 100, was decided at a time when the statute provided for qualifications of a candidate for the office and so was much different than the present statute, and therefore, is not in point.

As to your second question, the present County Superintendent holds over until his successor is duly elected and qualified, and if a person who was elected does not qualify, that is, does not possess the necessary qualifications, then necessarily, the present incumbent of the office will hold over. Whether he would hold over for the entire period of three years or until the convention could be reassembled, we are passing no opinion on this at this time, but if this question comes up, we will then go into it.

TAXES: SCHOOLS: DEDUCTION OF SCHOOL TAX FROM TUITION: Purchaser of real estate being a non-resident, when buying under contract, may deduct the amount of school tax paid by him in district from amount of tuition required to be paid, the same as if he would were he owner in fee.

April 28, 1936. *County Attorney, Independence, Iowa:* We have your request for opinion on the following proposition:

"Would a party buying real estate on a contract which contract requires a purchaser to pay taxes on the real estate, deduct the amount of school taxes paid by him in the district, from the amount of tuition required to be paid, the purchaser of the real estate being a non-resident of the district. In event he is entitled to deduct the tax, can the school taxes which are due in 1936 be credited to the payment of tuition for the year 1935?"

Section 4269 of the Code does not require that the taxpayer be the owner in fee of the property, but merely provides that in event he pays school taxes, then the amount may be deducted or offset, and this being true, the purchaser of real estate under contract, where the contract provides that he pay the taxes, would be entitled to the same deduction and offset as he would be if he were the owner in fee.

As to your second proposition, you will note that this is an offsetting tax which is to be deducted by offset so that the tuition due in any given period may be offset by the school taxes paid for that same period and as I understand, the school taxes for the year 1935 are due and payable in 1936 and therefore, the tuition for the year 1935 could be deducted from the amount of those taxes.

BONDS: SCHOOLS: FUNDING OR REFUNDING: WHETHER PUBLISHED: Section 1172, Chapter 63 of Code provides that when bonds are offered for sale, they shall be published for 2 or more weeks—Sec. 1179 prevents exchange of bonds, so when offered for sale, it must be by public and not private sale, except district may exchange bonds with holders of already outstanding ones.

April 28, 1936. *County Attorney, Belle Plaine, Iowa:* We have your request for opinion on the following proposition:

"Section 4405 of the Code authorizes the Board of Directors of a school corporation to issue funding or refunding bonds. Will you please advise whether it is necessary for the refunding bonds to be offered at public sale and also advise whether the district could issue warrants to be substituted in place of the refunding bonds, and be carried by a local bank at an agreed rate of interest."

Chapter 63 of the Code provides for the authorization and sale of public bonds and you will note that Section 1172 of that chapter provides that when the bonds are offered for sale, there shall be an advertisement published for two or more consecutive weeks; and Section 1179 provides that the provisions of the chapter shall not prevent the exchange of bonds, so that when the bonds are offered for sale, it must be by public sale and not private sale, except that the district may exchange bonds with holders of already outstanding bonds.

In regard to your second proposition as to the issuance of warrants and probably having them stamped unpaid for want of funds, this could be done and they could be taken by the bank on a private sale and would not have to be offered for public sale, but such a method of refinancing is not thought to be very satisfactory except where the warrants are issued only for a short period, that is, for not more than a year, and will be paid within that time; and the issuance of such warrants is also frowned upon for the reason that bonds at this time draw such a low rate of interest, and the issuance of bonds puts the district in a much more stable financial condition where the indebtedness is to run for any length of time.

PUBLIC FUNDS: SCHOOLS: SPECIAL TRUST FUND: Section 7420-d1 provides that public moneys must be deposited in depository banks—therefore, there can be no attempted creation of a special trust fund for purpose of avoiding payment of interest into the State Sinking Fund, as Sec. 7420-d1 provides that public deposits shall be deposited in depository bank legally designated.

April 28, 1936. *County Attorney, Algona, Iowa:* We have your request for opinion on the following proposition:

"The Independent School District of Burt is building an addition to their school building and for the purpose of financing this addition, have sold bonds, and in addition thereto, have received a Federal grant. These moneys will be checked out as work progresses and both funds must be placed in the same account and the money checked out from the joint account. The banks are unwilling to accept this money and pay interest on it as public funds as it will not be on deposit very long. Would you please advise whether this can be treated as a special fund in the nature of a trust fund and left in the bank for the purpose of withdrawal and the bank not be liable for interest thereon to the State Sinking Fund for public deposits?"

You will note that Section 7420-d1 of the Code provides that the treasurer of each school corporation shall deposit all public funds in their hands in

banks approved, and the subsequent sections provide for the interest to be paid thereon, and Chapter 352-a1 of the Code creates a State Sinking Fund and provides for the payment of interest to that fund.

This money which you have inquired about is public moneys under the provision of Section 7420-d1 of the Code and must be deposited in depository banks. You will note that Section 7420-d6, which is an act of the 46th General Assembly, provides that public deposits shall be deposited with reasonable promptness and shall be evidenced by a pass book entry by the depository bank legally designated as a depository for such funds.

This being true, then, there can be no attempted creation of a special trust fund for the purpose of avoiding the payment of interest into the State Sinking Fund, as that was one of the reasons why Section 7420-d6 was enacted by the last General Assembly, as prior to that, it was rumored that a number of public bodies were accepting cashier's checks, drafts and so on, in lieu of making the deposit. In view of the fact that you have suggested that your local banks do not desire to accept this money, I call your attention to Section 7420-d4 of the Code, which allows public deposits by a school treasurer or school secretary to be made in any bank in the State of Iowa.

CCC CAMP: Enrollees must pay the regular fee for the recording of their discharges.

May 4, 1936. *County Attorney, Clarion, Iowa:* Your letter of April 23d, addressed to the Attorney General, has been referred to me for reply.

You request our opinion as to whether CCC Camp enrollees may have their discharges recorded in the office of the County Recorder without the payment of the statutory fee.

Section 5173 of the Code is as follows:

"5173. *Military discharge.* The County Recorder of each county in this state shall maintain in his office a special book in which he shall, upon request, record the final discharge of any soldier, sailor, or marine of the United States. No recording fee shall be collected when the soldier, sailor, or marine requesting such record shall be an actual resident of said county or shall have been such at the time of his entrance into the service of the United States. In all other cases the legal fee shall be charged."

This section provides that no recording fee shall be collected when a soldier, sailor, or marine requesting such record shall be an actual resident of the county in which he seeks to record his discharge or shall have been such resident of the county in which he seeks to record his discharge, at the time of his entrance into the service of the United States. It provides that in all other cases, the legal fee shall be charged. Clearly, this section is not broad enough to include the boys enrolled in the CCC Camps.

FIRE MAINTENANCE FUND: Cities and towns may not pay for expenses of firemen attending fire school out of the fire maintenance fund.

May 4, 1936. *Auditor of State:*

In Re: Fire school expense paid from municipal funds.

You advise that the report of the examination of the records and accounts of the city of Maquoketa, as made by your examiners, discloses that a small amount was expended from the fire maintenance fund for "Expense to Fire

School." The amount apparently was spent to pay traveling expenses and entrance fees of the fire chief or several fireman to such school.

You request our opinion as to whether such an expenditure of municipal funds from the Fire Maintenance Fund or any other fund of the city is an authorized and legal expenditure. The item is listed as "Expense to Fire School" and your question, therefore, assumes that only the expenses of those who attended were paid.

Section 6211 of the 1935 Code of Iowa provides that any city or town shall have the power to levy a Fire Maintenance Fund which "shall be used only to maintain a fire department," except that in any city with a population over three thousand, and in towns, such fund may also be used for the purchase of fire equipment. The Fire Maintenance Fund shall be used to maintain a fire department. It cannot be used for other purposes not authorized by statute. The question is, then, whether expenses of firemen who attend fire school are properly items of maintenance expense.

It is the opinion of the majority of the staff of this department (not concurred in by the writer of this opinion) that cities and towns may not in any case legally pay from the fire maintenance fund the actual and necessary expenses of firemen attending a fire school.

OLD AGE ASSISTANCE LAW:

The commission has the right to pay back taxes, but discretion should be exercised.

The commission has the right to file liens against both the recipient and the spouse of recipient where assistance is granted.

May 6, 1936. *Old Age Assistance Commission:* In your letter of April 29, 1936, you ask:

Under Section 16 of the Old Age Assistance Act (Code Section 5296-f16) you ask if the commission has a right to file liens against both the recipient and the spouse of recipient where assistance is granted.

You further state that where liens are filed, taxes have not been paid upon the property for a number of years, and that considerable indebtedness against these has accrued against the property.

You state that in some instances at the death of the recipient, the unpaid taxes amount to a figure such that the taxes take the propery and the county becomes the owner.

You desire to know if the commission can pay back taxes and also if necessary keep up the taxes during the lifetime of the recipient.

It is our thought that this right is given under the law but of course we know that your commission, from a practical standpoint, will use discretion in these matters and as we view the law, it is a discretionary matter with the commission. See Section 5296-g7 of the 1935 Code of Iowa.

As we view it, the legislative intent in creating the revolving fund was that it be used for such a purpose.

In the case of the filing of a lien against the spouse, see Section 5296-f16, and particularly that part of the same which reads as follows:

"In any event, the assistance furnished under this chapter shall be and constitute a lien on any real estate owned either by the husband or wife for assistance furnished to either of such persons."

OLD AGE ASSISTANCE LAW:

The commission has the right to take over a note of doubtful or uncertain character and after acquiring the same, may take whatever steps are necessary to collect it.

May 6, 1936. *Old Age Assistance Commission:* In your letter of April 29, 1936, you ask for the opinion of this department with reference to Section 16-b (Code Section 5296-g2). You set out the provisions of said Code Section 5296-g2 of the 1935 Code of Iowa.

It would be our opinion that the section cited refers exclusively to assignments of death benefits, loan value, or cash surrender value of any life insurance policy, death or funeral benefit of any association, society or organization, and then states with reference to the payment of premiums or assessments on such policies. This section is construed as simply related to matters of this nature.

You then ask with reference to an assignment of promissory notes, in some cases being past due, but the statute of limitations not having run. We wish to call to your attention Sections 5296-f13 and 5296-f16, and particularly that part of the sections which reads as follows:

"5296-f13. * * * * No person shall receive old age assistance if he has more than three hundred dollars in cash, on deposit in a bank, in postal savings, or if the immediate cash value, as determined by the board and subject to review by the commission, of his holdings of bonds, stocks, mortgages, other securities or investments, except real estate, exceeds three hundred dollars. At the discretion of the commission, however, where such immediate sale, for cash, of such securities or investments necessitates an undue financial sacrifice, the applicant, when in immediate need of assistance, shall assign such securities and investments to the state to be held in trust by the commission to reimburse the old age assistance revolving fund for the amount paid from the old age pension fund and the old age assistance revolving fund in assistance or other benefits in behalf of said applicant."

We construe the part of the section above set out to allow a discretion on the part of the commission, where a promissory note is held by the applicant, which is of doubtful and uncertain value at the time the assistance is granted, or where the value is known and considered low. The part of the section cited gives to the commission its authority to use its discretion in such matters as to ultimate sale.

"5296-f16. * * * * If the commission deems it necessary to protect the interest of the state, it may require, as a condition to the grant of assistance, the absolute conveyance of all, or any part, of the property of an applicant for assistance to the state. Such property shall be managed by the board which shall pay the net income to the person or persons entitled thereto. The commission shall have 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 recipient, or person who has received assistance, and the surviving spouse of such person, which spouse meets the requirements set out in Section 5296-f15 of this chapter, the property shall be disposed of and the proceeds shall be transferred to the old age assistance revolving fund of the state."

Construing the parts of these two sections together in the case as cited by you, with reference to the promissory note, it is our opinion that these sections give the right to the commission to take over a note of doubtful and uncertain value, and after acquiring the same, to take whatever steps are necessary to collect, as it becomes, by virtue of these sections, the property of the state.

HOSPITAL: CITY: COUNTY:

A city hospital cannot be leased to a private corporation or association, if the control of the hospital is lost, as it would be through a lease.

May 6, 1936. *Bureau of Labor:* In your letter of May 1, 1936, you state that you are in receipt of a communication addressed to you as head of the Department of Labor, asking that you secure an opinion from this department on the following question:

"Can a hospital that has been financed by a city or county be leased to a private corporation or association?"

You state further that you are informed that former Attorney General Ben J. Gibson rendered an opinion in 1925 with reference to this point on the question of the authority of a county to lease a hospital. You desire to know if a city hospital would come under the same heading as county hospitals.

Chapter 300 of the 1935 Code of Iowa is entitled *"Municipal Hospitals"* and provides in general that cities may by ordinance provide an election whereby three hospital trustees may be named. See Section 5867.

Section 5873 of the 1935 Code of Iowa provides:

"In a city maintaining a hospital the council may appropriate each year not exceeding five per cent of the general fund for its improvement and maintenance."

Section 5871 of the 1935 Code of Iowa provides:

"Said Board of Trustees shall be vested with authority to provide for the management, control, and government of such city hospital and shall provide all needed rules and regulations for the economic conduct thereof. In the management of said hospital no discrimination shall be made against practitioners of any school of medicine recognized by the laws of the state."

A reading of the chapter under consideration will show that no authority is given to the city, through such Board of Trustees, to lease the hospital. This is in accordance with the law as stated in the opinion to which you refer relating to the authority of a county to sell or lease a county hospital to a private organization, which opinion was rendered under date of October 9, 1925, to the County Attorney of Boone County by this department.

Subsequent to the rendering of the opinion just referred to, the Supreme Court of Iowa in the case of *Hilgers vs. Woodbury County* decided an action for damages for personal injury suffered by the plaintiff in an elevator in the courthouse owned by the defendant, to the effect that the trial court in directing a verdict in favor of defendant was correct. In the opinion rendered, Chief Justice Faville stated:

"The power of the Board of Supervisors under Sec. 422, Code of 1897, (1) 'to purchase real estate for county purposes,' (2) 'to build and keep in repair' such buildings, (3) 'to make such orders concerning county property as it may deem expedient,' and (4) 'to have the care and management of county property where no other provision is made,' did not authorize the Board of Supervisors to lease a portion of a courthouse to private parties."

In this case it was contended by appellants that while the Board of Supervisors may not be held liable for the acts of the agents, servants, or employees of the county, while acting within the performance of the duties connected with the "governmental powers" of the Board of Supervisors, the renting of a portion of the courthouse to the American Legion was a "private

enterprise," and that the Board of Supervisors could legally and properly rent the said premises, and that, having done so, the county is liable for the negligent acts of the employees of the county in connection with the use of the rooms so rented. See 200 Iowa 1318.

The court, in disposing of this proposition, states:

"* * * * the Board of Supervisors exceeded its powers in executing the lease of the room in the courthouse to the post of the American Legion, and that the county cannot be held liable for the negligent act of its employee, directly connected with the business of carrying out the said unauthorized contract."

In accordance with the decision just cited, in the general powers of cities and towns as set out in Chapter 292 of the 1935 Code of Iowa, and in the specific powers given the hospital trustees under Chapter 300 of the Code, we do not think that a city hospital could be legally leased. However, you will note the following wording of Section 5871 of the Code: "The board of trustees shall be vested with authority to provide for the management, control, and government of such city hospital." From this, we take it that the management could be turned over to any individual, club of individuals, society or association as long as the control was kept by the board of trustees. But if the control of the hospital is lost, as it would be through a lease, then it would be illegal.

REAL ESTATE LAW:

Unless the party engaged in the sale of burial lots can successfully show that the chapter is non-applicable to him by reason of one of the provisions of Section 1905-c26, he will be required to obtain a license as a real estate salesman from the Iowa real estate commissioner.

May 7, 1936. *Secretary of State:* You have asked to be advised as to the following question:

Is a person engaged in the occupation of selling cemetery lots required to obtain a license from the real estate commissioner under the provisions of Chapter 91-c2 of the 1935 Code of Iowa?

Section 1905-c23 of the Code reads 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."

It will be noted that the broad term "real estate" is used twice in this section. This term is broadly defined in Bouvier's Law Dictionary as "real property." There is a cross reference in that dictionary to the term "real property," which in turn is defined as "land, and generally whatever is erected or growing upon or affixed to land. * * * Also rights issuing out of, annexed to, and exercisable within or about the same." *Bouvier's Law Dictionary,* Volume 3, page 2816 (Rawle's Third Revision).

In 2 Tiffany on "Real Property," Second Edition, page 1252, the following statement is made concerning burial rights:

"The privilege of interring bodies in a burial ground belonging to a corporation or association, has been referred to as an easement, as a usufructuary right, and as a license. The question of the nature of the interest of a lot holder, as he is frequently termed, is dependent primarily upon the in-

tention manifested by the instrument by which it is created or evidenced, and the nature of such instrument. It may occur that a lot is conveyed outright to one for burial purposes, he acquiring an estate therein to endure so long as it is used, or capable of use, for burial purposes. This, however, is unusual.

"A privilege of interring bodies in a cemetery lot has been regarded as passing by descent. Whether it could ordinarily be devised or transferred *inter vivos* to persons outside the family would appear to depend on the provisions of the instrument under which it is held and the regulations of the cemetery corporation or association."

Tiffany further makes note of the fact that a cemetery lot has been regarded as passing by descent, thus showing that it partakes of the nature of real property, and he cites a number of cases indicating that trespass *quare clausum fregit* will lie against anyone interfering with the right of burial. *Op. Cit. Supra*, page 1254.

The conclusion that a burial right is indeed a right in land is indisputably established by the case of *Northern Light Lodge vs. Town of Monona*, 180 Iowa 62 (1917), in which the Iowa Supreme Court held that conveyances of burial lots were so effective as transfers of real property that a cemetery company, which had conveyed all of the burial lots owned by it and abutting upon a street, was not thereafter subject to assessment for public improvements, at least in respect to such abutting lots.

In the subsequent case of *Carter vs. Town of Avoca*, 197 Iowa 670 (1924), the court recognizes that the right of burial, while perhaps conveying no title to the soil, nevertheless includes the transfer of a privilege or a license, and entitles the owner to maintain a civil action for any disturbance of the right of burial.

The court further indicates that the exclusive right of burial ground marked off for cemetery lots is one that the courts will protect at the suit of the heirs. Certainly this interest cannot be other than an interest in land and "real estate" within the meaning ascribed to that broad term in Bouvier and other authoritative law dictionaries, which meaning was without doubt the one adopted by the Legislature in writing Section 1905-c23 and Section 1905-c25 of the Iowa Code.

It cannot be doubted that the form of conveyance used by the Davenport Memorial Park, including as it does the words "grant, bargain, sell and convey," and also the old classic words of the fee simple habendum, "*to have and to hold* The same unto the second party * * * * his heirs and assigns forever," conveys or purports to convey a fee simple or at least an interest equivalent to a license and easement for a usufructuary right. It is worthy to note that a conveyance of any right to burial within a burial ground necessarily carries with it by implication an easement to and from the place of burial. Some form of incorporeal right in land indisputably exists.

You are advised therefore that unless the party engaged in the sale of burial lots can successfully show that the chapter is nonapplicable to him by reason of one of the provisions of Section 1905-c26, he will be required to obtain a license as a real estate salesman from the Iowa Real Estate Commissioner.

May 7, 1936. *Department of Labor:* I have been asked to advise you upon the following questions:

Has the State of Iowa a plan for services to crippled children entitling it to share in the benefits of the Social Security Act and, if so, what depart-

ment or officer of the state government has jurisdiction over the administration of such plan so as to be entitled to further and augment the same by the application thereto of any federal funds which may be allotted to the State of Iowa under the said Social Security Act?

Section 511 of the Federal Social Security Act, approved August 14, 1935 (Public Act Number 271, 74th Congress), reads as follows:

"For the purpose of enabling each state to extend and improve (especially in rural areas and in areas suffering from severe economic distress), as far as practicable under the conditions in such state, services for locating crippled children, and for providing medical surgical, corrective, and other services and care, and facilities for diagnosis, hospitalization, and aftercare, for children, who are crippled or who are suffering from conditions which lead to crippling, there is hereby authorized to be appropriated for each fiscal year, beginning with the fiscal year ending June 30, 1936, the sum of $2,850,000. The sums made available under this section shall be used for making payments to states which have submitted, and had approved by the Chief of the Children's Bureau, State plans for such services."

This section and the ones following it provide for services for crippled children, requiring as conditions for the approval of state plans under which state participation in federal funds and support may be granted the following:

(a) A state plan providing for financial participation by the state.

(b) The administration of the plan by a state agency or the supervision of the same by a state agency.

(c) Methods of administration necessary for the efficient operation of the plan.

(d) A provision for the making of reports by the state agency as may be from time to time required by the Secretary of Labor.

(e) The state plan must provide for the carrying out of the purposes specified in Section 511 quoted above, and

(f) It must provide for cooperation of medical, health, nursing, and welfare groups and organizations and with any agency in the state charged with administering state laws providing for vocational rehabilitation of physically handicapped children. (See Section 513 of the Social Security Act.)

The Iowa state plan appears in Chapter 199 of the Code of Iowa, 1935, entitled "Medical and Surgical Treatment of Indigent Persons." The substance of this chapter first began to appear in the Supplemental Supplement to the Code of Iowa, 1915 (see Section 254-b thereof et seq.). See also the Compiled Code of Iowa, 1919, Chapter 9, Section 2375 and following which contain the same provisions that originally appeared in the Supplemental Supplement of 1915. At that time this chapter was headed "Medical and Surgical Treatment for Indigent Children." The subsequent legislative history of this subject has been a broadening of the provisions to include adults and no narrowing or restricting modifications or amendments have appeared.

In pursuance of the plan of the state for the care of crippled children, the so-called "children's hospital" has been erected at Iowa City, Iowa, at a cost of approximately $400,000.00 and with a capacity for accommodating 200 patients. In addition to this building, there is directly across the street from it the General University Hospital having a capacity of 700 beds and the Medical Library and Laboratories erected at a cost of $4,000,000.00.

It will be noted under Sections 4005 and 4006 of the Iowa Code, 1935, that any adult resident of the State of Iowa may file an information con-

cerning any person suffering from a deformity and it is particularly made the duty of physicians, public health nurses, members of Boards of Supervisors and Township Trustees, Overseers of the Poor, Sheriffs, policemen and public school teachers so to do. Section 4006 reads as follows:

"*Duty of public officers and others.* It shall be the duty of physicians, public health nurses, members of boards of supervisors and township trustees, overseers of the poor, sheriffs, policemen, and public school teachers, having knowledge of persons suffering from any such malady or deformity, to file or cause such complaint to be filed."

The participation by the state is shown by appropriations that have been made from year to year for the support of the hospital and the care of indigent persons therein. The current appropriation is in the 46th General Assembly, Chapter 126, Section 45, Subsection 6, which reads as follows:

"For the purpose of carrying out the provisions of Chapter one hundred ninety-nine (199), Code, 1931, for each year of said biennium, the sum of nine hundred forty thousand, nine hundred ninety-four (940,994) dollars or so much thereof as may be necessary, to be expended in the manner and under the authority provided in said chapter."

The administration of the plan by a state agency is clearly provided for in Section 3919 which entrusts the government of the University of Iowa to the Iowa State Board of Education, the powers and duties of which are set forth in Section 3921 et seq. of the Code. It will be noticed that Section 4029 imposes upon the Medical Faculty the duty to prepare blanks containing such questions and requiring such information as may, in their judgment, be necessary and proper, these blanks to be furnished to the Clerks of Juvenile Courts throughout the state.

The efficient operation of the state plan of Iowa seems assured. All peace officers and public school officers and employees of the State of Iowa are, under the statute, bound to inform of the existence and needs of any crippled children. Provision is made for their being committed to the University of Iowa Children's Hospital and for their treatment there at state expense.

It is to be noted that while Section 4018-f1 of the Code sets up a quota plan upon a population basis, both under Section 4012 and Section 4018-f1 "crippled children" or "orthopedic" cases are excepted from the quota.

There would appear to be no doubt that the numerous provisions of Chapters 195, 198 and 199 will satisfy the requirements of the federal statute that the state law contains provisions under which reports may be made by the state authorities from time to time to the Secretary of Labor. (See particularly Iowa Code Sections 3921, 3938, 4003, 4026 and 4027.)

Section 511 of the Social Security Act, cited above, requires state statutes to provide for the locating of crippled children and the administering of medical, surgical, corrective and other services and care to them through hospitalization, aftercare, etc. There can be no doubt that the system for care of crippled children set up in Chapter 199 of the Iowa Code is as extensive, if not much more so, than that of any of the sister states of Iowa. The statute provides fully for aftercare following the discharge of patients from the Hospital. Section 4023 of the Code, 1935, reads as follows:

"*Treatment outside hospital—attendant.* If, in the judgment of the physician or surgeon to whom the patient has been assigned for treatment, continuous residence of the patient in the hospital is unnecessary, such patient

may, by the hospital authorities, be sent to his home or other appropriate place, and be required to return to the hospital when and for such length of time as may be for his benefit. The hospital authorities may, if necessary, appoint an attendant to accompany such patient and discharged patients, whose compensation shall be the same and whose expenses shall be audited and paid as provided for an attendant appointed by the court."

The requirement under the Social Security Act that there be cooperation of medical, health, nursing and welfare groups with vocational rehabilitation institutions, etc., is provided for by the authority for transfers of patients from Board of Control Institutions, the School for the Deaf, the School for the Blind, the Soldiers' Orphans' Home, etc., to the Children's Hospital of the State University for care and treatment, and by the provisions of Section 4006 of the Iowa Code above quoted, providing a duty of various public employees to bring crippled children to the notice of courts for commitment to the University Hospital.

Thus the provisions for cooperation with the Federal authorities and the required conditions for the sharing in Federal funds would seem to be satisfied by Chapters 195 and 199 of the Code of Iowa. These refer to the Board of Education and to an institution under the jurisdiction of the Board of Education.

Several sections and subsections of the Code of Iowa, 1935, clearly presuppose that the Iowa State Board of Education is authorized to accept gifts for the advancement of the work of any of the institutions under its jurisdiction. For convenience, these are quoted below:

"3921. *"Powers and duties.* The board shall: . . . .

4. Manage and control the property, both real and personal, belonging to said institutions.

6. Accept and administer trusts deemed by it beneficial to and perform obligations of the institutions."

"3926. *Loans—conditions.* The finance committee may loan funds belonging to said institutions, subject to the following regulations: . . .

4. Any gift accepted by the Iowa State Board of Education for the use and benefit of any institution under its control may be invested in securities designated by the donor, but whenever such gifts are accepted and the money invested according to the request of the said donor, neither the state, the Iowa State Board of Education, the finance committee, nor any member thereof, shall be liable therefor or on account thereof."

"3935. *Duties of treasurer.* The treasurer of each of said institutions shall:

1. Receive all appropriations made by the general assembly for said institution, and all other funds from all other sources, belonging to said institution."

"3937. *Reports of secretarial officers.* The secretarial officer shall, for the institution of which he acts as secretary, on or before August first of each year, report to the board in such detail and form as it may prescribe:

2. Interest on endowment and other funds, tuition, state appropriations, laboratory and janitor fees, donations, rents, and income from all sources affecting the annual income of the support funds of said institution."

"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."

These sections all corroborate the common usage and custom of the United States which ascribes to all educational institutions of higher learning the power to accept and receive gifts for the purpose of advancing their work. 11 Corpus Juris 989; Simpson Centenary College vs. Bryan, 50 Iowa 293 (1878); Farmers' College vs. Cary, 35 Ohio State 648 (1880); In re Royer's Estate, 123 Cal. 614, 56 P. 461 (1899). If further corroboration were necessary, it could readily be found in the practice, which, according to common knowledge, obtains of accepting donated buildings for classroom, laboratory or dormitory use; endowment funds to carry on particular studies; scholarship funds, loan funds and similar donations.

In addition to these general provisions and principles, the specific provisions of the Iowa statutes providing for state acceptance of and from, and cooperation with, the Federal Government under the Sheppard-Towner Act lead to the clear conclusion that the State Board of Education is the proper state agency to accept Federal assistance under Title V of the Social Security Act. (See Iowa Code, 1935, Chapter 198.) While only the Sheppard-Towner Act was before the Iowa General Assembly at the time the chapter cited was passed by the latter, the provisions in the Iowa Code Sections 4001 et seq. are broad enough to cover Federal grants under subsequent acts, including the present Social Security Act. The provisions of Section 4001 are particularly of interest. It reads as follows:

4001. *State agency.* The State Board of Education is hereby designated as the state agency provided in such act; and the said State Board of Education is charged with the duty and responsibility of cooperating with the children's bureau of the United States Department of Labor in the administration of such act; and is given all power necessary to such cooperation. The State University shall be in actual charge of the work done under this chapter.

The question has been raised whether the State Department of Health under the administration of the Commissioner of Public Health would be the proper department to receive and to direct the expenditure of the Federal fund in question here. This may be answered by pointing out that Chapters 105 and 106 of the Code of Iowa, 1935, which provide for the State Department of Health and the Board of Health and the office of Commissioner of Public Health have to do with public hygiene and sanitation. The powers and duties of the Commissioner of Public Health are set out in full in Section 2191. The application of the fundamental maxim of statutory interpretation, *Inclusio unius est exclusio alterius,* would appear to limit the powers and duties of the Commissioner of Public Health to the matters therein set forth. None of the paragraphs describing his powers and duties have to do with the care of crippled children.

Section 2217-c1 of the Code, 1935, reads as follows:

"Federal aid. The State Deparment of health is hereby authorized to accept financial aid from the government of the United States for the purpose of assisting in carrying on public health work in the State of Iowa."

This section expressly authorizes the State Department of Health to receive Federal aid for "public health work in the State of Iowa." Here too the maxim, *Inclusio unius est exclusio alterius* would tend to exclude all powers or duties in the acceptance of Federal funds which are not to be devoted to public health work according to the professional implications of that phrase.

In this connection, it is important to note that the Federal Social Security Act provides for services for crippled children under *"Title V,"* which is headed *"Grants to states for maternal and child welfare."* As indicated above this title establishes the clear relation of its contents with matters entrusted to the Board of Education under Code Chapters 198 and 199. A quite distinct section of the Social Security Act is headed *"Title VI—Public Health Work."* It is to be inferred that the phrase "public health work" was used in the Federal Social Security Act in the same sense as that in which it was used in Chapter 105 of the Code of Iowa, 1935, and in the sense in which the same is commonly used by members of the medical profession, i. e., a sense which restricts it to public hygiene and sanitation.

It is concluded, therefore, that the State of Iowa does have a plan for services to crippled children which entitles it to share in the benefits of the Social Security Act and that the Iowa State Board of Education is the agency of the Iowa state government which has jurisdiction over the administration of such plan. The said Board of Education is, therefore, entitled to further and augment the state program for the care of crippled children by the application thereto of any Federal funds which may be allotted to the State of Iowa under the provisions of the said Social Security Act for aid to crippled children.

MEMORIAL BUILDINGS: City Council and Soldier's Memorial Commission have no authority to convert memorial buildings to other purposes than those named in Section 500 of the 1935 Code.

May 7, 1936. I wish to acknowledge receipt of your letter of April 28th with which you enclose correspondence with the clerk of the city of Monticello. From the file attached to your letter, it appears that the city of Monticello in the years 1923 and 1924, proceeding according to law, purchased, equipped and has since maintained certain buildings as memorial buildings, as authorized by Chapter 33 of the Code of Iowa. The question now presented is whether the Soldiers' Memorial Commission may lease a memorial building or a portion of such building to private parties, and whether such commission may turn over to the city council the control of a part of such buildings, and whether the city council may assume control thereof and lease the same or sell the same to private parties. $3,000.00 of an original bond issue of $18,000.00 is still outstanding against said property.

Section 500 of the Code is as follows:

"500. *Name—uses.* Any such memorial hall or building shall be given an appropriate name and shall be available so far as practical for the following purposes:

"1. The special accommodations of soldiers, sailors, marines, nurses, and other persons who have been in the military or naval service of the United States.

"2. For military headquarters, memorial rooms, library, assembly hall, gymnasium, natatorium, club room, and rest room.

"3. County, town, or city hall, offices for any county or municipal purpose, community house, recreation center, memorial hospital, and municipal coliseum or auditorium.

"4. Similar and appropriate purposes in general community and neighborhood uses, under the control and regulation of the custodians thereof."

The question submitted to the voters of the city and voted favorably upon was as follows:

"Shall the city of Monticello, Iowa, purchase and equip a labor memorial building and issue bonds therefor?"

When the people voted to purchase and equip a labor memorial building and issue bonds therefor, they contemplated that the building would be used for the purposes contemplated by Section 500 of the Code of Iowa.

It is the opinion of this department that the building or buildings in question, having been purchased and equipped for memorial building purposes as authorized by law, they may not now be devoted to other purposes or converted to uses other than the cause contemplated by the questions submitted to and voted upon by the electors of the city. The obligation of the Soldiers' Memorial Commission and the city council to carry out the purposes for which the buildings were acquired is a sacred one. The city council and Commission have no right or authority to convert the memorial buildings to purposes other than those named in Section 500 of the 1935 Code of Iowa.

CHAIN STORE TAX: Bulk oil stations are liable for the unit tax. (Citations on constitutional questions.)

May 8, 1936. *Iowa State Board of Assessment and Review:* We acknowledge your request for an opinion on the taxability of bulk oil stations under the provisions of Chapter 329-G1 of the 1935 Code, the Iowa chain store tax law, and we have searched the authorities for guidance in the matter. As the Iowa statute has been effective less than one year, we find no aid from our own Supreme Court rulings, and we are forced to rely upon the statute and courts of other jurisdictions.

The Iowa statute, H. F. 311 of the 46th General Assembly and reported as Chapter 75 of the 46th Session Laws, declares the following purpose:

"An act to impose an occupation tax on conducting a business by a system of chain stores for selling or otherwise disposing of tangible personal property, such as goods, wares, and merchandise at retail—"

This statute appears in the 1935 Code of Iowa as Chapter 329-G1, and Section 6943-G2 of said chapter is devoted to definitions.

Under Section 2, "person" is defined to include any individual, firm, copartnership, joint adventure, association, corporation, business trust, receiver, or any other group or combination acting as a unit, and the plural as well as the singular thereof, and all firms however organized and whatever be the plan of operation.

Section 4 defines retail sale or sale at retail as a sale to a consumer or to any person for any purpose other than for resale of tangible personal property, including goods, wares and merchandise.

Section 5 defines business as including any merchandising activity with the object of gain, profit, or advantage, either direct or indirect.

Section 6. Store means any store or stores or any mercantile or other establishment in which merchandise of any kind is sold or kept for sale at retail.

Section 7 provides that "conducting a business by a system of chain stores" when used in this act shall be construed to mean and include every person—in the business or owning, operating, or maintaining under the same general

management supervision, control, or ownership in this state and/or any other state two or more stores where merchandise of any kind whatever is sold or offered for sale at retail at a profit.

Section g3 lists certain exemptions, but we do not find bulk oil stations included in such exemptions, either specifically or by implication.

Section g4 imposes a tax upon every person within the state of Iowa engaged in conducting a business by a system of chain stores from any of which stores are sold or otherwise disposed of at retail, tangible personal property, such as goods, wares and merchandise, an annual occupation tax, et cetera. The tax provided in this section is a unit tax on each store in excess of one, computed on the basis of the number of stores operated by any person on July 1st of each year.

Secton g5 provides for filing returns by all persons subject to the chain store tax.

Section g6 provides that in case of no return or incorrect return, the Board of Assessment and Review shall determine the amount of tax due, and give notice to the person liable for the tax; and provides further that said person may apply for hearing and after such hearing, the board shall make final determination of the amount of the tax.

Section g7 provides for appeals to the district court by the taxpayer and the following sections of said act provide for a lien of the tax, and further procedural matters.

Section g11 empowers the board to make rules and regulations for the administration and enforcement of this statute; and,

Section g12 empowers said board to require any owner, manager or employee of any store in the state to file with the board a verified statement showing the ownership, management, and control of such store for the purpose of determining whether or not such store is subject to the tax imposed.

Section g15 provides for a penalty of 5% of the amount of tax due, plus 1% per month, for failing to file a return or to pay any tax within the time required, and a further penalty upon any person required to make, render, sign, or verify any return, or who makes any false or fraudulent return with the intent to evade the tax.

Section g16 specifically defines the chain store tax as an occupation tax.

It is supposed that any objections to the payment of this tax on the part of the bulk oil stations will be on the grounds that such a tax is an interference with or impediment to interstate commerce, this objection being sound under the well-known rules of law to the effect that the state may not place any tax burden on interstate commerce. The authorities for this general rule are so numerous that we deem it unnecessary to cite the same herein, and no one will question that if the retail sale of oil and gasoline products from bulk stations is a part of interstate commerce, the chain store tax may not be collected from said stations on such sales.

Authorities are not numerous on the question of taxing the units, but we find the case of *Bowman vs. Continental Oil Company*, 256 U. S. 642, decided in 1921, in which the constitutionality of a New Mexico statute was questioned. For our purpose, it is necessary to take up only one question decided by the United States Supreme Court in this opinion, and that question is set out in the head notes to said case as follows:

"A statute of New Mexico applicable to distributors of gasoline imposes an excise of 2 cents for each gallon sold or used and an annual license tax of $50, payable in advance, for each distributing station, place of business, or agency, and makes it a penal offense to carry on the business without paying the license tax, *Held:*

(2) The license tax falling with its prohibition upon the business as a whole cannot constitutionally be applied where interstate and intrastate business necessarily are conducted indiscriminately at the same stations and by the same agencies."

This case came up from the United States District Court of New Mexico on an appeal from a temporary injunction which restrained the state from collecting any of the taxes. The case was based on a statute of the state which required every distributor of gasoline to pay an annual license tax of $50 for each distributing station or place of business or agency; required to be paid in advance, and rendered it unlawful to carry on the business without having paid it; and provided further, that any person engaging or continuing in the business of selling gasoline without this license was guilty of a misdemeanor, and upon conviction be punished by fine or imprisonment or both. The facts further showed that the statute made no provision for the separation of interstate and intrastate business and the oil company did not maintain such separate records.

Speaking of the $50 license tax, the court speaks as follows:

"The subject taxed is not in its nature divisible as in the case of the excise tax. The imposition falls upon the entire business indiscriminately and so does the prohibition against the further conduct of business without making the payment. By accepted canons of construction, the provisions of the act in respect to this tax are not capable of separation so as to confine them to domestic trade, leaving interstate commerce exempt. (Citations) No doubt, the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce, if it did not make its payment a condition of carrying on interstate or foreign commerce. But the state has not done this by any act of legislature."

The gist of the foregoing facts and law is that the records of the oil company and the provision of the statute fail to provide a separation between the interstate and intrastate commerce, and for this reason, the Supreme Court held that the law was unworkable.

In our opinion, the language quoted above clearly implies that if the facts and the statute had specified otherwise, that the license tax might well have been sustained. We are further convinced of the soundness of this conclusion by the final determination of the high court, which is set out in the following language:

"The decree under review should be reversed and the cause remanded with the direction to grant a decree enjoining the enforcement as against plaintiff for the license tax without qualification, etc., etc.—and without prejudice to the right of the state to require plaintiff to render detailed statements of all gasoline received, sold, or used by it, whether in interstate commerce or not, to the end that the state may the more readily enforce said excise tax to the extent that it has lawful power to enforce it as above stated."

The foregoing quotation, to our mind, clearly recognizes the right of the state to exact the unit tax from the above oil station engaged in intrastate or domestic commerce and the question of the distinction in the two types of business carried on by an oil company generally depends upon the selling practices and methods of each individual unit.

We are advised that the oil companies operated in this state ship in their product from out of the state in their own tank cars and empty said cars into large storage tanks. Company owned motorized tank trucks are then filled from the storage tanks and the truck is driven through the rural districts where the oil products are supplied to farmers and other consumers at retail. When the truck driver starts out with a full tank, he has no definite assurance that he will sell any of his product—in short, he starts out to peddle his merchandise in varying quantities if and where he finds a purchaser. It is contended by certain oil companies that the interstate character of the merchandise obtains and continues until the final sale is made to the consumer, this contention being based upon the fact that the tank cars, storage tanks and the tank wagons are all company owned and the merchandise is handled by company employees. For this reason, it is claimed that all these facilities are instruments of interstate commerce. With this contention, we are unable to agree for the reason that the merchandise came to rest in this state and interstate commerce ceased when the product was placed in the storage tanks. From that point, we are clearly of the opinion that the transaction culminating in the retail sale to the consumer is domestic or intrastate trade and where such sales are made by the same oil company from two or more company storage or bulk stations, said units are subject to the Iowa Chain Store unit tax.

We find that the United States Supreme Court has passed upon the chain store tax statute of West Virginia which is surprisingly similar to the Iowa law. In this case, *Fox vs. Standard Oil Company of New Jersey*, 294 U. S. 87, 79 Law. Ed., 780, decided January 14, 1935, the court decided the following propositions:

1. Filling stations and distributing plants are stores within the meaning of the chain store statute.
2. Increasing the amount of the licenses with the number of stores does not deny equal protection of the laws.
3. The size or amount of the license fee making business unprofitable does not deny equal protection of the law.
4. If the power to tax exists and it does exist, the extent of burden is up to the legislature.
5. Equal protection is not denied because higher taxes are exacted from larger chains than from smaller chains.
6. The chain store system of taxation does not violate a provision of the state constitution insuring equal and uniform taxation.
7. The due process clause of the United States Constitution is not violated.

In conclusion, we note with interest that the United States Supreme Court, in *Gulf Refining Company vs. Fox*, 80 Law Ed. 561, on March 2, 1936, decided that where oil companies have made lease agreements with their station operators, said stations nevertheless would come under the operation of the chain store tax statute. This opinion was founded upon a certain type of lease, but it may be fairly assumed that regardless of lease agreements, the control and management of the chain of stations is retained by the oil company and if so, said chain is subject to the tax.

GAMBLING DEVICE: TRADE CHIPS USED: TRADE STIMULATOR:

"There is no question in our minds but that the machine described, in view of the use made of it, constitutes a gambling device under the statutes of this state."

May 9, 1936. *County Attorney, LeMars, Iowa:* You submit for official opinion the following statement of facts:

"The officers here seized a machine similar to a slot machine used in one of the cigar stores here, in which machine only trade chips are used and on which a tax of one cent is paid. The trade chips are used by those who play cards and the ones losing have to pay the winner in trade chips or they may make whatever arrangement they want as to the paying of the trade chips, the house, however, expecting to receive twenty cents in money or the purchase of twenty cents worth of chips for each game. The trade chips may be placed in the machine and the machine always returns a nickel's worth of merchandise for every chip placed in the same and sometimes the machine would pay more than one item of merchandise. The player can select the merchandise he wants and only trade chips can be played. They contend that it is a trade stimulator used for the purpose of selling more merchandise. The trade chips are sold by the store for a nickel. The store requires that those playing pay either 20c in cash or chips for the game."

There is no question in our minds but that the machine described, in view of the use made of it, constitutes a gambling device under the statutes of this state.

Should any further analysis of the law or citation of authorities be necessary, the same may be found in the general letter of this department covering the subject matter issued under date of March 20, 1936.

TAXATION: FOREIGN CORPORATE STOCK: Stock of foreign corporations engaged in merchandising and manufacturing is subject to taxation as moneys and credits.

May 9, 1936. *Iowa State Board of Assessment and Review:* Pursuant to recent written and oral requests from your department we have examined the law pertaining to assessment for taxation of the corporate stock of foreign corporations, giving particular attention to those foreign corporations engaged in (1) Merchandising and (2) Manufacturing. In the absence of statutes which expressly except the stock of such corporations, no person could reasonably deny that such property should be listed and assessed in the same manner as ordinary foreign corporation stock, i. e., to the owner at his place of residence at the rate of six mills on the dollar of actual valuation. See Code: 6953-(7); 6956-(5); 6963; 6985; 6987, and cases cited under the respective sections in the Iowa Revenue Laws, 1934—Second Edition. As before stated (1) Merchandising and (2) Manufacturing foreign corporations operating within this state are subject to the foregoing statutes unless other statutes supply an exemption.

Our general tax exemption statute is Section 6944 of the 1935 Code, which provides:

"6944. *Exemptions.* The following classes of property shall not be taxed: (20) * * * The shares of capital stock of * * * corporations engaged in merchandising as defined in Section 6971, domestic corporations engaged in manufacturing as defined in Section 6975—."

That the foregoing exemption does not apply to the stock of foreign manufacturing corporations is well settled by our Supreme Court in numerous decisions:

Judy vs. Beckwith, 137 Iowa 24;
Morril vs. Bentley, 150 Iowa 677;
Bennett vs. Lumber Co. 199 Iowa 1085.

This answers our question so far as foreign manufacturing corporations are concerned and we will close this question here.

We are left with the big question, does the phrase "corporations engaged in merchandising as defined in Section 6971" in 6944-20 exempt the stock of both foreign and domestic merchandising corporations or does it exempt only domestic corporations? In seeking the answer to this question it is necessary to go into the history of the pertinent statutes. For the sake of brevity in relating such history we refrain from setting out any more of the former statutes than is necessary for our purpose. It will be noted the last quoted statute, 6944-20, refers to "corporations engaged in merchandising as defined in Section 6971." Section 6972 prescribes the method of assessing stocks of merchandise. These two sections appeared as one section, 1318, in the Code of 1897, the wording of which was almost identical with the two current sections with an additional provision which is of great importance to our question. Section 1318 of the 1897 Code provided:

"*Merchants.* Any person, firm or corporation owning or having in his possession or under his control within the state, etc. (setting out the full provisions of 6971-2, 1935 Code) and the provisions of this section shall apply and constitute the method of taxation of a corporation whose business, or principal business is of like character and *shall be in lieu of any tax on the corporate shares.*"

This statute appeared in the same form, including the exemption provisions, from 1897 until 1919, appearing as Section 4499 of the Compiled Code of 1919. Our 1924 Code, the first edition of our present condensed Codes, was drafted from the 1919 Compiled Code and when the Code Revision Legislature, the 40th Ex. General Assembly, came to tax exemptions, all the tax exemption statutes wherever located in the Compiled Code were picked out and set in one place in the 1924 Code under Section 6944. In effecting the transition new statutes were enacted in which the old provisions were revised, condensed, modified, etc., into condensed and concrete statutes. It will be noted that Section 1318 of the 1897 Code in the opening lines thereof contains the word "corporations" and in the closing lines exempts the stock of such corporations from taxation. This was all expressed in the 1924 Code by the short statement in 6944-20, "corporations engaged in merchandising as per Section 6971." From this we conclude that the law on exemption of stock of merchant corporations, although different in form, is identical in substance and effect today as it was in 1897.

In 1908 our Supreme Court in Judy vs. Beckwith, cited above, with the provisions of Section 1318 of the 1897 Code in full force and effect, which statute exempted from taxation the stock of "corporations" engaged in merchandising, made the following pronouncement on page 29 of 137 Iowa:

"Without taking time for further reference to the statute, we feel entirely safe in the assertion, that there is no existing legislation in this state which expressly or by implication exempts from the category of taxable property the shares of capital stock owned or held by residents of a state in a foreign corporation."

This is a leading case on the question at hand and the court goes into a thorough discussion on taxation of corporation stock, basing its finding on a recognized line of authority that there is a marked distinction between a corporation proper and its stockholders in the matter of capital stock. The

court dispels arguments against the hardship and inequity of double taxation. This opinion is cited repeatedly in Supreme Court decisions since 1908, and it might be pointed out that the quoted passage is set out with approval in the Morril case in 150 Iowa 677 in 1911. An examination of the facts in the Judy case will disclose that the corporation involved was a manufacturing corporation and not a merchandising corporation and it might be contended that our reasoning and conclusions are unsound on that account. This feature of the situation has caused us some concern but we cannot ignore the plain and positive language quoted above and, with the exemption provisions of 1318 before it, the court in announcing the above rule defines the word "corporations" in this statute to mean only domestic corporations.

Our conclusions are supported by two prior opinions of this department. In the Attorney General's Report of 1926, at page 453, we find the following statement:

"We are of the opinion that Section 7008 and Section 7010 do not apply to manufacturing or merchandising corporations organized in the state. However, stock in foreign merchandising and manufacturing corporations owned by residents of the state is covered by Sections 7008 to 7010 and is taxable under the provisions thereof."

And in the 1930 Report on page 336 we find:

"You are advised that the stock of any foreign corporation in the hands of a resident of this state is subject to tax under the laws of this state in accordance with the provisions of Chapter 332, Code of 1927, such stock being taxed as moneys and credits."

While we believe that foreign corporation stock is taxed under Section 6985 rather than Section 7008 as indicated in the 1926 opinion, we think it would be proper to follow the procedure prescribed in 7008 in fixing the value of said stock. We might have answered your inquiries by citing these two opinions but we were aware that your request mentioned Section 6944-20 of the Code and our efforts have been along the line of harmonizing that statute with these opinions. We trust that we have covered the subject to your satisfaction.

GAMBLING DEVICE: PROCEDURE FOR FORFEITING: "A police officer has the same right to seize without a search warrant any implement or device actually in operation in violation of the gambling statutes of the state as any peace officer would have to arrest without warrant one actually engaged in the commission of a crime."

May 9, 1936. *County Attorney, Sioux City, Iowa:* This will acknowledge receipt of your letter of May 4, 1936, in which you ask for an official opinion upon the following question:

"If a police officer walks into an establishment and finds a gambling device in operation and takes the device to the police station without having a search warrant, what is the proper procedure to follow in order to forfeit the gambling device? As I understand the situation, the only proper way to forfeit the gambling device would be by the police officer first obtaining the search warrant."

We do not find that this exact question has ever been presented to this department before, but from common sense, the statutes and opinions of this court, we reach the following conclusion: A police officer has the same right to seize without a search warrant any implement or device actually in opera-

tion in violation of the gambling statutes of the state as any peace officer would have to arrest without warrant one actually engaged in the commission of a crime.

Chapter 617 of the Code of 1934, dealing with search warrants and the seizure of articles, implements and merchandise therein described, is not exclusive. Sections 13198 to 13202 deal with the question of gambling houses and the implements or gambling devices specified in Section 13198. It being conceded in the question that the implement or device seized was a gambling device and it being conceded that the same was in operation, the police officer had a right to seize the same and the County Attorney would have the legal right and duty to institute an action in rem against the device seized and have the same condemned under and by virtue of the same provisions set forth in Chapter 617.

Section 13203 provides that any property, whether real or personal, offered as a stake, or any moneys, property, or other thing of value staked, paid, bet, wagered, laid, or deposited in connection with or as a part of any game of chance, lottery, gambling scheme or device, gift enterprise, or other trade scheme unlawful under the laws of this state *shall be forfeited to the state* and said personal property may be seized and disposed of under Chapter 617. The search warrant chapter, 617, provides a method of procedure for the obtaining of a search warrant, the execution of it, the hearing to determine whether or not the property seized thereunder should be destroyed.

It is a purely civil action to determine whether or not the merchandise seized is or is not one of the implements or devices condemned by the statute and, if so, to have the same forfeited to the state. Conceding that under Chapter 617 the search warrant is the vehicle by which generally illegal devices are brought into court for forfeiture, this does not preclude in any way a police officer seeing the illegal device in operation from being just as an effective, legal and efficient vehicle to accomplish the same purpose.

See State vs. Doe, 263 N. W., 529.
State vs. Certain Lottery Tickets (Iowa), 241 N. W., page 421.
State vs. Ellis, 200 Iowa, 1228.
State vs. Marvin, 211 Iowa, 462.
State vs. Lazio, 222 N. W., page 34.
State vs. Striggles, 202 Iowa, 1318.

Incidentally, there does not appear to be any reason, under the facts submitted, why a criminal prosecution should not be instituted against the owner or keeper of the establishment for keeping a gambling house under Section 13198.

EMBEZZLEMENT PROSECUTION: VENUE, PLACE OF:

"In the opinion of this office, the venue for the prosecution of X for embezzlement under the above detailed facts would not be in any county in Iowa, but would probably be in the State of Kansas. * * * The mere fact that the person for whom the funds were collected was a resident of Jasper county, Iowa, would not be sufficient to lay the venue in your county."

May 11, 1936. *County Attorney, Newton, Iowa:* This will acknowledge receipt of your inquiry to this office under date of April 24, 1936, in which you requested our opinion as to where the venue would lie for a prosecution of X for embezzlement under the following facts:

"X was formerly a salesman or dealer in the employ of B Company, a corporation with offices in Newton, Iowa. On February 3, 1936, this employment terminated by written contract in which X agreed that he was indebted to B Company in the amount of $318.00. X then secured employment with the A Company with home offices in Des Moines, Iowa. On or about March 8, 1936, X resided with his family in the State of Kansas, and while so residing was regularly in the employ of the A Company of Des Moines as a salesman. On that date, the B Company learned of X's residence in Kansas and wired him to make collection of an account for them in the State of Kansas, stating that a letter would follow by air mail. The said letter authorized X to make collection of an account from Y, a citizen of the State of Kansas for them, and since there was a controversy as to the amount owing, the letter authorized him to compromize Y's account with the B Company for $400.00. The letter stated that X's expenses in the matter would be taken care of. There was nothing in said letter indicating as to what he should do with the money in case he collected it, or what his compensation or commission would be in so doing. X then, on the 8th or 9th of March, effected the collection from Y in Kansas by receiving from Y, Y's check payable to X in the sum of $400.00. On the 13th of March, a letter was addressed over the signature of X to the B Company, in which X claimed that the B Company, over and above the $400.00 received, owed him a matter of $40.00 extra. This letter bore a heading of Kansas City, Kansas, but was posted at Perry, Iowa.

"Shortly after receipt of this letter by the B Company, representatives of the B Company learned that X would be in Des Moines on a certain date. On that date, B's representatives contacted X in Des Moines and demanded the $400.00 received by X from Y. X then stated that he would pay them $42.00 in cash and give B his note for $300.00, inasmuch as he had used the money in a business in Kansas. B Company refused to accept this arrangement and demanded all or nothing.

"Prior to the conference in Des Moines between B's representatives and X, X was observed to have $200.00 in cash in his possession in Story county while negotiating for the purchase of an automobile. X was then discharged by the A Company and now is living in a county in Iowa other than Jasper or Polk. As far as known, X was never in Jasper county from the time he received the $400.00 from Y until the time demand was made upon him by B Company's representatives at Des Moines. In that conversation between B's representatives at Des Moines and X, X further stated that he did not have the money and that he supposed that they could put him in the penitentiary for what he had done."

In the opinion of this office, the venue for the prosecution of X for embezzlement under the above detailed facts would not be in any county in Iowa. but would probably be in the state of Kansas. Under the Iowa cases, the duty to account for funds collected is a circumstance to be considered in connection with the proper venue. However, failure to account at the place required by the terms of the contract of employment is merely a circumstance tending to show the embezzlement took place at that point. Under the facts stated, we do not believe there was any duty on X to account at Newton. Neither can such duty be inferred from the correspondence between the parties. All of the facts and circumstances detailed in your statement of facts tend to exclude the possibility of any embezzlement or conversion having been accomplished in Jasper County, Iowa, and for that matter in any other county in the state of Iowa. The defendant's statement that he invested at least part of the funds in a business of his own in Kansas would tend to show that the embezzlement took place in the state of Kansas. The mere fact that the person for whom the funds were collected was a resident of Jasper County, Iowa, would not be sufficient to lay the venue in your

county. The property was never seen in the defendant's possession in Jasper County, Iowa. Neither did he reside there at the time nor can we find any duty upon him to account at Newton.

In the Iowa cases touching this question, there were definite contracts of employment in which the defendant had agreed to account in the county of the venue, and in addition the county of the venue was likewise in some instances the county of the defendant's residence. The Iowa cases bearing on this question are:

State vs. Hengen, 106 Iowa, 711.
State vs. Maxwell, 113 Iowa, 369.
State vs. Stuart, 190 Iowa, 476.

MOTOR VEHICLE LAW. Motor Vehicle Department not authorized to purchase posters for use on boulevards.

May 12, 1936. *Motor Vehicle Department:* You state that your department is carrying on an extensive additional campaign in Iowa in an effort to bring to the average citizen a better understanding of the necessity of observing the motor vehicle laws and regulations of the state and your department, in the belief that only through this method is any improvement to be made in the present deplorable accident situation.

You state further that in this campaign, your department desires to purchase posters for use on boulevards, the subject matter on the posters to be of such a character as is calculated to assist in bringing about some improvement in driving practices to the end that there will be fewer accidents, less loss of life and less property damage. You say this program is being carried out in several states, and your question is whether under Section 5000 of the Code of Iowa, 1935, your department has authority to purchase such posters, no expense to be made by posting or space, but merely for the purchase of the posters.

Section 5000 of the Code is as follows:

"5000. *Expenditure of department fund.* The maintenance fund for the motor vehicle department shall constitute a fund for the payment of salaries as provided by law for the department, the expense of plates, certificate containers, blanks, printing, and any other expense necessary to enable the department to carry out the provisions of this chapter and to carry into effect the provisions of the law relating to operator's and chauffeur's licenses."

The question necessarily arises whether the expense incurred for such posters would be "expense necessary to enable the department to carry out the provisions of this chapter."

Section 5004 of the Code provides that:

"The department shall have full authority to make such rules and issue such instructions as may be necessary to insure and obtain uniformity in the administration and full enforcement of the provisions of this chapter."

(Chapter 251, relating to motor vehicles and law of the road.) Such posters might aid in insuring and obtaining uniformity in the administration and full enforcement of the provisions of this chapter, but in the opinion of this department, such posters, addressed as they would be to the general public, would require an expenditure not authorized under the language of the statutes quoted. Such expense would hardly be "necessary to enable the department

to carry out the provisions of this chapter," nor would promulgation of rules and instructions of the department by the use of such posters be calculated directly to insure and obtain uniformity in the administration and full enforcement of the provisions of the chapter.

The purchase of such posters might be very helpful to the state and result in the saving of life and in better uniformity of administration and enforcement of the motor vehicle laws, but I believe it would require a strained construction of the statutes referred to to hold that they grant authority to the department to purchase such posters.

BOARD OF EDUCATION: TEACHERS' PLACEMENT BUREAUS: LICENSE FEES: Teachers' placement bureaus operated by the state at the State University of Iowa, Iowa State College and Iowa State Teachers' College do not come within the provisions of Chapter 77-c1 and are not required to pay annual license fee, or comply with other provisions of that chapter.

May 13, 1936. *Board of Education, Bureau of Labor Statistics:* We have your request for opinion on the following proposition:

Chapter 77-c1, Code of Iowa, 1935, provides that every person, firm or corporation who shall keep or carry on an employment agency for the purpose of procuring or offering to procure help or employment, or the giving of information as to where help or employment may be procured, either directly or through some other person or agency, and where a fee privilege or other thing of value is exacted, charged or received therefor, shall procure a license; and the chapter then goes on and sets forth the procedure in regard to making application and the issuance or refusal of applications and provides for an annual fee and the manner of revocation of the license and also provides that any person in any manner undertaking to do any of the things described without first procuring a license shall be guilty of a misdemeanor

A teachers' placement bureau is maintained at the State University of Iowa, Iowa State College and Iowa State Teachers' College. The bureaus are operated as an integral part of the various institutions and the service is ordinarily extended to graduates of the institution and former students. A registration fee is charged, but there is no further or additional charge to those who used these facilities. At Iowa State Teachers' College, registration in the placement bureau is a requirement for graduation and no fee is charged for the first registration. Subsequent registrations cost $3.00 a year. These fees become a part of the institutional funds and the placement bureau was budgeted the same as any other department of the institutions and the employees subject to the same regulations as the other employees of the institutions.

Would you please advise us whether these placement bureaus operated by the State University of Iowa and Iowa State College and Iowa State Teachers' College come within the provisions of Chapter 77-c1 of the Code, and whether a license fee must be paid pursuant to the provisions of that chapter?

The State Board of Education was created by an act of the Legislature and Section 3919 of the Code provides that the board shall govern the State University of Iowa, Iowa State College and Iowa State Teachers' College, and pursuant to this authority and acting for and in behalf of the State of Iowa, it has been determined that the so-called placement bureaus be maintained at these state institutions and for these purposes, these institutions are arms and agencies of the state and acting for the state.

You will note that Section 1551-c1 of the Code only applies to persons, firms or corporations and does not apply to the state itself. Therefore, it is clear

that these bureaus and agencies do not come within the provisions of Chapter 77-c1 of the Code.

It is, therefore, the opinion of this department that teachers' placement bureaus operated by the state at the State University of Iowa, Iowa State College and Iowa State Teachers' College do not come within the provisions of Chapter 77-c1 of the Code and are not required to pay the annual license fee, or comply with the other provisions of that chapter.

PUBLIC FUNDS: BANKS: The resolution made by banks pursuant to Section 9222-c3 of the Code pledging a portion of their assets to secure public funds and other funds as may be authorized by the Superintendent of Banking does not need to be renewed annually—no requirement for this under the law—it is in the same category as any other resolution and would continue in force and effect until subsequent action is taken by the bank.

May 13, 1936. *Board of Control:* We have your request for opinion on the following proposition:

Section 9222-c3 of the Code of Iowa, 1935 provides that 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. Pursuant to this statute, all banks in which the state institutions under the Board of Control deposit funds, have secured the funds in this manner.

Will you please advise whether it is necessary for the depository bank to renew this resolution or whether such a resolution and pledge remains in force and effect without being annually renewed?

You will note that this section does not require an annual resolution such as is required in Section 9222-c3, which section gives to the officers and employees the authority to pledge or hypothecate certain assets of the bank, but further provides that the authority must be given at least annually. We have examined the authorization issued by the Superintendent of Banking pursuant to Section 9222-c3 and this provides in part as follows:

"Such pledge of assets is hereby approved and such approval shall stand until the deposit is liquidated and pledged assets released in writing."

Resolutions of directors of a bank are in force and effect until subsequently altered or changed and it is not necessary that resolutions be renewed annually and as there is no specific requirement under the law that this particular resolution be renewed annually, then it is in the same category as any other resolution and would continue in force and effect until subsequent action as taken by the bank and need not be renewed annually.

MUNICIPAL APPROPRIATIONS: Councils shall make separate appropriations in cities for all the different expenditures of the city government for each fiscal year at or before the beginning thereof. It shall be unlawful for any officer, agent or employee of such city to issue any warrant, enter into any contract or appropriate any money in excess of the amount thus appropriated during year for which appropriation is made.

May 14, 1936. *Auditor of State:*

Re: Municipal Appropriations.

You have submitted to this office the following question:

"Does Section 5663-16 of the Code, which provides, in part, that City Councils shall 'make separate appropriations in cities for all the different

expenditures for each fiscal year at or before the beginning thereof, * * * *' refer, in your opinion, to such divisions as the water works department, the light plant department, and the gas plant department, when municipally owned?"

The Code section to which you refer, insofar as material, is as follows:

"*City and town councils.* City and town councils shall: * * *

"16. *Appropriations.* Make separate appropriations in cities for all the different expenditures of the city government for each fiscal year at or before the beginning thereof, and it shall be unlawful for it or any officer, agent, or employee of the city to issue any warrant, enter into any contract, or appropriate any money in excess of the amount thus appropriated during the year for which the appropriation is made. 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."

This section is mandatory in all its provisions. It provides that city and town councils shall do certain things. It has not been repealed and is still the law of this state unless it has been partially repealed or modified by implication by the terms of more recently enacted statutes.

"It is the law that repeals by implication are not favored and will be held to occur only when the court is driven thereto by the necessities of the situation."

State vs. Claussen, 216 Iowa 1079 at 1089, and many cases cited.

Paragraph 16 above quoted provides that councils shall make separate appropriations in cities for all the different expenditures of the city government for each fiscal year at or before the beginning thereof. It further provides that it shall be unlawful for *any* officer, agent or employee of such city to issue any warrant, *enter into any contract* or *appropriate any money* in excess of the amount thus appropriated during the year for which the appropriation is made. The words, "any officer, agent or employee" necessarily include trustees, charged with the duty of operating the electric light, gas and water plants.

Section 6144 provides for the submission of the question as to whether the management and control of such plants shall be placed in the hands of boards of trustees.

Section 6149 clothes such boards of trustees with all the power and authority in the management and control of such utilities as is conferred upon waterworks trustees appointed under Chapter 313.

Section 6158, in Chapter 313, prescribes the powers and duties of boards of trustees with reference to the purchase or erection and operation of waterworks plants. It provides further that "All money collected by the board of waterworks trustees shall be deposited at least weekly by them, with the city treasurer; and all money so deposited and all tax money received by the city treasurer from any source, levied and collected for and on account of the waterworks, shall be kept by the city treasurer as a separate and distinct fund. * * * Such moneys shall be paid out by the city treasurer only on the written order of the board of waterworks trustees, who shall have full and absolute control of the application and disbursement thereof for the purposes prescribed by law, including the payment of all indebtedness arising in the construction of such works, and the maintenance, operation, and extension thereof."

The question arises as to how much power is conferred upon such board of trustees by this section, and whether this section modifies or partially repeals Paragraph 16 of Section 5663. When the Legislature provided, in Section 5158, that "such money shall be paid out by the city treasurer only on the written order of the board of waterworks trustees," it divested all other officers of authority to draw upon the waterworks fund, but it went still further when it provided with reference to the trustees that they "shall have full and absolute control of the application and disbursement thereof for the purposes prescribed by law." Full and absolute control of the application and disbursement of such fund would appear to be controlled without any limitation such as might be imposed by Paragraph 16 of Section 5663.

We are disposed to hold that under Section 6158, such waterworks trustees have full and absolute control of the application and disbursement of the waterworks fund, subject only to the limitations contained in said Paragraph 16 of Section 5663.

"The object of subdivision 16, requiring expenditures only as the result of appropriations, is to place municipal corporations on a cash basis, preventing the accumulation of floating indebtedness."

Windsor vs. Des Moines, 110 Iowa 175.

That part of Section 6158 beginning with the words, "all money collected by the board of waterworks trustees," was enacted by the 28th General Assembly in 1900. Paragraph 16 of Section 5663 was enacted by the 22d General Assembly in 1888, but then applied only to cities of the first class. It was amended in 1907 by the 32d General Assembly to apply to cities of the second class, so that so far as cities of the second class are concerned, said Paragraph 16 is a more recent enactment than the material part of Section 6158, fixing the powers of waterworks trustees. As between repugnant statutes the later enactment must prevail. *Clear Lake Coop. vs. Wier*, 200 Iowa 1293; *Fitzgerald vs. State*, 260 N. W. 681 (Iowa).

"Every state must be construed with reference to the object intended to be accomplished by it. The intent of the legislature is a controlling element."

Fitzgerald vs. State, Supra.

Applying these rules of construction, we are forced to the conclusion that the Legislature intended Paragraph 16 of Section 5663 to have full force and effect, and to prevail under the seemingly somewhat conflicting provisions of Section 6158, prescribing the powers and duties of waterworks trustees. When, subsequent to the enactment of the latter section in its present form, the Legislature made a material enactment, making it applicable to cities of the second class, it was the same as though the entire paragraph had been repealed and a substitute enacted therefor.

That part of Section 6158 which is material here, and which was enacted in 1900, was twice amended by the Acts of the 29th General Assembly in 1902, but the amendments were to correct matters of form, rather than substance, and in any event they were prior to the later and material amendment to Paragraph 16 of Section 5663.

Chapter 24 of the 1935 Code of Iowa, known as the "Local Budget Law," is a recent enactment by the Legislature placing further limitations upon the tax levying and spending powers of municipalities.

In an opinion written by Mr. Justice Parsons, our Supreme Court, on April

20, 1936, in the case of G. L. Clark vs. City of Des Moines (not yet published in the reports), spoke with reference to this chapter as follows:

"No one can read this chapter of the Code (24) and the sections therein involved without coming to the conclusion that the legislature, in enacting this chapter, had in mind not only the limitation of taxation that might be levied, but expenditures that might be made."

For all the reasons herein stated, we are of the opinion the Legislature did not intend to remove so far as tax money expended by boards of trustees operating public utilities are concerned the limitations upon appropriations made by said Paragraph 16.

BASIC SCIENCE LAW: NATUROPATHY: Naturopathy not mentioned in Basic Science Law, and therefore is not an exception.

May 16, 1936. Some little time ago, Dr. Walter F. Bierring, State Commissioner of Health, referred to me your letter to Governor Clyde L. Herring, with reference to the applicability of the basic science law to the members of your profession.

A large volume of court work and other matters has prevented an earlier reply.

The basic science law, enacted by the last General Assembly, makes specific reference to certain professions licensed in Iowa, and provides for exemptions in certain cases. Naturopathy is not mentioned in the basic science law, which authorizes and expressly mentions those professions practicing the branches of healing arts which are recognized and licensed by the law of this state.

Section 2437-g5 of the 1935 Code of Iowa, being part of the basic science law, is, so far as material, as follows:

"2437-g5. *Exceptions.* Nothing in this chapter shall be construed to apply to persons holding licenses as physicians and surgeons, osteopaths, osteopaths and surgeons or chiropractors at the time this chapter takes effect; nor shall this chapter, at any time, be construed to apply to dentists, dental hygienists, nurses, pharmacists, optometrists, embalmers, pediatrists, barbers or cosmetologists practicing within the limits of their respective license or Christian Scientists. * * *"

Section 2437-g22 is in part as follows:

"2437-g22. *Misdemeanors.* Any person who shall practice the healing art without first having obtained a certificate of proficiency in the Basic Sciences or violates or participates in the violation of any provisions of this chapter shall be guilty of a misdemeanor," etc.

Under the basic science law as it exists at the present time, there is nothing that the Governor, the Department of Health or the Basic Science Board could do to relax or broaden the provisions of the law so as to authorize the granting of exemptions to persons engaged in practicing your profession at the time the basic science law went into effect.

The matter is entirely a legislative one and is therefore beyond the control of the executive and administrative branch of the state government.

BASIC SCIENCE LAW: Residents of Iowa enrolled in schools outside the state are not exempt from taking the basic science examination.

May 18, 1936. *Chiropractic Examining Board:* You have submitted to this department for an opinion the following question: Are residents of

Iowa, who are enrolled in schools outside of this state, exempt from taking the basic science examination under the provisions of Section 2437-g5 of the 1935 Code of Iowa?

The section in question is a part of Chapter 114-g1 of the Code, which chapter is the basic science law. The part of said section material so far as your question is concerned, is as follows:

"This chapter shall not apply to students regularly registered, enrolled and in attendance as of July 1, 1936, in the accredited schools of medicine, osteopathy and chiropractic in the State of Iowa."

It would be helpful to Iowa students enrolled in certain professional schools, if this chapter could be construed not to apply to students regularly registered, enrolled and in attendance as of July 1, 1936, in schools of medicine, osteopathy and chiropractic accredited by the State of Iowa.

It is our opinion, however, that the language used by the Legislature does not justify such a liberal construction. The exception is in favor of students in accredited schools of medicine, osteopathy and chiropractic in the State of Iowa. The following words, "in the state of Iowa," have reference to accredited schools of medicine, osteopathy and chiropractic and limits the schools to those located within this state. We think the arrangement of the words used does not permit us to construe the provision as though it read "Schools of medicine, osteopathy and chiropractic accredited in and by the state of Iowa." The provision under discussion will not permit of two constructions.

"It is a general rule of law, early adopted in this state, that when the language of a statute is explicit and definite, the words used shall govern." *State vs. Claussen,* 216 Iowa 1079.

It is not for us to determine the soundness or fairness of legislative policy. We must construe the statutes as we find them.

MOTOR VEHICLE FUEL TAX: PENALTY: MID-CONTINENT PETROLEUM CORPORATION OF TULSA, OKLA.: If it apears to Treasurer of State that there was no attempt to evade payment of motor vehicle fuel license fees due and payable by Mid-Continent Petroleum corporation as of April 20, 1936, then he may waive the penalty as provided for therein.

May 20, 1936. *Treasurer of State:* I have your letter of May 15, 1936, in which you ask for an opinion from this department with respect to your authority in the matter of waiver of penalty with respect to the return made by the Mid-Continent Petroleum Corporation of Tulsa, Oklahoma, which facts are set forth in your letter.

It appears that following the decision of the Honorable F. H. Rice, Judge of the District Court of Woodbury County, Iowa, holding the motor vehicle fuel tax law of the State of Iowa unconstitutional, that this matter was referred to the legal department of the Mid-Continent Petroleum Corporation for legal advice with reference to the future payment of the motor vehicle fuel tax in the State of Iowa.

It further appears that the delay in making their return was caused by their legal department in reviewing Judge Rice's opinion and also the laws of the State of Iowa and decisions of our Supreme Court with reference to similar matters.

Chapter 251-F1 of the 1935 Code of Iowa contains the complete Code laws

with reference to the motor vehicle fuel tax. Section 5093-f9 of the 1935 Code provides as follows:

"* * * If any distributor of motor vehicle fuel shall fail to remit on or before the twentieth of each month to the Treasurer of State to cover the license fees due on that date as shown by his report, a penalty of ten per cent of the amount thereof shall immediately accrue and become due and payable when such license fees are paid or collected."

Section 5093-f11 of the 1935 Code provides as follows:

"* * * The Treasurer of State may remit in whole or in part the penalty herein provided for, if convinced that there was no intent to evade the payment of the motor vehicle fuel license fees."

While the above quoted portions of the law appear in two different sections of the motor vehicle fuel tax code, yet the entire chapter should be considered in determining the real legislative intent. This proposition has previously been passed upon by the United States Supreme Court in the case of *Mona Motor Oil Company vs. Johnson,* 292 U. S., 86.

Hence, in construing the above sections, it appears that the Treasurer of State is vested with discretionary or quasi judicial powers in determining whether or not there was an attempt to evade the payment of the motor vehicle fuel license fees due as shown by the record in this case.

Therefore, it is the opinion of this department that if it appears to the Treasurer of State that there was no attempt or intent to evade the payment of the motor vehicle fuel license fees due and payable by the Mid-Continent Petroleum Corporation as of April 20, 1936, then he may waive the penalty as provided for therein.

ENGINEERING FIRMS: Firms must be registered in this state in order to render engineering services. One who practices a profession without complying with the law governing such practice may not recover for his services.

May 22, 1936. *State Board of Engineering Examiners:* Your letter of May 18th to the Attorney General has been referred to me for reply.

You state that in 1934 and 1935 a firm in Chicago entered into a contract with the city of Iowa City to appraise the property of the Iowa City Light and Power Company, and that such firm was never at any time registered with the State Board of Engineering Examiners of this state and has never had a certificate or license to practice engineering in this state. This firm performed its contract and was paid one-half of the contract price for its services. You state that officials of Iowa City now wish to know whether this firm could make the appraisals without registering with the State Board of Engineering Examiners and whether or not the city is liable for the remainder of the contract price.

If it is a fact that the firm in question was employed as an engineering firm to render engineering services within this state, it could not legally render such service so long as it was not registered in this state as required by Chapter 89 of the Code of Iowa. Section 1875 of the Code provides that any person who is not legally authorized to practice in this state as provided in said chapter, and who shall practice or who shall, in connection with his name, use any designation tending to imply or designate him as a registered practitioner within the meaning of this chapter, shall be deemed guilty of

a misdemeanor and shall for each offense be punished by fine or imprisonment, or both.

According to your letter, the firm did make the appraisal without registering with the State Board of Engineering Examiners. Not having seen the contract which this firm had with the city, we are not able to say whether the city is liable for the unpaid portion of the contract price for their services.

It is a general principal of law in this state that one who practices a profession without complying with the law governing such practice may not recover for his services. *Lynch vs. Kathmann,* 180 Iowa 607; *Miller vs. City,* 185 Iowa 307; *Lyon vs. Leet,* 199 Iowa; *Rader vs. Elliott,* 181 Iowa 156; *Rowe vs. Toon,* 185 Iowa 848.

In the case of *Rader vs. Elliott,* supra, a Johnson County case, the court held that a veterinarian could not recover for services rendered where he was not regularly licensed to practice his profession in this state.

Lynch vs. Kathmann, supra, was an action to recover for medical services. The defendant plead that the plaintiff had failed to record his certificate in the office of the County Recorder. The Supreme Court sustained judgment for the defendant.

In view of this line of authorities, it would appear that the city of Iowa City, on a proper showing of facts, would have a good defense if suit were brought by the unlicensed engineering firm to recover the balance of the contract price.

You also request an opinion as to the extent of the Board's responsibility in cases of this nature, and ask whether it is the duty of the Board to see that all engineers practicing in this state are registered, or whether it is merely the Board's duty to pass on those who make application for registration. The Engineering Board has only those duties specifically conferred upon it by Chapter 89 of the 1935 Code of Iowa. This chapter prescribes no law enforcement duties. It is our opinion, however, that if the Board knows of violations of the engineering laws of the state, it should call attention of the law enforcement officers to such violations and should lend its assistance to the enforcement of engineering laws to the end that the purposes of the Legislature in the enactment thereof may be accomplished.

EMERGENCY RELIEF ADMINISTRATION FUND—OVERSEER OF POOR. The identity of the overseer of the poor in a county has nothing whatever to do with the county's right to participate in the I. E. R. F., and a summary and arbitrary discontinuance of relief by the I. E. R. A. would subject those responsible for such discontinuance to proceedings in mandamus.

May 23, 1936. *County Attorney, Davenport, Iowa:* We acknowledge your letter of May 18th in which you submit the following questions:

1. Can the Scott County Board of Supervisors appoint an overseer of the poor for Scott County, Iowa, without consulting with, or obtaining the approval of, the Iowa Emergency Relief Administration?

2. If the overseer of the poor of Scott County, Iowa, appointed by the Board of Supervisors of Scott County, Iowa, does not meet with the approval of the Iowa Emergency Relief Administration, would the said Emergency Relief Administration have the right to deprive Scott County, Iowa, of any financial assistance provided for under Chapter 76, Laws of the 46th General Assembly.

Chapter 76 of the Laws of the 46th General Assembly provides as follows:

"On July 1, 1935, and quarterly thereafter, up to and including April 1, 1937, the board shall, from the revenue collected under this act, set aside and cause to be paid into a fund to be known as the Iowa Emergency Relief Administration Fund, which fund is hereby created, the sum of one million dollars quarterly, which sums *are hereby appropriated for direct relief and for* work relief and for expenses incidental thereto, for the *purpose of caring for unemployed and needy persons within this state.* The funds hereby appropriated shall be administered through the Iowa Emergency Relief Administration and shall be withdrawn only as needed from time to time, by requisition of the governor, and upon warrants drawn by the State Comptroller payable to the Iowa Emergency Relief Administration. WITH THE EXCEPTION OF NECESSARY ADMINISTRATIVE EXPENSES, SAID FUND SHALL BE ALLOCATED BY THE IOWA EMERGENCY RELIEF ADMINISTRATION THROUGHOUT THE VARIOUS COUNTIES OF THE STATE IN ACCORDANCE WITH THE NEED THEREFOR."

It will be conceded that the I. E. R. A. is a state agency for the administration of direct and work relief in the state. It came into being in the early part of 1933 for the purpose of distributing funds which were available from the federal government. The organization grew and by the fall of 1933 had assumed proportions of considerable magnitude. It was recognized by the Legislature in the 45th Extra Session, being referred to as the Federal Emergency Relief Administration of Iowa in Chapter 153 of the Session Laws. This is the first time such an organization appears in our statutes. In 1935 the 46th General Assembly recognized the organization as the I. E. R. A., as indicated in the statute set out above. This is the second and last time that such an organization is mentioned in our statutes. It is not a creature of our state Legislature, except as implied in the statutory references aforesaid. It has no designated powers or authority of any description as a state institution unless we say that the duty of allocating the emergency relief fund is a power. We have searched in vain for some statute defining the powers and general authority of this organization and we are satisfied that such authority as it has is limited to the implication contained in Chapter 76 of the Laws of the 46th General Assembly. No person with average intellect could read this statute and arrive at any other conclusion than that the I. E. R. A. is a recognized state agency for the distribution of the Iowa Emergency Relief Administration Fund throughout the various counties of the state in accordance with the need therefor. A purely administrative and ministerial agency, with no particular powers of any description except such as naturally fall within the scope of the duties to be performed.

Your first question infers that the I. E. R. A. or some individual connected with the same, is attempting to dictate to the Board of Supervisors of your county in the matter of the appointment of the overseer of the poor. This office, as you know, is created by statute, Section 5321 of the 1935 Code, which provides:

"5321. *Overseer of 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. . . . ."

This section is contained in Chapter 267 of the Code, which is devoted to poor relief, the administration of which is solely and exclusively a county

obligation and a primary duty of the township trustees and the Board of Supervisors. The office of overseer of the poor was created for convenience and in an apparent effort to give better service to those entitled to such service. The selection of such officer is left to the discretion and judgment of the Board of Supervisors who, it may be fairly assumed, are acquainted with the people and conditions in their county and will use their best judgment in selecting an overseer best qualified to serve. How, where or why, any person connected with the I. E. R. A. should claim a voice in the selection of such official is beyond our comprehension. No statute grants such a right or even privilege. If the Legislature intended that such a right or privilege should be granted or enjoyed, we would find some expression of such intent in our statutes. We find none and we are forced to the conclusion that the Board of Supervisors has the sole and exclusive authority to appoint such overseer of the poor as judgment and discretion dictates, without consulting with or obtaining the approval of anyone outside its own membership.

Your second question infers that the I. E. R. A. or someone connected therewith, is threatening or attempting to accomplish indirectly that which may not be done directly, by a mandate, as it were, in effect: "You will appoint an overseer approved by me or your county will receive no more funds from the Iowa Emergency Relief Administration Fund." We have given this matter considerable thought and we are unable to understand such a position. Why should the identity of the overseer of the poor have any effect upon the I. E. R. A. in carrying out its functions of distributing the state fund? The overseer pays no claims and handles no money. He approves claims before they are presented to the Board of Supervisors but it is the Board that allows claims against the poor fund and this is one of the very sound reasons why the Board should be permitted to appoint the overseer, an officer in whom they have confidence as to his ability and judgment. But, to return to the question at hand, we must look into the statutes to determine the answer.

In passing upon the most recent statute, we might suggest, with all due respect to the Legislature, that Chapter 76 of the 46th General Assembly is not exactly a model of legislative effort in the matter of prescribing a formula for the allocation of the E. R. F. No system is prescribed, no official is named to whom responsibility might attach, the Legislature merely said that said fund shall be allocated by the I. E. R. A. throughout the various counties of the state in accordance with the need therefor. The lexicographers tell us that "allocate" means "to allow an appropriate portion; to apportion; to allot." Therefore, the I. E. R. A. is directed by the Legislature to distribute the fund to the various counties in appropriate portions in accordance with the need therefor. The next question is: "Who determines the need therefor?" Was it intended that the I. E. R. A. should send out agents into each county of the state to determine "the need therefor," a stranger in a strange land attempting to determine a question of such vital importance to the community? Was this the thought of the Legislature when each county already has a Board of Supervisors, township trustees, welfare workers in cities and towns, and an overseer of the poor, any and all of whom should be fairly well qualified to determine "the need therefor" on a moment's notice? We have too much respect for the intelligence of the Legislature to entertain

the notion that such policy was contemplated in the enactment aforesaid. If the Legislature had any such thought in mind it may fairly be assumed that the statute would contain some such indication. The Legislature said that the fund shall be allowed to the counties in appropriate portions. The Legislature knew that the matter of poor relief is a statutory duty and obligation of the County Supervisors and such other proper officials as the Supervisors choose to appoint. The Legislature must have recognized the fact that relief generally is a purely and strictly local enterprise and, in the absence of a legislative direction to the contrary, it may be assumed that the intent of the Legislature was that the E. R. F. should reach the proper objects of its bounty through the hands of the Board of Supervisors in each county. The "need therefor" to be determined, in the first instance, by the Board of Supervisors.

We have, then, a fund of one million dollars to be apportioned every three months by the I. E. R. A. to the various counties of the state in accordance with the need therefor. We are now confronted with the question as to how, on what basis, shall the apportionment be made? If the fund were to be divided into 99 equal parts it would be a simple matter. Unfortunately, such is not the purpose of the law. However, it would appear that a certificate from each county stating the number of persons on relief, or the amount of money to meet anticipated needs each month or each three months, would offer a tentative basis for apportionment. It should not be expected that the I. E. R. A. should meet such tentative demands. It is probable that the fund available would not permit. We have no doubt that the I. E. R. A. has current records of the number of people on the relief rolls in each county and the organization is probably acquainted with the greater and lesser needs in different parts of the state. With this information at hand or available, the I. E. R. A. should be able to arrive at a fair and equitable basis of apportionment to the various counties. It is not to be expected that every county will be satisfied with its allotment but the final determination of the basis of distribution must be placed somewhere and the statute seems to indicate that this duty and function is in the I. E. R. A. Therefore, the determination of the I. E. R. A. should be final when such distribution is fair and equitable in the light of statistics at the time of such determination. Any county aggrieved in the matter would have a right to apply to any district court and present evidence that it was being wrongfully deprived of its due proportion of the state fund. If such evidence proved that said county was the victim of arbitrary discrimination, it would seem that a writ of mandamus would be in order.

Therefore we come to the conclusion that the identity of the overseer of the poor in your county has nothing whatever to do with the county's right to participate in the I. E. R. F. and a summary and arbitrary discontinuance of relief by the I. E. R. A. would subject those responsible for such discontinuance to proceedings in mandamus.

BOARD OF CONTROL: AUDITING: Where steward or storekeeper of institution resigns, he is required to account for property in his possession and this accounting would be a post-audit and not a pre-audit, and the making of this audit or check is clearly the duty of State Auditor's office.

May 25, 1936. *Board of Control:* We have your request for opinion on the following propositions:

"Since the passage of the Budget Control Act, this office has no accountant nor auditor. Quite often, it is necessary to check out a steward or storekeeper of an institution. Would you please advise whether it is the duty of the State Auditor's office to make this check?"

The budget and financial control act is Chapter 4 of the Laws of the 45th General Assembly and Section 11 of the act provides in part as follows:

"The Board of Control is hereby relieved of all duties with regard to institutions under its control, in respect to auditing, abstracting and certifying claims for payment, prescribing uniform accounts and the maintenance of a central system of accounts is acquired by Chapter 167 of the Code, 1931, or any other law."

Section 6 sets forth the duties of the State Comptroller and they are, generally, to preaudit all accounts and to control the payment of all moneys into the treasury and out of the treasury. Chapter 5 of the Laws of the 45th General Assembly is the state audit act and this redefines the duties of the State Auditor that they are in general that that office shall do all post-auditing, so that at the present time, the various institutions are relieved of all duties pertaining to auditing and all pre-auditing is in the hands of the comptroller and post-auditing is in the hands of the auditor.

Where a steward or storekeeper of an institution who has charge of certain properties of the state, resigns, he should, of course, be required to account for the property in his possession and under his control, for in no other way can his bond be released, and this accounting then, would be a post-audit and not a pre-audit, and it seems clear to us, therefore, that the making of this audit or check is clearly a duty of the State Auditor's office, and such is the opinion of this department.

BOARD OF CONTROL: PRISONERS: SENTENCES: Any person who shall commit Sodomy shall be imprisoned not more than 10 years (Sec. 12980)—therefore, under indeterminate sentence statute, any attempted fixing of sentence by court is surplusage. As to second proposition—prisoner now serving time at Fort Madison under sentence from Scott county and Polk county having revoked his parole and sent mittimus to Superintendent of Men's Reformatory at Anamosa—it seems clear that as the two institutions are under the Board of Control and the prisoners are interchangeable —that the two sentences will run concurrently.

May 27, 1936. *Board of Control:* We have your letter enclosing letter from W. H. Frazer, warden of the Men's Reformatory and a copy of the mittimus, also letter from the sheriff in regard to Ray Curling, No. 15,673, and you ask our opinion on the following proposition:

"Curling pled guilty to the crime of Sodomy and his sentence reads in part as follows:

'It is the judgment of the court that the defendant be committed to the Men's Reformatory at Anamosa for an indeterminate term of five years and pay the costs.'

The court thereafter paroled him. Subsquent thereto, he was found guilty in Scott county of the same crime and on September 7, 1935, the District Court of Polk county which had paroled him, entered an order revoking his parole. His commitment from Scott county was to the State Penitentiary at Fort Madison, that commitment being on the 17th of August, 1935.

"Will you please advise as to the term of years for which he should be

entered and whether the sentences of the Polk and Scott county courts run concurrently?"

In regard to the first proposition of sentence, Section 12980 provides that any person who shall commit sodomy shall be imprisoned in the penitentiary not more than ten years and therefore, under the indeterminate sentence statute, any attempted fixing of the sentence by the court is surplusage, for he is to be confined until released, the confinement not to run for over the maximum period of ten years. The sentence should, therefore, be for ten years.

We have heretofore rendered a number of opinions to your office on this proposition so it is not necessary to set forth the cases except that we should suggest that there is now a case pending in the Supreme Court entitled Cave & Keener vs. Board of Control, in which the plaintiffs claim that the board is without authority to in any wise change the commitment even though the commitment be not according to law. Our Supreme Court has apparently held against this proposition for a number of years, but we are calling your attention to this present case in the Supreme Court, for it is always possible that the Supreme Court might reverse a former position that they have taken so that this prisoner should be entered with the maximum term of ten years.

Now, as to your second proposition, as I understand the facts, the prisoner is now serving time in the penitentiary at Fort Madison under the sentence from Scott County, and that Polk County, having revoked his parole and sent the mittimus to the Superintendent of the Men's Reformatory at Anamosa, the question is whether the sentences will run concurrently even though the prisoner is not actually present in the reformatory at Anamosa, but is in the penitentiary at Fort Madison.

In Dickerson vs. Perkins, 182 Iowa, 871, a prisoner there was sentenced from two different district courts and one of the questions raised was whether sentences run concurrently and it was argued that it would only be where a person was sentenced from the same court, but the court there held that the clear implication of the statute is that such terms run concurrently unless the court entered judgment otherwise, and the court there held that our statute was very broad on this proposition. As the court here did not order that the sentences run consecutively, it, therefore, seems clear that as the two institutions are under the Board of Control and the prisoners are interchangeable, that the two sentences will run concurrently even though he is actually confined in only one of the institutions, and such is the opinion of this department.

I am returning herewith the letter from Mr. Frazer together with the other enclosures in your letter.

REAL ESTATE LICENSE LAW: Can a licensee divide a commission with one who does not have a license upon the pretext that the two are involved in a real estate transaction as a partnership?

May 27, 1936. *Secretary of State:* In your letter of May 22, 1936, you request the opinion of this department on the following question:

"Can a licensee divide a commission with one who does not have a license upon the pretext that the two are involved in a real estate transaction as a partnership?"

It is the opinion of this department that the question submitted is answered in the first three sections of the real estate brokers' law, Chapter 91-c2, the sections being 1905-c23, 1905-c24 and 1905-c25. The first section deals with those who must have a license to sell real estate. If one of the persons who is a co-partner has not a license, he could not take a commission for selling real estate in this state. If those persons desiring to sell real estate as a co-partnership wish to do so under the law, it will be necessary that they take out a license issued by your department.

The next section, 1905-c24, provides in part:

"No copartnership * * * * shall be granted a license, unless every member or officer of such copartnership * * * who actively participates in the brokerage business of such co-partnership * * * * shall hold a license as a real estate broker * * * *."

Therefore, if the partner who desires to take commissions and who is actively engaged, or takes any part, in the transaction, and does not have a license, he cannot sell real estate in this state legally.

The next section involved, 1905-c25, states that:

"* * * * any person who for a compensation or valuable consideration is employed either directly or indirectly by a real estate broker, to sell or offer to sell, to buy or offer to buy, or to negotiate the purchase or sale or exchange of real estate, or to lease, to rent, or offer for rent any real estate, or to negotiate leases thereof, or of the improvements thereon, as a whole or parties vocation" is defined as a real estate salesman and must have a license.

You cited Section 1905-c48, Subsections 1, 2, 7 and 9 of the 1935 Code of Iowa, which are also in point with reference to making misrepresentations or false promises and failing to remit any moneys, and also relate to the paying of a commission or valuable consideration to any person for acts or services performed in violation of this chapter. In this connection you will note that Section 1905-c25 speaks of those who for compensation, either directly or indirectly, are employed by a real estate broker to do all the things set out above, are defined as real estate salesmen.

Therefore, apparently the question presented is statutory in its nature, and the statutes clearly present the situation and are broad in their application.

BEER LAW: Person desiring to do business on the waters of the Mississippi river could not qualify under any of the methods by which permit could be secured. Person selling beer without a permit are violating the Iowa beer law and would be subject to the penalties therein provided.

May 29, 1936. *Treasurer of State:* Supplemental to our letter to you under date of April 14, 1936, you give us more information in regard to the question submitted. You state that it was your desire to secure information with reference to class "B" permit holder, rather than that of a class "A" permit holder. The question is of a person selling beer at retail from a float pavilion on the Mississippi River, this float to be used as a tavern, the intention being to serve beer and food. It is the desire to sell beer "only on federal waters."

Section 3 of the 1935 Code of Iowa states as follows:

"*Concurrent jurisdiction.* The state has a concurrent jurisdiction on the waters of any river or lake which forms a common boundary between this and any other state."

From your presentation of the facts, we assume that no matter of interstate commerce is involved, and that the person desiring a permit to sell beer will sell on the Mississippi River adjoining the Iowa shore. Therefore this state would have jurisdiction in accordance with the Code section above cited.

It has been held by our Supreme Court that one fishing in the river which forms a boundary between Iowa and Illinois has to have an Iowa fishing license. This case is *State vs. Moyers,* 155 Iowa 678.

Under the Iowa beer law there appears to be no way in which such a person could secure a permit to sell beer from a boat in the Mississippi River. Under our law permits are only issued by cities and towns to those located within the incorporated limits of such cities and towns, also Boards of Supervisors are given the power to grant permits, under certain conditions, to applicants located in unincorporated villages platted prior to January 1, 1934. The other provision for the grant of permits is for several special classes of permits to golf or country clubs, hotels and railroad cars.

A person desiring to do business on the waters of the Mississippi River could not qualify under any of the methods by which a permit could be secured, and if such a person should undertake to sell beer without a permit, under Section 3 of the Code above set out, the authorities of the adjoining Iowa counties should take steps to see that the practice is discontinued, as he would be violating the Iowa beer law and would be subject to the penalties therein provided.

LIQUOR CONTROL COMMISSION: ENFORCEMENT OF LIQUOR LAWS: DUTY OF LOCAL LAW ENFORCEMENT OFFICERS:

"Therefore, it is the opinion of this office that the Liquor Commission does not have the duty of enforcing the liquor laws of the State of Iowa and that the Liquor Commission cannot assign any of its personnel to assist local law enforcement officers whose duty it is to enforce the liquor laws of the state."

May 29, 1936. *Iowa Liquor Control Commission:* Your question relative to law enforcement divides itself into two parts:

(1) Does the duty of enforcing the liquor laws of Iowa rest with the Iowa Liquor Control Commission?
(2) Does the Iowa Liquor Control Commission have it in its power to assign the men in its investigating department to local officials for the purpose of assisting local officials in enforcing the liquor laws in such official's community?

The Supreme Court recently answered the first question in the negative when the decision in the case of State vs. Cooper, 265 N. W., 915, was handed down. The Supreme Court in this case in effect said that Section 87 of the Iowa Liquor Control Act puts the duty of enforcing the liquor laws of the state in the hands of the County Attorneys and other local officials, and that the Commission has no more to do with violations of the liquor laws by the public than a private citizen. Section 87 quoted in this case reads as follows:

"In every county in Iowa the County Attorney will constitute the head of the enforcement provision for the Iowa liquor control commission. As supplementary aids to such attorney the Sheriff and his deputy, or deputies, and the police department of every city, this to include the day and night Marshal of every incorporated town.

"Any neglect, misfeasance, or malfeasance shown by any peace officer

included in this section will be sufficient cause for his removal as provided for by the statutes of the State of Iowa."

A reading of the pertinent portion of the opinion which deals with the subject of enforcement of the liquor laws leaves no room for doubt that your question must be answered in the negative.

"As a matter of sensible contemplation, it seems highly speculative that the Legislature would have even anticipated, as a likely evil to be guarded against, that the personnel of the commission the Legislature was so carefully creating would be knowingly and willingly permitting bootlegging and kindred offenses by the public. But, if the Legislature had contemplated such evil as something to be safeguarded, as appellee claims in argument, it is quite necessary to believe and assume that somewhere in the act the Legislature would have taken definite precautions against the evil, and would have imposed in express terms on the personnel of the commission some duty to be observed, or some authority to be exercised, in restraining or preventing or prosecuting the offending public. This the Legislature did not do. Nothing of that nature is to be found in the act. It is hardly reasonable that the Legislature contemplated such evil so casually and without providing in the act any specific obligations or duties in avoidance thereof. But in another manner the Legislature seems to have legislated fully on the subject of controlling violations by the public.

For it is noted that Section 87 of the Act (Code 1935, C. 1921-f94) constitutes the County Attorney of every county together with the Sheriffs, Deputies, City Police, and Town Marshals of the entire state as the enforcement provision of the act. In this section, the Legislature placed its dependence upon the County Attorneys and this body of peace officers, that observance of the act by the general public would be obtained, and made any neglect, malfeasance, or misfeasance sufficient ground for removal. Such provision was an efficient method of attaining that object on account of the contact with the public and the opportunity to be advised of violations, incidental to the other duties of such County Attorneys and peace officers. The Legislature having thus delegated to a defined body of public officials the enforcement of observance by the general public, and significantly omitting the personnel of the commission from such group of enforcement officials, it is a fair conclusion, from these positive matters appearing in the act, that the Legislature had no contemplation that the personnel of the commission would have any more to do with violations by the public than would a private citizen."

In answering your second question, it might be well to set out the facts relative to your investigating department. As I understand it, your investigating department consists of Chief W. W. Akers, who is in charge, and ten men. The duties of four men consist of acting as guards in the warehouse and as night watchmen. The remaining six men are used to police the store and central office personnel and in the past have assisted county attorneys in gathering evidence against liquor law violators. They frequently have also assisted the Federal law enforcement officers in gathering evidence of violations of the Federal liquor laws.

The Liquor Commission can only do those things which come within the scope of the purpose for which it was created by the Legislature. It is not necessary to go into a detailed discussion as to what this purpose is. Suppression of liquor law violations quite obviously is not within its scope, for the Supreme Court in the case cited above states that violation of the liquor laws is no more the business of the Liquor Commission than it is of a private citizen.

If the Liquor Commission has no more business enforcing the liquor laws than a private citizen has, the Liquor Commission quite obviously cannot hire

and pay men to go out and do enforcement work. If enforcement of the liquor laws is beyond the scope for which it was created, the Liquor Commission cannot hire people and pay them to assist local officials to do this type of work. In other words, the Liquor Commission cannot do indirectly that which the Supreme Court has said is none of its business to do directly. This is particularly true since the very people whom they wish to assist, county attorneys and other local officials, have been specifically named in Section 87 of the Iowa Liquor Control Act as those upon whom the duty of enforcing the liquor laws squarely rests.

Therefore, it is the opinion of this office that the Liquor Commission does not have the duty of enforcing the liquor laws of the state of Iowa and that the Liquor Commission cannot assign any of its personnel to assist local law enforcement officers whose duty it is to enforce the liquor laws of the state.

OLD AGE ASSISTANCE LAW. Applicant for old age assistance, convicted of a felony and discharged from a penal institution after serving sentence imposed, is eligible for assistance, if the other provisions or qualifications of the act are met.

May 29, 1936. *Old Age Assistance Commission:* In your letter of May 13, 1936, you request the opinion of this department on the following question:

Is an applicant for old age assistance, who has been convicted of a felony and who has been discharged from a penal institution after serving the sentence imposed eligible for old age assistance?

You cite Section 3823 of the 1935 Code of Iowa, which provides in part as follows:

"The governor shall have the right to grant any convict, whom he shall think worthy thereof, a certificate of restoration to all his rights of citizenship. * * * *"

You further state:

"It has, therefore, been the supposition of this department that a felon has lost all civil rights, including the right to receive old age assistance."

It is the opinion of this department that Section 5296-f12 of the 1935 Code of Iowa controls as to the granting of assistance in all cases. Found in that section are eleven subsections with reference to qualifications of the applicants. Subsection 7 thereof states:

Old age assistance may be granted only to an applicant who, at the time of making application for assistance or for the renewal of a certificate of assistance:

"7. Is not at the date of making application or of receiving aid, an inmate of any prison, jail, workhouse, insane asylum, or any other public reform or correctional institution."

It is our thought that if convicts discharged from penal institutions were to be denied the right to receive old age assistance, the legislature would have so stated in the statute above set out.

As we view the situation presented, the legislature in Section 5296-f12 of the 1935 Code of Iowa is specific on the point that one cannot be granted old age assistance if he is an inmate of any prison, jail, workhouse, insane asylum, or any other public reform or correctional institution.

Therefore, it is the opinion of this department that an applicant for old age assistance, who has been convicted of a felony and who has been discharged

from a penal institution after serving the sentence imposed, is eligible for old age assistance, if the other provisions or qualifications of the act are met.

BANKS: SERVICE CHARGE TO BANK BY PUBLIC BODIES: Public body has no authority to pay service charge to banks on their deposits.

June 5, 1936. *Superintendent of Public Instruction:* You have handed to us a letter from the Dewitt Iowa public schools, enclosing a form letter from the First National Bank of Dewitt advising that the following charges will be made, effective May 1, 1936:

"A uniform insurance charge of 50c per month will be made on all checking accounts, regardless of size. For this charge the customer is entitled to ten free checks. For each additional check there will be a charge of 3c to cover actual handling cost."

You ask whether a school district has authority to pay such sums to their depository bank.

Under date of May 8, 1934, this office ruled on the question of authority of public bodies to pay service charges and part of that opinion is as follows:

"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 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 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."

Subsequent to the rendering of the above opinion, there was a meeting of representatives of the bankers association and state officers and it was agreed that if the interest rate into the sinking fund was reduced, then there would be no question of service charges as against public funds and it was settled in this manner, and the legislature pursuant to this arrangement, did reduce the interest to the sinking fund, and under the provisions of Chapter 85 of the Laws of the 46th General Assembly, the Treasurer of State, with the approval of the Executive Council, has the authority to adjust the rate of interest payable by all depositories on public funds.

It is, therefore, the opinion of this department that this public body has no authority to pay these service charges.

SCHOOLS: TEACHERS' TRAINING: SUPERVISED STUDENT TEACHING: Arrangement by which additional compensation is paid to teacher for additional work in working with supervisor of students and with students themselves in their practice teaching is legal, if arrangements are made prior to time services are rendered.

June 5, 1936. *The Board of Educational Examiners:* We have your request for opinion on the following proposition:

"Chapter 193 of the Code authorizes the State Board of Educational Examiners to issue teachers' certificates pursuant to provision of that chapter. One of the requirements of the board is that the teacher's training must

have included a course in directed observation and supervised student teaching. In order that their graduates may have this supervised student teaching, a number of the colleges in the state enter into arrangements with the public schools whereby these students assist in teaching of the pupils in the public schools and are supervised by the regular public school teachers of the particular rooms in which the student is assisting. It oft happens that after the regular contract of the teacher has been entered into, the practice teaching is done under that teacher and the board enters into arrangements whereby additional compensation is to be paid to the teacher for her additional work in working with the supervisor of the students, and with the students themselves in their practice teaching and this often requires a great deal of additional time of the regular school teacher as individual conferences are necessary with the college, the supervisor and the student teachers. These student teachers pay their fees directly to the college of which they are students and the colleges then pay the public schools for the services rendered, that is, for furnishing a place for supervised student teachers, and out of this sum is paid the additional compensation to the regular public school teachers.

"Would you please advise us whether this practice is legal under the laws of this state and whether the school boards are authorized to pay their teachers an additional sum for this additional work?"

This question received the consideration of our Supreme Court in the case of Clay v. Independent School District of Cedar Falls, 187 Iowa, 89, decided in 1919. In that case, an action in equity for an injunction and for a writ of mandamus was asked against the defendant, Independent School District of Cedar Falls. It appears that the officers of Iowa State College and the district entered into an agreement whereby certain of the advance students of the college went into the public schools and received supervised student teaching and the plaintiffs who were residents and taxpayers of the district challenged the regularity and legality of such arrangement and our Supreme Court there, after going thoroughly into the proposition, held that the school board of the Independent District did have the right to make such arrangement and that such arrangement was legal and was not an unauthorized use of the school building and funds.

Turning then to the question of compensation, the court pointed out in the Clay case that the teacher was paid partly from the funds of the district and partly from funds of the college and in regard to the legality of such arrangement, the court said at page 106:

"So far as we may discover from the entire record, there has been no fraud or corruption on the part of the Board of Directors or any member thereof, nor, indeed, is there any charge of such wrong. The funds of the district have not been misappropriated or diverted from their proper uses. Neither the school district in general nor the plaintiffs in particular have been deprived of anything to which they are entitled."

Preceding this statement, the court said at page 104:

"We are unable to see why a teacher may not lawfully divide her time and labor between two schools, and receive compensation from both, where both employers consent, and payment is equitably proportioned to each. If these schools were rivals, and service rendered to one involved any disloyalty to the other, there might be room for objection; but there is no showing that the district has paid these teachers, or any of them, any more than their stipulated wages for the time actually employed, or that the teachers have failed to return the full equivalent therefor in honest service."

So, if the college could pay the teachers directly, there is no reason why

they could not pay them indirectly by paying a certain amount to the school district and the district in turn pay the teachers for this additional service. As we understand, the agreement with the teacher in regard to compensation is entered into prior to the time the services are rendered, that is, after the teachers' contracts have been entered into, some of the teachers are chosen to supervise the student teaching, and for this additional work, the school board agrees to pay them an additional amount of money over and above that originally stipulated in their contract, and this, of course, is legal, but it would not be legal if the services were rendered and then at the end of the period, the school district voted to give to the teachers a gratuity or some reward for additional work, for public officers and employees are not so entitled to gratuities for work already performed, but are entitled to arrange as to their compensation prior to the time the services are rendered.

We believe that this fully and completely answers your inquiry and you will note that our opinion is that the arrangement that you have outlined is legal and that the teachers are entitled to the additional compensation.

SCHOOLS: MOVING OF SCHOOLHOUSE: In moving a schoolhouse from one sub-district to another to replace schoolhouse destroyed by cyclone the matter must be submitted to a vote of the electors and it must be submitted to the vote of the entire district.

June 5, 1936. We have your request for opinion on the following proposition:

"School directors of a district desire to move a schoolhouse from one sub-district to another to replace the schoolhouse which has recently been destroyed by a cyclone. They feel that it would serve their purpose and save the district considerable money and would be for the best interests of the taxpayers.

"There are two questions that arise in regard to this:

1. "Do the school directors have the authority to order the schoolhouse moved or must it be submitted to the vote of the electors?"
2. "If a vote is necessary, should the vote be of the entire district or just the vote of the two sub-districts involved in the transaction?"

Back in 1873, the Superintendent of Public Instruction ruled on this proposition, the ruling being found in the school laws of Iowa, 1935, and beginning at page 365. This ruling is as follows:

"J. W. Randall vs. District Township of Vienna
Appeal from Marshall county

Schoolhouse. The board may legally remove a schoolhouse from one sub-district to another only by vote of the electors.

Schoolhouse. When the electors have voted to remove a schoolhouse from one sub-district to another the board must execute such vote, and from its action in so doing no appeal can be taken.

Injunction. The execution of a fraudulent vote of the electors may be prevented by a writ from a court of law.

At the district township meeting held the second Monday in March, 1873, it was voted to remove the schoolhouse situated in sub-district number four into sub-district number three. On the seventeenth day of March, the board ordered the removal of the schoolhouse in accordance with said vote of the electors. From this action, appeal was taken to the county superintendent, who reversed the action of the board. The district township, through its president appeals.

Section seven, School Laws of 1872, provided that the electors shall have the power 'to direct the sale, or other disposition to be made of any school-

house'; also 'to vote such tax, not exceeding ten mills on the dollar in any one year, on the taxable property of the district township as the meeting shall deem sufficient for the purchase of grounds and the construction of necessary schoolhouses for the use of the respective sub-districts.' Section fifteen provides that the board 'shall make all contracts, purchases, payments and sales necessary to carry out any vote of the district.' Section sixteen provides that the board 'shall fix the site for each schoolhouse.'

From the law as above quoted, we understand that the electors may vote a tax for the erection of a schoolhouse in any particular sub-district, or may direct the removal of one already built, from a sub-district, and that the board determines the site within a sub-district, but has no authority to remove a schoolhouse from a sub-district without affirmative action of the electors, such action, however, being taken, the board must execute their vote, if in accordance with the law. From the action of the board in thus executing the vote of the electors, no appeal can be taken. If the vote of the electors is contrary to law, its execution may be prevented by injunction; if unwise, the electors, themselves, must bear the consequences."

This appears to be good law and as far as we can ascertain, has never been modified by either this office or by our Supreme Court, and therefore, that opinion which has stood for a great number of years adopted as the opinion of this department and you will note therein that it is necessary to submit the matter to a vote of the electors.

As to your second proposition, it, of course, must be submitted to a vote of the entire district, as under our law, a school district is the only legal entity, the subdistricts being such only for governmental purposes, but with no authority under the law as an entity.

HIGHWAY COMMISSION: RE-CONVENING OF BOARDS OF APPROVAL. Board of Approval has authority to re-convene to adopt new road program where some of the projects submitted at the first meeting were found unsatisfactory to the Iowa State Highway Commission.

June 6, 1936. *County Attorney, Mills County:* Your letter of May 18, 1936, has been referred to this office for reply.

As I understand the situation, the Board of Approval in your county met in regular meeting following the procedure providing for the calling of the same, provided for in Sections 4644-c24 to 4644-c33, inclusive. At this meeting certain secondary road construction projects were approved; the program of such projects was then submitted to the Iowa State Highway Commission for approval, as provided in Section 4644-c24; the Highway Commission found one of the projects submitted unsatisfactory and the Board of Approval reconvened and approved another project in the place of the unsatisfactory project; that some question is now raised as to the legality of reconvening the Board of Approval for such projects.

The first question suggested, is as to when the project should be submitted to the Iowa State Highway Commission for approval, as provided by Section 4644-c24. This section states that the program must be submitted by the Board of Supervisors, but does not specify when. However, in Section 4644-c34, it is stated that at the meeting of the Board of Approval the proposed program may be approved without change, or may be amended and approved. As long as the proposed program is subject to amendment at this meeting, there could be no final, definite plan to submit to the Highway Commission until after this meeting. The Highway Commission could not of course give a blanket approval in advance of any and all amendments that might be made at this meeting.

Since the proper procedure was followed in summoning the Board of Approval, the Board had jurisdiction to act, and it is different from the situation where the Board was never called or was improperly called. The Board of Approval having jurisdiction to act, and having acted, and approved a program of projects, it was then the duty of the Board of Supervisors to submit the program to the Iowa State Highway Commission, which was done in this case.

It would be a futile and foolish procedure to require the program to be approved by the Iowa State Highway Commission without giving the Board of Approval any opportunity of meeting the objections of the Iowa State Highway Commission. The Board of Approval having acquired jurisdiction to act, it continued to have jurisdiction to act until it completed the duties required of it by law, to-wit: the adoption of a secondary road construction program approved by the Iowa State Highway Commission. Upon the program not being approved, it was the duty of the Board of Approval to reconvene and adopt a new program in the place of the one disapproved by the Iowa State Highway Commission, the re-convened meeting being a continuation of the original meeting. Strength is given to this view by the fact that Section 4644-c33 providing for the meeting is entitled as follows: "Provisional determination and hearing," and that in Section 4644-c36 it is provided that when the program is "finally determined" it shall be recorded in the county road book.

After a program has been adopted by the Board of Approval, and approved in its entirety by the Iowa State Highway Commission, both have exhausted their jurisdiction, and neither has any jurisdiction to make any further changes, but until the entire program is adopted and approved by both boards, both have jurisdiction to act.

Where the Iowa State Highway Commission in passing upon a proposed program for secondary road construction is not satisfied with certain projects included, and sends the program back to be dealt with by the reconvened Board of Approval, the entire program is then before the Board of Approval and subject to change or amendment as to all of the projects included in the program, even those satisfactory to the Highway Commission. The reason for this is, that the different projects are, under the statutory provisions relating thereto, all a related whole of the program, and the elimination of one project might throw the other parts of the program out of balance. For instance, if a very expensive piece of road building in a particular township was the part not satisfactory to the Iowa State Highway Commission, its elimination might necessitate changes in other parts of the program. The greater the number of projects disapproved, the greater would be the need to make other changes to balance up the program. It would be frequently not impossible to substitute another project of approximate similarity in cost and having the same relation to the other parts of the program. This is also true because the reconvened meeting is merely a continuation of the original meeting and one of the powers given the meeting is the power to amend the program. Until the original meeting or the re-convened meeting fulfills the duty placed upon them by law, of adopting a program approved by the Iowa State Highway Commission, the reconvened meeting has fully plenary jurisdiction to amend or change any part of the program.

I have talked with Mr. F. R. White, Chief Engineer, and Mr. C. Coykendall, Administrative Engineer, and they inform me that as a matter of administrative practice that when such secondary road construction programs are submitted, approval will be withheld on the entire program until all of the projects are satisfactory. When certain projects are unsatisfactory they will call attention to the unsatisfactory portion and then when the reconvened meeting has finally submitted a program in which all of the projects are satisfactory, the entire program will then be approved by the Iowa State Highway Commission.

BOARD OF SUPERVISORS: Candidate must receive not less than thirty-five per cent of all the votes cast by his party for such office.

June 12, 1936. *County Attorney, Charles City, Iowa:* Your letter of June 3d to the Attorney General has been referred to me for reply.

You state that at the recent primary in your county there were four candidates for the Board of Supervisors in one district, none of whom received 35 per cent of the vote cast for that office, and you present the question whether it is necessary for the candidate having the highest number of votes for that office to have received at least 35 per cent of all the votes cast by his party for such office, as provided by Section 580 of the Code, or whether Section 581 applies in such case.

Sections 580 and 581 and 582 of the 1935 Code of Iowa were enacted by the 34th General Assembly, Chapter 59. 1913 Supplement Code of Iowa.

I have compared these statutes, as enacted by the Legislature with the recodification thereof by the Code Editor, as set out in Sections 580, 581 and 582 of the Code. We feel we are compelled to accept said sections as they appear in the 1935 Code as a fair and correct recodification of said statute as originally enacted.

Section 1087-a19 of the 1913 Supplement, after providing that the Board of Supervisors shall canvass the returns and certify them to the County Auditor, then provides as follows:

"* * * and the candidate or candidates of each political party for each office to be filled by the voters of any subdivision of a county having received the highest number of votes shall be duly and legally nominated as the candidates of his party for such office."

A provision then follows applicable to candidates whose names are not printed on the ballot, and then follows the following provision:

"* * * and the candidate or candidates of each political party for each office to be filled by the voters of the county having received the highest number of votes, and *not less than thirty-five per centum of all the votes cast by the party for such office,* shall be duly and legally nominated as the candidate of his party for such office."

The Code Editor and the Recodification Committee have not changed the language of the law as enacted by the Legislature, nor have they changed its meaning by dividing it into Sections 580, 581 and 582. Section 580 relates to candidates for offices to be filled by the voters of the county, and in that case the candidate receiving the highest number of votes must also receive not less than thirty-five per cent of all the votes cast by his party for such office.

Section 581 relates to candidates for offices to be filled by the voters of any

subdivision of a county. In this section, the provision, "and not less than thirty-five per cent of all the votes cast by the party for such office," does not appear. We cannot write it into this section by implication.

A careful reading of Section 1087-a19 of the 1913 Supplement also leads us to the conclusion that that part of the enactment with reference to thirty-five per cent of all the votes cast by the party for such office, relates only to candidates of each party for offices to be filled by the voters of the county.

A candidate from one supervisor district is not a candidate for an office to be filled by the voters of a county. His district is a subdivision of the county.

State vs. Parker, 147 Iowa 69.
Lehart vs. Thompson, 140 Iowa 298.

It is the opinion of this department that Section 581 applies to candidates of each political party for the office of supervisor where such office is to be filled by the voters of a district or subdivision of the county, rather than by the voters of the county as a whole.

"SUIT CLUB": LOTTERY:

"In the present case, by purchasing a suit for whatever amount the same may be offered for sale under the conditions of the contract or agreement, the purchaser gets the chance of securing his suit before he pays for it. It is chance that luck and good fortune may give a large return for a small outlay. * * * we therefore conclude that all the essential elements of a lottery are present and the scheme is condemned as being violative of the statutes of this state."

June 12, 1936. *County Attorney, West Union, Iowa:* This will acknowledge receipt of your favor of the 4th instant, asking for an official opinion as to whether or not the following state of facts constitutes a lottery:

"Would it be considered a lottery for a clothier to sell a card to one hundred persons, each paying $1.00 per week, and once each week having a drawing, the one holding the lucky number receiving a suit of clothes? The first week the winner gets the suit for $1.00; the second week, when each one has paid in $2.00, there is another drawing for one suit of clothes. This continues for twenty-five weeks, and at that time all of those who have not held lucky numbers receive their suits, having paid $25.00 for them. In case a member drops out, after having made several payments, he forfeits his payments and receives nothing therefor."

Another County Attorney states the proposition in his county in these words:

"Thus a member of a 'Suit Club' can get value received for his membership only provided he either wins at one of the weekly drawings or is a member in good standing at the end of the 25 week period. In order to be a member in good standing he must have met the weekly deposit requirements."

A sample of the advertising employed in connection with so-called "Suit Clubs" employed in one of the counties reads as follows:

".....Clothes Shop agrees to deliver to the holder of this book one suit of clothing valued at $25.00 after this book shows that the amount of $25.00 has been paid or sooner, if holder's name is drawn at one of the weekly drawings. Suits awarded earlier for less than the above amount are for advertising purposes only. Drawings will start Saturday, ..., at 9:30 o'clock p. m. and continue each Saturday at the same hour for 24 consecutive weeks."

Our statute makes no attempt to define a "lottery." However, our Supreme

Court, in Brenard Manufacturing Company vs. Jessup, 186 Iowa, 872, and in State vs. Rundling, 264 N. W., page 608, concluded that the three elements necessary to constitute a lottery are (1) a prize to be given; (2) upon a contingency to be determined by chance; (3) to a person who has paid some valuable consideration or hazarded something of value for the chance.

As far back as October, 1922, the Federal Trade Commission issued an order to cease and desist from conducting "Suit Clubs" against the Budd Tailoring Company of Washington, D. C., tailors in Washington, who had been conducting clubs there for some time. Complaint was registered that the company was representing to customers that they were selling suits and overcoats to customers at a specified rate of $30.00, as stated in its so-called co-operative advertising plan, dividing the customers into groups of sixty and selecting therefrom a member each week to receive a suit of clothes or overcoat free. It was found, after testimony was taken and trial conducted, that they did not group their customers into groups but arbitrarily selected such contract holders as they desired in such business districts as would best afford their business, such selection being not as a reward for services rendered but as an inducement to secure additional customers. The Federal Trade Commission in its order to cease and desist condemned the "Suit Club" business, declaring the methods employed constituted unfair competition, were unjust to reputable men's wear dealers and in violation of law as a lottery.

Some of the leading authorities are collected in the recent case of People vs. Hecht (Cal.), 3 Pac. (2d), 399, as follows:

"In People vs. Wassmus, 214 Mich. 42, 182 N. W. 66, 67, the defendant sold tailor-made suits for $48, payable $1 a week under a simple contract similar to the contract in the instant case. According to advertising matter accompanying the contract, each week a suit was discounted or given to one of the customers selected by the management in order to induce the customer selected to use his influence in securing new accounts and allow the use of his name as having received one of the garments. The court said: 'It is said that the essentials of a lottery are: First, consideration; second, prize; third, chance. 17 R. C. L. 1222. There need be no question under this scheme about the element of consideration or prize, but it is contended that there is no element of chance in the transaction; that one buys a suit for $48 and gets it, and, beside, he may get his suit discounted before he makes 48 payments. Herein lies the element of chance. By purchasing a suit for $48 one gets the chance of acquiring it before he pays for it, or before he pays the $48. This chance is the seductive thing about the scheme, and it is this which attracts the investor. But it may be said that there is no element of chance because there is no drawing; that the management itself selects the beneficiary; but this fact does not purge the transaction of all element of chance. To the purchaser it is uncertain, as to him it is chance.'

"In State vs. Lipkin, 169, N. C. 265, 84 S. E. 340, 341, L. R. A. 1915F, 1018, Ann. Cas 1917D, 137, a scheme by which articles were contracted for at a uniform price to be paid in installments with the possibility of receiving the article before the installments were all paid, and having the contract cancelled for advertising purposes, and of losing all right to this privilege by default in payments, was held to be a lottery. The contract required the customer to make weekly payments of 25 cents until the sum of $17.50 was paid or until his name was selected by the company as an advertising medium. The contract stated, 'No method of any kind dependent upon or connected with chance in any form whatsoever, enters into this contract.'. The court said:

'The same contention was made there (State vs. Clarke, 33 N. H. 329, 66 Am. Dec. 723), as in this case, that the choice of persons to receive the furniture was not by lot or chance, but by the judgment of the company

which proposed to sell; but the court rejected it, and thus showed its fallacy: "With the purchaser, what prize he might obtain was a mere matter of lot and chance. The scheme involved substantially the same sort of gambling upon chances as in any other kind of lottery. It appealed to the same disposition for engaging in hazards and chances with the hope that luck and good fortune may give a great return for a small outlay, and as we think within the general meaning of the word lottery, and clearly within the mischief against which the statute is aimed." Randle vs. State, 42 Tex. 580. * * * *

'So far as we can see from the evidence, the managers of the "Mutual Supply Company" exercised no more than an arbitrary choice of its customers as recipients of its gifts; but, however that may be in fact, the vice of the whole scheme lies farther back than that, and is found in the "chance" which the customer takes when he pays his money under the terms of the contract and the temptation held out to arouse the gambling spirit, which is just as evil and debasing as if there were any other kind of chance taken, and, besides, if he fails once or twice, or more times to win the prize, and discontinues paying, he loses all that he has paid. So that if tempted by this cunning device, which so insidiously appeals to this gambling instinct, his money is risked in the hope of drawing a piece of furniture of much larger value, the person so investing it may lose or win, and in either event may retire, forfeiting what he had paid in the one case, and retaining what he has drawn in the other as the profit of his venture'."

To like effect, see People vs. McPhee, 103 N. W., 174; 69 L. R. A., 505; LaFrance vs. Cullen, 163 N. W., 101; 196 Mich., 726; Glover vs. Malloska (Mich.), 213 N. W., 107; 52 A. L. R., 77; State vs. Powell (Minn.), 212 N. W., 169; 170 Minn., 239; State vs. Wolford, 185 N. W., 1017; 151 Minn., 59; State vs. Nebraska Home Company (Neb.), 92 N. W., 763; 60 L. R. A., 448; State vs. Moren (Minn.), 51 N. W., 618; 48 Minn., 555.

It is possible that the present plan of conducting a drawing to determine the prize by chance may now operate or be hereafter changed to operate by having the owner or manager of the Des Moines club personally select the winner rather than have the drawing. This scheme also is condemned by Corpus Juris law. It is there stated:

"So-called clubs, wherein the members pay periodical dues and conduct periodical drawings for a specified article of merchandise, are lotteries, even though the unsuccessful members are entitled to receive the article eventually after the payment of a stipulated amount or to withdraw and take out in trade the installments which they have paid, and although the winners are not determined by lot but are selected by the seller."

38 Corpus Juris, page 299, and cases cited.
17 R. C. L., 1222, and cases supra.

In the present case, by purchasing a suit for whatever amount the same may be offered for sale under the conditions of the contract or agreement, the purchaser gets the chance of securing his suit before he pays for it. As to the purchaser, it is uncertain. It is chance that luck and good fortune may give a large return for a small outlay. This is one of the evils against which the statute is directed, and we therefore conclude that all the essential elements of a lottery are present and the scheme is condemned as being violative of the statutes of this state.

MUNICIPALLY OWNED UTILITIES. Cities have the right to operate utility plants and do those things which are necessarily essential to the proper operation thereof. Cities and towns should not pay interest on

deposits of consumers. Any concessions should be made by way of reduction of rates.

June 12, 1936. *Auditor of State:* We acknowledge receipt of your letter of April 14th in which you submit several questions, the first of which is as follows:

"Are cities and towns which operate municipally owned utilities legally justified, in your opinion, in exacting deposits from consumers to guarantee payment of future bills and in agreeing to pay such consumers a stipulated rate of interest on their deposits?"

It is our opinion this question should be answered in the affirmative, assuming, of course, that the deposits required by such municipal corporation will be reasonable in amount. Cities and towns should not exact from customers deposits which could be properly said to be unreasonable or arbitrarily large in amount.

In support of this position, we quote an eminent authority on municipal corporation as follows:

"A rule or regulation requiring those who use the public service of water or light to give security for payment or to deposit a fair sum in advance, has been held to be reasonable and enforceable; and if the consumer be in arrears in respect of the premises, the municipality or the public service corporation is justified in refusing to furnish any service. The condition of the service is that the consumer shall pay therefor the reasonable value. If the consumer does not perform his part of the contract by paying the consideration for the service as it becomes due, the contract is broken by him, and the organization furnishing the supply may refuse to continue the service and may cut off the supply."

Dillion on Municipal Corporations, 5th Edition, Section 1321.

There appears to be no reason why a city should furnish to a consumer any gas, electricity or water without pay therefor. In some instances, it would be impossible to collect the fees or charges for such service if the consumer chose not to pay. It seems reasonable, therefore, that cities and towns should have the right to protect themselves from any loss which might result from the failure of consumers to pay for gas, electricity or water furnished.

Section 6127 of the 1935 Code of Iowa provides that cities and towns shall have the power to purchase, establish, erect, maintain and operate within or without their corporate limits waterworks, gas or electric light or power plants. The right of a city or town to operate such plants carries with it the right to do those things which are necessarily incidental to the proper operation thereof.

Section 6143 gives cities and towns the power to regulate and fix the rent or rate for water, gas, light and power and to fix the charges for water, gas and electric light and power maintenance where such utilities are operated under private or corporative ownership.

Other statutes provide that cities and towns owning such plants may place their management in the hands of trustees who are given rather broad powers and authority. Generally speaking, a municipally owned plant should be operated as efficiently and in much the same manner as privately owned plants are operated.

The question is presented whether cities and towns may enter into agreements to pay consumers a stipulated rate of interest on deposits made by

such consumers to guarantee the payment of their bills. There is no specific statutory authority for payment of interest on such deposits. If private corporations owning and operating such plants make a practice of paying interest on such deposits as a proper incident to the operation thereof, must it therefore be conceded that cities owning such plants have the same authority?

If paying a stipulated rate of interest on such deposits were a necessary incident to the operation of such plant, then cities clearly would have the right to pay such interest. Such a deposit, however, to be reasonable should not greatly exceed the bill which the patron would incur in a month or shorter period and the interest payable thereon would be an inconsequential amount.

We are disposed to hold that cities and towns should not pay interest on such deposits and any concessions to be made to the consumer should be made by way of a reduction in rates. Strictly speaking, such corporations are not borrowing money and, therefore, should not pay interest thereon.

Your second question is as follows:

"If deposits are made as contemplated by the above question, are they to be segregated from the regular utility operating funds?"

We believe they should be segregated as a special trust fund to be used only for the purposes for which the deposits are made.

Your third question is as follows:

"May such deposits be invested in securities, and, if so, in what particular types of securities?"

It is the duty of the public officer who has charge and control of said trust fund to safeguard it against loss. The law does not specify how he shall do this, but if, in his judgment, the fund can be said best safeguarded by investing it in U. S. Government bonds or in good bonds issued by counties in this state, we think such investment would be lawful. To hold otherwise would be to say that he must keep the deposit in the form in which it was originally made in his personal possession and custody.

Such deposits do not belong to the city until such time as the consumer has failed to pay his current bills at the time or times specified for payment, when by reason of non-payment by the consumer of his obligations the deposit is transferred to the city. It should then be handled the same as any other funds belonging to the city or earned by the utility in question.

"Seldom have municipal corporations surplus moneys for loan or investment. But where such a condition of affairs presents itself, the municipality has power to loan or invest in proper securities, unless it should be forbidden by statute."

McQuillan Municipal Corporations. Second Edition, Section 2321.

A municipal corporation may invest its surplus fund in U. S. Securities." Ibid. (Note)

Your fourth question is:

"If interest from securities is insufficient to pay the stipulated rate of interest on deposits, or the deposits are not invested in securities, what provision may be made for the payment of such interest?"

This question becomes moot in view of our holding that cities and towns should not pay interest on such deposits.

BANK NIGHT—GAMBLING ("Attendance Card" Registration). Under the facts detailed in your letter the scheme would clearly fall within all the recognized legal rules for a lottery. The facts detailed by you show a money consideration paid for a chance to win a prize of value to be determined, as we construe your facts, in accordance with some formula of chance.

June 15, 1936. *County Attorney, Des Moines, Iowa:* Replying to your request under date of April 13, 1936, for an opinion as to whether or not the following plan or scheme constitutes a lottery, this office advises you that it is our opinion that under the facts detailed in your letter the scheme would clearly fall within all the recognized legal rules for a lottery. The facts that you give us are as follows:

"A local theatre has commenced operating what is commonly known as "Bank Night." This theatre allows a person to register free and then on Tuesday afternoon buy a 16c ticket and sign an "Attendance Card" giving him eligibility for the prize.

So as to be clearly understood in this procedure, the party who registered free on a former day comes to the lobby of the theatre on Tuesday afternoon, circles about the lobby and finally purchases a 16c ticket and signs an attendance card, which is not to be construed to be a ticket admitting him to see the show or performance, but only to give him eligibility for the prize, and this can be done without attending the theatre at all. This card is signed in the lobby and a participant does not have to attend the theatre or see the show."

We base our opinion on the following definitions:

1. Black's Law Dictionary::

"A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid, or promised or agreed to pay, any valuable consideration for the chance of obtaining such property, or portion of it, or for any share of or interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a 'lottery,' a 'raffle,' or a 'gift enterprise,' or by whatever name the same may be known."

2. Bouvier's Law Dictionary:

"A lottery is a scheme by which, on one's paying money or some other thing of value, he obtains the contingent right to have something of greater value, if an appeal to chance, by lot or otherwise under the direction of the manager of the scheme, should decide in his favor."

3. Corpus Juris:

"Where not otherwise defined by statute, the word 'lottery,' whether coming up for consideration in a criminal prosecution, or in a civil proceeding cannot be regarded as having any techincal legal signification different from the popular one, and it is, therefore, a species of gambling, which may be defined as a scheme for the distribution of prizes or things of value by lot or chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize; or as a game of hazard in which small sums of money are ventured for the chance of obtaining a larger value, in money or other articles."

4. Ruling Case Law: (Vol. 17, page 1209).

"A distribution of prizes and blanks by chance, a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or in other articles."

5. Cyclopedic Dictionary of Law:

"A gift enterprise is a lottery, as is any enterprise by which prizes are paid by lot to persons paying to become members of an association;" and,

second, on page 411, it defines a 'gift enterprise' thus: "A scheme whereby gifts or premiums are distributed among the patrons of a business establishment, either the value of the premium, or the persons who shall receive the same, being determined by chance."

The facts detailed by you show a money consideration paid for a chance to win a prize of value to be determined, as we construe your facts, in accordance with some formula of chance.

SINKING FUND FOR PUBLIC DEPOSITS: PUBLIC BODIES: When conditions herein set forth have been fully, fairly and in good faith complied with, said public bodies may file their claims for their losses with the Treasurer of State as custodian of the State Sinking Fund for public deposits.

June 15, 1936. *Treasurer of State:* Your request for the opinion of this department, upon the right of various public bodies in Taylor County to participate in the state sinking fund for public deposits, in the matter of the People's Bank of New Market, Iowa, has been received. The complete record which accompanies your request shows the entire proceedings in the liquidation of this bank as presented to you by County Attorney Warin and Mr. Wisdom on behalf of the county and other municipal corporations.

The People's Bank of New Market, Iowa, was a private bank, and is in the course of voluntary liquidation as distinguished from receivership, bankruptcy or reorganization. The public deposits involved are:

Taylor County	$30,170.09
Independent School District of New Market	4,759.26
Independent School District of Dallas	1,571.81
Incorporated Town of New Market	2,877.36

These corporations propose to contract for present payment in cash at fifty per cent of the deposits. You desire to know whether under the circumstances hereinafter set out, the corporations may participate in the state sinking fund for the remaining fifty per cent.

For many years during its operation the bank paid into the state sinking fund, created by Code Section 7420 et seq., earned interest which would otherwise have been paid to the depositor.

The purpose of these payments was to create a fund to secure the depositor against loss. The statute so says (Section 7420-a2).

There is fair analogy to insurance premiums; and, of course, the only time any public depositor can resort to the fund is when it has suffered a loss because the depositee bank has failed to pay.

It is the *fact of loss to* the public depositor that gives recourse to the sinking fund.

The extent of the loss is the measure of the right to resort to the fund.

Once it is assumed or proven that the loss has or will be sustained, the right of the public bodies to draw upon the sinking fund (which has been created wholly by funds which would have otherwise been in its possession and control) is complete—and is again fairly analogous to rights under a policy insuring against loss.

Treating the state as the insurer out of the sinking fund, all that is required is certainly that the loss has been sustained, and of its extent.

The depositee has offered out of what is claimed to be the entire resources

available for that purpose, reduced to possession and cash, fifty per cent of the fact of the deposit in cash.

The public bodies concerned have, after investigation, determined that this is the full measure of possible recovery by them and have passed appropriate resolutions to take this sum in cash as a substitute for their undoubted rights to resort to less expeditious and more expensive methods of collection.

If what these public bodies have found to be the fact as the basis of their said resolution is a verity, the loss sustained by them as public depositors is the other fifty per cent which they have determined is impossible to collect.

Have they power to make the determination?

The question presented is merely one of a *method* of ascertaining the extent of the loss. If the loss exists it is as much the measure of the extent to which the losing public depositor may resort to the sinking fund as had the loss been ascertained through one of the several other methods mentioned in Code Section 7420-a9.

The question then becomes merely whether any or all of these public bodies have power to make the compromise. If they have the power to make it, the presumption of regularity attaching to all official conduct creates a presumption that in making it they have secured to themselves all that it is possible to obtain.

The presumption is that public officers do as the law and their duty requires them.

Lawson on Presumptive Evidence, page 53.

There is presumption that those charged with public trusts act honestly and in good faith.

Sioux City & St. P. R. Company vs. Osceola County, 45 Iowa 168.

Official acts, even though ministerial in their nature, must be regarded as prima facie correct.

Smith vs. District Township, 42 Iowa 522.

If it does appear that what they are about to get presently in cash is the equivalent of all they could get later in some other way, then the extent of the loss is definitely fixed by appropriate legal action.

The Supreme Court of the state and this department have recognized the power of a county to compromise demands in its favor, and upheld its agreement incident thereto to waive all except that which is offered in compromise.

The cases in which the rule was announced (and in which it has been followed by this department) are not cases in which the basis of the compromise was a dispute as to the right (though they would be within the principle), but cases in which the right was not disputed and the basis of the compromise was (as here) desire to have presently, with certainty, a sum of money determined by the county to be the full equivalent of what it might collect by other means. The department said:

"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

(which 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.*, 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% of the deposits and permit them, to be trusteed and to accept 50% of the deposits in cash. More than a year ago, this same board executed a waiver for a period of three years of 100% of the county's deposits. If it has no authority to execute the present agreement, it certainly has 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, determine positively that it would be to the best interest of the county to execute this agreement, and that it would be impossible to collect 10% of its deposits by action or by any other procedure, it would have authority to execute such agreement on behalf of the county."

If the bank were being liquidated under what has been known as Senate File No. 111, or were in some process of reorganization or were in receivership or in bankruptcy, the Legislature has assumed that these legal proceedings will afford a determination of the extent of the loss.

The certification there provided would be the equivalent of the certification by the Board of Supervisors here in the proceedings referred to.

The statute (Section 7420-a9 of the Code), referring to waiver by which public bodies in cases where there is receivership, reorganization or bankruptcy, is no provision with respect to the right to make such waiver, nor its consequences, but is merely a cumulative provision, recognizing but not creating the right, and merely adopting certain methods of ascertaining the consequent loss; if those methods happen to be available.

The source of the right of the county to resort to the fund is its loss.

If as these cases demonstrate it has power to make the agreement under general principles and other statutes, the "waiver," so-called, is not a relinquishment of anything it might obtain to minimize the loss, but a legal determination that what it is to obtain is *all* that *can* be obtained; and the difference between it and possible attainment represents loss:

As said in *Poweshiek County vs. Battles*, 70 Iowa, at page 249, where there was recognition of the county's power to take half of what was due a school fund on an undisputed purchase money, mortgage, and release the lands:

"The wisdom and prudence of the act must be determined upon the facts as they appeared at the time to the supervisors."

It is the opinion of this department therefore that in view of the peculiar fact situation presented, the agreement of the county to take fifty per cent in cash in satisfaction of its entire demand does not preclude recourse by it to the sinking fund for the ultimate repayment to it of the other fifty per cent thus ascertained to have been lost through its deposit.

This department has reserved until now, when it seems to be required, whether other Iowa municipal corporations have the power to compromise, which it has recognized in counties.

If an incorporated town has powers over its funds and property equal to that of a county, it has this power:

Section 5738 of the 1935 Code of Iowa provides:

"Cities and towns are bodies politic and corporate under such name and style as may be selected at the time of their organization, with the authority vested in the mayor and a common council, together with such officers as are in this title mentioned or may be created under its authority, and shall have the general powers and privileges granted, and such others as are incident to municipal corporations of like character, not inconsistent with the statutes of the state, for the protection of their property and inhabitants, and the preservation of peace and good order therein, and they may sue and be sued, contract and be contracted with, acquire and hold real and personal property, and have a common seal."

"Power to compromise doubtful claims is inherent in the common council as the representative of the municipality."

44 C. J. Municipal Corporations, Section 4644.

"Such a compromise is 'as binding on the defendant city as would have been the case had plaintiff been dealing with a private corporation or individual'."

First National Bank vs. Emmetsburg, 157 Iowa at page 568, citing other Iowa cases.

It is therefore the opinion of this department that the rights of the incorporated town of New Market in this matter are the same as those of Taylor County.

Unless the Independent School District of New Market and the Independent

School District of Dallas have less power with respect to compromise and unless there is less effect to be attached to the finding inhering in the compromise that what is offered is all that can be had, the rights of these two public bodies should be the same as of the county and the town.

In 1851, it was declared in Section 1108 of the Code of 1851 that

> Each school district now existing shall continue a body politic as a school corporation, unless hereafter changed as provided by law, and as such may sue and be sued, hold property, and exercise all the powers granted by law, and shall have exclusive jurisdiction in all school matters over the territory therein contained.

This has remained the law and is found at Section 4123 of our current Code.

While there was an early tendency to strictly construe the words "all the powers granted by law" as negativing power not granted in terms, this department has recognized the change in that view compelled by the decisions of the Supreme Court in which it has been held that such bodies have all powers incident to the general one to conduct their business where there are no words of negation.

This department in construing a provision of Section 4228 of the Code of 1935 that the directors of certain school townships "should make all contracts necessary or proper for exercising the powers granted and perform the duties required by law" ruled that such a body had power to contract, to employ and pay counsel to enforce a demand in favor of the school corporation.

In the opinion of this department the Iowa cases were reviewed and cited. They included *Beers vs. Lasher*, 209 Iowa 1158, and particularly *Rural Independent School District vs. Daly*, 201 Iowa 286.

The situation there was quite analogous to the one presented here. Here there may be resort to a certification made by the court or officers conducting said legal proceedings, or by the Superintendent of Banking. That does not exclude resort to a determination and certification made outside of court where there are no court proceedings in which to make it, and no control assumed by the superintendent.

There, there was a provision that such a school corporation might have the services of the County Attorney.

In ruling that it need not demand them, this department ruled that Section 5180 of the Code simply defined one of the duties of the County Attorney and that the law did not make it mandatory upon the school board or officers to employ the County Attorney to perform that duty.

In the opinion of this department, ruling that there might be private employment, we quoted as follows from the Daly case:

> "It was proper on the part of the Board of Directors to see that there was a compliance with the law in all particulars. They acted in good faith and they deemed it necessary for the public good to employ legal talent. We find nothing by way of negation in the statute."

In view of the legal authorities hereinabove set forth, it appears to this department that if the following conditions are met, that it will constitute substantial compliance with the law and should be just and equitable to have said claims filed with the State Sinking Fund for Public Deposits, these conditions being as follows, to-wit:

1. That the supervisors of Taylor County, upon investigation made in good faith, shall ascertain and determine that the proposed settlement is for the best interests of Taylor County and is the maximum amount that could be secured from said bank on its deposits and that said amount so received will be greater than could possibly be expected in case said bank was placed in receivership or in the hands of a trustee in bankruptcy and that the County Attorney of Taylor County joins in this finding of facts and recommendation and the legality of such procedure.

2. That the school boards herein involved make a similar investigation and determine with the approval of their legal counsel as more specifically set forth in Division 1 above.

3. That the incorporated town of New Market make a similar investigation and determination approved by their proper legal counsel as more specifically set forth in Division 1 hereof.

4. That the Treasurer of State ascertain and fix the amounts of loss of each of the above mentioned municipal corporations in view of the fact that the matter is not pending in court, all as provided for in Section 7420-a9 of the 1935 Code of Iowa, and in case such plan is approved by a great majority of all of the depositors in said bank.

This opinion reserves for subsequent decision the effect of similar contracts by such municipal corporations on their right to have recourse to the State Sinking Fund when the matter of the settlement of such claims is not pending in court.

It, therefore, follows that when the conditions hereinabove set forth have been fully, fairly and in good faith complied with, that said public bodies may file their claims for their losses with the Treasurer of State as custodian of the State Sinking Fund for public deposits and assign any and all rights that they may have to participate in any assets of said bank that may later be discovered, which assignments shall be executed by the governing board of said public bodies to the Treasurer of State, as custodian of said Sinking Fund for public deposits.

BOARD OF EDUCATION: INTEREST UPON LOANS MADE FOR IOWA STATE COLLEGE AND IOWA UNIVERSITY (1) FROM PERMANENT ENDOWMENT FUND WHERE NOTES WERE MADE PRIOR TO JULY 1, 1935 (2) WHETHER COMPOUND INTEREST COLLECTIBLE: (1) Amendment to Section 9404, regarded as ineffective in respect to obligations existing prior to effective date, but effective after date. (2) Compound interest payable on principal and unpaid installments of interest.

June 16, 1936. *Iowa State Board of Education:* You have asked for information bearing upon the following questions:

(1) What rate of interest is collectible upon loans made by the Iowa State Board of Education for the Iowa State College and the State University of Iowa from the Permanent Endowment Fund of such institutions in instances where the notes evidencing the loans were made prior to July 1, 1935 provided for a rate of 6% interest until due and 8% thereafter?

(2) Is compound interest collectible upon sums owed to the State University of Iowa on account of loans made from its endowment funds and evidenced by notes executed upon the printed forms and coupons there in use?

These questions will be answered in the order in which they are above stated:

(1) Prior to action taken by the 46th General Assembly the words "six" and "eight" appeared in Section 9404 of the Code of Iowa where the words "five" and "seven" now appear. As the amendatory statute (46th General Assembly, Chapter 103) contained no publication clause, the same became effective July 4, 1935 (Iowa Constitution, Article III, Section 26).

Article I, Section 10 of the Constitution of the United States reads as follows:

"No state shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin money; emit Bills of Credit; make any thing but gold and silver coin a tender in payment of debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. . . . ."

Under the above provision of the Federal Constitution it is quite obvious that contracts made in Iowa between private parties prior to July 4, 1935, cannot be affected in the interest rates applicable thereto by the statute changing the rate from eight per cent to seven upon obligations after their maturity.

It has been axiomatic ever since the case of Trustees of Dartmouth College vs. Woodward, 4 Wheat. 518, 4 L. Ed. 629 (U. S. S. S. 1819) that no state may repudiate its contract with an individual or corporate person by legislative enactment. On the other hand it is accepted that a state, through legislative enactment, if it so pleases, may relieve a private person or corporation of the onerous effect of an obligation previously entered into between the state and such a party. See Pawhuska vs. Pawhuska Oil & Gas Co., 250 U. S. 539 (1921). For a discussion of this point see "The Enforceability of Contracts Fixing Public Utility Rates," 30 Columbia L. Rev. 527; C. K. Burdick, "Regulating Franchise Rates," 29 Yale L. Journal 589 et seq.; W. L. Ranson, "The Legislative Power, the Public Utility Rate and Local Franchise," 4 Cornell L. Quarterly 17. See also 23 Harvard L. Rev. 388, and 26 West Virginia L. Quarterly 67.

While the power to forgive an obligation owed to the state is thus among the sovereign powers, it is fundamental in the Common Law that the voluntary extinction or transfer of any interest in property, real or personal, corporeal or incorporeal, requires an unambiguous, specific, definite and intended expression of the will of the owner. Thus a general statute fixing a rate of interest payable on matured and unpaid obligations generally does not supersede a statute fixing a higher rate of interest to apply by way of a penalty upon unpaid taxes. (See report of Attorney General, Iowa, 1934, page 375.)

While the University of Iowa is not in any sense a municipal corporation, the conclusion that the rate of interest payable to the University was not reduced by a general and non-specific act of the General Assembly is somewhat strengthened by numerous Iowa decisions which hold that a municipal corporation's vested right in taxes levied under existing laws cannot be destroyed by a subsequent statute releasing property from the payment of such taxes. See Burlington vs. Burlington & M. Railroad Co., 41 Iowa 134 (1875); Independent District vs. Independent District, 62 Iowa 616, 17 N. W. 895 (1883).

It has also been held that the repeal of an act under which delinquent taxes have accrued, and the enactment of a new statute providing for the collection of taxes with interest will not operate to remit the interest previ-

ously accrued, although the later statute contains no express saving clause. State ex rel vs. Stewart, 11 Iowa 251 (1860).

While a Legislature may constitutionally release a public officer and his sureties from liability for loss of a public fund, in each instance where this result has been reached, it appears to have been based upon a specific, unambiguous statute. See Miller vs. Henry, 62 Oregon 4, 124 Pac. 197 (1912) and annotation to the case cited in 40 L. R. A. (N. S.) 97.

You are, therefore, respectfully informed that the amendment of Section 9404 to the Code of Iowa is regarded as ineffective in respect to obligations made and existing prior to the effective date of the amendment, July 4, 1935, but that the same will be effective upon all obligations entered into after such date.

(2) In response to your question concerning compound interest set forth above, it is respectfully submitted that notes in use at the State University of Iowa after providing for annual interest payable annually, contain the statement that: "any interest overdue shall bear interest at 8% until paid." Coupons attached to the notes and to the form used for renewal of mortgages contain statements to the effect that they bear interest at 8% per annum after due until paid.

Webster's New International Dictionary defines compound interest as follows: "Interest both on the original principal and on accrued interest from the time it fell due." Under the term "Interest," it is also stated that when interest is paid "on unpaid interest (usually periodically added to the principal) besides the original capital, it is called 'compound interest.'"

With respect to compound interest, the following appears in Baldwin's Edition of Bouvier's Law Dictionary:

"*As to the allowance of simple and compound interest.* Interest upon interest is not allowed, except in special cases; 1 Eq. Cas. Abr. 287; 31 Vt. 679; 34 Pa. 210; and the uniform current of decisions is against it as being a hard, oppressive exaction, and tending to usury; 1 Johns. Ch. 14; Cam. & N. 361; 13 Vt. 430; 21 Or. 353. But interest on interest may be allowed if made after the interest which is to bear interest comes due; 31 W. Va. 410; 79 Ga. 213. By the civil law, interest could not be demanded beyond the principal sum, and payments exceeding that amount were applied to the extinguishment of the principal; Ridley's Views of the Civil, et., Law 84; Authentics, 9th Coll. . . ."

The oppressiveness of compound interest has resulted in its statutory prohibition along with usury in some jurisdictions, but in states where such statutes are in effect, the courts have drawn what appears to be specious distinctions between "compound interest" and "interest upon interest." For an interesting example of this, see Morgan vs. Mortgage Discount Co., 100 Fla. 124, 127 (1930).

Our Iowa courts have frequently held that where interest upon a note is made payable annually each installment of interest will draw interest at 6% from the time it is payable. These holdings were under Section 9404, as it was before the amendment by the 46th General Assembly, which reduces the rate of interest applicable from six to five per cent. See Burrows vs. Stryker, 47 Iowa 477 (1877) and White vs. Savery, 50 Iowa 515 (1879). Furthermore, the Iowa Supreme Court has specifically held that a contract providing for interest at the lawful rate, payable semi-annually, and providing that the

semi-annual installments of interest should draw interest at that rate after they become due, is not usurious but perfectly lawful. Hawley vs. Howell, 60 Iowa 79 (1883).

Among the opinions of the Attorney Generals of Iowa are to be found several recognitions of compounding interest without any indication that the same might be illegal. See Report of Attorney General, Iowa, 1922, page 243, and in the same volume at 245.

Section 9404 of the Code provides as follows:

"9404. *Rate of Interest.* The rate of interest shall be five cents on the hundred by the year in the following cases, unless the parties shall agree in writing for the payment of interest not exceeding seven cents on the hundred by the year:

1. Money due by express contract.
2. Money after the same becomes due.
3. Money loaned. . . . ."

Under the provisions of the sections above quoted that interest may be attached to and collected upon, "Money due by express contract," and upon "Money after the same becomes due," it would seem to be clear, even without the specific provisions of the form of promissory notes in use for evidencing indebtedness to the Endowment Funds of the University, that interest would be payable not only upon unpaid principal, but also upon unpaid installments of interest. As indicated above, this result has been reached by the Iowa Supreme Court in Burrows vs. Stryker and White vs. Savery, *supra.*

You are therefore respectfully advised that interest upon interest at the legal rate (8% upon contracts made before July 4, 1935, and 7% thereafter), should be calculated annually and charged to each debtor upon Endowment Fund loans payable to the University of Iowa and evidenced by notes as above indicated.

ELECTIONS: If a candidate whose name is written in the ballot received not less than five per cent of the votes cast in such subdivision for governor on the party ticket at the last general election, he should be entitled to have his name printed on the official ballot and to be voted on at the general election without other certificate.

June 17, 1936. *County Attorney, Cherokee, Iowa:* Your letter of June 13th to the Attorney General has been referred to me for reply.

Your question is: Does the County Convention have authority to nominate a candidate for the office of a member of the Board of Supervisors from a district composed of only three townships, where the name of no candidate was printed on the primary ballot, but where a number of votes were cast for a certain eligible citizen in the district, though less than five per cent of the votes cast in such subdivision for Governor on the same party ticket at the last general election?

If the candidate whose name was written in received not less than five per cent of the votes cast in such subdivision for Governor on the party ticket at the last general election, he should be entitled to have his name printed on the official ballot and to be voted on at the general election without other certificate.

The case of *Zellmer vs. Smith,* 206 Iowa 726, holds that the county convention of a political party may legally make a nomination for an office where

no candidate of said party for said office had his name printed on the primary ballot, and where the "written in" names at said primary election for said office would not effect a nomination because the candidate receiving a majority of the votes cast would not receive a vote equal to the ten per cent required by statute. "It will be seen that the prohibition against nomination by a party convention is confined to those cases where 'no party was voted for in the primary election.'"

It was held by this department in an opinion to the Auditor of State under date of October 20, 1930, that a county convention cannot nominate a candidate to fill a vacancy in the nomination for a supervisor district or subdivision of a county.

Your attention, however, is called to Section 614 of the Code, relating to vacancies in nominations in offices for subdivisions of a county. Said section is as follows:

"614. *Vacancies in nominations and in offices for subdivisions of county.* Vacancies in nominations made in the primary election, and nominations occasioned by vacancies in offices, when such offices are to be filled by a territory smaller than a county shall be filled by the members of the party committee for the county from such subdivision."

In the case which you present, where certain parties received votes for nomination for the office of member of the Board of Supervisors for a certain district, Section 614 provides the method for filling such vacancy. That is, such vacancy shall "be filled by the members of the party committee for the county from such subdivision."

HIGHWAY COMMISSION: SECONDARY ROAD CONSTRUCTION. In the expenditure of the 35% of the Secondary Road Construction Fund for local county roads, under the provisions of Section 4644-c9, the Board of Supervisors can only improve those secondary roads included in the program adopted by the Board of Approval.

June 17, 1936. *County Attorney, Grinnell, Iowa:* Your letter of June 12, 1936, has been referred to this office for reply.

As I understand the situation, the Board of Approval of your county met and adopted a secondary road construction program as provided by Section 4644-c24 to 4644-c36 inclusive, which program I assume was approved by the Iowa State Highway Commission. That there are only sufficient funds to improve the roads in the approved program. That a demand is now made by a large number of farmers, that a road be improved, which was not included in the recommendations of the Township Trustees, and not included in the program adopted by the Board and approved by the Iowa State Highway Commission. The question is as to the right of the Board of Supervisors to use funds from the Secondary Road Construction Fund for the improvement of a road not included in the program adopted by the Board of Approval.

I am assuming that your questions relate to the 35 per cent of the Secondary Road Construction Fund available for local county roads under the provisions of Section 4644-c9. The 65 per cent of the Secondary Road Fund referred to in Section 4644-c10 is available only for the local county roads after the county trunk roads have been completed, which I assume is not true in your county, and that situation is specifically excluded from this opinion.

A study of the statutes relating to secondary road construction and their legislative history shows that the fundamental purpose of the Legislature was to provide a certain unity in purpose and administration, but that within that general framework of unity, provision was made for the functioning of the local board of Township Trustees.

The fundamental purpose of the secondary road construction act is as shown by Section 4644-c27 that the program when "finally executed shall be the highest possible systematic, intra-county and inter-county connections of all roads in the county," and to that end in the same section it is provided that due and careful consideration should be given to the relation of the local county roads to the primary, county, trunk, main and market roads and to rural mail routes and school bus routes.

We have a system wherein the townships represented by the Boards of Trustees, the county represented by the Board of Supervisors and the County Engineer functioning together to carry out the fundamental purposes, with final supervisory power in the state represented by the Iowa State Highway Commission to see that those purposes are carried out. The township trustees initiate the projects, as a recognition of local needs, with which they would be most familiar; the Board of Supervisors and the County Engineer study all the projects thus submitted to fit them into a general plan to carry out the purposes of the act, and see how far those purposes can be achieved during a stated period considering the construction problems and the funds available.

After the Legislature has provided all this procedure for carrying out its purposes, for a Board of Supervisors to pick out roads at will for improvement which were not included in the program, would be to ignore and nullify the plain statutory provisions relating to this phase of secondary road construction.

You correctly advised your Board of Supervisors when you told them it could not be done. The Board of Supervisors so far as the funds referred to in this opinion can only improve those secondary roads included in the program adopted by the Board of Approval.

UNITED STATES PROPERTY AND DISBURSING OFFICER FOR IOWA: AUTHORITY OF STATE TO PAY PREMIUM FOR OFFICIAL BOND REQUIRED BY SECRETARY OF WAR: ADJUTANT GENERAL:

"It is therefore the opinion of this department that the premiums on such bond for such property and disbursing officer may be properly paid for by the state."

June 23, 1936. *Adjutant General:* I have your letter of May 22, 1935, wherein you refer to your former letter of December 26, 1934, requesting an official opinion of this department as to whether or not the State of Iowa may legally pay the premium for the official bond required by the Secretary of War of the United States property and disbursing officer for the state of Iowa.

The federal and state statutes and facts pertaining thereto are as follows:

Section 67 of the National Defense Act, adopted by the National Congress on June 3, 1916, provides as follows:

"United States Property and Disbursing Officers Required to be Bonded— * * * * * Before entering upon the performance of his duties as property and disbursing officer, he shall be required to give good and sufficient bond to the United States, the amount thereof to be determined by the Secretary of War, for the faithful performance of this duties and for the safekeeping and proper disposition of the federal property and funds entrusted to his care."

Also included in the above federal act is a provision for the appointment of such property and disbursing officer by the Governor of each state with the approval of the Secretary of War of the United States.

Prior to the adoption of the new military code for the State of Iowa by the 45th Extra General Assembly, the law of the State of Iowa pertaining to this matter was contained in Section 443 of the Codes of 1924, 1927 and 1931, which is as follows, to-wit:

"443. Bonds of officers. All officers to whom shall be issued or who shall be accountable for arms, equipment, uniforms, and any other state or United States property for military uses, or who shall have the control, custody, or disbursement of funds as provided for in this chapter, shall, before the delivery to them of such arms, equipment, uniforms, and other state or United States property, and the receipt of such funds, be required to execute and deliver to the adjutant general a bond therefor, with sureties to be approved by the governor and payable to the state, in such amount as may be fixed by the governor, conditioned according to law, for the proper care, use, and return in good order, wear, use, and unavoidable loss and damage excepted, of all such state and United States property, and the proper care and faithful disbursement and accounting of all funds coming into the hands of such officer; upon the violation of any of the conditions of such bond, action thereon shall be brought by the adjutant general upon behalf of the state, and any recovery thereon shall be credited to the guard funds of the state. It shall be the duty of the Attorney General of the state to prosecute all actions upon such bonds."

On October 16, 1926, the Attorney General of Iowa issued an official opinion to the Honorable Louis G. Lasher, Adjutant General of the State of Iowa, wherein the Attorney General ruled that the premium on the bond for such property and disbursing officer could be properly and legally paid by the state and not by the individual officer.

It further appears that the Adjutant General's Department of the State of Iowa had placed a similar practical construction upon this matter ever since the National Defense Act was passed by the National Congress in 1916. In addition to the practical construction placed upon this question by the Adjutant General's office, there is the official opinion of the Attorney General above referred to, which was issued on October 16, 1926.

Judicial notice is taken of the official acts of the federal executive departments, Governors of states and other state officers or boards, including local or inferior officers or boards. (See 23 Corpus Juris, page 100.) The courts also take judicial notice of the official acts of the heads of state departments wherein such acts constitute the long-continued practical construction given by such officials to statutes governing their actions and have much the force of unwritten law and may become so notorious as to be judicially known to the courts. (See 23 Corpus Juris, page 101.)

Our Supreme Court, in the case of Field vs. Samuelson, adopted this rule as being recognized by the State of Iowa. (See Field vs. Samuelson, 233 N. W., 687.) In announcing this rule, our court used the following language:

"The defendant, as the present incumbent of the office and in obedience

to the construction put upon that section by the department during the last forty years, held that the statute in question was not applicable to apply in this case. The statute has not hitherto received any construction by this court.* * * * * * So far as Section 4302 is concerned, we hold that the construction long adopted by the Department of Education is the correct one."

In a consideration of the federal constitution and the National Defense Act above referred to, it appears that it was the purpose of the National Congress in passing the National Defense Act to make the National Guard of each state a part of the army of the United States and subject to call for any purpose for which an army may be placed by the federal government as distinguished from the former state militia. Under this National Defense Act, the National Guard of each state is equipped, clothed and paid by the federal government. The care and safeguarding of all federal property used for military purposes by the National Guard is not left alone in the care and keeping of a state official as such but in the care and keeping of the state as a public corporation. This bond is to be provided for the purpose of protecting the federal government in case of loss of such military property or funds, due to the negligence or misfeasance of the state officer who is appointed by the Governor and approved by the Secretary of War. It is a requirement imposed upon the state by the federal government in order to properly carry out the intent and purposes of the National Defense Act.

We are therefore of the opinion that the general, notorious and settled construction of the statute by the Adjutant General's Department and by the Attorney General's Department of the State of Iowa brings the question at issue within the rule of practical construction as adopted by our Supreme Court in the case of Field vs. Samuelson, supra.

It is therefore the opinion of this department that the premiums on such bond for such property and disbursing officer may be properly paid for by the state.

TAX LISTS: Before January 1st each year, the County Auditor shall transcribe assessments of several cities and towns to a book to be known as the tax list, which must be delivered to the County Treasurer on or before December 31st. This will be his authority to collect the taxes therein. Errors on tax list may be corrected any time before the taxes have been legally discharged.

June 26, 1936. *County Attorney, Harlan, Iowa:* Your letter of June 4th, with which you enclose a copy of an opinion written by White & White, attorneys of your city, has been placed on my desk for reply.

You state that last summer the City Council of your city built a sewage disposal plant and issued bonds for the payment of the cost thereof; that a tax levy was certified to the County Auditor by the City Council after September 1, 1935, but before January 1, 1936, and that the Auditor failed to place the assessment upon the tax list.

You refer to Section 6227 of the Code of 1935, which provides that all assessments and taxes of every kind and nature levied by the Council, except as otherwise provided by law, shall be certified by the Clerk on or before the 1st day of September to the County Auditor and by him placed upon the tax list for the current year, and that the County Treasurer shall collect all taxes and assessments levied in the same manner as other taxes and that when delinquent they shall draw the same interest and penalties. The pro-

vision in Section 6227 that all taxes and assessments levied by the Council "shall be certified by the Clerk on or before the 1st day of September to the County Auditor and by him placed upon the tax list for the current year," while it should be complied with strictly, must be construed as being merely directory, and a slight deviation therefrom cannot be held to invalidate levy merely on account of a slight delay by the Clerk in certifying the levy to the County Auditor after September 1st. As bearing somewhat upon the question under consideration, we quote from an opinion of the Supreme Court of this state as follows:

"The tax in question was not certified to the County Auditor until September 24, 1889. Th appellant contends that under Section 495 of the Code, this tax was required to be certified on or before the first Monday in September, and, not being certified until after that date, the defendant has no authority to collect the same. This omission is without prejudice to the taxpayers, as it does not increase their liability beyond what it would have been had the tax been certified within the time named. *It was certified in time to be placed upon the tax list.* It was, at most, but an irregularity."

Taylor vs. McFadden, 84 Iowa 262 at 270.

In a later case, the same court speaks as follows:

"The certification of such taxes to the auditor September 24th was held to be in time. *Taylor vs. McFadden,* 84 Iowa 262. In *Burlington Gas Light Company vs. City of Burlington,* 101 Iowa 458, a provision of Section 1366, requiring the assessor to lay the assessment rolls as prepared by him before the Board of Review 'on or before the first Monday of April in each year for correction' was construed to be directory, notwithstanding a penalty was prescribed in Section 1367 upon failure on the part of the assessor to perform any of his duties 'at a time and in the manner specified'."

After referring to other sections the court continues:

"The local Boards of Review are composed of officers discharging other duties, and who act in this capacity for a brief period only, and we think that, even though Section 1370 enacts that the particular duties shall be performed not later than the 1st of May, yet as no prejudice can result to the taxpayer, performance *within a reasonable time* thereafter is not invalid. * * * * We think the statute should be construed as directory.* * * *"

Lumber Company vs. Board of Review, 161 Iowa 504 at 510.

It is the opinion of this department that the failure of the City Council to make and certify the proper levy by September 1st was not fatal to the validity of the levy had it been made within a reasonable time after September 1st. It appears, however, that almost a year has elapsed since the levy should have been made and certified, and it has not yet been done. Many taxpayers within your city have paid their taxes in full and have been given receipts for full payment. Others have paid the first half and are making arrangements for the payment of the second half of their taxes.

Section 7145 of the Code provides that before the 1st day of January in every year, the County Auditor shall transcribe the assessments of the several townships, towns or cities to a book, to be known as the tax list, and Section 7147 provides that the Auditor shall deliver such tax lists to the County Treasurer on or before the 31st day of December, taking his receipt therefor, and such lists shall be sufficient authority for the Treasurer to collect the taxes therein levied. Thereupon the duties of the Auditor end and those of the County Treasurer with reference to the collection of taxes begin.

Section 7149 provides that the Auditor may correct any error in the assess-

ment or tax list and may assess and list for taxation any omitted property, but this section does not give the Treasurer authority to do all of the things which are necessary to complete and make effective the levy necessary to collect the special assessment under consideration.

No mere formality in making the tax list will affect the validity of proceedings for the collection of taxes. *Watkins vs. Couch,* 142 Iowa 164.

The authority given to the Auditor to correct the tax books may be exercised after the books have passed into the hands of the Treasurer. *(Ridley vs. Doughty,* 85 Iowa 418; *Parker vs. Van Steenburg,* 68 Iowa, 174.)

The County Auditor is without authority to correct an error in an assessment after the tax list has been completed, passed to the County Treasurer, and the tax levied has been paid. (First National Bank vs. Hayes, 186 Iowa 892.)

"The error in assessment or tax list is one relating to perfecting the tax list in the course of preparation or thereafter at any time prior to the payment of taxes levied." The auditor may not, after the books have been delivered to the treasurer, go back of the current year to correct omissions which have occurred in previous years. (Ibid.)

The rule above expressed seems to be somewhat modified by the subsequent case of First National Bank vs. Anderson, 196 Iowa, 587. We quote from the syllabus thereof as follows:

"An '*error in the assessment or tax list,*' within the meaning of Sec. 1385-b, Code Supp., 1913, may be corrected by the County Auditor, without notice, and at any time *before the taxes have been legally discharged.*"

We quote from an opinion in the same case as follows:

"We said, in *First Nat. Bank of Remsen vs. Hayes,* supra, that:

" 'The error in the assessment or tax list is one relating to perfecting the tax list in the course or preparation or thereafter, at any time prior to the payment of taxes levied. Retroactive authority is not expressly conferred on the auditor, and there is no good reason for saying that, after the tax lists have been perfected by the officers, in so far as they know, and accepted by the property owner in discharging the burden imposed, the auditor may go "back of the returns" and, by the correction of errors thereafter discovered exact payment of additional sums as taxes which neither the public nor the taxpayer knew of, or might reasonably have anticipated. There ought to be a time beyond which even an error in name description, or valuation may not be corrected to the detriment of the taxpayer, and that time is when the proceedings relating to assessment, listing, and collection of the tax, always construed *ad invitum,* have been consummated by full payment of the amount exacted by the records as they then exist'."

First National Bank vs. Anderson, supra, at 594. We quote again from the same case, at page 594:

"The purpose of the statute is to prevent property from escaping taxation. Provision is made therein for the assessment of omitted property, and also for the correction of errors in the tax lists. The authority of the auditor to correct the tax lists is not expressly or impliedly limited to the time within which he is required to deliver the same to the treasurer, but continues until the tax has been paid, or otherwise legally discharged."

In view of the decisions of our Supreme Court, we would be inclined to hold that if no part of the 1935 taxes had been paid, the tax levy in question certified to the County Auditor by the Council after September 1, 1935, and before January 1, 1936, but not placed by the Auditor upon the tax list, should still be placed thereon another additional tax represented thereby duly collected.

You state in your letter that "it will make it difficult if this tax is assessed at this time for the reason that a considerable number of persons have paid their 1935 tax in full, but on the other hand the city, if it does not receive this money, will have to default on the interest on its bonds this year."

It is our opinion the taxpayer who has paid his taxes in full for 1935 should not now be compelled to pay any additional 1935 taxes which might hereafter be in the year 1936 spread on the tax records. We are of the opinion also that if the taxpayer who has paid his 1935 taxes in full should not be required to meet this additional tax this year, the taxpayer who has not paid his 1935 taxes should not be compelled to pay such tax. It would not be equitable, fair or reasonable that one taxpayer should be required to pay a 1935 sewer bond levy in 1936 and that another taxpayer should escape it. The city was at fault in not certifying its levy to the County Auditor prior to September 1st, and the County Auditor was seemingly in error in not placing the levy as certified upon the tax lists, but the taxpayer who has paid his taxes for 1935 is not at fault.

Under all the circumstances, we are disposed to hold that the levy in question, not having been placed upon the tax list for collection until after many taxpayers had paid their 1935 taxes in full, cannot now be spread upon the tax list collected in 1936.

ELECTIONS: COUNTY POLITICAL CONVENTION: NOMINATION OF CANDIDATE NOT RECEIVING TEN PER CENT OF TOTAL VOTE CAST FOR GOVERNOR AT PRECEDING ELECTION:

"It is therefore the opinion of this department that the county political convention may nominate a candidate for a county office where votes were cast for such office, even though the total number of votes written in by the voters on the ballot was less than ten per cent of the total vote cast for the governor at the preceding election."

June 26, 1936. *State Comptroller:* I have your request of June 25th for an official opinion as to whether or not a county political convention can nominate a candidate for a county office on its party ticket where no name of any candidate for such office was printed on the official ballot and where the voters wrote in the name of a candidate and such candidate did not receive ten per cent of the total vote cast for the Governor at the preceding election.

Your request shows that it comes from the County Auditor of Monroe County and was made in the absence of the County Attorney, who could not advise said County Auditor and could not make written request for the opinion in time to be of service to the County Auditor in the full performance of her duties. Under such circumstances, we feel that it is entirely proper for us to advise you fully in this matter and to have this information transmitted immediately to the County Auditor of Monroe County at Albia, Iowa.

It is true that previous opinions of the Attorney General's office ruled to the effect that the convention could not nominate such a candidate, unless the name of the candidate was written in on the ballot by ten per cent of the total vote cast for the Governor. These former Attorney General's opinions were contained in the Report of the Attorney General's Office for the years 1917 and 1918, 1919 and 1920, and the last opinion was issued by Attorney General Ben Gibson on September 11, 1922. At the time these official

opinions of the Attorney General's office were written, they were entirely correct, but the statutes have been changed since the last opinion previously written by the Attorney General.

This question has since been settled definitely by the Supreme Court, which handed down an opinion on October 4, 1928, in the case of Zellmer vs. Smith, 206 Iowa, 725, squarely holding that the convention could nominate a candidate who was voted for in the primary election and whose name was written on the ballot but who had not received ten per cent of the total vote cast for the Governor at the preceding election. The holding of the Supreme Court was based upon the provisions of the new statutes, which appear as Sections 624 and 625 of the Code of 1924 and which are the same as Sections 624 and 625 of the 1935 Code of Iowa.

It is therefore the opinion of this department that the county political convention may nominate a candidate for a county office where votes were cast for such office, even though the total number of votes written in by the voters on the ballot was less than ten per cent of the total vote cast for the Governor at the preceding election, and that the county convention may make a nomination for an office for which some person was voted in the primary election of such party, even though the voters voting for such party by writing in the names of their candidates did not cast a vote equal to ten per cent of the total vote cast for the Governor at the preceding general election.

HIGHWAY COMMISSION: OSCEOLA COUNTY BOND ISSUE: RESCINDING AUTHORITY FOR PRIMARY ROAD BONDS. An election presuming to submit the question of rescinding an authorization for Primary Road bonds heretofore authorized by election, is without constitutional or legislative authority, and is a nullity.

July 1, 1936. *Iowa State Highway Commission:* On October 13, 1930, the Board of Supervisors of Osceola County adopted a resolution submitting to the voters of that county at the general election held on November 4, 1930, the following question:

"Shall the Board of Supervisors be authorized to issue bonds from year to year in the aggregate amount of not exceeding $800,000 dollars for the purpose of providing the funds for draining, grading and hard surfacing the primary roads of the county, and to levy a tax on all property in the county from year to year not exceeding 5 mills in any one year, for the paying of the principal and interest of said bonds, provided, however, that the annual allotments to the county of the Primary Road Fund shall be used to pay said interest and retire said bonds as they mature and only such portion of said tax shall be levied from year to year as may be necessary to meet any deficiency, if any, between the amount of the interest and principal of the bonds, and said allotments from the Primary Road Funds."

The proposition was carried by a vote of 1,400 to 905.

In November, 1934, the Board of Supervisors of that county purported to submit to the voters of the county the proposition of rescinding the authority to issue bonds granted by the election held in November, 1930; on which proposition a majority of the votes cast were for the rescission. Prior to the so-called rescission election the Iowa State Highway Commission let contracts for improving certain portions of the primary roads in Osceola County, Iowa; the cost of which was approximately $210,000. No bonds were issued prior to the so-called rescission election, but after the so-called rescission elec-

tion the proper officers of Osceola County, Iowa, were by mandamus proceedings commanded to, and did, issue $210,000 of the bonds to reimburse the Iowa State Highway Commission for the expenditures made.

The question submitted by you is as to the right of the Board of Supervisors of Osceola County to issue additional bonds up to the amount authorized by the bond election, your concern in the matter being whether in planning the future financial and road program of the Highway Commission that consideration be given to the likelihood of additional bonds being issued by Osceola County. I am assuming, of course, that the amount of the additional bonds would be within the indebtedness limitation of the county.

The original proceedings for the bond election of 1930 have heretofore been passed upon by bond attorneys in connection with the issuance of $210,000 of bonds and found legal and valid. Therefore, the only question is as to the effect of the so-called rescission election of 1934 on the right to issue additional bonds authorized by the bond election of 1930. The general and universal rule is that in all popular forms of government that elections have to be held by virtue of some legal authority and that an election held without affirmative constitutional or statutory authority is universally recognized as a nullity. 20 C. J. 95, and cases cited. In the citation just given, this rule is stated to be characteristic of "all popular forms of government." The thought running through the cases is that this is not a mere technical rule of law but one of the fundamental rules of democracy. That, as the result of elections are binding upon everybody, those to be bound by elections should not have their fundamental rights endangered by elections called at the whim and caprice of different agencies upon such terms and conditions and under such circumstances as such agencies may see fit. If elections not authorized by legislative and constitutional provisions can be called by such agencies, even when acting with the best of intentions and motives, such as was true in this case, such elections can also be called by agencies with bad motives and evil intentions to carry out their purposes by snap and trick elections. To have definite known times, places and rules prescribed by the Legislature for the exercise of the right to vote is as important as the right to vote.

The right to prescribe when and how elections may be held is a power entrusted by the people to the Legislature, and any agencies attempting to hold elections not affirmatively authorized by the Legislature are in effect trying to take over and exercise the functions of the Legislature.

Therefore, in this case, affirmative, statutory authority for holding the so-called rescission election must be found. The only existing statutory provision that might be considered as bearing on the question of authorizing the so-called rescission election in this case, is Section 5271 of the 1935 Code of Iowa, which reads as follows:

"Rescission by subsequent vote. Propositions thus adopted may be rescinded in like manner and upon like notice, by a subsequent vote taken thereon, but neither contracts made under them, nor taxes voted for carrying them into effect, can be rescinded."

This section is found in Chapter 265 of the 1935 Code of Iowa, dealing mostly with the construction of courthouses, jails, etc. The law as relating to primary roads and primary road financing is found in another part of the Code of 1935—Chapters 241, 241-B, 241-F1 and 242. Section 5271 has

been the law of this state in its present form since 1897, and is still the law. In determining whether Section 5271 applies to elections held under the provisions of the law relating to primary roads, the question of the intent of the Legislature is of importance. In determining the question of legislative intent there is first to be considered the actions of the Legislature itself as reflecting its intent, and next the judicial interpretation of the legislative intent.

Ordinarily if one statute authorizes a particular thing, another statute authorizing the same thing is not necessary. Therefore, if a statute is amended it is presumed that the Legislature intended some change by the amendment. While attempts at amendments are not conclusive that the statute does not authorize the action sought to be authorized by the amendment, yet to a certain degree attempts at amendments tend to throw light on the legislative intent.

The Primary Road Law was originally enacted in Chapter 237 of the Acts of the 38th General Assembly (1919) and contained nothing directly, one way or the other in regard to the re-submission of matters previously submitted to the voters relating to primary roads. As originally enacted the Primary Road Law provided for submission to the voters of both the question of hard surfacing and bond issues. These issues could be voted on separately or at the same election by separate ballots. During the session of the 38th General Assembly, while it was considering the Primary Road Act an amendment was rejected by the Legislature designed to give the right to re-submit the question of hard surfacing previously authorized. In the 39th General Assembly the Legislature rejected another proposed amendment giving the right to re-submit the question of hard surfacing, and in the 40th General Assembly the Legislature again rejected a proposed amendment giving the right to re-submit the question of hard surfacing. In the Extra Session of the 40th General Assembly, by Chapter 25 of the Laws of that session, Section 50-a1, the Legislature adopted a definite legislative act making provision for re-submission to the voters of an authorization for hard surfacing previously voted. However, this statute making provision for the re-submission to voters of propositions relating to primary roads was repealed by the Acts of the 42d General Assembly (1927). These legislative actions indicate most strongly the legislative intent that Section 5271 did not authorize the re-submission of questions previously submitted to the voters in connection with the Primary Road Act. Further, the matter of the legislative intent in connection with Section 5271 relating to primary road matters was definitely passed on by the Iowa Supreme Court in the case of McLeland, et al., Marshall County, 199 Iowa, 1232, 201 N. W. 401 (1924)—known as the Marshall County road case. In that case the question of hard surfacing had previously been submitted to the voters and adopted by them. Thereafter a petition was filed asking that a special election be called for again submitting the question of hard surfacing. The Board of Supervisors declined to call the election, declaring that "there is no statutory authority for calling or having the special election asked for by the petitioners." Thereupon, the petitioners asked that a writ of mandamus issue commanding the Board of Supervisors to call the election. The lower court refused to issue the writ and upon appeal this holding was affirmed by the Iowa Supreme Court. The contention was made in that case

that Section 5271 authorized the calling of such elections. Section 5271 and its related sections are Sections 446 to 452 of the 1897 Code of Iowa, and were so called and referred to in the official Iowa report of the case. The Iowa Supreme Court in denying that Section 5271 applied to elections held under the Primary Road Act, said as follows on page 1250 of the Iowa citation:

"Appellants also rely upon Code Sections 446 to 452, as giving them the right to resubmission of the question of hard surfacing. *These sections have to do with matters not in any way connected with primary roads.* The primary road law relates to a general plan of improvement of all highways in the state; and we think said sections not applicable in the instant case. We reach the conclusion that, under the record in this case, no right existed for resubmission of the question of hard surfacing."

The holding of this court in this case in regard to this matter could easily be overlooked, for in the North Western citation there is a misprint in the Code section numbers referring to this statute, and its related sections, and on the face it is not apparent that the court was referring to this section. However, in the official Iowa Report the correct reference is made to this section and its related sections.

Thus, in this matter, we have the Legislature by its own actions showing that they did not consider that Section 5271 applied to election held under the Primary Road Act, and the Marshall County case, cited, is a judicial interpretation to the effect that it was not the legislative intent to have Section 5271 apply to elections under the Primary Road Act.

My conclusion is, that the so-called rescission election held in 1934, was held without either constitutional or legislative authority and is a nullity, and there is no question as to the right of the Board of Supervisors of Osceola County to issue the additional bonds authorized by the bond election of 1930, but not previously issued, providing, of course, that the legal limitations as to indebtedness are observed and the proper proceedings taken in connection with the issuance of the bonds.

PARKING METERS: City of Des Moines can legally enact an ordinance providing for the installation of parking meters. Cities have power to construct street improvements.

July 3, 1936. *County Attorney, Des Moines, Iowa:* Your letter of June 26th, addressed to the Attorney General, has been referred to me for reply.

You present the following statement of facts with reference to the authority of the city of Des Moines to install parking meters:

"Under the set up as proposed, twenty-foot spaces are painted off each curbing with a slot machine or device standing about four feet above the sidewalk in which the car owner must deposit five cents for each hour the car or automobile is there. The car owner is not permitted, however, to stay in that allotted space longer than the time a proposed ordinance designates. The people selling the parking meters claim for the legality of it that they are not charging for the space but are merely charging for the service rendered."

In connection with this statement, you present three questions, as follows:

"Question 1. Is the City of Des Moines as a municipality authorized under the law to install these slot devices known as parking meters to collect a revenue therefrom to the discrimination of those entitled to use the same space for the parking of other vehicles?

"II. Would this be unfair discrimination against other taxpayers or residents entitled to the free use and enjoyment of the same space?

"III. Would this be discrimination against the free use of those not owning automobiles denying others the free use and access of sidewalks where these posts or meters would be placed?"

Cities and towns have only such powers and authority as are given them by laws of the state as enacted by the Legislature. This does not mean, of course, that each and every power granted to a city or town must be specifically defined and set out in the statutes. Statutes cannot be made so complete and definite as to cover each and every situation which may arise, so the Legislature has conferred many powers and the courts have undertaken to so construe the statutes as to carry out the legislative intent. Thus, statutes, granting authority to do specific things have been construed, after granting implied authority, to do other things necessary to accomplish the purposes of the statute.

Chapter 307 of the 1935 Code of Iowa, relating to streets and public grounds, confers upon cities and towns the power to establish, lay off, open, widen, straighten, narrow, vacate, extend, improve, and repair streets, highways, avenues, alleys, public grounds, parks and playgrounds, wharves, landings and market places, and gives them the care, supervision, control of all public highways, streets, avenues, alleys, public squares, and commons within their limits.

They must cause streets and alleys to be kept open and in repair and free from nuisances. They have the power to establish grades and provide for grading of any street, highway, avenue, alley, public ground, wharf, landing, the expense thereof to be paid from the general or grading fund or from the highway taxes of such city or town. They have the power to provide for the construction, reconstruction and repair of permanent sidewalks upon streets and to assess the cost thereof to the lots or parcels of land in front of which the same shall be constructed.

By Section 5970 in said chapter, cities and towns have the power:

"1. To regulate, license, and tax all carts, wagons, street sprinklers, drays, coaches, hacks, omnibuses, and every description of conveyance kept for hire.

"2. To fix the rate and prices for the transportation of persons and property from one part of the city to another in the vehicles above named, and to require such persons to keep exposed to view, in or upon such vehicle, a printed table of the rates and prices so fixed.

"3. To establish stands for hackney coaches, cabs, omnibuses, drays, and express wagons, and to enforce the observance and use thereof.

"4. To prescribe the width of the tires of all vehicles habitually used in the transportation of persons or articles from one part of the city to another.

"5. To require vehicles and bicycles to carry lamps giving sufficient light."

They have the power to authorize and to construct certain street improvements, and the implied power to close such streets while the improvements are being made, and the power to grant franchises for the use of streets and alleys by private individuals and corporations, such franchises carrying with them the right to construct water, gas and other mains under the surface of the street, and polls, wires and labels within the limits of such streets.

Section 5745 provides they shall have the power to limit the number of, regulate, license or prohibit gasoline curb pumps in streets, highways, avenues, alleys and public places. They clearly have authority to grant authority to

street car companies to construct and operate their lines upon the city streets, to regulate the speed of vehicles and to limit certain vehicles to certain streets. They can go much farther even than this and can pass zoning ordinances greatly restricting the use by individuals of their own property within the city limits. They have, and in the very course of events must have, control over the use of the streets and the traffic therein. Their right to pass parking ordinances prohibiting parking in certain places, and authorizing it in others, limiting parking by one person in one place to an hour and denying the right of one person to park his motor vehicle in one place for several days at a time, have been recognized by the courts of many states. Cities and towns in Iowa, no doubt, have the right and power to pass valid ordinances limiting parking in certain districts to one hour and imposing a fine for violation thereof.

Our Supreme Court has held that a city ordinance, requiring the owner of an express wagon or other conveyance used in conveying persons, property for hire, to pay a license fee or tax, is not unconstitutional for want of uniformity because exempting from the tax carriages and vehicles used in ordinary livery business. *Des Moines vs. Bolton,* 128 Iowa 108.

"The statute gives municipalities the power to license and tax vehicles using its streets. When the fee required is only such as will cover the expense of enforcing the regulation as to a particular calling, it is under the police power of the state; but when the fee is larger than is necessary for such purpose, and is exacted for the purpose of revenue, the license is issued under the taxing power of the state, and is generally held valid. Elliott on Roads and Streets, Section 454 and cases cited; City of Terre Haute vs. Kersey, 159 Ind., 300 (64 N. E. Rep. 469, 95 Am. St. Rep. 298). Under the statute, cities are required to keep their streets in repair, and it cannot be doubted that the legislature, in the exercise of its discretion, has the power to authorize them to exact from those who use the streets with vehicles some compensation therefor (Elliott, supra, and Section 71); and, if this be true, it is but reasonable and just that such use be classified, and that those who habitually use the streets for the transportation of heavy loads shall pay a reasonable license or tax for such use; and, if the municipality may graduate the scale of fees charged, it may reasonably exempt therefrom all vehicles, the ordinary use of which will not materially wear its streets or obstruct the free use thereof."

Des Moines vs. Bolton, supra, and many cases cited.

One who parks his automobile in a crowded city street thereby obstructs and impedes traffice materially, and presumably gains a special advantage by so parking. We believe it is within the police power of cities and towns to subject such person to the payment of a nominal charge for the special privilege he gains, as for instance five cents an hour if such requirement is made as a police measure, and the fee so charged is used to carry out the police power and authority of the city in connection with such streets. If a city may prohibit parking within a certain district, it would seem logical that it would have the power to prohibit parking in the same district unless a nominal fee were paid for the privilege of parking there.

In the Bolton case, supra, it was said that "if all who are under the same conditions are brought within the classification, there can be no just complaint," and that the law or ordinance does not have uniform operation or that it discriminates unjustly between parties of the same class or group. The city is under no obligation to furnish to the motor vehicle operator a

place to park without charge any more than the private parking station owner is required to furnish such free parking. On the other hand, the streets are maintained for the purpose of travel and transportation from place to place, and they should be so used and controlled as to facilitate to the greatest possible extent the proper use thereof by the people of the city and others who have occasion to use such streets. An ordinance to be valid must be reasonable, and no ordinance could be upheld which prohibited parking upon all the streets of the city, unless a parking fee were paid. The parking of motor vehicles is as essential and legitimate as the driving thereof, and it is our opinion that the use of such parking meters in any districts other than those where traffic is most congested, would be an invalid exercise of the police power.

The Supreme Court of the United States recently spoke as follows:

"We are concerned in this case only with public highways. Their regulation, maintenance, and protection, as well as the safety of travelers upon them, is everywhere and by all courts conceded to be within the police power of the jurisdiction maintaining them."

Ashland Transfer Company vs. State Tax Commission, 87 A. L. R. 534.

The exaction of a small fee for the privilege of parking in certain localities would be no greater interference with the rights of the abutting property owner than parking without the payment of such fee. Such property owner has certain rights, among which are: (1) the right to encroach on the street temporarily or otherwise in front of his property, subject to valid police regulations; and (2) the right to have the street remain unobstructed and used by the public so as not to interfere with his ingress and egress from his property, his air, light and view.

McQuillan on Municipal Corporations, Second Edition, Section 1425.

"Power to control and regulate a street does not include power to lease the surface thereof for a private use."

McQuillan on Municipal Corporations, Section 1417.
Lowry vs. Pekin, 71 N. E. 626 (Ill.).
Lawbry vs. Gilmour, 89 S. W. 231 (Ky.).
Glasgow vs. St. Louis, 87 Mo. 678.
Maine Ins. Co. vs. St. Louis I. M. & S. R. Co., 41 Fed. 643.
Clarke vs. Evansville Boat Club, 144 Ind. App. 426, 88 N. E. 100.
Chapman vs. Lincoln, 121 N. W. 596; 25 L. R. A. (N. S.) 400.

We do not consider that the use of such parking meters amounts to the leasing of any part of the street. Such meters are a mechanical device for policing the parking of motor vehicles, and the operators thereof are given no greater rights than they have at the present time. On the other hand, they are not deprived of any absolute or constitutional right.

"Whatever the legislature may itself do in the matter of regulation and control of streets in cities and towns, it may delegate to such municipality. *Huston vs. City of Des Moines,* 176 Iowa 455. The term 'to regulate,' as used in the statute, includes the power to prescribe all reasonable rules, regulations, and conditions upon which the business of taxicab owners and drivers shall be licensed or permitted upon the streets of municipalities. It is a very broad import of power. City of Madison vs. Southern Wisconsin R. Co., 156 Wis. 352 (146 N. W. 492."

Ritchhart vs. Barton, 193 Iowa 271 at 274.

We have not been called upon for our opinion as to the soundness of the policy of installing such devices or their fairness as between the well-to-do

car operator and the operator whose funds are very limited. If we were asked for such an opinion, it would be unfavorable to the adoption of the parking meters, which, if the experience in other cities is to be a criterion, will be a very burdensome additional tax on the motor vehicle operators of the city. We answer your questions, however, by saying it is our opinion that the city of Des Moines can legally enact an ordinance providing for the installation of such parking meters.

SCHOOLS: ELECTIONS: COUNTY SUPERINTENDENTS: It is mandatory duty upon the County Superintendent of Schools to call the election re: discontinuance of school, provided for in Section 4267 of Code, where the other prerequisites provided for in statute have been complied with.

July 7, 1936. *Superintendent of Public Instruction:* I have your letter asking for opinion on the following proposition:

"Section 4267, Code of Iowa, 1935, gives the board the authority to establish high schools and further provides the method of discontinuance of the school by an affirmative vote of a majority of the votes cast, which election, the statute states may be called by the County Superintendent of Schools upon the petition of a certain number of the electors. Will you please advise this department whether the calling of the election is optional or discretionary with the County Superintendent of Schools where the other requisites of the statute have been followed?"

Under the holdings of our Supreme Court in the case of *Queeny vs. Higgins*, 136 Iowa, 573, and *State of Iowa vs. Hansen*, 210 Iowa 773, you are advised that it is the opinion of this department that it is a mandatory duty upon the County Superintendent of Schools to call the election provided for in Section 4267 of the Code where the other prerequisites provided for in the statute have been complied with.

1. DEPOSITS OF STATE BOARDS AND COMMISSIONS—PUBLIC FUNDS. 2. IMPROPER INTEREST-INSURANCE LOSS. 1. House File 506 (Chapter 85 of the Laws of the 46 General Assembly applies only to public deposits in properly authorized depository banks made by the public officials and does not have any application to deposits made by other deposits made by other officials. 2. State banks accepting deposits of funds from the Iowa State Board of Education are required to pay interest on the same and therefore should be in no danger of losing the benefit of insurance by the Federal Department Insurance Corporation in case such interest payments are made.

July 9, 1936. *Iowa State Board of Education:* I have your request for an opinion upon the following questions:

1. Does the opinion of the Attorney General, dated August 5, 1935, and directed to the Honorable Leo J. Wegman, Treasurer of State, and constituting an interpretation and construction of House File 506 of the Acts of the 46th General Assembly, contain a ruling to the effect that the deposits of the various state boards and and commissions are not public funds?

2. Does Regulation IV of the Federal Deposit Insurance Corporation, which became effective February 1, 1936, make payment of interest upon demand deposits by the Board of Education improper so that a state bank in paying the same would lose the benefit of insurance by the Federal Deposit Insurance Corporation?

1. In response to the first question you are advised that the opinion issued under date of August 5, 1935, and directed to the Honorable Leo J. Wegman,

on the subject of interpretation and construction of House File 506 of the Acts of the 46th General Assembly concludes with the following paragraph:

"It is, therefore, the final conclusion and opinion of this department that House File 506, otherwise known as Chapter 85 of the Laws of the 46th General Assembly, applies only to public deposits in properly authorized depository banks made by the public officials, as clearly defined by Section 7420-d1 of the 1931 Code of Iowa, and that it cannot have and does not have any application to deposits made by other officials."

This conclusion does not state, nor does it imply that deposits, "made by other officials," would not be public funds. It is clearly and only a statement to the effect that such deposits are not public deposits as defined by Section 7420-d1. It is obvious that certain public deposits may be embraced within the provisions of that Section, while other public deposits are not included therein. Such was stated to be the case.

2. In response to the second question set forth above, it will be noted that Section 2 of Regulation IV of the Federal Deposit Insurance Corporation, effective February 1, 1936, reads as follows:

"*(a) Interest prohibited.* Except as hereinafter provided, no insured nonmember bank shall, directly or indirectly, by any device whatsoever, pay any interest on any demand deposit.

(b) Exceptions. The prohibition stated in subsection (a) above does not apply to—

(1) Payment of interest accruing before August 24, 1937, on any deposit made by a "savings bank" as defined in Section 12B of the Federal Reserve Act, as amended, or by a mutual savings bank;

(2) Payment of interest accruing before August 24, 1937, on any deposit of public funds made by or on behalf of any state, county, school district, or other subdivision or municipality, or on any deposit of trust funds, if the payment of interest with respect to such deposit of public funds or trust funds is required by state law when such deposits are made in state banks;

(3) Payment of interest in accordance with the terms of any certificate of deposit or other contract which was lawfully entered into in good faith before February 1, 1936 (or, if the bank became an insured nonmember bank thereafter, before the date upon which it became an insured non-member bank), which was in force on such date, and which may not legally be terminated or modified by such bank at its option and without liability; but no such certificate of deposit or other contract may be renewed or extended unless it be modified to eliminate any provision for the payment of interest on demand deposits, and every insured non-member bank shall take such action as may be necessary, as soon as possible consistently with its contractual obligations, to eliminate from any such certificate of deposit or other contract any provision for the payment of interest on demand deposits.

(c) Deposits in "savings banks" in specifically designated deposit accounts with respect to which withdrawal by checking is permitted in accordance with paragraph (7), subsection (c), Section 12B of the Federal Reserve Act, as amended, shall for the purposes of this regulation be classed as demand deposits."

It would appear that deposits made by State Board of Education institutions are embraced within the terms of exception number two as above set forth. While a number of public funds are mentioned specifically in Section 7420-d1 of the Code, and the rate of interest collectible upon the same is set forth in Section 7420-d6, clearly bringing the funds involved within the second exception of the fourth section of the F. D. I. C. regulations set forth above, it should be remembered that the major part of funds expendible by the State Board of Education at the various institutions under its jurisdic-

tion, are moneys made available to the Board through the process of appropriation of money raised by taxation. These funds must be expended as directed by the legislative act in making the appropriation, and all must be accounted for, together with all other income of the state institutions, through the offices of the State Comptroller and the Auditor of State. (See Code, 1935, Sections 84-e24, 84-e25 and 101-a2.)

Section 3921, Subsection 8, of the Code, 1935, reads as follows:

"3921. *Powers and duties.* The board shall: . . . .
(8) Collect the highest rate of interest consistent with safety, obtainable on daily balances in the hands of the treasurer of each institution."

It is quite clear that any bank within the state might refuse to accept the deposits made by Board of Education institutions and thereby avoid becoming liable for any interest. This is equally true in respect to all of the deposits embraced in Chapter 352-D1 entitled, "Deposits of Public Funds," as indicated particularly by the contents of Section 7420-d5, which reads as follows:

"*Refusal of deposits—procedure.* 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."

Any bank accepting a deposit from a Board of Education institution, however, would have to accept the same with at least constructive knowledge of the powers and duties imposed upon the State Board of Education and officers of State Board institutions by Section 3921 of the Code, 1935. Thus the bank accepting the deposits, knowing the duty of the depositing officer to "collect the highest rate of interest consistent with safety," would be bound to make such a payment of interest, the exact amount of the same to be settled by negotiation between the parties representing the State Board and the banking institution.

The payment of interest upon deposits of public funds by State Board of Education institutions is required, therefore, by state law when such deposits are made in state banks, in the same sense that interest is required to be paid upon public funds deposited under the provisions of Sections 7420-d1 and 7420-d6.

It is therefore concluded, and you are advised, that under the interpretation of Iowa statutes and of Regulation IV of the Federal Deposit Insurance Corporation, effective February 1, 1936, state banks accepting deposits of funds from the Iowa State Board of Education or funds owned and controlled by State Board of Education institutions, are required to pay interest on the same, and in doing so would be acting within the second exception to Subsection (a), Section 2, of such regulation. They therefore should be in no danger of losing the benefit of insurance by the Federal Deposit Insurance Corporation in case such interest payments are made.

AUDITOR OF STATE'S REPORT OF 1935.
In re: LIQUOR COMMISSION: BOARD OF CONTROL.

July 9, 1936. *Governor of Iowa:* We have your letter of July 6th in which you request the opinion of this department concerning the following:

"The Board of Control and the Iowa Liquor Control Commission have protested to this office that auditors in the Auditor of State's office are ex-

ceeding their authority in interfering with matters pertaining to administration of their departments, to the detriment of the efficient administration of the institutions under their control. I feel that earnest, conscientious commissioners are entitled to protection from this office against encroachment by minor employees of the state, and particularly so if there be any violation of the statutes.

"I understand you have been provided with a recent audit made by the Auditor of State's office concerning the operations of the institutions under the State Board of Control. I am sending to you today a recent audit compiled by employees of the auditor's office concerning operations of the Liquor Commission. Frankly, it seems to me that in this Liquor Commission audit these employees have exceeded their authority, inasmuch as they attempt to suggest radical changes which come within the province of the legislature, and I am unable to find in the statutes any suggestion that employees of the auditor's department are to make recommendations to the legislature, even by indirectly doing so in a report which is intended for publicity.

"I favor the most stringent and careful audit of all departments of state as it concerns financial matters, and others which properly come within the scope of an audit, but I do want these employees limited to their duties under the law, and to that end I shall appreciate an opinion from you after examining these audits, as to whether or not there has been a violation of authority given by statute, so that this office may direct that such violations cease and proper conduct within the law be observed in the future by these auditors."

In answering the questions propounded by Your Excellency, we shall first deal with the audit of the Iowa Liquor Control Commission. The post-audit of all departments of state government is made by the Auditor's office under and by virtue of the authority vested in the Auditor by Section 101-a4 of the 1935 Code of Iowa, which is as follows:

"*Report of audits.* The Auditor of State shall make or cause to be made and filed and kept in his office written reports of all audits and examinations, which reports shall set out in detail the following:

1. The actual condition of such department found to exist on every examination.
2. Whether, in his opinion,
a. All funds have been expended for the purpose for which appropriated.
b. The department so audited and examined is efficiently conducted, and if the maximum results for the money expended are obtained.
c. The work of the department so audited or examined needlessly conflicts with or duplicates the work done by any other department.
3. All illegal or unbusinesslike practices.
4. Any recommendations for greater simplicity, accuracy, efficiency, or economy in the operation of the business of the several departments and institutions.
5. Comparisons of prices paid and terms obtained by the various departments for goods and services of like character and reasons for differences therein, if any.
6. Any other information which, in his judgment, may be of value to him.

All such reports shall be filed and kept in his office."

From a casual reading of the above section, it might appear to a mind not legally trained that the Auditor's office had almost unlimited power to say what they please concerning a department of state. The above section apparently authorizes the Auditor to include many things in his report which in his opinion he deems necessary or which in his judgment may be of value to him. While this statute does authorize the Auditor to exercise his opinion and judgment with respect to these audits, nevertheless it is a fundamental rule of law that where judgment is exercised by a state official, it must be

a legal discretion, not an arbitrary or capricious one. Therefore in applying the law with respect to the duties of the State Auditor, in making an audit of the Liquor Commission or the Board of Control, such reports must be analyzed in the light of the above well-known rule of law, namely, that the discretion and judgment exercised by the State Auditor must be a legal discretion and not otherwise. It should also be borne in mind that the law nowhere authorizes the State Auditor to superimpose his opinion or judgment upon the exercise of a proper state function by any other department of state government where the Legislature has clothed the heads of these other departments with the exercise of their sound and legal discretion in the administration of the affairs under their control and management as provided by the statutes of this state. A careful reading of Section 101-a4 of the 1935 Code clearly shows that the Auditor's office can only report on conditions existing which are covered by the Auditor and cannot go beyond this limitation. If the conditions existing at the time the audit was made show any illegal or unbusinesslike practice, these conditions can be reported and contained in the report in case the Auditor deems it advisable and proper. The Auditor's report should be a fair and impartial report of conditions existing in any state department and should be so reported as not to allow any erroneous impression to be given to the general public on conditions in any department of state government.

In going through the most recent report made by the Auditor's office on the Iowa Liquor Control Commission (the report of December 31, 1935, which was released during the latter part of June, 1936), we find that the Auditor's office made a number of criticisms of the Liquor Commission's method of doing business. To be specific, the report dealt greatly on the fact that the Liquor Control Commission carried a large number of brands of liquor, and that they carried rather an extensive inventory of these brands. On page 19 of this report, there is a compilation of the number of brands of liquor handled by the commission. The total number of brands as contained in this report on page 19 thereof is 662. This part of the report would lead the general public or anyone else, not thoroughly familiar with the actual conditions existing, to believe that the Liquor Commission carried in stock a total of 662 brands of liquor. We have been reliably informed that the actual number of brands carried by the Iowa Liquor Control Commission during the period covered by this report was 380. It further appears that some of these brands were in different sizes, namely, gallon sizes, quart sizes, pint sizes and half-pint sizes. We are satisfied that the auditors that made this report added the total number of different sizes of each brand in order to arrive at their total of 662.

It is needless to say that such a report is misleading. The Iowa Liquor Control Commission is authorized by law to purchase and sell liquor and in doing so, they must keep in mind the main object and primary purpose of the Iowa liquor control act, which is to promote temperance. In other words, the Iowa Liquor Control Commission is clothed with a legal discretion in the purchase of liquor for the purpose of selling it to the public, in accordance with the specific provisions of the Iowa liquor control act. This discretion to be exercised by the Iowa Liquor Control Commission must likewise be a legal discretion and not an arbitrary or capricious one. In determining whether

or not the Commission has abused this discretion, placing 380 different brands of liquor in stock, we must consider a number of facts and circumstances. If the primary object of the Iowa Liquor Control Commission was to make a large profit, then the criticism contained in the Auditor's report perhaps would be justifiable. Naturally it would be unbusinesslike to carry in stock slow-moving brands, where the primary object under the law would be to make money, and to manage the Iowa liquor monopoly for the purpose of revenue only. The purchase of 380 different brands of liquor by the Commission cannot be illegal per se, for the reason that the Commission is authorized by law to purchase liquor for the purpose of selling it to the public.

Therefore we are limited in this consideration to the question of whether or not this policy adopted by the Commission is an unbusinesslike or inefficient practice. The Auditor's report shows upon its face that the Liquor Commission during the year 1935 sold $6,090,734.63 worth of liquor and that during this same year the Commission made a net profit of $1,212,812.82. In other words, during the year 1935, which is the year covered by the Auditor's report, the Iowa Liquor Control Commission made a net profit of approximately 20 per cent of the total amount of liquor sold by the Commission. This percentage of net profit would not in itself give the impression to any person familiar with modern business methods and familiar with modern business conditions the idea that the affairs of the Commission were handled in efficiently or in an unbusinesslike way. It further appears to be an undisputed fact that many of the brands of liquor carried in the state liquor stores enjoy but a limited sale. We cannot state legally that such a practice means that the Liquor Commission should discontinue these brands entirely for the reason that we must always keep in mind the main object and purpose of the Iowa liquor control act, which is to promote temperance.

A drug store or any other mercantile business might carry from 500 to 1,000 articles on which the sale is much less than the slow-moving brands of liquor in the state liquor stores. We do not believe that such merchandising concerns could be legally criticised as being inefficient or unbusinesslike in carrying these articles. In order to hold their trade and keep people coming into their stores for the purpose of making purchases, it is necessary to carry some slow-moving articles for the purpose of satisfying the whims or tastes of their patrons. For instance, if a patron goes into a drug store and wishes to purchase an article of slow-moving type, and the drug store does not have this article, then this prospective patron will go shopping in order to find a store that does have it in stock. When this patron is satisfied by the service he has procured in this other store, no doubt he will make other purchases there and continue to do so in other stores.

The Iowa Liquor Control Commission has a monopoly on the legal sale of liquor in the State of Iowa. This being true, a patron coming to the Iowa liquor store desiring a brand of liquor of the slow-moving type and being unable to secure the same in the liquor store, but still desiring this type of liquor, is very apt to purchase what he wants through illegal channels.

The criticism of the Auditor in this report, concerning the large number of brands carried and the brands of the slow-moving type, can hardly be justified legally on the grounds that it represents conduct which is unbusinesslike or inefficient. From the facts surrounding this situation, it appears

to us that it would be very difficult to legally find just what would be considered "businesslike" or "unbusinesslike" in the administration of the affairs of the Iowa Liquor Control Commission. The Iowa liquor control act sets up a commission, grants it power to sell liquor and then turns around and lays down restrictions which prevent the free sale of liquor to the public generally. In other words, the Iowa liquor control act makes the Liquor Control Commission merchandisers of liquor, and at the same time places limitations thereon, which prevents it from using the ordinary methods of merchandising which would apply to the merchandising of articles of trade or commerce in the ordinary course of business.

From a careful reading and analysis of the Auditor's report in this respect and from consideration of the provisions of the Iowa liquor control act, and all the facts surrounding this question, it is impossible for us to legally hold that the carrying of 380 different brands of liquor, some of which is of the slow-moving type, constitutes an illegal, unbusinesslike or inefficient policy of the administration of the affairs of the Iowa Liquor Control Commission.

The next important consideration, as it appears to us, is the suggestion and recommendation contained in the Auditor's report that the Iowa Liquor Control Commission change its method of management, and that the three commissioners relinquish their duties of active management in which they now engage, and that some other man be hired to manage all of the business affairs of the commission, and that the commissioners merely act in an advisory capacity, as formulators of policy.

It is properly within the provisions of the Auditor's office to suggest changes in procedure which would permit better operation and more efficiency within the limits as contained in the Iowa liquor control act. However, in suggesting or recommending such changes, the Auditor's office should only suggest and recommend changes which can be complied with under the law. There is no provision in the laws of the State of Iowa authorizing or empowering the Auditor's office to make recommendations to the Legislature of the State of Iowa with respect to the administration of the affairs of any other state department or agency. The Liquor Commission would have no legal right to put into effect the suggestion or recommendation made by the Auditor's office relative to the hiring of a business manager and the relinquishing of the functions imposed by law upon the members of the Iowa Liquor Control Commission. A review of the passage of the Iowa liquor control act shows that the committee appointed by the Governor for the purpose of recommending liquor legislation in the 45th General Assembly, Extraordinary Session, did recommend that the new law should provide for a manager of the business activities of the commission. The Legislature, however, saw fit to disapprove this recommendation, and provided specifically that the liquor commissioners should devote all of their time to the management of the business affairs of the Liquor Commission, and specifically granted them definite powers. Hence, if the liquor commissioners exercise such powers and perform such functions as are definitely and specifically placed under their control, there would be nothing left for a manager to do. We feel that the Auditor's report, suggesting and recommending the employment of a manager, is contrary to the provisions of the Iowa liquor control act, and is wholly

outside the scope of the authority vested in the Auditor by the State Legislature. Certainly the Auditor's office should not recommend any illegal practices.

The next serious consideration of the Auditor's report has reference to the recommendation for another investigation of the hauling contract. It should be remembered that a very thorough investigation of this hauling contract was made by the special liquor investigating committee as appointed by the 46th General Assembly of the State of Iowa. This special investigating committee of the 46th General Assembly failed to find that this hauling contract was illegal, invalid or unconscionable. Therefore it must be presumed that this contract was validly entered into by the contracting parties in good faith, and is a valid, binding contract. Neither the Auditor's office, nor the Liquor Commission, nor the Legislature of the State of Iowa can adopt any rule or pass any legislation interfering with or impairing the obligations of a contract. If the Legislature did attempt to pass an act changing, varying or in any way impairing the same, it would be in direct violation of the constitution of the State of Iowa and also the constitution of the United States of America. Section 21 of Article I of the constitution of the State of Iowa provides as follows:

"No bill of attainder, ex post facto law, or law impairing the obligation of contracts, shall ever be passed."

Article I, Section 10 of the constitution of the United States, provides as follows:

"No state shall * * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

We fail to see how a criticism of this contract at this time can serve any useful purpose. The Auditor's criticism appeared to be that Iowa was paying too high a rate per case for the hauling of its liquor in view of the fact that other states having similar state monopoly on liquor, have their liquor hauled at a lesser rate per case. In basing such criticism from a practical standpoint without considering its legal phases, all the conditions and circumstances existing in Iowa and in these other states should be taken into consideration. Before a valid comparison could be made, an intensive study should be made of the entire cost of handling liquor, rather than the specific cost of only one phase of it, which is the hauling. For instance, the per mile cost of hauling liquor per case in a state which has five central warehouses should be much less than hauling liquor per case in Iowa, which has only one central warehouse. But the entire cost of handling liquor in a state with warehouses, five in number, might be much larger than the cost of handling liquor in Iowa with only one central warehouse. Under such circumstances and conditions, it appears unfair to compare Iowa's rate per case for hauling liquor with other states without setting forth all of the circumstances which might make the comparison with other states really comparable.

It is therefore the conclusion of this department that the Auditor of State exceeded his authority in issuing the report of the Iowa Liquor Control Commission as of December 31, 1935, in the particulars hereinabove set forth in detail. The Auditor's report should contain the following:

1. The actual condition of such department found to exist on every examination.

2. Whether in his opinion such opinion being based upon a legal discretion, not an arbitrary or capricious one),

a. All funds have been expended for the purpose for which appropriated.

b. The department so audited and examined is efficiently conducted, and if the maximum results for the money expended are obtained.

c. The work of the department so audited and examined needlessly conflicts with or duplicates the work done by any other department.

3. All illegal or unbusinesslike practices. (The matter of illegal practices can be very accurately determined by an examination of the statutes of the State of Iowa and the Supreme Court decisions. It is difficult to lay down a hard and fast rule as to what constitutes unbusinesslike practices. Each case could only be determined upon the particular facts surrounding the same, but in passing judgment upon such practices, we again point out that the Auditor must exercise a legal discretion and not an arbitrary one.)

4. Any recommendations for greater simplicity, accuracy, efficiency, or economy in the operation of the business of the several departments and institutions. (This does not mean that the Auditor can impose his will upon any other state institution or agency with respect to the policies adopted by such other state institution or agency where the same is in accordance with the laws of the State of Iowa pertaining to regulation and management of such other state institution or agency. In other words, the State Auditor cannot impose his ideas as to what the policies should be of other state institutions and agencies where such other state institutions and agencies are operating under a policy consistent with the powers fixed in them by the laws of the State of Iowa.)

5. Comparisons of prices paid and terms obtained by the various departments for goods and services of like character and reasons for differences therein, if any. (This subparagraph would not apply to the Liquor Commission because under the laws of this state the Liquor Commission has an absolute monopoly upon their merchandise, except in the case of office supplies, stationery, equipment, etc.)

6. Any other information which, in his judgment, may be of value to him. (Again we call attention to the fundamental legal proposition that this judgment to be exercised by the Auditor must be a legal, rather than an arbitrary or capricious one.)

DIVISION II

In addition to your request for an opinion from this department with reference to the report of the Auditor concerning the condition of the institutions under the Board of Control, we also have a request directly from the State Board of Control. The letter from the Board of Control requesting an opinion from this department states the problem and questions as follows:

"Ever since the advent of the present auditor's office, those in charge of auditing the state institutions have taken it upon themselves to criticize and in so doing give to the press unfavorable and unfair statements of their criticisms pertaining to almost every phase of the operations of our state institutions.

"They went into our coolers at each institution, examined the meat that we bought, and criticized our purchases of meats and attempted to tell us what kind of meat we should buy. They examined the dry goods, shirting,

sheeting and all other material from which we make clothing for the inmates and criticized the purchase of these materials and attempted to tell us what kind of materials we should buy. They criticized the running of our farms, the dairy herds, and the management of the gardens, and instructed us how to farm and how to garden. They criticized the operation of the chair and furniture industry and instructed us in the art of making furniture.

"The above are just a few and the most glaring of the examples. It is beyond our comprehension to understand how these gentlemen, who are accountants by profession—as we do not in the least discredit their ability as excellent accountants—are so skilled in their knowledge of the purchasing of meats and dry goods, in the making of furniture, in the operation of farms and in the art of gardening, when the men we hire for these various positions who are specialized in these fields, having spent the greater part of their lives in their work, admit that they have not completely mastered their jobs.

"The Board of Control feels that it is not the business of the auditors who check our institutions to tell us what kind of meat we can buy, what kind of dry goods and clothing material we must purchase, nor how we plow our corn and plant our beans.

"As previously stated they have made constant use of the press in their unfair criticisms of institutional management. Upon completion of the audit of the Iowa Soldiers' Home at Marshalltown, an article appeared in the Des Moines and other papers severely criticizing the Board of Control and the institution head because 290 tons of coal was missing. Upon checking into this carefully, the board found that this loss of coal was not a loss but the normal shrinkage over a period of time for the coal that was purchased, a portion of this shrinkage being due to coal shipped during the extreme winter just passed when many cars of coal which we purchased contained some snow. Their article did not mention the fact that this was the normal shrinkage but tended to leave the impression that this coal had been stolen or lost through mismanagement.

"At the completion of the audit of the Institution for Feebleminded Children at Glenwood, the Board of Control and the Superintendent were severely criticized for the loss of 36 head of hogs. The board again made a careful check of this situation and found that the institution raised between six to seven hundred hogs that year, and that this loss was not 36 hogs but was 36 little pigs which died shortly after birth or at some time before weaning. Their article did not mention the fact that a great number of hogs were raised at Glenwood, and that we had one of the finest herds of hogs in the State of Iowa, and one of the best hogsmen in the middle west, but, as before, left the impression that these hogs were mature and had either been stolen or lost through mismanagement of the institution. In this particular case, anyone, who has any knowledge at all of the raising of live stock, particularly hogs in such great numbers, knows that it is very common for little pigs to die shortly after birth or during the weaning period and that such deaths are hard to keep track of.

"It would be useless and to no avail to continue citing more instances. In setting out the above we feel that we have stated very clearly the position of the Board of Control relative to the question at hand, to the end that these auditors should not be allowed to dictate policies to be carried out in the operation of these institutions, and by all means, should not be allowed to give to the press publicity pertaining to the audits of these institutions other than the compiled report, itself, much less unfavorable comment."

The problems of law as hereinabove stated by you in connection with the duties of the Auditor in the discussions of the report of the Liquor Commission are also applicable to the auditing of institutions under the State Board of Control. From the above letter it appears that the accountants who check the records of the Board of Control fail to secure complete information with regard to many of the items criticized by them in their report. A few of these items are as follows:

The Auditor's report shows that there is a loss of 290 tons of coal at the Iowa Soldier's Home at Marshalltown. These accountants apparently did not take into consideration the possible and ordinary shrinkage in the coal, as pointed out by the Board of Control in their letter explaining the situation.

The next item that appears in the letter from the Board of Control was the reported loss of 36 head of hogs at the institution for the feebleminded children at Glenwood. The Board of Control states the fact of the matter was that there was not a loss of 36 head of hogs, and that the loss was of 36 little pigs, shortly after birth or shortly before weaning. In fairness to the Board of Control these matters should be fully investigated by the accountants and a complete check-up made on the same. The loss of 36 little pigs is entirely different than the loss of 36 hogs.

As a matter of law, we cannot hold that the Auditor has the authority under the law to dictate to the Board of Control as to what kind of meat they should buy or from whom they should purchase their dry goods, shirting, sheeting, and other materials from which clothing is made for inmates of such institutions. It is likewise true from a legal standpoint that the Board of Control has the authority under the law in the exercise of sound discretion to manage their farms, gardens, dairy herds, and other activities placed under their jurisdiction by the laws of the State of Iowa. The examination of the Auditors should be first to determine that the policy adopted by the Board of Control for the management of its institutions is in accordance with the laws of the State of Iowa pertaining thereto. If this policy is found to be legal, then the auditors should examine into the means employed by the Board, and if they find that there is any inefficiency or unbusinesslike practices, these matters should be called to the attention of the Board of Control in an honest effort to secure all the facts pertaining thereto. It appears to us from the legal standpoint that there should be no criticism contained in the Auditor's report until they have ascertained all the facts relating to any particular transaction that appears to the auditors to be irregular, inefficient or unbusinesslike. It stands to reason that the Auditor's report should not be used as a method to embarrass or to interfere with the legal management and operation of institutions under the Board of Control, but should be employed for the purpose of real fair, honest and constructive criticism of means or methods in order that the institutions thereby and the Board of Control would be assisted in correcting the same and securing a better and more efficient administration of their duties.

The Board of Control has reported to this office that in many instances the first information that they have received concerning alleged irregularities in the management of those institutions is from newspaper accounts based upon information given to the press by the accountants in the Auditor's office. If this situation as reported by the Board of Control has been existing, it should certainly be corrected and stopped. The accountants should be interested in securing the entire truth and certainly under the law should not be permitted to report just part of the truth without reporting the entire truth for the reason that such a report would lead the public to lose faith in the administration of its state government. When all the facts are secured by the accountants, then of course irregular, inefficient or unbusinesslike practices should be contained in the report and the same filed for public

inspection and for the benefit of institutions concerned, and the state government as a whole. Our Supreme Court has held on a number of different occasions that every sworn public official is presumed to do his duty, and that this presumption obtains and continues until the contrary is shown by material, relevant and competent evidence. In making these reports the Auditor's office should keep in mind this fundamental rule of law at all times.

The foregoing specific situations covered by this opinion which is in two divisions, illustrate the evil of lack of cooperation amongst coordinate agencies of our state government, which under the law should function as a unit for the proper administration of governmental affairs. This can be accomplished by the adoption of the plan that has been in force for years in the Department of Insurance of the State of Iowa.

Under this plan the Commissioner of Insurance accepts the insurance examiner's report of the conditions of insurance companies as preliminary in character. Then each company is given an opportunity to appear and make explanations, objections, and to furnish the insurance department with additional data that might have been overlooked by the examiners. After the commissioner has been fully and completely advised in the premises and has given due and careful consideration to the supplementary information thus furnished him by the insurance companies examined, he then approves the report with such modifications as may be justifiable. Thereafter these final reports are officially filed and made public records and available to the press for the first time.

Where such consideration is given to private corporations, it should likewise be given to all state departments and agencies in conformity with law. No individual or governmental agency should be condemned without an opportunity to be heard. In line with these fundamental principles of law, it appears that the above procedure should be followed by the Auditor of State. When the report on the condition of any state institution or agency is first presented to the Auditor, he should treat it as being preliminary in character. He then should notify the department examined and give the department an opportunity to be heard, and after hearing the objections and exceptions and additional information, he should approve the report with such modifications as may be justified. Then the final report as approved by the Auditor after such hearing should reflect a full, complete, true and accurate condition of the departments audited. It should then be officially filed and given to the press for the first time.

It is therefore the opinion of this department, if such procedure is followed, that the governmental affairs of the State of Iowa will be more properly administered than heretofore.

BOARD OF CONTROL: AUDITOR OF STATE: Auditor of state is the proper and only official in the state government to make settlements between the state and any state officials, department or person receiving or expending state funds, and that the auditor shall make such settlements annually and oftener if deemed necessary.

July 13, 1936. *Board of Control:* During the month of May, 1936, you requested an opinion from this department concerning the following matter:

"Since the passage of the budget control act, this office has no accountant or auditor. Quite often it is necessary to check out a store or a store keeper

of an institution. Would you please advise whether it is the duty of the State Auditor's office to make this check?"

On May 25, 1936, an opinion was furnished you with reference to this matter by Assistant Attorney General Lehan T. Ryan. A prior opinion written by Assistant Attorney General John J. Foarde was furnished the Auditor's office with respect to this same matter.

You are hereby advised that the opinion furnished to the Auditor's office by Assistant Attorney General John J. Foarde is hereby withdrawn, and the opinion furnished by Assistant Attorney General Lehan T. Ryan is likewise withdrawn, and the following opinion is hereby issued and shall take precedence over the two former opinions, and shall be substituted in lieu thereof.

It is true that the budget and financial control act, as passed by the 45th General Assembly, did relieve the Board of Control of its former duty and responsibility of having the most modern, complete and uniform system of accounts, records, and reports possible for the purpose of clearly showing the detailed facts relative to the handling and use of all purchases. This former duty and responsibility of the Board of Control was contained in Section 3291 of the 1931 Code of Iowa. The 45th General Assembly repealed this section and placed all of the duties as contained in said section under the office of the State Comptroller. Thus the duties of pre-auditing, that formerly were placed in the hands of the Board of Control, have been taken from the Board of Control and placed in the office of the State Comptroller. The post-auditing of the condition of the institutions under the Board of Control of State Institutions was formerly done by expert firms of accountants selected by the Executive Council, in accordance with Section 397-d1 of the 1931 Code of Iowa. This former section of the Code has likewise been repealed by the budget and financial control act, and all post-auditing duties have been placed in the office of the State Auditor. As a result of this legislation, as passed by the 45th General Assembly, the Board of Control has no authority to either pre-audit or post-audit the affairs of the institutions under its control.

It appears to us that the question that you desire to be settled by a legal opinion from this department has reference to settlements between the state and all state officers, departments and all persons receiving or expending state funds, and does not refer to the question of the complete auditing of the books and accounts of institutions under the supervision, management and government of the Board of Control of State Institutions. We therefore will limit this opinion to the question of settlements rather than that of the final audit of such institutions.

Your attention is called to Section 101-a2 of the 1935 Code of Iowa, which provides as follows:

"*Annual settlements.* The Auditor of State shall annually, and oftener if deemed necessary, make a full settlement between the state and all state officers and departments and all persons receiving or expending state funds, and shall annually make a complete audit of the books and accounts of every department of the state.

"Provided, that the accounts, records and documents of the treasury department shall be audited daily;

"Provided further, that a preliminary audit of the educational institutions and the State Fair Board shall be made periodically, at least quarterly, to check the monthly reports submitted to the comptroller's office as required

by Section 84-e6, subsection 7 of Chapter 7-E1 and that a final audit of such state agencies shall be made at the close of each fiscal year."

From a careful reading of this section, it is apparent that the first paragraph of the above section refers to two separate matters, the first being the question of settlements, and second, the complete audit of the books and accounts of every department of state.

The first paragraph of the above section makes it the duty of the Auditor of State to make annual settlements with all state officers and departments, and all persons receiving or expending state funds, and that the Auditor shall make full settlements between the state and such officers, departments and persons "oftener if deemed necessary." It is plain from a careful reading of the above section that it is the duty of the Auditor to make such settlements annually and oftener if deemed necessary. This being true, the question narrows itself down to a legal construction of the statutory phrase, "and oftener if deemed necessary." Whom did the Legislature intend should decide the question of making such settlements "oftener if deemed necessary"? In other words, in whom did the Legislature place the responsibility of making the decision as to when more frequent settlements should be made if deemed necessary?

With respect to the making of annual settlements, the Legislature did not give the Auditor any discretion, but directed the Auditor to make *annual settlements.* The Legislature in this same provision of law also directed the Auditor to make such settlements "oftener if deemed necessary." If the Legislature intended that the Auditor should determine when more frequent settlements should be made, it would have used different language for such a purpose. It would have directed the making of these settlements oftener if *the Auditor* deemed it necessary. The refusal of the Legislature to specifically authorize the Auditor to decide when more frequent settlements should be made shows on its face that the Legislature did not intend that the Auditor should be authorized to make these decisions. When an act has been properly passed by the Legislature, in accordance with the provisions of the state constitution, applicable thereto, and has been properly enrolled and becomes effective as a law, it then becomes the duty of the supreme executive of the state to enforce the same. Article IV, Section 1 of the constitution provides as follows:

"The Supreme Executive power of this state shall be vested in a Chief Magistrate, who shall be styled the Governor of the State of Iowa."

Article IV, Section 8 of the constitution of the State of Iowa provides as follows:

"*Duties of governor.* Sec. 8. He shall transact all executive business with the officers of government, civil and military, and may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective officers."

Article IV, Section 9 of the constitution of the State of Iowa provides as follows:

"*Execution of laws.* Sec. 9. He (the governor) shall take care that the laws are faithfully executed."

Section 1225 of the 1935 Code of Iowa provides as follows:

"*State accounts—inspection.* The books, accounts, vouchers, and funds belonging to, or kept in, any state office or institution, or in the charge or under the control of any state officer *or person having charge of any state funds or property*, shall, at all times, be open or subject to the inspection of the governor or any committee appointed by him, or by the general assembly or either house thereof; * * * *."

Therefore if any situation should arise in the settlement of accounts between the state and any person receiving or expending state funds or having charge of any state funds or property more frequently than annually, and it became necessary for such settlement to be made and a dispute should arise between the Auditor's office and the person or officer or state department as to whether such settlement should be made immediately or whether it would be delayed until the Auditor made his annual settlements with such person, officer or department, it clearly appears that the chief executive of the State of Iowa is empowered under the law to make this decision. Situations may arise between the time of making annual settlements, where it does become necessary for full settlements to be made, between the state and any state officer, department or person receiving any state funds or property such as the abolition of any such office by the Legislature, and the transfer of its powers, functions and duties to some other officer or department or by the resignation of any such officer or any person where the interests of the state might be prejudiced by waiting until the annual settlement was made by the Auditor. It must have been situations of this type and character that the Legislature had in mind when they adopted the first paragraph of Section 101-a2 of the 1935 Code of Iowa. The Legislature appreciated and realized that such settlements might become necessary more frequently than annually. The Legislature specifically directed the Auditor to make such settlements. *He shall make such settlements annually and oftener if deemed necessary.*

In case such a dispute should arise and upon being directed by the Governor to make such settlement, the Auditor would still refuse to make the same oftener than annually, it appears clear to us that a writ of mandamus would lie for a court order directing and compelling the Auditor to perform the duties as imposed upon him by the laws of the State of Iowa, and particularly by Section 101-a2 of the 1935 Code of Iowa, otherwise known as Chapter 5, Sections 10, 12 and 32, and Chapter 5, Section 2, of the Acts of the 45th General Assembly. It would be the duty of the Attorney General to bring such an action when, in his judgment, the interests of the state required such action, or when the Attorney General is requested to do so by the Governor, Executive Council or the General Assembly. See Section 149, Paragraph 2, of the 1935 Code of Iowa.

If in such a proceeding it should appear to the court that it was necessary to make these settlements more frequently than annually, there is no question but what the court would be authorized and empowered to require the Auditor to do so at once, or punish for failure to comply with the court's order in contempt cases.

In arriving at our conclusions, we have examined law dictionaries in order to determine the legal meaning of the word "deem." On page 343 of Ballentine's Law Dictionary, we find the following definition:

"To judge; to determine upon consideration; to form a judgment; to conclude upon consideration.

"The verb deem and its past participle, 'deemed' are of frequent occurrence in statutes, and yet the word does not appear to have acquired any legal or technical meaning. It has received many interpretations, most of which have depended almost wholly upon the context. It is used in the sense of 'adjudge,' 'regard,' 'believe,' and otherwise. The cited case and the note in Ann. Cas. which follows it, appear to exhaust the subject. See In re Rogers, 19 Ontario Law Reports, 622, 16 Ann. Cas. 476."

On page 344 of Ballentine's Law Dictionary, we find that the word "deemster" means:

"One of the two chief justices of the Isle of Man."

Therefore when the Legislature did not specifically authorize the Auditor of State to deem that such settlements should be made oftener than annually, it clearly follows that this judgment or discretion must be exercised by other officials. The Legislature plainly directed the Auditor to make these settlements annually and oftener if deemed necessary. Suppose the Auditor should refuse to make annual settlements. We believe that the procedure above outlined would apply in this latter hypothetical case, as in the case where the Auditor refused to make these settlements oftener than annually.

In arriving at a full and complete determination of this question, you should call attention to the rule of law that has been uniformly upheld and applied by our courts which is to the effect that every sworn public official is presumed to do his duty. We feel that where it is really necessary to have these settlements made oftener than annually that the State Auditor will perform his duty therein, as outlined by Section 101-a2 of the 1935 Code of Iowa. We cannot anticipate and we do not presume that the Auditor of State will refuse to perform the duties imposed upon him by the Legislature with reference to making these settlements. However, in case an honest dispute should arise as to who should make the decision as to whether or not the settlements should be made oftener than annually, we have attempted to outline the proper procedure for determination of such an issue, in accordance with the constitution and statutory provisions relating to the operation of our state government.

It is therefore the final opinion and conclusion of this department that the Auditor of State is the proper and only official in the state government to make settlements between the state and any state official, department or person receiving or expending state funds, and that the Auditor shall make such settlement annually or oftener if deemed necessary, in accordance with the provisions of law as hereinbefore expressly set forth.

SCHOOLS: TRANSPORTATION: Board of consolidated school corporation of Milford may transport children of school age living within said corporation and more than mile from such school to the consolidated school. Mere fact that some of the children thus transported should desire to attend a private school would not make the matter illegal or unauthorized.

July 14, 1936. *County Attorney, Spirit Lake, Iowa:* It appears from information that has come to our office that the consolidated school corporation of Milford, Iowa, and the officials of the private school at Milford, Iowa, desire an opinion from this department upon the following question:

Can the board of the consolidated school district transport every child of

school age living within such school corporation and more than a mile from such school to the consolidated school at Milford, where some of the children so transported attend the private school and not the public school?

Section 4179 of the 1935 Code of Iowa is as follows, to-wit:

"*Transportation.* The board of every consolidated school corporation shall provide suitable transportation to and from school for *every child of school age living within said corporation* and more than a mile from such school, but the board shall not be required to cause the vehicle of transportation to leave any public highway to receive or discharge pupils, or to provide transportation for any pupil residing within the limits of any city, town, or village within which said school is situated."

From a reading of the above section, it appears that the board of such consolidated school corporation shall make provisions for the transportation of every child of school age living within said corporation and more than a mile from such school, unless other statutes of the State of Iowa prohibit them from doing so. The pertinent statutes that we should consider in this connection are the following sections:

"5256. *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."

"5257. *Violations.* Any officer of any county, or any deputy or employee of such officer, who violates any of the provisions of Sections 5255 and 5256, shall be guilty of a misdemeanor, and fined not less than one hundred dollars, nor more than five hundred dollars, for each offense."

Section 5256 of the Code of Iowa has been interpreted by our Supreme Court as applicable to school corporations as well as to counties and townships. See *Knowlton vs. Baumhover*, 182 Iowa 691, 166 N. W. 202. In this decision our court held that public taxes may not be legally diverted to the maintenance of a school which is under sectarian management. It therefore appears clear to us that the public taxes which are used for the purpose of paying for the transportation of the school children could not be employed for the benefit of any private or sectarian school. However, the real question that arises from the consideration of this problem is whether or not transportation of these children is for the benefit of those children who might desire to attend the private school, or whether or not it is for the benefit of the private or sectarian school. If the transportation of such children is for the benefit of the private or sectarian school, then our laws would prohibit the board from entering into any such agreement for their transportation. However, if the transportation of these children, in accordance with Section 4179, is for the benefit of the children in enabling them to secure an education, a different legal situation would be present.

A somewhat similar situation existed in the State of Louisiana where the Legislature had passed laws authorizing the school board to supply free school books to the school children of the state. In carrying out this act, the school board in the State of Louisiana were furnishing these free school text books to students in private and sectarian schools, as well as to students in public schools. An injunction was sought to prevent the school boards from supplying such free textbooks to the children who were attending private or sectarian schools. The Supreme Court of Louisiana denied the is-

suance of such a writ of injunction and thereafter the case was appealed to the Supreme Court of the United States.

On April 28, 1930, the United States Supreme Court affirmed the decision of the Supreme Court of Louisiana, which decision is known as the case of *Cochran vs. Board of Education,* reported in 281 U. S., at page 370. The decision of United States Supreme Court was written by Chief Justice Hughes, and in arriving at his conclusions, quoted from the opinion of the Supreme Court of the State of Louisiana, as follows:

"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 nonsectarian, 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." *67 A. L. R. 1183, 123 So. 655.*

In summing up his views on the question presented, 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."

Therefore, in applying the rule of law as announced by Chief Justice Hughes of the United States Supreme Court to the question before us, we may likewise say that Section 4179 of the Code is a proper exercise of the taxing power of the State of Iowa, and it is used for a public purpose. Section 4179 of the Code does not segregate children of school age within the district into classes of those attending private schools or the public school. Section 4179 of the Code makes every child of school age living within said consolidated school corporation and more than a mile from such school the beneficiaries of this legislation. The private schools are not in any wise made the beneficiaries of this law. The intent of the Legislature, as expressed in Section 4179, was to make the school children and the state alone the beneficiaries of this legislation. The individual interests of the school children are thus aided only as the common interest is safeguarded. It appears to be the main object of Section 4179 to make it possible for every child of school age in the school corporation and living more than a mile from such

school to secure an education. Under this section of the Code, it is the duty of the school corporation to transport such children to the consolidated school, and then when the school day is over, to transport them back to their homes. It is not the purpose of the laws of this state to require parents and guardians to send their children to public schools exclusively.

Section 4410 of the 1935 Code of Iowa provides that any person having control of any child over seven and under sixteen years of age, in proper physical and mental condition to attend school, shall *cause said child to attend some public or private school* for at least twenty-four school weeks in each school year * * * *. Thus when the board has transported these school children to the consolidated school of Milford, Iowa, the children may then attend the consolidated school or may attend a private school at Milford. The law does not and cannot compel the parents or legal guardians of children to send their children to private schools, exclusively, or to public schools, exclusively. The conditions of the law are met when the parent or guardian compels the children to attend either, in accordance with Section 4410 of the 1935 Code of Iowa.

It is therefore the opinion of this department that the board of the consolidated school corporation of Milford may properly and legally transport every child of school age living within said consolidated school corporation and more than a mile from such school to the consolidated school at Milford, Iowa, and the mere fact that some of the children thus transported should desire to attend a private school would not make the matter of their transportation illegal or unauthorized by the laws of this state. This conclusion appears to be the only conclusion that we can arrive at, in view of the holding of the Supreme Court of the United States of America in the case of *Cochran vs. Board of Education of the State of Louisiana,* reported in 281 U. S., 370.

In view of the policy adopted by our office and in conformity with Section 149 of the 1935 Code of Iowa, we are sending the original of this opinion to the County Attorney and copies of it to the board of directors of the consolidated school district of Milford and to the authorities in charge of the private school who desire an official opinion from this department on this question.

HIGHWAYS: PRIMARY ROAD FUND: ADVANCEMENT TO PAY COUNTIES IN TRUST TO PAY COUNTY PRIMARY ROAD BONDS AND INTEREST DUE IN THE FUTURE. The authority of the State Highway Commission to advance money in trust to the counties for the payment of county primary road bonds and interest is by Sec. 4755-f8 limited to those bonds "about to mature or accrue" and the Highway Commission cannot at this time advance in trust to Guthrie county money to be held by such county in trust to pay the principal and interest of the Guthrie County Primary Road Bonds due May 1, 1937.

July 14, 1936. *Iowa State Highway Commission:* I am in receipt of your request of July 8, 1936, for an opinion on the situation hereafter set forth. Guthrie County is at the present time indebted in an amount approximately $3,000.00 in excess of its debt limit. The county home of Guthrie County has been destroyed by fire, and the Board of Supervisors wish to submit to the voters the question of issuing $30,000.00 of bonds to construct a new county home. The large part of the indebtedness of the county consists of county primary road bonds. On May 1, 1937, $90,000.00 of these bonds will

be due and payable. The Board of Supervisors of Guthrie County has requested your commission to now advance or pay to the county in trust, from the Primary Road Fund, sufficient funds to pay the interest due on all the primary road bonds due May 1, 1937, and also sufficient additional funds from the same fund to pay $18,000.00 of the principal of the bonds due May 1, 1937. The reason for this request is that upon the deposit of such funds, such funds are on hand available for the payment of $18,000.00 of those bonds, and under the provisions of Section 4753-g1 may be computed as an offset against the county indebtedness. This offset together with some $15,000.00 of other county bonds to be paid off on October 1, 1936, will reduce the indebtedness of the county, so that the $30,000.00 of bonds for rebuilding the county home could be issued without exceeding the debt limit of the county.

Section 4755-b4 of the 1935 Code of Iowa, relating to the primary road fund, provides among other things, that it should be used for "the payment of interest and the redemption of any bonds issued in anticipation of said primary road fund."

Section 4755-f8 provides as to how the State Highway Commission shall make payment of the interest and principal of those bonds by providing that whenever in any county, any of the bonds, or interest on such bonds, are *"about to mature or accrue,"* the State Highway Commission shall prepare a voucher for the amount of that principal and interest and forward the same to the State Treasurer who shall pay the same out of the primary road fund. This provision, which came into the law by Chapter 48 of the laws of the Extra Session of the 45th General Assembly (1933-1934), changed the provisions of the then existing law; which provided in Section 4755-b32 of the 1931 Code of Iowa, that such funds should be sent out thirty days prior to maturity of the bonds and interest.

Section 4753-a12 provides that a county in issuing primary road bonds shall provide for a tax levy to pay the principal and interest of the bonds, if the allotment to that county from the primary road fund is insufficient for that purpose. Thus, contingencies could occur where such levies would be necessary, and in 1933, for a while it looked like such levies might be necessary.

There are at the present time county primary road bond issues outstanding in an overwhelming number of the counties in the state. The interest on these bonds is payable semi-annually on November 1st, and May 1st, of each year, with the principal of the bonds maturing on the same dates. There are no Guthrie County bonds maturing November 1, 1936, but there are bonds maturing on that date in other counties in the state.

The only authority given to the State Highway Commission to pay funds over to a county to meet bond and interest payments is contained in Section 4755-f8 above referred to, which provides that such commission shall pay the same to the counties when such bonds and the interest "are *about* to mature and accrue." With the November 1, 1936, payment of interest and principal intervening between now and May 1, 1937, and the November 1, 1936, payment being nearly four months away, and the May 1, 1937, payment six months after that, it could not be said that the bonds and interest due May 1, 1937, are "about to mature or accrue." It is true that the bonds

due May 1, 1937, will mature or accrue, but the same is true of all bonds issued, even though the maturing or accruing is several years hence.

Conditions in regard to meeting the bond and interest payments on county primary road bonds might not always be as favorable as they are at the present time, and there is always in the background the possibility of the necessity of a county tax levy. If on any particular time in the future when the payment of the principal and interest of the county primary road bonds becomes due, there would be insufficient funds in the primary road fund to pay all of the principal and interest, it would certainly be the rule under the decisions of the Iowa Supreme Court relating to analogous cases, that all counties would have to be treated alike, and the available funds would be allotted proportionately among the counties according to the maturities to be met, and it could not be the intention of the Legislature that in such cases certain counties would get their bonds and interest paid in full and thus escape any tax levy, while others would have to make a tax levy for the whole amount. If when such occasion arose, it developed that certain counties had already been advanced one or more payments in the future, these would have had their money in full and thus escape a tax levy, while those not so fortunate would have to levy taxes, and it would in effect be the same as though the Highway Commission had paid some in full and left some of the rest out. While no Highway Commission would ever consciously do this, yet the amount of money going into the primary road fund is more or less on a monthly basis, and can fluctuate greatly from month to month, and where funds are advanced for payments due some distance in the future, unexpected events and happenings might leave a deficiency in meeting those payments due in the then shortly immediate present.

There is another rule of law that has been adopted by the Iowa Supreme Court in some analogous cases, known as the "earlier maturity rule," typified by the case of Leavitt vs. Reynolds (1890), 79 Ia. 348, 44 NW 567, L. R. A. 365. This rule is to the effect that where there are holders of several evidences of secured indebtedness, the first to mature is entitled to the priority and preference of being paid in full before anything is paid on the indebtedness maturing later. In the cases of special assessment bonds in Iowa where shortages occur the most frequently, those bonds maturing first are paid in full before anything is paid on those maturing later. While the situation in regard to making payments in a county primary road bond from the primary road fund is not identical, yet it is analogous, in that a special fund or source is provided for their payment. Under this theory, the holders of those county primary road bonds maturing Nov. 1, 1936, would be entitled to be paid in full before anything is paid on those maturing later. The advancement of funds as requested in this case would, in order to be effective, as a means of reducing the county indebtedness, have to be beyond the power of recall by the Highway Commission, and would in legal effect constitute a payment of that amount of bonds due May 1, 1937, before the payment in full of the bonds due Nov. 1, 1936, and in my opinion, would constitute an infringement upon the rights of those bond holders holding bonds maturing Nov. 1, 1936.

In this connection it should be noted that under the law that previously existed, as found in Section 4755-b32 of the 1931 Code of Iowa, the Highway

Commission was obliged to set aside from the primary road fund sufficient to meet the payment of the bonds and interest. This provision was held by an opinion of the Attorney General, dated April 6, 1933, found in the report of the Attorney General, for the year 1934, on page 151, to make the claim for bond payments and interest a prior claim upon the primary road fund. This provision was, however, repealed by Chapter 48 of the Acts of the Extra Session of the 45th General Assembly (1933-1934). While the repeal of this provision might be of importance in determining the question of the priority of the claim for bond payments and interest over other items directed to be paid from the primary road fund, it would not have any connection as to the right of those having bonds maturing first to have them paid ahead of the bonds maturing later out of such funds as might be allotted for such payments.

While all of the bond holders would have recourse to the tax levy of the counties in case of any deficiency, yet the procedure for levying and collecting a county tax would take a year or a year and one-half, and the question would be of importance as to who had to do the waiting.

It should be further noted that the Primary Road Fund is deposited in banks as state funds, and as such, interest is paid on it which goes into the State Sinking Fund, as provided by Chapter 352-A1 of the 1935 Code of Iowa, and that when money is paid out of the Primary Road Fund to the County Treasurer for the purpose of meeting payments of bonds and interest, it is provided by Section 4753-g1 that such funds shall be "by such county treasurer converted into a separate account, and any of the same when so deposited in another qualified county depository be designated and held by such depository *without interest* as a special trust fund deposit." So, the effect of such a deposit as requested in this case, would be to take funds from where they are drawing interest going into the State Sinking Fund and putting them where they would draw no interest, and thus in effect deprive the State Sinking Fund of interest legally due such fund. If, as suggested, in such cases, the county favored pay to the State Sinking Fund the amount of the interest lost, this would not seem to solve the problem, for the county would be paying interest on the bank deposit, and there is no provision in the Iowa law where a county or other governmental agency can pay interest on a bank deposit; to the contrary, all of the provisions of the Iowa law relating to that matter provide for the bank paying interest on such deposits, not the governmental agency. The use of county funds for such purpose would be subject to the question of illegality.

To hold that the Highway Commission could make the advance requested in this case would be to hold that the Legislature has given the Highway Commission authority to make advancements from the Primary Road Fund for payments due six months, a year and a year and one-half in advance, within the biennial period, to such counties for such reasons as might appeal to the Commission at the time. I cannot find any legislative grant of such authority.

The legislative grant of authority to the Highway Commission is to pay to the counties the amount of the bonds and interest "about to mature or accrue." In this case, at the present time, the principal and interest due May 1, 1937, is not "about to mature or accrue" and cannot be legally paid at this time.

If it were to be conceded that the power asked to be exercised in this case existed, it would, I feel sure, be exercised by the present Commission only as to small amounts and wisely, but to concede that such power could be exercised by the present Commission because they would exercise such power only as to small amounts, and then wisely, would be to concede that it could be exercised by future Commissions as to large amounts, and unwisely. As to whether a power exists does not depend upon who constitutes the board or agency at the particular time it is sought to exercise the power, but depends upon the general rules of law, for this is a government of laws, and not of men.

I regret that it has been necessary to reach the conclusions set forth in this opinion, and thereby delay and hinder the program for the assistance and relief of the aged poor, but whatever may be one's personal wishes and desires, they cannot override the seeming plain mandate of the Legislature as to the handling of Primary Road Funds.

HIGHWAYS: SECONDARY ROAD CONSTRUCTION PROGRAM: RECOMMENDATION OF TOWN TRUSTEES. The County Engineer, Board of Supervisors and Board of Approval, in planning a Secondary Road construction program are confined in their selection to those submitted by the township boards of trustees. However, any township whose Board of Trustees submits projects so limited in number, and of such a character, as not to enable a unified program to be adopted, are not complying with the law and the particular township may be omitted from the program.

July 15, 1936. *County Attorney, Newton, Iowa:* I am in receipt of your letter of July 1, 1936, requesting an opinion as to the rights and limitations of a Board of Approval in framing a secondary road construction program, as to the recommendations or plans submitted by the Township Trustees.

In regard to the question of whether the Board of Approval meeting, as provided by Sections 4644-c24 to 4644-c36, inclusive, is limited in adopting such programs to those submitted by the Township Trustees, involves a study of purposes and objects of the whole Secondary Road Construction Act. The fundamental object and purpose of the Secondary Road Construction Act is as shown by Section 4644-c27, that the program shall furnish "the highest possible systematic, intra-county and inter-county connections of all roads in the county," and to that end, in the same section, it is provided that due and careful consideration be given to the relation of the local county roads, to the primary roads, county, main and market roads, and to rural mail routes and school bus routes.

We have a system provided where the townships represented by the Board of Trustees and the county represented by the Board of Supervisors and the County Engineer functioning together, with the duty of carrying out this purpose, with final supervisory authority in the State Highway Commission to see that the object and purpose of the act is not ignored. The system is a combination of township, county, and state responsibility and control. It was the evident purpose of the act to provide for local self government by the townships coordinated together by the county and state to form a unified program. It is a plan of checks and balances. The township trustees institute the projects as a recognition of local needs, with which they would be most familiar. This acts as a check on the Board of Supervisors so they

cannot ignore local needs. However, there is a check on the township trustees by providing that the projects submitted by them must be capable of being coordinated and fitted into a general program by the Board of Supervisors, the County Engineer and the Board of Approval; with a check on them by the supervisory powers of the Iowa State Highway Commission. Thus, it is a system of local self-government functioning within a framework of unity.

In Section 4644-c25 provision is made for the township trustees to prepare a tentative plan of improvement for the roads in their townships, setting out in the plan the road or roads, which in their estimation should be improved first. It is further provided in that section that the Board of Supervisors and the County Engineer shall, after the filing of the plans, proceed to plan a program of construction to be submitted to the Board of Approval, "always observing the plans filed by the boards of trustees." In my opinion, this limits the program to the plans filed by the township trustees. If roads are selected not filed by the township trustees, their plans are ignored and ignoring plans cannot be construed as "observing them." If the Board of Supervisors, the County Engineer and the Board of Approval can go outside of the plans submitted, to include one additional road, they could go outside as to all, and completely ignore them, which would be contrary to the legislative intent which is to give recognition to needs and wishes of the local township.

In this connection, there is one phase that might easily be overlooked by the township trustees, that they are not merely to submit enough projects to cover the estimated funds likely to be provided for that township, they are to submit sufficient projects so that the Board of Supervisors, the County Engineer and the Board of Approval have some choice, so that if a particular project does not fit into the comprehensive program, others can be selected. This is made very clear by Section 4644-c25, which provides that the township trustees shall indicate in their estimation which roads should be improved first; next by Section 4644-c26, which provides that the program shall be a unified program, which implies that if one project does not fit into that program another could be substituted; and, lastly, by Section 4644-c29, which provides that the County Engineer may recommend omissions or additions to the program, and since the engineer is bound by Section 4644-c25 to always "observe" the plans of the township trustees, he could not very well make omissions or additions unless there were several projects to select from.

The question then arises as to what can be done where a particular board of township trustees only files such a limited amount of road as to leave no choice in either the Board of Supervisors or the Board of Approval. Supposing in a hypothetical case, that a board of township trustees includes only in its plan a limited stretch of road in front of one of the member's places, and completely ignores main and market roads, rural mail routes and school bus routes, the improvement of which is needed by the great majority of the residents of the township. In such a case it is plain that this particular board of trustees are neglecting to perform the duties imposed upon them by the Secondary Road Act. They are not giving consideration to the roads the Legislature says should be given consideration; they are not giving any heed to the provisions of setting forth what roads should be improved first, for there is no chance of making the particular road anything but first. They are not giving the County Board of Supervisors and the County Engineer,

or the Board of Approval any opportunity to present a unified plan, such as the law requires. It would be a plain case of flaunting the law. If any township trustees were so neglectful of their duties as to not file any plan, that particular township would of course be omitted from the program. The submission of a plan that flaunts the law by noncompliance has no legal standing as a plan, as it is the same as if no plan were submitted at all. If in a typical county of twenty townships, nineteen submit plans in accordance with the law, and one does not, the good faith efforts of the nineteen cannot be nullified by the action of one, and there is nothing to do in such a case but to submit the county program with the offending township omitted, and its estimated share of the funds made available for those townships that do comply with the law.

The administrative officers of the Highway Commission, who examine secondary road construction programs and make recommendations as to their acceptance or rejection by the Highway Commission, inform me that in cases such as just mentioned, they will recommend approval with offending township or townships omitted, and that in cases where the project or projects of the offending township or townships are included in the program by the Board of Approval, they will recommend that the program for that county be not approved until the offending township is omitted from the program, or the situation corrected.

While it may seem hard in some cases to penalize an entire township because of the attempt of their trustees to flaunt the law, yet it may be presumed that when such township is on that account entirely omitted from the road construction program, that the voters of that township will at election time deal in no uncertain fashion with those unfaithful to their trust, and elect trustees who will comply with the law. In a democracy many situations are left to be dealt with and solved in this manner.

Where plans are filed by township trustees that obviously fail to comply with the law, while not necessary, yet to avoid penalizing for what might be lack of information, or ignorance, it would be good practice for the County Engineer, or the Board of Supervisors, to call the attention of the particular board of trustees, of the failure of their plan to comply with the law and suggest corrections. If after such notice the particular board of trustees adheres to the original plan submitted, of course then, it is a plain case of attempting to defy the law and they can then have no complaint when their township is omitted from the program entirely.

As a matter of precaution, so that the township will not be in danger of running into some of the difficulties mentioned, I believe it would be well for the township trustees to include in their plan submitted, three times as many projects or miles as the contemplated funds might improve, during the particular period, indicating the order which in their estimation they should be improved during the period, paying careful attention that the projects submitted fulfill the objects and purposes of the Secondary Road Act, heretofore set forth.

COUNTY ATTORNEY: ADDITIONAL EXPENSE OF: A County Attorney is required by law to institute actions for the benefit of the county, and therefore has authority to incur necessary expense for the purpose of carrying out and administering his duties.

July 16, 1936. *Auditor of State:* Under date of July 3, 1936, Mr. John J. Foarde, Assistant Attorney General, issued an unofficial letter opinion to you with regard to the following matter:

"During the year 1934, warrants totaling $1,715.00 were drawn in favor of the Polk County Attorney for payments made by him to alleged criminal investigators.

"I can find no provision in the Code of Iowa that would authorize such payments.

"Section 5184 of the 1931 Code provides for criminal investigation to be made by the Sheriff when so requested in writing, and the Sheriff is required to file a detailed, sworn statement of his expenses, accompanied by the written order of the County Attorney before the Board of Supervisors can audit and allow his claim.

"Section 5146 of the 1931 Code also provides that each warrant issued by the auditor shall be made payable to the person performing the service.

"It would, therefore, seem that these payments are not only unauthorized, but in direct violation of Section 5146 of the 1931 Code.

"Kindly advise."

It appears that the letter opinion prepared and issued to you by Assistant Attorney General Foarde was based upon an erroneous assumption of the facts relative to this matter. For this reason Mr. Foarde's letter opinion of July 3, 1936, is hereby withdrawn and the following opinion is issued in lieu thereof.

The legal question requested by you refers to the joint powers of the County Attorney and the Board of Supervisors to make reasonable and necessary provisions for the expenditure of county funds for the purpose of defraying the expenses of under-cover investigations in criminal matters authorized by the County Attorney and also by the Board of Supervisors. It is true that there is no express statutory provision for this purpose. However, this is not controlling for the reason that the Legislature cannot anticipate each and every situation that might arise wherein it is necessary for county officials to incur necessary expense where the same is not specifically mentioned in the statute.

It is true that Section 5184 of the Code authorizes a sheriff to make special investigations of alleged infractions of the law when so directed in writing by the County Attorney. This section simply adds an additional duty to the sheriff's office under certain conditions. This statute does not exclude other investigations that might be necessary to be made for the purpose of enforcing the criminal laws of the state by the County Attorney and in accordance with the expressed duty of the County Attorney is contained in Paragraph 1 of Section 5180 of the 1935 Code of Iowa, which is as follows, to-wit:

"5180. *Duties.* It shall be the duty of the County Attorney to:

"1. Diligently enforce or cause to be enforced in his county, all of the laws of the state, actions for a violation of which may be commenced or prosecuted in the name of the State of Iowa, or by him as County Attorney, except as otherwise specially provided."

This section of the Code makes it the express duty of the County Attorney to diligently enforce or cause to be enforced the criminal laws in his jurisdiction. It is the general rule of law that where a county official has express authority to do or to perform a certain duty, he necessarily has the additional implied authority to incur necessary expense for the purpose of carrying out and administering his duties as expressly provided for.

A similar situation is true with respect to the powers of the Board of Supervisors. The following paragraphs of Section 5130 of the 1935 Code of Iowa illustrate this principle of law:

"5130. *General Powers.* The Board of Supervisors at any regular meeting shall have power: * * * *

"2. To make such rules not inconsistent with law, as it may deem necessary for its own government, the transaction of business, *and the preservation of order.* * * * *

"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."

On June 7, 1933, this office issued an official opinion to the County Attorney of Polk County, Iowa, holding that the Board of Supervisors have the power and authority to hire a parole agent for Polk County where the same was necessary and where such employment would not conflict with the duties of any office already created by law, and where it did not exceed an express statutory provision regarding employment, and where such employment was for the best interests and benefit of the county. In this opinion we stated the rule of law, as follows:

"Our Supreme Court has consistently upheld the action of the 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."

See *Report of Attorney General,* 1934, pages 241 and 242.

Some of the decisions of our Supreme Court in line with this proposition at law are as follows:

Campbell vs. Polk County, 3 Iowa 467.
Bean vs. Board, 51 Iowa 53.
Grimes vs. Hamilton County, 37 Iowa 290.
Mills County vs. Burlington & M. R. R. Co., 47 Iowa 66.
Collins vs. Welch, 58 Iowa 72.
McCarty vs. Eggert, 154 Iowa 28.
Poweshiek County vs. Stanley, 9 Iowa 511.
Heller vs. Montgomery Co., 188 Iowa 981.
Allen vs. Cerro Gordo Co., 34 Iowa 54.
Page County vs. American Em. Co., 41 Iowa 115.
Call vs. Hamilton Co., 62 Iowa 448.
Hawk vs. Marion Co., 48 Iowa 472.

Under certain conditions the County Attorney may bind the County without first securing the approval of the Board of Supervisors. It has been held that where the County Attorney is required by law to institute actions for the benefit of the county he may bind it to pay the reasonable and necessary expenses incidental thereto.

18 C. J. 1313.
Christner vs. Hayes County, 79 Nebraska 157; 112 N. W. 347.

In the case of *Christner vs. Hayes County, supra,* the Supreme Court of Nebraska lay down the following rule of law which appears to be valid and sound:

"But, where it is impossible, the power to make expense therefore is incidental to the power conferred by law, and the order of the board directing

the institution of such suits. In *People vs. Board of Supervisors*, 45 N. Y. 196, it was held that an attorney could recover for the time and traveling expenses incidental in finding and subpoenaing witnesses. 'Public officers have not only the powers expressly conferred upon them by law, but they also possess by necessary implication such powers as are requisite to enable them to discharge the official duties devolved upon them.' 3 Am. & Eng. Ency. Law (2nd Ed.) 364. This court has repeatedly recognized the rule that county officers have such powers as are incidentally necessary to carry into effect those which are granted. *Lancaster County vs. Green*, 54 Neb. 100, 74 N. W. 430, and cases cited."

In the Iowa case of *Heller vs. Montgomery County*, 188 Iowa 981, the County Attorney secured a court order for the purpose of having the clerk of the grand jury make a full and complete transcript of all of the evidence introduced before the grand jury at the expense of Montgomery County. The County Attorney did not first procure the consent of the Board of Supervisors of Montgomery County for the purpose of authorizing such expense. In deciding this question our Supreme Court uses the following language on pages 984 and 986 of 188 Iowa:

"It is doubtless true that the County Attorney is not entitled to reimbursement for personal expenses, unless provided by law. 32 Cyc. 701. But the compensation sought to be recovered by plaintiff in this action is not for the personal expenses of the County Attorney. It was for the benefit of state and the county. *We think the County Attorney has some discretion in incurring costs on the part of the county.* In this case, he did not proceed upon his own responsibility, but took the precaution to ask the court to make an order. There can be no question of his good faith. Nor can there be any question that it was necessary, under the circumstances, to have a transcript of this evidence, in order that the County Attorney could perform the duties required of him. An unusual situation was presented. Neither the County Attorney nor the court could arbitrarily or unnecessarily put the county to expense. But we think that, in a proper case, such as this, the County Attorney had the authority, had authority under order of the court, to order the transcript of the evidence. Each case must rest upon its own peculiar facts."

The facts surrounding the question presented to us for our opinion are as follows:

It appears that the County Attorney of Polk County appeared before the Board of Supervisors of Polk County, explaining the necessity for the employment of an under-cover investigator and stated valid reasons therefor. The Board of Supervisors under their discretionary powers, as hereinbefore stated, decided that the employment of such an under-cover agent was necessary. In their budget estimates for the County Attorney's office for the year 1934, they included the estimate of $1,715.00 as being necessary for extra help of a special investigator for the County Attorney's office. (See certified copy of such budget estimates hereto attached and by this reference made a part hereof.)

The Board of Supervisors of Polk County on January 12, 1934, by proper resolution, authorized the expenditure of $1,750.00 for defraying the expenses of a special investigator for the County Attorney's office. (See certified copy of such resolution attached hereto and made a part hereof.) Certified copies of the payroll for the office of County Attorney of Polk County for the year 1934 are hereby attached and made parts hereof, clearly show that the sum of $71.43 was expended bi-monthly to Carl A. Burkman for special

investigations, the last payment for the second half of the month of December, 1934, being in the amount of $72.11.

In addition to the above certified copies of the record concerning this matter the receipts showing full payment to the special investigator were produced and presented to me for my inspection, and I also examined the special investigator who verified his signature to each and every receipt showing that he actually received the sum of $1,715.00 from the County Attorney of Polk County for the performance of his services as an under-cover agent in procuring evidence of law violations in Polk County where it appeared that such evidence could not be produced by the regular peace officers for the reason that they were too well known. After such receipts were presented to me and after I had examined the special investigator, I advised the County Attorney that he should present those receipts to an authorized representative of your office. Prior to the writing of this opinion I was reliably informed these receipts were presented to Mr. Wm. Shaw, one of your examiners or accountants, and that the same were thoroughly checked and would be included by Mr. Shaw in his special or additional report concerning this matter.

From a full and complete investigation of this matter, it appears that the question of the necessity for such special under-cover investigator was determined by the County Attorney and by the Board of Supervisors of Polk County, and that the services were rendered for the benefit of the county and state by such under-cover investigator and that such special under-cover investigator actually received the amount appropriated therefor and that none of this appropriation was used by the County Attorney for his own personal expenses or for his own personal benefit in any manner whatsoever. Under such a statement of facts we cannot legally hold that there was any violation of law on the part of the Board of Supervisors or on the part of the County Attorney of Polk County with respect to this matter.

We therefore feel that when your examiner, Mr. Shaw, makes his additional special report with regard to this matter, that the same will be satisfactorily accounted for, and that no further proceedings will be necessary in this matter.

HIGHWAYS: ELECTRIC TRANSMISSION LINES. Where it is desired to have electric transmission wires pass over a primary highway, even though poles are not to be located thereon, the applicant must make application to the State Highway Commission to have a state highway engineer locate the same, as provided by Section 4838 of the 1935 Code of Iowa.

July 20, 1936. *Iowa State Highway Commission:* I am in receipt of your request of July 2, 1936, submitted through W. H. Root, Maintenance Engineer, in which is requested an opinion on the following question: "Where an electric transmission line passes over a primary highway, but does not have any poles in the right-of-way, is it necessary that application be made to your Commission to have a State Highway Engineer designate the location of the wire or wires?"

Section 4838 of the Code of Iowa provides as follows:

"New lines, or parts of lines hereafter constructed, shall, in case of secondary roads, be located by the County Engineer upon written application filed with the County Auditor, and in case of primary roads, by the State Highway Engineer upon written application filed with the State Highway Commission and shall thereafter be removable according to the provisions of

this chapter. If there be no County Engineer, the Board of Supervisors, in case of secondary roads, shall designate said location."

The Supreme Court of Iowa, in the case of Wheeler vs. City of Fort Dodge (1906), 131 Iowa 566, 108 NW 1057, made the following pertinent statement on page 570 of the Iowa citation:

"The public right goes to the full width of the street and extends indefinitely upward and downward so far at least as to prohibit encroachment upon said limits by any person by any means by which the enjoyment of the public right is or may be in any manner hindered or obstructed or made inconvenient or dangerous."

The same reasoning would apply to the public rights in the primary highway. In connection with the construction program of the Highway Commission it is frequently found necessary to have electric transmission wires and telephone wires moved which have no poles in the right of way. This is most frequently necessary in connection with overpass projects, or where a corner is being rounded, or where there is a change in grade in the highway.

It is well settled in this state that a wire strung over a public way, even though strung high in the air, and even though no poles or supports are in it, constitutes an obstruction. That rule was established in Iowa in the case of Wheeler vs. City of Fort Dodge (1906), 131 Iowa 566, 108 NW 1057, above cited, where a wire was strung high above a street, without having supports in the street, for a "slide for life" act. In the case of Incorporated Town of Ackley vs. Central States Power Company (Iowa 1927), 214 NW 879, an electric power company was denied the right to have its transmission wires cross high in the air above the street, even though no poles or supports were situated in the streets. While the cases cited relate to streets, yet the reasoning of the cases, that such a rule is necessary so that the public rights in public ways may not in any manner be hindered, obstructed, made inconvenient, or dangerous, applies with equal force to primary highways, many of which are made wider use of by the public than most streets in cities and towns.

Section 4838 of the 1935 Code of Iowa, heretofore referred to, relating to the location of electric transmission lines over primary highways, is found in Chapter 248 of the Code relating to obstructions in highways. Under the authorities, telephone lines and electric transmission lines are considered as obstructions in public ways, but because of their semi-public character they can, under proper conditions, become permissible obstructions. Because the placing of obstructions in public ways is an encroachment upon the rights of the public and carries with it potentialities of danger to the public, the right to make an obstruction a permissible obstruction in such public ways, is most stringently safeguarded by law, and is only allowed in a limited number of cases, and then only under certain definite conditions. In the case of streets in cities and towns, electric transmission and telephone lines can only become permissible obstructions by a franchise granted by a vote of the people. A city or town council cannot make such use of the streets permissible without that procedure being followed. Governmental agencies cannot give legal permission to obstruct a public way, except in those cases, and for those purposes prescribed by law. In the case of Wheeler vs. City of Fort Dodge, cited above, in the opinion it is recited that the officers of the city "undertook so far as possible to authorize" the use of a wire across

a street for the purpose of a "slide for life" act, and the court held that the city could not make it legally permissible.

In cases outside of cities and towns electric transmission lines can only become permissible obstructions in the primary highways of the state, by securing a franchise from the Board of Railroad Commissioners as prescribed in Chapter 383 of the 1935 Code of Iowa, and by further making application under the provisions of Section 4838 to the Highway Commission to have them located by a state highway engineer. In the case of telephone companies, the provision for the franchise is omitted, obviously, because of the less dangerous character of telephone lines compared to electric transmission lines, but the telephone company must still comply with Section 4838 in regard to application to the Highway Commission and location by a state highway engineer.

In Section 8338 of the 1935 Code of Iowa, found in Chapter 383 of the 1935 Code of Iowa, relating to franchises for electric transmission lines, it is provided that nothing in that chapter shall prevent an electric transmission line owning a private right of way on both sides of the highway from crossing, under such rules and regulations as the Board of Railroad Commissioners may prescribe. This provision relates specifically to the matters found in said Chapter 383, which relates to franchises, but doesn't purport in any way to excuse such lines from complying with the provisions of law relating to obstructions found in Chapter 248, of which chapter, Section 4838 is a part. It seems clear that under the case of Iowa Railway & Light Corporation (Iowa 1930), 231 NW 461, the right to determine whether electric transmission lines shall be allowed on the particular primary highways at all is to be determined by the Railroad Commissioners, but where they are to be located on the particular highway is to be determined by a state highway engineer upon application to the Highway Commission.

The plain purpose of Section 4838 is to enable the Highway Commission to have supervision over the placing of obstructions in the primary highways of the state, because they might tend to interfere with the public rights therein. Since under the cases cited, wires which pass over a public way, even though the supports are not located therein, are obstructions, they can only become permissible obstructions by having the company involved proceed as provided by Section 4838.

In my opinion, no electric transmission wires or telephone wires which are intended to cross a primary highway, even though the poles are not to be located thereon, can be installed unless application is made to the Highway Commission to have the same located by a state highway engineer.

BONDS: PUBLIC IMPROVEMENTS: (Sec. 10300, Code of Iowa). Board would not have authority to pay costs of such bonds (Sec. 10302 also) directly to insurance company.

July 21, 1936. *Superintendent of Public Instruction:* We have your request for opinion on the following proposition:

"We desire an official ruling on the question as to whether the board may pay the costs of a bond provided for in Section 10300 of the Code of Iowa, 1935, direct to the surety company."

Section 10300 of the Code of Iowa provides as follows:

"*Public Improvements—bond and conditions.* Contracts for the construc-

tion of a public improvement shall, when the contract price equals or exceeds one thousand dollars, be accompanied by a bond, with surety, conditioned for the faithful performance of the contract, and for the fulfillment of such other requirements as may be provided by law. Such bond may also be required when the contract price does not equal said amount."

There is nothing in the law which requires or allows the public body to pay for the cost of a bond as such, and Section 10302 provides that a deposit may be made in lieu of a bond so in that event, there would be no premium payable and while it may be true that the cost of the bond and the other overhead is a part of the bid, yet the Board would have no authority to pay any of these items as such and it is the opinion of this department that the Board would not have the authority to pay the costs of such a bond directly to the insurance company.

BUILDING AND LOAN ASSOCIATION—CERTIFICATES. Auditor of State has no discretion after approval by the Executive Council.

July 22, 1936. *Auditor of State:* We acknowledge your letter of July 20th, in which you state that the Executive Council recently approved articles of incorporation of the Home Savings and Loan Association, Ames, Iowa, which is a new building and loan association, and said articles were then filed in the office of the Secretary of State and the required fees paid. You state that the secretary of another association at Ames has objected to the issuance of a charter to the new association and you submit the following question:

"Do we have the power to refuse to issue a charter to any group desiring to organize a building and loan association under the present laws?"

Building and loan and savings and loan associations are first incorporated under the general corporation statutes, Code 9310. Under these statutes on general corporations the Executive Council has certain discretion in approving or disapproving articles of incorporation, Code 8347. Section 8348 of the Code provides in substance that nothing in 8347 shall be construed as repealing or modifying "any statute now in force in respect to the approval of articles of incorporation relating to insurance companies, building and loan associations or investment companies." This statute was enacted since the 1897 Code was enacted and published and the provision in 8348, *"any statute now in force in respect to the approval of articles of incorporation of building and loan associations,"* refers to Section 1894 of the Code of 1897, which provides as follows:

"Such articles of incorporation with the by-laws of the association shall be presented to the Executive Council, and if it finds they are in conformity with the law, and based upon a plan equitable in all respects to its members, it shall attach thereto its certificate of approval, and thereupon such articles and by-laws shall be filed in the office of the Auditor of State, who shall issue a certificate authorizing the association to transact business."

This latter statute is in the same form in our present Code as Section 9315 of the chapter on building and loan associations and is the prevailing guide to the Executive Council in the premises.

You state that in the case at hand the Executive Council has approved said articles and you want to know whether the Auditor of State has the power to refuse the building and loan certificate. The law assumes that the

Executive Council has performed its duty in approving said articles. The mandate of the state is clear and positive, stating in substance that when the articles of incorporation, with the certificate of approval of the Executive Council attached, reaches the Auditor of State, said articles shall be filed in his office and he shall issue a certificate authorizing the association to transact business. This, therefore, is the positive duty of the Auditor of State and in our opinion he has no discretion in the matter.

In the absence of any evidence of fraud, deceit, concealment or mistake in the matter of the Executive Council's approval of the articles of incorporation, we see no reason or authority for withdrawing such approval.

HIGHWAYS: SECONDARY ROAD CONSTRUCTION: NECESSITY OF INCLUDING UNCOMPLETED PORTION OF PREVIOUS PROGRAM IN NEW PROGRAM. Where a secondary road construction program is adopted under the provisions of Section 4644-c24 to 4644-c36, of the 1935 Code of Iowa, and at the end of the period fixed in the program, certain portions are uncompleted the specified officers and boards in adopting a new program are not forced to include in the new program the uncompleted portions of the previous program. However, the matter of their inclusion should be carefully considered, as their inclusion in the previous program would give rise to the presumption that they fulfilled the spirit and purpose of the secondary road construction act.

July 24, 1936. *Iowa State Highway Commission:* I am in receipt of your request of July 17, 1936, in which you ask an opinion on the situation that follows:

In Cedar County a secondary road construction program was adopted for the years 1934, 1935 and 1936 as provided by Section 4644-c24 to 4644-c36 of the 1935 Code of Iowa. At the end of 1936, the last year of the program, about one-half of the program will be uncompleted. The question you submit is whether the law contemplates that in the new program to be adopted by the Board of Approval for the years following the year 1936, there must be included all those roads which were in the 1934, 1935 and 1936 program, but which were not completed during that time.

Section 4644-c24 of the 1935 Code of Iowa provides as follows:

"Before proceeding with any construction work on the secondary road system for any year or years, the Board of Supervisors shall, subject to the approval of the State Highway Commission, adopt a comprehensive program or project based upon the construction funds estimated to be available for such year or years, not exceeding three years."

It will be noted that this section provides that "*construction work* for any year or years" based upon the estimated construction fund for "such year or years not exceeding three years."

In the first place it should be noted that if it were to be held that if those roads not constructed during the prescribed period of the existing program, have to be continued in the succeeding programs until they are completed, it would in effect mean that if a road once got into the program, it could not be gotten out again, until it was completed, even though because of shortage of funds and construction difficulties it could not be constructed for four, five or six years. Thus, if some projects got into the program which in light of construction difficulties or changes in other roads should prove

to be ill-advised and nearly valueless, future Boards of Approval would be tied to these mistakes or ill-advised projects for all eternity.

Our Legislature and our Supreme Court have adopted a very strict policy or rule in regard to the power of boards or agencies from entering into financial engagements, contracts, or programs which tie the hands of their successors. Our Supreme Court in the case of Burkhead vs. Independent School District of Independence, (1898) 107 Iowa 29, 77 NW 491, in a case involving the right of a school board to enter into a contract with a teacher for five years, after holding that such contracts were then limited to the particular school year, went on to say, commencing on page 33 of the Iowa citation, "If not so limited, then the directors might employ teachers for any number of years, tie up the hands of their successors in office, and wrest from the control of the people the schools which they are required to support." Whenever our Legislature allows a particular board or agency to tie the hands of their successors, by obligating future income by bond issues, or in the case of secondary roads by means of secondary road anticipation certificates, the right is given specifically, and then only under very strict limitations. In the case of an adoption of a secondary road construction program, the right to bind successors is limited not to exceed three years. It is not without significance, that the elective officers having to do with secondary road construction programs, which consist of the Board of Supervisors and the township trustees, both serve only three-year terms, and at the end of the three-year program, there could and in some cases would be a complete change in personnel in both bodies.

The Legislature has fixed the period for the program at not to exceed three years, and if roads once included have to stay in the succeeding programs until completed, it would in effect extend the binding force of the program beyond the period fixed by the Legislature.

It would seem to be the plain legislative intent, that each program adopted is of binding force only as to the period fixed in the program and when the period expires the right and duty to improve the roads in the program expires, and a new program must be adopted, and that in adopting the new program all projects are considered anew, in the light of the then existing circumstances. It might sometimes be the case that the failure to improve certain roads in the program during the period fixed is due to such projects being ill-advised in the light of subsequent developments, and not fitting into the general unified program, and the adoption of a new program gives an opportunity to get rid of them. However, it is more likely to be the case that the failure to improve such roads is due to the non-receipt of the estimated income. Since the latter situation is so generally the case, the officers and boards in adopting the new program, while not forced to include the uncompleted roads of the prior program, should give careful consideration to the matter of their inclusion, as their inclusion in the previous program, or programs, would give rise to the presumption that they fulfill the spirit and purposes of the Secondary Road Construction Act.

TAXES: SCAVENGER SALE: ASSIGNMENT OF TAX SALE CERTIFICATES: COUNTY FUNDS. Receipts from redemption on assignment of certificates should be apportioned to the various county funds.

July 24, 1936. *County Attorney, Sioux City, Iowa:* We acknowledge yours

of June 22d, in which you present a matter of scavenger sale prior to the public bidder law where the county purchased tax sale certificates for a nominal amount and the county has then sold and assigned said certificates to private individuals for the full amount of all taxes, penalties, costs, etc., the receipts being the same as in case of redemption. Your question is, should the amount received for the assignment be turned into the county general fund or allocated and apportioned to the taxing districts?

The statutes are not as helpful as one might wish, but we believe there is statutory declaration to guide us in this matter. In the first place, a tax sale is for the purpose of collecting taxes. If property were sold at a tax sale before the new law took effect, the owner knew that he had three years in which to redeem. In other words, he had three years in which to pay his delinquent taxes with extra penalties and in making redemption he is in fact paying taxes. The tax statement on any given property is based upon the taxes due each taxing district in the county. It is by virtue of the claims of the several taxing districts that the County Auditor or Treasurer demands a certain total sum in satisfaction of the taxes on a given property. Therefore, when the sum is received by the county, it would seem only just and equitable to apportion said receipts to those taxing districts on whose claims the tax statement was based. The county general fund has no valid claim except to a small portion of such receipts. The major portion was certified by the taxing districts and levied for the purpose of collecting needed revenue for such districts and we can see no legal basis for depriving said districts of this revenue whenever it is paid into the county treasury.

Code Section 7256 provides that in case of scavenger sale, any taxes in excess of the amount received at the sale shall be credited to the Treasurer by the Auditor as unavailable and such unavailable excess shall be apportioned among the funds to which it belongs. The Legislature neglected to tell us what to do in case redemption is made from such a sale, but we do find indication of legislative intent in another case where taxes are collected after having been declared unavailable.

Code Section 7194 permits the Board of Supervisors to declare unavailable all taxes which are more than four years in arrears and such taxes "shall be credited to the Treasurer by the Auditor as unavailable and he shall apportion such tax among the funds to which it belongs."

Section 7196 declares:

"Should any of such tax afterward be collected, the County Treasurer shall distribute the net amount collected among the several funds the same as though it had never been declared unavailable. * * * *"

In view of this declared policy, we are inclined to the opinion that where a portion of the taxes are declared unavailable as a result of a scavenger sale and the county later collects said taxes by assignment of the certificate or by redemption, that portion of the taxes which were declared unavailable and later collected should be apportioned to the various taxing districts, the same as though it had never been declared unavailable.

Code Section 7232 directs the Treasurer to apportion all taxes collected each month among the several funds to which they belong and in our opinion this statute is further authority and justification for the conclusion reached herein.

HIGHWAYS: SECONDARY ROAD FUNDS: EXPENDITURES: TUCK LAW. Contracts or agreements obligating counties to the expenditures out of secondary road funds become obligations of these funds when the contract or agreement is entered into, and when the amount of these obligations plus expenditures already made equal the collectible revenues for those funds for the current year, all further expenditures or agreements creating expenditures are prohibited by Section 5258 of the 1935 Code of Iowa. When that situation occurs the Board of Supervisors cannot continue to create expenditures by the employment of road employees or contracts for the purchase of machinery even though such employees and sellers are not to be paid until after January 1st.

July 29, 1936. *County Attorney, Wapello County, Iowa:* Your letter of July 18th has been referred to the undersigned for attention. As I understand the situation, Wapello County has entered into certain WPA agreements wherein the county has agreed to pay a set amount of money from the secondary construction or maintenance funds for material and supplies in connection with certain projects, which your county could be called upon to pay during the current year. Some of these projects have not been started, and some have been started, but so far the county has not been called upon for any money. That these amounts of money which the county has agreed to advance on these contracts together with the expenditures heretofore made are now about equal to the collectible revenues for the secondary construction and maintenance funds. The question is as to the right of the Board of Supervisors to make further expenditures from those funds.

The next situation that naturally grows out of the previous situation is as to the continued employment of the county road employees when the amounts pledged under the WPA agreements together with the expenditures already made equal the collectible revenues for the secondary road construction and maintenance funds. Your question in regard to this situation is whether in such a case, the employment of the county road employees can be continued upon the understanding that the claims for labor will not be filed or allowed until after January 1, 1937. The last situation is where the amounts pledged under the WPA agreements and the expenditures already made equal the collectible revenues for the funds mentioned, and the Board of Supervisors wishes to purchase road machinery. Your question is, in that case, whether the Board of Supervisors can enter into a contract to purchase the machinery with payment to be made after January 1, 1937.

Section 5258 of the 1935 Code of Iowa, which is entitled, "Expenditures confined to Receipts," provides as follows:

"It shall be unlawful for any county, or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.

Any officer allowing a claim, issuing a warrant or making a contract, contrary to the provisions of this section, shall be held personally liable for the payment of the claim or warrant, or the performance of the contract."

The above statute is known as the Tuck Law, and was passed, as its legislative history shows, for the purpose of putting the counties on a "pay as you go" basis by requiring them to confine their expenditures to their income.

In Section 5259 of the 1935 Code of Iowa, are set forth those expenditures which are excepted from the operation of the so-called Tuck Law. Expendi-

tures for secondary road construction and maintenance are not within the exceptions. A study of the legislative background of this legislation shows that the need for it arose principally in connection with expenditures made by counties for secondary road purposes, so that the reason for the legislation not excepting road expenditures from the operation of the Tuck Law can well be understood.

It is probably true that the county might not be called upon to pay all of the set amounts in the WPA agreement. Thus, the first question is when or at what stage do these agreements obligate the secondary road funds, or in other words, when do these agreements become chargeable expenditures against the secondary road fund under the provisions of the Tuck Law? Fortunately, this question has been clarified by the Iowa Supreme Court in the comparatively recent case of Carl R. Miller Tractor Co. vs. Hope, (1934) 218 Iowa 1235, 257 NW 312. In that case Monroe County entered into a contract to purchase certain road machinery. Because of a dispute, settlement was not made until later, at which time a compromise agreement was entered into providing for the payment to the tractor company of a specified amount. Both at the time of the purchase and at the time of the compromise settlement the amount to be paid was within the available collectible revenue. There was seemingly an interval between the compromise agreement and when demand was made upon the County Auditor for the issuance of the warrant, during which time expenditures were made for road maintenance which together with the expenditures involved in the machinery agreement exceeded the collectible revenues for the year. The County Auditor refused to issue the warrant upon the ground that sufficient funds were not available in the collectible revenue to pay it and mandamus proceedings were instituted. On appeal the Iowa Supreme Court affirmed the holding of the lower court ordering the claim paid. On page 313 of the Northwestern citation the Iowa Supreme Court says:

"The position of the auditor can only be reached by assuming as she did as a witness, that road maintenance costs and expenditures incurred after such agreement and contract had been entered into must first be subtracted from the available funds in determining the validity of plaintiff's claim. It is of course obvious that under the statute the contract and agreement were involved only in the event that when entered into the *expenditure thereby created* would be in excess of collectible revenues of the year. It seems certain that if expenditures during any year were in excess of collectible revenues the County Auditor could not go back in the year and select certain items for rejection and thus reach a position in which obligations subsequently incurred could be validly paid, and the prior items selected for rejection be invalidated under the statute. It seems certain that the limit of valid expenditure is reached when the total of collectible revenue is equalled, and that from then on all expenditures are within the ban of the statute."

The foregoing case makes clear the following points: that the particular county fund becomes obligated and the expenditures a charge upon the fund under the provisions of the Tuck Law when the agreement or contract providing for the expenditure during the year is entered into, and not when the payment is in fact made; that the order of expenditures under the Tuck Law is determined by the order in time of the agreement or contract which "created" the expenditure, and that when a definite agreement or contract is entered into providing for a certain expenditure, that in effect it amounts

to the "ear-marking" of the amount of the expenditure out of the particular fund or funds. Thus when Wapello County entered into the WPA agreements obligating themselves to pay set amounts of money during the current year, it amounted in effect to an "ear-marking" of that amount of money from the secondary road funds, and when the total of the amounts plus the expenditures already made or created equal the amount of the collectible revenues for those funds, all subsequent expenditures created are under the ban of the statute and the Board of Supervisors would be personally liable for the same.

I infer that this state has about been reached in your county, and that your county is now faced with the problem of continuing the employment of your road employees and the purchase of needed road machinery. I understand that the road employees are willing to continue work and not present their claims until after January 1, 1937, and that the machinery men are willing to deliver machinery now under an agreement to be paid after January 1, 1937, and the question is, whether your difficult situation can be solved in this manner.

In regard to this proposition there are two general principles of law involved. The first is that the Legislature through the Tuck Law and then the County Budget Law has laid down the legislative mandate of having the counties operate on a "pay as you go" basis, in that with certain exceptions not here material, that the expenditures of the county must be held within the anticipated revenues. In the case of Carl R. Miller Tractor Co. vs. Hope, referred to above, it was held that the expenditures were created when the contracts or agreements were entered into. The status of the road employees is that of contracts of employment, and the retaining of the road employees would be the creation of expenditures, and the same situation would be true in regard to the machinery contracts. These contracts of employment and machinery contracts creating expenditures beyond the collectible revenues are within the ban of the Tuck Law, even though payment is not attempted to be made during the current year. The payment of this year's bills and expenditures out of the income of future years is not operating the county on a "pay as you go" basis under the Tuck Law and the County Budget Law. The second rule of law is that our Legislature and our Supreme Court have adopted a very strict policy or rule in regard to the power of boards or agencies entering into financial engagements, contracts or programs which tie the hands of their successors. Our Iowa Supreme Court in the case of Burkhead vs. Independent School District of Independence (1898) 107 Iowa 29, 77 NW 491, in a case involving the right of a school board to enter into a contract with a teacher for five years, after holding that such contract was then limited to the particular school year, went on to say, commencing on page 33 of the Iowa citation: "If not so limited, then the directors might employ teachers for any number of years, tie up the hands of the successors in office, and wrest from the control of the people the schools which they are required to support." Whenever our Legislature allows a particular board or agency to tie the hands of their successors, by obligating future income, whether by bond issue, or in the case of secondary roads by anticipation certificates, the right is given specifically and then under very strict limitations. To hold that the present Board of Supervisors could enter into agreements or contracts creating expenditures payable out of the revenues of future years,

would be to allow them to mortgage the income of the county for a period of years in advance and tie the hands of their successors so as to in effect wrest the control of county financial affairs from the people. I can find no legislative grant of such authority. It is, therefore, the opinion of this department that when the total amount of the expenditures made or created during the current year equal the collectible revenues for the secondary road funds your county cannot legally continue contracts of employment with your road employees upon the understanding that these claims are not to be filed or paid until after January 1, 1937, and that your county cannot now enter into contracts for the purchase of machinery to be paid for after January 1, 1937.

NURSES TRAINING SCHOOLS: If students desiring to enter schools of nursing have theretofore pursued subjects required in nursing school and can show credits earned in such courses, the nurses training school may recognize such credits the same as though the work had been done in the nurses training school. Registered nurses may administer anaesthetics under supervision of licensed physician.

August 4, 1936. *Board of Nurse Examiners:* You have submitted to this department several questions, and in connection therewith quote Section 2564 of the 1935 Code of Iowa as follows:

"No training school shall be approved by the nurse examiners as a school of recognized standing unless said school is attached to a general hospital and:

"1. Requires for graduation or any degree the completion of a course of study covering a period of at least three years of actual attendance."

We assume an approved nurses training school would not lose its recognized standing if the school were to give time credit for time actually spent by a student in actual attendance at another approved nurses training school within the state. It would be conceded, no doubt, that one approved training school may properly give credit for actual attendance at another approved training school. The university or college making no pretense at being a nurses training school may offer certain courses, properly taught in such nurses training school. Such courses, of course, require certain hours or time.

It would seem an illogical construction of the statute in question to hold that a student who had successfully completed certain courses of study in the university should not be given time and academic credit for those courses upon entering a nurses training school if she would be given such credit for them had she pursued such studies in another approved nurses training school. Such a student would have been in actual attendance at a recognized educational institution.

It is our opinion, therefore, that attendance at a university or college may be considered "actual attendance" insofar as such student has successfully taken and passed examinations in courses required or recognized by approved training schools for nurses.

Your second question is as follows:

"In the case of nurses desiring to register in the State of Iowa by reciprocity, who are graduates of schools of nursing requiring less than the three years of actual attendance (28-30 months) but who have since com-

pleted post-graduate courses in nursing or university courses acceptable to nursing, may this further preparation be interpreted as a completion of the three years of actual attendance?"

We believe this question should be answered in the negative, and that nurses under such circumstances should be required to take the examination in this state. Your question No. 1 above assumes that a student who has attended a college or university has first satisfied the approved nurses training school, that her college or university work was of a character which would be recognized and accepted if the work had been done in the nurses training school.

Section 2563 provides that each applicant for a license to practice nursing shall present a diploma, issued by a nurses training school, approved by the nurse examiners.

Your second question does not contemplate the presentation of a diploma from a school meeting the standards required by the laws of this state.

Your third question is:

"Students desiring to enter schools of nursing frequently have Bachelor of Science degrees in a recognized university or college, having pursued subjects required in the nursing school, or may show credits earned in such courses, when full graduation has not been attained. May the recognition of such credits or degrees be accepted as time spent in 'actual attendance'?"

If students desiring to enter schools of nursing have theretofore pursued subjects required in the nursing school and can show credits earned in such courses, the nurses training school may recognize such credits the same as though the work had been done in the nurses training school, and may give the holder of such credits credit for "actual attendance" to the extent of time actually devoted to the subjects taught in or required by nurses training schools. The Board will have in mind the fact that it should not permit credit for actual attendance in another college or university to permit the omission of any course or amount of training required by a recognized nurses training school.

In the second division of your letter you refer to Section 2561 of the Code, which is as follows:

"For the purpose of this title any person shall be deemed to be engaged in the practice of nursing who practices nursing as a graduate or registered nurse or publicly professes to be a graduate or registered nurse and to assume the duties incident to such profession."

In connection with this question you submit three inquiries, the first of which is as follows:

"1. Shall a graduate nurse employed by a college or university, and who by virtue of being a graduate nurse is engaged in the teaching of health subjects, be considered a graduate nurse subject to registration in the State of Iowa?"

If such graduate nurse is engaged merely in teaching health subjects as a teacher in a school, she would not be subject to registration in the State of Iowa as a registered nurse. Section 2561 provides that any person shall be deemed to be engaged in the practice of nursing who practices nursing as a graduate or registered nurse or publicly professes to be a graduate or registered nurse and to assume the duties incident to such profession. If such person does anything to bring herself within the provisions of Section

2561, then, of course, she should meet the requirements of Chapter 120 of the Code relating to the practice of nursing.

Your second question is:

"Shall a graduate nurse engaged in the giving of anaesthetics be considered a graduate nurse subject to registration in the State of Iowa?"

This question must be answered in the affirmative. Strictly speaking, no one other than a licensed physician has authority to administer anaesthetics. However, it has been generally considered by the medical and nursing professions that registered or licensed nurses may administer anaesthetics under the direction and supervision of a licensed physician, who is charged with full responsibility as to the manner in which the anaesthetic is administered.

Your third question is as follows:

"Shall a graduate nurse engaged as an X-Ray technician be considered a graduate nurse subject to registration in the State of Iowa?"

It is our opinion this question should be answered in the affirmative. If such person publicly professes to be a graduate or registered nurse and to assume certain duties incident to such profession, clearly she should be subject to registration in this state. This answer assumes that such graduate nurse would claim some extra proficiency as such technician by reason of being a graduate nurse.

CIVIL SERVICE: CHIEF OF POLICE: A person who is a legally appointed, qualified and acting chief of police, whether there is an action pending against him for the legality of his appointment or not, is vested with all the powers granted a chief of police by statute.

A person who has rendered temporary duty on the police force, but has not taken the examination, must take examination before being appointed as a regular member thereof.

August 7, 1936. *Mayor, Iowa City, Iowa:* Your letter of July 8th to the Attorney General has been referred to me for reply.

You state a question has been raised as to whether a man who has had three years temporary duty off and on and one and one-half years steady special duty can be considered as eligible for appointment to the regular police force without examination under the provisions of Section 5695 of the Code of 1935. In other words you ask whether this section can be construed so as to excuse from examination anyone other than those men who had been appointed and had rendered long and efficient service prior to the enactment of Section 5695. Said section reads as follows:

"Persons now holding positions for which they have heretofore been appointed or employed after competitive examination, or who have rendered long and efficient service, shall retain their positions without further examination, but may be removed for cause."

We think it was contemplated by the Legislature that the statutes providing for civil service should apply fairly general and apply to all appointive offices and employees of cities coming under the provisions of Chapter 289 of the Code. For a good many years, and long prior to the appointment of the officer referred to in your letter, Iowa City has subjected its police officers to a civil service examination as a condition precedent to their appointment. The officer in question has had three years of temporary duty off and on and one and one-half years of steady special duty. His work has

been of a temporary and special character. Assuming that he has rendered long and efficient service without a civil service examination, his work has been as a special or temporary officer, and not as a regular member of the police force operating under the civil service, and if he were to retain his position without further examination it would not be a position as a regular fully qualified member of the police force.

The exception contained in Section 5695 in favor of people "who have rendered long and efficient service," should be construed to apply to persons who were rendering service at the time the statute went into effect. The force and effect of the civil service statutes and ordinances would be seriously undermined if certain applicants for positions were required to meet civil service requirements and others were excused from its provision. An exception in favor of those who had rendered long and efficient service at the time the civil service laws became effective, of course, would be entirely justifiable.

The spirit of the law and the ends sought to be obtained thereby are expressed in Section 5701, which reads in part as follows:

"Except as otherwise provided, no person shall be appointed or employed in any capacity in the fire or police department, or any department which is governed by the civil service, until such person shall have passed a civil service examination as provided in this chapter, and has been certified to the City Council as being eligible for such appointment;"

In examining the statutes to see if it is anywhere "otherwise provided," we find Section 5695, which excuses civil service examinations in certain cases, but as heretofore stated we do not believe that section is applicable to the temporary officer referred to in your letter.

Your second question is as follows: Has the chief of police of your city the power to make a permanent appointment to the police force with full civil service status under the authority of Section 5657, Code of Iowa, 1935, while a case is now pending against him to determine his status as chief of police, the case being brought by one who formerly held the office of chief of police, and maintains that he was wrongfully removed from office in view of the Soldiers' Preference Law for his reinstatement?

If the present chief of police, Mr. C. O. Paine, is the legally appointed, qualified and acting chief of police, his official acts are vested with authority. If he is not qualified to make the civil service appointments as provided by the ordinances of your city, he is not qualified to perform any other duties or receive pay as such officer.

We do not have before us the record in the case now pending to determine the status of this officer, and no court order has challenged or set aside his official status, therefore, it is our opinion he has all the authority given to such chief of police by the law and the ordinances of your city.

CIVIL SERVICE: SAILORS. All honorably discharged soldiers, sailors or marines must receive preference by Civil Service Commission, regardless of whether they have seen wartime service or not.

August 7, 1936. *City Solicitor, Cedar Rapids, Iowa:* Your letter of August 4th to the Attorney General has been referred to me for reply.

You state that the Civil Service Commission of your city has given certain examinations for applicants to the police and fire departments, and that one

of the applicants is a sailor having an honorable discharge from the United States Navy, who, however, saw no wartime service, having joined the Navy some years after the World War, and having served for only a short period. You state it has been the policy of the Commission to give all honorably discharged soldiers who have served during wartime a preference in the form of ten per cent addition to their earned grades.

In this case the applicant referred to insists that under Section 5697 of the Code of Iowa, 1935, he is entitled to a preference without regard to the time or type of service rendered. Section 5697 of the Code is as follows:

"Preferences. In all examinations and appointment under the provisions of this chapter, honorably discharged soldiers, sailors or marines of the regular or volunteer army or navy of the United States shall be given the preference, if otherwise qualified."

This section refers to honorably discharged soldiers, sailors and marines of the regular or volunteer army or navy and requires that they shall be given a preference if otherwise qualified. The section further provides that in all examinations and appointments under the provisions of Chapter 289 such honorably discharged soldiers, sailors and marines shall be given preference, assuming they are otherwise qualified. No mention is made in this section of the various wars referred to in the Soldiers' Preference Law as it is embraced in Chapter 60 of the Code.

Section 1159 provides for preference for the soldiers over other applicants of no greater qualifications. Section 5697 provides that in all examinations and appointments under this chapter, the soldier, sailor or marine shall be given the preference if otherwise qualified. Under this section the former soldier might have some ground for claiming that if he and other applicants are all qualified he is entitled to the preference even though they are better qualified than he. Chapter 60 is not applicable to your question for the soldier is not a veteran of any war. We do not see how the board can escape the applicability of Section 5697. The applicant in question is an honorably discharged sailor of the Navy of the United States and he must therefore be given a preference, if otherwise qualified.

We are not attempting to construe Section 5697, however, further than to say that under it an honorably discharged soldier, sailor or marine of the regular, volunteer army or navy of the United States shall be given a preference if otherwise qualified, and it is immaterial whether or not such soldier, sailor or marine served in a war in which our country has been engaged.

MOTOR VEHICLE FUEL TAX: Contractors engaged in performance of projects paid for with public funds are not entitled to purchase motor vehicle fuel, tax free under exemption certificates.

August 8, 1936. *Treasurer of State:* We acknowledge your recent request for advice on a matter submitted to your office by the Standard Oil Company of Indiana, under date of June 11, 1936, presenting four examples of fuel oil purchases or sales, with a request for advice as to whether or not the state motor vehicle fuel tax should be collected in each case. The four examples are as follows:

"1. Sold to the state, cities, counties, townships, etc. under Certificate of Exemption prescribed by you for use in stationary engines off the highways;

"2. Sold to the state, cities, counties, townships, etc. under Certificate of

Exemption prescribed by you for use in propelling tractors on their own or private property and not on the highways of the state, e. g. propelling tractors at state and county institutions;

"3. Sold to contractors under Certificate of Exemption prescribed by you for use in stationary engines in the performance of federal projects when no part of such fuel is used to propel motor vehicles upon highways or in the construction or maintenance of the highways:

(a) If paid for from federal funds,

(b) If paid for in part from state funds and in part from federal funds;

"4. Sold to contractors under Certificate of Exemption prescribed by you for use in stationary engines and cranes in the construction of bridges under contract with the state, cities, counties, townships, etc. when the contractors are paid out of state, county, etc., funds."

It will be noted that in each of the four examples, the sale is made under an Exemption Certificate.

The declared purpose of the Motor Vehicle Fuel Tax Statute is "the policy of collecting for highway purposes, an excise tax or license fee on all motor vehicle fuel used to propel motor vehicles on the highways of this state, and * * * * to refund to such user such license fee so paid by him, on motor vehicle fuel not used in connection with the operation of motor vehicles on public highways."

The term "motor vehicle fuel" includes practically every known type of petroleum product capable of operating internal combustion engines, by itself or by combination with other types of fuel. The term "fuel oil" is fuel which alone and without combination is incapable of successfully operating internal combustion engines of the type used in automobiles and trucks. The statute provides that the State Treasurer may issue Certificates of Exemption covering the sale of fuel oil, in which Certificate, the user agrees not to use such fuel oil, alone or in combinations, as fuel for motor vehicles. The term "tax free" when used in connection with the sale of fuel oil, shall mean a sale or purchase without the payment of the tax. Section 5093-f14 expressly provides that the Treasurer of State may issue a fuel oil dealer's permit which shall entitle the holder to purchase fuel oil tax free, from a fuel oil distributor, and sell to users tax free, provided the users furnish the dealers a certificate of exemption. In view of the foregoing general provisions of the statute, we can see no difficulty with the first two examples presented; and the only reasonable conclusion is that all of these sales should be tax free.

Examples three and four present the case of purchases made by contractors in the performance of public contracts, to be paid for with public funds. The questions submitted state that such purchases are made under exemption certificates. This presents the real question involved, that is, whether or not contractors are entitled to use a certificate of exemption on purchases of fuel oil to be used in public projects. Section 29 of the statute provides that no refund shall be made on motor vehicle fuel used in any construction or maintenance work which is paid for with public funds. The obvious purpose of this provision is to prevent the contractor engaged in performing public contracts from unjust enrichment. All public contracts are let by public letting to the lowest responsible bidder. The cost of motor vehicle fuel including the tax is a part of the estimate made by the contractor when he submits his bid. The contractor buys the fuel and pays the tax—the public body pays the contractor the contract price which includes the tax. If the

contractor could claim a refund on all such fuel, after the work is completed, he would be receiving additional compensation which is not countenanced by the statutes and is against public policy.

We come now to the question at hand—after the contractor has submitted his bid on a public project, which bid includes the cost of motor vehicle fuel including the tax, should he be permitted to purchase such fuel tax free under an exemption certificate? It is obvious that if he may do this he is being unjustly enriched to the same extent that he would be if he was entitled to a refund. He would be doing indirectly what the Legislature forbids directly. The underlying purpose of the gas tax statute is to prevent evasion in payment of said tax. It fairly appears from the provisions of Section 29 of the act that the Legislature considered the matter of fuel used in the performance of public contracts and considered the more effective and satisfactory method was for the contractor to pay the tax after including it in his estimate. No other conclusion appears reasonable to us, as there would be no necessity for Section 29 unless the tax had been paid. There would be no occasion to make a provision denying a refund in certain cases if the fuel was purchased tax free.

We are therefore of the opinion that contractors engaged in performance of projects paid for with public funds are not entitled to purchase motor vehicle fuel, tax free under exemption certificates. In support of the general doctrine announced herein we might point out that the United States Supreme Court held in Construction Company vs. Grosgen, 291 U. S. 466, 78 L. Ed. 918, the head note reading as follows:

"No constitutional taxation of means or instrumentalities of the federal government is involved in the imposition of a state excise tax on gasoline consumed by a contractor with the United States in the performance of a contract for the construction of levees."

The state gas tax on fuel used on a Federal project was upheld; therefore the tax should be collected in the cases presented in three and four of the questions submitted.

MOTOR VEHICLE FUEL TAX: FUEL OIL: STANDARD OIL COMPANY:Statutes do not require or authorize collection of motor vehicle fuel tax in cases set out below.

August 8, 1936. *Treasurer of State:* We acknowledge your recent request for advice on a matter submitted to your office by the Standard Oil Company of Indiana, under date of June 11, 1936, presenting four examples of fuel oil purchases or sales, with a request for advice as to whether or not the state motor vehicle fuel tax should be collected in each case. The four examples are as follows:

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"3. Sold to contractors under Certificate of Exemption prescribed by you for use in stationary engines in the performance of Federal projects when no part of such fuel is used to propel motor vehicles upon highways or in the construction or maintenance of the highways:

(a) If paid for from Federal funds,

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It will be noted that in each of the four examples, the sale is made under an Exemption Certificate.

The declared purpose of the Motor Vehicle Fuel Tax Statute is "the policy of collecting for highway purposes, an excise tax or license fee on all motor vehicle fuel used to propel motor vehicles on the highways of this state, and * * * * to refund to such user such license fee so paid by him, on motor vehicle fuel not used in connection with the operation of motor vehicles on public highways."

The term "motor vehicle fuel" includes practically every known type of petroleum product capable of operating internal combusion engines, by itself or by combination with other types of fuel. The term "fuel oil" is fuel which alone and without combination is incapable of successfully operating internal combustion engines of the type used in automobiles and trucks. The statute provides that the State Treasurer may issue Certificates of Exemption covering the sale of fuel oil, in which Certificate, the user agrees not to use such fuel oil, alone or in combinations, as fuel for motor vehicles. The term "tax free" when used in connection with the sale of fuel oil, shall mean a sale or purchase without the payment of the tax. Section 5093-f14 expressly provides that the Treasurer of State may issue a fuel oil dealer's permit which shall entitle the holder to purchase fuel oil, tax free, from a fuel oil distributor, and sell to users, tax free, provided the users furnish the dealer a certificate of exemption.

In view of the foregoing general provisions of the statute, we can see no difficulty with the four examples presented.

As before stated, in each of the examples we are requested to pass upon the sale as made under a Certificate of Exemption and we may assume that the seller had a fuel oil dealer's license. In addition to this, in each and every example, the fuel oil is for use other than for propelling motor vehicles on the highway. In our opinion these are the two controlling features in determining whether or not such sales should be tax free, and the only reasonable conclusion is that all of such sales should be tax free. In examples three and four, the question of the purchase of such fuel oil with Federal and/or state funds, is suggested. We find nothing in the statutes which occasion any distinction dependent upon the type of funds used in payment for the fuel oil. The tax free exemption exists and obtains by virtue of the Exemption Certificate and the proposed use of the fuel, other than in motor vehicles on highways. It is true that Section 29 of the statute provides that no *refund* shall be paid on motor vehicle fuel used in any construction or maintenance work which is paid for with public funds, but we have no question of refund in our examples. There could be no refund if the tax had not been paid in the first instance. All of our cases being tax free sales, the question of refunds does not arise, and consequently the question of payment from public funds does not enter into the picture.

We are, therefore, of the opinion that in the four cases presented in the

letter from the Standard Oil Company, the statutes do not require or authorize the collection of the motor vehicle fuel tax.

MOTOR VEHICLE FUEL TAX: FUEL OIL: STANDARD OIL COMPANY: Statutes do not require or authorize collection of motor vehicle fuel tax in cases set out below.

August 8, 1936. *Treasurer of State:* We acknowledge your recent request for advice on a matter submitted to your office by the Standard Oil Company of Indiana, under date of June 11, 1936, presenting four examples of fuel oil purchases or sales, with a request for advice as to whether or not the state motor vehicle fuel tax should be collected in each case. The four examples are as follows:

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In view of the foregoing general provisions of the statute, we can see no difficulty with the four examples presented.

As before stated, in each of the examples we are requested to pass upon the sale as made under a Certificate of Exemption and we may assume that the seller had a fuel oil dealer's license. In addition to this, in each and every example, the fuel oil is for use other than for propelling motor vehicles on the highway. In our opinion these are the two controlling features in determining whether or not such sales should be tax free, and the only reasonable conclusion is that all of such sales should be tax free. In examples three and four, the question of the purchase of such fuel oil with Federal and/or state funds, is suggested. We find nothing in the statutes which occasions any distinction dependent upon the type of funds used in payment for the fuel oil. The tax free exemption exists and obtains by virtue of the Exemption Certificate and the proposed use of the fuel, other than in motor vehicles on highways. It is true that Section 29 of the statute provides that no *refund* shall be paid on motor vehicle fuel used in any construction or maintenance work which is paid for with public funds, but we have no question of refund in our examples. There could be no refund if the tax had not been paid in the first instance. All of our cases being tax free sales, the question of refunds does not arise, and consequently the question of payment from public funds does not enter into the picture.

We are, therefore, of the opinion that in the four cases presented in the letter from the Standard Oil Company, the statutes do not require or authorize the collection of the motor vehicle fuel tax.

BANK NIGHT: FAIRS: If county or district fairs desire to have "bank night" at the time of their annual fair, same could be conducted legally by following decision of Supreme Court in *State vs. Hundling.*

August 10, 1936. *Secretary, Iowa State Fair Board:* This will acknowledge receipt of your recent request for the opinion of this department with reference to the legality of a county or district fair holding a "Bank Night." You state that E. W. Williams, Manchester, Iowa, secretary of the Iowa Fair Managers' Association, has requested information from your department and in so doing, states that a number of fairs anticipate having "Bank Night" at the time of their fair this summer or during the late summer or fall of 1936. In advising Mr. Williams, you desire an interpretation of *State vs. Hundling,* a recent decision handed down by our Supreme Court and reported in 264 N. W. 608.

The question that arises with reference to the so-called "Bank Night" is as to whether or not the scheme or system of giving a prize constitutes a lottery, and therefore, is in conflict with the prohibition under the Constitution of the State of Iowa with respect to lotteries, and also is in violation of Section 13218 of the Code of 1935. The section referred to, provides as follows:

"*Lotteries and lottery tickets.* 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."

The constitution of the State of Iowa, Article III, under Legislative Department, Section 28, provides:

"No lottery shall be authorized by this state; nor shall the sale of lottery tickets be allowed."

Our Supreme Court in interpreting Section 13218 above set out, in the case of *Brenard Manufacturing Company vs. Jessup and Barrett Co.*, 186 Iowa 872, 173 N. W. 101, as to what constitutes the elements of lottery, stated:

"The three elements necessary to constitute a lottery are a consideration, the element of chance, and a prize."

Also, in passing on the question and giving an illustration of an example of lottery in the case of *Guenther vs. Dewlein*, 11 Iowa 133, the court stated:

"The disposal of lands by a scheme in which parties were to buy tickets and draw therefor, held a lottery."

And in passing on the question and giving an example of what was not a lottery, the court, in *Chancy Park Land Co. vs. Hart*, 104 Iowa 592, 73 N. W. 1059, stated:

"Where the purchaser of lots, buying under a contract by which the lots purchased were to be distributed among them as they might agree, entered into an arrangement by which such lots were distributed by chance, held that the transaction was not a lottery and that the sale was valid."

Also, in the *Brenard Manufacturing Co. vs. Jessup* case, supra, it was said:

"A trade extension scheme which involves the giving of prizes in a personal popularity contest to contestants who pay nothing for the privilege of being such, is lacking in one of the essential elements of a lottery."

In *State vs. Hundling*, decided by our Supreme Court on January 21, 1936, Justice Powers in rendering the opinion of the court, stated:

"To constitute a lottery, there must be a prize to be given upon a contingency to be determined by chance to a person who has paid some valuable consideration; a mere giving away of property or prizes is not unlawful even though recipient is determined by lot."

The court also said that the statute making it a criminal offense to advertise a lottery, must be strictly construed. And in the particular case above cited, the court passed upon the peculiar state of facts presented with reference as to whether or not a giving away of a prize under those facts, constituted a lottery. The facts were as follows:

Defendant was manager and part owner of a motion picture theatre at Newton, and was convicted of advertising a scheme for a lottery known as "bank night" in violation of the provisions of Section 13218, Code of 1935. The advertising consisted of a distribution of handbills announcing that a prize of $50.00 would be given away at the theatre on the following Thursday night, to the person whose name was drawn, if claimed within two and one-half minutes. It advised that the drawing would be from names appearing in a registration book kept by the theatre for that purpose and in which everyone was invited to register *without charge*, and that but one name would be drawn. If the person did not appear within two and one-half minutes, $25.00 would be added by the theatre to the fund and that a drawing would take place for the enlarged fund on the following Thursday night. It urged people to register and thus have their names among those from which the winner of the prize would be drawn. In addition to these handbills, there were banners displayed at the theatre on which the words "Bank Night" were written. The scheme thus advertised was carried out at the

theatre in a manner consistent with the advertising. The evidence shows that the defendant, as Manager of the moving picture theatre, maintained a registration book in the lobby of the theatre, another in a drug store in the town and others at various places in the town of Newton. People generally were invited to register their names in one of these books. They were not required to pay anything to register in the books, and no consideration of any kind was required as a condition to register. Each person registered, was assigned a number. On the night the prize was to be given away, all these numbers were put in a receptacle and one number was drawn out. When the number was thus drawn, by reference to registration books, the person's name was obtained. It was then announced from the stage of the theatre and also at the front door of the theatre. It was further announced at the front door of the theatre that if the person whose name was announced was outside the theatre, such person would be permitted to enter to obtain the prize without the payment of any admission fee.

The question in the case was whether the scheme thus shown was a lottery, the advertising of which would be a violation of Section 13218. The court, in passing on this question, stated that the statute prohibiting the advertising of a lottery made no attempt to define a lottery and that to arrive at a proper definition, it is necessary to look to the generally accepted meaning of the term as defined by the authorities and if there be conflict among the authorities as to the proper definition, the definition to be adopted must be that which includes as an element the evil which the statute obviously intended to prevent. The court goes on to point out that the giving away of property or prizes is not unlawful, nor is the gift made unlawful by the fact that the recipient is determined by lot, and cites Section 883 of the Code of 1935 which provides that the recipient of a public office may be determined by lot in certain cases where there is a tie vote. The court further states:

"To constitute a lottery, there must be a further element and that is the payment of a valuable consideration for the chance to receive the prize," and citing Bishop on Statutory Crime,

"A lottery is any scheme where one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value or nothing, as some formula of chance may determine."

Also 38 Corpus Juris 286, defines a lottery as follows:

"A species of gambling which may be defined as a scheme for the distribution of prizes or things of value by lot or chance among persons who have paid or agree to pay a valuable consideration for a chance to obtain a prize; or as a game of hazard in which smal lsums of money are ventured for the chance of obtaining a larger value in money or other articles,"

and the court states:

"This is the generally accepted meaning of the term, especially when used in criminal statutes."

In continuing with Justice Powers' opinion in *State vs. Hundling*, he states as follows:

"The term 'lottery' as popularly and generally used, refers to a gambling scheme in which chances are sold or disposed of for value, and the sums thus paid are hazarded in the hope of winning a much larger sum. That is the predominant characteristic of lotteries which has become known to history and is the source of the evil which attends a lottery, in that it arouses the gambling spirit and leaves people to hazard their substance on a mere chance. It is undoubtedly the evil against which our statute is directed. The provisions of the statute making it a crime to have

possession of lottery tickets with intent to sell or dispose of them indicates not only what is regarded as characteristic of a lottery, but it indicates the particular incident of a lottery which is regarded as an evil. To have a lottery, therefore, he who has the chance to win the prize must pay, or agree to pay, something of value for that chance."

In continuing, the court states:

"In the particular scheme under consideration here, there is no question but what two elements of a lottery are present, first, a prize, and, second, a determination of the recipient by lot. Difficulty arises in the third element, namely, the payment of some valuable consideration for the chance by the holder thereof. The holder of the chance to win the prize in the case at bar was required to do two things in order to be eligible to receive the prize, first, to sign his name in the book, and, second, be in such proximity to the theatre as that he could claim the prize within two and one-half minutes after his name was announced. He was not required to purchase a ticket of admission to the theatre either as a condition to signing the registration book or claiming the prize when his name was drawn. In other words, paying admission to the theatre added nothing to the chance. Where then is the payment by the holder of the chance of a valuable consideration for the chance, which is necessary in order to make the scheme a lottery?"

The court then discusses the argument advanced on behalf of the state that the manager of the theatre gained some benefit or hoped to gain some benefit in the way of increased attendance at his theatre, and that this would afford the consideration required, which theory was not accepted by the court as being remote and indirect. Also, the court rejected the theory that attendance in the neighborhood of the theatre on the part of those who had a chance, was sufficient consideration. And in concluding, the court states:

"Being present at the place where the prize is given and where it costs nothing to be, cannot be said to be the payment of a valuable consideration, and this is so even though the donor of the prize may receive some remote and indirect benefit from such presence."

And, therefore, it was the decision of the court in this case that the particular state of facts advanced in this case, did not include the three elements necessary to constitute a lottery, which was stated by the court in the previous decision above referred to, *Brenard Mfg. Co. vs. Jessup & Barrett Co.;* in the Hundling case, consideration being lacking.

Therefore, if county or district fairs desire to have a so-called "bank night" at the time of its annual fair, the same could be conducted legally by following the decision of our Supreme Court in *State vs. Hundling,* above set out at some length. Any such scheme would not contain the three elements of a lottery as defined by our Supreme Court. There would not be a consideration, an element of chance and a prize, and in cases where these three elements are not all present, such as existed in *State vs. Hundling* (the element of consideration being lacking), prizes could be given away. If such a scheme were had, whereby it was necessary to buy a ticket of admission to the fairgrounds in order to be eligible for the prize, then it would be our opinion that the element of a lottery existed; but where a prize is given away by lot and there is no consideration paid by the person who may be the winner under such a scheme, then the case comes within the exception as set out in *State vs. Hundling.* In other words, if anyone without paying any consideration, could register for such a prize and be given a number (and this regis-

tration could be made outside the fairground) and during some day of the fair this prize was determined by lot and publicly announced, and the person winning the prize had an opportunity to enter the fairground without charge, if not already there, and claim such prize, then undoubtedly it would come within the decisions of our Supreme Court, especially that of *State vs. Hundling*. This case should be closely followed and through a public address system, the name of the winner should be announced over the ground and in the immediate vicinity of the fairgrounds, so that anyone outside who had not paid admission to enter, could go through the gate and claim the prize, if his number was drawn.

We have gone somewhat at length into this situation, because from your letter you have asked for a detailed interpretation of the recent decision of the Supreme Court.

HIGHWAYS: CONSTITUTIONAL LAW: CONTRACTS: CANCELLATION OR RESCISSION: ADDITIONAL COMPENSATION: WAGE SCALES.

(1) The State Highway Commission under Article III, Section 31, is prohibited from paying a contractor, after contract has been entered into, additional or extra compensation, either directly or indirectly beyond that provided by the contract.

(2) The State Highway Commission may not cancel or rescind legal and binding contracts not in default, either with or without the consent of the contractor, for the purpose of reletting them at increased cost.

(3) The State Legislature has not granted the State Highway Commission authority to require the prevailing wage scale in state highway contracts.

(4) The only authority the State Legislature has granted the State Highway Commission in regard to wage scales in state contracts is in cases of contracts where Federal funds are involved, and there its authority is limited to meeting only the minimums "required" by the Federal Government.

(5) The matter of increasing minimum wage scales or including prevailing wage scales in state highway contracts where Federal funds are involved, can at the present be only handled through the Federal Government making such a part of the regulations relating thereto; as to all other state contracts where Federal funds are not involved, the matter must be dealt with by the State Legislature. Any changes in regulations or in legislation cannot affect contracts already let, but can only apply to future contracts.

August 11, 1936. *Iowa State Highway Commission:* I have received the plans, specifications, contracts, surety bonds, papers, bulletins, regulations and other documents requested by me in connection with your request for an opinion dated August 5, 1936, relating to a proposed settlement or adjustment of a controversy in regard to the wage scale on certain bridge and viaduct projects in the city of Des Moines, referred to as the East 14th Street projects.

From a study of the data and material submitted, and of the Federal statutes involved, I find that in Chapter 48 of the First Session of the 74th Congress, adopted April 8, 1935, there was appropriated for relief purposes the total sum of four million, eight hundred eighty thousand dollars ($4,880,000.00), a portion of which was appropriated for highways, roads, streets and grade crossing eliminations which was to be apportioned to the

different states by the Secretary of Agriculture. Under this act, there was on June 4, 1935, apportioned to the State of Iowa by the Secretary of Agriculture, for the purposes mentioned, the sum of ten million, five hundred ninety-two thousand, three hundred forty-three dollars ($10,592,343.00). The Highway Commission has let contracts obligating approximately ninety per cent of the allotment and has definitely allotted the balance of approximately ten per cent to other counties and cities in the state. The matter of the supervision of Federal and highway projects is under the Bureau of Public Roads, of which Bureau Thomas H. MacDonald is the head. The appropriation act above referred to, contains the following provision:

"Provided, however, that the expenditure of funds from the appropriation made herein for the construction of public highways and other related projects shall be subject to such rules and regulations as the President may prescribe for carrying out this paragraph, and preference in the employment of labor shall be given (except in executive, administrative, supervisory, and highly skilled positions) to persons receiving relief, where they are qualified, and the President is hereby authorized to predetermine for each state the hours of work and the rates of wages to be paid to skilled, intermediate and unskilled labor engaged in such construction herein."

The Congressional Records show that accompanying this bill, when submitted to Congress, a statement or report was submitted showing that it was proposed under the bill to pay what was known as a "security wage."

This so-called "security wage" was not directly an hourly wage, but a fixed schedule of monthly earnings, based on a work month of 130 hours. In many communities, this required number of hours would result in an hourly wage being paid below the "prevailing wage." An amendment was introduced known as the "prevailing wage" amendment, which would require the higher hourly prevailing wage to be paid but that the workman would have his hours cut down so that his monthly earnings would be the same. A determined fight was waged in Congress for the adoption of this amendment. The debate on the question covers a vast number of pages of the Congressional Record. The President's wishes prevailed and the amendment was defeated. However, in the so-called relief act of 1936, relating to WPA and other relief funds for the year commencing July 1, 1936, the provisions of the "prevailing wage" amendment rejected in connection with the 1935 relief bill, were included. This change of policy applies only to appropriations made for the year commencing July 1, 1936, and does not apply to appropriations made under previous appropriation acts or to contracts of the State Highway Commission involving Federal funds and does not apply to the contracts hereafter discussed. The contracts hereafter discussed were made from and under the previous appropriation act of 1935, and under the rules and regulations adopted thereunder. Under the rules and regulations adopted by the Federal Government for the projects and contracts herein discussed, it was provided that minimum wage rates be established by the State Highway Commission in connection with such projects, which Federal regulations further provided that:

"A minimum wage rate of less than twenty cents per hour for unskilled labor will not be accepted for projects under the above programs and other minimums so established shall provide a return, for the permissible hours of work, of not less than the schedule of monthly earnings established by executive order for the general works program."

A schedule of the so-called "security wage" for the different states was specified by the President, in which the "security wage" for Iowa was fixed at from $40.00 per month to $55.00 per month for unskilled labor and from $55.00 per month to $85.00 per month for skilled labor. The employees were to be able to earn these sums within the limits of hours specified. The State Highway Comission made up minimum wage scales for the projects involved under the appropriation, which were approved by the Bureau of Public Roads as complying with such rules and regulations.

That on June 25, 1936, for the purpose of carrying out the projects to be built or constructed under Iowa's allotment under the 1935 Relief Act, the Highway Commission after public advertisement for bids, entered into two contracts for what is known as the East 14th Street projects. One contract was entered into with G. G. Herrick and the specified contract price is $294,472.72, and the other contract was entered into with E. A. Kramme, Inc., and the specified contract price is $219,093.95. Both contractors have filed proper and legal surety bonds with corporate sureties, guaranteeing the fulfillment of the contracts on the part of the contractors. The Federal Government is not a signatory to these contracts. The contracts purport to be, and are contracts between the State Highway Commission and the contractors named. All plans, specifications and minimum wage scales in connection with such projects have to be submitted to the Bureau of Public Roads. If all are satisfactory, the Bureau of Public Roads directs the Highway Commission to advertise for bids. These two projects were so submitted and the award of these contracts approved by the Bureau of Public Roads as complying with the Federal rules and regulations as to plans, specification and minimum wage scales. The minimum wage scales approved in connection with these projects and made a part of them are unskilled labor fifty cents per hour, intermediate grade labor fifty-five cents per hour, and skilled labor sixty-five cents per hour. I find that these two contracts have been legally and properly entered into under the laws of the State of Iowa and the regulations of the Federal Government, and are binding and legal contracts with the performance guaranteed by corporate surety companies.

Those Federal rules and regulations which are a part of the contracts are definitely set forth in the special provisions attached to the contracts, and the contractors do not consent to being bound to any others or to any changes in them.

It appears from the memorandum of the proposed compromise that it is assumed that the two contractors may not, or promise not to pay what is known as the "prevailing wage" scale. The contracts with the two contractors do not provide what wage scale they are to pay, except that it cannot be below certain minimums specified. The specifications made a part of these contracts in paragraph two of the Special Provisions of January 7, 1936, in that connection provide as follows:

"It is a responsibility of the contractor to pay wage rates sufficient to staff the work with labor from the designated area or to make such other arrangements as may be necessary to accomplish this purpose, providing the minimum wage rates are paid."

Section 1102.3 of the standard specifications, made a part of these contracts, provides in referring to the contractors:

"They must satisfy themselves as to the nature of the work and all conditions affecting the performance of the contract."

It nowhere appears in the records submitted what wage scale or scales the contractors used in their figuring in submitting their bids or what wage scale or scales they may pay, but it seems to be assumed that for the contractors to pay the "prevailing wage" scale would require an additional substantial amount above the contract prices specified in the contracts.

As the principal part of the proposed compromise, it is proposed that the Highway Commission pay the contractors additional substantial amounts above that specified in the contracts in order to enable them to pay the assumed additional labor costs, or that if the result sought could not be legally attained in that manner, that the same result be achieved by having the contracts cancelled or rescinded and new lettings had to enable these contractors or other contractors to raise their bids sufficiently to take care of this item. Your question is as to the legality of the proposed procedure.

Because of the feature of Federal funds being involved, obviously nothing could be done on the proposed compromise until a ruling was had from the Bureau of Public Roads, and it appears from the records submitted that a ruling was requested by the Commission from the Bureau of Public Roads of which Thomas H. MacDonald is the Chief, and the ruling of that department is found in the following telegram dated August 1, 1936:

"Relative to Fourteenth Street bridge and viaduct in Des Moines, I advised Governor Herring that the Bureau can legally do whatever the state can legally do. I question if the state has authority to annul a contract already made; also stated I did not see how the minimum rates set by state would be sufficient legal reason to release contractors from their contract obligations, even though it was necessary to pay higher than minimum rates to obtain labor. I advised the Governor that if the state can cancel contracts legally, the state can then submit a new scale of wages for this area which we will approve. Any increased cost will have to be paid from allotments already made to state.—MacDonald."

The Bureau of Public Roads under this ruling will not allow Iowa any additional Federal funds for meeting the proposed increase in cost. As heretofore mentioned, all of the balance of the funds included in Iowa's previous allotment have been allotted to the different counties and cities. Therefore, the legal effect of the Bureau's ruling is that if the payment of the increased cost can be legally made under the laws of the State of Iowa, the Bureau will consent to funds being diverted from the other counties and cities in the state to pay the increased amounts on the Des Moines projects. This ruling of the Bureau of Public Roads still leaves the legal questions unsettled.

The first question is as to what bearing it has on the legal situation that there are Federal funds involved. It appears that Federal funds may be handled or distributed in many different ways; in some cases the money is paid over on conditions, and in other cases the money is paid over after the conditions have been performed. In the case of Federal funds relating to highway matters, it appears that the Federal Government does not pay over the funds until the conditions have been performed. The Federal Government while not a party to the contracts between the State Highway Commission and the contractors, will, if the work is done to its satisfaction and according to its rules, pay over a specified portion of the cost to the State

Treasurer. The funds when thus paid over are not subject to conditions for the conditions have already been performed. The question suggests itself whether these funds when paid over to the State Treasurer become state funds so as to be subject to the operation of the state constitutional and statutory provisions. All of the cases that have passed on this matter hold that when Federal Aid funds are paid over to the State Treasurer, they become state funds. *Ellis vs. Stephens,* (1921) 185 Cal. 720, 198 Pac. 403; *Chicago, etc., Ry. Co. vs. Public Service Commission* (Mo. App. 1926) 287 S. W. 617.

In the California case of *Ellis vs. Stephens,* cited above, the Supreme Court of California on page 404 of the Pacific citation states:

"So far as the United States government is concerned, the payment of the funds to the proper state officer terminates its interest in the fund. In no instance is the fund payable by the United States government until the work for which it is apportioned has been actually performed. As the money thus paid by the United States government belongs to the State of California, it is subject to the control of the state, acting through its appropriate officers."

In the later California case of *California Highway Commission vs. Riley,* (1923) 192 Cal. 97, 218 Pac. 579, on page 585 of the Pacific citation appears the following statement by the court:

Petitioners next contention is that if it be held that the proposed payment cannot be lawfully made out of the state highway funds, nevertheless 'the highway commission still has at its disposal, the federal aid fund that it may spend practically as it wishes.' This contention was resolved adversely to petitioners in the case of Ellis vs. Stephens, 185 Cal. 720, 198 Pac. 403."

In the case of *State ex rel. Western Bridge and Construction Co. vs. Marsh,* (1923) 111 Neb. 185, 196 N. W. 130, the Nebraska Supreme Court held that the Federal aid engagements of a state are not exempted from the direction of its constitution, and the operation of its statutes. Thus, the legal situation in this matter is to be determined by the laws of the State of Iowa, which is in accordance with the view of the Bureau of Public Roads, as set forth in its telegraphic ruling heretofore referred to.

It being a matter then of state law, the first matter to be considered is Art. III, Sec. 31 of the Constitution of Iowa, which reads as follows:

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

Similar provisions are found in a majority but not in all state constitutions. Such a provision is not found in our Federal constitution so cases involving Federal contracts are not applicable. This provision did not appear in the Iowa constitution of 1846 but appeared for the first time in our present constitution adopted in 1857. The purpose of such constitutional provisions is the protection of public funds. The spirit in which these constitutional provisions are to be interpreted is stated by Judge Cardozo, now a Justice of the Supreme Court of the United States, when he was a member of the New York Court of Appeals in the great leading case of McGovern vs. City of New York, (1923) 234 N. Y. 377, 138 N. E. 26, 25 A. L. R. 1442, on page 390 of the New York citation, where he says:

"We are dealing with a restraint imposed by the Constitution itself upon the agencies of government. Its prohibitions are to be interpreted not narrowly or grudgingly like those of a penal statute * * * * but broadly and liberally to promote the policy behind them. * * * * The underlying realities of plan and purpose and effect must prevail over the form or disguise which may encumber or belie them."

The leading Iowa case on this question is the fairly recent case of *Love vs. City of Des Moines,* (1930) 210 Iowa, 90, 230 N. W. 373, where in February, 1917, one Love entered into a contract with the city of Des Moines to construct a sewer. Because of war conditions he was delayed throught the apparent necessity of digging sewers on the site of Camp Dodge, then being made into an army camp. He claimed to have sustained losses in the sum of $44,000.00 for which claim was made against the city of Des Moines. An agreement of compromise was entered into whereby he was to be paid $25,000.00 in the form of certificates of indebtedness in full settlement on condition that legislation be secured validating such payment. On February 14, 1921, the Legislature passed Chapter 348, Acts of the 39th General Assembly purporting to legalize "certain obligations of cities and towns made under pressure of war conditions." The city thereafter refused to pay the certificates of indebtedness and suit was brought against the City of Des Moines on them. On appeal to the Iowa Supreme Court, payment was refused on the ground that such proposed payment violated Art. III, Sec. 31 of the constitution hereinbefore set forth. The Iowa Supreme Court on page 95 of the Iowa citation says:

"In June, 1917 the contractor was operating under the benefits and obligations of a contract perfect in legal effect. He was under obligation to perform it. Upon performance he was entitled to receive the contract price. * * * * The power of the city council over the contract and its compensation was limited by the terms of the contract itself. They were bound to pay in full. They were not bound to pay more. Not only so, but they were bound not to pay more. If by any specious plea, their sympathies had been won, whereby they desired to add a bonus to the compensation of the contractor, they had no legal power to perform the wish. To perform it would be illegal."

The Iowa Supreme Court considered the effect of the purported legalizing act, and held that the provisions in Article III, Sec. 31 of the Iowa Constitution which permits payments of extra compensation to contractors by a two-thirds vote of both branches could not be exercised by general legislation, and held that the legalizing act did not validate the payment to the contractor, even though passed by a two-thirds vote of both branches of the legislature. The Iowa Supreme Court on page 102 of the Iowa citation in that case says:

"We are of the opinion, therefore, that no power exists in a city council to appropriate public moneys to private use without "public benefit," and that no such power can be conferred upon it by legislative act."

The general rule is that paying parties for what they are legally bound to do is a payment without consideration. Payments made without consideration are gifts or gratuities. In Iowa this rule in regard to consideration was recognized and enforced by the Iowa Supreme Court in the case of Ayres v. C., R. I. & R. Co. (1879), 52 Iowa, 478, where railroad contractors under contract to construct a portion of the railroad were losing money and threatened to stop work, were promised additional sum, it was held that even though the stoppage of the work would be to the serious disadvantage of the railroad com-

pany, the promise of the additional sum was a promise to pay for what the contractors were already legally required to do under their contract and was without consideration and the additional amount promised could not be collected.

The great leading case in this country on the payment of additional compensation to contractors under such constitutional provisions as herein involved, is the case of McGovern v. City of New York (1923), 234 N. Y. 377, 138 N. E. 26. In that a contractor in 1916 entered into a contract with the city of New York for the construction of a portion of a subway. The contractor was a party to a contract with the labor unions engaged in subway work fixing the wage scale which was to remain unchanged until the completion of the contracts. In December, 1916, an increase in wages was demanded which was met, and in February, 1917, a new demand for increased wages was made. The city officials insisted that the work must not be interrupted. The contractors were assured that a way could be found of reimbursing them. The contractors then entered into another new increased wage scale agreement. In May, 1918, a new increased wage scale was demanded and the contractor refused to go on unless the city would enter into a definite agreement to reimburse him and upon assurance that it would be signed, the contractor put in the new wage scale. The city then refused to enter into such an agreement, and the contractor went back to the previous wage scale, and the workmen struck. They gave notice in striking that unless they had a satisfactory agreement they would scatter and prevent the further prosecution of subway work. The city then entered into a contract to reimburse the contractor for the additional labor costs and the higher material costs caused by the World War. In a suit brought upon this agreement the opinion of the New York Court of Appeals denying the contractor's claim was written by Judge Cardozo. On page 30 of the Northeastern citation, he states:

"The contractors say that what they are seeking is not a gift in form or substance, not an extra at all in the sense of gratuitous concession, but the stipulated equivalent for the surrender of a right. The right, when subjected to analysis, will be found to be illusory. Millions were promised by the city in return for an unreal surrender. Either there was no consideration at all, or the shred of value, if any, is so grossly disproportionate to the return that to uphold it would be to nullify the constitution by subterfuge and fiction."

On page 31 of the Northeastern citation the same Judge makes the following statements:

"Their case is built on the mistaken notion that a strike in and of itself was sufficient to relieve them of a duty to proceed."

"The contract does not mean that whenever a strike is threatened the contractor may abandon all effort to avert it and fold his hands until such times as lower wages prevail."

The hardships caused public contractors in New York by the increase in labor and materials due to the World War resulted in the passage of the statute by the legislature giving the Court of Claims in that state jurisdiction to award additional amounts in such cases, and assumed to give the city the privilege at its election to cancel existing contracts and re-make them on new terms. The constitutionality of this statute came before the New York Court of Appeals, in the case of Gordon v. State of New York, (1922) 233 N. Y. 1, 134 N. E. 698, in which it was declared unconstitutional as an attempt to

grant extra compensation to a contractor after the contract was entered into. On page 700 of the Northeastern citation the court says:

"The claimant assumed the risk incident to the performance of these contracts. Had the cost of the labor and materials decreased rather than increased, the state under the contract would still be obligated to pay the unit prices it covenanted to pay, and equity and justice would turn a deaf ear to a suggestion by the state that the expense to claimant had been materially reduced, his anticipated profits thereby largely increased, and, therefore, a moral obligation existed on his part to reduce the cost to the state.

The state did not undertake to indemnify claimant against loss on his contract, on the contrary, it required him to give a bond for a strict compliance on his part with the same."

In the Pennsylvania case of *Dockett vs. Old Forge Borough*, (1913) 240 Pa. 98, 87 Atl. 421, a contractor entered into a contract with a municipality for the construction of a sewer. The laborers struck for higher wages and the municipality agreed to stand one-half of the increased cost of meeting the wage increase. The Supreme Court of Pennsylvania held that the municipality having a legal contract calling for the performance of the contract, could not increase the cost in this manner.

To hold that the Highway Commission could make the suggested payments in this case would be to hold that after a contract was legally let for a definite price, the Highway Commission could thereafter for such reasons as might appeal to it, pay such additional amounts to such contractors as it wished. To so hold would be to nullify the laws of the State relating to public letting of public contracts and to completely ignore the constitutional provisions adopted for the express purpose of preventing such payments.

From the cases cited it is clear that the Iowa State Highway Commission having entered into legal contracts calling for the performance of these contracts cannot pay the additional amounts suggested to these contractors, either directly or indirectly.

The next question is whether the same result can be achieved by cancelling the contracts either with or without the consent of the contractors, and new lettings had to enable these contractors or other contractors to raise their bids sufficiently to take care of the proposed item. This would be an attempt to do indirectly what cannot be done directly. As stated by Judge Cardozo in the case of *McGovern vs. City of New York*, (1923) 234 N. Y. 377, 138 N. E. 26, on page 32 of the Northeastern citation:

"The underlying realities of plan and purpose and effect must prevail over the form or disguise which may incumber or belie them."

The Highway Commission now has binding legal contracts for the performance of these contracts. If on a re-letting the same contractors receive them at the contemplated higher figures, they will be receiving extra compensation for what they had been previously legally bound to do, and if different contractors receive the new contracts, the State will be paying the additional sum for doing what the former contractors were legally bound to do. There is no suggestion of default on the part of either the State Highway Commission or the contractors, for the work has not started yet, and under their contracts the contractors do not have to commence work until Sept. 1, 1936, and have until August 1, 1937, to complete the same. The Iowa Supreme Court in the case of *Miller vs. City of Des Moines*, (1909) 143 Iowa, 409, 122 N. W. 226,

held that public bodies may not handle public lettings so as to deprive the public of the lowest responsible bid, which would be the case if the contracts in question were re-let for the purpose indicated.

The question of the right of a State Highway Commission to cancel a contract was passed upon by the Supreme Court of California in the case of *California State Highway Commission vs. Riley,* (1923) 192 Cal. 97, 218 Pac. 579, where the California State Highway Commission had entered into a contract for a seemingly very extensive piece of highway construction. After entering into the contract it was felt that it would be better to cancel the contract with the consent of the contractor and use the funds involved for other highway construction. The Court said that there was no suggestion but what the Highway Commission was acting with the best of motives. An agreement was entered into with the contractor cancelling the contract, in which the contractor was to be paid for a small amount of work already done, and his loss on "overhead." The legality of this action was the question involved in the case. The Supreme Court of California held that the contract could not be so cancelled. The second head-note of this case reads as follows:

"A grant of authority to an agent to execute a contract in behalf of his principal contemplates the performance of such contract, not its breach, and authority to break a contract is not implied from a mere grant of authority to execute such contract."

On page 584 of the Pacific citation the court says:

"By the execution of such an authorized contract the state acquires certain legal rights and incurs certain liabilities which are fixed and ascertained or ascertainable. Thereafter no one can either increase or diminish the rights of the state unless he has been vested with authority so to do by express grant or clear implication. The state having directed or authorized the making of the contract contemplates its performance. * * * *.

The Court calls attention to the difference between the situation of public bodies in regard to contracts and of individuals, stating that while in some respects a state in entering a contract is subject to some of the rules and liability of a private individual, yet there are certain important differences. That when a private individual enters into a contract he is a free agent and may determine for himself whether he may modify or abrogate the same and he may pay the other party merely what he is entitled to, or pay him more by way of extra compensation or as a gratuity, but that a state has no similar rights. Attention has been previously called to the fact that a New York statute purporting to give public bodies the right to cancel contracts and make them on new terms on account of the increased cost growing out of the World War was unconstitutional.

The Highway Commission is an agency of the State and the general rule is that an agent is without authority to waive or give up his principal's rights or interests or to increase his liabilities or obligations for the benefit of others. 2 *Corpus Juris Secundum* 1253.

There are certain provisions in the Standard Specifications made a part of these contracts, giving the Highway Commission the right to annul these contracts, but they are all based upon the default of the contractor, which situation is not involved in this matter, but in all such cases, even though the contract is annulled, the surety of the contractor's bonds has to make good the loss.

Without going into what situations might justify the Highway Commission in cancelling a contract, it is clear that the Highway Commission cannot cancel or rescind these contracts for the purpose proposed, of increasing the cost to the State above that specified in existing, binding and legal contracts, either with or without the consent of the contractors; nor as previously stated, can the proposed additional payments be made under the existing contracts.

Opinions of this office and cases giving public bodies the right to cancel contracts under NRA for failure of the contractor to pay the "prevailing wage" are not applicable to this situation, for there the regulations of NRA in regard to the "prevailing wage" were a part of the contract, which is not the situation in this case.

The situation sought to be dealt with by the proposed compromise is somewhat similar to the situation that the Federal Government has found itself in regard to most of its contracts since the termination of the NRA by the United States Supreme Court decision. The different agencies of the Federal Government found that without Congressional legislation which was in most cases lacking, they could not specify or require contractors bidding on Federal contracts to pay the "prevailing wage" or even the "minimum wage" or meet other specified labor standards. The Committee report accompanying the Congressional legislation hereafter mentioned states as follows:

"An investigation conducted at the request of the committee has shown that in recent months the requirement that government contracts must go to the lowest bidder, regardless of his labor practices, has tended to depress the advance in wages and purchasing power achieved during the first two years of the administration. Passage of the bill will end the present paradoxical and unfair situation in which the government on one hand urges employees to maintain and uphold fair labor standards, and on the other hand gives vast orders for supplies and construction to the lowest bidder, often a contractor or manufacturer whose own labor policies offend all decent social standards."

To remedy the anomolous situation the Federal Government passed the Walsh-Healey bill on June 30, 1936, which goes into effect October 1, 1936, a copy of which is attached for reference. Under this law, contractors entering into contracts with the Federal Government in an amount exceeding $10,000.00 or over have to agree to pay the prevailing wage scale in the locality where the work is to be performed and agree to other labor standards.

This act does not apply to Federal contracts entered into before October 1, 1936, or to contracts let under certain previous appropriation acts. It specifically exempts from its provisions the labor provisions of the Relief Act of 1935 which contains the appropriation under which the two contracts in question were let, and it does not include under its provisions State Highway Commission contracts let or to be let where Federal Aid funds are involved. A study of the different rules and regulations relating to highway contracts involving Federal funds shows that the Bureau of Public Roads by its power to make rules and regulations in regard to Federal Aid highway funds generally incorporates into its rules by regulations the different Federal statutes in regard to labor. The only way the provisions of the Walsh-Healey Act could be made a part of state highway contracts where Federal funds are involved would be for the Bureau of Public Roads to incorporate the provisions of the Walsh-Healey Act into such rules and regulations,

which could take place, if that bureau follows its previous seemingly general policy.

It seems clear that the agencies, boards, commissions and officials of the State of Iowa are in regard to public contracts in the same position the Federal Government was before the passage of the Walsh-Healey Act, and that the various agencies, officials and commissions of the State of Iowa do not have the power without state legislative authority to prescribe any wage scale in state contracts either "prevailing" or "minimum." The Iowa Legislature, with the exception hereafter noted, has not given state agencies, officials or commissions the power to prescribe or specify either "prevailing" or minimum wage scales in state contracts let by them. A good many of the states, including neighboring states, have enacted what is known as "prevailing wage" statutes in regard to public contracts in order to deal with the situation. This lack of legislation in Iowa results in continued appeals, demands and pressure upon state boards, commissions and state officials to indirectly assume powers in that regard not granted them by the Legislature and which belong exclusively to the Legislature.

The State Highway Commission has a very limited right in regard to putting in minimum wage scales in its contracts involving Federal funds, by virtue of Section 4755-b1 of the 1935 Code of Iowa which provides in part as follows:

"The State Highway Commission is empowered on behalf of the state to enter into any arrangement or contract with and *required* by the duly constituted federal authorities, in order to secure the full co-operation of the government of the United States, and the benefit of all present and future federal allotments in aid of highway construction, improvement or maintenance."

Under this section in contracts involving Federal funds the Highway Commission is authorized to do what is "required" by the Federal Government. Under this section, the Highway Commission is limited in the matter of wage scales to what is "required" by the Federal Government, and not what the Federal Government will merely approve. The only requirements made by the Federal Government as yet, in regard to these contracts, is a "minimum" scale on certain projects. The State Highway Commission would not and does not have any authority to require contractors to pay a prevailing wage scale until it becomes a requirement of the Federal Government in regard to such contracts, which the Federal Government has not as yet done, and until it does so require, the Highway Commission's authority is limited to complying with the Federal minimum wage standards.

The authority given the State Highway Commission by Section 4755-b1 above set forth is thus so limited in the matter of minimum wage scales on Federal Aid projects as to leave the Highway Commission in the rather difficult position of not being able to require minimums above those required by the Federal Government, even though under the circumstances, the Highway Commission feels that the Federal Government's required minimums are inadequate, and unless more general legislation is intended on the entire subject, it might be considered to amend that section to give the Highway Commission power to fix minimum wage scales above those "required" by the Federal Government.

In regard to other State Highway contracts not involving Federal funds, the Highway Commission is as helpless as are the other state agencies in

attempting to demand or require a "prevailing wage" scale or any wage scale.

It will be seen that in regard to state highway contracts involving Federal funds, the situation can only be dealt with under the present circumstances by having the Federal Government in such cases "require" higher minimums, or by having the Federal Government incorporate into its regulations pertaining to such contracts, provision or provisions for a "prevailing wage" scale similar to that contained in the Walsh-Healey Bill, and thus "require" the "prevailing wage" in connection with such contracts. This would deal only with this particular class of state contracts, and all other state contracts would have to be dealt with by general state legislation of the type of the Walsh-Healey Bill.

The Congressional Committee Report accompanying the Walsh-Healey Bill shows that the constitutionality of state legislation of similar character has been sustained by the Supreme Court of the United States.

In conclusion attention is called to the fact that any changes made in the Federal regulations or changes made by state legislation has a prospective effect and not a retrospective effect. It cannot affect contracts already let, but can only affect future contracts.

PUBLIC—No. 846—74th Congress

(S. 3055)

AN ACT to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes.

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract:

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week;

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; and

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories,

buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the state in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

Sec. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in Section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency or the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in Section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: PROVIDED, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

Sec. 3. The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by this Act. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

Sec. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act and to utilize such Federal officers and employees and, with the consent of the State, such state and local officers and employees as he may find necessary to assist in the administration of this Act and to prescribe rules and regulations with respect thereto. The secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1923, an administrative officer, and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of this Act. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

Sec. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requir-

ing the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In the case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which said inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

Sec. 6. Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in Section 1 will seriously impair the conduct of government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected.

Sec. 7. Whenever used in this Act, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

Sec. 8. The provisions of this Act shall not be construed to modify or amend title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes," approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes," approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time, nor the labor provisions of title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of Section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act to provide for the diversification of employment of federal prisoners, for their training and schooling in trades and occupations, and for other purposes," approved May 27, 1930, as amended and supplemented by the Act approved June 23, 1934.

Sec. 9. This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor

shall this Act apply to perishables, including dairy, live stock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in this Act shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934.

SEPARABILITY CLAUSE

Sec. 10. If any provision of this Act, or the application thereof to any persons or circumstances, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

Sec. 11. This Act shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from the effective date of this Act: PROVIDED HOWEVER, That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

Approved, June 30, 1936.

LEGAL RESIDENCE OF CHILDREN: A minor cannot himself change his legal settlement, nor can persons not legally liable for his support and not standing in loco parentis. Legal settlement of minor children is the same as that of their parents by adoption or those legally responsible for their support.

August 11, 1936. *County Attorney, Grundy Center, Iowa:* We acknowledge receipt of your letter of April 22d, in which you present the following statements of facts:

"A man, living in another county and the father of three minor children, was killed in June, 1935, while a resident of that county. The mother of the children had died previously. Some of the children came to this county to live with relatives prior to the death of the father, but one boy did not come to this county to live with relatives until after the death of the father."

Your question is whether these children have gained a legal settlement in your county.

Paragraph 5 of Section 5311 of the 1935 Code of Iowa provides:

"5. Legitimate minor children take the settlement of their father, if there be one, if not, then that of the mother."

The parents of minors are ordinarily legally liable for their support, and grandparents are liable for the support of their grandchildren under certain instances. Other and more distant relatives are not legally liable for the support of dependent children.

You state that, "Some of the children came to this county to live with relatives prior to the death of the father." You do not state the relationship of the relatives, but we assume there was no legal liability on the part of the relatives to support these children, and that the support was purely a voluntary matter on the part of such relatives. Under a statutory provision very similar to the one under consideration here, our Supreme Court said:

"Legitimate minor children follow and have the settlement of their father, if he have one; but, if he have none, then that of his mother.' Other subdivisions of the section provide for the settlement of married women with their husbands, and those abandoned by them, of illegitimate minors, of

minors whose parents have no settlement, and of minors bound as apprentices and servants; but there is no provision for minors who are emancipated, except that the settlement of legitimate minor children follow that of their father. It thus appears that no person can obtain a settlement under the poor laws of the state (with the exceptions stated) unless he has attained his majority."

Clay Co. vs. Palo Alto Co., 82 Iowa 626 at 629.

It is our opinion, in view of the plain language of the statute quoted, that the legal settlement of the minor children was the same as that of their father so long as he lived.

The Clay County case, supra, is authority to sustain our opinion that no person, whose parents are deceased, can change his legal settlement under the poor laws of this state unless he has attained his majority. In other words, nothing the minor himself can do will change his legal settlement to a county other than that in which his father had his legal settlement at the time of his death. If the minors in question have acquired a legal settlement in a county different from that in which their father had his last legal settlement, it must be because of the action of someone standing in loco parentis. Residence, domicile and legal settlement are not synonymous terms, but a consideration of what constitutes residence and domicile may be helpful in determining the legal settlement of minors whose parents are deceased.

" 'Residence' as used in various statutes has been considered synonymous with 'domicile,' but of course this depends upon the intent of the particular statute as ascertained by construction of its provisions. The terms are not necessarily synonymous. * * * The term 'settlement' as used in pauper acts is not synonymous with 'domicile'."

19 *Corpus Juris*, 397.

"An infant being non sui juris is incapable of fixing or changing his domicile, * * * *. During minority the domicile of an infant continues to be the same as that of the person from whom he took his domicile of origin and changes only with the domicile of that person."

19 *Corpus Juris*, 411.

"After the death of both parents the domicile of the infant will remain that of the parents, or of the parent who died last, subject to the rule as to the incapacity of the mother after remarriage, until changed by residence elsewhere with a guardian or person in loco parentis. Infants residing with their grandparents, after the death of their parents, generally acquire the domicile of such grandparents, the latter being next of kin and in loco parentis. But infants whose parents are dead do not lose the domicile of their parents by being temporarily cared for elsewhere by relatives. Removal by strangers does not change an infant's domicile."

19 *Corpus Juris* 413.

"The domicile of an adopted child during his minority follows the domicile of his adoptive parents."

19 *Corpus Juris* 414.

"The domicile of a child is to be determined by the domicile of the parent; and when the domicile is once fixed, it remains until another is lawfully acquired. Schouler, Dom. Rel., Sec. 230. The domicile of these minors at the time of the death of their father was in Waverly, and they could do nothing to change their domicile, for they were not sui juris. Jenkins vs. Clark, 71 Iowa, 552, 32 N. W. Rep. 504. Under our statutes the parents are the natural guardians of their minor children, and are equally entitled to the care and custody of them. Code, Section 2241. At common law, although some of the books speak only of the father, or, in case of his death, the mother, as

guardian by nature, yet it is clear that the grandfather or the grandmother, when next of kin, is such a guardian. Lamar vs. Misou, 114 U. S. 218, 5 Sup. Ct. 857; Hargraves, note to Co. Litt. 88, 6-12; Reeve, Dom. Rel. 389; Darden vs. Wyatt, 15 Ga. 414. 'After the death of both parents, infants, who take up their residence at the home of the paternal grandparent or next of kin, in another state, will acquire such grandparent's domicile. Schouler, Dom. Rel., Section 303. While our statute does not in terms make the next of kin guardians by nature, yet it does hold them responsible for their support. Code, Section 1331. Being so held, it seems to us that they should, in the event of the death of both parents, be entitled to the custody of their grandchildren, and that the common law rule, that they are guardians by nature, should obtain in this state. Guardians by nature have the right to change the domicile of their wards, if done in good faith. And while the next of kin may not change it, so as to affect their rights of succession or of property, yet if the change is made in good faith a new domicile may be acquired, which will give a probate court jurisdiction to appoint a guardian at law for them. In this case the grandfather is living with, and is a member of, the petitioner's family, and he signed the petition for the appointment of David M. Benton as guardian in the Wisconsin county court. The children, or one of them, were taken by David Benton to Wisconsin at the request of the grandfather; and the paternal grandfather, petitioner, and the children all live together as one family."

In Re Benton, 92 Iowa, 202 at 205.

Subsection 2 of Section 5311 of the 1935 Code is as follows:

"2. Any person having acquired a settlement in any county of this state shall not acquire a settlement in any other county until such person shall have continuously resided in said county for a period of one year without being warned to depart as provided in this chapter."

Subsection 3 provides that any person who is an inmate 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 the state, or any person who is being supported by public funds, shall not acquire a settlement in another county unless such person, before becoming an inmate thereof, or being supported thereby, has a settlement in such county.

It is our opinion that the legal settlement of a minor may be changed in the same way that the domicile of such minor may be changed. If such minor is legally adopted he takes the legal settlement of his parents by adoption. The legal guardian of the person of a minor, under proper order of court, probably has authority to change the domicile and legal settlement of his ward, and under the authority of Section 5301 of the Code and the case of *In Re Benton,* supra, grandparents who have taken the personal custody of their indigent minor grandchildren and have assumed the support of said grandchildren, and who therefore stand in loco parentis, have authority to change the legal settlement of such minors so that it will be the same as their own. A minor cannot, himself, change his legal settlement, nor can persons not legally liable for his support and not standing in loco parentis change such legal settlement.

UNFAIR DISCRIMINATIONS: A statute does not prohibit the payment of the same price for the same commodity at different places. Discrimination in purchases means different prices to different parties for the same commodity.

August 12, 1936. Your letter of August 7th to the Attorney General has been referred to me for reply.

You state that you have a client who operates a large creamery and poultry house in connection with which it has some 65 buying agencies in small communities throughout the state, and that this client has many competitors operating in a similar manner in the state.

One of these competitors you say has established routes, and sends its trucks out thereon to pick up cream, and that it pays the farmer the same price at the farm that it pays other farmers at the station, who deliver their own cream. You ask whether this practice is contrary to Chapter 432 of the Code relating to "Unfair Discrimination in Purchases."

It is our opinion this question should be answered in the negative. You state that these competitors, or one of them, has established routes, and their truck will go out on these routes and pick up the cream and pay the farmer the same price at the farm as they pay a farmer who is not on the route and hauls his own cream to the station. If any section in Chapter 432 is violated, it is Section 9886, which section insofar as material is as follows:

"Any person * * * engaged in the business of purchasing * * * any commodity of commerce that shall for the purpose of destroying the business of a competitor, or creating a monoply, discriminate between different sections, localities, communities, cities or towns, in this state by purchasing such commodity at a higher rate in one section * * * than is paid for such commodity by such party in another section * * * after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of purchase to the point of manufacture * * * shall be deemed quilty of unfair discrimination * * *"

In other words, the person who violates Section 9886 is one who, for the purpose of destroying the business of the competitor or creating a monopoly, discriminates between different localities by purchasing such commodity at a higher rate in one locality than in another, after making due allowances for difference in grade and in cost of transportation. Your question contemplates not the payment of different prices in different localities, but payment of the same price for the same grade of cream in different localities. Dealers are not restricted in the transaction of their business to particular localities.

The law contemplates the establishment of cream routes and specific reference is made thereto in Sections 3100-g3 and 3100-g5. Section 9886 does not prohibit the purchase at different prices in different localities where the difference in price merely makes allowance for the difference in the grade or quality and in the actual cost of transportation from the point of purchase to the point of manufacture, sale or distribution. A creamery company would be justified, we think, in charging the seller with the actual cost of transportation by making a difference in prices in different localities with a view to taking care of the actual transportation cost, but they are not compelled to do so.

The farmer whose cream is picked up at his door gets a higher price therefor than the farmer who gets the same price after he delivers his cream at the station some miles distant, since the cost to the farmer of transporting his cream to the creamery in effect reduces the price by that amount. While the price is the same to both producers, the effect is the same as though the farmer whose cream is picked up at his farm received a higher price.

The statute does not prohibit the payment of the same price for the same commodity at different places. Discrimination in purchases means different

prices to different parties for the same commodity. We can see no unfair discrimination between different sections, localities, communities, cities or towns where a certain grade of cream is purchased by the same company in all such places at the same price.

WHISKEY WAREHOUSE RECEIPTS: LIQUOR CONTROL ACT: "Therefore, the sale of whiskey warehouse receipt is subject to the terms and conditions of the Iowa Liquor Control Act and any other liquor laws which may be on the statute books."

August 14, 1936. *Iowa Liquor Control Commission:* In your letter of August 13th you asked the following question:

"Are warehouse receipts, issued for whiskey stored in a bonded warehouse outside of the State of Iowa, sold or otherwise disposed of in the State of Iowa, subject to the provisions of the Iowa Liquor Control Act?"

Warehouse receipts are defined in Corpus Juris as follows:

67 Corpus Juris 463:

(P. 31) G. *Warehouse receipts.* 1. *Definitions.* A warehouse receipt is a written acknowledgment by a warehouseman that he holds certain goods in store for the person to whom the writing is issued, the essential thing before the acknowledgment by the warehouseman that the goods are in his warehouse or store. It has also been defined as a simple written contract between the owner of the goods and the warehouseman, the latter to store the goods and the former to pay the compensation for that service.

67 Corpus Juris 471:

(P. 46) c. *As to title and possession.* (1) *In general.* The delivery of a warehouse receipt by the warehouseman carries the title and constructive possession of the property to the holder of the receipt, * * * *.

Thus you see that a warehouse receipt represents title to the commodity in storage which it covers and ownership of such a receipt represents constructive possession of the commodity covered by it. The sale of such a receipt, therefore, constitutes passage of title and passage of constructive possession to the commodity covered. The sale of a warehouse receipt for whiskey, therefore, represents the sale of title to whiskey and passage of constructive possession of such whiskey. In other words, the sale of a whiskey warehouse receipt is a sale of the whiskey covered by the receipt. The Iowa statutes governing the sale of whiskey as found in the Code of Iowa are as follows:

1924. *General prohibitions.* 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 device,* manufacture, sell, exchange, barter, dispense, give in consideration of the purchase of any property or of any service, or in evasion of the statute, or keep for sale or have possession of, any intoxicating liquor except as provided in this title; * * *.

1921-f3. *General prohibition.* It shall be unlawful to manufacture for sale, *sell, offer, or keep for sale,* possess and/or transport vinous, fermented, spirituous, or alcoholic liquors * * * except upon the terms, conditions and limitations as set forth herein.

The Code of Iowa forbids the sale of whiskey in Iowa "directly or indirectly, or upon any pretense, or by any device" except upon the "terms, conditions and limitations" as set forth in the laws of the state. Since the sale of whiskey warehouse receipts is the sale of whiskey, it is forbidden except upon the terms and conditions as set forth in the liquor laws. Therefore,

the sale of whiskey warehouse receipts is subject to the terms and conditions of the Iowa Liquor Control Act and any other liquor laws which may be on the statute books.

OLD AGE ASSISTANCE LAW: Cost of items such as office equipment, supplies, telephones, postage and so on, must be paid for by the respective counties and cannot be paid for out of the old age assistance fund.

August 18, 1936. *Old Age Assistance Commission:* We have your request for opinion on the following proposition:

"A question has arisen as to the liability of the Old Age Assistance Commission for the purchase of county office equipment and the expenses incurred in connection with county offices, such as telephones, postage and general office supplies.

"This office desires an opinion from your office as to the responsibility for the payment of these items."

In the case of *Jones vs. Dunkelberg, et al.,* decided by the Supreme Court on February 13, 1936, the court had before it the question of liability for expenses of a member of the County Board under the Old Age Assistance Act, and in order that the opinion would be confined to the particular facts, the court stated in its opinion: "So that this opinion is only an authority confined to the facts and simply to and in accord with the facts set forth in the petition in the action"; and the court went on to hold there that by reason of the provisions of the act creating the Old Age Assistance Fund, that the liability for such personal expense were those of the assistance fund and not those of the county.

But in regard to office supplies and equipment, we have a very different proposition, for these supplies are out in the various 99 counties of the state and are for the use of the County Board or those employed by the County Board and for use in that office.

This fund of the Old Age Commission is a trust fund created by an act of the Legislature and is held separate and apart from the moneys and funds of the sovereign State of Iowa, and therefore, being a trust fund, and the Commission being trustees of the fund, it can only be disbursed pursuant to the express terms of the act creating the fund, and there is nowhere in the act any provision for the payment out of the fund for the office supplies and equipment inquired about.

It is, therefore, the opinion of this department that the cost of the items such as office equipment, supplies, telephones, postage and so on, must be paid for by the respective counties and cannot be paid for out of the Old Age Assistance Fund.

INDEPENDENT SCHOOL DISTRICT: JUVENILE HOME: Children of school age may attend 11th and 12th grades of high school in independent school districts free of charge, who reside in juvenile homes.

August 20, 1936. *State Board of Control:* A question has been raised by the Independent School District of Toledo with regard to the payment of tuition for children who have been committed to the Juvenile Home at Toledo, and who are attending the eleventh and twelfth grades in the high school of the Independent School District of Toledo. The president of the Independent School District of Toledo takes the position that the school district is entitled

to the payment of tuition for all such children who are attending their high school in the eleventh and twelfth grades and fifty per cent of this expense should be borne by the state and the balance by the counties from which these children were committed.

In arriving at the proper legal solution of this question, it is necessary for us to call your attention to the following sections of the 1935 Code of Iowa. Section 3698 of the Code provides as follows:

"3698. *Objects.* The Iowa juvenile home shall be maintained for the care, custody, and education of children therein, who shall be wards of the state. Such education shall embrace instruction in the common school branches, in such other higher branches as may be practical, and in such manual training, as shall best fit and develop such children and render them self-sustaining. Instruction may also be given in elementary military tactics."

Section 3703 of the 1935 Code provides as follows:

"3703. *Counties liable for support.* Each county shall be liable for sums paid by the home in support of all children committed or received from said county to the extent of one-half of the per capita cost per month for each child, and when the average number of children is less than two hundred ninety-two in any month, each county shall be liable for its just proportion for each child of the amount credited to the home for that month. The sum 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."

Section 4273 of the Code provides as follows:

"4273. *Tuition.* Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years, and to resident honorably discharged soldiers, sailors, and marines, as many months after becoming twenty-one years of age as they have spent in the military or naval service of the United States before they became twenty-one. Every person, however, who shall attend any school after graduation from a four-year course in an approved high school or its equivalent shall be charged a sufficient tuition fee to cover the cost of the instruction received by such person."

Section 4283 of the Code is as follows:

"4283. *Tuition in charitable institutions.* When any child is cared for in any charitable institution in this state which does not maintain a school providing secular instruction, and which institution is organized and operating under the laws of Iowa, and the domicile of the child is in another school district than that where in the institution is situated, then such child shall be entitled to attend school in the district where such institution is located. In such case, the district which provides schooling for such child shall be entitled to receive tuition not exceeding the average cost thereof in the department of the school in which schooling is given, and not exceeding eight dollars per month for tuition in schools below the high school grade, and not exceeding twelve dollars per month for tuition in high school grades. Such tuition shall be paid by the county of the domicile of such child. Any county so paying tuition shall be entitled to recover the amount paid therefor from the parent of such child. This section shall not apply to charitable institutions which are maintained at state expense."

In analyzing the above sections, we can eliminate Section 4283 for the reason that this section is not applicable for the reason that the last sentence in said section states, "This section shall not apply to charitable institutions which are maintained at state expense."

Section 3698 of the Code and Section 3287 authorizes and directs the State Board of Control to maintain the Iowa Juvenile Home at Toledo for the

care, custody and education of children therein *"who shall be wards of the state."* This education shall embrace instruction in the common school branches and *in such other higher branches as may be practical.* Acting in accordance with and by virtue of said sections of the Code, the Board of Control has determined that education for such children in the ninth and tenth grades is practical and in conformity with the authorization given by Section 3698. It is true that the Board of Control might determine that a full four-year high school course would be practical, but so far they have not done so. If the Board of Control would establish a four-year high school course of instruction in their Juvenile Home, then it would not be necessary for any of the children committed thereto to attend any other high school.

The expenses of maintaining this Juvenile Home are provided for by Section 3703 of the Code. As the Home is now organized, these expenses include those that are necessary for the care, custody and education of the children therein in the common branches and in the higher branches up to the eleventh grade. So far the Board has not determined that it is practical for them to provide courses in the eleventh and twelfth grades. Therefore, the only expenses for the education of the children therein that are authorized to be paid by Section 3703 of the Code are the expenses for education in the common school branches and in the ninth and tenth grades in the higher branches. Section 3703 does not authorize any expenses for the education of such children in the eleventh and twelfth grades for the sole reason that the Board of Control has not deemed it practical to include education in these higher grades in their Juvenile Home at Toledo. We, therefore, cannot look to Section 3703 of the Code for authority for the proposition that the state and the counties where such children may be domiciled can be called upon to pay the tuition expenses for such children as may be in attendance in the high school of the Independent School District of Toledo in the eleventh and twelfth grades.

Section 4273 of the Code specifically provides that "Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years." The question that now arises is simply this—are the children who have been committed to the Juvenile Home at Toledo, and who are actually living and residing in this home "actual residents" of the Independent School District of Toledo?

This question has been answered by the Supreme Court of Iowa in the case of *Salem Independent School District vs. Kiel,* 206 Iowa 967. The facts in the above case are as follows:

For more than seventy years prior to 1928, there existed in Chestnut Hill School District, Lee County, Iowa, a charitable institution, known as White's Manual Labor Institute. Four children were placed in this institute under the provisions of Chapter 6, Title XVI, of the Code of 1897, which has since been repealed. These children were placed therein by their parents under contracts of indenture, wherein the full control and custody of the children were given and surrendered by the parents to the superintendent of the institute where they were to remain until they should have attained their majority. The parents were given the right to visit the children at such reasonable times and under such requirements as the superintendent might prescribe. Two of these children formerly resided in Lee County, outside of Chestnut

Hill School District, and two entered the institute from Monroe County. These four children attended the high school at the Salem Independent School District during a portion of the school years of 1924, 1925, 1926, and 1927. No tuition was paid to the Salem Independent School District and the action was brought by this district to compel the County Auditor to issue and transmit an order to the County Treasurer, directing him to transfer certain funds for the amount due from Chestnut Hill School District to the credit of the Salem Independent School District as provided by Section 4278 of the present Code.

In deciding this question, the Supreme Court used the following language:

"Counsel divide upon the question as to whether the case is controlled by Section 4275 or Section 4283, Code of 1924. Section 4275 is as follows;

"'Any person of school age who is a resident of a school corporation which does not offer a four-year high school course, and who has completed the course as approved by the department of public instruction for such corporation, shall be permitted to attend any public high school or county high school in the state approved in like manner that will receive him.'

"* * * Thus two questions involving the interpretation and construction of the foregoing statutes are involved, (Sections 4275 and 4283) and require decision: First, were the children under the provisions of Section 4275, residents of Chestnut Hill School District; and, second, if appellant's construction of Section 4283 be accepted, was such district their domicile? The terms 'residence' and 'domicile' are not necessarily identical in meaning. The first is used to indicate the place or dwelling which may be either permanent or temporary; the second, to denote a fixed, permanent residence to which, when absent, one has the intention of returning. *Fitzgerald vs. Arel*, 63 Iowa 104; *In Re Estate of Titterington*, 130 Iowa 356; *In Re Estate of Colburn*, 186 Iowa 590.

"The institute is to be the permanent home of the children in question until they attain their majority. They have no other home. They are, therefore, we think, unless excluded by the fact that they are cared for in a charitable institution, clearly residents of Chestnut Hill District. Mt. Hope Sch. Dist. vs. Hendrickson, 197 Iowa 191. See, also Hume vs. Independent Sch. Dist., 180 Iowa 1233. This conclusion finds support in many decisions in other jurisdictions. Ashley vs. Board of Education, 275 Ill. 274 (114 N. E. 20); School Dist. of Borough of Ben Avon vs. Sch. Dist. of Pittsburgh, 77 Pa. Super. Ct. 75; I. O. O. F. of W. Va. vs. Board of Education, 90 W. Va. 8 (110 S. E. 440); Board of Trustees vs. Powell, 145 Ky. 93 (140 S. W. 67); Yale vs. West Middle Sch. Dist., 59 Conn. 489 (22 Atl. 295) Logsdon vs. Jones, 311 Ill. 425 (143 N. E. 56); Delaware, L. & W. R. Co., vs. Petrowsky, 250 Fed. 554.

"This precise question has not been decided by this court, but it arose in the following cases from other jurisdictions, in which it was held that children cared for in a charitable institution are residents of the school district in which the same is located. Delaware, L. & W. R. Co. vs. Petrowsky, supra; Logsdon vs. Jones, supra; Ashley vs. Board of Education, supra; School Dist. of Borough of Ben Avon vs. School Dist. of Pittsburgh, supra; I. O. O. F. of W. Va. vs. Board of Education, supra.

"Having reached this conclusion, we next inquire as to the applicability of Section 4283. The reason and necessity for the enactment of this section were to provide schooling for children cared for in a charitable institution which does not provide for or maintain secular instruction. In the absence of this statute, the question might well arise as to whether the children therein cared for would have the right to attend the schools of the district in which the institution is situated. It is obvious that the legislature did not, in the enactment of this section, have in mind the question presented in this case. Neither in express nor implied terms does this statute give children cared for in a charitable institution the right to attend school in another district than the one in which the institution is situated. It is, therefore,

clearly without application to this case. We are of the opinion, therefore, that Section 4275 and the following sections are controlling. The decree of the court below is, accordingly, affirmed."

Children under eighteen years of age who are not accused of an offense which is punishable by life imprisonment or death, and who are not feeble minded and who are not inmates of any state institution or of any institution incorporated under the laws of this state, may be admitted or committed by the Juvenile Court to the Juvenile Home at Toledo. Whether they are admitted under voluntary applications by their parents or by order of the Juvenile Court, they become wards of the state. This means that the state and the Juvenile Court has the legal right to determine their residence and their home so long as they remain the wards of the State of Iowa. The Juvenile Home at Toledo is to be the permanent home of such children until they attain the age of eighteen, or previous thereto are adopted out and placed under contract with other persons as provided for by Section 3702 of the Code. They are, therefore, clearly residents of the Independent School District of Toledo, Iowa.

Being residents of the Independent School District of Toledo, Iowa, they are then entitled to attend high school at Toledo in the eleventh and twelfth grades as specifically provided for by Section 4273 of the Code. Such high school shall be free of tuition to such children for the reason that they are actual residents of the Independent School District of Toledo, Iowa.

While this might appear to be an extra burden upon the Independent School District of Toledo, yet it is not a burden without compensation to such district. The Independent School District of Toledo, Iowa, is entitled to its proper state and county apportionment, based upon the total number of children of school age received in the Independent School District of Toledo. The Independent School District of Toledo has included 307 of such children in their certification of school taxes. This certification shows that the total number of persons of school age in the Independent School District of Toledo is 708, which includes 307 at the Juvenile Home and 401 residing in the district, but outside of the Juvenile Home.

The Board of Supervisors levies a tax for the support of the schools within the county of not less than one-fourth, nor more than three-fourths of a mill on the dollar on the assessed value of *all* the taxable property within the county. See Section 4395. This tax is then apportioned, together with the interest of the permanent school funds and rents on unsold school lands to which the county is entitled, and all other money in the hands of the County Treasurer belonging in common to the schools of the county, and not included in any previous apportionment among the several corporations therein *in proportion to the number of persons of school age* as shown by the report of the County Superintendent filed with him for the year immediately preceding. See Section 4396 of the 1935 Code.

This general county school levy does not fall upon the taxpayers of the Independent School District of Toledo alone, but is spread upon all the taxpayers of the county. It appears that this tax apportionment to the Independent School District of Toledo should fairly compensate the district for the education of the children received in the Juvenile Home while attending high school in the Independent District in the eleventh and twelfth grades

therein. If there is any unfairness in this law, the extra burden would be upon all the taxpayers of Tama County, rather than the Independent School District of Toledo. The Independent School District of Toledo is getting its apportionment of such school taxes on the basis of the total population of persons of school age within its district, including the children of the Juvenile Home, and the district is only furnishing educational facilities to the children presiding in the Juvenile Home in but two high school grades, namely: the eleventh and the twelfth grades. The Independent School District of Toledo is therefore relieved of the necessity of furnishing additional facilities to such children in the common branches and in the ninth and tenth grades in its high school. However, the question of whether or not the present law places an unfair and unjust burden upon the taxpayers of Tama County is a legislative one, rather than one for the courts to change or one for the Attorney General to attempt to change by an official opinion.

It is, therefore, the opinion of this department that the children of school age residing in the Juvenile Home at Toledo may attend the eleventh and twelfth grades of high school of the Independent School District of Toledo, free of tuition.

SECURITIES: EXECUTIVE COUNCIL: APPLICATION OF CORPORATION TO ISSUE STOCK: APPROVAL OF EXECUTIVE COUNCIL: PENN ELECTRIC SWITCH CO.

"The statute only forbids the issuance or exchange of stock 'until the corporation has received the par value thereof.' This the corporation has already received. Its valuation has already been determined and any approval by the Council for such exchange is unnecessary."

August 24, 1936. *Executive Council of Iowa:* Under date of the 24th instant, you have submitted for opinion the following inquiry:

"The Penn Electric Switch Co., Des Moines, has filed an application for authority to issue stock under the provisions of Sections 8413 and 8414 of the 1935 Code of Iowa. We are enclosing herewith a copy of their application and a copy of the amendment to the Articles of Incorporation of said company.

"Will you kindly advise whether or not, under the terms of their proposal, it is necessary for this corporation to secure the permission of the Executive Council for their proposed stock issue under the terms of the above named Code sections?"

From the proposals attached, it is found that the Penn Electric Switch Company makes application to the Executive Council for authority to issue stock of the aggregate par value of $1,000,000 in exchange for its present outstanding stock of the par value of $1,000,000 appraised as by law provided and in accordance with the rules adopted by the Executive Council; that in July, 1928, the Executive Council of the State of Iowa issued a certificate of authority, granting the corporation permission to issue $800,000 of its capital stock for certain assets, and that subsequent thereto the balance of the authorized capital stock, to-wit, $200,000, was issued for cash.

It is further set forth in the proposal that the present plan constitutes merely an exchange by the corporation of its old stock for new stock without any change in the aggregate par value of stock issued, and that under the amendment to the articles of incorporation the corporation will receive no property or assets upon the exchange of stock therein provided for, unless the surrender to the corporation of its old stock for exchange be regarded as a receipt of property; that the issued capital stock of the corporation will

neither be increased nor decreased, and the aggregate par value of all of the shares issuable upon such exchange will be equal to the aggregate par value of all of the shares outstanding prior to said amendment.

The statutes invoked are Sections 8412, 8413 and 8414 of Chapter 385, respectively, as follows, to-wit:

"8412. Par value required. No corporation organized under the laws of this state, except building and loan associations, shall issue any certificate of a share of capital stock, or any substitute therefor, until the corporation has received the par value thereof.

"8413. Payment in property other than cash. If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the executive council of the state for leave so to do. Such application shall state the amount of capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock.

"8414. Executive Council to fix amount. The Executive Council shall make investigation, 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 the stock. It shall enter its finding, fixing the value at which the corporation may receive the same in payment for capital stock; and no corporation shall issue capital stock for the said property or thing in a greater amount than the value so fixed."

Under the situation here disclosed, it is clearly apparent to this department that the approval of the Executive Council of the State of Iowa is not required as a condition precedent for the proposed exchange of stock. The clear purpose of the statutes invoked is to protect the corporation against the issue of its corporate stock in payment for property or services or other thing at fictitious valuations.

(See First National Bank vs. Fulton, 156 Iowa, 734.)

In this case a promissory note given as part payment for stock without valuation or approval by the Executive Council was held to be justified and not requiring such valuation or approval. The statute only forbids the issuance or exchange of stock "until the corporation has received the par value thereof." This the corporation has already received. Its valuation has already been determined and any approval by the Council for such exchange is unnecessary.

BOARD OF CONTROL: INSANE PATIENTS: STATE HOSPITALS: RELEASE: COUNTY HOMES: After insane person has been committed to one of the state hospitals for insane, Board of Control has supervisory authority over insane person and he cannot be paroled by county officers to relatives or friends prior to person's discharge, but pursuant to provisions of Sections 3505-3508, board may release person when patient is not susceptible to cure by remedial treatment in hospital and is not dangerous at large.

August 28, 1936. *Chairman, Board of Control:* We have your request for opinion on the following proposition:

"Under the provisions of Section 3528 of the Code of Iowa, 1935, the Board of Control is authorized to transfer harmless patients from our state hospitals for the insane to county homes. At the present time, there are a number of patients being so transferred. We are receiving requests from county officials and from relatives for the parole of these transferred patients from the county home directly to the relatives. Will you kindly advise

us as to whether such patients can be paroled from the county homes to the relatives, and if so, whether this parole should be granted by the Board of Control or the county officers?"

Our Supreme Court in the early case of *Speedling vs. Worth Co.*, 68 Iowa, 152, said at page 154:

"An insane person often needs more than mere maintenance. He often needs restraint, peculiar care and treatment. Society often is entitled to be protected and relieved against him. When this is so, the state lays hold upon him and makes him its ward. *Delaware Co. vs. McDonald*, 46 Iowa, 170. It claims the right to select, and does select, his custodian. This is so even where he is not maintained at public expense."

It thus becomes necessary to look at the statutes of the State of Iowa to ascertain in what manner the state has provided for the protection of the insane and for the protection of the citizens of the state generally from insane persons.

Section 3287 of the Code gives to the Board of Control the power to manage, control and govern various institutions of the state, including the state hospitals for the insane.

Section 3292 of the Code provides that the Board shall appoint a superintendent for each institution who shall have charge of it subject to the orders of the Board.

Chapter 176 of the Code creates a commission of insanity which is a county commission, and in Chapter 177 of the Code, the Legislature has provided the manner in which insane persons may be committed and discharged and this provides that if the commission finds that the person is insane and a fit subject for custody and treatment in the state hospital, it shall order the insane person's commitment therein and a warrant of commitment shall issue.

Section 3564 of this chapter and the following sections provide for the custody of the person after he has been found insane, but where he cannot at once be admitted to the hospital and in such cases, the insane person may be cared for by relatives or friends.

Section 3567 gives to the commission of insanity the right to grant the application for the restraint, protection and care of an insane person, which is the county, but outside of the state hospital.

Section 3570 of the Code provides that the commission of insanity, with the approval of the Board of Control, may order the immediate discharge of any person when it appears, to the satisfaction of the commission, that cause no longer exists for the care within the county of such person, and this further directs that the commission shall find and enter of record as to whether the person was sane or insane at the time of such discharge, but you will note that this pertains only to discharge of the patient and not to parole.

Under the statutory provisions, the Board of Control, acting for the State of Iowa, has certain obligations to perform when an insane person is committed to its care, and as the county of the residence of the insane person must bear the expense of his care and keep, they are given a certain discretion as to the place in which the insane person shall be kept.

Section 3528 provides that insane persons may be transferred from a state hospital to a county or private institution on the request of the Board of Supervisors and the commissioners of insanity and with the approval of the

Board of Control, but there is no provision for the transfer of such patients to the homes of relatives or friends in the nature of a parole.

Section 3501 of the Code provides that patients shall be discharged immediately on regaining their sanity, and Section 3505 provides that relatives of a patient not susceptible to cure by a remedial treatment in a hospital and not dangerous to be at large, shall have the right to take charge of and remove him with the consent of the Board of Control.

Section 3508 of the Code provides that the Board of Control, on recommendation of the superintendent, and on the application of relatives or friends of a patient who was not cured, and who cannot be safely allowed to go at liberty, may release such patient when fully satisfied that such relatives or friends will provide and maintain all necessary supervision, care and restraint over such patient.

It is apparent from the foregoing that the Legislature of the state has placed supervision of the care, custody and control of insane persons in the Board of Control and that this supervision cannot be delegated to friends or relatives except as provided by the above quoted statutes.

It is, therefore, the opinion of this department that after an insane person has been committed to one of the state hospitals for the insane, that the Board of Control has supervisory authority over the insane person and that he cannot be paroled by county officers to relatives or friends prior to the person's discharge, but that pursuant to the provisions of Sections 3505 and 3508, the Board of Control may release an insane person to relatives or friends when the patient is not susceptible to cure by remedial treatment in the hospital and is not dangerous to have at large.

CONSERVATION COMMISSION: McGREGOR, TOWN OF: DEED: It is not legally possible for the State Conservation Commission, acting in behalf of the State of Iowa, to turn over to the town of McGregor, the title to any lots acquired under an act of congress, as referred to above.

August 29, 1936. *Conservation Commission:* This will acknowledge receipt of your letter of the 18th instant with reference to lots deeded to the State of Iowa by the Federal Government by an act of the 74th Congress, in which you ask for the written opinion of this department on the following question:

"Is it legally possible for the State Conservation Commission, acting in behalf of the State of Iowa, to turn over to the town of McGregor, the title to any lots acquired under an act of congress, as referred to above?"

An examination of the act of the 74th Congress entitled "Granting to the State of Iowa for State park purposes certain land of the United States in Clayton County, Iowa," *Public*—No. 650 (H. R. 11929), shows that a grant of certain lots is made upon the conditions and limitations "hereinafter expressed, belonging to the United States, in the Upper Mississippi River Wild Life and Fish Refuge, aggregating five hundred and forty-four and twenty-seven one-hundredths acres, more or less, to be held and administered by said State for the purposes of a State public park."

The conditions and limitations appear in the last paragraph of the act and provide:

"The state shall improve and maintain the said land for such purpose, *and not otherwise,* and shall provide adequate conveniences for the public."

And further:

"The state shall sedulously safeguard the wildlife in the park from molestation and destruction, and shall do everything reasonably necessary to safeguard the park from injury by fire, or otherwise, and shall preserve the timber and other natural growth in the park from depredation and destruction. In the event the state shall fail to maintain the aforesaid granted land as a state park under the conditions and limitations herein prescribed, or upon abandonment of the park by the state, said land and all improvements thereon shall revert to the United States."

Under the mandatory direction in the act, this department is of the opinion that it is not legally possible to turn over the lots in question to the town of McGregor, and that any such act, under this law, would make the property revert to the United States.

MOTOR VEHICLE DEPARTMENT: POSTERS: Motor Vehicle Department has authority to purchase posters for outdoor or billboard advertising so long as they are free from any taint of political or private advertising and strictly for the purpose of making the operators' and chauffeurs' license law more effective.

September 1, 1936. *Motor Vehicle Department:* Your letter of September 1st to the Attorney General has been referrd to me for a reply.

Your letter is in part as follows:

"Under Section 4960-d25 of the 1935 Code of Iowa appears the following provision regarding the expenditure of funds received for drivers and operators licenses—'To be used for the purpose of making effective the uniform operators and chauffeurs license law.'

"In construing this law and with an absolute belief that education of the public as drivers is vital to this law, the Department has been issuing pamphlets, sending some employees in to speak before schools and other groups, and recently sponsored Dr. Lauer's Driving Clinic in various county seats, to educate the people regarding drivers license requirements.

"I would like to ask if in your opinion, the use of posters on billboards would come within this category. These posters carry safety pictures and safety slogans—no advertising whatsoever—and are furnished to the Department at cost. All labor and board rental is taken care of otherwise. These posters are being used in Nebraska, Michigan, Minnesota, and many other states in the Union, and have been found to be very effective. It is the opinion of the writer that they have a very sound value in carrying out this program."

On May 12, 1936, this department gave you its opinion that your department had no authority under Section 5000 of the 1935 Code of Iowa, to purchase posters for billboard or outdoor advertising, such as is referred to in your letter. We have no disposition at this time to recede from that opinion. That section relates to the maintenance fund for the Motor Vehicle Department and prescribes certain purposes for which the fund may be used, including "any other expense necessary to enable the department to carry out the provisions of this chapter."

Your question now is whether under Section 4960-d25, of the 1935 Code of Iowa, your department has authority to expend any of the funds referred to in that section for the purchase of such posters. We set out said section in full, as follows:

"For each operator's license issued for which a license fee is paid, the person issuing the same shall be entitled to retain the sum of fifteen cents and for each chauffeur's license, the sum of fifty cents which shall, where

the license is issued by the sheriff, be credited to the county general fund and where issued by a chief of police or town marshal, shall be credited to the city or town general fund. The balance of such license fees shall be forwarded to the Treasurer of State who shall place same in the maintenance fund of the motor vehicle department to be used for the purpose of making effective the uniform operators' and chauffeurs' license law, during the period covered by such licenses."

This section provides that a portion of the chauffeur's license fee shall be used for certain purposes and "the balance of such license fees shall be forwarded to the Treasurer of State, who shall place the same in the maintenance fund of the motor vehicle department to be used for the purpose of making effective the uniform operators' and chauffeurs' license law." Here a special fund is created for the specific purpose "of making effective the uniform operators' and chauffeurs' license law." This language is rather general. It was added to the section by the 46th General Assembly. The intention of the Legislature evidently was to broaden the powers of the department.

It is our opinion that under this section your department has authority to purchase posters for outdoor or billboard advertising, as contemplated by your letter of September 1st. So long as such posters are in good faith used for the purpose of making effective the uniform operators' and chauffeurs' license law. Such posters must be free from any taint of political and private advertising and must be used strictly for the purpose of making said license law more effective.

HIGHWAYS: PRIMARY ROADS: REDEMPTION OF COUNTY PRIMARY ROAD BONDS: SERVICE FEES AND METHOD OF HANDLING.

"The Iowa State Highway Commission can legally pay banks service fees in connection with the redemption of county primary road bonds and can require as a condition in connection therewith that no additional or other charges be made against the bondholders."

September 2, 1936. *Iowa State Highway Commission:* I am in receipt of your request for an opinion on certain matters in connection with the redemption of county primary road bonds and interest coupons.

Under our present system, county primary road bonds are a general obligation of the county. The principal and interest of such bonds are by Section 1179-f1 payable at the office of the County Treasurer. While these bonds are general county obligations, provision is made for the payment of the principal and interest of the same out of the primary road fund. Under the provisions of Section 4755-f8 of the 1935 Code of Iowa, when the principal or interest on said bonds are "about to mature or accrue," the Highway Commission presents a voucher for the necessary amount to the State Comptroller who thereupon draws a warrant for the necessary amount and forwards the same to the County Treasurer of the particular county. There is here presented a situation different from that presented in the case of the redemption or payment of any other public bonds in this state. In the ordinary case, only the bondholder and the particular public body issuing the bonds are involved, as the bonds are paid off out of such public bodies' own funds. In the case of county primary road bonds, there is the feature involved of a third party entering the transaction, in this case, the state, which through the Highway Commission and the State Comptroller furnishes the funds to pay off the bonds. Because of this feature, the State Legislature has provided

a very special and highly safeguarded means of handling such funds, which is found in Section 4753-g1 of the 1935 Code of Iowa. This was enacted by the 46th General Assembly (1935) in Chapter 42 of the laws of that session. A study of the legislative history in connection therewith shows that as a part of the background for it, that during the several preceding years a large amount of primary road funds had been tied up in closed banks, and that frequently money transmitted to County Treasurers for the payment of the principal and interest on county road bonds was deposited with other county funds and would be tied up in closed banks with such other county funds. Under the provisions of the State Sinking Fund Act now found in Chapter 352-D1 of the 1935 Code of Iowa, the interest on county funds was diverted into the State Sinking Fund, and then in case of bank failure, the county was to be paid the amount of the deposit from the State Sinking Fund. Because of the many bank failures, the State Sinking Fund became several million dollars behind on paying off public deposits, and was in such condition when the 46th General Assembly met in 1935. Under the system prevailing before the 46th General Assembly met the banks paid interest on county deposits and such deposits were general deposits which the bank was allowed to make use of along with its other deposits. The only protection for such public deposits was through the State Sinking Fund, which was in the situation heretofore mentioned. Money sent out for the payment of county primary road bonds and interest was mixed in with general county deposits in a large number of closed banks. This situation helps to explain some of the provisions of Section 4753-g1. This section provides that funds coming into the possession and control of a County Treasurer for the purpose of paying interest on, or principal of, primary road bonded indebtedness "shall be by such County Treasurer converted into a separate account, and any of the same as may be deposited in an otherwise qualified county depository shall, when so deposited, be designated and held by such depository without interest as a special trust fund deposit."

It will be observed that this provision does two things—it provides for a distinct separation between funds received by a County Treasurer to pay primary road bonds and interest and the ordinary county funds, and it provides for a special trust fund deposit without interest. The provision requiring the deposit without interest is explained by the case of *Andrew vs. Presbyterian Church*, (1933) 216 Iowa 1134, 249 N. W. 274, wherein it is pointed out that when a bank is under obligation to pay interest on a deposit, that it is thereby presumed that the deposit is a general deposit, and not a specific or special trust fund deposit, the reason being that the bank cannot very well pay interest on deposits and not be allowed to use them for the purpose of earning interest. Therefore, if a deposit is to retain the character of a specific deposit, or special trust fund, there must be no obligation to pay interest, for when the interest comes in, the specific deposit or special trust deposit feature has to go out. Therefore, the Legislature provided that in case of funds deposited in banks, in a special trust fund for the purpose of meeting primary road bonds and interest, that no interest is to be paid on the same. Therefore, when such funds are deposited in a bank, while the bank is not obligated to return the specific money, it would be obligated to always keep on hand sufficient funds to meet this particular deposit, and

so in effect not make use of such deposit. In case of insolvency of the bank, it would be presumed that the funds on hand, to the extent of the special trust deposit, were funds retained by the bank for the purpose of meeting that deposit, and that deposit would be a preferred claim against such amounts to that amount, instead of being a claim against the State Sinking Fund. Because of the feature of the banks not being legally allowed to use such funds, and since the handling of the trust fund involved work and expense to the bank in paying out the funds on the order of the County Treasurer for the payment of bonds and interest, a demand has been made by the banks for a reasonable charge for handling such trust fund, based upon the number and amount of items handled. Your first question is as to the right of the Highway Commission to pay the banks reasonable fees and charges out of the primary road fund for handling such trust fund deposits. There are previous opinions of this department holding that counties and municipalities have no right to pay service charges or fees on their deposits, 1934, O. A. G. 523, 697. Those opinions related only to general deposits where the Legislature has prescribed or made provisions for prescribing interest to be paid on such deposits, and where the bank is allowed to use the funds for the purpose of earning interest, and these opinions correctly held that the Legislature having provided for the banks to pay a definite rate of interest into the State Sinking Fund for such deposit, they could not by service charge, in effect, make the public bodies return all or a portion of the interest to them. However, the situation is different where the interest feature is not involved and the bank cannot use the funds. In such cases it is performing services analogous to those performed by a trustee or escrow agent, and a special kind of service required only in the case of deposits under discussion, and not required in the case of any other funds handled by public bodies. The Legislature has made a provision in regard to these county primary road bonds that I have not found in connection with any other public bonds. It is found in Section 4755-b4 relating to the disbursements that may be made from the primary road fund, which provides that among other purposes that there may be paid from such fund, "the costs of issuance and *redemption* of any bonds issued in anticipation of said primary road fund." This is the only instance I have found where the Legislature has specifically authorized costs of redemption of bonds. Since the only cost involved in the redemption of those bonds is the fees to be paid the banks, for their services in connection with the redemption, such fees could certainly seem to be "costs of redemption" as authorized by the Legislature to be paid from the primary road fund. It is the opinion of this department that the State Highway Commission has authority to pay banks a reasonable fee for the handling of the special trust fund in the redemption of county primary road bonds and interest.

From the papers submitted it appears that a trust agreement or receipt is furnished the County Treasurer by the banks in connection with such agreements and that in the form of receipt submitted it is provided that the banks shall not make any charge against the bondholders for redeeming the bonds and interest coupons. The Highway Commission acting for the State of Iowa has created, and set up, this trust for the protection of the public moneys of the State of Iowa and to see that they were properly disbursed

to the bondholders entitled thereto, that it could require the depository bank to comply with certain conditions in acting as a depository, viz.: that the bank would accept the fee allowed by the Highway Commission in full for its service and would not charge any fee to the bondholder, and the matter of undertaking to be a depository being voluntary on the part of the bank, it could accept the conditions of the deposit and not charge the bondholders or it could refuse to accept the conditions of the deposit, and the deposit placed elsewhere. The matter of fees charged bondholders for securing redemption of their bonds and interest sooner or later reflects itself in the interest rate bid on primary road bond purchasers, which are being issued from time to time. Because the interest has to be paid from the primary road fund, the State Highway Commission is interested in keeping the interest rate as low as possible. Since the purpose of the payment of service fees to the banks is to enable the banks to receive reasonable fees for their services, the Highway Commission would have the right to make it a condition of the deposit that these be the only fees charged in that connection and thus protect against excessive or unreasonable charges made to the bondholders which might reflect itself in higher interest rates on future bonds to be paid out of the primary road fund.

Your attention is called to one provision in your letter of instructions accompanying the trust deposits which provides:

"When such called or maturing bonds or coupons are presented either to the County Treasurer *or to a bank acting as a depository* of the special trust fund deposit, check or draft shall be forwarded in payment of same and no deductions of any kind shall be made fod collection charges. * * * *."

If this is construed to only mean that when the bonds or coupons are properly sent to the bank for payment that no charge shall be made for redeeming the same, it is not objectionable. If it purports to give the bank the right to pay bonds or coupons without order or check from the County Treasurer it is legally objectionable, for it is the Treasurer's official duty to determine what bonds and coupons are properly payable out of the fund, and his official responsibility to see that no improper payments are made. The County Treasurer would be liable on his official bond for paying the money out on forged bonds or coupons and on immature bonds and coupons. The State Highway Commission would not have any right to attempt to delegate this responsibility and duty to a bank. However, the construction placed upon this provision by the Banking Department, and in which I concur, is that payment of the bonds is actually made by the County Treasurer, and the bank merely acts as a disbursing agent which makes the remittance.

The constitutionality of the general provisions of Chapter 241-F1 of the 1935 Code of Iowa (Sections 4755-f6 to 4755-f10 inclusive) in regard to the redemption of county primary road bonds in refunding the same was sustained by the Iowa Supreme Court in the case of Banta vs. Clarke County, (1933) 219 Iowa 1195, 260 N. W. 329, but that case did not deal directly with the matters herein dealt with.

HIGHWAYS: FEDERAL AID FUNDS: COUNTIES:

Federal aid funds paid to the State Treasurer on account of Federal aid projects financed by county primary road bonds, become an unrestricted part of the Primary Road Fund, and may be expended as the State High-

way Commission sees fit, generally throughout the state, and are not "earmarked" by either the state legislature or the Federal government to be used to reduce the cost of the project paid for by county primary road bond funds or to be specifically applied towards the payment of the particular bonds issued to pay for the project or for additional highway construction in the particular county.

September 2, 1936. *State Auditor and Iowa State Highway Commission:* There has been submitted to the undersigned by the State Auditor and the Iowa State Highway Commission, a request for an opinion as to the following question:

"May Federal Aid Funds received in reimbursement of expenditure for highway construction financed with County Primary Road Bond Funds, legally become an unrestricted part of the Primary Road Fund of the Iowa State Highway Commission, subject to expenditure where and as said commission sees fit, or shall such reimbursements be used to reduce the cost of the project or the amount of bonds to be issued?"

The Federal Aid Road System in this state includes a total of approximately 7,640 miles of road. The Primary Road System in this state includes a total of approximately 8,278 miles. All of the Federal Aid System is included in the Primary Road System, but approximately 638 miles of Primary Road System are not a part of the Federal Aid Road System. The first Federal Aid Road Act, approved July 11, 1916, is found in 39 Stat. 355. This act provided for distribution among the states, upon a basis prescribed in the law, of the Federal funds therein appropriated for the purpose of cooperating with the states in the construction of rural post roads. The original act has been amended and supplemented from time to time and appropriations continued. Under all of these enactments, the Federal Government has been within the limits of the different allotments made to each state, paying to the cooperating states one-half of the amount expended in such states on construction work on the roads included in the Federal Aid System, which complied with the Federal standards and constructed in accordance with its rules and regulations. The cooperation of each state was dependent upon proper state legislation authorizing such cooperation. The first legislative enactment by the Iowa Legislature authorizing such cooperation is found in Chapter 249 of the Acts of the 37th General Assembly (1917), Section 1 of which provided as follows:

"That the State of Iowa, through its legislature, hereby accepts the proposal of the United States as set forth in the Act of Congress, approved July eleventh, nineteen hundred sixteen, entitled 'An Act to provide that the United States shall aid the states in the construction of rural post roads, and other purposes,' thirty-ninth United States statutes at large three hundred fifty-five, and assents to the provisions of said Act of Congress * * * *'."

At that time, and until 1927, the construction and maintenance of the primary roads in Iowa was under the Board of Supervisors of each county, with supervisory powers in the Iowa State Highway Commission. Section 3 of Chapter 249 of the Acts of the 37th General Assembly (1917), referred to, went on further to provide that the State Highway Commission was authorized and directed to enter into all contracts and agreements with the United States Government relating to the "survey, construction and maintenance of roads" and to "supervise and direct the work of construction." Section 5 of the same chapter provided that the Highway Commission "ap-

portion the Federal aid provided by the Federal Aid Road Act, among the several counties of the state, in the same ratio that the area of the county in the state bears to the area of the state." Section 6 of the same chapter provided that the Federal funds received were to be paid to the State Treasurer, and he was directed to open an account known as the "Federal-county-cooperation road fund." Into this fund the State Treasurer was also to transfer from the motor vehicle fund an amount equal to the Federal funds received. The Federal-county-cooperation road fund was directed to be held in trust for the purposes of carrying out the provisions of the Federal Aid Road Act. To pay the State Highway Commission for its engineering services on Federal aid projects, the same section provided for setting aside from the motor vehicle fund an amount sufficient for that purpose, known as the Federal aid engineering fund. The method of handling of the improvements under that chapter was that the State Highway Commission entered into a contract with the counties for the different improvements and the State Highway Commission then entered into a contract with the Federal Government making such improvements Federal aid projects. The Federal aid funds growing out of such improvements were paid to the State Treasurer. At no time under the Federal Aid Act has the Federal Government had any direct relations either as to construction or as to the Federal aid funds with the different counties; all such matters have been handled directly between the State Highway Commission and the Federal Government. The Federal aid funds as above pointed out went into a separate fund known as the Federal-county-cooperation road fund, into which fund also went from the motor vehicle road fund an amount equal to the Federal aid funds. Under the provisions of that chapter the method of distributing the Federal aid funds was that each county would be entitled to a definite apportionment of the Federal aid funds. In order to secure these funds it was necessary for the county to agree to make certain improvements that fulfilled the purposes of the Federal Aid Road Act and which improvements would under the circumstances, have to amount in cost to double the amount of the Federal aid. If the particular county did not enter into the contract with the State Highway Commission its allotment of Federal aid could be apportioned to the other counties. This chapter further provided that in the contract between the State Highway Commission and the county, that the contract should provide that not to exceed double the amount of Federal aid apportioned to that county could be paid for the improvements covered in that contract from the Federal-county-cooperation fund. Thus, the entire cost of the improvement would be paid out of the Federal-county-cooperation road fund. The county was able to receive double the amount of the Federal aid from the Federal-county-cooperation road fund because there has been paid into that fund from the motor vehicle road fund, an amount equal to the Federal aid. However, under this system, when the Federal Government made out its checks or warrants for one-half of the cost of any particular improvement, the checks or warrants were not delivered to or made payable to the particular county where the improvement was made, but were all paid to the State Treasurer, and by him deposited in the Federal-county-cooperation road fund, and merged with all other Federal aid payments and with payments made into the same fund from the motor vehicle fund. The law contained in that

chapter continued until the 38th General Assembly (1919) which made substantial changes in the law by Chapter 237 of the laws of that Assembly. By Section 4 of that chapter of the primary road fund was created, into which went the balance of the old Federal-county-cooperation road fund, the Federal aid funds, all of the motor vehicle funds, except those funds needed for the Federal aid engineering fund, the fund for the maintenance of the State Highway Commission, and for the administration of the motor vehicle fund. This primary road fund was to be apportioned to the counties upon an area basis. This chapter also made provision for the issuance of county road bonds to hasten the improvement of the primary roads in those countes which voted to issue such bonds. Section 1 of that chapter provided:

"It is the intent of this act to divide the highways of the state and each county into a primary and secondary system, to provide for the substantial and durable improvement of such primary roads of each county, to pay for improvements on such primary roads from federal aid funds, motor vehicle registration funds, and from the proceeds of assessments on benefited real property, to permit each county to anticipate such funds if it chooses to do so, to divert other existing highway funds to the construction, reconstruction, improvement and maintenance of the secondary system of roads, to secure the benefit of all present and future acts of the government of the United States which proffer financial aid to the State of Iowa in the construction and maintenance of highways, and to co-ordinate the system herein created with the requirements of said federal government relative to such improvements."

The provision in regard to Federal aid found in Section 2 of that chapter, provides as follows:

"The State Highway Commission is empowered, on behalf of the state, to enter into any arrangement or contract with, and required by, the duly constituted federal authorities, in order to secure the full cooperation of the government of the United States, and the benefit of all present and future federal allotments in aid of highway construction, reconstruction, improvement or maintenance. The good faith of the state is hereby pledged to cause to be made available each year sufficient funds to equal the total of any sums now or hereafter apportioned to the state for road purposes by the United States government for each year and to maintain the roads constructed with said funds. The Board of Supervisors of each county is empowered to enter into any agreement or contract with, and required by, the State Highway Commission, in order to fully carry into effect the provisions of this act."

So, that under this system the Federal aid funds when received on account of the Federal aid project in a particular county, were not paid by the Federal Government to that particular county, but were paid to the State Treasurer and by him put into the primary road fund, with the money from the motor vehicle fund, which two items constituted the primary road fund. This fund, under this system, as heretofore pointed out, was divided among the counties on an area basis. The counties allotment from the primary road fund could be used for construction and maintenance. No Federal aid has been or is paid for maintenance but only for construction, and the proportion which would have been spent for each would vary from county to county depending on maintenance problems. However, a county which spent a large amount for maintenance upon which no Federal aid was received and a small amount for construction upon which Federal aid was received, did nevertheless upon the following allotment receive its same allotment based on area, while other counties where nearly all of the allotment has been spent on construction

upon which Federal aid payments would be made, would not receive any more because of that fact, but would merely receive its allotment on an area basis. The Legislature by this system did not give back to the particular counties the particular Federal aid payments received on projects in that particular county but in effect, in the distribution of the Federal aid payments received, apportioned them to the counties upon an area basis, which might have no relation to the Federal aid projects in that county. That these Federal aid projects did not need to be paid back to the particular county on account of a project in that county when the Federal aid payment was received is made clear by Section 4 of Chapter 237 of the Acts of the 38th General Assembly, referred to, which provides:

"For the purpose of administration the apportionment to any county *may* be made up partly from the Federal aid allotments."

Under this, the State Highway Commission could if they wished, for administration purposes, consider that the money apportioned to a county from the primary road fund was made up in part of payments made to the state on account of Federal aid projects in that county. It will be noticed that this section says "may" and not "shall," and hence was optional with the Highway Commission, and that, even where the option was exercised that it was for administration purposes only, and that it would have no effect in increasng a county's allotment of funds beyond that to which it was entitled on an area basis. This particular section was evidently adopted to enable the Highway Commission to use if necessary to comply with Federal rules and regulations which migh require payments on a particular Federal aid project to go to the county involved, which as hereafter pointed out, the Federal Government has not, and does not require. This particular section was subsequently repealed and is no longer of importance.

In Chapter 237 of the Acts of the 38th General Assembly provision was made for hard-surfacing, draining and grading, either with or without a bond issue. If a county wished to hasten such matters it could by proper procedure issue bonds for such purposes. The bond issue provided for a county tax to pay the interest on the bonds, but the principal of the bonds was to be paid from the county's allotment from the primary road fund, and a county tax was to be levied only for the purpose of paying the principal of the bonds where the said allotment was insufficient for that purpose. Later, in 1927, the law was amended to provide for both the payment of principal and interest on the bonds from the primary road fund. Under said Chapter 237 the allotment was still continued on an area basis, so that even though a county put out a million dollar bond issue and the state primary road fund on account of such improvement received $500,000.00, or one-half of the cost from the Federal Government, the particular county would still continue to receive only its share of the primary road fund based on an area basis irrespective of how much the particular projects in that county put into the primary road fund through Federal aid payments, for no matter what the Federal aid projects in the county, it could only receive from the primary road fund what it was entitled to on an area basis.

There were no substantial changes in the law relating to this matter until the enactment of Chapter 101 of the Acts of the 42d General Assembly (1927), in which all of the powers of the County Supervisors with respect to primary

roads was transferred to the State Highway Commission. By Section 2 of that same chapter, which now appears as Section 4755-b3 of the 1935 Code of Iowa, and which is the present law, it was provided:

"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, 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."

It will be seen from this that Federal aid funds received are to be paid into the primary road fund and not to any other fund.

Section 4 of the same act which appears as 4755-b4 of the 1935 Code of Iowa, and which is the present law on the subject, provides as follows in regard to what the funds in the primary road fund may be used for:

"Said primary road fund is hereby appropriated for and shall be used in the establishment, construction and maintenance of the primary road system, including the drainage, grading, surfacing, construction of bridges and culverts, the elimination or improvement of railroad crossings, the acquiring of additional right of way, the payment of interest and redemption of any bonds issued in anticipation of said primary road fund, and all other expenses incurred in construction and maintenance of said primary road system, the costs of issuance and redemption of any bonds issued in anticipation of such primary road fund, and the refund of special assessments for paving."

The same chapter (Chapter 101 of the Acts of the 42d General Assembly) did away with the allotment of the primary road fund to the counties, either upon an area basis, or any other basis, and the matter of how much shall be spent in any particular county out of the primary road fund is within the discretion of the State Highway Commission.

The law formerly provided by Section 4755-b32, of the Code of 1927, that the State Highway Commission should set aside from the primary road fund an amount equal to the interest and principal of the county primary road bonds maturing each year, which was held by an opinion of the Attorney General, found in 1934 Report of Attorney General, page 151, to make such payments a prior claim on the primary road fund.

However, this provision was repealed by the 45th Extra General Assembly (1933-1934) and there is now seemingly no priority or preference in favor of the different items authorized to be paid from the primary road fund.

The matter upon which you request a legal opinion arises when a county issues so-called primary road bonds. Primary road bonds when issued by a county are a general obligation of the county. Interest accruing and principal maturing on the primary road bonds are paid out of the state primary road funds. If at any time the primary road fund should fail to be sufficient to meet the annual interest and principal payments, the county or counties would be obligated to meet what was lacking by a tax levied upon the property in the county. The funds received from the sale of primary road bonds of the county are expended under the direct control and supervision of the State Highway Commission. The state primary road fund may be increased by projects paid for by county primary bond issues. For example, X County

has $500,000.00 of funds available for construction on the primary roads in that county, arising from the sale of county primary road bonds. The State Highway Commission then sets up a $500,000.00 Federal aid project in that county, and enters into the necessary contract with the Federal Government whereby there is to be paid to the state one-half of the cost of the project. The contractors' monthly and final estimates are paid out of the bond funds in the hands of the County Treasurer. There is expended $500,000.00 from these bond funds and $500,000.00 worth of work is done in that county. The county gets a dollar's worth of work for each dollar of bond funds expended. When the project is completed the State Highway Commission makes claim against the Federal Government out of the Federal aid funds for $250,000.00, one-half of the cost. The State Treasurer thereafter receives from the Federal Government a check or warrant for $250,000.00 on account of such project, which, as required by law, is deposited by him in the primary road fund, and used for paying the principal and interest on county primary road bonds in all of the counties which have bond issues outstanding, and for the construction and maintenance of primary roads generally throughout the entire state. There has been no expenditure directly from the primary road fund on account of the project, but the primary road fund has been increased $250,000.00 because of it. However, eventually the particular $500,000.00 bond issue issued by the county, and the interest on the same, will be paid off from the primary road fund. The question is as to whether the particular county has any particular claim to the $250,000.00, either in having it applied towards the payment of the particular bond issue, or in having the $250,000.00 spent for additional construction work in the same county. Because of the matter involving Federal funds, it was felt desirable to learn the attitude of the Bureau of Public Roads in regard to the situation. On July 17, 1936, the Bureau made the following rulings, the pertinent portions of which are as follows; given in response to questions submitted by the State Highway Commission, after setting out the manner of handling such funds as hereinbefore set forth:

"Question: When a portion or all of a Federal aid road project is completed and the Federal government has remitted to the state its pro rata share of the cost of the completed portion or all of said project, is the state under any obligation, so far as the Federal government is concerned, to spend the funds so received from the government, for additional construction work in the same county in which the Federal aid project was located?

Answer: No.

Question 2: When Federal aid road funds are remitted to the state on account of any Federal aid project as authorized in the preceding question, is there any provision in the Federal aid road law or in the rules and regulations of the U. S. Bureau of Public Roads, as to what the state shall do with the funds so received?

Answer: No. There has been at least two court decisions, holding that Federal aid road funds paid to the state as reimbursement for the Federal share of the cost of work accomplished become state funds.

Question 3: Is there anything in our method of handling disbursements or use of Federal aid road funds received from the government as authorized above, to which you would take exception?

Answer: Your method of handling Federal aid road funds is satisfactory to this bureau."

The first question is as to whether Federal aid funds when so paid over

become state funds. It is the attitude of the Bureau that they do, and that is in accord with the view of all of the courts that have passed on the question. Ellis vs. Stephens, (1921) 185 Cal. 720, 198 Pac. 403; Chicago, etc., Ry. Co. vs. Public Service Commission (Mo. App., 1926), 287 S. W. 617. In the California case of Ellis vs. Stephens just cited, the Supreme Court of California on page 404 of the Pacific citation states:

"So far as the United States government is concerned, the payment of the funds to the proper state officer terminates its interest in the fund. In no instance is the fund payable by the United States government until the work for which it is apportioned has been actually performed. As the money thus paid by the United States government belongs to the State of California, it is subject to control of the state acting through its appropriate officers."

In the case of Chicago, R. I. & Pac. Ry. Co. vs. Public Service Commission of Missouri (Mo. App. 1926), 287 S. W. 617, cited above, the court in regard thereto states as follows on page 621 of the Southwestern citation:

"Federal aid funds allotted to the several states are *gratuities;* the allotment to the State of Missouri is state money * * * * ."

This leaves the matter to a question of state law, and the first question is what is the nature and extent of control that the State Legislature has over county funds and finances. The case of Scott vs. Johnson (1928), 219 Ia. 213, 222 N. W. 378, dealt with the power of the Legislature to divert interest on county deposits from the general county fund to the state sinking fund, and held that such funds belonging to a county could be diverted into such state fund as the Legislature desired. The court on page 280 of the Northwestern citation says in regard to the plaintiff county:

"All of the plaintiff's property is acquired by the exercise of governmental functions. All its revenues are public revenues derived from the powers of taxation conferred upon it by the legislature. All its rights, privileges and powers are likewise governmental, and are conferred again upon it by legislation, 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."

The county, while unlike a city or town, does not have any proprietary or private rights free from legislative control. Herrick vs. Cherokee County (1925) 199 Ia. 510, 202 N. W. 252. The holding of these cases is that the county is only entitled to such money and funds as the Legislature may give to it or allow it to collect, and that the Legislature can divert county funds into state channels to be used generally throughout the state. From the legislative history heretofore set forth, the Legislature has never granted to the counties whatever aid might be received on Federal aid projects in the different counties, and has provided, and does now provide for the payment of Federal aid into the primary road fund for general use throughout the state.

However, even if the county were not a governmental unit, and hence only entitled to such funds as the Legislature might allow it, but were instead, a private corporation, it would still not be entitled to make any claim to Federal aid payments received by the state on account of projects paid for by its funds. This question was squarely presented in the case of Chicago, R. I. & P. Ry. Co. vs. Public Service Commission of Missouri. (Missouri 1926) 287 S. W. 617. In that case the Public Service Commission of Mis-

souri ordered the construction of a viaduct over the tracks of the railway company, and ordered the railway company to pay one-third of the cost. The railway company resisted payment and among other defenses set up the following as found on page 620 of the Southwestern citation:

"It is further argued that, since it appears that this is a Federal aid project and the Federal government pays one-half of the cost of construction, the commission has no power to assess against the appellant more than one-third of the remaining one-half of the cost which the state will be required to pay. * * * * The fact that the Federal government has approved the construction of the proposed viaduct and will reimburse the state for one-half of the cost therefor, if found to have been constructed in accordance with the plans and specifications approved by the Secretary of Agriculture, *does not appear to be a matter in which the appellant should be concerned.*"

The court held that this private corporation had no right to the Federal aid money paid to the state, even though such payment to the state would include an amount equal to one-half of what the railway company put into the cost.

The Federal aid funds have been handled for 17 years by being deposited in the designated state fund and used generally throughout the state, without reference to the particular projects out of which the Federal payments arose, and during all this time the Legislature has met every two years. The Legislature is presumed to know the construction of the statutes made by the different departments of the state government. John Hancock Mutual Life Ins. Co. vs. Lookingbill (1934) 218 Ia. 273; 253 N. W. 604. In this case the court on page 611 of the Northwestern citation goes on to say:

"If the legislature was dissatisfied with the construction which has been placed on them by the duly elected officials in the past years, the legislature could very easily remedy the situation, as it has the power to pass such legislation, and the only conclusion we can come to is that the legislature must have been satisfied with the construction placed upon it by the secretary."

So in this matter it must be presumed to know what its laws provided in regard to the handling of Federal aid funds, and if dissatisfied with such a method of handling it could have easily changed the method of legislation.

The most recent change made by the State Legislature in regard to the payment of county primary road bonds and interest was made by the Extra Session of the 45th General Assembly (1933-1934) in Chapter 48 of the laws of that Session which appears as Chapter 241-F1 of the 1935 Code of Iowa which contains Sections 4755-f6 to 4755-f10. Under the provisions of that chapter the State Highway Commission was to prepare and adopt a comprehensive plan for the financing of county primary road bonds. They were given authority to pay the principal and interest of county primary bonds about to mature and accrue out of the primary road fund. Section 4755-f9 provides that the method provided by that chapter shall be exclusive and in lieu of the method heretofore provided in the statutes for the use of primary road funds for the payment of the principal and interest on county primary road bonds, and Section 4755-f10 repeals all laws in conflict with the provisions of that chapter. The only authority and right now given in this regard is that the State Highway Commission is to use the primary road fund for the payment of county primary road bonds, the principal and interest

of which "is about to mature and accrue," and this provision cannot by any stretch of imagination be construed to "ear-mark" Federal aid funds making up part of the primary road fund for the payment or redemption of the county primary road bonds of a particular county.

As heretofore shown Federal aid funds when received by the State Treasurer become state funds and subject to the control of the State Legislature. The State Legislature might have adopted a different policy in regard to the disposition and use of Federal aid funds than it did, but such matters are by the State Constitution vested in the Legislature and belong exclusively to it. All counties voting county primary road bonds are legally chargeable with notice of the power of the State Legislature over state funds and county funds, and its power to designate what funds shall go into the primary road fund and how that fund shall be expended and used.

Much light is thrown on the situation by Section 2 of the Federal Highway Act, as amended by 42 Stat. 212 (1921), which provided:

"The term 'state funds' includes for the purposes of this act funds raised under the authority of the state, or any political or other subdivision thereof, and made available for expenditures under the direct control of the State Highway department.

Funds raised by counties through county bonds are funds raised by a political subdivision of the state, and "made available for expenditures under the direct control of the State Highway Department." So far as the Federal Government is concerned such funds are regarded as state funds, and the matching Federal aid properly paid to the state.

The Federal Government deals only directly with states in the matter of Federal aid, and what the Federal Government is interested in is in having the Federal aid highways improved, and to that end will pay to the state one-half of the cost of all improvements made on them in that state, whether the improvement be made by money raised by the state, or by counties, cities, or by railway companies, as in the case of viaducts. The entire transaction is one solely between the Federal Government and the state, and the Federal Government uses this method of distributing the Federal aid funds. If the Federal Government chooses to pay gratuities to the State of Iowa for Federal aid improvements paid for by other entities, such gratuities are, as the Missouri court said, no "concern" of such other entities. Such other entities have only such rights therein as may be granted them by the State Legislature, which under present legislation is in sharing the primary road fund, into which such payments go, with the other counties in the state. Therefore, the conclusion is that the State Highway Commission is not in any way obligated to make the amount of Federal aid received on any particular Federal aid project available to the particular county where primary road bonds paid for the improvement, either through applying such payment towards the cost of such improvement, or to the payment of the bonds issued to pay for it, and for additional highway construction in the particular county.

HIGHWAYS: IOWA STATE HIGHWAY COMMISSION: NEGLIGENCE IN CONSTRUCTION AND MAINTENANCE OF PRIMARY ROADS: The Iowa State Highway Commission is not liable for claims based upon negligence in the maintenance and construction of primary roads. Such claims cannot be allowed by such commission but can only be allowed by the state legislature.

Sept. 2, 1936. *Iowa State Highway Commission:* I am in receipt of your request for an opinion as to the liability of the Iowa State Highway Commission to persons who have sustained injuries to their persons and properties by reason of negligence of the Highway Commission or its employees in the construction and maintenance of the primary road system.

The Supreme Court of Iowa has always drawn a distinction between the liability of cities' and towns' failure to keep their streets in a safe condition and the liability of those entities having to do with highways outside of cities and towns.

Snethen vs. Harrison County, (1915) 172 Iowa 81; 152 N. W. 12.

On page 13 of the Northwestern citation of the case just cited the court states:

"Counties unlike cities and incorporated towns, are not, as a rule, held liable for torts committed by them, so long as they are acting within the scope of their governmental powers. They are quasi-municipal corporations engaged in the performance of governmental functions, and are not responsible for the neglect of duties enjoined upon them, in the absence of statute giving a right of action."

In the case cited, recovery was sought against Harrison County and the members of the Board of Supervisors individually because of the death of one Hardy due to dangerous and defective condition of the highway. The Iowa Supreme Court held that the construction and maintenance of the highway was a governmental function, and that neither Harrison County nor the individual members of the Board were liable. On page 13 of the Northwestern citation in that case the court says:

"The defendant county was in the exercise of its powers upon the road in question, and it must be assumed that its board or employees, or both were extremely negligent in leaving a dangerous place in the road. * * * * But there is nothing in the statute anywhere which indicates any intention on the part of the legislature to impose any liability upon the county for negligence on its part in the doing of its work."

In regard to the liability of the individual members of the Board of Supervisors the court on the same page says:

"It is insisted, however, that the individual members of the Board of Supervisors, are liable personally. As they were engaged in a public work in virtue of their office, the rule of non-liability applies to them, as well as to the body for which they were acting."

For a long period of time the Iowa court seemingly rather inconsistently held that while there was no liability upon counties for negligence in the construction and maintenance of highways, yet counties were liable for negligence in the construction and maintenance of bridges. However, in the case of *Post vs. Davis,* (1922) 196 Iowa 183; 191 N. W. 129, overruled the previous rule in regard to bridges and held that counties were not liable for negligence either in the construction and maintenance of bridges or the construction or maintenance of highways.

By Chapter 101 of the Acts of the 42d General Assembly (1927), the "powers and duties of the Board of Supervisors with respect to the construction and maintenance of primary roads was transferred to the State Highway Commission."

The Iowa State Highway Commission is an arm of the state.

Long vs. Highway Commission, (1927) 204 Iowa 376; 213 N. W. 532.

In the above case the court on page 533 of the Northwestern citation states:

"The State Highway Commission are agents of the state, acting for and in behalf of the state, within the powers conferred upon them by statute."

Among the powers and duties conferred upon the state Highway Commission is the construction and maintenance of the primary roads of the state so that in so doing the Highway Commission is "acting for and in behalf of the state, under the powers conferred upon them by statute."

It has been repeatedly held that a suit against an agency of a state is a suit against the state and cannot be maintained without legislative consent.

Devotie vs. Iowa State Fair Board, (1933), 216 Iowa 281; 249 N. W. 429.
Hollingshead vs. Board of Control, (1923), 106 Iowa 841; 195 N. W. 577.
Long vs. Highway Commission, (1927), 204 Iowa 376; 213 N. W. 532.

When the control of the primary roads passed from the County Boards of Supervisors to the State Highway Commission, there was the feature introduced that the State Highway Commission could not be sued, whereas, the counties were subject to suit, but this change did not make any practical difference, for even under county control there was no liability for negligence in the construction and maintenance of highways. The rule and reason for non-liability in such cases became even stronger after the transfer, for the reason for non-liability of the counties was based upon their being a part of the state. This is made clear in the case of *Post vs. Davis County,* (1922) 196 Ia. 183; 191 N. W. 129, heretofore referred to, where on page 133 of the Northwestern citation the court says:

"A county is a political organization and is merely a part of the organization of the state. There is no more reason or legal principle for holding the county liable for damages for negligence of its officials than for holding the state liable for such damages for negligence of its officials. *No one has ever contended that the state could be liable under such circumstances.*"

There is no legislation in which the state has consented that it or its agency can be sued for negligence in connection with the construction and maintenance of primary roads, and no legislation authorizing or allowing the payment of claims based on such negligence of the Iowa State Highway Commission. Therefore the matter of the allowance and payment of tort claims based upon negligence in the construction and maintenance of primary roads will have to continue to be matters to be handled by the Legislature through its Claims Committees.

HIGHWAYS: HIGHWAY COMMISSION: CONTRACTS: PUBLIC LETTINGS: PRICE FIXING: AGREEMENTS TO STIFLE COMPETITION.

(a) Agreements or understandings for the fixing of prices are illegal except as permitted in the cases of trade-marked articles under Chapter 431-G1 of the 1935 Code of laws.

(b) Cases of identical bids in cases of public lettings give rise to a situation that requires explanation, investigation, and in some cases, civil and criminal action.

(c) Agreements which, in their necessary operation, tend to stifle competition are contrary to public policy, and those taking part in them are guilty of a criminal conspiracy.

(d) Where there exists an agreement to stifle competition, the fact that a reasonable bid is submitted is immaterial.

(e) Those submitting known higher bids to give an appearance of competition is a false and deceptive representation for the purpose of misleading public officials.

(f) While joint adventures in bidding, if open and disclosed is permissible, yet, if the joint adventure, even though open and disclosed, is an attempt to wrest control of lettings from public agencies, it is illegal.

September 9, 1936. *Iowa State Highway Commission:* I am in receipt of your inquiry asking for an opinion as to the legal phases of agreements or understandings tending to restrict competition in public lettings.

Such agreements might relate solely to the matter of the fixing of prices upon merchandise or commodities being purchased directly by the Highway Commission or to be used by contractors in carrying out and performing contracts with the Highway Commission. Such agreements may have two phases, one as to price fixing generally and next as contributing towards the stifling of competition on a particular contract.

The matter of price fixing generally in Iowa is dealt with by Section 9906 of the 1935 Code of Iowa which provides as follows:

"Any corporation organized under the laws of this or any other state or county for transacting or conducting any kind of business in this state, or any partnership, association, or individual, creating, entering into, or becoming a member of, or a party to, any pool, trust, agreement, contract, combination, confederation, or understanding with any other corporation, partnership, association, or individual, to regulate or fix the price of any article of merchandise or commodity, or to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in this state, shall be guilty of a conspiracy."

This statute has been on the statute books for a long period of time.

The above section being limited in its scope to the fixing of prices of merchandise or commodities, would be of importance chiefly where the Highway Commission is advertising for bids for the direct purchase by it of lumber, machinery, equipment, etc. Although it could be of importance in connection with merchandise or commodities such as cement, to be used by contractors in carrying and performing construction or maintenance contracts. The statute above cited classes such price fixing agreements as conspiracies. The criminal penalty for such conspiracies is found in Section 9908 of the 1935 Code of Iowa which reads as follows:

"Any corporation, company, firm, or association, violating any of the provisions of Sections 9906 and 9907 shall be fined not less than five hundred nor more than five thousand dollars, and any president, manager, director, officer, agent, or receiver of any corporation, company, firm, or association, or any member of any corporation, company, firm, or association, or any individual, found guilty of a violation thereof, shall be fined not less than five hundred nor more than five thousand dollars, or to be imprisoned in the county jail not to exceed one year, or both.

There is apparently some doubt and confusion and misunderstanding in regard to price fixing agreements under the Iowa law because of the NRA. Under the NRA certain price-fixing agreements were authorized or sanctioned in certain codes in order to eliminate undesirable trade practices growing out of ruthless and cutthroat price cutting and unfair competition. The right of Congress to pass the NRA was based upon the assumption that the

control of Congress over interstate commerce was broad enough for the purposes of the act. The law is that whenever Congress is legislating within the scope of its powers, that state legislation in conflict therewith is superseded. So that while the NRA was in effect, which authorized or sanctioned certain price fixing, Iowa's statute against price fixing as above set forth was considered as not applicable to price fixing agreements under the NRA. However, upon the NRA being declared unconstitutional by the Supreme Court of the United States, Iowa's anti-price-fixing statute applied with full force and effect and prohibited price-fixing agreements. Because there was a period when this statute was considered as not applying to price-fixing agreements under the NRA there apparently arose the idea that this statute had been repealed, but it never was, and is still in full force and effect. While the NRA was in effect, persons or parties not observing price-fixing agreements sanctioned by it, were subject to criminal liability under the Federal law, but after the invalidation of the NRA persons or parties were subject to criminal liability under the state law if they did observe them. The fact that what was criminal not to do in regard to price fixing under the NRA became criminal to do after the invalidation of the NRA has seemingly resulted in doubt and misunderstanding. Evidently some persons or parties who sell merchandise or commodities to the Highway Commission or to its contractors are still confused about the matter, for there appears to be numerous cases where several different apparently independent bidders bid or quote prices identical to the last decimal point. There are doubtless cases where the commodity sought to be purchased is obtainable only from one source, and that those bidding have all received the same quotation, and so even in such cases where the bidders all submit identical bids, it is open to explanation how they all figured the same identical overhead handling charge and profit on the transaction unless there is an effectual but illegal control by the main source over retail prices beyond that authorized by Chapter 431-G1 of the 1935 Code of Iowa relating to trademarked articles. However, as a general rule when several apparently independent bidders submit identical bids, it gives rise to a situation that requires explanation, investigation, and in some cases civil or criminal action. You should continue in the future as in the past to submit all cases of identical bids to the Attorney General's office.

By Section 9909 of the 1935 Code of Iowa all contracts relating to such price fixing are void. By Section 9910 of the 1935 Code of Iowa it is provided that any purchaser can legally keep any article or commodities sold under price-fixing agreements without paying for them. If a corporation is involved, it is provided by Section 9911 that its charter may be forfeited. There is also the criminal liability involved above set forth. By Section 9913 it is made the duty of the County Attorneys in the respective counties and the Attorney General to enforce the provisions of the anti-price-fixing statutes, and by Section 9914 those officials are given a portion of any fine levied.

In this connection your attention is called to the fact that Iowa is one of the few states in the Union that does not have any constitutional provision against self-incrimination. The matter of when a person shall be excused from incrimination himself by being compelled to testify or produce evidence is a matter to be determined by the Legislature. In Subsection 2 of Section 11268 of the 1935 Code of Iowa, it is provided that in prosecutions

for entering price-fixing agreements, no witness shall be excused from giving testimony or producing evidence on the ground that it might incriminate him. This would be true both before a grand jury in investigating the matter and before the petit jury hearing the case.

It was heretofore pointed out that price-fixing agreements as to commodities or merchandise can be and often are also a phase of agreements to stifle competition.

The general rule of law is that any agreements which in their necessary operation, upon the action of the parties, in bidding upon public contracts, which tend to restrain or stifle their natural rivalry and competition are against public policy. *Hoffman vs. McMullen* (9th C. C. A. 1897) 83 Fed. 372, affirmed (1898), 174 U. S. 639, 19 S. C. R. 839, 43 L. Ed. 1117. Such agreements are not only against public policy, but contrary to public morale and vicious and void. *In re Salmon* (1906) 145 Fed. 649, petition for review dismissed, 150 Fed. 279.

Section 9928 of the 1935 Code of Iowa provides as follows:

"The following provision shall be deemed and held to be a part of every contract hereafter entered into by any person, firm, or private corporation with the state, or with any county, city, town, city acting under special charter, city acting under commission form of government, school corporation, or with any municipal corporation, now or hereafter created, whether said provision be inserted in such contract or not, to-wit:

'The party to whom this contract has been awarded, hereby represents and guarantees that he has not, nor has any other person for or in his behalf, directly or indirectly, entered into any arrangement or agreement with any other bidder, or with any public officer, whereby he has paid or is to pay to any other bidder or public officer any sum of money or anything of value whatever in order to obtain this contract; and that he has not, nor has another person, for or in his behalf directly or indirectly, entered into any agreement or arrangement with any other person, firm, corporation, or association which tends to or does lessen or destroy free competition in the letting of this contract, and he hereby agrees that in case it hereafter be established that such representations or guaranties, or any of them, are false, he will forfeit and pay not less than five per cent of the contract price but in no event less than three hundred dollars, as liquidated damages to the other contracting party.'"

While this section provides for the recovery of a stipulated per cent as a forfeiture, yet since such agreements are by this section condemned as illegal and by the authorities as contrary to public policy and public morals, and since such agreements can be only carried out by two or more persons, such agreements would constitute a criminal conspiracy under the provisions of Section 13162 of the 1935 Code of Iowa which reads in part as follows:

"If any two or more persons conspire or confederate together to do any illegal act injurious to the public trade, health, morals or to the administration of public justice or to commit any felony, they are guilty of a conspiracy, and every such offender and every person who is convicted of a conspiracy at common law, shall be imprisoned in the penitentiary for not more than three years."

In grand jury investigations and prosecutions in regard to public contracts, the Legislature by Subsection 15 of Section 11268, has provided that the plea of self-incrimination is not available in regard to evidence or testimony "in any action or investigation in relation to any public work or contract."

There is one misunderstanding that the courts have found necessary to

clear up from time to time. It seems to be sometimes assumed that those bidding on public contracts or eligible to bid on public contracts can legally have such understandings or arrangements among themselves as to who shall bid and the price to be bid as long as it does not result in an unreasonable price in the bid or bids submitted. Such is not the law. Where there are agreements among bidders or prospective bidders which limit the number bidding or the amount to be bid, the contract is void, even though a reasonable bid was in fact submitted, and the courts will condemn the contract without inquiry into the reasonableness of the bids submitted. *Atcheson vs. Mallon* (1870) 43 N. Y. 147, 3 Am. Rep. 678. In the case just cited where there was involved an agreement between two prospective bidders on a municipal contract, the court on page 149 says:

"It is not necessary, for the determination of this case, to inquire whether the effect of the agreement between the parties was in fact detrimental to the town of Oswegatchie. The true inquiry is, is it the natural tendency of such an agreement to injuriously influence the public interests? The rule is, that agreements, which in their necessary operation upon the action of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in disadvantage of the public or of the third parties, are against the principles of sound public policy and are void."

The reason for the Iowa Legislature providing by Section 9928 of the 1935 Code of Iowa for a fixed amount of forfeiture in addition to the criminal liability elsewhere provided would seem to have been for the reason that in many cases it would not be possible to prove any detriment or unreasonable price because of the collusive bid.

The court in the above referred to case of *Atcheson vs. Mallon* (1870) 43 N. Y. 147, 3 Am. Rep. 678, well states the object and policy of public letting statutes on page 150 as follows:

"The object and policy of the statute was to be achieved, only by exciting the rivalry and competition of men seeking this privilege. The competition was to be excited by calling by advertisement for sealed and secret proposals. Each bidder, ignorant of what his rival was about to offer, would be under a stimulus to make a bid at the best rate to the town; which his judgment would sanction, as of profit to himself. *Whatever made known to one bidder, the views and proposal of another,* abated his stimulus, and tended to weaken rivalry and deaden competition."

While generally agreements or understandings among bidders lessening competition result in higher bids, yet if such agreements exist, the fact that in a particular case the bids are reasonable in price, is not material and the parties involved would incur the civil and criminal penalties provided.

It sometimes seems to be assumed that as long as the contract at a particular letting will be let to the lowest bidder, then there is nothing illegal or criminal in putting in a bid obviously certain to be higher, so as to make the letting appear more competitive, generally with the express or implied expectation that such favors will be reciprocated at other lettings. Those who put in such kind of bids are guilty of illegal practice though they have no agreement or understanding whereby they will receive any share of the profits in the particular contract. In the case of *McMullen vs. Hoffman* (1898) 174 U. S. 639, 19 S. C. R. 839, 43 L. Ed. 1117, the United States Supreme Court in dealing with a case where one bidder knowingly put in

higher bids on the different classes of work, on page 650 of the U. S. citation states:

"The reason given for the making of these fictitious bids by complainant, that it was a formal matter and to keep the name of his company before the public is entirely inadequate. The bids actually put in by them for the other classes of work had the same tendency to strengthen belief in the reaility of competition which in fact did not exist between these persons. The whole transaction was intentionally presented to the water committee in a false and deceptive light."

In the same case the United States Supreme Court condemned such bids even though there were bona-fide higher bids submitted and even though a member of the committee testified that he was not influenced by the bid in question, and awarded the contract to the lowest bidder simply because he was the lowest bidder. The United States Supreme Court states in regard to such a bid, on page 646 of the U. S. citation:

"It would tend to the belief on the part of the committee receiving the bids that a bona-fide bidder, seeking to obtain the contract, regarded the price he named, although much higher than the lowest bid, as a fair one for the purpose of enabling him to realize a reasonable profit from its performance. A bid thus made amounts to a representation that the sum bid is not in truth an unreasonable one or too great a sum for the work to be done. We do not mean it is a warranty to that effect or anything of the kind, but simply that a committee receiving such a bid and assuming it to be a bona-fide bid would naturally regard it as a representation that the work to be done, with a fair profit, would, in the opinion of the bidder, cost the amount bid. Hence, *it would almost certainly tend to the belief that the lower bid was not an unreasonably high one*, and that it would be unnecessary and improper to reject all the bids and advertise for a new letting."

and on page 648 of the U. S. citation:

"The evidence is that all the bids that were given received the consideration of the committee, and there can be no doubt that the more bids there were, seemingly of bona-fide character, the more the committee would be impressed with the idea that there was active competition for the work to be done."

Thus a bidder who puts in a bid apparently competitive, but in fact knowingly non-competitive, is making a false and deceptive representation, for the purpose of misleading and deceiving public officers in connection with public lettings, and since such bids cannot generally be put in without an express or implied understanding with the successful bidder, it would in such cases also constitute taking part in a conspiracy for an illegal purpose with the resulting civil and criminal liability.

There is another matter that sometimes gives rise to doubt and misunderstanding in connection with public lettings, and that is the difference between agreements between bidders to stifle competition in connection with public lettings and agreements for joint enterprises in connection therewith. It frequently happens that a particular public contract is beyond the ability of one contractor to handle alone, but which could be handled by a number of contractors by going together. In the case of the construction of Boulder Dam, which was deemed beyond the resources of any one contractor, six of the major contractors openly and with full governmental approval, formed one joint corporation for the purpose of bidding on and constructing the dam.

Whether a contract is an agreement to stifle competition or for a joint enterprise is generally determined by motive, and there are generally certain things which indicate the motive which prevails over whatever disguises of form may be put on the transaction. The motive can generally be gauged by how the transaction is dealt with in its realities and its effect upon the transaction. If several small contractors go together in order to submit a bid against stronger contractors, it strengthens competition. However, if several contractors, each eligible to bid, secretly join and agree to submit one bid and divide the work and profits to avoid bidding against each other, it stifles competition. One of the important tests of gauging motives is the matter of openness and full disclosure to the public body or agency to whom the bid is submitted. The United States Supreme Court in the case of *McMullen vs. Hoffman,* cited above, on page 652 of the U. S. citation says:

"In Atcheson vs. Mallon, 43 N. Y. 147, 151, Judge Folger, in delivering the opinion of the court said:

'But a joint proposal, the result of *honest* cooperation, though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. *They are public and avowed and not secret.* The risk, as well as the profit, is joint and openly assumed. The public may obtain at least the benefit of the joint responsibility, and of the joint ability to do the service. *The public agents know,* then, *all that there is in the transaction,* and can more justly estimate the motives of the bidders, and weigh the merits of the bid.'

We have here nothing to do with a combination of interest which is open and avowed, *which appears on the face of the bid,* and which is therefore known to all. * * * It is not too much to say that the most perfect good faith is called for on the part of the bidders at these public lettings, so far as concerns their position relating to the bids put in by them or their interest."

The authorities also state that the fact that the arrangements between cooperating bidders are oral and not in writing, is indicative of a fraudulent and illegal intent, for business men or firms in proper and legitimate dealings generally have some writing, not necessarily a formal written contract, but a letter, memorandum or confirmation slip.

An example of the type of joint arrangement condemned by the law as fraudulent is found in the case of *In re Salmon* (1906) 145 Fed. 649, petition for review dismissed, 150 Fed. 279. In that case the court dealt with a case where certain banks desired to act as depositories for public funds. Under the procedure then in force, the banks were to put in bids for the deposits on an interest rate basis. The banks entered into an arrangement that only one bank would bid, and the deposits parceled out among the banks in the arrangement according to certain proportions. The court on page 652 of the above citation says:

"The distinct understanding and agreement among themselves was that, while Salmon & Salmon would thus become the ostensible depository of the entire public funds of the county, the same should thereafter be parcelled out among all the banks in the combination in given proportions; the allottees paying on the respective sums the amount of interest Salmon & Salmon promised to pay to the county. That such a combination was a fraud upon the county and void, as in contravention of sound public policy, hardly needs the citation of authorties to maintain. It is a uniform, inflexible rule of law that all such combinations, the effect of which is to stifle competition in bidding at public or private sales, or in the letting of public works, and, on principle, in the letting to hire of public moneys, *are immoral, vicious and void.*"

Therefore, when in connection with the letting of contracts by the Iowa State Highway Commission, any persons or parties whomsoever who are in any material way connected with any secret arrangement or understanding whereby those interested in bidding avoid bidding against each other by having one bid and then apportioning the subject matter among them upon an agreed basis, would be guilty of "immoral" and "vicious" conduct constituting a criminal conspiracy under Section 13162 of the 1935 Code of Iowa, and punishable by state penitentiary sentence.

Such contracts would of course be void, and payment excused for any work done or materials furnished.

In an ordinary contract between private individuals, the matter of who is interested in the contract other than the persons executing it, is generally not of legal importance, and as long as no fraudulent practices are practiced or intended, neither party is under any obligation or duty to those who might be interested in the contract, but parties undertaking to enter into contracts with public bodies and agencies are held to much stricter rule. In Beard's case (1867) 3 Court of Claims 122, the United States Court of Claims on page 129 states:

"Where individuals are acting for themselves, it is presumed that their own self-interest will excite their vigilance and guard them against mistake or imposition. In the case of a public officer, every presumption is made in favor of the fairness of his conduct, and of his fidelity to his public trust. Yet a court, whenever there are circumstances to excite suspicion, will look narrowly into the case and hold the party who seeks to enforce such a contract to *fuller explanations and stricter proof of fairness* than would be required between two individuals, sui juris, and each acting on his own behalf."

and on page 128:

"The law requires the utmost fairness and good faith on the part of those dealing on public business with an officer."

Therefore, it is plain that bidders on contracts with the Iowa State Highway Commission are under a duty and obligation to disclose fully who are interested in their particular bid, for frequently the disclosure would and could be the distinguishing feature separating agreements to stifle competition with the resulting civil and criminal penalties and legal joint enterprises. Because of the importance of disclosure, it should not be left to oral, informal conversations with the Commission, which might only seriously involve the Commission, but indicated in written form, preferably on the bid. Some public agencies have a special form on the proposals for making such disclosure, but the absence of such a form does not excuse the duty of disclosure. In connection therewith, you should have the right to require the bidder or bidders to fully disclose the nature, kind and character of the agreements, arrangements between the various parties interested in the bid. You would have the right to require bidder or bidders to disclose in what capacity the bid is made, whether as an agent, a wholesaler, or as a joint bid, nature and kind of the arrangements, so that in awarding the bid, you may not be misled or deceived to the detriment of the public interest.

While open and avowed at public disclosure that two or more bidders are operating and cooperating together, would give rise to the presumption that it was a bona-fide joint enterprise, yet, where such open and avowed relationship shows that it is in effect nothing but a plan to control public let-

tings, such arrangements lose the presumption of being bona-fide and are illegal. In such cases it is not a bona-fide case of joint enterprise, but a case of agreements to effectively stifle competition and wrest control of lettings from the public agencies to which it has been entrusted, bearing the false name and outward appearance of a joint enterprise. In cases of an open and avowed claim of joint enterprise where those interested nevertheless submit different bids, there is nothing left of the presumption of bona-fideness, for such bids are non-competitive and futile. While the public agency letting the contract is not itself deceived by such bids because of the disclosure, yet such bids would not be submitted without some purpose, for people do not ordinarily do futile and foolish things or acts, and the only apparent purpose of such bids would be to give a false impression of competition to the public at large which is to be condemned.

The law in regard to criminal conspiracy in these matters is not limited, in its operation, to bidders or prospective bidders, but applies to any individual who in any manner takes any part in any scheme, manipulation or arrangement whereby competition is stifled in connection with public lettings.

SCHOOLS: TEACHERS' PENSIONS: INSURANCE: Independent school district cannot deposit taxes raised for the purpose of providing teachers' pensions into the hands of a selected insurance company for the purpose of providing a guarantee of teachers' pensions at definite designated times and in fixed amounts.

September 11, 1936. *County Attorney, Des Moines, Iowa:* In your letter of August 24th you request the opinion of this department on the following question:

"Is it within the legal province of the Independent School District at Des Moines to deposit taxes raised for the purpose of providing teachers' pensions into the hands of a selected insurance company for the purpose of providing a guarantee of teachers' pensions at definite designated times and in fixed amounts?"

A teacher's retirement or pension system is set up for certain independent school districts under Sections 4345, 4346 and 4347 of the 1935 Code of Iowa. Section 4347 reads as follows:

"*Management.* The Board of Directors of the independent school district shall constitute the Board of Trustees and shall formulate the plan of the retirement; and shall make all necessary rules and regulations for the operation of said retirement system."

The contents of this section and of Section 4346 would appear clearly to presuppose that a "fund" will remain in the hands of a "board of trustees," from which disbursements shall be made in accordance with rules and regulations for the operation of the retirement system. We can find no direct or implied authority on the part of such trustees to delegate their duties either to protect the trust fund or to make disbursements from it.

It is therefore the opinion of this department that your question must be answered in the negative, and that the boards of directors of independent school districts must act as trustees to conserve their pension fund themselves and to make disbursements from it directly to their retired pensioners.

HIGHWAYS: COUNTY PRIMARY ROAD BONDS: STATE HIGHWAY COMMISSION: PAYMENTS OF PRINCIPAL AND INTEREST.

"The Iowa State Highway Commission in providing funds from the Primary Road Fund for the payment of principal and interest on County Primary Road Bonds issued by a particular county, is not limited to such an amount as the county would receive, if the Primary Road Fund were divided among the counties on an area basis."

September 11, 1936. *Iowa State Highway Commission:* You request an opinion upon the following question:

"Must the Highway Commission in providing funds from the Primary Road Fund for the purpose of paying the principal and interest of County Primary Road Bonds issued by a particular county under the provisions of Sections 4753-a10 to 4753-a17, inclusive, limit the amount of such funds to that proportion of the Primary Road Fund that the area of the particular county bears to the total area of the state?"

Prior to the enactment of Chapter 101 of the Acts of the 42d General Assembly (1927), the laws of the state provided that jurisdiction in the matter of the construction and maintenance of primary roads should be in the different county Boards of Supervisors in which the particular primary roads were situated. The State Highway Commission exercised certain supervisory powers. As long as the construction and maintenance of primary roads was a county matter, some method had to be provided for distributing the primary road fund among the counties. The method provided prior to 1927, was the so-called area basis under which each county was to receive that proportion of the primary road fund that its area bore to the total area of the state.

Since 1919, the counties had had, and still have, the power to issue county primary road bonds for the purpose of hastening the improvement of the primary roads in the particular county. These bonds have always, and still do, provide for a general county tax levy for the purpose of paying the principal and interest, to the extent not paid or payable from primary road funds.

Prior to 1927 only the principal of the bonds could be paid from primary road funds allotted the county, while the interest had to be paid by a general county tax levy. In 1927, by Section 4 of Chapter 101 of the Acts of the 42d General Assembly the Highway Commission was authorized to pay both the principal and interest from the primary road fund.

By Chapter 101 of the Acts of the 42d General Assembly (1927) certain other very important changes were made in the laws relating to primary roads. The powers theretofore exercised and had by the county boards of supervisors over primary roads were transferred to the State Highway Commission and the state rather than the counties became the unit of administration. This accordingly made changes necessary in the manner of handling primary road funds, and the same chapter repealed the provision requiring the allotment of the primary road to the counties on an area basis, and provided for the use of the primary road fund generally throughout the state. While the same chapter repealed the provision requiring the distribution of the primary road among the counties on an area basis, it enacted a provision which appeared as Section 4755-b32 of the Code of 1927, that the Highway Commission should not set aside from the primary road for the purpose of paying the principal and interest of county primary road bonds issued by

any county and for the purpose of maintaining the primary roads in that county, more than the county would have received on an area basis. This was different from the prior rule requiring that each county receive so much from the primary road fund on an area basis, in that it was a limitation that the county could not receive more for the purposes indicated than it would have received on an area basis. This limitation only applied to funds to be used for the payment of bonds and interest and maintenance and was not a limitation on funds from the primary road fund used for construction. The evident purpose of the limitation was to prevent bond-voting counties from absorbing too large a proportion of the primary road fund to the detriment of the non-bond-voting counties. However, this shred of a limitation was repealed in January, 1934, when the Extra Session of the 45th General Assembly (1933-1934) enacted Chapter 48 of the Acts of that Session, providing for the refunding of county primary road bonds.

The present statutory provision in regard to the use of the primary road fund is found in Section 4755-b4 of the 1935 Code of Iowa, which reads as follows:

"Said primary road fund is hereby appropriated for and shall be used in the establishment, construction and maintenance of the primary road system, including the drainage, grading, surfacing, construction of bridges and culverts, the elimination or improvement of railroad crossing, the acquiring of additional right of way, the payment of interest and redemption of any bonds issued in anticipation of said primary road fund, and all other expenses incurred in the construction and maintenance of said primary road system, the costs of issuance and redemption of any bonds issued in anticipation of said primary road fund, and the refund of special assessments for paving."

The last change made in regard to the handling of primary road funds in paying off the principal of county primary road bonds is found in Chapter 241-F1, enacted by the Extra Session of the 45th General Assembly (1933-1934), as Chapter 48 of the laws of that session. Section 4 of that chapter appears as Section 4755-f8 of the Code of 1935 and provides in part that whenever in any county any of the bonds referred to in that chapter, or interest on such bonds are about to mature or accrue, the State Highway Commission shall cause to be remitted to the County Treasurer of the particular county the amount of the principal and interest on such county primary road bonds. Notwithstanding the entire change of policy and plan in regard to the handling of primary road funds heretofore referred to, yet in some of the earlier enacted statutes in regard to primary roads still appearing in the Code reference is made to "allotments" to counties. However, in so far as the use of the word "allotment" in such statutes might have once referred to allotments on an area basis is now covered and dealt with by Section 4755-f10 of the 1935 Code of Iowa, which was enacted as a part of Chapter 48 of the Laws of the Extra Session of the 45th General Assembly (1933-1934), and which chapter, as heretofore pointed out, contains the latest legislative mandate on the payment of principal and interest on county primary road bonds; which section reads as follows:

"Laws or parts of laws relating to use of primary road funds for the payment of interest and principal of primary road bonds and bonds issued to refund primary road bonds, and which laws are in conflict with this chapter shall not apply to the use of such funds in the payment of principal and interest of the bonds referred to in this chapter."

Thus, the only present significance of the word "allotment" in such statutes would be as a reference to whatever funds might be remitted to the different counties by the Highway Commission for the purpose of paying the principal and interest on county primary road bonds, and not as a reference to any fixed obligatory allotment or limitation based upon area.

It is the opinion of this department that there is not now, any legal requirement that the Highway Commission in providing funds from the primary road fund for the purpose of paying the principal and interest on county primary road bonds is limited to such amount as the particular county would receive if the primary road fund were divided among the counties on an area basis.

CREAM GRADING LAW: A person buying cream in Iowa to sell in Iowa or another state is not exempt from complying with the cream grading law.

September 12, 1936. *Department of Agriculture:* This will acknowledge receipt of your letter of September 11th, in which you present this question:

"Does Section 5054 of the Code exempt a party from complying with the cream grading law if buying cream in Iowa for sale in another state?"

Section 3054 is as follows:

"3054. *Goods for sale in other states.* Any person may keep articles specifically set apart in his stock for sale in other states which do not comply with the provisions of this title as to standards, purity, or labeling."

This section provides that any person may keep articles specifically set apart in his stock which do not comply with the provisions of Title 10 of the Code, if they are kept for sale in other states. In other words, it provides that certain articles may be kept set apart by the owner, but it further limits such articles by providing that the same may be set apart for sale in other states. This section assumes ownership by the party of the articles which are specifically set aside for sale in other states, which articles do not comply with the provisions of this title as to standards, purity or labeling embraced in Chapter 150-g1 of the 1935 Code of Iowa.

Section 3100-g1 thereof is as follows:

"3100-g1. *Title.* This chapter may be cited as 'The cream grading law' and is an amendment to this title."

This chapter was enacted by the 46th General Assembly as an amendment to Title 10, its enactment being subsequent in date to the enactment of the title. The provisions of this chapter must prevail over other parts of the title where there is a conflict between the provisions of this chapter and the provisions of the title prior to amendment. When the Legislature in 1935 enacted Chapter 150-g1, it intended clearly that all parts of said chapter should be effective regardless of what the law provided previous to the enactment of this chapter.

As between repugnant statutes, the later enactment must prevail.

Clear Lake Co-operative vs. Wier, 200 Iowa 1293.
Fitzgerald vs. State, 20 N. W. 681.

The Cream Grading Law, as embraced in Chapter 150-g1, being the latest enactment with reference to the subject matter therein referred to, it must prevail in all its parts as against any inconsistent or seemingly inconsistent prior legislation with reference to the same subject matter.

It is our opinion, therefore, that Section 3054 of the Code does not exempt a party from complying with the Cream Grading Law, even though the cream bought in Iowa is or may be for sale in another state. The Cream Grading Law requires that certain things shall be done. It makes no exceptions in favor of the buyers of cream to be sold in foreign states. The Legislature could have made such an exception, but it chose not to do so, and it is not for us to say that the Legislature should have written a different law. We must construe the statutes as we find them, and leave the Legislature in its wisdom to determine what is proper legislative policy.

SCHOOLS: TRANSPORTATION: Board of consolidated school corporation cannot be required to furnish transportation for any pupil residing within the city, town or village in which said school is located. It is a discretionary power of the board to furnish such transportation.

September 14, 1936. *Department of Public Instruction:* You request the opinion of this department on the following questions:

"Must the board furnish transportation for the children living in the incorporated town and a mile or more from the schoolhouse in this consolidated school district where they must attend school?

"Or is it discretionary with the board to furnish such transportation?

"May the board in its discretion transport all the children of the incorporated town to and from this consolidated school regardless of whether the distance from such schoolhouse is less than one mile, one mile, or more than one mile?"

Section 4179 of the 1935 Code of Iowa reads as follows:

"*Transportation.* The board of every consolidated school corporation shall provide suitable transportation to and from school for every child of school age living within said corporation and more than a mile from such school, but the board shall not be required to cause the vehicle of transportation to leave any public highway to receive or discharge pupils, or to provide transportation for any pupil residing within the limits of any city, town, or village within which said school is situated."

The contents of this section of the Code would seem to be closely related to the contents of Section 4233-e4 which also deals with the question of transportation and provides as follows:

"*Transportation.* When children enrolled in an elementary school other than in a consolidated district live 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 transportationof 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."

While it is the general rule that school boards have only such powers as as conferred upon them by statute or by reasonable implication therefrom, the Iowa Supreme Court, in discussing statutes dealing with the transportation of school children, said:

"The foregoing provisions of the statute, which are designed for the benefit of children of school age, should be liberally construed so as to effectuate and carry out the legislative intent."

Hibbs vs. Independent School District, 218 Iowa 841, 845.

By the clear terms of Section 4179 above quoted, the board of the consolidated

school corporation cannot be required to furnish transportation for any pupil residing within the city, town or village in which said school is located. Thus the first question must be answered in the negative.

The second question, however, would be answered in the affirmative, that is, it would appear to be the discretionary power of the board to furnish such transportation, although the board is not compelled to do so.

The answer given above to your second inquiry practically answers the third. In the light of the *Hibbs case* above quoted, it certainly seems correct to say that the school board of a school district has ample power to provide for the transportation to and from school of pupils living an unreasonable distance from the school. The sound discretion of the board should be used in all cases and transportation should not be furnished for trivial distances. In the case of consolidated schools, the statute first cited would have to be followed with the limitation that it must be for a distance of more than a mile, in accordance with Section 4179. In the case of elementary schools, you will note from a reading of the same that it provides "other than in a consolidated district." There a discretionary power exists in behalf of the board, and where children of school age could not travel without inconvenience, danger or undue fatigue, it would seem that the exercise of sound discretion should be used and transportation provided in cases where it would be for the benefit of the child to attend the school.

SCHOOLS: RESIDENCE: TUITION: The children, whose father maintain residence outside of Iowa, may be required to pay tuition.

A former resident of said school district, who has moved outside thereof, cannot be required to pay tuition for children to attend within the said district.

September 16, 1936. *County Attorney, Decorah, Iowa:* In your letter of August 5th, you request the opinion of this department on the following question:

"Will children of a father who maintains residence outside of the state of Iowa, but who sends his wife and children temporarily into Iowa for the purpose of sending the children to school be required to pay tuition to the public school?"

The sections of the code particularly relevant to your question would appear to be Section 4275, which 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, and who has completed the course as approved by the department of public instruction for such corporation, shall be permitted to attend any public high school in the state approved in like manner that will receive him, 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."

and Section 4277 of the 1935 Code of Iowa reads:

"*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 nine dollars per month during the time he so attends, not exceeding a total period of four school years. The tuition rate chargeable to the home district of such nonresident high school pupil shall not exceed the pro rata cost and shall be computed solely upon the basis

of the average daily attendance of all resident and nonresident pupils enrolled in such high school, but it shall not include the cost of transportation to high school or any part thereof, unless the actual pro rata cost of such tuition is less than the maximum rate authorized by law, in which case the board of the district that is responsible for the payment of such tuition may, by resolution, authorize the payment of such portion of transportation costs as does not exceed the difference between the actual pro rata cost of high school tuition and the maximum rate authorized by law, provided the creditor district collects any balance of such transportation cost from the parents whose children are transported. Transportation costs shall, in all cases, be based upon the pro rata cost of all pupils transported to school in such district.

"It shall be unlawful for any school district maintaining a high school course of instruction to provide nonresident high school pupils with transportation to high school or normal college unless the district is fully reimbursed therefor, as provided in this section, or to rebate to such pupils or their parents, directly or indirectly, any portion of the high school tuition collected or to be collected from the home district of such pupils, or to authorize or permit such pupils to receive at the expense of the district, directly or indirectly, any special compensation, benefit, privilege, or other thing of value that is not and cannot legally be made available to all other pupils enrolled in such high school. Any superintendent or board members responsible for such unlawful act shall each be personally liable to a fine of not to exceed one hundred dollars. Action to recover such penalty or action to enjoin such unlawful act may be instituted by the board of any school district or by a taxpayer in any school district.

"On or before February 15 and June 15 of each year the secretary of the creditor district shall deliver to the secretary of the debtor district an itemized statement of such tuition fees."

The place of residence of a wife, unless for some matrimonial offense she has obtained authority to have a separate domicile, is with her husband. The domicile and place of residence of minor children, in the absence of special circumstances, is with the father. However, where the residence is established in good faith, then the rule would be changed. If the mother lived within the school district in Iowa, she could send the child to that school without reference to the domicile of the father which may be in Minnesota. The measuring yardstick, as we view it, is on good faith in establishing the residence within the district. By way of illustration, a public officer, who had his legal domicile in any one of the 98 counties in the state, might move into Polk County to perform duties in connection with the office he holds, and if he is the father of children, might desire to have his children attend school in Polk County. In such a case there would be no question with reference to the good faith of his residing in Polk County, where he would be at the seat of government and where he would have to be in order to perform the duties of his office. If he had his children with him, those children of school age could attend school in the city of Des Moines without reference to the question of paying tuition.

The opinion set forth in the Report of the Attorney General for 1934 at page 255 was based upon the adoption of the child or children involved by an Iowa resident in a school district in which no high school facilities were provided. In view of the adoption by the aunt, residing in Iowa, the school district in which the aunt resided was properly required to pay tuition to the school district which maintained the high school which was actually attended by the boy.

Your second question follows:

"May a former resident of the Decorah Independent School District who has moved to a house outside the school district be required to pay tuition for children continuing to attend within the said district?"

Either the parent or the school district of his present residence is liable for the payment of tuition fees for the children now attending the independent school district of Decorah. The fact of his former residence within that district and of his owning taxable property therein are not material. Liability for tuition is fixed by residence, and residence, of course, is fixed by the place of habitation, which, according to your question, is clearly no longer within the independent school district of Decorah.

PRACTICE OF VETERINARY MEDICINE: A person engaged in the practice of posting chickens to ascertain what disease they may have, and prescribing medical treatment therefor, is engaged in the practice of veterinary medicine.

September 17, 1936. *County Attorney, Cedar Rapids, Iowa:* Your letter of September 9th to the Attorney General has been referred to me for reply.

You request an opinion upon the following statement of facts:

"A local businessman manufactures poultry tonic. It is a stock preparation and is sold by agents in the field. The tonic is for the purpose of ridding chickens of worms. The agents give no veterinarian treatment of any kind, unless the following state of facts can be construed to amount to prescription or other veterinary work:

"In making their sales, the agents sometimes find it necessary to convince the farmers that their chickens have worms. They do this by killing a chicken and opening the intestines to show the wormy condition. No surgical treatment is given by the agents and the only prescription of remedy is by offering the tonic for sale and the sales talk setting forth its properties."

You request the opinion of this department as to whether or not the above outlined method of operation violates any of the provisions of law relating to the practice of veterinary medicine and surgery.

The first section of Chapter 132 of the 1935 Code of Iowa, relating to veterinary medicine and surgery, is as follows:

"2764. *Persons engaged in practice.* For the purpose of this chapter the following classes of persons shall be deemed to be engaged in the practice of veterinary medicine:

"1. Persons practicing veterinary medicine, surgery, or dentistry, or any of the branches thereof.

"2. Persons who profess to be veterinarians, or who profess to assume the duties incident to the practice of veterinary medicine.

"3. Persons who make a practice of prescribing or who do prescribe and furnish medicine for the ailments of animals."

The work of posting chickens to ascertain or to diagnose a disease they may have, the diagnosing of such disease and the prescribing of medical treatment therefor, constitutes the practice of veterinary medicine and surgery. The section above quoted clearly provides that persons shall be deemed to be engaged in the practice of veterinary medicine who "profess to assume the duties incident to the practice of veterinary medicine. One of the duties incident to the practice of veterinary medicine is the posting of chickens to ascertain what disease they may have, and prescribing medical treatment therefor.

Said section further provides that persons shall be deemed to be engaged in the practice of veterinary medicine who make a practice of prescribing and furnishing medicine for the ailments of animals. The animals as used in this section is broad enough to include farm poultry. A poultry tonic is more than a poultry food. One who prescribes and furnishes a poultry tonic is prescribing and furnishing a poultry medicine.

Many and gross frauds have been perpetrated upon farmers by the sale of alleged live stock and poultry medicines and tonics which were of little or no value and would not do what was claimed for them. It was, no doubt, with a view to protecting farmers and stock raisers from such frauds and mistakes that the Legislature enacted the section above set out.

It appears under your statement of facts that an agent visits a flock, posts one chicken in order to ascertain the disease from which it is suffering, and then prescribes a tonic or medicine for the remainder of the flock, after diagnosing the disease from which the flock is suffering by means of posting of one bird. He prescribes his tonic as being a proper treatment for the diseased flock.

It is our opinion any person engaged in such practice is engaged in the practice of veterinary medicine.

HIGHWAYS: SOCIAL SECURITY TAX AS PROPER CHARGE ON "FORCE ACCOUNT" WORK—FEDERAL REIMBURSEMENT.

(a) Federal excise taxes for unemployment compensation levied under the Federal Social Security Act against a contractor in connection with work performed by contractor for Iowa State Highway Commission on "force account" basis are not a proper charge against the State Highway Commission under existing "force account" provisions.

(b) The Federal government will not on projects where it is to reimburse the State Highway Commission for a portion of the cost, allow such item to be included in the claim for reimbursement, even though the State Highway Commission should change its "force account" provisions to make such items a proper charge against the State Highway Commission.

(c) The legal uncertainties in connection with the Social Security Act render it legally inadvisable to change the "force account" provisions to include such tax item as a charge against the Highway Commission.

September 18, 1936. *Iowa State Highway Commission:* I am in receipt of your request for an opinion as to whether the Federal excise taxes for unemployment compensation incurred by a contractor under the Federal Social Security Act based upon the wages paid out by him for the work performed by him on "force account" basis are a proper charge against the State Highway Commission.

Title IX of the Federal Social Security Act approved August 14, 1935, provides that commencing January 1, 1936, that every employer of eight or more employees shall pay an excise tax based on the total wages paid at the rate of one per cent for the calendar year 1936, two per cent for the calendar year of 1937, and three per cent thereafter. This tax is for unemployment compensation. This tax is as such payable to the Federal Government, with provisions, however, that if any state sets up an unemployment compensation plan meeting the Federal standards, that credit up to 90 per cent of the Federal tax will be given for state taxes paid for that purpose. So far the State of Iowa has not adopted an unemployment compensation

plan or levied taxes for that purpose, so that only the Federal tax is as yet involved.

It appears that frequently in connection with highway contracts that extras or changes are performed on a "force account" basis. It appears that in some cases the State Highway Commission is entitled to reimbursement from the Federal Government for part of the cost of the improvement, including that portion performed on a "force account" basis. Two questions then arise; first, if the State Highway Commission allows the contractor the amount of this excise tax paid measured by the wages paid on the particular work, can it include such an item in the claim for reimbursement presented to the Federal Government? The position of the Federal Government is made clear by the bulletin of the Department of Public Roads dated September 4, 1936, and which reads as follows:

"In response to an inquiry whether the payment of Social Security taxes may be included in vouchers for reimbursement with Federal funds, the following reply was made:

'The bureau has taken the position that the taxes imposed by the Social Security Act are not proper items for inclusion in vouchers for payment from Federal funds made available for highways or railroad grade crossing protection structures. The law under which this work is performed provides that the Federal share of the cost shall be limited to the actual cost of labor and materials entering into the construction work. Taxes are not regarded as coming within this category. They are considered as overhead expense not chargeable to the government.'

Thos. H. MacDonald,
Chief of Bureau."

The Federal Government makes its own rules and regulations as to what items it will or will not allow in a claim for reimbursement. That still leaves the second question to be answered, as to whether the State Highway Commission under the general contract provisions now in use is under a legal obligation to pay a contractor on "force account" work the amount of this Federal excise tax incurred by the wages paid in connection therewith. The provisions in regard to the payment of "force account" work are found in Section 1109.5 of the Standard Specifications for Construction Work on the Primary Road System which provides as follows:

"Extra work performed on a "force account" basis will be paid for in the following manner:

"(a) For labor, teams, timekeepers and foremen the contractor shall receive the current local rate of wage, to be agreed upon in writing before starting such work, for the time they are actually engaged in the extra work, plus Liability and Workmen's Compensation Insurance thereon, to which shall be added an amount equal to 15 per cent of the total thereof. This shall include compensation for the furnishing of the necessary small tools for the work.

"The wages of a foreman or timekeeper who is employed partly on force account work and partly on other work shall be prorated between the two classes of work according to the number of men employed on each class of work as shown by the payrolls.

"(b) For materials used on force account work the contractor shall receive the actual cost thereof delivered on the work, including freight and haulage charges as shown by original receipted bills, to which cost shall be added a sum equal to 15 per cent thereof.

"(c) For machinery, tools or equipment, fuel and lubricants therefor, except small tools which may be used, the engineer shall allow the contractor a reasonable rental at a rate to be agreed upon in writing before such work is begun. No profit percentage shall be added to the rental. * * * *

"The compensation as herein provided shall be accepted by the contractor as payment in full for extra work done on a force account basis, and shall include superintendence, use of tools and equipment for which no rental is allowed, overhead and profit."

The tax in question is for unemployment compensation. The provisions above cited provide for the allowance of Liability and Workmen's Compensation Insurance, which are premiums for insurance and not taxes, and which provisions do not include the tax in question. There is no place in these provisions where any provision is made for the payment of any of the taxes levied against the contractor.

Paragraph (a) above set forth provides that the contractor is to receive 15 per cent of the amount paid in wages, which is to take care of all of his items of expense in connection therewith except those additional items specifically provided, which in this case is Liability and Workmen's Compensation Insurance.

It is the opinion of this department that the State Highway Commission cannot in cases of work performed on a "force account" basis under your general contract provisions pay the contractor the amount of the Federal excise tax for unemployment compensation incurred by him under the Social Security Act.

Because the constitutionality of the Social Security Act is now being attacked in the courts, and because there is some doubt as to the right of the Federal Government to levy the tax in question in connection with work on state contracts, it would be legally inadvisable at this time to make the changes in the "force account" provisions for the purpose of attempting to make such tax item a charge against the Commission.

This opinion does not cover the matter of the Federal taxes provided in the same Social Security Act for old age benefits which begin on a graduated scale commencing January 1, 1937.

VACANCIES IN OFFICE: Governor has no power to make an appointment to fill a vacancy in office of the United States Senator unless when vacancy occurs the Senate of the United States is in session or will convene prior to the next general election.

September 19, 1936. *Governor of Iowa:* I have your request for an official opinion regarding your power to fill by appointment a vacancy created in the office of the United States Senator, where such vacancy occurs when the Senate of the United States is not in session and will not convene prior to the next general election.

In answering this question, your attention is called to the following portions of the United States Constitution, Constitution of the State of Iowa, and the Statutes of this state bearing upon this subject. Article I, Section 3, of the Constitution of the United States bearing upon this question is as follows:

"The Senate of the United States shall be composed of two Senators from each state chosen by the legislature thereof, for six years; and each Senator shall have one vote. * * * and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.* * * *"

Section 4 of Article I of the Constitution of the United States, is as follows:

"The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators. * * *"

The original manner prescribed by the United States Constitution for the selection of United States Senators was changed by the 17th Amendment to the Federal Constitution, which became effective on May 31, 1913. The 17th Amendment to the Constitution of the United States is as follows:

"The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

"When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, That the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct. * * *"

In accordance with the 17th Amendment to the Federal Constitution we find the Legislature of the State of Iowa enacted the following law, which is known as Paragraph I of Section 1152 of the 1935 Code of Iowa, which is as follows, to-wit:

"Vacancies shall be filled by the officer or board named, and in the manner, and under the conditions, following:

"1. *United States senator.* In the office of United States senator, when the vacancy occurs when the Senate of the United States is in session, or when such Senate will convene prior to the next general election, by the governor."

The second paragraph of Section 4, of Article I, of the Constitution of the United States of America, provides as follows:

"The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day."

The 20th Amendment to the Constitution of the United States, which became effective on February 6, 1933, provides that the Congress shall assemble at least once in every year, and such meeting shall begin at noon on the third day of January, unless they shall by law appoint a different day. The 20th Amendment also provided that the terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January of the years in which such terms would have ended if this article had not been ratified, and the terms of their successors shall begin. The 74th Congress, on June 22, 1936, passed the following joint resolution, fixing the time of meeting of the 75th Congress, in accordance with the provisions of the 20th Amendment.

"Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, that the 75th Congress shall assemble at noon on Tuesday, the 5th day of January, 1937."

From an examination of the above authorities, it is plain that the Governor has no power to make an appointment to fill a vacancy in office of the United States Senator unless when the vacancy occurs the Senate of the United States is in session or will convene prior to the next general

election. The Honorable Louis Murphy, United States Senator from Iowa, died while the United States Senate was not in session. If the President of the United States should call a special session between now and the next general election, you would then have the authority to make an appointment to fill this vacancy, and the party so appointed would hold office until the next general election.

Trusting that this opinion will be of service to Your Excellency and to all parties concerned.

HIGHWAYS: FEDERAL AID PROJECTS: GARNISHMENT: EXEMPTIONS: The employees of a contractor engaged in constructing a highway improvement to be financed in part by regular Federal aid funds are so far as garnishment of wages are concerned in no different class or situation than the employees of a contractor engaged in private construction.

September 21, 1936. *Iowa State Highway Commission:* I am in receipt of your request for an opinion on whether the wages of a workman employed by a contractor engaged in constructing an improvement on the Primary Road System which is a regular Federal aid project are exempt from garnishment. The question could only arise in cases where the employee was not the head of a family, or if the head of a family was a nonresident of the state, for under the provisions of Section 11763 of the 1935 Code of Iowa, the current earnings of a debtor who is a resident of the state and the head of a family would be exempt from garnishment.

There are at the present time several types and uses of Federal funds in highway projects. There is the regular Federal aid appropriation under the Federal Aid Road Act, approved July 11, 1916, found in 39 Stat. 355, which original act has been amended and supplemented from time to time and the appropriations continued. Then there has been the special funds from the 1933, 1934, and 1935 Federal Relief Acts, which are now under the supervision of the Works Progress Administration. Under the regular Federal aid appropriations the power of making rules and regulations in regard to the use of the funds is vested in the Secretary of Agriculture and carried out by the Bureau of Public Roads. Under the Relief Act appropriations the power of making rules and regulations in regard to the use of the funds is vested in the President and carried out by the Works Progress Administration. Under whichever appropriation the highway improvement is made by the Iowa State Highway Commission, the work is done by contract.

I have examined the Federal rules and regulations relating to regular Federal aid appropriations and the pertinent statutes, and it is the opinion of this department that the employees of a contractor having a contract with the Iowa State Highway Commission for the construction of a highway improvement to be paid for in part by regular Federal aid funds are in no different class or situation so far as garnishment of wages are concerned than the employees of a contractor engaged in private construction.

This opinion does not cover the cases of the employees of a contractor engaged in the construction of a highway improvement to be paid for out of the appropriations provided in the various Relief Acts referred to as to which no opinion is expressed.

COMPTROLLER: ASSISTANTS: DEPUTIES: OFFICIAL ACTS: Assistant comptrollers have the authority to perform acts of an official nature coming through the comptrollers' office.

September 21, 1936. *State Comptroller:* I have your letter of September 15th in which you request an official opinion on the following matters:

"In Chapter 4, Section 5, Paragraph 1, of the 45th General Assembly, the comptroller has the power and authority 'to employ, with the approval of the governor, two assistant comptrollers and such clerical assistance as he may find necessary.' This seems to be about all there is regarding assistant comptroller.

"The question has been raised as to the authority of an assistant comptroller. For your information, I personally have signed all kinds of documents when the comptroller was not in the office, and when he was in the office I have authorized the payment of practically all of the bills passing through this department, amounting to approximately sixty million dollars per year. I have approved levies for emergency tax; in fact, I have done about every act of an official nature that comes through the office, when the comptroller was not present. In doing this it never occurred to me but what the assistant comptroller had full authority in such cases.

"Would you please give your official opinion as to whether or not the assistant comptroller has the authority to perform such acts?"

You are advised that in 1859 the Supreme Court of Iowa in the case of *Abrams vs. Ervin,* reported in 9 Iowa at page 87, handed down the following rule:

"Where the duties of a public officer are of a ministerial character, they may be discharged by deputy. Duties of a judicial character, cannot be so discharged. The clerk is a ministerial officer. When the law gives him power to appoint a deputy, such deputy, when created, may do any act that the principal might do. He cannot have less power than his principal. He has the right to subscribe the name of his principal; and the act of the deputy, in the name of the principal, within the scope of his authority, is the act of his principal."

A deputy has been held to be one appointed as the substitute of another and empowered to act for him, in his name or on his behalf.

Webster's Dictionary, quoting:
People vs. Barker, 14 Misc. 360, 35 N. Y. S. 727.
Herring vs. Lee, 22 W. Va. 661.
Peterson vs. Lewis, 73 Oregon 641.
18 Corpus Juris 784.

A deputy has also been held to be one who is appointed, designated, or deputed, to act for another. See *18 Corpus Juris 784 and 785,* and cases cited thereunder.

It has also been held that a deputy is one who by appointment exercises an office in another's right; one who occupies in right of another, and for whom his superior will regularly answer. See *18 Corpus Juris 785,* and cases cited thereunder.

It has further been held that a deputy has power to do every act which his principal might do, but a deputy cannot make a deputy, as this imports an assignment of all his authority, which is not assignable. See *18 Corpus Juris 785,* and cases cited thereunder.

When the law authorizes an officer to appoint a deputy without any express limitation upon his power, the duties of the office may be performed

by either, *(Sturgis vs. Mt. Clemens Sugar Company,* 184 Mich. 456; 151 N. W. 746; *Steinke vs. Graves,* 16 Utah 293; 52 Pacific 386), and a deputy may exercise any of the duties pertaining to the office, as the necessity or convenience of the public may demand their use. See *46 Corpus Juris 1063,* and cases cited thereunder.

In May, 1935, our Supreme Court in the case of *Woodman Accident Company vs. District Court,* 219 Iowa on page 1331, held that a deputy commissioner of insurance was authorized to perform the duties of his principal. In this latter case our court uses the following language:

"Under this statute (Section 8608 of the 1935 Code of Iowa) the deputy insurance commissioner is required to assist his principal in the performance of his duties. A deputy of an officer is defined to be 'one appointed as the substitute of another and empowered to act for him, in his name or on his behalf.' Webster's New International Dictionary, a deputy has also been defined as: 'One appointed as the substitute of another, and empowered to act for him in his name or on his behalf; one who is appointed, designated, or deputed to act for another; one who by appointment exercises an office in another's right. * * * The position of a 'deputy,' as the word implies, is that of a subordinate. A deputy has power to do every act which his principal might do, but a deputy may not make a deputy'."

Our Supreme Court cited 18 Corpus Juris 784 for the above and foregoing definitions which they adopted as the law of the State of Iowa with reference to the duties of a deputy.

Your attention is also specifically called to Section 431 of the 1935 Code of Iowa which is as follows, to-wit:

"*Deputy to qualify.* The deputy shall qualify by taking the oath of the principal, to be indorsed upon and filed with the certificate of appointment, and when so qualified he shall, in the absence or disability of the appointing officer, unless otherwise provided, perform all the duties pertaining to the office of the appointing officer."

In view of the above decisions and also in view of Section 84-e5, Paragraph 1, and Section 431 of the 1935 Code of Iowa, it is the opinion of this department that the assistant comptrollers have the authority to perform the acts mentioned by you in your letter of September 15, 1936.

MOTOR VEHICLE LICENSE FEES: TREASURER OF STATE: AUDIT OF ARMY POST EXCHANGE STORES:

The State Treasurer has the right to audit army post exchange stores in an effort to verify the correctness of the reports submitted by the post commander in line with the authority granted by the Iowa statutes.

September 22, 1936. *Treasurer of State:* We acknowledge yours of September 14th in which you request the opinion of this department on the interpretation and application of Section 10, H. R. 11687, Public Act No. 686, enacted by the last session of Congress. This act pertains to motor vehicle license fees and reads as follows:

"Sec. 10 (a) That all taxes levied by any state, territory or the District of Columbia upon sales of gasoline and other motor vehicle fuels may be levied, in the same manner and to the same extent, upon such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be

paid to the proper taxing authorities of the state, territory or the District of Columbia, within whose borders the reservation affected may be located.

(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the state territory or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel not sold for the exclusive use of the United States during the preceding month."

Your particular inquiry is whether or not the State Treasurer has a right to audit army post exchange stores in an effort to verify the correctness of the reports submitted by the Post Commander in line with the authority granted by the Iowa Statute—Code 5093-F26.

The purpose of the Iowa motor vehicle tax statute is clearly defined in the first section of the act—Code 5093-F1.

"To collect the license fee on all motor vehicle fuel in the state and from the first person receiving the same in this state for sale or use in this state and to require such person, and all subsequent sellers to collect such license fee from purchasers to whom the same is sold for use or resale in this state so that said license fees shall be ultimately paid by the person using said motor vehicle fuel in this state."

It may be noted here that the Iowa tax is collected from the ultimate consumer—said taxes being in the nature of a sales tax and the Iowa tax is clearly within the scope of Section 10 (a) of the Federal Act which states:

"That all taxes levied by any state * * * * upon sales of gasoline."

We have examined the Federal statute in its entirety and nothing therein authorizes the state tax collecting official to do more than collect said tax when it is paid over by the Post Commander. No mention is made of submitting the record, accounts, etc., kept by the Federal seller for the scrutiny and inspection of the state taxing official. As a general proposition this fact would preclude the State Treasurer from entering the Government reservation for the purpose of inspecting or auditing said records. This is in harmony with long established legal doctrine that the state and Federal Governments may not inflict any burden of any nature on each other without the express consent of the other. However, it must be borne in mind that the taxes to be collected under the privilege conferred by the Federal act aforesaid is not a tax on the Federal Government. It is a tax paid by the consumers of motor vehicle fuel who do not use said fuel in carrying out Federal Governmental functions or activities. It is identical in its character with the tax collected by every commercial service station. The seller acts as an agent or trustee of the State of Iowa in collecting said tax from the purchaser to be held in trust and paid over to the state. The operator of a government service station should act in the same capacity on sales which are not for the exclusive use of the United States. The selling of gasoline for other than government use is not a governmental function or activity. On each of such sales the government steps out of its governmental role and enters the private commercial field. Whether or not the Federal Government is authorized to do this is no concern of ours. The fact is that the Government does engage in private or commercial sale and in so entering the commercial field in the State of Iowa it cannot escape the operation of such statutes as the State of Iowa enacts for the control of such commercial field.

This situation has been passed upon by the Supreme Court of the United States in several reported cases, the leading ones being South Carolina vs. United States, 199 U. S. 453; Ohio vs. Heldgrin, 292 U. S. 360, 78 L. Ed. 1307. The Ohio case, decided in 1933, was on the question of the liability of the State of Ohio for Federal excise tax on intoxicating liquors sold by the state through its state owned and controlled liquor stores. The state objected to the Federal tax on the ground that the Federal Government had no right to tax a governmental function of the state and contended that the sale of liquor under its liquor control system was an exercise of its police powers and purely a governmental function. The United States Supreme Court said:

"Whenever a state engages in a business of a private nature it exercises non-governmental function, and the business though conducted by the state is not immune from the exercise of the power of taxation which the constitution vests in Congress."

And further:

"If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned, but the exercise of such right is not the performance of a governmental function. * * * * When a state enters the market place seeking customers it divests itself of its quasi sovereignty and takes on the character of a trader."

While the foregoing legal principles were applied in a case where the state was the trader, we see no reason why the same rules should not apply when the Federal Government is the trader. It is therefore the opinion of this department that when the Federal Government, through its agents, enters the commercial field of selling motor vehicle fuel for private use, the Government is performing a non-governmental function and submits to all the laws of the State of Iowa which control and apply in the particular field of commercial operation. The Iowa statute authorizes the State Treasurer to examine the records and accounts of all motor vehicle fuel dealers as a part of the enforcement of the gas tax collection. We can see no reason why the Government agencies in question should be exempt from the operation of these Iowa statutes.

CONSERVATION COMMISSION: AGREEMENTS, CONCESSIONS: RENTALS: FACILITIES, FURNISHING OF:

It is legal to enter into concession agreements.

It is not legal to conduct operations involving rentals.

Facilities and equipment may be furnished if they are of a permanent nature and become attached to and constitute a permanent part of each unit.

(Because of limited space, contents are abbreviated. See opinion in its entirety as follows.)

September 23, 1936. *Conservation Commission:* I have your formal written request of September 14th for an official opinion regarding the expenditure of state conservation funds, wherein you submit the following:

"We have submitted a claim to the Comptroller's office covering the purchase of certain equipment for use at Palisades-Kepler State Park, and involving, among other items, a refrigerator, range, broiler and other cooking equipment, also tables, buffet, etc., used in the serving of meals in the lodge at said park. We are informed that the Comptroller's office is in doubt as

to the legality of paying for such purchases out of the State Conservation fund.

"For your convenience, we are quoting below the sections of law which we believe apply.

"Under the provisions of Chapter 87, Code of Iowa 1935, Section 1799, we have the following:

" '1799. Duties as to parks. It shall be the duty of the commission, under the supervision and direction of the Executive Council, to establish, *maintain, improve,* and beautify public parks upon the shores of lakes, streams, or other waters, or at other places within the state which have become historical or which are of scientific interest, or which by reason of their natural scenic beauty or location are adapted therefor. The commission shall have the power under such supervision and direction, to maintain, improve or beautify state-owned bodies of water, and to provide proper public access thereto.'

"Section 1819 provides as follows:

" '1819. Leases. The commission may, with the approval of the Executive Council, lease for periods not exceeding five years such parts of the property under its jurisdiction as to it may seem advisable. All leases shall reserve to the public of the state the right to enter upon the property leased for any lawful purpose.'

"Chapter 85-G1, Section 1703-g26 provides as follows:

" '1703-g26. Expenditures. When lands are acquired or leased, the said commission is authorized to make expenditures from any of its funds not otherwise obligated, for the management, *development and utilization* of such areas; to sell or otherwise dispose of products from such lands, and to make such rules and regulations as may be necessary to carry out the purposes of this chapter.'

"The foregoing pertains to the powers and duties of the commission. The following pertains to funds and expenditures.

"Chapter 85-D1, Section 1703-g17, provides as follows:

" '1703-g17. Funds. The financial resources of said commission shall consist of three funds:

1. A state fish and game protection fund,
2. A state conservation fund, and
3. An administration fund.

The state fish and game protection fund, except as otherwise provided, shall consist of all moneys accruing from license fees and all other sources of revenue arising under the division of fish and game.

The conservation fund, except as otherwise provided, shall consist of all other funds accruing to the conservation commission.

The administration fund shall consist of an equitable portion of the gross amount of the two aforesaid funds, to be determined by the commission, sufficient to pay the expense of administration entailed by this chapter.'

"Chapter 85-D1, Section 1703-g19 provides as follows:

" '1703-g19. Expenditures. All funds accruing to the fish and game protection fund, except the said equitable portion, shall be expended solely in carrying on the activities embraced in the division of fish and game.

All administrative expense shall be paid from the administration fund.

All other expenditures shall be paid from the conservation fund.

All expenditures under this act shall be subject to approval by the state comptroller.'

"Chapter 85-D1, Section 1703-g20, pertains to divisions of department.

" '1703-g20. Divisions of department. The department of conservation, herein created, shall consist of the following divisions:

1. A division of fish and game which shall include matters relating to

fish and fisheries, waterfowl, game, fur-bearing and other animals, birds, and other wild life resources.

2. A division of lands and waters which shall include matters relating to state waters, state parks, forests and forestry, and lakes and streams, including matters relating to scenic, scientific, historical, archeological, and *recreational matters.*

3. A division of administration which shall include matters relating to accounts, records, enforcement, technical service, and public relations.'

"Acting under the provisions of law, the commission has construed that the word 'improve' as used in Section 1799 above quoted is a broad term that permits of the providing of all facilities commonly associated with general park usage. Such general usage involves the providing of water supplies, sanitation, shelters, trails, bathing beaches, bath houses, lodges, residences, roads, parking grounds, picnic areas, picnicking facilities, museums, zoos, cabins, play fields, refreshment places, camp grounds, entrance portals, fences, etc. Such facilities are provided in city parks and in state parks of other states in numerous instances as well as in Iowa. In the light of the definition of conservation as 'the wise use of the natural resources for the benefit of humanity,' such usage of state parks has been commonly associated and understood in connection with state parks. Such usage is recognized by the National Park Service in state park development, and was so recognized and recommended by the 'Iowa Twenty-Five Year Conservation Plan Report—1933.'

"It will be further noted that Section 1703-g20 above quoted recognizes 'recreational matters.' The word 'recreation' is also a broad term, and has been liberally construed in general practice and by the Conservation Commission of this and other states.

"The Conservation Commission has in a number of areas entered into agreements with private individuals and groups for the operation of certain concessions, involving, among other items, refreshment stands, dining rooms, bath house and beach operation. It has also provided cabins for lease or rent. All of the above items have recreational value.

"In the present instance at Palisades-Kepler State Park, a lease had been entered into with an individual for the operation of a dining room. He now wishes to give up the concession. He has made an initial investment in certain equipment which we now wish to take over. Our intent has been to operate this dining room ourselves. The following is the action of the Conservation Commission under date of August 28, 1936:

" 'It was moved, seconded, and unanimously carried that it be the policy of the commission to provide the best service possible to the public, even though the providing of such service required the commission to operate its own consessions.'

"Also,

" 'It was moved, seconded, and unanimously carried that the director and the chief of the lands and waters division be empowered to investigate the status of the Palisades-Kepler State Park concession, and purchase the concession equipment, if necessary; also, that arrangements be made for the continuation of service in that park.'

"The primary intent of the commission is not to operate for profit, nor to compete with private commerce or industry. The primary intent is to provide service to the public to meet an existing demand and to make such service somewhat self-sustaining.

"In carrying out the foregoing policies, certain equipment and facilities are not in common usage, and it is not practical for concessionaries to provide such in several instances. In certain cases this equipment is, or should be, a permanent part of the structure or facility and be available to whoever the concessionaire should be. It would be less detrimental to the structure in the matter of maintenance if this equipment were a part thereof.

"In the specific case at Palisades-Kepler State Park, and in accordance with the action of the Conservation Commission on August 28, 1936, we took over

the concession at Palisades-Kepler State Park from the concessionaire, Mr. Ira C. Gabel, on September 2nd and agreed to reimburse him for his equipment, with the intent of conducting and, in fact, since that time we have been conducting the concession as a state operation. We had no idea that the legality of any part of the policy or execution involved in this would be questioned. The concessionaire has assumed that the state would reimburse him, and a previous negotiation for sub-leasing his concession to another individual has probably by now been irrevocably dismissed.

"Even though we could only legally purchase the equipment and not carry on operations ourselves, it would be to our advantage in dealing with other prospective concessionaires next spring to provide the equipment.

"In accordance with the foregoing, we submit the following questions:

"1. Is it legal for the commission to enter into concession agreements for the operation by private individuals of places for the sale of refreshments, food and miscellaneous articles and the operation of other recreational facilities?

"2. Is it legal for this commission to conduct operations itself involving the rental of cabins, bath house facilities, and the serving of meals and refreshments?

"3. Is it legal for the commission to furnish facilities and equipment to provide for the operation of bath houses, refreshment places, and cabins leased or rented to others?"

The answer to your first question is "yes."

The answer to your second question is "no," but your commission may lease cabins, boathouse facilities and facilities for the serving of meals and refrigeration to private parties under and by virtue of the authority granted under Section 1819 of the 1935 Code of Iowa.

In answer to your third question, your commission may furnish such facilities and equipment if they are of a permanent nature and become attached to and constitute a permanent part of each unit. Your commission has the authority to put in equipment, such as stoves, ranges, refrigerators, soda fountains and toilet facilities, or any other equipment of a permanent nature, suitable for the purposes for which the original unit was constructed.

It is our opinion that the Legislature has not authorized the commission to go into private business without limitation. Section 1703-g26 of the 1935 Code of Iowa does specifically authorize your commission to sell or otherwise dispose of products from such lands and to make such rules and regulations as may be necessary to carry out the purposes of this chapter. We find no other provisions in the law authorizing your commission to sell any personal property except the products from such lands which come under your jurisdiction. However, you are authorized to lease in accordance with Section 1819 of the Code.

OLD AGE ASSISTANCE: MAN PAROLED FROM INSANE HOSPITAL: A man paroled from an insane hospital is not an inmate therein and is entitled to old age assistance, if otherwise qualified.

September 28, 1936. *Old Age Assistance Commission:* We have your letter of September 25th, asking for an opinion on the following proposition:

"We now have a case of an old age 'pensioner' who was committed to the state insane asylum and whose payments of assistance have been suspended in the meantime for the reason that he has been an inmate of a state institution. The man is now about to be paroled.

"Would the man paroled from the insane hospital still be an inmate in the sense that his assistance payments would have to continue under suspension

until such time as parole is ended and the patient is given an outright release?"

Section 5296-f9 of the Code provides:

"Persons entitled to assistance. Subject to the provisions and under the restrictions contained in this chapter, every aged person who has not an income of $300 a year while residing in the state, shall be entitled to assistance in old age."

Under this provision of the Old Age Assistance Act, every person residing in the State of Iowa who has reached a proper age and has less than an income of $300 a year, is entitled to the assistance unless there is a special restriction in the act in regard to particular persons.

Section 5296-f12 of the Code goes on to state the further qualifications that a person must have, and Paragraph 7 of this section provides:

"is not at the date of making application or of receiving aid, an inmate of any prison, jail, warehouse, insane asylum or any other public, reform or correctional institutions."

The question then involved is whether a person paroled from an insane asylum is an inmate therein. Clearly, he is not, for the purpose of such parole is to allow time to pass to determine whether a person is completely cured or entitled to a discharge and so, instead of giving an immediate discharge to such insane persons from a hospital, he is paroled for a period, generally for a year, and if, during that year, there is no recurrence, then a release and discharge is issued, but of course, during that period, if there is a recurrence, then he is again confined to the institution, but during that year, the institution has no control over him and does not attempt to supervise his daily life, or to provide for him in any way.

It is, therefore, the opinion of this department that a man paroled from an insane hospital is not an inmate therein and is entitled to old age assistance, if otherwise qualified.

NATIONAL GUARD: STATE EMPLOYEES: LEAVE OF ABSENCE FOR NATIONAL GUARD SERVICE.

Under Section 467-f25 of the 1935 Code of Iowa, relating to leaves of absence to state employees who are members of the National Guard:

(a) Such leave of absence shall be in addition to vacations regularly and usually allowed by the particular department.

(b) The provisions of this section are applicable where the national guard is called into camp for field training.

(c) Such employees shall be paid their full regular compensation without deduction for any military pay received.

(d) Cases of casual, temporary or extra employees are not within the provisions of this section.

(e) The manner of determining compensation during leave of absence of employees having different employment relations set forth.

September 30, 1936. *Iowa State Highway Commission; Iowa Old Age Assistance Commission; Iowa Liquor Control Commission:* I am in receipt of your inquiry as to the interpretation and construction to be given Section 467-f25 of the 1935 Code of Iowa which provides as follows:

"All officers and employees of the state or subdivision thereof, or a municipality therein, who are members of the national guard shall, when ordered by proper authority to active service, be entitled to a leave of absence from such civil employment for a period of such active service, without

loss of status or efficiency rating and without loss of pay during the first thirty days of such leave of absence."

The National Guard may be called into active service in different ways. They may be called into the Federal service by the President under the provisions of Section 467-f58, in which case they would receive their military pay from the Federal Government. In cases of insurrection, invasion, breaches of the peace or imminent danger thereof or where the law-enforcing agencies of any subdivision or subdivisions are unable to maintain law and order, the National Guard may be called into active service by the Governor under the provisions of Sections 467-f28 and 467-f29. In such cases it is provided under the provisions of Section 467-f31 that the compensation of the National Guard shall be paid out of any funds in the state treasury not otherwise appropriated. Under the provisions of Section 467-f51 the Governor may call the National Guard into camp for field training. Under the various War Department appropriation bills of the Federal Government, provision is made for the payment out of Federal funds, of compensation for members of the National Guard when called into camp for field training. While in camp for field training, the members of the National Guard receive the pay and allowance for the same rank or grade as paid in the army of the United States.

There might be some question whether being called into camp for field training is such active service as to make the military pay of the members of the National Guard during that period a charge against the state treasury under the provisions of Section 467-f31. However, that question as to pay does not arise under present conditions, for under the provisions of Section 467-f21 the state is only chargeable for the difference between the military pay received from the Federal Government and the rate of military pay provided for in the same sections, and since the Federal Government pays the full rate of pay therein provided for there is no difference for the state to pay. The apparent object of the Federal Government in paying compensation to the National Guard is to provide for better trained troops when and if necessary to call the National Guard into Federal service.

The legislative background for Section 467-f25 providing that public employees when called into active service as members of the National Guard shall be entitled to leave of absence without loss of pay during the first thirty days, is that the members of the National Guard are state troops, and that since the state has the benefit of their services, it is a form of service to the state, and that such service shall be encouraged and not penalized or discouraged. The legislative intent seems to be that no public employee shall be discouraged from joining the National Guard because of any loss of pay, status or efficiency rating that might ensue by absence caused thereby, and that during such absences everything shall continue so far as his regular employment is concerned, as though not interrupted by such absences. All statutes are to be interpreted in the light of legislative intent, and with a view of not defeating such legislative intent by a narrow, grudging and hampering construction.

One of the first questions that arises is in connection with vacations. It is the view of this department that if in the past the employees of any state department are regularly and usually allowed a vacation, that it would be

contrary to the statute to require an employee who is a member of the National Guard to take his vacation during the period he is called into service with the National Guard.

The phraseology of the entire chapter relating to the National Guard is not always precise as to the situation under consideration. Section 467-f25 provides that such leave of absence shall be given public employees when ordered into "active service" and being called into camp for field training is not specifically designated as "active service." The most frequent cause of absence of public employees who are members of the National Guard is the annual calling them into camp for field training, absence for other forms of service in the National Guard is of very infrequent occurrence. To hold that Section 467-f25 did not apply in cases where the National Guard is called into camp for field training, would practically wipe out the benefits of the statute. It is the view of this department that it was the legislative intent that Section 467-f25 should apply to cases where the National Guard is called into camp for field training. Whether being called into camp for field training is "active service" in all cases and for all purposes, is not passed upon in this opinion.

The next question is whether when public employees are called into camp, they shall receive their full regular compensation irrespective of the military pay they may receive from the Federal Government or the state, or whether the amount of the full regular compensation shall be reduced to the extent of the military pay received from the Federal Government or the state. Section 467-f25 provides that "leave of absence from such civil employment" shall be without loss or pay, etc. The reading of this statute is persuasive that the legislative intent was that the full regular pay of public employees "in such civil employment" be continued during such absence, without deduction for any military pay they might receive during such absence. When, as in Section 467-f21, where the Legislature desired whatever military pay received from the Federal Government deducted from the state military pay, the Legislature specifically so provided. If the Legislature had intended any deduction to be made against the regular civil employment pay on account of any military pay received, it would have doubtless so provided, for it made such specific deduction in Section 467-f21, passed at the same time and as a part of the same chapter as Section 467-f25. It is the view of this department that the Legislature intended that public employees called into service in the National Guard should have their full regular civil pay continued during that period without deduction for any military pay received. In cases where the National Guard is called into camp for field training and the military pay paid by the Federal Government, there is an additional feature involved, the principle of which is illustrated by the case of *Chicago, Rock Island & Pacific Railroad versus Public Service Commission of Missouri,* (Missouri) 1926, 287 S. W. 617. In that case the Public Service Commission of Missouri had assessed one-third of the cost of a viaduct against the particular railway company. The railway company resisted payment upon other grounds that the State of Missouri would under a particular Federal aid statute receive one-half of the cost back from the Federal Government, and that therefore, the railway company was entitled to credit for that amount, and should only pay one-sixth of the cost instead of the one-

third proposed to be assessed. The Missouri court overruled this defense, stating somewhat firmly that the matter of what the Federal Government was going to pay the state was a matter of no concern to the railway company. So in the situation under review, the matter of what the Federal Government may or may not pay the members of the National Guard for field training is, so far as the state is concerned, a payment or a gratuity by another distinct entity which is no concern of the state.

The next questions are as to the method of dealing with the different employment relations of the various classes of employees. The cases of employees who receive a regular weekly or monthly salary or of employees who though paid on an hourly basis, work the same number of fixed hours every week, are easily dealt with by continuing the same weekly or monthly rate. In the case of regular employees paid on an hourly basis, but whose number of hours might vary from week to week on account of weather conditions, the situation should be dealt with by paying such employees during such absence the average of his weekly earnings during the preceding year. In cases where such employee was engaged in work which would normally be discontinued during a portion of the year, the average of the weekly earnings should be determined by the weekly earnings during the normal working season. In the cases of employees in presumed regular employment who have not worked long enough to establish an average of weekly earnings, the payments during leave of absence should be the average paid to others in similar employment. Cases of temporary or casual employment would not be within the scope of the statute, for the term "leave of absence" carries with it the implication of assumed continuity of an employment status. In such cases the employee would not be losing anything that he had any reasonable expectation of receiving and hence would not tend to discourage his enlistment of the National Guard thereby. In cases where persons while not employed in regular full time employment are nevertheless on a fairly permanent panel for extra work with the number of hours varying greatly from week to week, a more serious problem is encountered. It is the view of this department that such persons are not within the purview of the statute, for if such persons were called into service when not engaged in extra work, they would not be employees and if called into service on a day when they happened to be working, their employment is so lacking in continuity as not to be consistent with the assumed continuity of employment implied by the term "leave of absence" used in the statute.

SECURITIES: EXCHANGE OF PAR VALUE STOCK FOR NO PAR VALUE STOCK: IOWA PUBLIC SERVICE COMPANY: EXECUTIVE COUNCIL, APPRAISEMENT BY:

"Under the factual situation here disclosed and the statutes applicable, it is apparent to this department that the approval of the Executive Council of the State of Iowa is not required as a condition precedent for the proposed exchange of stock."

October 1, 1936. *Executive Council:* This will acknowledge receipt of communication addressed to you under date of the 29th ultimo from B. J. Price, attorney at law, Fort Dodge, Iowa, and counsel for the Iowa Public Service Company, on the question of the exchange of the no par value common stock of said company for an issue of equal number of shares having a par value of $15.00.

As a basis for such opinion, the following facts were submitted:

"Iowa Public Service Company is a Delaware corporation. It has outstanding 412,000 shares no par value common stock at a declared value of $15.00, which amounts on the books to $6,180,000.00.

"The new Holding Company Act prohibits no par value stock. The company contemplates some refinancing. It is the desire of the Iowa Public Service Company to issue 412,000 shares of Iowa Public Service Company common stock with a par value of $15.00 in exchange for the outstanding no par value stock, share for share."

You desire to know whether or not it would be necessary to procure an appraisement on the part of the Executive Council under the provisions of Section 8433 of the Code of Iowa before such exchange could be made.

In an opinion issued to you under date of August 24, 1936, practically the identical question was submitted and answered in the negative. It appears to this department that the present plan constitutes merely an exchange by the corporation of its old no par value stock for new stock having a par value of $15.00 a share without any change in the aggregate par value of the stock issued; that the corporation will receive no property or assets upon the exchange of stock; that the issued capital stock of the corporation will neither be increased nor decreased and the aggregate par value of all of the shares issuable upon such exchange will be equal to the aggregate par value of all of the shares now outstanding.

Section 8433 of Chapter 387, dealing with foreign public utility corporations, merely makes applicable those foreign utility companies under the provisions of Section 8412 and 8413 of the Code of Iowa, 1935. Under these sections, the requirement of appraisal is made only of corporations organized under the laws of the State of Iowa. The statutes invoked, therefore, are Sections 8412, 8413 and 8414 of Chapter 385, and they are respectively as follows, to-wit:

"8412. Par value required. No corporation organized under the laws of this state, except building and loan associations, shall issue any certificate of a share of capital stock, or any substitute therefor, until the corporation has received the par value thereof.

"8413. Payment in property other than cash. If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the Executive Council of the state for leave so to do. Such application shall state the amount of capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock.

"8414. Executive Council to fix amount. The Executive Council shall make investigation, 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 the stock. It shall enter its findings, fixing the value at which the corporation may receive the same in payment for capital stock; and no corporation shall issue capital stock for the said property or thing in a greater amount than the value so fixed."

There is, however, one further statute dealing with the convertibility of shares of stock. It is Section 8419-c10 of Chapter 385-C1, and it is as follows:

"The articles of incorporation, or any amendment thereto, of any such corporation may provide that shares of stock of any class shall be convertible into shares of stock of any other class upon such terms and conditions as may be therein stated."

Under the factual situation here disclosed and the statutes applicable, it is apparent to this department that the approval of the Executive Council of the State of Iowa is not required as a condition precedent for the proposed exchange of stock. The clear purpose of the statutes invoked is to protect the corporation against the issue of its corporate stock in payment for property or services or other thing at fictitious valuations. No such fact situation is here presented.

SOCIAL SECURITY ACT: RESEARCH COMMITTEE: RETRENCHMENT AND REFORM COMMITTEE: USE OF FUNDS:

"We therefore fail to find any authority in law which would justify the payment of the expenditures for a research committee of thirty-five outstanding persons for the purpose of studying the Social Security Act and making suggestions to the next session of the legislature, in order to harmonize our State Social Security Law with the Federal Social Security Act."

October 1, 1936. *Governor of Iowa:* I have received your official request dated September 29, 1936, in which you request an opinion concerning the following question:

"As you have probably already noted, the committee of six which was selected by the Social Security Conference, met and selected a research committee of thirty-five outstanding persons, who will study the Social Security Act and make suggestions to the next session of the legislature, which will assist in bringing our State Social Security Law into harmony with our Federal Social Security Act.

"Will you please advise whether or not the funds which are set aside for use by the Retrenchment and Reform Committee can be used to finance the work which is to be done by this Research Committee of thirty-five?"

Sections 39 to 46, inclusive, of the 1935 Code of Iowa, provide for the organization, meetings, authority and general duties of the Committee on Retrenchment and Reform. An extra duty was placed upon this committee by Section 46 of Chapter 126 of the Laws of the 46th General Assembly, which is as follows, to-wit:

"Sec. 46. 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, 1935, and ending June 30, 1937, the sum of eighty thousand (80,000) dollars 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.*"

It will be noted from the provisions of Section 46 hereinabove quoted that this committee may administer the general contingent fund of the state and may approve and pay for expenditures due to contingencies arising during the biennium which are legally payable from the general fund of the state.

In interpreting this section, we must consider the following questions:

1. Would the matter spoken of by you in your letter be a "contingency?"
2. If the answer to the first proposition is in the affirmative, then is it such a contingency, the expenses of which are legally payable from the general fund of the state?

Ballentine's Law Dictionary defines a contingency to be "that which possesses the quality of being contingent or casual; the possibility of coming to pass; an event which may occur; a possibility; a casualty."

Webster defines a contingency in substantially the same words as Ballentine.

The expense connected with research for the purpose of proposing new legislation is a possibility that may occur between legislative sessions. It is a possibility that is liable to occur, but is not certain. Therefore, I believe that we can easily answer the first question in the affirmative.

However, are the expenses of a research committee selected by private parties, even with gubernatorial approval, to study these matters sufficient to bring the same within the limitation of the provisions of the contingent fund, which states that such expenses can be paid if they *"are legally payable from the general fund of the state"*? I fail to find any statutory authority authorizing the general fund of the state to be used for the purpose of making an interim study of proposed legislation by any such private group. It appears to us that the Legislature is the only power in the state government that could authorize such an expenditure. There must be an obligation created against the state by some general or special law before the state could pay for the same out of its general fund. We fail to find that the 46th General Assembly or any prior General Assembly has granted this specific authorization for the purpose of defraying the expenses of any kind of committee to make the study of proposed new legislation where the creation of such a committee has not been authorized by the Legislature.

We therefore fail to find any authority in law which would justify the payment of the expenditures for a research committee of 35 outstanding persons for the purpose of studying the Social Security Act and making suggestions to the next session of the Legislature, in order to harmonize our State Social Security Law with the Federal Social Security Act.

However, it appears to us that the Committee on Retrenchment and Reform would be authorized by Sections 39 to 46, inclusive, of the 1935 Code to make such a study and report to the next Legislature, if said committee determined that it was proper to do so.

Section 182 of the 1897 Code of Iowa provided as follows:

"Sec. 182. Duties. Said committee shall examine into the reports and official acts of the Executive Council and of each officer, board, commission and department of the state at the seat of government, in respect to the conduct and expenditures thereof, and the receipts and disbursements of public funds thereby. It shall report to the general assembly a joint resolution fixing the number of employees, and the salary of each, for the several offices, boards, commissions and departments for the ensuing biennial period, and recommend such appropriations and legislation as shall promote public interests and an efficient and economical administration of the affairs of the state."

The above section of the Code of 1897 appears as Section 45 of the Codes of 1924, 1927 and 1931. This same section appears in the Code of 1935 as follows, to-wit:

"45. Duties. Said committee shall examine into the reports and official acts of the Executive Council and of each officer, board, commission, and department of the state at the seat of government, in respect to the conduct and expenditures thereof, and the receipts and disbursements of public funds thereby."

It appears that the second sentence of Section 182 as it appeared in the Codes of 1897, 1924, 1927 and 1931 had been omitted by the Code Editor in Section 45 of the 1935 Code of Iowa. The Code Editor apparently did

this on the assumption that this second part of the original section was impliedly repealed by either the old budget law or by the budget and finance control act of the 45th General Assembly. The law does not favor repeal by implication. We fail to find any express repeal of this latter portion of Section 182 of the Code of 1897. At any rate, we cannot and do not find any authority in the old budget law or in the new comptroller act which would even impliedly repeal the duty of the Committee on Retrenchment and Reform to recommend such appropriations and legislation as shall promote public interests and an efficient and economical administration of the affairs of the state. The way that the Code Editor now has Section 45 of the 1935 Code of Iowa would give rise to the belief that all that this committee could do in the performance of their statutory duties during the period while the Legislature was not in session was simply to make examinations and was without the authority to make any report whatsoever respecting the result of its examinations. This certainly cannot be the law. The law does not sanction the doing of any vain and useless act. We therefore hold that the Committee on Retrenchment and Reform still has the power to make investigations and to report and recommend legislation as shall promote public interests and an efficient and economical administration of the affairs of the state.

The coordination of state and Federal laws relative to social security certainly would be proposed legislation calculated and intended to promote the public interests. This Committee on Retrenchment and Reform may legally and properly meet as may be ordered by a resolution of the committee or upon call of the chairman and three other members of the committee for the purpose of studying proposed legislation intended to coordinate the laws of this state with the Federal Social Security Act and make a report of their recommendations to the next General Assembly, and said committee has the power to summon and examine witnesses, administer oaths, compel the production of books, papers and evidence and to punish for contempt, the same as the District Court.

ITINERANT TRUCKERS FROM FOREIGN STATES: IOWA LICENSE: MOTOR VEHICLES:

"From the facts as stated in your letter, it is our opinion that those parties are engaged in carrying on or doing business within the State of Iowa and should be required to comply with Section 4865 of the 1935 Code of Iowa." (Must have Iowa license.)

October 5, 1936. *County Attorney, Des Moines, Iowa:* I have your recent request for an opinion with respect to the following proposition:

"It has come to the attention of this office that a considerable amount of produce and other commodities is being transported into this state and particularly into Polk county from adjoining states by itinerant truckers, whose trucks are licensed in foreign states. Such commodities are transported into Polk county and sold by the truck owner in this locality in competition with local merchants. Because of the large volume of this business, this office has been called upon to make some investigation. Before proceeding further with an investigation, this office desires an opinion from your office as to the rights of such itinerant merchants to transport commodities into any county in this state for the purpose of selling the same here, while operating with a foreign license on their trucks, or whether such merchants are subject to prosecution for failure to take out an Iowa registration on these trucks.

"Section 4865 of the Code reads as follows:

" 'Non-resident 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.'

"You will note that this section grants reciprocity to the owners of automobiles registered in a state other than Iowa unless the owner is a 'foreign corporation, manufacturer, dealer or owner doing business in this state.' We would like very much to have an opinion from your office as to whether or not these itinerant merchants transporting commodities from a foreign state into Polk county and selling the commodities in Polk county constitutes a dealer or owner doing business in this state within the meaning of Section 4865 of the Code.

"Likewise it is brought to our attention that itinerant merchants from border states purchase commodities within Polk county and transport them outside of the state for sale in border states operating with a nonresident license. We would like to have your opinion as to whether or not this constitutes 'doing business in this state' within the meaning of Section 4865 of the Code."

The answer to your question will depend upon what constitutes "doing business" or "carrying on business." Ballentine's Law Dictionary defines "carrying on business" as follows:

"The meaning of the term is largely a question of fact to be determined in each case by its own special circumstances. Little assistance can be gained from the authorities. But it is clear that it does not necessarily include carrying out the contracts it is the business of the merchant, retail dealer, or money lender to enter into. See Kirkwood vs. Gadd (1910) A. C. 422, 432, 18 Ann. Cas. 25, 29."

An approved definition of the phrase "to carry on," when applied to business, is "to prosecute, to help forward, to continue, as, to carry on business." Cooper Manufacturing Company vs. Ferguson, 113 U. S., 735; 5 Sup. Ct., 742; 28 U. S. L. Ed., 1137.

It has also been held that in common parlance the terms "carrying on business" and "transact business" mean the same thing. Territory vs. Harris, 8 Mont., 144; 19 Pac., 288.

The definitions of the words comprising the phrase, "carry on business," import the idea of some permanency or durability, something more than a single, temporary or spasmodic undertaking. Amons vs. Brunswick-Balke-Collender Company, 141 Fed., 575; 72 C. C. A., 614.

The doing of a single act pertaining to a particular business ordinarily will not be considered carrying on the business, although a series of such acts would be so considered. Holmes vs. Holmes, 40 Conn., 120; State vs. Shipley, 98 Md., 661; 57 Atl., 13; 50 Ala., 127.

It appears that the rule is somewhat different when applied to a foreign corporation doing business in the state. It has been held that a single transaction by a foreign corporation may constitute a doing of business in the state within the meaning of Section 1283, Kansas General Statutes of 1901, making certain requirements of foreign corporations doing business in the state, where such transaction is a part of the ordinary business of the corporation and indicates a purpose to carry on a substantial part of its deal-

ings in such state. See John Deere Plow Company vs. W. W. Wyland, et al., 69 Kans., 255; American and English Annotated Cases, Volume 2, page 304.

In this John Deere case, supra, the Kansas Supreme Court distinguishes the rule as applicable to foreign corporations from the rule that they had previously announced with respect to domestic companies, corporations or individuals. In the earlier Kansas case, Siegel-Campion Livestock Commission Company vs. Haston, 68 Kans., 749; 75 Pac., 1028, they held that a single transaction in connection with all of the other surrounding facts did not constitute the doing of business within the State of Kansas. However, in the John Deere case, the Kansas Supreme Court uses the following language in distinguishing the two decisions:

"Although the record in each case discloses but one transaction of the corporation, that transaction was not merely incidental or casual; it was a part of the very business for the performance of which the corporation existed; it did distinctly indicate a purpose on the part of the corporation to engage in business within the state, and to make Kansas a part of its field of operation, where a substantial part of its ordinary traffic was to be carried on. Therefore, although a single act, it constituted a doing of business in the state within the meaning of the statute, while several acts of a different nature might not have had that effect. See, in this connection, Farrior vs. New England Mortg. Security Co., 88 Ala, 275, 7 So. Rep. 200, and other Alabama cases cited in Chattanooga Nat. Bldg., etc., Assoc. vs. Denson, 189 U. S. 408, 23 U. S. Sup. Ct. Rep. 630, 47 U. S. (L. ed.) 870."

The possible objection that Section 4865 of the 1935 Code might be an interference with interstate commerce could not be successfully urged with respect to the matters presented by you, in view of the decision of the Supreme Court of the United States in Howard Morf vs. John D. Bingaman, Commissioner of Revenue for the State of New Mexico, which decision was handed down on May 18, 1936. In this New Mexico case, the appellant sought an injunction to retrain the Commissioner of Revenue for the State of New Mexico from collecting and enforcing the provisions of the state law exacting a permit fee for the privilege of transporting motor vehicles over the highways of the State of New Mexico for purposes of sale. The plaintiff was a California concern and was engaged in transporting new or used cars in processions or caravans across the State of New Mexico for sale or resale in California. The average distance traveled across the state by the plaintiff was about 166 miles. The permit fee for the privilege of transporting said motor vehicles over the highways of New Mexico was collected at ports of entry. The plaintiff claimed that he was engaged in interstate commerce and that the New Mexico statute placed an undue and unnecessary burden on interstate commerce and therefore was in violation of the Federal constitution. The Supreme Court of the United States, speaking through Mr. Justice Stone, held that the constitution of the United States was not violated by this New Mexico statute. It is apparent that this New Mexico case is more far-reaching than any case that could possibly arise under Section 4865 of our Code.

From the facts as stated in your letter, it is our opinion that those parties are engaged in carrying on or doing business within the State of Iowa and should be required to comply with Section 4865 of the 1935 Code of Iowa. However, Section 4865 should be read and construed with Section 4866 of

the Code. A careful examination of these two sections clearly shows that the exemption does not apply to motor vehicles operated by nonresidents in this state, unless the laws of their state have a reciprocal provision for residents of this state.

We have previously held that motor vehicles from foreign states, when operated in Iowa only occasionally, are considered visitors and are not required to buy an Iowa license; but that trucks doing business or used for hauling on a contract in Iowa should have an Iowa license, as they are not visitors. In this former opinion, we also held that "each case must be determined upon its own facts with the sections above quoted stating the rule." See Report of Attorney General for 1934, pages 583, 584 and 585. However, at the time of the writing of this former opinion, we did not go into the question as to what constituted the "doing of business" or the "carrying on of business" in the State of Iowa. Our former opinion should be interpreted in the light of the present holding of this department. The head note on page 583 of the Attorney General's Report for 1934 is a little misleading. However, a careful examination of the former opinion will show that it is in accord with our present opinion.

The logic, the reasoning and the legal distinctions pointed out by the Supreme Court of Kansas in the John Deere case, supra, appear to us to be controlling. Hence, if the acts carried on by foreign corporations, manufacturers, dealers or owners are a part of the ordinary business of such nonresidents indicating a purpose to carry on a substantial part of its dealings in Iowa, then Section 4865 of the 1935 Code has been violated, for which the general penalty section, 5089, would be applicable. Each case will have to be determined upon its own particular set of facts, and if it falls within the interpretation as handed down by the Kansas Supreme Court, then it is our opinion that such party should be prosecuted and required to comply with our laws, if they desire to continue carrying on or doing business in the State of Iowa.

SCHOOLS: CATHOLIC NUNS TEACHING IN PUBLIC SCHOOLS:

"It is further the opinion of this department that a Catholic nun dressed in the garb of her order, or a representative of any other creed wearing a particular distinctive religous garb, cannot teach in the public schools of the State of Iowa while wearing such distinctive ecclesiastical garb, and that no public moneys can be paid to any teacher where the money is transferred by such teacher under her own particular vows to any sectarian institution, school, association or order."

October 10, 1936. We have your letter of August 13th, in which you request an opinion as to whether or not a Catholic nun may be permitted under the laws of Iowa to teach school in a public school.

While such questions should be first presented to the County Attorney, because the statute provides that he shall advise school officers within his county on matters pertaining to the schools, still in view of the nature of the question presented to us, we have made an exhaustive study of this matter and are herewith complying with your request. A copy of this opinion is being sent to the County Attorney of your county.

In order to answer your question, it is necessary for us to set forth the constitutional and statutory provisions of this state and also the decisions of

our Supreme Court and the decisions of the Supreme Courts of other states bearing upon this question.

Article I, Sections 3 and 4 of the Constitution of the State of Iowa are as follows:

"*Religion.* Sec. 3. The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.

"*Religious test—witnesses.* Sec. 4. No religious tests shall be required as a qualification for any office, or public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion; and any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law."

Section 4258 of the 1935 Code of Iowa reads as follows:

"*Bible.* The bible shall not be excluded from any public school or institution in the state, nor shall any child be required to read it contrary to the wishes of his parent or guardian."

Section 13252-f1 provides:

"*Religious test.* Any violation of section four, article one of the constitution of Iowa is hereby declared to be a misdemeanor."

Section 13252-f2 provides:

"*Evidence.* If any person, agency, bureau, corporation or association employed or maintained to obtain, or aid in obtaining, positions for others in the public schools, or positions in any other public institutions in the state, or any individual or official connected with any public school or public institution shall ask, indicate or transmit orally or in writing the religion or religious affiliations of any person seeking employment in the public schools or any other public institutions, it shall constitute evidence of a violation of Section 13252-f1."

And Section 5256 of the 1935 Code of Iowa provides:

"*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."

From the above provisions of our state constitution and statutory sections, it is apparent that there shall be no discrimination practiced in the hiring of teachers based upon any religious convictions of the teacher. On the other hand, no public moneys may be appropriated or given to any institution, school, association or order which is under ecclesiastical or sectarian management or control.

Where a teacher applies for a teaching position, it is a misdemeanor for anyone to ask what the applicant's religion is. Therefore, no secular person may be prohibited from teaching in the public schools because of such person's religious beliefs. This applies to Protestants as well as to Catholics and Jews, or any other other religious sect.

A Catholic nun could teach in the public schools of this state, if she did

not wear the religious garb of her order and did not turn her salary over to an ecclesiastical institution or school. However, the wearing of the religious garb in the public schools is another matter that has been most seriously considered by courts of last resort. The law does not prescribe the fashion of dress of man or woman; it demands no religious test for admission into the teacher's profession; it leaves all men to worship God or to refrain from worship according to their own consciences; it prefers no one church or creed to another. At the bar of the court, every church or other organization upholding or promoting any form of religion or religious faith or practice is a sect, and to each and all alike is denied the right to use the public schools or the public funds for the advancement of religious or sectarian teaching. The point where the courts may rightfully intervene, and where they should intervene without hesitation, is where legitimate use degenerates into abuse —where a teacher employed to give secular instruction has violated the Constitution by becoming a sectarian propagandist.

True Christianity asks no aid from the sword of civil authority. It began without the sword, and wherever it has taken the sword, it has perished by the sword. To depend on civil authority for its enforcement is to acknowledge its own weakness, which it can never afford to do. Christianity is able to fight its own battles. Its weapons are moral and spiritual, and not carnal. True Christianity never shields itself behind majorities. When Christianity asks the aid of government beyond mere impartial protection, it denies itself.

The law knows no distinction between the Christian and the Pagan, the Protestant and the Catholic. All are citizens. Their civil rights are precisely equal. The law cannot see religious differences, because the Constitution has definitely and completely excluded religion from the law's contemplation in considering men's rights. The state is not, and, under our Constitution, cannot be, a teacher of religion. All sects, religious or even anti-religious, stand on an equal footing. They have the same rights of citizenship, without discrimination.

In New York, the question of the propriety of a school teacher wearing the unusual dress adopted exclusively by adherents of one religious faith, while discharging her duties in the school room, was brought by appeal before the State Superintendent of Public Instruction on the theory that such practice constitutes sectarian influence and ought not to be permitted. It was decided that the school directors should require the teachers to discontinue the practice while engaged in their work. The teachers refused to comply with this decision and the matter then became the subject of consideration by the courts in a suit brought to collect the wages of such teachers during the time they were in contempt of the Superintendent's order. The Constitution of New York provides, substantially in the words of our statute, that neither the public property nor credit nor money may be used, directly or indirectly, in the aid of any school wholly or in part under the control of any religious denomination. Applying this provision of the law to the facts above noted, the New York Supreme Court says:

"Here we have the plainest possible declaration of the public policy of the state, as opposed to the prevalence of sectarian influences in the public schools. The regulation established by the State Superintendent of Public Instruction, through the agency of his order in the Bates appeal, is in accord with the public policy thus evidenced by the fundamental law. There can

be little doubt that the effect of the costume worn by these Sisters of St. Joseph at all times in the presence of their pupils would be to inspire respect, if not sympathy, for the religious denomination to which they so manifestly belong. To this extent the influence was sectarian, even if it did not amount to the teaching of denominational doctrine.

* * * * *

"The teachers, when thus arrayed, come into the school, not as common school teachers or as civilians, but as the representatives of a particular order in a particular church, whose lives have been dedicated to religious work under the direction of that church. Now, the point of the objection is not that their religion disqualifies them. It does not. * * * It is not that holding an ecclesiastical office or position disqualifies them; for it does not. It is the introduction into the schools, as teachers, of persons who are, by their striking and distinctive ecclesiastical robes, necessarily and constantly asserting their membership in a particular church and in a religous order within that church, and the subjection of their lives to the direction and control of its officers. * * * * They have renounced the world, their own domestic relations, and their family names. They have also renounced their property, their right to their own earnings, and the direction of their own lives, and bound themselves by solemn vows (of chastity, poverty and obedience) to the work of the church, and to obedience to their ecclesiastical superiors. They have ceased to be civilians or secular persons. They have become ecclesiastical persons, known by religious names and devoted to religious work. * * * * This is not a question about taste or fashion in dress nor about the color or cut of a teacher's clothing. * * * It is deeper and broader than this. It is a question over the true intent and spirit of our common school system, as disclosed in the provisions referred to."

(See *O'Connor vs. Hendrick,* 184 N. Y., 421.)

Thus the Supreme Court of New York squarely held that it was improper for any person wearing any religious garb to teach in the public schools, for the reason that the wearing of the garb constituted the injection of ecclesiastical sectarianism into the public school system.

A different view of this question was taken by the Supreme Court of Pennsylvania in the case of Hysong vs. Gallitzin Borough School District, reported in 164 Pa., at page 629. However, in this Pennsylvania Supreme Court decision, there was a strong dissenting opinion by Justice Williams, which was followed by the Supreme Court of New York in the O'Connor case, supra. Our own Supreme Court has cited with approval the dissenting opinion in the Pennsylvania case and the majority opinion in the New York case as being the law applicable in the State of Iowa. (See Knowlton vs. Baumhover, 182 Iowa, 691, on pages 703 to 719.)

Where a Catholic nun would teach school in the public school and receive a salary therefor, she would be required under the vows that she took when she became a member of her order to turn this money over to the ecclesiastical order to which she belonged. Therefore, public money would be used for the purpose of supporting ecclesiastical sectarian institutions, which, under the laws of this state, is prohibited. If a Catholic nun applied for a position in the public schools and agreed that she would not accept any salary for her services, she would still be prohibited from teaching in the public schools, in accordance with the views of the courts as set forth above, because of the wearing of her particular religious garb.

Our Supreme Court, in the Baumhover case supra, speaking through Justice Weaver, has the following to say:

"If there is any one thing which is well settled in the policies and pur-

poses of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state, and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer, and infidel—shall not be used, directly or indirectly, for religious instruction, and above all, that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed, or belief. So well is this understood, it would be a waste or time for us, at this point, to stop for specific reference to authorities or precedents, or to the familiar pages of American history bearing thereon."

Courts of last resort have forbidden Protestants to teach their own particular creed in the public schools. See State vs. Schene, 35 Neb., 853; 91 N. W., 846; and again the same case in 93 N. W., 169; Donohue vs Richards, 38 Me., 379; State vs. District Board of Edgerton, 76 Wis., 177; Moore vs. Monroe, 64 Iowa, 367; Board of Education of Cincinnati vs. Minor, 23 Ohio St., 211; and other cases cited by our Supreme Court in the Baumhover case supra.)

It is therefore the opinion of this department that no secular person, be he Catholic, Jew, Protestant or infidel, shall be denied the right to teach in the public schools of the State of Iowa nor shall he be required to state what his particular religious beliefs may be. It is further the opinion of this department that a Catholic nun dressed in the garb of her order, or a representative of any other creed wearing a particular distinctive religious garb, cannot teach in the public schools of the State of Iowa while wearing such distinctive ecclesiastical garb, and that no public moneys can be paid to any teacher where the money is transferred by such teacher under her own particular vows to any sectarian institution, school, association or order.

ELECTIONS: REPRESENTATIVE TO CONGRESS: RESIDENT OF DISTRICT IN WHICH NOMINATED:

"There is no legal requirement that a candidate for representative to the Congress of the United States must be a resident of the district at the time he receives a certificate of nomination."

October 14, 1936. *Secretary of State:* This will acknowledge receipt of a letter addressed to you under date of the 13th instant from Mrs. Harvey Dean of Waterloo, Iowa, purporting to be an objection or protest of the candidacy of Lloyd R. Smith as Representative for Congress in the third district of Iowa.

The protest is based on the statement that Candidate Smith is not a resident of the third district. The communication is as follows:

"In explanation of telegram sent you in protest to the candidacy of Lloyd R. Smith who claims he is a resident of Hubbard, Iowa, Hardin county. He told me personally on September 10th that he was a resident of Forest City, Iowa.

"In Article 2, Section 1, constitution of Iowa, they must be sixty days in the county, therefore, he is not a legal resident and cannot vote in Hardin county."

You have asked the opinion of this department as to the sufficiency and validity of this objection under Chapter 37-A1 of the 1935 Code of Iowa. This chapter is devoted to NOMINATIONS BY NONPARTY POLITICAL ORGANIZATIONS. Section 655-a4 provides that objection may be made to the legal sufficiency of a certificate of nomination or to the eligibility of a candidate by any person who would have the right to vote for such candi-

date. Sections 655-a5 and 655-a6 make respective provision for a notice of such objections to the candidate affected and for hearing thereon before the Secretary of State. Under the facts submitted, is such notice and hearing required?

It is true that Section 1 of Article II of the constitution of Iowa provides that every male citizen of the United States of the age of twenty-one years, who shall have been a resident of this state six months next preceding the election, and of the county in which he claims his vote sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law. Is this determinative of the question presented? We think not. There is no legal requirement that a candidate for Representative to the Congress of the United States must be a resident of the district at the time he receives a certificate of nomination.

The constitution of the United States provides in Section 2, Article I, as follows:

"The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

"No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen."

Section 4, Article I, provides in part:

"The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, exceptions, except as to the places of choosing senators."

Section 5, Article I, provides in part:

"Each House shall be the judge of the elections, returns and qualifiations of its own members, and a majority of each shall constitute a quorum to do business; * * * *."

In view of the Federal constitutional provisions, in which the jurisdiction of the eligibility of members of either branch of Congress is reserved in each respective house, we conclude that the complaint registered with you does not constitute a legal objection and does not require any official action or consideration as a part of the duties of your office.

OLD AGE ASSISTANCE TAX: POLICEMEN AND FIREMEN: Section 5296-f34 of the Code, which is a part of the Old Age Assistance Act, levies a tax on all persons whether they ever participate or not. Policemen and firemen are not relieved from this capitation tax and therefore, are required to pay this old age assistance tax.

October 15, 1936. *County Attorney, Davenport, Iowa:* We have your request for opinion on the following proposition:

"Section 6326-f3 of the Code of Iowa, 1935, provides that all persons who become policemen or firemen after the date that the retirement systems as provided in chapter 322-f1 of the Code are established, that they shall become members as a condition of their employment and that such members shall not be required to make contributions under any other pension or retirement system of the said county of State of Iowa and this section further provides that should any member in any period of five consecutive years after last

becoming a member, be absent from service for more than four years, or should he withdraw his accumulated contributions, or should he become a beneficiary or die, he shall thereupon cease to be a member. The hand book for county old age assistance boards and investigators provides at page 55 that such policemen and firemen are liable for the tax provided for in the old age assistance act. Will you please advise us in regard to this question of liability for the tax?"

Section 5296-f34 of the Code, which section is a part of the Old Age Assistance Act, levies a tax on all persons whether they ever participate or not, so that the liability for this tax does not depend upon whether the person ever will participate and this tax is not a contribution from which policemen and firemen could be relieved under the provisions of Section 6326-f3 of the Code, but is what is known in the law as a capitation tax, firemen and policemen not being relieved of this capitation tax in either the Old Age Assistance Act, or the act creating the retirement system for policemen and firemen, such policemen and firemen are required to pay this old age assistance tax, and such is the opinion of this department.

OLD AGE ASSISTANCE: PAROLED PERSON: When a person is on parole and not receiving support or care from the state, he is entitled to old age assistance.

October 15, 1936. *Old Age Assistance Commission:*

Re: Application No. 20208, Henry Harper, 1021 West Second Street, Davenport, Iowa.

On September 1, 1936, you wrote to me in regard to the above styled matter and enclosed a letter written to Clark O. Filseth, Assistant. County Attorney of Scott County, and you asked whether a person on parole was entitled to old age assistance. It appears that this man was sentenced to the state penitentiary at Fort Madison, but was paroled and had completed a six months' sentence.

You will note that the Old Age Assistance Act provides that those who are inmates of jails, penitentiaries and so on, are not entitled to receive assistance, but when out on parole where he is receiving no care or maintenance from the state, is clearly not an inmate of the institution within the provisions of the Old Age Assistance Act.

Therefore, it is the opinion of this department, when a person is on parole and is not receiving support or care from the state, he is entitled to old age assistance.

TAXATION: OLD AGE ASSISTANCE: IN ARREARS: The first tax of $1.00 was due on or before July 1, 1934, and therefore, the 3 years would run from that date, so after July 1, 1937, a person would be in arrears more than 3 years if he failed to pay the tax.

October 15, 1936. *Old Age Assistance Commission:* We have your request for opinion on the following proposition:

"The Old Age Assistance Act provides that any one who becomes in arrears more than three years on this tax for any year, shall forfeit all claim to old age pensions provided for in the act. The legislature, for the purpose of creating the Old Age Assistance fund, levied on all persons a tax of $1.00, payable on or before July 1, 1934. Will you please advise from what date the three-year period runs, which would bar those in arrears for the nonpayment of this tax?"

Section 35 of the original act provides that there is levied on all persons pursuant to Section 4 of the original act, a tax of $1.00 payable on or before July 1, 1934.

Section 34 of the original act, as amended by Section 23 of Chapter 55 of the 46th General Assembly, provides for the annual payment, and provides further that the tax shall be collected as of January 1st, each year, beginning in 1935, and shall be delinquent on July 1st of each year thereafter; but the question you have is not one of delinquency, but is a question of when the tax is due. It is clear from the act that the first tax of $1.00 was due on or before July 1, 1934, and therefore, the three years would run from that date, and so, after July 1, 1937, a person would be in arrears more than three years if he failed to pay the tax and such is the opinion of this department.

"SCREENO": GAMBLING: LOTTERY: "From what has been here said, it is clearly apparent that the scheme in question constitutes a lottery. It is a scheme which has neither legal nor moral right to exist and should be speedily suppressed."

October 17, 1936. *County Attorney, Waterloo, Iowa:* This will acknowledge receipt of your recent request for an official opinion as to the legality of the game or scheme called "Screeno." As a basis for the opinion, we gather the following facts:

The purchaser of a ticket to a local theatre is given a "Screeno" card free. At some time during the entertainment, certain numbers are thrown upon the screen, and if the numbers thrown upon the screen correspond with the numbers appearing upon one of the cards held by patrons then present in the theatre and such patron then calls out "Screeno," a prize is given to such patron.

You desire to know whether or not such a game or scheme is in violation of the lottery statutes of this state.

There is no conflict among the authorities that the essential elements of a lottery scheme are consideration, chance and prize. The genesis of lotteries is set forth in several decisions which will be referred to hereafter. A generally accepted definition is that contained in 38 Corpus Juris, page 289, as follows:

"The three necessary elements of a lottery are the offering of a prize, the awarding of the prize by chance, and the giving of a consideration for an opportunity to win the prize."

Brenard Manufacturing Company vs. Jessup, et al., 186 Iowa, 872.
State vs. Hundling (Iowa), 264 N. W., 608.

In the instant scheme, it is clearly apparent that the operator supplies the prize and chance and the patron furnishes the consideration. The relation of these elements in the combination has been well stated by the Supreme Court of Missouri in the following language:

"A lottery includes every scheme whereby anything of value is for a consideration allotted by chance."

State vs. Emerson, 318 Mo., 633; 1 S. W. (2d), 109, at 111.

In the present scheme and those kindred to it, any valuable consideration paid or promised at the time of a drawing or prior thereto in order to participate in the final distribution fulfills the requirement of statute as to con-

sideration. Thus if a scheme induces A to pay the operator a sum of money in connection with a drawing for a prize, it is immaterial whether A pays the money for a number or for something that may help the number to win. In either case the payment is for "the chance" that remains unknown until the winning number is drawn. In "Screeno" the element of a valuable consideration is directly parted with by the purchaser at the time he purchases the ticket. As directly in point sustaining these views see:

Horner vs. United States, 147 U. S., 449; 13 Sup. Ct., 409; 37 L. Ed., 237.
Brooklyn Daily Eagle vs. Voorhies, 181 Fed., 579.
General Theatres, Inc., vs. Metro-Goldwyn-Mayer Distributing Corporation, 9 F. Supp., 546.
Central States Theatre Corporation vs. Patz, (U. S. D. C. Iowa), 11 F. Supp., 566.
Eastman vs. Armstrong-Byrd Music Co., 212 Fed., 662.
Maughs vs. Porter, 157 Va., 415; 161 S. E., 242.
State vs. Danz, 140 Wash., 546; 250 Pac., 37; 48 A. L. R., 1109.
Glover vs. Molloska, 238 Mich., 215; 213 N. W., 107.
Featherstone vs. Independent Service Station, 10 S. W. (2d), 124.
Bader vs. Cincinnati, 21 Ohio L. Rep., 293.
People vs. Miller, 271 N. Y., 44; 2 N. E. (2d).

The last case cited, *People vs. Miller*, is the most recent case handed down by a court of last resort dealing directly with the question at hand. The scheme was as follows:

A patron of the theatre buys a ticket of admission which entitles him to witness a motion picture. The holder of this ticket draws another ticket which one of the defendants tears in half, putting one-half into a box and returning the other half to the patron. Another defendant goes upon the theatre stage with a wheel, explains its operation, and when the wheel stops at a certain name he picks out a ticket with a number on it and announces that the holder of that ticket is the winner. The third defendant hands the money prize to the winner. The game is concededly one of chance. Defendant's argument is that no valuable consideration has been paid for the chance and, therefore, the game is not a lottery. * * * * The issue of law, therefore, is whether a payment which entitles one to a ticket of admission to the theatre plus a chance to win a prize constitutes payment of a valuable consideration for the chance. This court has held that when a pecuniary consideration is paid and the return for that consideration "what and how much he who pays the money is to have for it" is determined by chance, the scheme constitutes a lottery. Hull vs. Ruggles, 56 N. Y. 424, 427. The patron of these defendants' theatre paid his money at the box office and, in return for that consideration, received a ticket entitling him to witness a motion picture and a chance to win a money prize. He paid a valuable consideration for something determinable by chance. What was he to receive, merely a right to view a picture or that right in addition to a sum of money? The principle of this case is no different from the scheme described in People ex rel. Ellison vs. Lavin, 179 N. Y. 164, 71 N. E. 753, where the purchaser of cigars, upon presentation of cigar bands, became entitled to a chance to win a sum of money. We held in that case that persons among whom the distribution was to be made paid a valuable consideration for the chance when they purchased the cigars, the bands on which entitled them to compete for prizes. In neither case was an additional sum of money exacted for the chance to win. Here the theatre patron paid only the regular price of admission; there the purchaser of cigars paid no more than the usual price.

The same scheme was denounced as late as April 6, 1936, in *Forte vs. United States*, 83 Fed. Rep. (2d), 612; on February 25, 1936, by the Supreme Court of Massachusetts in *Commonwealth vs. O'Connell*, 200 N. E., 269, where 25 names of purchasers of "charitable donation subscriptions" were to be

drawn and allotted to 25 women who would participate in the game of "Beano," the purchasers represented by the winning participants to receive the cash prizes; later still, by the California court in *People vs. Rehm,* 57 Pac. (2d), 239, an enterprise whereby contestants on payment of $1.00 for a ticket picked titles for cartoons from suggested lists which contained many titles, any one of which might be equally appropriate, and the contestants who picked titles most nearly corresponding to those selected by judges were entitled to receive prizes ranging from $25,000.00 downward; on February 14, 1936, by the Supreme Court of Kentucky in *Leake et al. vs. Isaacs,* 90 S. W. (2d), 1001.

From what has been here said, it is clearly apparent that the scheme in question constitutes a lottery. It remains only to be said that it is equally the duty of the state to not only protect the public welfare against lotteries and lottery schemes such as the one here condemned but to prevent legitimate business from being both overrun and destroyed by them. The scheme in question falls under the clear condemnation of the statute. It promotes the spirit of gambling. It is a scheme calculated to set the particular community in which it operates wild with speculation. It is a scheme in and of itself which shows that it is operated for a profit. It is a type of scheme insidious and dangerous and one that, if permitted to operate in theatres, would have a tendency to spread and multiply in all other lines of business and do violence to recognized standards of business ethics. It is a scheme which has neither legal nor moral right to exist and should be speedily suppressed.

ELECTIONS: LAST DAY FOR REGISTRATION: "A simple process of mathematics leads to the conclusion that Saturday, October 24, 1936, is the last day for registration in Polk county and Des Moines, as this is the tenth day next preceding election day, November 3, 1936, and there are nine clear days between October 24th and November 3rd."

October 24, 1936. *Governor of Iowa:* We wish to call Your Excellency's attention to a matter that has just come to our attention through the request of a Polk County voter who made application to register today and was advised that the official registration closed at 8:00 o'clock p. m. yesterday.

In examining the statutes, we find that a special chapter, 39-B1, of the 1935 Code pertains to permanent registration in cities having a population of more than 125,000 inhabitants. Section 718-b11 of this chapter provides:

"The commissioner of registration, or a duly authorized clerk acting for him, shall, up to and including the tenth day next preceding any election, receive the application for registration of all such qualified voters as shall personally appear for registration at the office of the commissioner or at any other place as is designated by him for registration, who then are or on the date of election next following the day of making such application will be entitled to vote. * * * *"

Section 718-b13 provides:

"The commissioner of registration shall have nine full days between the last day of registration and election day to perfect his election registers * * * * *."

A simple process of mathematics leads to the conclusion that Saturday, October 24, 1936, is the last day for registration in Polk County and Des Moines, as this is the tenth day next preceding election day, November 3, 1936, and there are nine clear days between October 24th and November 3d.

ELECTION: REGISTRATION: A person who meets the constitutional requirements of an elector may register on election day in cities using the ordinary registration plan provided he meets one of the requirements of Section 707 of the Code, but he may not register on election day in cities using the permanent registration plan.

October 27, 1936. *Secretary of State:* We acknowledge your letter of October 19th in which you submit the following question:

"Does a person who meets the Constitutional requirements of an elector, have the right to swear in his vote on election day in precincts where ordinary registration, or permanent registration prevails, just as he would have in a precinct where registration is not required?"

The real question submitted is: Whether a citizen's constitutional right to vote is denied by the provisions of the statutes pertaining to registration.

In the early case of Edmond vs. Barbury, 28 Iowa 267, our Supreme Court upheld the constitutionality of the registry law and distinctly held that the Legislature had the power to enact laws aimed at preventing fraud and corruption in voting, and that the laws prescribing the time and place for the registration of voters did not deny his constitutional right to vote. This case and the rule announced therein have been cited, with approval, by a large number of appellate courts in the United States. Our own Supreme Court in September, 1935, recognized the rule in Piuser vs. City of Sioux City, 220 Iowa 308, wherein it states:

"Registration is a regulation of the right of suffrage and not a qualification for such right."

In other words, the statutory requirements as to time and place for registration do not deprive a voter of his right of suffrage but only tells him when he must exercise such right.

Chapter 39 of the 1935 Code requires registration of voters for all elections in cities having a population of 10,000 or more, and gives cities between 6,000 and 10,000 the right to enact ordinances adopting registration. In this chapter we find Sections 691 and 707 expressly authorizing registration on election day and prescribing regulations controlling the same.

Chapter 39-B1 of the Code requires a permanent registration system in cities over 125,000, and authorizes any city over 10,000 to adopt such system —718-b21. In this same chapter we find Section 718-b3 which provides:

"From and after July 1, 1928, no qualified voter shall be permitted to vote at any election unless such voter shall register as provided in this chapter."

Section 718-b11 provides for registration up to and including the tenth day next preceding the election, and 718-b13 states that the Commissioner of Registration shall have the nine days between the last day of registration and election day to perfect his registers, during which time voters may not register. The Commissioner must deliver the registers to the respective precincts on the day before election. It is clear, from these statutes, that the tenth day before election is the last day of registration in the cities where the permanent registration system is used.

Section 718-b19 states that the provisions of Chapter 39 (ordinary registration) and lines 6-10 of Section 795 shall not apply to the permanent registration system.

Section 795 is in the chapter on Methods of Conducting Elections, and provides:

"Voting under registration. In precincts where registration is required, if such name is found on the register of voters by the officer having charge thereof, he shall likewise repeat such name in the same manner; if the name of *the person desiring to vote is not found on the register of voters, his ballot shall not be received until he shall have complied with the law prescribing the manner and conditions of voting by unregistered voters.*"

The above italicized provision represents lines 6-10 as the statute appears in the Code, and the Legislature expressly states that this part of the statute shall not apply where permanent registration prevails. The only purpose we can find for this particular exception is to make clear that a voter may not register on election day under the permanent registration plan.

We are, therefore, of the opinion that a person who meets the constitutional requirements of an elector may register on election day in cities using the ordinary registration plan provided he meets one of the requirements of Section 707 of the Code, but he may not register on election day in cities using the permanent registration plan.

ELECTIONS: REGISTRATION OF VOTERS: Any qualified voter who appeared at office of commissioner of registration for purpose of registering during hours of 7 a. m. and 10 a. m. and 8 p. m. and 9 p. m. on Saturday, October 24, 1936 (said office was closed at these times) and were not permitted to register simply because the office was closed, would be entitled to register and vote on election day by establishing such facts. (Opinion of Vernon Seeburger, city solicitor, also included in this opinion.)

October 29, 1936. *City Clerk, Des Moines, Iowa:* Under date of October 28, 1936, you have requested an official opinion from our department concerning the following matters, to-wit:

"Nearly all of this occurred at the time the present registration system was installed. At that time duplicate cards were made out on the typewriter, and at the following election judges and clerks were requested to obtain the signatures on the duplicate of all those whose cards were transferred at the time of the change in 1928. Many signatures therefore were not obtained. That is the reason that approximately 16,000 duplicate registration cards do not now have the signature of the voter. However, a signature was taken previous to this time on a duplicate, and when the change of this system occurred these cards were all put through a photostatic process, and these photostatic cards are on file in the City hall. They were found to be too bulky to put in the files, and the change had to be made to the present duplicate card. So we are not without evidence of the signature of these 16,000 registrants.

"The question which confronts us in this office is: 'Shall we pass these books out without the signature, as has been done since 1928, or shall we use some method of correction?' The difficulty with the latter suggestion is that time will not permit the calling in of 16,000 people for signatures. So it appears to us that it is a physical impossibility to obtain these signatures."

In answering your questions, we desire to quote the following from an opinion prepared by Vernon R. Seeburger, City Solicitor of Des Moines, Iowa, and which was issued to your department on October 28, 1936:

"By the permanent registration law (Chapter 39-B1, Code of Iowa, 1935) in effect in Des Moines, the following provisions may be found bearing upon your question:

Section 718-b3, Code of Iowa, provides:

"718-b3. *Registration required.* From and after July 1, 1928, no qualified voter shall be permitted to vote at any election unless such voter shall register as provided in this chapter."

Section 718-b6, Code of Iowa, provides in part:

"7181-b6. *Form of records.* For the purpose of expediting the work of the commissioner of registration, for uniformity, and for preparation of abstracts and other forms in use by the election boards, the registration records shall be substantially as follows:

Suitable card index devices shall be provided. There shall also be provided suitable index cards of sufficient facial area to contain in plain writing and figures the data required thereon. The following information concerning each applicant for registry shall be entered on the card:

1. Ward.
2. Election precinct.
3. If a man:

A. The name of the applicant, giving surname and Christian names in full.
* * * *

h. *Signature of voter. (The applicant after registration shall be required to sign his name on both the original and duplicate registration lists.)*

Section 718-b11, Code of Iowa, provides in part:

"718-b11. *Time and method of registration.* The commissioner of registration, or a duly authorized clerk acting for him, shall, up to and including the tenth day next preceding any election, receive the application for registration of all such qualified voters as shall personally appear for registration at the office of the commissioner or at any other place as is designated by him for registration, who then are or on the date of election next following the day of making such application will be entitled to vote. Any qualified voter who applies for registration shall subscribe to the following oath or affidavit:

'You do solemnly swear or affirm that you will fully and truly answer such questions as shall be put to you, touching your qualifications as a voter, under the laws of this state?' 'Upon being sworn, the applicant shall answer such questions as are required, as hereinbefore set forth, and the clerk shall fill out the form which the applicant shall sign, and he shall not be required to register again for any election; * * * *'"

"Following the effective date of the above chapter, registration of the voters was provided for at designated places in each of the city's precincts at which persons were permitted to register in compliance with the law. Thereafter the city clerk as commissioner of registration was and is required to establish a permanent registration plan which calls for the registration of the voters at his office and supposedly makes possible registrations from day to day and from time to time. See Section 718-b4 and Section 718-b5. When the registrations were made under the first of the foregoing sections, in some instances voters signed the original registration card but omitted to sign the duplicate. The original, it is provided by Section 718-b5, must be kept at the clerk's office as part of the 'original registration list' and shall not be removed from the commissioner's (clerk's) office except upon order of court." The second list, known as the "Duplicate registration list," or "registry list' as it is also designated, is subject to public inspection and is sent to the polls for the use by the judges as is provided by Sections 718-b5, 718-b8 and 718-b13. I am informed that the facts further disclose that even in some subsequent registrations made under Section 718-b5 there has been omitted from the duplicate cards the signature of the elector although the omissions in this respect are not so great in number as in those registrations made pursuant to Section 718-b4. In some instances it is also disclosed that duplicate registration cards properly signed by electors were destroyed when the loose leaf book system now in use was adopted a few years ago.

"Concerning the right of persons once having registered to vote, it is provided by Section 718-b20, as follows:

"718-b20. *Certificate of registration.* In municipalities having permanent registration for elections, before any person offering to vote received the ballots from the judge or is permitted to enter the voting machine, a certificate containing the following information shall be signed by the applicant:

CERTIFICATE OF REGISTERED VOTER

I hereby certify that I am a qualified voter duly registered under the permanent registration act of 1927 in the.....precinct, ...ward, city of ....., county of....., Iowa.

Party affiliation (if primary election).....

Signature of voter.....

Address .....

Approved:

.....

Judge or Clerk of Election.

The certificate of registration shall be approved by a judge or clerk of election if the signature of the voter on the certificate of registration and the signature on the registry list appear to be the same. The voter shall present this certificate to the judge in charge of the ballots or voting machine, as proof of his right to vote. After voting, the voter shall present his certificate of registration to the judge or clerk in charge of the register of election, who shall make entry as provided in Section 718-b8. The certificates shall be arranged in alphabetical order after the close of the election, placed in envelopes provided for that purpose, and returned to the city clerk as commissioner of registration.

"You will observe from Section 718-b20 that an elector's right to vote, upon presentation of himself to the judges of the election, is determined by a comparison of his signature made on the certificate with the signature appearing on the duplicate registration, or registry, list in the hands of the judges. That the signatures appear to be the same seems to be a prerequisite to voting. Moreover, by Section 718-b9 persons may be challenged in order to prevent fraudulent voting and *'no one so challenged sholl be permitted to vote except by complying with all the provisions applicable to the proving of challenges.'* Relative to the matter of challenges, it is also provided by Section 718-b15 as follows:

"718-b15. *Challenges.* Any person may challenge a registration at any time by filing a written challenge with the commissioner of registration. Persons so challenging shall appear before the commissioner of registration thereafter to prove their challenge, and the person so challenged shall have notice of the challenge. The commissioner shall decide the right to the entry under the evidence. Either party may appeal to the district court of the county in which the challenge is made, and a date for the hearing shall be fixed and the decision of such court shall be final."

"By Section 796, Code of Iowa, it is also provided:

"796. *Challenges.* Any person offering to vote may be challenged as unqualified by any judge or elector; and it is the duty of each of the judges to challenge any person offering to vote whom he knows or suspects not to be duly qualified. No judge shall receive a ballot from a voter who is challenged, until such voter shall have established his right to vote."

"By Section 797, Code of Iowa, it is provided:

"797. *Examination on challenge.* When any person is so challenged, the judges shall explain to him the qualifications of an elector, and may examine him under oath touching his qualifications as a voter."

"By Section 798, Code of Iowa, it is provided:

"798. *Oath in case of challenge.* If the person challenged be duly registered, or if such person is offering to vote in a precinct where registration is not required, and insists that he is qualified, and the challenge be not withdrawn, one of the judges shall tender to him the following oath:

'You do solemnly swear that you are a citizen of the United States, that you are a resident in good faith of this precinct, that you are twenty-one years of age as you verily believe, that you have been a resident of this county sixty days, and of this state six months next preceding this election, and that you have not voted at this election.'

"If said person takes such oath, his vote shall be received.

"From the last three quoted sections you will observe that a person may be challenged as unqualified to vote by any judge or elector, whereupon he shall not be permitted to vote until he shall have established his right to do so and shall have executed an affidavit in substance as provided by Section 798, above set forth. This section plainly requires *that the person so challenged shall have been duly registered.*

"Taking all of the foregoing sections together and applying them to the problem at hand, it becomes apparent that upon a person presenting himself to the judges of election to exercise his right of suffrage, his signature must first appear upon the duplicate registration list and his identity be established by comparison of his signature thereon with the signature on the aforesaid certificate which he must execute preliminary to casting his vote. However, if an elector so presents himself and so executes a proper certificate but his signature does not appear on the duplicate list through no fault of his own, and such voter is duly registered at the clerk's office, on the original registration list, he is entitled by virtue of Section 798, above quoted, to submit an affidavit attesting to his right to vote, whereupon, in my opinion, he should be permitted to vote.

"The following quotation from Corpus Juris is pertinent to this point. See *20 Corpus Juris 87-88.*

"It is a general rule that statutes prescribing the power and duties of registration officers should not be so construed as to make the right to vote by registered voters dependent on a strict observance by such officers of minute directions of the statute, thereby rendering the constitutional right of suffrage liable to be defeated through the fraud, caprice, ignorance, or negligence of the registrars. Thus an elector will not be deprived of his right to vote merely because of the incorrect spelling of his name on the registry, or the registrar's negligent failure to enter his name or address on the registry list, or because he was registered by a third person with whom the registrar had left his books, or because of the registrar's failure to post a list of the electors, or because the registration was made at a place other than that named by the registrar in his notice. So one who has been properly registered cannot be deprived of his right to vote because his name has been wrongfully or improperly erased from the registration lists, and a registered voter is not disfranchised because of the destruction by fire of all the registration records. An election will not be held void on account of an irregularity as to the time of registration in the absence of a showing that it affected the result. Nor will an election be vitiated because voters registered under a law which was subsequently declared void where the voters and officers relied on such law, and the voters were qualified under the former law as well as that declared void. Again where the constitution or statute provides that no one shall be entitled to register without first taking an oath to support the constitution of the United States, a voter who is entitled to register cannot be deprived of his right to vote because of irregularities in administering such oath; or even because of the negligence of the registrar in failing to administer it to those applying for registration. While some constitutional and statutory requirements as to proof of qualifications to be furnished, or other matters to be done by the applicant, as distinguished from duties imposed upon the registration officials, must be strictly and literally complied with before he is entitled to register, yet where he is registered and allowed to vote, the vote cast by him will not be rejected as illegal on the ground that he has not complied with all the minutiae of the registration law."

"And, in the case of *Huffaker vs. Edgington,* 30 Idaho 179, 186, 163 Pac. 793, it was said:

"It has been held frequently that a strict, literal compliance with the

provisions of the law as to registration will not be required in the absence of fraud or intentional wrongdoing. If a person is a citizen, has the other qualifications of a voter and does everything required of him to register and vote, the failure of the election officers to do their part in every detail will not deprive the citizen of the right to vote. . . . . As a general rule, statutes prescribing the duties of election officers relative to registering voters should not be so construed as to make the right of citizens to vote depend upon a strict observance of the law by such officers."

"A similar view was expressed by the Supreme Court of Iowa in the case of *Younker vs. Susong,* 173 Iowa 663, 156 N. W. 24, wherein this language was used at page 670:

"Statutes prescribing the mode of proceeding of public officers are regarded as directory unless there is something in the statute which shows a different intent. In the instant case, the electors were not to blame for the failure of the officers to provide voting machines and booths; but the mistakes, if any, were those of the officials. Under such circumstances, prejudice must be shown in order to defeat an election fairly held."

"In this connection see *People vs. Earl,* 42 Colo. 238, 94 Pac. 294.

"As a word of caution, I would suggest that you advise all judges and clerks of election, where a person who has not signed the duplicate registration list or for whom no duplicate registration card appears in the list, demands the right to vote, that a check be made at once by the election officials through yourself, as clerk, to ascertain whether or not such person is in fact duly registered on the original registration list; if not, he should not under any circumstances be permitted to vote unless he can establish by unmistakable evidence that he has in fact duly registered and his name fails to appear on such original list through no fault of the voter himself but rather through the fault of ministerial officers in charge of the records; but if his name does in fact appear on such original registration list then he should be permitted to vote upon executing an affidavit in the form provided by Section 798 of the Code without further proof of his right to vote. On account of the large number of duplicate registration cards which are unsigned by the persons named thereon, it is also suggested, as a precautionary measure, that a supply of affidavit blanks be provided for each polling place to be available for use as aforesaid.

"Nothing herein contained, however, shall be construed as authority for permitting a person wholly unregistered to vote."

While we agree substantially with the opinion that was prepared and presented to you by City Solicitor Vernon R. Seeburger, there are certain qualifications which we now desire to pass upon officially, and which we are specifically calling to your attention.

You will note from the last paragraph of Mr. Seeburger's opinion, which appears on page 11 thereof, the following statement: "Nothing herein contained, however, shall be construed as authority for permitting a person wholly unregistered to vote."

In view of the fact that this last paragraph of Mr. Seeburger's opinion might be misunderstood, we desire to qualify it by calling your attention to the following facts:

On Saturday afternoon, October 24, 1936, many qualified voters appeared at the office of the Commissioner of Registration in Des Moines for the purpose of registering. Due to a misunderstanding of the law, the Registration Office at the City Hall was not opened until 10 a. m., or some time thereafter, on Saturday, October 24, 1936, which was the tenth day before the general election, November 3, 1936, as contemplated by Section 718-b14 of the 1935 Code of Iowa. The registry office at the City Hall was closed at 8 p. m. on October 24, 1936, or at least after 8 p. m. on October 24, 1936,

there were no officials in the registry office to take registrations of qualified voters. Section 718-b4 of the 1935 Code of Iowa specifically requires that "such registration places shall be selected by the Commissioner of Registration and *shall be open between 7 o'clock a. m. and 9 o'clock p. m.*" Thus, it further appears that registration was not permitted during the hour of 8 p. m. to 9 p. m., and also from 7 a. m. to at least 10 a. m. on October 24, 1936, which was the tenth day and last day for the registration of voters, prior to the coming general election on November 3, 1936.

It, therefore, clearly follows from the substance of Mr. Seeburger's opinion, and from the opinion of this department, that any qualified voter who appeared at the office of the Commissioner of Registration for the purpose of registering during the hours of 7 a. m. and 10 a. m., and 8 p. m. and 9 p. m. on Saturday, October 24, 1936, and were not permitted to register simply because the office was closed, would be entitled to register and vote on election day by establishing such facts.

This is the law applicable to this particular set of facts because the courts of last resort of many states, including our own Supreme Court, specifically hold that the voter should not be denied his constitutional privilege of voting if his failure to either register or vote is caused by no fault of the voter. This interpretation of the law has been held in the following cases:

Younker vs. Susong, 173 Iowa, 663.
People vs. Earl, 42 Colo. 238, 94 Pac. 294.
Huffaker vs. Edgington, 30 Idaho, 179; 163 Pac. 793; 20 Corpus Juris, pages 87 and 88.

There is another matter that we wish to call to your attention in order to avoid any further misunderstandings with reference to the right of a qualified voter to vote at the coming election where he has cast his ballot in accordance with the absent or disabled voters' law which is controlled by Chapter 44 of the 1935 Code of Iowa. Section 954 of Chapter 44 of the 1935 Code of Iowa provides as follows:

"*Affidavit envelope constitutes registration.* The affidavit upon the ballot envelope shall constitute a sufficient registration of the voter in precincts where registration is required."

It is, therefore, the opinion of this department that the former opinion furnished you by Vernon Seeburger, City Solicitor of Des Moines, Iowa, construed together with above qualifications, constitutes the law governing the questions submitted by you.

WARRANTS: LEGISLATORS: Legislators paid on a per diem basis, not on a salary basis. See Section 20, Code, 1935.

October 30, 1936. *State Comptroller:* You state that a member of the House of Representatives who was elected in 1932 to serve for a two-year period and who did actually serve during the 45th General Assembly but who failed to show up during the session of the 45th Extra General Assembly until the last two weeks was paid his mileage and per diem for the time he actually served as such representative during the 45th General Assembly in Extraordinary Session, but was not paid for the balance of the time while he was not present, and that warrants were drawn for all of his pay but

never delivered to him by your office for the reason that you discovered that he did not actually serve except during the last two weeks of the session.

It is my further understanding that this Representative made no complaint because he did not receive full pay for the entire session, but that he accepted the warrants tendered to him and appeared to be entirely satisfied. It is my understanding that he has never made any demand for the balance of the warrants that were drawn but were never given to him.

The record shows that the President of the Senate and the Speaker of the House certified that this Representative was present during the entire session. Now you want to know if you have any legal authority to go back of such certificates for the purpose of determining the true state of facts and also whether or not these old unused warrants may be cancelled by you.

You are advised that the certificate signed by the President of the Senate and the Speaker of the House is not absolutely binding upon you in each and every case. The Supreme Court of Missouri in the case of *Morgan vs. Buffington,* 21 Missouri 549, holds that the State Auditor of Missouri had the authority to go back of such a certificate for the purpose of determining the true state of facts.

In the Missouri case the facts were that the Legislature adjourned in April to reconvene in November for the purpose of permitting a special interim committee to make a complete study of the laws for the purpose of revising the same. When they reconvened in November this particular member of the General Assembly filed a claim for his per diem for the period covered during the adjournment. This member was not a member of the interim committee. The Auditor refused to draw this warrant because he knew this member was not performing any legislative service or duty for the state during this period, and the Supreme Court of Missouri sustained the Auditor. Under the laws of Missouri in existence at that time the State Auditor performed similar functions that are now to be performed by your office under the Iowa law.

In handing down this decision, Justice Scott of the Supreme Court of Missouri used the following language:

"The auditor of public accounts is an important officer, entrusted with the management of the revenues of the state. Whilst the treasurer holds the iron or brazen key of the treasury, the auditor holds the legal key, and it is through his instrumentality alone that money can lawfully be drawn from it. The state looks to him as the protector of her treasure. The powers confided to him are necessarily large, and as by his mismanagement the state may at any time be rendered unable to fulfill her pecuniary engagements, so there should be a power in him to prevent such a state of things."

* * * * * * * *

"Suppose the speaker should, in the form adopted in the present case, issue his certificate to ten thousand men as members of the 18th General Assembly, would those certificates be binding on the auditor? If, under the authority of such vouchers, the auditor should issue warrants on the treasury, could he escape the indignation of the community and avoid the punishment due his crime? As some of the ten thousand, in the case supposed, would be members, and really entitled to their pay, how could the auditor distinguish between those who were or were not members, but by hearing evidence, or, which is the same thing, acting on his own knowledge, and distinguish between the real and pretended members? When we contemplate the consequences which may ensue from maintaining that a voucher cannot be examined, and its correctness tested, we see no propriety in investing such

instruments with the sanctity claimed for them by the argument. It is for the interest of the state that there should be such a power in the auditor. It is better that an individual should be delayed in the receipt of the compensation due for his services, than that a door should be opened by which the public treasury would be subjected to exactions wholly unwarranted by law. Ours is a government of checks and stays. These are necessary incidents to the freedom of our institutions. They are a part of the price we pay for the liberties we enjoy."

* * * * * * * * *

* * * "we are aware of no principle that would warrant a claim for compensation, by the party who had voluntarily abandoned the service of the other, during the time of such abandonment and whilst he was engaged in his own pursuits. A persuasion that the interests of the employer would be promoted by a delay in the execution of the contract, would confer no right to claim for services during the time the performance of the work was delayed. Full compensation for the time employed had been received, and the agreed compensation is offered when the services are resumed."

In view of the further reasoning of the Supreme Court of Missouri we feel that the same rule should prevail in this state. We therefore hold that the Comptroller is not absolutely bound by the certificate of the President of the Senate and the Speaker of the House where the Comptroller knows the facts to be entirely different from those certified by such officers.

Section 20 of the 1935 Code of Iowa is as follows:

"*Issue of warrants.* The state comptroller shall also issue to each officer and employee of the general assembly, from time to time, upon certificates signed by the president of the senate and the speaker of the house, warrants for *the amount due for services rendered.*"

It appears from a careful examination of Section 20, supra, that it was the intent of the Legislature that members of the General Assembly should only be paid for services rendered. The pay to which Legislators in this state are entitled is not on a salary basis but on a per diem basis. See Section 25 of Article III of the Constitution of the State of Iowa, and also *Gallarno vs. Long,* 214 Iowa 805.

It is therefore the opinion of this department that you have already performed your proper duties and have paid this Representative in full for services rendered by him during the session of the 45th General Assembly in Extraordinary Session and that you may cancel the balance of the warrants drawn by you but which were not delivered to this Representative because such warrants do not represent money due this Representative for services rendered.

The former opinion written by Assistant Attorney General Harry Garrett, to you on August 27, 1935, is hereby withdrawn and the above and foregoing opinion filed in lieu thereof.

DEEDS: UNIVERSITY OF IOWA: BOARD OF EDUCATION: EXECUTIVE COUNCIL: ACQUISITION OF PROPERTY: The purpose and character of the deeds in question should be briefly noted in the minutes of the Board of Education. It is not requisite, however, that such record be presented to the Executive Council of the state for action.

October 30, 1936. *Iowa State Board of Education:* I have your request for an opinion upon the following situation:

A deed to certain lands was made on July 13, 1899, naming Lovell Swisher, treasurer of the State University of Iowa, as grantee, but obviously intended

to convey to the State University of Iowa, that is to say, the State of Iowa. Since that time, the university has continuously occupied the land in question, openly, adversely, and under claim of title. On October 24, 1936, Flave L. Hamborg, treasurer of the State University of Iowa, successor in office to Lovell Swisher, made a deed conveying the same said land to the State of Iowa.

With respect to another parcel of land, the following history is important:

Phillip Bradley, who owned the property in 1876, mortgaged the same on September 18th of that year to A. J. Hershire. In December of that year, while the mortgage was still outstanding, Phillip Bradley conveyed the same to the city of Iowa City. Subsequently, the university of Iowa succeeded to a title obtained by foreclosure of the Hershire mortgage against the Bradley property. This land has been occupied by the State University of Iowa constantly, openly, adversely, and under claim of title, since 1893, when it was conveyed to Charles A. Shaeffer, A. N. Currier, Emlin McLain as trustees for the university. On October 27, 1936, the city of Iowa City, by action of its council and execution of the document by the mayor and clerk gave a quit-claim deed of the property to the State of Iowa for the use and benefit of the State University of Iowa.

The question is: *Do the transactions involved in the giving and acceptance of these deeds fall within the terms of Section 3922 of the Code of Iowa, dealing with the acquisition of real property and requiring in such transactions the approval of the Board of Education and the Executive Council of the state?*

Section 3922 of the 1935 Code of Iowa reads as follows:

"*Purchases—prohibitions.* No sale or purchase of real estate shall be made save upon the order of the board, made at a regular meeting, or one called for that purpose, and then in such manner and under such terms as the board may prescribe and only with the approval of the Executive Council. No member of the board or finance committee shall be directly or indirectly interested in such purchase or sale."

And Section 3923 of the Code is as follows:

"*Record.* All acts of the board relating to the management, purchase, disposition, or use of lands and other property of said institutions shall show the members present, and how each voted upon each proposition."

Section 3922 clearly appears to refer only to the acquisition of property, and not to the matter of clearing technical clouds from titles already by clear conveyance or by effect of the statute of limitations already securely vested in the State of Iowa for the use and benefit of the State University.

Section 3923, however, requires all acts of the Board relating to the "management" of property to be entered of record in the minutes of the Board of Education. The matter of obtaining quit-claim deeds for the purpose of clearing away clouds from titles already clearly vested in the state would be included within the term "management" and require a Board record.

The purpose and character of the deeds in question should be briefly noted in the minutes of the Board of Education. It is not requisite, however, that such record be presented to the Executive Council of the state for action.

FRANCHISE: REVOCATION: BOARD OF SUPERVISORS: In Iowa, there is express limitation within which grantee must perform franchise in whole or in part, which is 2 years from granting of franchise. Grantee has performed substantial part of work within this limitation period sufficient to create right of property. Therefore, Board of Supervisors would not have

a mandatory duty to revoke and cancel franchise, and also would not have any duty or right to cancel these franchises.

October 31, 1936. *County Attorney, Davenport, Iowa:* You have asked this department to render an official opinion with respect to the question as to the authority of the Board of Supervisors to revoke franchises in cases where operations under such franchises have been dormant for several years.

You state that these franchises were granted to a power company in 1929 and about fifty per cent performed within the first two years, and the power company insists on retaining its franchise rights despite the fact that no work has been carried on since 1931. It has also been called to our attention that work has been resumed just recently by the holders of these franchises and that in one case, approximately three and 25/100 additional miles of said line is now under construction and that in the other case, two additional miles have been constructed since September 23, 1931.

You now ask if it is mandatory that the Board of Supervisors cancel these franchises because the main lines have not been fully constructed as of the date of July 14, 1936.

These franchises were granted in the year 1929 and the power company constructed about fifty per cent of the same within two years from the granting of said franchises. In other words, about one-half the territory included in these franchises have been served by the power company holding the franchises.

You are advised that the cancellation of such franchises is governed by Sections 8329 and 8330 of the 1935 Code of Iowa. Section 8329 of the 1935 Code of Iowa is as follows:

"*Nonuser.* Unless the improvements for which a franchise is granted is constructed in whole or *in part within two years from the granting thereof*, it shall be forfeited and the board which granted the franchise shall cancel and revoke the same and make record thereof."

It will be unnecessary for us to consider Section 8330 of the Code for the reason that your question does not relate to any of the violations justifying forfeiture under the provisions of Section 8330.

It is the mandatory duty of the Board of Supervisors to cancel and revoke such franchises under the following conditions: "Unless the improvements for which a franchise is granted is constructed in whole or in part within two years from the granting thereof." Therefore, if no construction is started for a period of two years after the granting of this franchise, it would be the mandatory duty of the Board to revoke and cancel the franchise.

The next question that naturally arises is what must the power company do in order to avoid forfeiture of their franchises?

Section 8329 of the 1935 Code of Iowa clearly and unmistakably answers this question—the power company must construct the improvement in whole *or in part* within the two years in order to avoid this mandatory action on the part of the Board of Supervisors to cancel and revoke their franchises.

It has been called to our attention that the franchises granted on or about August 1, 1929, which was for the construction of approximately forty miles of such transmission line, was exercised by the company to the extent of completing 22.25 miles of said line within two years from the granting of the franchises, and that the company is now doing further work on the con-

struction of said line and that approximately 3.25 additional miles are actually under construction. This would indicate the intention on the part of the company to complete the line insofar as it was practicable to do so.

We have been further advised with respect to the franchise granted on or about September 23, 1929, which authorized and permitted the company to construct approximately 35 miles of such transmission line. That 23 miles of this line were completed within two years from and after September 23, 1929, and that since September 23, 1931, the company has further constructed an additional two miles of said line. In this latter instance, it appears that the company has already constructed 25 miles of the 35 miles which they were permitted to construct under the franchise.

Thus, clearly, it appears that the company did construct these lines in part within two years since the franchise was granted. The company has a property right in these franchises. This franchise is good for a period of 25 years. If the franchises were cancelled and revoked at the present time, it certainly would constitute taking the company's property without due process of law.

The best decision which, in my opinion, applies to your question is *New York Electric Lines vs. Subway*, 235 U. S., 179. In this case the plaintiff company received franchise in 1883 and did not make any attempt to exercise its rights thereunder or to attempt to make any construction in accordance with the privileges and rights granted under this franchise until 22 years thereafter. Naturally, the Supreme Court of the United States held that the action of the city and its agencies was correct in refusing to permit them to start construction after the lapse of 22 years, during which time there was no activity on the part of the plaintiff company to construct its conduits and other construction necessary for the carrying out of the purposes for which the franchise was granted.

In the Subway case supra, Justice Holmes, on page 194, announces the following rule:

"In the cases where the right of revocation in the absence of express condition has been denied, it will be found that there has been performance at least to some substantial extent or that the grantee is duly proceeding to perform."

See New Orleans Water Works Co. vs. Rivers, 115 U. S. 674; Walla Walla vs. Walla Walla Co., 172 U. S. 1; Detroit vs. Detroit etc. Ry. Co., 184 U. S. 368; Louisville vs. Cumberland Telephone Co., 224 U. S. 649; Grand Trunk Railway Co. vs. South Bend, 227 U. S. 544; Owensboro vs. Cumberland Telephone Co., 230 U. S. 58; Boise Water Co. vs. Boise City, 230 U. S. 84; Russell vs. Sebastian, 233 U. S. 195.

Again quoting Justice Hughes in the Subway case supra, we find him using the following language:

"Grants like the one under consideration are not *nude* pacts, but rest upon obligations expressly or impliedly assumed to carry on the undertaking to which they relate. See The Binghamton Bridge, 3 Wall. 51, 74; Pearsall vs. Great Northern Railway, 161 U. S. 646, 663, 667. They are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated, as well as after that performance."

235 U. S., page 193.

Again quoting Justice Hughes in the Subway case supra, on page 194 we find him using the following language:

"It has always been recognized that, as the franchise is given in order that it may be exercised for the public benefit, the failure to exercise it as contemplated is ground for revocation or withdrawal. * * * If 'no time is prescribed, the franchise must be exercised within a reasonable time.' City of New York vs. Bryan, 196 N. Y. 158, 164."

In 201 New York, pages 321, 329, it was held that the franchise under consideration there was a license merely, revocable at the pleasure of the city, unless it has been accepted in some substantial part of the work performed, as contemplated by the permission sufficient to create a right of property and thus form a consideration for the contract. In the Subway case supra, the Supreme Court of the United States held that this New York Supreme Court decision was correct.

In Iowa there is an express limitation of time within which the grantee must perform in whole or *in part.* This limitation is two years from and after the granting of the franchise. It appears to us that the grantee has performed a substantial part of the work within this limitation period sufficient to create a right of property and thus form a consideration for the contract. Under such circumstances as appears in this case, the Board of Supervisors would not only not have a mandatory duty to revoke and cancel the franchise but also would not have any duty or right whatsoever to cancel and revoke these franchises. This rule has been repeatedly upheld by the United States Supreme Court in the decisions above cited.

This opinion is based upon the assumption that the grantee has been fully exercising the rights conferred by the franchise to that substantial part of the construction which they have already completed. In other words, we assume that the grantee has been servicing patrons in a long line as far as it has been constructed.

COMPTROLLER: PAYMENT OF OFFICIAL BOND PREMIUMS OF COMPTROLLER AND ASSISTANT COMPTROLLER: EXECUTIVE COUNCIL: Due to the precedent that has been established by the Executive Council of heretofore allowing and paying these items from their supply or necessary expense allocations, these bond premiums should be paid as they have been allowed and paid in the past, until the legislature has made provisions to the contrary.

November 6, 1936. *State Comptroller:* Our department has an official request from your department, and also a request from the Executive Council, for a ruling upon the following question:

It appears that the premium for the official bonds of the State Comptroller and for the assistant comptroller, Eric Brown, has previously been paid from the allocations for supplies or necessary expense from the appropriation made to the Executive Council. It further appears that the Executive Council has approved the payment of these bond premiums for the state officers and directed that the same should be taken from the appropriation made to the comptroller's office. An opinion is desired as to whether or not these premiums should be paid from the comptroller's appropriation or should be paid in the usual manner from the supply or necessary expense account of the Executive Council's appropriation.

Section 84-e4 of the 1935 Code of Iowa provides that the premium on the State Comptroller's bond "shall be paid out of the state treasury." In the official askings by the State Comptroller for an appropriation sufficient to defray the expenses of his office, it appears that there was no item included

therein containing a request for payment of such bond premiums as may be required of public officers in his department. Hence, it must be presumed that when the 46th General Assembly passed the appropriation of the Comptroller's office, it did not include any sums for the payment of premiums on such official bonds. However, in the askings by the Executive Council for an appropriation sufficient to defray the expenses in connection with the administration of duties of the Executive Council, there was a requested item for supplies and necessary expense. Likewise it must be presumed that in passing the appropriation for the Executive Council, the Legislature intended to cover these items for supplies for other state offices, and also necessary expense.

Due to the precedent that has been established by the Executive Council of heretofore allowing and paying these items from their supply or necessary expense allocations, it would, therefore, naturally follow that these bond premiums should be paid as they have been allowed and paid in the past. The departmental construction placed upon this matter by the Executive Council should obtain until the Legislature has made provisions to the contrary.

We, therefore, hold that these items of expense should be paid from the supply or expense allocation of the appropriation for the Executive Council.

However, at this time we advise the State Comptroller in his askings for the next biennial period to include therein a sufficient amount to cover the bond premiums required for the public officers in the Comptroller's department.

A copy of this letter is being sent to the Executive Council under this same date.

MUNICIPAL CORPORATIONS: LIGHT AND WATER PLANTS. Such expenditures may be made as are necessary to operate a municipally owned light or water plant. Printing and mailing greeting cards and advertising of merchants on bargain day are not necessary incidents to operation of light and water plants. Corporations have power to advertise light and power which they lawfully sell where such advertising to increase efficiency of the plant.

November 16, 1936. *Auditor of State:* Acknowledgment is made of your letter of October 10th, in which you say certain questions have been presented to your department with reference to the extent to which municipal corporations may go in promoting good will for municipally owned utilities, and in promoting the sale of electric current, water, gas, etc. In connection with such inquiries, you submit to this office the following questions:

May cities and towns legally use the various water, gas and light plant operating funds to pay for:

1. Printing and mailing holiday greeting cards?
2. Advertising merchant's bargain day?
3. Advertising through "question box" ads?
4. Miscellaneous advertising designed to promote the sale of the particlar product furnished?
5. Expenses incurred by a merchant in installing equipment articles sold by him, in residences?

Chapter 312 of the Code of Iowa, 1935, gives cities and towns authority to purchase, establish, erect, maintain and operate within their corporate

limits heating plants, waterworks, gas works and electric light or power plants.

Section 5738 provides that cities and towns "shall have the general powers and privileges granted and such others as are incident to municipal corporations of like character not inconsistent with the statutes of the state for the protection of their property and inhabitants, and the preservation of peace and good order therein."

By Section 6130, municipal corporations are permitted to enter into contracts for the purchase of gas, water or electric current for either light or power purposes for the purpose of selling the same either to residents of the municipality or to others, including corporations.

"A municipality which has its own water or light plant, or a street railway or the like, may make all contracts and engage in any undertakings, as an incident to the municipal ownership of such plant, which is necessary to render the system efficient and beneficial to the public. * * * *

"But the municipality cannot carry on as an incident a business which is not essential to the accomplishment of any of the purposes for which the water or light or street railway plant was acquired."

Volume 5, McQuillin Municipal Corporations, 2nd Ed. Section 1943.

Cities and towns are creations of the statutory law and have only such powers as are conferred upon them by statute, with such additional powers as may arise as a necessary incident to the powers expressly granted.

In the generation of electric current for light and power purposes, and in the sale of such current, and in the sale of water to individuals, firms and corporations, cities and towns are invading a field of enterprise also occupied by individuals and private corporations. Municipalities may engage in private business so as to come in competition with individuals or corporations transacting a like business only when granted statutory authority to do so.

"The object of the creation of a municipal corporation is, that it may perform certain local public functions as a subordinate branch of the state government; and while it is invested with full power to do everything necessarily incident to a power discharge thereof, no right to do more can ever be implied. In the absence of express legislative sanction, it has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals. Under authority to construct and maintain a waterworks system, it cannot engage generally in the plumbing business. * * * *

"While the law permits municipal corporations to do those things which are necessary to accomplish the objects of their creation, under an implication of power, the right has not usually been held to go so far as to permit them to engage in the manufacture of articles necessary to their lawful enterprises, where they are in common use and are to be had in the open market."

Vol. 1, McQuillin Municipal Corporations, Second Edition, Section 375.

The Legislature has sought in many ways to safeguard public funds, and has not seen fit to grant to municipal corporations unlimited power to spend such funds as the officers and employees of such cities and corporations may see fit. Clearly such expenditures may be made as are necessary to properly operate a municipally owned light or water plant.

In answer to your specific questions, we are of the opinion that the printing and mailing of holiday greeting cards, and the advertising of merchants

bargain day are not necessary incidents to the operation of light and water plants. Advertising through "question box" ads may be a proper expenditure of municipal funds, depending upon the results obtained.

Miscellaneous advertising designed to promote the sale of the particular product furnished may or may not be legitimate expenditure, depending upon the results accomplished.

Expenses incurred by a merchant in installing equipment articles sold by him in residences should be paid for by municipal corporations. Such corporations have the power within reasonable limitations, in our judgment, to advertise the light and power which they may lawfully sell where such advertising tends to increase the efficiency and advance the economical administration of such plant. A plant serving a small portion of the people of a city, if producing much less than its capacity, should be able to serve the interests of the people better if the production were increased and a greater number of people served.

BAND FUND: MUNICIPAL BANDS: A municipal band may be permitted by Mayor and City Council to give concerts at state fairs. Warrants cannot be drawn on the band fund to pay for such concerts.

November 17, 1936. *Auditor of State:* You have submitted to this office a question submitted to you by Mr. Fred S. Holsteen, City Solicitor of Burlington, Iowa, by letters dated August 26th and September 1st, with reference to paying the band out of the city band fund for concerts given by the municipal band at the Tri-State Fair.

In his August 26th letter, Mr. Holsteen presents this question:

"Is the Mayor and City Council of Burlington acting within their legal rights, when permitting our municipal band to give concerts at our Tri-State Fair as stated."

The Tri-State Fair is conducted and carried on by a corporation and not by the city of Burlington. The organization, it is stated, is not a money-making undertaking, and is largely maintained by the business people of the city of Burlington, with such aid as the Chamber of Commerce can give for the purpose of stimulating business in and about Burlington by bringing visitors and shoppers, thus resulting in an indirect benefit to the public.

Since the Municipal Band does not devote its full time to working for the city, we are of the opinion the Mayor and Council are within their rights in permitting the band to give concerts at the Tri-State Fair.

The second question presented, however, is whether warrants can be drawn on the Band Fund for such concerts. It is our opinion payment for concerts at the Tri-State Fair should not be made out of the Municipal Band Fund. The operation of such fair is not strictly a municipal activity maintained and controlled by the city, and the city should not pay for the concerts at the fair any more than it should pay for other entertainment or amusements thereat.

TRANSFER OF FUNDS: Code authorizes comptroller to approve transfer of amounts from one fund to another for the purpose of meeting an emergency, which amount must be returned within such time as comptroller may determine fit and proper.

November 17, 1936. *State Comptroller:* I have your written request of

November 10th instant, in which you ask for our opinion with reference to the following question:

"The City of Des Moines is arranging to issue bonds in the sum of $354,000.00 partly to pay for right-of-way or damage to property in connection with the improvement of S. W. 21st street and a viaduct or similar crossing over railroad tracks, also to purchase property and right-of-way for the outfall sewer line and for the proposed sewerage disposal plant. The estimated cost of the above two proposals is $126,000, the balance to be used for certain materials, labor, etc.

"It now seems the street project estimate is approximately $15,000.00 too high and the sewer estimate $20,000.00 too high. The projects have not been started but options have been secured and other costs determined which indicate the cost will not amount to the original estimate.

"The bonds are what may be termed 'limited levy' bonds. They are to be issued in anticipation of the collection of taxes authorized to be levied for sewer and street purposes, or in other words, special bonds issued for a specific purpose.

"During the year 1935-36 the Street Department borrowed $23,000.00 from the judgment fund with the provision that the money be returned in 1936-37 which has been done. This, of course, has reduced the revenue available for expenditure this year in the Street Department with the result funds are now exhausted and a larger number of men will be out of employment.

"The city has submitted to the State Comptroller the proposal to transfer or use permanently about $27,000.00 of the proceeds of the bond issue which it is claimed is in excess of the original estimate of property and right-of-way costs set out above to replenish the current budget which, as stated, is exhausted as far as the street funds are concerned. Can this legally be done?"

Since the receipt of your written request, I have been reliably informed that the city of Des Moines has already sold these bonds and has the money on hand from the proceeds of such sale.

The duties of the State Comptroller in regard to this matter are contained in Section 388 of the 1935 Code of Iowa, which is as follows, to-wit:

"388. *Transfer of active funds—poor fund.* Upon the approval of the comptroller, it shall be lawful to make temporary or permanent transfers of money from one fund of the municipality to another fund thereof; but in no event shall there be transferred for any purpose any of the funds collected and received for the construction and maintenance of secondary roads. The certifying board or levying board, as the case may be, shall provide that money temporarily transferred shall be returned to the fund from which it was transferred within such time and upon such conditions as the comptroller shall determine, provided that it shall not be necessary to return to the emergency fund, or to any other fund no longer required, any money transferred therefrom to any other fund. No transfer shall be made to a poor fund unless there is a shortage in said fund after the maximum permissible levy has been made for said fund."

It clearly appears that the city of Des Moines is faced with an emergency due to the transfer during the year 1935-36 of $23,000.00 from the judgment fund to the street department, which was absolutely necessary at that time in order to keep the snow removed from the streets of Des Moines in order that the ordinary traffic in trade and commerce might be carried on during the worst winter that the state has experienced in over a hundred years. In April of 1936, this $23,000.00 was repaid from the street department back to the judgment fund, thereby leaving the street department with $23,000.00 less than they ordinarily would have had.

The street department has informed us that the amount originally esti-

mated for the purchase of right-of-way is in excess of their actual needs. The street project estimate appears to be approximately $15,000.00 too high, and the outfall sanitary sewer system project estimate is approximately $20,000.00 too high.

In view of the fact that this bond issue is of the limited levy type and the money received from the sale of such bonds being pledged for a specific purpose, it follows that any transfer of this excess should be only temporary and must be refunded and paid back to their bond redemption fund. The savings in construction and purchase of right-of-way from the sale of bonds, of course, should go into this bond redemption fund as a credit to the people in the benefited district, which will be called upon to pay for the outstanding bonds and interest thereon by special assessments.

The only transfer that cannot be made is a transfer from the funds collected and received for the construction and maintenance of secondary roads. This appears to be the only limitation in the transfer of funds subject to the approval of the Comptroller as contemplated by Section 388 of the 1935 Code. Section 388 of the Code authorizes the Comptroller to approve other transfers if in his judgment it appears to be just and equitable, and the Comptroller may specify the conditions and the time within which such temporary transfers shall be made and returned to the original fund. Therefore, if it appears clearly that there will be an excess of $23,000.00 or more in their estimates for the purchase of right-of-way, and a proper showing is made to the State Comptroller substantiating this fact, the Comptroller would be authorized to approve a temporary transfer upon such reasonable conditions as the Comptroller shall determine. This transfer should not be a permanent one because the taxpayers in this benefited district cannot be called upon to pay by special assessments the principal amount of the bond issue of $354,000.00 plus the amount that is to be transferred because of the emergency situation now existing. In other words, the amount that is transferred for the purpose of meeting the emergency should be and must be returned to the bond redemption fund within such time as the Comptroller may determine to be fit and proper.

FIREMEN: Neither the city nor a volunteer fireman is liable for damages resulting from the operation of fire truck in answering a fire alarm.

November 18, 1936. *County Attorney, Tama, Iowa:* Your letter of November 13th to the State Department of Justice, has been referred to me for reply.

Your letter is in part as follows:

"The incorporated town of Chelsea, Iowa, has a volunteer fire department. The fire truck is driven by a volunteer fireman who receives no pay for his services other than that which may be given to the first department by an appreciative townsman. The question has arisen as to whether or not the driver of the truck could be held civilly liable in the event that an accident or collision occurred when the truck was being used in answering a fire alarm."

The question presented contemplates that the truck operator is an agent of the city, aiding in the performing of a proper function of the city with the understanding and agreement that he is selected for that specific purpose.

Would the truck operator who is a volunteer fire fighter be civilly liable

for damage where he is a volunteer and is working without pay, in a case where if he were a regular city employee drawing pay, he would not be liable? We think the fact that the truck operator volunteers his services without pay is immaterial and does not affect the question of his liability or non-liability in case of damage.

We assume the same volunteer fireman operates the truck at all fires and has been selected for and assigned to that particular duty. Clearly he is an agent of the city performing its proper municipal and governmental function, and it is our opinion that neither the city nor the volunteer fireman would be liable for damages resulting from the operation of such truck in answering a fire alarm.

HOSPITAL TRUSTEES: Rules adopted by Wayne county (Detroit) Medical Society and other state and county medical associations where they are not in effect, in their present form are not within requirements set out in the statutes.

November 25, 1936. *County Attorney, Des Moines, Iowa:* Your letter of November 24th to the Attorney General has been referred to me for reply.

You submit two questions, as follows:

"(1) Do the Polk County Hospital Trustees have a legal right to adopt the rules which are fully set out and enclosed herein, containing twenty-six numbered paragraphs, which purports to be a modification of rules adopted by the Wayne County (Detroit) Medical Society, and other state and county medical societies where they are now in effect?

"(2) Do the Polk County Hospital Trustees have a legal right to enter into an agreement, said agreement being completely set out and attached hereto for your reference, to be signed by the Broadlawns Polk County Board of Trustees by their chairman and the Des Moines Academy of Medicine and the Polk County Medical Society by its president?"

You have submitted in connection with your letter a brief in the form of a letter to Mr. T. P. Sharpnack, executive secretary of Broadlawns General Hospital of this city, under date of November 23d, in which in effect you answer both questions in the negative.

It is our opinion the purpose of the contract and the purposes underlying the rules in question are honest and laudable, but it is our opinion, too, that both questions should be answered in the negative. Paragraph 7 of the contract, for instance, is an improper limitation upon the legal rights and duties of the trustees. The rules referred to in our opinion unduly limit the Board of Trustees in carrying out their statutory duties and exercising their statutory powers. With some modifications, the contract and rules, no doubt, can be sustained, but in their present form, and without modification, we believe they are not entirely within the requirements set out in the statutes.

SOCIAL SECURITY ACT: CONSTITUTIONALITY OF AMENDMENT HAVING RETROSPECTIVE EFFECT SO AS TO PRESERVE RIGHTS OF THE STATES TO RECEIVE FEDERAL GRANTS:

From the decisions of the United States Supreme Court set out herein and the settled rule of construction placed upon similar provisions in state constitutions by the Supreme Courts of the states, it is apparent that the national congress could pass an amendment similar to the one suggested by Your Excellency and that the same would not be unconstitutional, unless it were of a criminal nature.

November 27, 1936. *Governor of Iowa:* You have asked for my opinion as to whether or not an amendment to the Federal Social Security Act having a retrospective effect so as to preserve the rights of the states to receive the Federal grants under the Social Security Act, could be passed by the next Congress of the United States. You also want to know if the next Congress should pass such an amendment, whether or not the same would be constitutional.

It appears that the Attorney General of the United States has advised the state authorities of Pennsylvania that it would be necessary for the State of Pennsylvania to call a special session of their Legislature for the purpose of enacting a state law in accord and in compliance with the Federal Social Security Act before January 1, 1937, in order to qualify Pennsylvania for the Federal grants for the taxable year of 1936 under the act. You state that you suggested that it might be better to have Congress pass an amendment authorizing and legalizing the Federal grant to the state for the year 1936, provided the next General Assembly of the State of Iowa would pass a compliance act. It has been reported that the reaction of the Honorable Homer Cummings, Attorney General of the United States, to this suggestion was that Congress might not be willing to pass such an amendment, because the same might be declared unconstitutional by the Supreme Court. In other words, you want to know whether or not the National Congress, which convenes in January, 1937, could pass an amendment to the Social Security Act so as to make the act have a retrospective as well as a prospective effect. In my opinion, the National Congress does have the power to pass such an act and such an act would not be unconstitutional, unless it were of a criminal nature.

Clause 3 of Section 9 of Article I of the Constitution of the United States of America is as follows:

"No Bill of Attainder or ex post facto law shall be passed."

This provision of the Federal Constitution is a limitation upon the powers of Congress. It prohibits Congress from passing any bill of attainder or ex post facto law.

Every law that makes an act done before the passage of the law criminal, which was innocent when done, or that aggravates a crime or makes it greater than it was when committed, or that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed, or that alters the rules of evidence, permitting less or different evidence to convict a person of an offense committed prior to its passage, is an *ex post facto* law and within the prohibition of this clause of the Federal Constitution.

Calder vs. Bull, 3 Dall. 393.
Fletcher vs. Peck, 6 Cranch 138.
Watson vs. Mercer, 8 Pet. 110.
Ex parte Garland, 4 Wall. 336.
Kring vs. Missouri, 107 U. S. 232.

See also:

Medley, petitioner, 134 U. S. 160, with dissenting opinions by Justices Brewer and Bradley.
Ogden vs. Saunders, 12 Wheat, 266.

Locke vs. New Orleans, 4 Wall. 173.
Baltimore, etc., R. Co. vs. Nesbit, 10 How. 395.
Carpenter vs. Pennsylvania, 17 How. 456.
In re Sawyer, 124 U. S. 219.

The debates in the Federal Convention upon the Constitution show that the term "ex post facto laws" was understood in a restricted sense relating to *criminal cases only.*

Bugajewitz vs. Adams, 228 U. S. 585.
Johannessen vs. U. S., 225 U. S. 227.

The National Legislature may validate retrospectively any proceedings which it could have authorized in advance; and it is immaterial that such legislation may operate to divest an individual of a right of action existing in his favor, or subject him to a liability which did not exist originally. In a large class of cases this is the paramount object of such legislation.

The Exchange Bank Cases, 21 Fed. 99. Judgment affirmed in *Williams vs. Albany*, 122 U. S. 154.

Section 21 of Article I of the Constitution of the State of Iowa provides as follows:

"No bill of attainder, ex post facto law, or law impairing the obligation of contracts, shall ever be passed."

The Supreme Court of Iowa has on numerous occasions interpreted this provision of our constitution relative to ex post facto laws, the same as the interpretation placed upon the ex post facto prohibition in the Federal Constitution by the Supreme Court of the United States. It is the general rule of almost universal application in the United States of America that the term "ex post facto laws" refers solely to laws of a criminal nature. An ex post facto law is a retrospective enactment which makes acts, innocent when done, criminal, or if criminal when done aggravates the crime, increases the punishment or reduces the measure of proof. The term applies *only to criminal laws.*

See *State vs. Taggart*, 186 Iowa 247, 172 N. W. 299.
Polk County vs. Hierb, 37 Iowa 361.
State vs. Squires, 26 Iowa 340.

From the above decisions of the United States Supreme Court and the settled rule of construction placed upon similar provisions in state constitutions by the Supreme Courts of the states, it is apparent that the National Congress could pass an amendment similar to the one suggested by Your Excellency and that the same would not be unconstitutional, unless it were of a criminal nature.

It appears that your request for this opinion is for the purpose of guiding Your Excellency in determining whether or not a special session of the State Legislature should be called immediately. If such a call were made, it would necessarily require the passage of three or four days before the Assembly could convene. Then after the Assembly convened, several days, no doubt, would be required for the purpose of the proper organization of the special session. The solemn deliberations of the Assembly in the consideration of the type of a state law necessary to comply with the provisions of the Federal enactment would also require sufficient time for the proper understanding

and consideration of this proposed new state legislation. The holiday season might interfere with the deliberations of the special session.

Section 903 (a) of the Federal Social Security Act provides that "the Social Security Board shall approve any state law submitted to it within thirty days of such submission which it finds" to be in compliance with the restrictions contained in the Federal Social Security Law. In other words, the Federal Social Security Board has thirty days in which to approve the state laws submitted to it. Hence, it is possible and probable that the Federal Social Security Board might not find time to approve an enactment rushed through the State Legislature, if called at a special session, until after January 1, 1937.

Subsection (6) (b) of Section 903 of the Federal Social Security Act provides that "on December 31st in each taxable year, the board shall certify to the Secretary of the Treasury of each state whose law it has previously approved * * * *."

From a consideration of the above provisions of the Federal Social Security Act itself, it appears that such a state compliance act rushed through a special session of the State Legislature, if called, might not be approved by the Federal Social Security Board for the taxable year of 1936. If it were not approved until after January 1, 1937, then the State of Iowa would not be entitled to its share of the Federal appropriation for the year 1936. Hence, the calling of a special session at the present time might not obtain the results as anticipated, even if the General Assembly might have time to formulate, approve and pass such a state compliance act during the month of December, 1936.

Trusting that I have hereinabove set forth an analysis of the constitutional question involved, and also the operation of the Federal act pertaining thereto.

SCHOOLS: INDEPENDENT SCHOOL DISTRICT OF BURLINGTON: DRUG COMPANY: The member of said board is the president and a large stockholder of a local drug company, selling supplies to the board (sale not made upon a public bid), is guilty of violating Section 4468 of the 1935 Code of Iowa.

A member of the school board, who is a partner in an insurance company or agency which has sold policies of insurance to the local school board, is guilty of violating said section.

November 30, 1936. *County Attorney, Burlington, Iowa:* We have your letter of October 22, 1936, requesting an official opinion upon the following questions:

"A member of the local school board of the Independent School District of Burlington is the president and large stockholder of a local drug company. This drug company has sold drug supplies to the local school board. The sale was not made upon a public bid. In your judgment, is this member of the school board guilty of violating Section 4468 of the Code?

"A member of the school board who is a partner in an insurance agency has sold policies of insurance to the local board. In your judgment does this violate Section 4468 of the Code of Iowa?"

Section 4468 of the 1935 Code of Iowa provides as follows:

"*Officers as agents.* It shall be unlawful for any school director, teacher, or member of the county board of education to act as agent for any school textbooks or school supplies during such term of office or employment, and any school director, officer, teacher, or member of the county board of educa-

tion who shall act as agent or dealer in school textbooks or school supplies, during the term of such office or employment, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined not less than ten dollars nor more than one hundred dollars, and pay the costs of prosecution."

The only decision discovered which interprets and applies to the statute just quoted is *State vs. Wick,* 130 Iowa 31 (1906). In that case Judge McClain held that it clearly applied to an agent and dealer in school textbooks and school supplies, and closed with the following words:

"We think that the policy of the statutory provisions as well as their specific language, make them applicable to a dealer such as the defendant is conceded to have been and prohibits such dealer from being a member of a school board of directors." (Page 35.)

That Judge McClain was correct in saying that the statutory provision then before the court expressed a "policy," is well attested by numerous similar provisions in the Code dealing with various state officers, city officials, etc. See Sections 180 (State Printing Board), 275 (Custodian of Public Buildings), 3922 (member of Iowa State Board of Education, Finance Committee of the Board of Education, and officers of institutions under the Board of Education), 4685 (Highway Commission and employees), 4755-b10 (state officials, members of State Highway Commission, etc.), 5324 (County Supervisors, employees of county, etc.), 5361 (County Hospital Trustees), 5673 (officers and employees of cities and towns), 5828 (City Planning Commissions), 6534 (officers and employees of cities and towns under commission form of government), 6710 (officers and employees of special charter cities), and 13324, which is a general provision against the holding of any interest in any contract, made by a public body, by any trustee, warden, steward, or any other officer of any educational, penal, charitable or reformatory institution supported in whole or in part by the state.

This question was before the Attorney General's staff on January 13, 1934, by reason of a question which was raised by a member of the Board of Education. In an opinion rendered on that date, it was expressed that the statute did not prohibit a member of the Board of Education from being interested as an officer and stockholder of a brick and tile company which sold its products to a dealer who in turn sold to an institution of the Board of Education, provided no agreement for such series of sales existed prior to the letting of the contract in pursuance of which the said brick and tile were to be used. (Report of Attorney General, 1934, page 443.)

The same subject was also before the Attorney General on August 12, 1931 (Report of Attorney General, 1932, page 110), and in the opinion there rendered, it was concluded that a School Board cannot deal with a corporation in the purchase of coal or other supplies where members of the School Board are also stockholders or directors of the corporation. In this opinion, the Attorney General cited *James vs. City of Hamburg,* 174 Iowa 301 (1916), and *Bay vs. Davidson,* 133 Iowa 688 (1907).

In another opinion (Report of Attorney General, 1932, page 189), the Attorney General has expressed the belief that each individual sale would not constitute a violation of the statute, but rather the acting as agent for sales while at the same time holding a membership or employment of a County Board of Education would be a single violation even though several sales were made.

In this connection it seems necessary to consider also the effect of *Security National Bank vs. Bagley,* 202 Iowa 701 (1926). In that case a member of a school board who was also president of a bank voted in favor of introducing a thrift course into the schools of the district. Subsequently a contract was made between the bank of which he was president and "Thrift Incorporated," which owned a patented system. The court sustained the transaction, finding that nothing existed to disqualify the member of the board in question from voting at the time when the action of the school board was taken.

This result is entirely consistent with the opinion rendered by this office to a member of the State Board of Education as above indicated (Report of Attorney General, 1934, page 443).

It will be noted that in each of the situations stated in your inquiries, the school board is dealing with one of its members, or a corporation in which a school board is interested, as the party with whom the board deals at arms' length, and whose interests, it may be said, are opposed to those of the board, in the matter of seeking advantages in the contemplated transactions. The contemplated transactions are not indirect, as was true in the case of *Security National Bank vs. Bagley,* supra, where the bank with which the member of the board was connected had no interest at all in the transaction at the time the action of the board was taken, and as was true in the case of the Board of Education member who held stock in a corporation which sold products to a dealer who ultimately sold to a State Board institution, without prearrangement or understanding of any kind between the State Board member, the intermediate dealer and the said institution.

Since the transactions contemplated in your question, then, involve direct dealings not within the exception recognized in *Security National Bank vs. Bagley* and in the opinion rendered in the report of the Attorney General for the years 1933 and 1934, page 443, you are advised that both types of transactions are, in the opinion of this department, violations of Section 4468 of the 1935 Code of Iowa.

ELECTIONS: JUSTICE OF SUPREME COURT—SHORT TERM: CERTIFICATE OF CANVASS: EXECUTIVE COUNCIL.

"Consequently, the official abstract made by the Executive Council on their completion of their official canvass of the returns cannot now be changed and the official abstract should be delivered to the Secretary of State without regard or reference to this belated certificate of the Board of Supervisors of Polk County, Iowa."

December 2,. 1936. *Executive Council:* I have your letter of December 1st, in which you request an opinion from this office on the following matter:

"At the general election held on the third day of November, 1936, no candidate was nominated by any political party for the office of Judge of the Supreme Court for the short term. Three thousand eight hundred and eighty-eight (3,888) voters wrote names in for this office. The result of the official canvass showed the following result: James W. Fay received nine hundred nineteen (919) votes and Carl B. Stiger received one thousand two hundred forty-eight (1,248). The balance of the votes were for scattering individuals, none of whom approached the totals above listed.

"The certificate was made up on this basis and has been signed by the members of the Board of Canvassers but it has not been delivered to the Secretary of State for issuance of certificate of election.

"Enclosed herewith is a certificate and photostat copies of Polk county tally sheets which were today transmitted to the Secretary of State and, by her office, transmitted to this office.

"Will you kindly examine the enclosed exhibits and advise us as to our course of action in this matter? Should we change the certificate of the official canvass or should we deliver it as it now is to the Secretary of State? Kindly return the exhibits when you have finished with them."

In the first place, it should be borne in mind that the State Executive Council officially canvass all of the election *returns*. They have no authority to canvass the *votes*. See Section 877 of the 1935 Code of Iowa.

The local Boards of Supervisors throughout the state had no authority to canvass the *votes*, but are likewise limited to a canvass of the returns at their meeting on the Monday after the general election at 12:00 o'clock noon. See Section 863 of the 1935 Code. After the official canvass of the Boards of Supervisors is completed, they must abstract the votes for the judges of the District Court under Section 864 of the Code, and under Section 869 of the Code the Auditor shall within ten days after the election forward these abstracts of the votes for Judges of the Supreme Court to the Secretary of State. Then on the twentieth day after the election, the Executive Council, acting as state canvassers, shall open and canvass all of the *returns*. See Section 877 of the 1935 Code. As soon as the Executive Council, acting as the state canvassers, have completed the canvass of all of the *returns*, they shall make an abstract, stating in words written at length the number of ballots cast for each office, the names of the persons voted for, for what office, the number of votes each received, and whom they declare to be elected; which abstract shall be signed by the canvassers in their official capacity and as state canvassers, and have the seal of the state affixed. See Section 878 of the 1935 Code. When this abstract is completed, then the Secretary of State shall file the same when received, and shall have the same bound in book form to be kept by the Secretary of State as a record of the result of said state election, to be known as the state election book. See Section 879 of the 1935 Code. Then each person declared elected by the state board of *canvassers* shall receive a certificate thereof signed by the proper officials, as directed by Section 880 of the 1935 Code.

From your letter it appears that the Board of Supervisors of Polk County, Iowa, by transmitting the certificate mentioned in your letter to the Secretary of State, which certificate of said Board of Supervisors was thus transmitted to the Secretary of State on December 1, 1936, constituted an attempt on the part of the Board of Supervisors of Polk County, Iowa, to amend their official abstract of the votes which they previously had made and filed with the Secretary of State, in accordance with Sections 864 and 869 of the 1935 Code of Iowa. There is no statutory authority contained in the Code of Iowa authorizing the Board of Supervisors to officially amend such abstract or to file such an amended abstract with the Secretary of State. It is an attempt on the part of the Board of Supervisors of Polk County to recanvass the votes cast for a Judge of the Supreme Court for the short term prior to an election contest. This cannot be done legally. Section 985 of the 1935 Code of Iowa provides for a recanvass in case of contest.

It is therefore the opinion of this department that the transmittal of this certificate by the Board of Supervisors of Polk County to the Secretary of

State on December 1, 1935, is without any legal effect whatsoever. It is a procedure not specified, required or contemplated by the laws of this state. The State Board of Canvassers cannot recanvass the vote, but are simply limited in a canvass of the official returns. Consequently, the official abstract made by the Executive Council on their completion of their official canvass of the returns cannot now be changed and the official abstract should be delivered to the Secretary of State without regard or reference to this belated certificate of the Board of Supervisors of Polk County, Iowa. The facts attempted to be shown by this latter certificate could not be used for any legal purpose, unless the election of the Judge for the short term was contested.

PHARMACISTS: DRUGS: If drugs are labeled "For technical use only" or some similar appropriate label, they may be sold by others than licensed pharmacists.

December 2, 1936. *Pharmacy Examiners:* Your letter of November 30th to the Attorney General has been referred to me for reply.

You state:

"The Iowa Pharmacy Board would like an opinion as to whether or not the drug, potassium chlorate, which is official in the United States Pharmacopoeia, can be sold by others than licensed pharmacists when labeled, 'for technical use only,' or other similar words indicating that same is not to be used for medicinal purposes."

It is our opinion that if such drug is labeled "For Technical Use Only" or bears some similar appropriate label, it may be sold by others than licensed pharmacists. Persons shall be deemed to be engaged in the practice of pharmacy "who engage in the business of selling or offering or exposing for sale drugs and medicines at retail" and "persons who compound or dispense drugs or medicines or fill the prescriptions of licensed physicians and surgeons, dentists, or veterinarians." (Section 2578, 1935 Code of Iowa.)

"1. 'Drugs and medicines' shall include all medicinal substances and preparations for internal or external use recognized in the United State Pharmacopoeia or National Formulary, and any substance or mixture of substances *intended to be used for the cure, mitigation or prevention of disease of either man or animals.*"

I quote as follows from your letter to me under date of November 30th:

"Under the general notes of the United States Pharmacopoeia the following statements are found:

"The standards prescribed in this Pharmacopoeia apply solely to the substances therein named when intended for medicinal use and when bought, sold or dispensed for this purpose.

"Drugs, chemicals or preparations labeled with official synonyms must comply with the same standards that are demanded for the same drugs, chemicals or preparations under official Latin or English titles."

From the general notes appearing as a part of the U. S. Pharmacopoeia, it clearly appears that the standards therein prescribed apply solely and only to the substances therein named when intended for medicinal use, and when bought, sold or dispensed for that purpose. The notes above quoted further set forth that drugs, chemicals or preparations labeled with official synonyms must comply with the standards that are demanded for the same drugs, chemicals or preparations under official Latin or English titles.

Potassium chlorate is a drug recognized by the U. S. Pharmacopoeia, and it is therefore recognized as a drug by Section 2580 of the Code. When such drug is sold or offered for sale, bearing only the label "Potassium Chlorate," it must conform to the standards set by the Pharmacopoeia, and may be sold only by licensed pharmacists.

There are many purposes for which drugs may be used, and not always by any means are they used as "medicinal substances" and preparations for internal and external use as recognized in the U. S. Pharmacopoeia or National Formulary. Wherever such drugs are used as "medicinal substances and preparations for internal or external use" for either man or animal, they are drugs within the contemplation of Chapter 128 of the Code, and may be sold or dispensed only by licensed pharmacists.

Your question contemplates the use of potassium chlorate for purposes outside the scope of the provisions of Chapter 123 of the Code. A licensed pharmacist may sell a drug properly labeled, but he cannot control the use of the drug after it leaves his hands. The purpose of the law requiring drugs to be properly labeled is easily frustrated by the removal of the label by anyone desiring to remove it. Where a drug is not intended for medicinal purposes and is not intended as a preparation for internal or external use but is intended to be used for certain technical purposes where its character as a drug cannot effect human or animal life or health, and where it is distinctly labeled with a proper phrase such as "Not for Medicinal Use," "For Technical Purposes Only" or similar appropriate label, it is our opinion such drugs may properly be sold by persons other than registered pharmacists.

Under date of March 13, 1907, Hon. James Wilson, as Secretary of Agriculture of the United States, gave an opinion (Food Inspection Decision 58), a part of which we quote, as follows:

"Products used in the parts and for technical purposes are not subject to the food and drugs act. It is however, a well-recognized fact that many articles are used indiscriminately for food, medicinal, and technical purposes. It is also well known that some products employed for technical purposes are adulterated or misbranded within the meaning of this act. Inasmuch as it is impossible to follow such products into consumption in order to determine to what use they are finally put, it is desirable that an article sold under a name commonly applied to such article for food, drug, and technical purposes be so labeled as to avoid possible mistakes. The ordinary name of a pure and normal product, whether sold for food, drug, technical, or other purposes, is all that is necessary. Pure cotton-seed oil or turpentine may be sold without any restrictions whatever, whether such article is sold for food, medicinal, or technical purposes, but it is suggested that a cotton-seed oil intended for lubricating purposes, or a so-called turpentine consisting of a mixture of turpentine and petroleum oils, used by the paint trade, be plainly marked so as to indicate that they are not to be employed for food or medicinal purposes. Such phrases as the following may be used: 'not for food purposes,' 'not for medicinal use,' or for 'technical purposes only,' or "for lubricating purposes,' etc.

"In order to avoid complication it is suggested that chemical reagents sold as such be marked with such phrases as the following: 'For analytical purposes,' or 'chemical reagent,' etc."

Applying the definition of drugs and medicines as it appears in Section 2580 in connection with the other provisions of Chapter 123, it is our opinion that potassium chlorate labeled as "Potassium Chlorate, For Technical Use Only," indicating that the same is not to be used for medicinal purposes, may be sold by others than licensed pharmacists in this state.

SUPERINTENDENT OF BANKING AS RECEIVER: National banks located in the State of Iowa do have the power and authority to give security for the safe keeping and prompt payment of moneys therein deposited.

MONEYS received by the Superintendent of Banking come into his hands as public moneys over which he has no personal control. (Liquidation of banks as receiver).

December 2, 1936. *State Superintendent of Banking:* I have your letter on the following proposition:

A question has arisen as to whether national banks have the authority under the law to accept deposits "from me as Superintendent of Banking of the State of Iowa and Receiver of various state banks and pledge assets of the bank to secure such deposits?"

Chapter 604, 46 Statute 809 of the United States, as amended June 25, 1930, provides at Section 90 of the amendment:

"Any association may upon the deposit with it of public money of the state or other political subdivision thereof, give security for the safe keeping and prompt payment of the money so deposited of the same kind as is authorized by the law of the state in which such association is located, in the case of other banking institutions in the state."

The authority of the State of Iowa in regard to pledging assets is found in Section 9222-c3 of the Code of Iowa, 1935, which provides as follows:

"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."

So that under the law of Iowa assets may be pledged to secure public funds and such other funds as may be authorized by the Superintendent of Banking. The question then is, whether these funds deposited by you, as Superintendent of Banking and receiver of the various state banks in Iowa, pursuant to law, are public moneys of the state.

The Supreme Court of Iowa in the case of *Leach vs. Exchange State Bank et al.*, 200 Iowa 185, decided June 25, 1925, held that we have a separate and complete banking code in this state, and, on page 188 the court said:

"Banks chartered by the state are under state supervision. Elaborate and detailed provision is made by statute for their organization and control, and their powers and obligations are strictly defined. A separate department of the state government is provided, charged with the duty of administering the laws with respect to banks."

On page 198 the court said:

"We therefore hold that Chapter 189 of the Acts of the Fortieth General Assembly, in connection with the statute thereby amended and prior statutes on the subject, constituted a separate and complete code of laws governing the organization, operation, and liquidation of state banks, and controlled the distribution of their assets, notwithstanding the general provisions of Section 3825-a. These statutes are now to be found under Title XXI of the Code of 1924."

Section 9140 of the Code is a part of this banking code of Iowa and provides, 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 Iowa, and shall be charged with the execution of the laws of this state relating to banks and banking."

Section 9239 of the Code provides:

"The superintendent of banking may apply to the district court for that district in which said bank is located, or a judge thereof, for the appointment of said superintendent as receiver for such bank, and its affairs shall thereafter be under the direction of the court, and the assets thereof after the payment of the expenses of liquidation and distribution shall be ratably distributed among the creditors thereof, giving preference in payment to depositors."

Section 9242 of the Code provides:

"The Superintendent of Banking henceforth shall be the sole and only receiver or liquidating officer for state incorporated banks and trust companies and he shall serve without compensation other than his stated compensation as Superintendent of Banking, but he shall be allowed clerical and other expenses necessary in the conduct of the receivership."

In the Leach case, hereinbefore cited, the Supreme Court of Iowa went into the question as to the status of the Superintendent of Banking while he was liquidating a state bank pursuant to law, and the court, at page 193, said:

"Chapter 189 of the Acts of the Fortieth General Assembly has, we think, supplied the necessary statutory requirements to bring our banking laws to such a parity with the Federal statutes, relating to national banks as to no longer afford reasonable or logical basis, because of differences in the statutes, for denying them the effect, as against general provisions, accorded to the Federal statute. The act in question gives to the Superintendent of Banking, independently of the appointment of a receiver, the power to liquidate an insolvent bank and distribute its assets."

And again, on the same page, the court said:

"It is not difficult to see that many of the affairs of a bank might require the services of a receiver and the direction of the court in their settlement; but the actual 'winding up' of its affairs and the distribution of its assets do not, under this state, necessarily require either the services of a receiver or judicial direction. Furthermore, the present statute expressly provides that the Superintendent of Banking shall be the 'sole and only receiver or liquidating officer.' * * * * It is the Superintendent of Banking, and not the receiver, who is made the only liquidating officer."

Again, as to the status of the Superintendent of Banking while he is acting as statutory receiver, pursuant to law, our Supreme Court in the case of *In re Receivership City-Commercial Savings Bank of Mason City,* 210 Iowa 581, said, at page 586:

"The Superintendent of Banking, notwithstanding his appointment as receiver of a particular bank, pursuant to statute, remains a state officer. The additional bank examiner is appointed by him, and is his assistant."

The proceeds then of the liquidation of these banks, under the decisions of our Supreme Court, come into your hands as a state officer and you receive them as such. Under the law this apparently determines the question as to whether they are public moneys or not.

In the case of *State vs. McGraw,* 240 Pac. (Mont.) 812, the court said at page 815:

"Aside from the code definition and provisions quoted, it is generally held that it is the official character in which the moneys are received, and not the ultimate ownership which makes them public moneys."

On the same page the court quotes from a Kansas case as follows:

"The allegations that these moneys were received by the defendant in his official capacity is the allegation of a fact which conclusively fixes their character as 'public moneys'."

To the same effect see also *In re Bank of Nampa*, 157 Pac. (Idaho) 1117; *Pinal County vs. Hammons*, 243 Pac. (Ariz.) 919, and also the cases cited by the court in the McGraw case.

So, from this, it is apparent that the test is whether the moneys are received or held by you in your official capacity, as a state officer, and not whether the moneys are held for ultimate distribution to the depositors of the various banks who may be entitled thereto. These moneys on deposit clearly do not belong to you personally, nor do you have any control over them personally. Your sole control over the moneys is as a public officer of the State of Iowa, and your successor in office would have the same control over the moneys as you now have and, in the event you should ever relinquish your office you, of course, at that time would lose all control over these moneys.

It is apparent then, that your question must be answered in the affirmative, and that national banks located in the State of Iowa do have the power and authority to give security for the safe keeping and prompt payment of moneys therein deposited by you as Superintendent of Banking and receiver of state banks of Iowa that are in receivership.

MOTOR VEHICLE: SUSPENSION OF LICENSE. Department may not suspend a license for a period of more than one year. A person whose license is revoked shall not be entitled to apply for or receive new license until the expiration of one year from the date such former license was revoked.

December 7, 1936. *Motor Vehicle Department:* Your letter of December 5th is at hand.

You say you have before you the case of T. L. Thomas as Administrator of the Estate of Raymond Lloy Thomas, deceased, vs. T. E. Charter. The petition sets forth that the defendant was operating a vehicle in a careless and reckless manner, and judgment was rendered in the sum of $10,175, which has since been reduced by court order to $7,175. You say you have all the necessary papers in your files except official notice sent to the defendant by the County Treasurer, and that the Treasurer refuses to send such notice since the vehicle registered in the name of Charter was transferred to Mary Charter on October 14, 1936.

You ask our opinion as to whether your department may legally suspend this man's license under Section 4960-d35, Paragraph 2, of the 1935 Code of Iowa, and whether such suspension may be for an indefinite period exceeding one year in case the above mentioned judgment is not satisfied before the expiration of the year.

Section 4960-d35, insofar as material to your inquiry, is as follows:

"Optional suspensions or revocations. The department may immediately suspend the license of any person without hearing and without receiving a record of conviction of such person of crime whenever the department has reason to believe that: * * * *

"2. Such person has, by reckless or unlawful operation of a motor vehicle, caused or contributed to an accident resulting in death or injury to any other person or serious property damage."

This section is authority for the suspension of the license of a person who has, by illegal and unlawful operation of a motor vehicle, caused or contributed to an accident resulting in death or injury to any person or serious property damage.

Section 4960-d36 provides for a hearing following the suspension provided for by Section 4960-d35.

Section 4960-d40 provides that "The department shall not suspend a license for a period of more than one year."

Section 4960-d45 provides that "Any person whose license is revoked under this act shall not be entitled to apply for or receive any new license until the expiration of one year from the date such former license was revoked."

Under the authority of these sections a suspension cannot be for a period exceeding one year. A person whose license is revoked shall not be entitled to apply for or receive a new license until the expiration of one year from the date such former license was revoked, but may apply for a new license after the expiration of one year.

It is the opinion of this department that the Motor Vehicle Department may not suspend a license for a period of more than one year under Paragraph 2 of Section 4960-d35 of the Code. If, however, after a suspension under Section 4960-d35, a hearing is had pursuant to Section 4960-d36, and good cause appears therefor, a license may be suspended for a further period or may be revoked.

BANKS: TAXES: CAPITAL BANK STOCK: CLOSED BANK WHICH WAS SOLVENT 10 or 11 MONTHS PRIOR TO CLOSING: If a bank is closed and placed in hands of receiver, the Board of Supervisors is required to remit all unpaid taxes on capital stock of bank. The legislature made no provision for refund.

December 9, 1936. *County Attorney, Belle Plaine, Iowa:* We have your request for opinion on the following proposition:

"Section 7004-g1 of the Code of Iowa, 1935, provides that the supervisors shall remit all unpaid taxes on the capital stock whenever a bank has been heretofore or hereafter closed and placed in the hands of a receiver. Will you please advise whether these taxes should be remitted if a bank was solvent for ten or eleven months prior to its closing and also whether there could be a refund to those parties who have paid these taxes?"

You will note that the section does not make solvency or insolvency a condition, but merely provides that whenever a bank has been heretofore or shall hereafter be closed and placed in the hands of a receiver. Therefore, under this statute, this is the only test, that is, if a bank is closed and placed in the hands of the receiver, the Board of Supervisors is required to remit all unpaid taxes on the capital stock of the bank.

In regard to your further question as to whether there could be a refund of the taxes already paid, you will note that the Legislature has made no provision for refund and I personally know that this question was before the Legislature at the time of the passage of this act and they were against making a refund of the taxes already paid as they felt that that would cripple the county and its subdivisions, as the purpose of the act was to relieve those who were financially unable to pay the taxes but not to refund to those who had already paid them, so that there could be no refund under this statute of taxes already paid.

OLD AGE ASSISTANCE: LEGAL SETTLEMENT: When a person, while receiving old age assistance, moves from one county to another and continuously resides therein, and he does not acquire legal settlement in second county while he is receiving assistance, even though notice to depart is served upon him and he resides therein for more than a year.

December 9, 1936. *County Attorney, Marshalltown, Iowa:* We have your request for opinion on the following proposition:

"A person acquired a legal settlement in a county in Iowa and applied for and received old age assistance as a resident of that county. Subsequent to that time, he moved to Marshall county and has lived here for over a year and there has been no notice to depart served on him. During all of the time he has lived in Marshall county, he has received old age assistance. Will you please advise whether under the statute, he was barred from obtaining a legal settlement in Marshall county and would Marshall county be liable to furnishing him medical assistance?"

Section 5296-f27 of the Code, being part of the Old Age Assistance Act, provides that no person receiving assistance under this chapter 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.

Section 5319 of the Code provides that the county of settlement shall be liable to the county rendering relief for all reasonable charges and expenses incurred in the relief and care of a poor person. Your question is as to the county of settlement.

Having lived in Marshall County for a year without service of notice to depart, this would ripen into a legal settlement under the law unless the fact that he was a recipient of old age assistance during that time would bar him from gaining a settlement in Marshall County.

The question then turns on the construction of Section 5311 of the Code and Paragraph 3 of this section provides as follows:

"3. 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."

Now, clearly, the recipient of old age assistance is being supported by public funds because the funds he receives as assistance are from the State of Iowa and are received by the state in the performance of an essential governmental function. He must necessarily be supported by these funds, for otherwise, he would not be eligible for old age assistance, that is, if he had independent support, he would not be a recipient at all.

It is, therefore, the opinion of this department that where a person, while receiving old age assistance, moves from one county to another and continuously resides therein, that he does not acquire a legal settlement in the second county while he is receiving assistance, even though no notice to depart is served upon him and he resides therein for more than a year.

SCHOOL STRIKE: AUTHORITY OF GOVERNOR TO ACT:

"It therefore follows, as a necessary corollary, that your Excellency, as Chief Executive of Iowa, is without legal authority to make effective the provisions of Chapter 74, and especially Sections 1496 and 1497 in so far as the independent school district of the City of Des Moines is concerned."

December 11, 1936. *Governor of Iowa:* This will acknowledge receipt of two communications from your office as of December 10, 1936, the first being a letter from J. H. Allen, mayor of the city of Des Moines, and the second, a resolution passed by the City Council concerning the threatened strike in connection with the operation of the city schools. You have orally asked this department for an opinion as to your authority to act thereunder.

For the purpose of clarification, the contents of the respective papers handed us are herewith set forth:

"December 10, 1936
Hon. Clyde L. Herring
Governor of Iowa
Statehouse
City

Dear Governor:

I am enclosing herewith a copy of a resolution passed by the City Council concerning the threatened strike in connection with the operation of the schools of our city.

It seemed to the council that this was the surest and best way to avert a strike which probably would develop into a very serious situation.

With highest regards I am,

Yours very truly,
(S) J. H. ALLEN

JHA:PFC
Encl—1

Mayor"

"WHEREAS, a controversy exists in the City of Des Moines between the School Board of the City of Des Moines, and Local No. 103 of Building Service Employees of Des Moines, Iowa, relative to working conditions; and,

"WHEREAS, according to published statements in the press, and investigation made by the Mayor, the parties to said dispute appear to be unable to adjust their differences by negotiation; and,

"WHEREAS, it is apparent to the citizens of Des Moines that the situation is thus developing which will cause an interruption in the ordinary workings of our schools and tend to cause additional trouble and difficulties; and,

"WHEREAS, all such subjects should be submitted to arbitration where the parties are unable to agree; and,

"WHEREAS, under Chapter 74 of the 1935 Code of Iowa, the Mayor and City Council of a city may call upon the Governor of the State for arbitration of any disputes which may disrupt or interfere with the ordinary proceedings of the city;

"NOW, THEREFORE, BE IT RESOLVED, that the Mayor of the City Council of the City of Des Moines, hereby petition Clyde L. Herring, Governor of the State of Iowa, to at once notify both the School Board of the City of Des Moines and Local Union No. 103 of Building Service Employees of this petition for arbitration, and that both of the parties to said dispute shall, without interruption of their relation, submit their cause to arbitration, and furthermore, that the said Governor of Iowa, Clyde L. Herring, shall ask that both said parties to the dispute to be bound by said decision, all of which is in accord with the provisions of Chapter 74 of the 1935 Code of Iowa."

The answer to your inquiry involves a construction of Chapter 74, entitled, "Boards of Arbitration," and especially Sections 1496 and 1497 thereof. These respective statutes are as follows:

"1496. *Petition for appointment.* When any dispute arises between any person, firm, corporation, or association of employers and their employees or association of employees, of this state, except employers or employees having trade relations directly or indirectly based upon interstate trade relations operating through or by state or international boards of conciliation, which has or is likely to cause a strike or lockout, involving ten or more wage earners, and which does or is likely to interfere with the due and ordinary course of business, or which menaces the public peace, or which jeopardizes the welfare of the community, and the parties thereto are unable to adjust the same, either or both parties to the dispute, or the mayor of the city, or the chairman of the Board of Supervisors of the county in which said employment is carried on, or on petition of any twenty-five citizens thereof over the age of twenty-one years, or the labor commission, after investigation, may make written application to the governor for the appointment of a board of arbitration and conciliation, to which board such dispute may be referred under the provisions of this chapter; and the manager of the business of any person, firm, corporation, or association of such employers, or any organization representing such employees, or if such employees are not members of any organization, then a majority of such employees affected may make the application as provided in this chapter, but in no case shall more than twenty employees be required to join in such application.

"1497. *Notification by governor.* The governor shall at once upon application made to him as herein provided, and upon his being satisfied that the dispute comes within the provisions of Section 1496, notify the parties to the dispute of the application for the appointment of a board of arbitration and conciliation and make request upon each party to the dispute that each of them recommend within three days from the date of notice, the names of five persons who have no direct interest in such dispute and are willing and ready to act as members of the board, and the governor shall appoint from each list submitted one of such persons recommended."

The powers and jurisdiction of school districts in general are defined in Section 4123 of Chapter 208 of the 1935 Code of Iowa, as follows:

"4123. *Powers and jurisdiction.* Each school district now existing shall continue a body politic as a school corporation, unless hereafter changed as provided by law, and as such may sue and be sued, hold property, and exercise all the powers granted by law, and shall have exclusive jurisdiction in all school matters over the territory therein contained."

Is the Independent School District of the city of Des Moines either a person, firm, corporation or association of employers within the provisions of Section 1496?

In the definition of terms embodied in the statute, the Legislature acts very largely as its own lexicographer. Generally speaking, statutes should be construed so as to give force and effect to the manifest legislative intent, and this intent is to be determined from a consideration of the entire statute or statutes relating to the same general subject matter.

Howard vs. Emmet County, 140 Iowa, 527, 532.

In fact, the Legislature itself has provided by statute, Chapter 4, Section 63, under Rules of Construction, that:

"In the construction of 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 contest of the statute.*"

The intent once ascertained points out the duty to courts and executives alike to give force and effect, if such can be done without running counter to established legal precedence. Expediency plays no part.

It is a matter of common knowledge that the Independent School District of the city of Des Moines is a political subdivison exercising both proprietary and governmental functions. The only determinative question left is whether or not it comes within the definitive terms of "any person, firm, corporation or association of employers." In this connection, the eminent words of Judge Story in the case of *United States vs. Hoar*, 3 Mason, page 311, finds application:

"Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed or the language used that the government itself was in contemplation of the legislature before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law that the general words of a statute ought not to include the government or affect its rights, unless that construction be clear and indisputable upon the test of the act."

The term "corporation," as used in constitutions and statutes generally, refers to private business corporations and will not be held to include municipal corporations, unless the intent is clear. Under the doctrine of "Expressio unius est exclusio alterius," municipal corporations or corporations exercising governmental functions cannot be included by implication. The rule involved is annnounced in Volume I, Words and Phrases, Second Series, page 1062, as follows:

"The courts hold that the general word 'corporation' must be construed to mean 'private or ordinary business corporations' and not extended to embrace municipal corporations and bodies politic and corporate."

The foregoing language was quoted with approval and followed in *City of Boulder vs. Stewardson* (Colo.), 189 Pac., pages 1 to 3. A Massachusetts case, *Donahue vs. City of Newburyport*, 98 N. E., 1081, held that a municipal corporation was not included in a statute permitting recovery for an injury, the opinion saying in part:

"Generally it has been held that the word 'corporation' does not include a municipal corporation." Citing cases.

In *Township of East Oakland vs. Skinner*, 94 U. S., 255, an act of the Legislature of Illinois to incorporate a railroad was involved. The act provided:

"It shall be lawful for all persons of lawful age or for the agent of any corporate body to subscribe any amount to the capital stock of said company."

In denying that the act included the township, the court, after quoting the language above, said:

"This is the only provision in the charter in reference to subscriptions by either persons or corporations. It confers no power on municipal corporations to subscribe for such stock. The provision manifestly refers to private corporations when it authorizes agents to prescribe. It does not refer to counties, cities, towns, or townships and cannot be held to embrace them."

Similar judicial interpretations have been made in *Town of Kearney vs. Mayor of Jersey City*, 73 Atl., 110; *Puget Sound Traction, Light & Power Company vs. City of Tacoma*, 217 Fed., 265; *Emes vs. Fowler*, 89 N. Y. S., 685.

We are also satisfied that the words "person, firm or association of employers" does not include one of the parties referred to for our consideration, to-wit, the Independent School District of the city of Des Moines.

A city is a governmental as well as a corporate entity and in its governmental capacity is not a person or corporation within the meaning of a statute.

State vs. Peninsular Telephone Company, 73 Fla., 913; 10 A. L. R., 501.

Members of town council are not included in the term "person" when acting in administrative capacity.

Therrin vs. St. Paul, 23 Quebec Super., 248, 254.

Selectmen of a town are not included in the word "person."

Montville vs. Alpha Mills Co., 85 Conn., 1; 81 Atl., 1051, 1052.

Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others; there is then a natural inference that its application is not intended to be general.

Sutherland on Statutory Construction, Vol. 2, Section 493.
Johnson vs. Southern Pacific Co., 117 Fed., 462, 466; 54 C. C. A., 681.

There is a general rule adopted both by this court and the Supreme Court of the United States, that general statutes are not to be construed to include, to its hurt, the sovereign.

Sullivan vs. School District, 179 Wis., 502; 191 N. W., 1020.

As a general rule of statutory construction, without any express legislative declaration, general words in a statute do not apply to the state, nor affect its rights unless an intention to the contrary appears.

State vs. McCord, 203 Ala., 347; 83 So., 71.

In the interpretation of public statutes, the state and its political subdivisions are regarded as excluded unless included by positive legislation.

Inhabitants of Whiting vs. Inhabitants of Luber, 121 Me., 121; 115 Atl., 896.

The law is presumed to be made for the subjects or citizens only, and the sovereign is not reached by a statute unless named therein or unless by necessary implication.

State Highway Department vs. Mitchell's Heirs, 142 Tenn., 58; 216 S. W., 336.

It is a familiar and fundamental rule of statutory construction that general language shall not be interpreted to apply to the government or its agencies unless expressly included by name.

Balthazer vs. Pacific Elec. Ry. Co., 187 Calif., 302; 19 A. L. R., 452.

There are additional reasons to support these views. A history of the Iowa statutes discloses that business and municipal corporations are treated separately, and the policy of the various General Assemblies of this state has been to name municipal corporations and other public corporations, as such, in statutes applicable to them. Thus Title XIX of the Code of 1935 is entitled "Corporations," and Chapter 384 deals generally with corporations

for pecuniary profit. Chapters 385 and 385-C1 provide for stock corporations; Chapter 386 for permits of foreign corporations to do business in the state, and Chapters 387 through 394 of various types of corporations for pecuniary profit.

Title XX, entitled "Insurance," provides for various types of insurance companies. Title XXI is entitled "Banks"; XXII, "Building and Loan Associations." On the other hand, cities and towns are treated in Title XI of the Code, entitled "City and Town Government."

Moreover, as indicative of the fact that the Legislature did not contemplate the term "corporation" when used by itself, as including municipal or other public corporations, is evidenced by Section 12521 which provides:

"An injunction to stop the general and ordinary business of a *corporation*, or the operations of a railway, or of a municipal corporation, * * * can only be granted upon reasonable notice" etc.

Apparently the Legislature did not intend that the term "corporation" should include a municipal corporation, or the adding of the words "municipal corporation" would have been unnecessary.

Other evidence manifesting the legislative intent may be found in the method and manner of commencing actions by service of Original Notice. Thus Section 11071 provides the method of service on a county; 11072, for service on public utilities and foreign corporations; 11073, for service on consolidated railways; 11074, for service on insurance companies; 11075, for service on a municipal corporation; 11076, for service on a school township or independent district; and, 11077, for service on other corporations not expressly provided for in the preceding sections. In other words, school townships or independent school districts are segregated from other corporations in respect to the method of serving Original Notice.

Another legislative differentiation is found in Section 1421 of Chapter 70, entitled "Workmen's Compensation," where the word "employer" is defined to include "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." Here, again, it will be noted the Legislature deemed the use of the words "person, firm, association, or corporation" insufficient to include a "school district."

Additional illustrations indicating legislative policy in this regard could be furnished, but would only serve to unnecessarily extend the length of this opinion.

An analogous question was presented and determined by the Supreme Court in the case of *Julander and Julander vs. Reynolds*, 206 Iowa, 1115. It was an action to subject funds in the hands of the Independent School District of Des Moines to the payment of the judgment held by the plaintiff against the defendant. The lower court gave plaintiffs a judgment against the Independent School District and, on appeal, the judgment was reversed. The school district maintained that the court had no jurisdiction to enter an order requiring it to pay over any money to plaintiffs, and further insisted that the action could not be maintained for the reason that it was contrary to the public policy of the state and would interfere with the proper carrying out of the obligations and duties of the defendant.

The court said:

"In the Code of 1860, the legislature pronounced the public policy of the state in Section 3196, by saying that 'a municipal or political corporation shall not be garnished.' * * *

"The theory upon which these statutes were passed is that municipal corporations are in the exercise of governmental powers, to a very large extent, and are an arm of the state in conducting the business for the state, and that to permit them to be garnished would seriously interfere with properly conducting their business, would subject them to expense and annoyance and loss to time, in order that an individual might collect his private debts, and would thus pervert the course of such corporation by making a collection agency out of it.

* * * * * *

"If it is held that this school district comes within the provisions of the aforesaid section of the statute (Section 11815), it means that our political subdivisions of the state are to be constantly harassed by creditors of any person in the employ of such corporation to whom wages are due."

And the court quoted, with approval, from *Skelly vs. Westminster School District*, 103 Cal. 652, as follows:

" 'Laws made primarily to provide for individual rights will not be presumed to include the state, when the effect might be to authorize a suit against the state or embarrass it in the discharge of its functions'."

And see other cases cited therein.

This question is similar to the one raised by the policemen's strike in the city of Boston during the time that Calvin Coolidge was Governor of Massachusetts. Governor Coolidge promptly refused to recognize any rights to striking policemen as an interference with essential governmental duties and functions. The matter of education is an essential governmental function. The janitors are public employees engaged in the exercise of a governmental function.

From the foregoing observations this department reaches the conclusion that Chapter 74 is not only not broad enough in its terms to include a school district, but that political subdivisons of the state, such as independent school districts, should not be included without specific legislative provision, and thereby change or attempt to change the established public policy of the state.

It therefore follows, as a necessary corollary, that Your Excellency, as Chief Executive of Iowa, is without legal authority to make effective the provisions of Chapter 74, and especially Sections 1496 and 1497 insofar as the independent school district of the city of Des Moines is concerned.

OLD AGE ASSISTANCE: CITIZENSHIP OF APPLICANT: Applicant, Jas. Sampers, whose father had only taken out first papers for citizenship, is a citizen of U. S. under authority of case of *Boyd vs. Thayer, supra*, 143 U. S. 135, 36 L. Ed. 103, and is entitled to benefits of old age assistance.

December 12, 1936. *Old Age Assistance Commission:*

In re: James Sampers, Early, Iowa, No. 23759.

We have your request for opinion on the following proposition:

"The applicant was born February 6, 1867 in Holland. Later, he moved to the United States with his parents. September 29, 1887, his father declared his intentions to become a citizen of the United States and took out his

first papers. At this time, the applicant was a minor. In 1888, the applicant and his father moved to South Dakota, residing therein until 1894 and then returned to Iowa. The territory of South Dakota became a state in 1889 and after the applicant became of age in Dakota, he voted there and after he returned to Iowa, he voted here and has continued to do so. His father also voted during the time he was in South Dakota. The applicant's father took out his second papers in 1896. The applicant himself has never been naturalized. Will you please advise whether the applicant is a citizen of the United States under the provisions of Section 5296-f12 of the Code of Iowa which provides that old age assistance may be granted only to applicants who among other things at the time of making application, are citizens of the United States?"

In the case of *State vs. Covell,* 175 Pac. 989, the court, after stating that under the Federal Constitution an alien could only be transformed into a citizen in accordance with the provisions of Congress, said, at page 990:

"The power so vested is exclusive in Congress and cannot be exercised by any of the states and no privilege that a state may confer by its constitution or statutes can convert a foreigner into an American citizen."

A similar situation was presented to the Supreme Court of the United States in the case of *Boyd vs. Thayer,* 143 U. S. 135, 36 L. Ed. 103. The facts there are quite similar to the facts in this case, and after Boyd was elected Governor of Nebraska, his right to hold the office was challenged on the grounds that he was not a citizen of the United States. The Supreme Court of Nebraska held he was not a citizen, but the United States Supreme Court reversed and held that because first papers were taken out by Boyd's father in Ohio during Boyd's minority and Boyd's father, having held a number of public offices in Ohio, and Boyd himself having held a number of public offices in Nebraska and being a member of the United States Army, that this would make him a citizen and eligible to hold the office of Governor of Nebraska.

It appears from the facts presented in this case that the applicant has brought himself within the spirit of the Federal laws pertaining to citizenship, even though he has not strictly complied with the letter of the law.

We therefore hold that he is a citizen of the United States under the authority of *Boyd vs. Thayer,* supra, and entitled to the benefits of the Old Age Assistance Act.

SCHOOLS: RESIDENCE: ATTENDANCE: The child must be an actual resident of the school district. The fact that the father's residence may be at some other place is not controlling.

December 14, 1936. *County Attorney, Bedford, Iowa:* This will acknowledge receipt of your letter of November 27, 1936, in which you present a situation existing in Gay School Township in your county, and desire the opinion of this department thereon. You state:

"A man by the name of Evan Culver lives in Gay School Township and has lived there since the first of March, 1936. This fall arrangements were made to transport his children to Maloy, Iowa, in Ringgold county, at the expense of Gay township.

"On November 3, 1936, Mr. Culver went to Maloy, Iowa, to vote. I understand his vote was challenged and he swore in his vote. The school board believing now that he made a declaration that his residence is in Ringgold county, that Gay School Township of Taylor county is not obligated to transport his children.

"He is actually living in Gay Township, Taylor county, Iowa, and although I do not believe that he had a right to vote in Ringgold county, Iowa, there is no doubt in my mind that he is an actual resident of Gay Township, Taylor county, Iowa."

It is the opinion of this department that Section 4273 of the 1935 Code of Iowa controls in this situation. This section is as follows:

"*Tuition.* Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years, and to resident honorably discharged soldiers, sailors, and marines, as many months after becoming twenty-one years of age as they have spent in the military or naval service of the United States before they became twenty-one. Every person, however, who shall attend any school after graduation from a four-year course in an approved high school or its equivalent shall be charged a sufficient tuition fee to cover the cost of the instruction received by such person."

It is therein provided, as you will note, that the child be an actual resident of the school district. The fact that the father's residence may be at some other place is not controlling. By way of illustration—there are many people connected with the state administration whose duties make it necessary for them to reside in the city of Des Moines. The children of these public officials attend the Des Moines schools, and the actual residence of the children is in the city of Des Moines, and in some instances, the fathers and mothers of these children vote in another county.

As we view this matter with respect to voting, and that of attendance of school by children, they are two matters which are entirely distinct and separate. Therefore the fact that the man you mentioned votes some place else does not control with reference to the actual residence of his children.

SCHOOLS: BUDGET ESTIMATE: BOND ISSUE: ROCK ISLAND: Section 4403 of the 1935 Code of Iowa controls. The board was within its right in making the estimate, and the Rock Island is not entitled to a refund.

December 14, 1936. *County Attorney, Charles City, Iowa:* In your letter of November 19, 1936, you request the opinion of this department on the question of an irregular budget estimate of school expenditures. You enclose budget estimate covering the Rockford Independent School District, and state that the Rock Island tax experts object to items 1 and 5. You call attention that proposed expenditures in item No. 1 for schoolhouse is $3,000.00, and under item No. 5, under amount necessary to be raised by taxation, the figure is $6,000.00. You state that the Rock Island is insisting on a refund.

It is the opinion of this department that Section 4403 of the 1935 Code of Iowa controls in this situation. This section reads as follows:

"The board of each school corporation shall, when estimating and certifying the amount of money required for general purposes, estimate and certify to the Board of Supervisors of the proper county for the schoolhouse fund the amount required to pay interest due or that may become due for the year beginning January first thereafter, upon lawful bonded indebtedness, and in addition thereto such amount as the board may deem necessary to apply on the principal."

Therefore, it is our opinion that the board was within its rights in making the estimate as it was made. In checking the matter with the Department of Public Instruction, it is our understanding that there are bonds which come due in 1938, and if the board waited until that year to make the levies, they

would be excessive. The facts in the situation, as we view it, present nothing illegal in the board's budget. The Rockford School District, in its budget, states that $3,000.00 is the estimated expenditures for the year 1936. It indicates that the amount necessary to be raised by taxation is $6,000.00. This is for the purpose of building up a surplus to take care of $55,000.00 in bonds that come due in the near future.

If the board did not make a levy for that purpose, it would be forced to make an excessive levy the year these bonds became due or else to refund the bonds. It would seem that the sensible thing for the board to do is to levy an excess above the annual needs in order to build up a surplus to retire the bonds when due. The section of the Code above quoted makes it mandatory for the board to levy enough to pay interest and principal that is due the next ensuing year but this section would not prohibit an additional levy to build up a surplus to take care of bonds due in the near future.

For your additional information, enclosed is copy of an opinion rendered by this department on July 27, 1935, to the office of the State Comptroller.

SCHOOL DISTRICTS: BOUNDARY LINES: CONGRESSIONAL DIVISIONS OF LAND: The minimum should be quarter-quarter sections, but the rule would extend to all fractional lots actually platted on the official plat even though such lots contain more or less than 40 acres, but in case they were not actually platted, then the minimum would be 40 acres.

December 14, 1936. *Department of Public Instruction:* In your letter of November 30, 1936, you request the opinion of this department on the construction of the statement, "and its boundary lines must conform to the lines of congressional divisions of land," as the same is used in Section 4133 of the 1935 Code of Iowa with reference to school districts.

In the act of Congress, approved April 5, 1832, it is provided:

"That, from and after the first day of May next, all the public lands of the United States, when offered at private sale, may be purchased, at the option of the purchaser, either in entire sections, half-sections, quarter-sections, half-quarter-sections, or quarter-quarter-sections: * * * * * * *."

Surveys for the subdivision of public lands in what is now Iowa were begun a short time after this enactment. The term "congressional divisions of land" should not be limited in the minimum amount to only those quarter-quarter sections that were actually platted on the government plats but should extend to only quarter-quarter section in a section as long as its boundaries conform to a division of the section into sixteen normal parts, but it should not be extended to any subdivision of a quarter-quarter section or fractional lot.

The original acts of Congress with reference to this matter were to the effect that public lands should be divided first into townships six miles square, and that each of these townships should then be divided by parallel lines run two miles apart. The later of these acts provided that the township should be divided into thirty-six sections, one mile square.

Later acts provided for the subdivision of sections into half-sections, quarter-sections, half-quarter-sections and quarter-quarter sections, and lots, in the case of tracts, having one or more of their boundaries irregular, or which were in the north or west, or sometimes in the east tier of half-sections and

therefore were subject to an excess or shortage of acreage due to the convergence of north and south lines along the east and west boundaries of the townships, or to irregularities in the surveys in the field.

It is the opinion of this department that the minimum should be quarter-quarter sections, but that the rule would extend to all fractional lots actually platted on the official plat even though such lots contain more or less than forty acres, but in case they were not actually platted, then the minimum would be forty acres.

BASIC SCIENCE BOARD: EXAMINATIONS: The board may waive examination and issue a certificate of proficiency in certain cases upon proof that the applicant has passed before an examining or licensing board.

December 15, 1936. *State Department of Health:* Your letter of December 3d to the Attorney General has been referred to me for reply.

I quote from your letter as follows:

"The Board of Basic Science Examiners, on the 13th day of October, 1936, adopted a rule affecting Section 2437-g20, Code of 1935. The rule and section are quoted as follows:

"*Rule:* 'That hereafter no exemption from examination be granted by this board, except to such persons as present evidence that they have successfully passed a Basic Science Examination before a Board of Examiners in the Basic Sciences of another state with which reciprocity relations have been established. This ruling is not to affect those who are exempt under the provisions of Section 5 of the Iowa Basic Science Law.'

"*Section 2437-g20.* The board may, in its discretion, waive the examination and issue a certificate of proficiency in the basic sciences provided for herein and may accept in lieu of examination proof that the applicant has passed before a board of examiners in the basic sciences or by whatsoever name it may be known or before any examining or licensing board in the healing art of any state, territory or other jurisdiction under the United States, or of any foreign country, an examination in anatomy, physiology, chemistry, pathology, bacteriology and hygiene as comprehensive and as exhaustive as that required under authority of this chapter."

The question you present is whether or not a rule of the above character removes a portion of the discretionary power granted by Section 2437-g20 above quoted to the Board of Basic Science Examiners. Stated differently, the question is whether the Board of Basic Science Examiners, in establishing this rule, has assumed legislative authority not delegated to it, and whether the board, in enacting and enforcing such rule, has gone farther than the Legislature intended it should go.

Section 2437-g20 provides that the board may in its discretion waive the Basic Science examination and issue a certificate of proficiency in certain cases. This section grants the board rather liberal discretionary powers. Clearly the board may in its discretion waive the examination in certain cases, but in the exercise of the same discretion, it may determine not to waive the examination in those cases. In other words, it may or it may not in its discretion waive the examination and issue a certificate of proficiency in the basic sciences, and may accept in lieu of examination proof that the applicant has passed before a Board of Examiners in the basic sciences, or by whatever name it may be known, or before an examining or licensing board in the healing art of any other state and examination in anatomy and certain other subjects.

It would appear that the Board of Basic Science Examiners in adopting the rule under consideration, determined not to waive the examination and issue a certificate "except to such persons as present evidence that they have successfully passed a Basic Science examination before a Board of Examiners in the Basic Sciences of another state with which reciprocity relations have been established."

Section 2437-g20 does not compel the Board of Basic Science Examiners to waive the examination in any case. The statute is permissive and not mandatory. It was no doubt the intention of the Legislature to authorize the board to waive the examination in certain cases, but the statute does not provide that the board shall waive the examination in any case.

It is our opinion the rule does not violate the section quoted. Whether the rule may work a hardship in cases, and whether sound discretion required the adoption of such rule is not a question we are called upon to decide. The board must have in mind the injunction outstanding in the case of *Don C. White vs. Board of Examiners,* and so long as that injunction continues in force the board should obey it strictly. The Legislature in the enactment of Section 2437-g20, evidently had in mind the probability that many applicants for certificates of proficiency in the basic sciences would present themselves, who have passed examinations more than equivalent to those given by the board.

The Legislature sought to make it possible for persons who had passed ample examinations and had proper evidence thereof to avoid additional and superfluous examinations in the same subjects at the discretion of the board. The Legislature evidently assumed the board would, in the exercise of sound discretion, waive the examination in many cases, not covered by Section 2437-g21. This section provides that the Boards of Examiners shall waive examination in certain subjects upon presentation to said board of a certificate from any college or university accredited by the North Central Association of Secondary Schools and Colleges that the person seeking a certificate of proficiency has completed a course in certain basic science subjects of the number of hours required by Section 2437-g16.

In the case of *White vs. Board of Examiners,* above referred to, an amended and substituted order for a writ of temporary injunction is on file in the office of the Clerk of the District Court of Woodbury County, which contains the following provision:

"It is further ordered adjudged and decreed that a temporary writ of injunction issue out of the office of the clerk of this court, enjoining and restraining the board of examiners in the basic sciences and individual members of said board from issuing a certificate of proficiency in the said basic sciences to any person or persons under the provisions of Section 2437-g21 of Chapter 114-g1 of the Code of Iowa 1935 and from performing or carrying into effect all and singular the provisions of said section."

If, pursuant to said decree, a writ of injunction has been served upon said board, and the members thereof, said board should obey said injunction strictly pending final hearing in said case. So long as Section 2437-g21 may not be complied with by the board there is no mandatory waiver of examination. It is the opinion of the Attorney General's staff that the rule is harsh, and is an exercise of discretion more drastic than the Legislature contemplated when it enacted the statutes in question. Without holding spe-

cifically that the rule amounts to an exercising by the board of legislative authority not delegated to it by the Legislature, it is our opinion that the board should adopt a rule clearly in harmony with the intent and purpose of Chapter 114-g1. This chapter contemplated the exercise of sound discretion on the part of the board in each separate and distinct case, rather than the laying down of a general rule fair and reasonable in some cases, and possibly somewhat unfair and unreasonable in other cases. Had the Legislature intended that hereafter there be no exemption from examination except in cases where reciprocal relations have been established, it would have so provided. It did not do so, and we are of the opinion therefore that it contemplated exemptions in some cases. It is a close question as to whether or not the rule goes beyond the rule making authority granted by the chapter, but it clearly goes beyond the spirit of the law as contained in this chapter, and we believe it should be abrogated in favor of a rule more clearly within both the letter and spirit of Sections 2437-g20 and 2437-g21.

PUBLIC BIDS ON PUBLIC CONTRACTS: It is essential that the basis of bidding on public contracts be open to all on a fair competitive basis. The 5% of the various bids should vary with the bids themselves.

December 17, 1936. *University Architect:* I have been considering the following question submitted by you:

"A bidder on a public contract, to be let by the Iowa State Board of Education, accompanies his bid with a certified check amounting to five per cent of the bid if the lowest priced alternates are accepted. If, however, certain higher priced alternates are accepted, the certified check which accompanied the bid will not amount to five per cent as required by the advertisement for a bid. Can this bid be legally accepted?"

The statutes of the State of Iowa do not prescribe any fixed percentage, a certified check for which must accompany bids on public contracts.

Section 3945 of the Iowa Code, however, reads as follows:

"3945. Improvements—advertisement for bids. When the estimated cost of construction, repairs, or improvements of buildings or grounds under charge of the State Board of Education shall exceed ten thousand dollars, the said board shall advertise for bids for the contemplated improvement or construction and shall let the work to the lowest responsible bidder; provided, however, if in the judgment of the board bids received be not acceptable, the said board may reject all bids and proceed with the construction, repair, or improvement by such method as the board may determine. All plans and specifications for repairs or construction, together with bids thereon, shall be filed by the board and be open for public inspection. All bids submitted under the provisions of this section shall be accompanied by a deposit of money or certified check in such amount as the board may prescribe."

It is of course essential that the basis of bidding on public contracts be open to all on a fair competitive basis. The five per cent of the various bids would vary with the bids themselves. If the bids contained no alternates, but were on the basis of the alternates only which you plan to accept, the certified check would have been for an adequate amount. The bid must be regarded as a legal bid for such amount, and therefore is open to acceptance.

LIQUOR CONTROL COMMISSION: AUDITED ACCOUNT: CLAIM: It is the opinion of this department that the comptroller is fully authorized and directed to issue the proper warrant for the payment of this claim.

December 19, 1936. *Comptroller of State:* With reference to the expense occasioned by a meeting of the liquor administrators for the various states surrounding the State of Iowa, and the liquor administrator acting for and on behalf of the United States Government held in Des Moines on the first and second days of December, 1936, the conference was called by the Iowa Liquor Control Commission upon their own initiative and upon the suggestion and request of the Governor of the State of Iowa, to be held in Des Moines.

It appears that this is the second of such conferences of midwestern administrative officers charged with the duty of enforcing their liquor acts, the first being held in June, 1936, at St. Paul, Minnesota. There were representatives from the states of Minnesota, Illinois, Nebraska, North Dakota, South Dakota, Missouri, Wisconsin and Iowa, a Federal alcoholic control administrator and his attorney, and the general counsel for the internal revenue department, alcoholic division. The expense involved by reason of the two-day conference was in the sum of $252.85, and is itemized. It has been approved by the Iowa Liquor Control Commission under date of December 7, 1936. The claim is verified and payment of it has been authorized by the Executive Council, as shown by the letter of Ross Ewing, secretary of the Iowa Executive Council, under date of December 14, 1936. An official opinion of the Attorney General is requested as to the legality of the payment of this audited account.

Section 1 of Chapter 24, 45th General Assembly, Extra Session, provides that the liquor control act shall be deemed an exercise of the police power of the state, and that all of its provisions shall be liberally construed for the accomplishment of that purpose; that it should be regulated to the extent of prohibiting all traffic in intoxicating liquor except through the medium of an Iowa Liquor Control Commission in which is vested *the sole and exclusive authority to purchase alcoholic liquors for the purpose of resale.*

Paragraph 2 of Subsection 4 of Section 5 of the act provides:

"Members of the commission and said secretary, assistants and/or employees shall be allowed their actual and necessary expenses while traveling on business of the commission outside of their place of residence; provided, however, that an itemized account of such expenses shall be verified by the member, secretary, assistant and/or employee making claim for payment and shall be approved by a majority of the members of the commission. If such account is paid, the same shall be filed in the office of said commission and be and remain a part of its permanent records. All of said salaries and expenses shall be payable out of the liquor control act fund created by this act."

Section 7 enumerates the functions, duties and powers of the commission and Subsection 1 thereof provides that the commission shall have the power "to license, inspect and control the manufacture of alcoholic liquors and *regulate the entire liquor industry in the State of Iowa.*"

Section 43 of the act provides as follows:

"For the purpose of enabling the commission to carry out the provisions of this act, there is hereby appropriated from the funds of the state treasury not otherwise appropriated the sum of five hundred thousand dollars and the state comptroller shall set aside from the appropriation the amount necessary to be used by the commission for the purchase of alcoholic liquors and *payment of such other expenses as may be necessary to establish and*

operate state liquor stores and special distributors in accordance with the provisions of this act and to perform such other duties as are imposed upon it by this act.

"All money hereafter received by the commission, including any money received under the appropriation herein made, shall constitute what shall hereafter be known as the liquor control act fund. Whenever said liquor control act fund shall have a balance in excess of the amount necessary to carry out the provisions of this act as determined and fixed from time to time by the comptroller, the comptroller shall transfer such excess to the general fund of the State Treasury, which amount shall be used to reduce the general state tax levy against real estate."

Section 45 provides:

"The appropriation hereby made shall be paid by the Treasurer of State upon the orders of the commission, in such amounts and at such times as in the discretion of the commission, may be necessary to carry on operations in accordance with the terms of this act."

Section 47 provides:

"There is hereby granted unto said commission the sole and exclusive right of importation, into the state, of all forms of alcoholic liquor * * * *; and no distillery shall sell any such alcoholic liquor within the state * * * * only to the commission * * * * the intent hereof being to vest in said commission exclusive control within the State of Iowa both as purchaser and vendor of all alcoholic liquor sold * * * *."

It is a matter of common knowledge that the states surrounding the State of Iowa have statutory provisions permitting the sale of liquor by the drink, and we are informed by the commission and its representatives that the primary purpose of the meeting called in Des Moines with both representatives of surrounding states and the Federal alcoholic control administrator and the representative of the internal revenue department was to discuss not only the question of revenue in each of the states, including Iowa, but with special reference to the question of improving the control of alcoholic liquors within the State of Iowa, and to jointly work out a plan among all the states affected to improve the uniform operation and enforcement of their respective liquor laws.

In construing the statutes relating to the administration of the intoxicating liquor laws of the State of Iowa, under the administration of the Iowa Liquor Control Commission, we should bear in mind that the Iowa Liquor Control Commission is not engaged in an essential governmental function, but is in fact and in law engaged in a proprietary function similar to the carrying on of a private business. Hence a more liberal construction should be placed upon the Iowa Liquor Control act than should be placed upon the interpretation of a statute dealing with an essential governmental function. The administrators of the Iowa liquor control act should be given a little more latitude in the exercise of their sound discretion in the management of the business of the state entrusted to their care.

In applying the construction that we placed upon this matter, we have considered the proprietary capacity in which the Iowa Liquor Control Commission is functioning. The above quoted sections of the Iowa liquor control act show that it was the legislative intent to consider the sections relating to the creation of the liquor control fund and the payment of necessary expenses from the state treasury as an "appropriation" within the meaning of Section 24 of Article III of the state constitution, which is as follows:

"No money shall be drawn from the treasury but in consequence of appropriations made by law."

The word "appropriations," as contained in Section 24 of Article III of the state constitution, is not limited to the specific appropriations of the General Assembly which are grouped together and designated as the "appropriation acts." The Legislature makes more appropriations than those that are specifically contained and grouped together in the so-called "appropriation acts."

This rule of law was first determined by the Supreme Court of Iowa in the case of *Prime vs. McCarthy*, 92 Iowa 569. In this case the question raised was as to the authority of the State Treasurer to pay the expenses incurred by the national guard that was called into service by the Governor to prevent the invasion of "Kelly's Army." A general statute authorized the Governor to call out the guard on such occasions and specifically provided for the per diem pay of the soldiers while on duty. It did not provide for their subsistence. There was no appropriation act to specifically cover and pay for such an expense. The Supreme Court, in this case, held that the statutes authorizing the auditing and certifying of such expenses by the Executive Council, and the general law authorizing the Governor to call out the guard, constituted an appropriation within the meaning of the above constitutional provision.

In the year 1921, the Executive Council desired to pay for the expense of the decoration of the statehouse during the Imperial Council of Shrine convention, which was held in the city of Des Moines. The Attorney General ruled on May 17, 1921, that this expense could not be paid for the reason that there was no law authorizing the Executive Council to incur such an expense, and that as a result thereof, there was no appropriation for the same.

However, on July 6, 1921, the Attorney General ruled that Section 3 of Chapter 264 of the Laws of the 39th General Assembly was sufficient to constitute an appropriation even though there was no specific appropriation provided for in the so-called "appropriation acts." Section 3 of the above act of the 39th General Assembly provided:

"Any county or district fair or agricultural society upon filing with the secretary of the State Board of Agriculture a report as herein provided for, shall be entitled to receive from the State Treasury a sum equal to eighty per cent of the first one thousand dollars, etc."

The Attorney General ruled that this law, which was of a general nature, constituted an appropriation within the dominion of Section 24 of Article III of the state constitution.

On November 1, 1923, the Attorney General again ruled that Chapter 326 of the Acts of the 46th General Assembly constituted an appropriation for the expense of the land titles commission within the contemplation of Section 24, Article III of the state constitution. His ruling was based upon the authority of *Prime vs. McCarthy*, 92 Iowa 569, at page 578.

On May 29, 1923, the Attorney General again ruled that Chapter 326 of the Acts of the 40th General Assembly constituted an appropriation for the expense of the land titles commission even though no specific appropriation therefor contained in the "appropriation acts" of the 40th General Assembly.

He again based his ruling on the decision of the Supreme Court of Iowa in the case of *Prime vs. McCarthy*, 92 Iowa 569, at page 578.

The latest decision of our own Supreme Court, bearing on this matter, appears in the case of *Grout vs. Kendall*, 195 Iowa 467. This was a soldier's bonus case. The soldier's bonus act was attacked on the ground that it violated Section 24 of Article III of the constitution of the State of Iowa because there was no specific appropriation contained in the "appropriation acts" of the General Assembly which enacted this legislation. The act was also attacked on other alleged unconstitutional grounds. The Supreme Court of Iowa in an opinion therein by Justice Evans subsequently held that the soldier's bonus act did not violate the constitution although there was no specific appropriation therefor contained in the so-called "appropriation acts."

In the year 1891, the General Assembly of the State of Connecticut adjourned without passing any appropriation acts for the next biennium period. According to the laws of the State of Connecticut, school districts were entitled to share of the public funds of the state on the basis of $1.50 per student enrolled in the schools per year. The office of State Comptroller was created by a constitutional provision of the State of Connecticut. The duties of this State Comptroller were provided for by the general statutes of Connecticut. It was the duty of the State Comptroller of Connecticut to issue warrants to the several school districts entitled to the same. State tax levies had been made and the taxes collected, and transferred to the State Treasurer for the purpose of the operation of state government. Upon the refusal of the State Comptroller to issue these warrants, because he alleged there was no appropriation therefor, mandamus was brought against the Comptroller. The Supreme Court of Connecticut sustained the mandamus and ordered the Comptroller to issue the warrants. Section 407 of the general statutes of 1888 of the State of Connecticut specifically provided that no department of state government and no officer of the same should expend in any fiscal year or years any sum in excess of appropriations made by the General Assembly for such year or years.

The Supreme Court of Connecticut, speaking through Chief Justice Andrews, reported in 61 Conn. 553, announced the rule as follows:

"If the latter of these provisions (Section 407 of the general statutes of 1888) is binding under existing circumstances, then the law is the equivalent of a law providing that for an indefinite period the officers charged with the maintenance of the state government shall not perform the duties imposed on them by law; *courts shall not be held; persons charged with crime shall be refused a trial; prisoners in the state prison shall be released or starved; the property of the state shall be abandoned, uncared for and unprotected.* Such a law is obnoxious to certain plain provisions of the constitution, as well as to a fundamental principle underlying all government. * * * * But can it be that the legislature can do indirectly what it is forbidden to do directly? Is the default of the General Assembly more potent than its action? * * * *

"* * * * In the absence of a special appropriation the existence of a law requiring an expenditure to be incurred is an appropriation of money for that purpose, and the law imposes on the comptroller the duty of settling and adjusting demands against the state for such expenses. * * * *

"* * * * Divers laws impose, by imperative command, on executive, administrative and judicial officers, duties essential to the preservation of order, the administration of justice, and the protection of property. Many of these duties are not imposed by statute, but their performance is demanded by

the constitution and is of necessity involved in the existence of a government. The legislature has authorized the expenditure of money necessary for the performance of these duties, and has raised by taxation sufficient funds now in the State Treasury to meet these expenses. The constitution and laws command the comptroller to adjust and settle all demands against the state on account of such expenses, and to draw his order on the treasurer for their payment.

"* * * * One law says to the comptroller:—'You shall settle all demands against the state for the expense of carrying on its government.' The other law says:—'You shall draw no order upon the treasurer.' Obedience to one law involves a violation of the other. Acting is unlawful. Refusing to act is unlawful. If this is the real condition, if the conflicting laws cannot be reconciled by a reasonable construction, then the paramount law must control. One law cannot be said to repeal the other, for both were passed at the same time; both are contained in the general statutes and took effect at the same moment. The paramount must control. The command to provide for the essential operations of government must prevail against *a rule of procedure in applying the funds raised by taxation for the support of the government.*

"We conclude therefore that there is nothing in the special appropriations act to prevent the respondent from obeying the command of the alternative writ. * * * *

"* * * * But when a claim is liquidated in the sense that its amount is fixed by operation of law, it is difficult to see how the comptroller can use any discretion in respect to it. When the law fixed definitely the amount of any claim, and also fixes the time and manner of its payment and the person to whom it is due, and the claim is presented to the comptroller by that person and at that time, he has in respect to it 'no discretion to exercise, no judgment to use, and no duty to perform,' but to draw his order in payment of it. The duty to draw the order then falls exactly within the definition of a ministerial duty or act as given above."

We believe that this rule of law has application to the problem here presented because the account is one arising by operation of law and within the legitimate exercise of the discretion of the Iowa Liquor Control Commission which exercise the Comptroller cannot control. The Liquor Commission has already determined that this was a reasonable expense, a necessary expense and a just expense in order to assist them in the better administration of their duties. We further find that this account has already been approved by the Executive Council of the State of Iowa and payment authorized. We also find that the Legislature has made appropriation therefor as hereinabove pointed out.

It is therefore the opinion of this department that the Comptroller is fully authorized and directed, under the law, to issue the proper warrant for the payment of this claim.

December 21, 1936. *Board of Control:* I have your written request of December 14, 1936, in which you request an official opinion from this department with respect to the following question:

"From time to time much controversy has arisen between the Board of Control and the Comptroller's office relative to the fixing of the number of employees at each of our institutions and the salaries paid them.

"It is the understanding of this board that the law which established the Board of Control and which is now in effect gives the board and the board alone, the right to determine the number of employees at each of the institutions and fix their salaries.

"In order that this matter may be definitely settled, we would appreciate very much an opinion at your earliest possible convenience."

Section 3293 of the 1935 Code is as follows:

"*Subordinate officers and employees.*. The board shall determine the number and compensation of subordinate officers and employees for each institution. Such officers and employees shall be appointed and discharged by the chief executive officer. Such officer shall keep, in the record of each subordinate officer and employee, the date of employment, the compensation, and the date of each discharge, and the reasons therefor."

Section 3296 of the Code is as follows:

"*Salaries.* The board shall, annually, with the written approval of the governor, fix the annual or monthly salaries of all officers and employees for the year beginning July first of said year, except such salaries as are fixed by the General Assembly. The board shall classify the officers and employees into grades and the salary and wages to be paid in each grade shall be uniform in similar institutions."

If the above two sections of the Code of Iowa have not been repealed, amended or superseded by later legislation pertaining thereto, then we must answer your question that the board does have sole power to determine the number of subordinate officers and employees for such institutions, but the board does not have the sole power to fix the salaries for such subordinate officers and employees. The salaries for such subordinate officers and employees shall, annually, be fixed by the board with the written approval of the Governor.

If it has been the contention of the Comptroller's office that the number and salaries of such subordinate officers and employees cannot be determined by the board without the consent and approval of the Comptroller's office, it must be based upon the Budget and Financial Control Act, and Section 57 of Chapter 126 of the Laws of the 46th General Assembly, otherwise known as the Appropriation Act.

Chapter 4 of the Laws of the 45th General Assembly created the Budget and Financial Control Act. There is nothing in this act repealing, amending or modifying Sections 3293 and 3296 of the Code of Iowa. There is no specific authority granted to the Comptroller to determine the number and salaries of the subordinate officers and employees of the Board of Control. Repeal by implication is not favored by the courts.

There is nothing in the title or the enacting clause of the Budget and Financial Control Act, which expressly states that Sections 3293 and 3296 of the Code, shall be repealed, amended or modified in any manner. We therefore hold that the Budget and Financial Control Act does not authorize the Comptroller to "fix the number and salaries of the subordinate officers and employees of the Board of Control."

We now pass to a consideration of Section 57 of Chapter 126 of the Laws of the 46th General Assembly, otherwise known as the Appropriation Act. Section 57 of this latter act is as follows:

"Section 57. Employees of the state shall be under the control of the head of the department and the compensation shall be subject to the approval of the governor and state comptroller. * * * * *"

Does this section of the Appropriation Act repeal, amend or modify Sections 3293 and 3296 of the Code? In determining this question we must examine into the nature, object and purpose of the Appropriation Act. The Legislature in making appropriations, acts in its administrative rather than

in its legislative capacity. See Commonwealth vs. Ferries Co., 120 Va. 827, 92 S. E. 804. Modification, amendment or repeal of a pre-existing law must be made by the Legislature acting in its sovereign legislative capacity; it cannot be done by the Legislature when acting in its administrative capacity. Administrative acts by the Legislature are for the purpose of the proper execution and administration of laws that have been passed by the Legislature while acting in its legislative capacity.

All portions, clauses and sections of legislative acts must be construed with reference to the title of the act as required by constitutional provisions.

Section 29 of Article 3 of the Constitution of the State of Iowa provides as follows:

"*Acts—one subject—expressed in title.* Section 29. 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."

The title to Chapter 126 of the Laws of the 46th General Assembly is as follows:

"*An act,* to establish the general fund for the State of Iowa for the biennium beginning July 1, 1935 and ending June 30, 1937, 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."

The Constitution says that the Appropriation Act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, and if any subject shall be embraced in an act which shall not be expressed in the title, such acts will be null and void only as to so much thereof as shall not be expressed in the title. The one subject expressed in the title to the Appropriation Act is the establishment of the general fund for the next biennium and the appropriation from such fund for all departments of the state government for all purposes provided by law. In other words, the Appropriation Act is intended to follow the existing laws of the state by making the proper appropriations necessary for the administration of the laws of the state pertaining to all departments of state government. It is not intended by the title to this act that the act shall contain any new legislation, repealing, amending or modifying any existing laws of the state.

The title clearly shows the purpose of the Appropriation Act, which is, to establish and appropriate the necessary funds from the state treasury for the due administration of the existing laws of the state relative to all departments of state government. Therefore if there is any section or clause or part of the Appropriation Act which is inconsistent with the title, the same is null and void as being in contravention of Sec. 29 of Article 3 of the state constitution. We have previously so held.

These former rulings are as follows:

"We held that lines 3 and 4 of Section 12 of the Appropriation Act of the 45th General Assembly, were invalid and should read in part as follows: 'Three Hundred Seventy-seven Thousand, Five Hundred Dollars ($377,500).

"Section 69 of Chapter 188 of the laws of the 45th General Assembly contained the following paragraph: 'The sworn statement shall be made to

the Auditor of State, who shall disburse to the department, bureau, board or commission such part of the appropriations as *he* deems necessary.' "

We held that this clause of Section 69 of Chapter 188 was invalid and unworkable for the reason that it was in conflict with the provisions of the Budget and Financial Control Act. Our conclusion was based upon the consideration that the Appropriation Act could not have the force and effect of repealing the provisions of the Budget and Financial Control Act. The Legislature in passing the Budget and Financial Control Act was exercising a sovereign legislative function. When the Legislature was passing the Appropriation Act, they were exercising an administrative function, and furthermore this portion of Section 69 of the Appropriation Act was not expressed in the title to the act and was not properly connected therewith.

We are therefore again forced to rule that the Appropriation Acts do not repeal, amend or modify any existing law or laws of the State of Iowa and that Section 57 of Chapter 126 of the administrative laws of the 46th General Assembly is null and void as being in violation of Section 29 of Article 3 of the Constitution of the State of Iowa. Administrative provisions establishing rules of procedure must give way to and surrender to the paramount law of the state. We hold that Sections 3293 and 3296 of the Code of Iowa contain the paramount law relating to the question submitted.

Section 4 of Chapter 4, Acts of the 45th General Assembly, created the office of "Comptroller" and attached it to the Governor's office. The Comptroller's office is under the general direction, supervision and control of the Governor. The Governor relies and depends upon the Comptroller's office to furnish him with detailed information concerning the financial condition of the state's affairs. The Comptroller might recommend reduction in salaries, but the act of reducing them must be the act of the Governor.

It is therefore the opinion of this department that the Board of Control has the sole power in determining the number of subordinate officers and employees for each institution under their control, and that the Board of Control, with the written approval of the Governor, has the power to fix the salaries for all subordinate officers and employees for each institution under their supervision and control.

MOTOR VEHICLE: REVOCATION OF LICENSES: The department may revoke the license of any person found guilty of operating a motor vehicle without the owner's consent.

December 22, 1936. *Motor Vehicle Department:* We acknowledge your letter of December 9th, in which you present the question whether or not under Paragraph 4 of Section 4960-d33 of the Code the license of an operator may be revoked when the operator "has been charged with operating a motor vehicle without the owner's consent, and found guilty in the District Court."

Section 4960-d33, insofar as material to your question, is as follows:

Mandatory suspensions or revocations. 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:

"1. Any crime punishable as a felony under the motor vehicle laws of this state or any other felony in the commission of which a motor vehicle is used."

Section 13092 is set out in full as follows:

"13092. *Operating automobile without consent of owner.* If any chauffeur or other person shall without the consent of the owner take, or cause to be taken, any automobile or motor vehicle, and operate or drive, or cause the same to be operated or driven, he shall be imprisoned in the penitentiary not to exceed one year, or be imprisoned in the county jail not to exceed six months, or be fined not to exceed five hundred dollars."

Under this section any "person who shall without the consent of the owner take, or cause to be taken, any automobile or motor vehicle, and operate or drive, or cause the same to be operated or driven" shall be imprisoned in the penitentiary not to exceed one year, or be imprisoned in the county jail not to exceed six months, or be fined not to exceed $500.00.

"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." (Section 12890.)

The crime of operating an automobile without the consent of the owner, as defined by Section 13092, is a felony.

Section 4960-d33 provides that the department shall forthwith revoke the license of any person upon receiving a record of the conviction of such person of any crime punishable as a felony under the motor vehicle laws of this state or any other felony in the commission of which a motor vehicle is used. The operation of a motor vehicle without the owner's consent being a felony, it is mandatory upon your department to forthwith revoke the license of any person upon receiving a record of his conviction of such offense.

MOTOR VEHICLE: DRIVER'S LICENSES FOR DEFORMED PERSONS: If auxiliary equipment is required in order to enable the applicant to drive safely, a license may be issued upon condition that such auxiliary equipment will be used.

December 23, 1936. *Motor Vehicle Department:* In your letter of December 4th you state that in your examinations of applicants for operators' licenses you have found persons suffering from physical handicaps, who can operate a motor vehicle with a desired degree of safety providing the vehicle is equipped with certain auxiliary equipment, and that you have also found persons who were unable to see properly unless they wear glasses when driving. You further refer to cases where applicants have lost the use of a leg or arm, or are paralyzed in some manner, who can operate motor vehicles if they are equipped with air-brakes and automatic or electric clutch, or other effective equipment. You express the desire of your department to avoid the persecution of anyone who can demonstrate that he is able to operate a vehicle with a reasonable degree of safety, even though it is necessary that his vehicle be equipped with auxiliary equipment. Your question is whether or not, under the law, your department has authority to issue to such afflicted persons restricted licenses, designating that the license shall be void unless the licensee complies with certain definite regulations and restrictions, which must be complied with if the licensee is to operate a motor vehicle in a safe and lawful manner.

Section 4960-d9 of the 1935 Code of Iowa is as follows:

"4960-d9. *Physical incompetents.* The department shall not issue an operator's or chauffeur's license to any person when in the opinion of the de-

partment such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, nor shall a license be issued to any person who is unable to understand highway warning or direction signs in the English language."

You will note this section provides that the department shall not issue an operator's or chauffeur's license to any person when, in the opinion of the department, such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways. In order to disqualify the applicant, he must be afflicted with, or suffering from, a physical or mental disability or disease, which will serve to prevent him from exercising reasonable and ordinary control over a motor vehicle. If, with the aid of certain auxiliary mechanical devices, he can overcome his physical or mental disability so that in the judgment of your department he can operate such vehicle and maintain reasonable and ordinary control thereof, it would seem he should not be denied a license. There are many persons who cannot see without the aid of glasses to enable them to operate a motor vehicle successfully, but no one would be so presumptuous as to say that your department would be justified in forming an opinion that all persons whose eyes are in some measure defective, and who, therefore, wear glasses, should be denied an operator's license.

It is the opinion of this department that you are justified, under Section 4960-d9 above quoted, to issue operator's licenses to persons with physical defects, on the condition that such persons shall operate motor vehicles only when aided by auxiliary equipment which will enable them to maintain "reasonable and ordinary control over a motor vehicle while operating the same upon the highways." We all have in mind persons with rather serious physical defects, who operate motor vehicles with greater skill, ability and safety than other persons, possessing no physical handicaps.

Your department should not be motivated by sympathy, but, in the exercise of its best judgment, should issue licenses only to persons who can operate motor vehicles safely upon the public highways. If auxiliary equipment is required in order to enable the applicant to drive safely, you are clearly within your authority in issuing a license upon the condition that such auxiliary equipment will be used. A license issued on such terms and conditions should be revoked or suspended upon the failure of such licensee to comply with the conditions.

OPERATOR OF MOTOR VEHICLE: A discharge in bankruptcy releases or discharges of record a judgment based on the negligent operation of an automobile, when the issue of willfullness and maliciousness are absent.

December 23, 1936. *Motor Vehicle Department:* I have before me your letter of November 18th, relating to the suspension of L. M. Heggen, of Callender, Iowa.

This file discloses that Mr. Heggen was involved in an automobile accident in 1934, on account of which a judgment for damages was entered against him. Thereafter, his automobile license was taken up and his operator's

license indefinitely suspended. He paid no part of the judgment, but later was discharged in bankruptcy.

A charge of reckless driving, as defined by Section 5028 of the Code of Iowa, was filed against Mr. Heggen, and thereafter on or about November 17, 1934, he was fined $25.00, and judgment was entered against him for said amount and for costs. Subsequent to the entry of judgment for damages above referred to, Mr. Heggen was discharged in bankruptcy, and he now contends that proof of his discharge in bankruptcy is equivalent to "proof that such judgment has been stayed, satisfied or otherwise discharged of record" within the meaning and contemplation of Section 5079-c4 of the Code of Iowa. Said section, insofar as material to this controversy, is as follows:

"* * * such suspension shall not be removed nor such license plates returned to the county treasurer, nor shall a license to operate a motor vehicle thereafter be issued to such judgment debtor or debtors, nor shall a motor vehicle be registered in the name of such judgment debtor *until proof that such judgment has been stayed, satisfied or otherwise discharged of record shall be filed with the county treasurer.*"

The question is whether the discharge in bankruptcy amounts to stay, satisfaction or discharge of record of the judgment, such as to remove the suspension of the operator's license and the issuance by the County Treasurer of a motor vehicle license.

Section 17 of the Bankruptcy Act (U. S. Code, Title 11, Chapter 35) provides that:

"A discharge in bankruptcy releases a bankrupt from all his provable debts except such as * * * (2) * * * for willful and malicious injuries to the person or property of another." * * * .

It is our opinion that if a judgment for damages caused by the operation of a motor vehicle was based on "willful and malicious injuries to the person or property of another," such judgment would not be affected by a discharge in bankruptcy. Unless the record shows that the judgment was "for willful and malicious injuries to the person or property of another," the judgment would be discharged in bankruptcy.

Our Section 5079-c4 has never been passed upon by our Supreme Court. A similar statute has been upheld in California in the case of Watson vs. Division of Motor Vehicles, 298 P. 481. We quote the following from Blashfield Cyclopedia of Automobile Law, Section 580:

"The Supreme Court, however, held that the legislature might declare that no person shall have a license to operate a motor vehicle upon public highways until he has satisfied any outstanding judgment against him founded on previous operation of a motor vehicle, that statute of that nature might have a tendency to prevent conduct by a licensee capable of being the basis of such a judgment, and thus promote the public safety, and that it would have a tendency to keep off the highway those shown by their conduct to be dangerous to other travelers."

The purpose sought to be accomplished by the Legislature was a commendable one. It is not effectively accomplished if a discharge in bankruptcy is a satisfaction or discharge of the judgment. On the other hand, the purpose of the bankruptcy law is to relieve debtors of a large portion of their debts.

A judgment based on negligence on the part of the operator of a motor vehicle may be discharged in bankruptcy. In other words, a discharge in bankruptcy shall release a bankrupt from all his provable debts except

for certain exceptions named in the bankruptcy act, and a judgment based merely on the negligent operation of a motor vehicle is a provable debt and not within the exceptions referred to.

It is the opinion of this department that a discharge in bankruptcy releases or discharges of record a judgment based on the negligent operation of an automobile, when the issue of willfulness and maliciousness are absent. In the instant case, satisfactory proof is filed with the County Treasurer that the judgment debtor has been discharged in bankruptcy. The County Treasurer will be justified in taking the view that the "judgment has been stayed, satisfied, or otherwise discharged of record" if such proof is accompanied by satisfactory evidence that the judgment was not based on willful and malicious injuries to the person or property of the judgment creditor.

EXECUTIVE COUNCIL: RENTALS: OLD AGE ASSISTANCE COMMISSION: Executive Council has authority to select suitable quarters for the Old Age Assistance Commission outside of the state capitol building itself, when necessary for the proper administration of the business of the state government, and is authorized to pay rental for such quarters under Section 306 of 1935 Code.

December 28, 1936. *Executive Council of Iowa:* I have your letter of December 28th in which you ask our department for advice with reference to the following matter:

"Will you kindly advise whether or not the Executive Council has the power to pay the rent of outside quarters for the Old Age Assistance Commission from Sections 306 and 307 of the 1935 Code of Iowa."

You are advised that under date of April 30, 1929, the Attorney General issued an official opinion to Mr. W. C. Merckens pertaining to this same question, which opinion is hereinafter set forth in full:

"April 30, 1929. Mr. W. C. Merckens: I am in receipt of your communication of the 24th instant, which reads as follows:

" 'The Forty-third General Assembly created several new commissions of government, which will be effective July 1st or 4th, and it will be necessary that the Executive Council secure quarters for said new departments and also possibly change some locations of the present departments. Under Chapter 18, Section 295, the Executive Council is charged with the placing of the different branches of our government. It will become necessary that outside quarters be provided to take care of the changes as contemplated.

" 'Can the Executive Council, by proper resolution, contract, lease or rent outside quarters and have same paid out of Section 306 of said Chapter 18?' "

"While no express authority is given by statute to the Executive Council to rent quarters for departments of government outside of the buildings owned by the State of Iowa yet, as the administrative body of the state government, it is my notion that if it is impossible to house the various departments of state government within the building owned by the state, it becomes the duty of the council as a matter of business to see that all departments are so housed that they may function as intended by legislative enactment, and for this purpose would have the right to incur the necessary expense if funds are provided that can be used to rent quarters, if necessary, to house the departments.

"I am of the opinion that the Executive Council should pay such expense under the provisions of Section 306 of the Code.

"This opinion overrules the opinion of the department given under date of September 4, 1926, on this subject."

We are unable to discover any subsequent acts of the Legislature that would

place a different construction upon Section 306 of the Code, other than the above and foregoing opinion of the Attorney General. Many legislative sessions have been held since April 30, 1929, and the Legislature has not seen fit to place a different construction upon this matter. It can, therefore, be assumed that the construction placed upon Section 306 by the Attorney General on April 30, 1929, met with the approval of all subsequent Legislatures of the State of Iowa. In other words, the Legislature itself was satisfied with the interpretation placed upon Section 306 by the Attorney General in the above quoted opinion.

Chapter 17 of the Code affords additional evidence of the legislative intention in confirmation of the Attorney General's opinion, supra. Chapter 17 of the Code authorizes and directs the Executive Council to appoint a custodian of public buildings and grounds and expressly sets forth the duties of the custodian. It is not only the duty of the custodian to have charge of, preserve and adequately protect the state capitol and grounds, but also all other state grounds and buildings at the seat of government, and all property connected therewith or used therein or thereon. The custodian shall see that all parts and apartments of said buildings are properly ventilated and kept clean and in order, and, shall have charge of and supervise all the police, janitors, and other employees of the custodian's department in and about the capitol and other state buildings at the seat of government.

The seat of government is in Des Moines, Iowa. See Section 8 of Article XI of the State Constitution. Therefore, Chapter 17 of the Code clearly shows that the Legislature intended that buildings, other than the state capitol building itself, might be located in Des Moines, Iowa, at the seat of government.

It is clearly the duty of the Executive Council to provide suitable quarters for the Old Age Assistance Commission. The Old Age Assistance Commission is a department of the state government. The Old Age Assistance Act does not contain any provision to the contrary. In other words, the Old Age Assistance law does not authorize the Commission to select suitable quarters, and does not locate the Old Age Assistance Commission at any place other than the seat of government. It is necessary for the Old Age Assistance Commission to have suitable quarters or apartments for the conduct of their official business. Official apartments shall be used only for the purpose of conducting the business of the state. It is the selection of such official apartments over which the Executive Council has jurisdiction.

We therefore concur in the opinion of the Attorney General, which was issued on April 30, 1929, and hold that the Executive Council has the power to select suitable quarters for the Old Age Assistance Commission outside of the state capitol building itself, when necessary for the proper administration of the business of the state government, and to authorize the payment of the rental for such quarters under Section 306 of the 1935 Code of Iowa.

INCOME TAX: TRUST FUND: ADDITIONAL ASSESSMENT. The Board of Assessment and Review may inquire into all facts in the matter and make such determination as such facts indicate, keeping in mind the interests of the state and the general policy of the law, to prevent tax evasion.

December 30, 1936. *State Board of Assessment and Review:*

IN RE: Appeal from additional assessment against Albert Penn—income tax.

We acknowledge your oral request for an opinion in the above matter which involves the question of income tax on income from a trust declared by a father for his two children. The question is whether the father should pay one income tax on his total income, including the trust income, or whether three separate and distinct income tax assessments should be made.

Without going into details as to the provisions of the trust declaration, and with due respect to the good intentions of the father in this case, we are unable to view this matter in any light other than an attempt to evade the income tax due in the higher brackets of individual income.

It appears that our statutes do not cover this specific situation and, in the absence of legal precedence in the state, we believe your department is justified in following recognized authority which deals with a similar situation. It seems that such course has been pursued in this case and we are of the opinion that such procedure is justified and warranted. At least, under the provisions of Sections F-27-F-32 (3) of the Iowa income tax act, the Board may inquire into all facts in the matter and make such determination as such facts indicate, keeping in mind the interests of the state and the general policy of the law, to prevent tax evasion.

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